

1891

Assignees of Insolvent Debtors

Harlan L. Munson
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

 Part of the [Law Commons](#)

Recommended Citation

Munson, Harlan L., "Assignees of Insolvent Debtors" (1891). *Historical Theses and Dissertations Collection*. Paper 198.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

T H E S I S

written for the Degree of Bachelor of Laws

-----on-----

A S S I G N E E S

O F

I N S O L V E N T D E B T O R S .

-----by-----

Harlan L. Munson,
Cornell University,

1891.

C O N T E N T S

	page
Introduction	1
Who may assign?	2
Who may be an assignee?	4
Requisites of an Assignment	5
What Title vests in the Assignee?	7
The Title acquired in Property in another State or Country	8
Duties of an Assignee	11
The Assignee's Bond	12
Books of Account	14
General Power of Sale	15
Continuation of the Assignor's unfinished Business	16
Compromises	19
Liabilities of the Assignee	21
Action by and against the Assignee	23
Conclusion	25

A S S I G N E E S O F I N S O L V E N T
D E B T O R S .

By comparatively recent legislation, the chains which formerly bound the unfortunate debtor have been loosened; and at present statutory law provides a method by which the situation of the insolvent debtor and his creditors may be equitably settled by means of the laws of assignments for the benefit of creditors.

The details of these laws vary in the different states; but their object is the same. The greatest point of difference is that in some states preferences of individual creditors, or classes of creditors, are allowed to a greater or less extent; while, in others, no preferences are allowed with, perhaps, the single exception of wages and salaries due employees.

A debtor, becoming insolvent, transfers all his property, not exempt from levy on execution, by assignment to a trustee to be distributed: pro rata to his creditors. These trustees are known by different designations in the different states. In some they are

called assignees; in others, commissioners or trustees. In Louisiana, they are called syndics. Their appointment, powers, duties, and liabilities are largely regulated by statute; but there are some general principles applicable in all.

Who may assign? ----- At common law any person, partnership, or corporation capable of alienating property could make an assignment for the benefit of its creditors, making whatever preferences they desired. In many of the states this is the present law.

There is some variance of opinions in regard to assignments by corporations. Unless restricted by their charter or by statutory prohibition corporations may make assignments for the benefits of their creditors, stating preferences among them in the distribution of their assets to the same extent as individuals may and they will be sustained both at law and in equity. It has been held that a religious as well as a trading corporation may make an assignment.(1)

(1) De Ruyter vs St. Peter's Church, 3 N.Y. 238.

In *Ringoe vs Biscoe*, (1) Chief Justice Watkins said: "It is now well settled that a corporation unless restricted by a charter, or prevented by the operation of some bankrupt or insolvent law, by virtue of its general power to contract, may make an assignment of its effects, entire or partial, if made bona fide for the payment of its debts, the same as any natural person may do, and the corporation has the same right to make preferences among its creditors, or classes of creditors; and such preferences, when they are meritorious, so far from furnishing an argument against the deed, conduces rather to uphold it."

Mr. Morawetz in his work on corporations very justly criticises this doctrine. Justice demands that a corporation should be prohibited from making an assignment with preferences. It is granted its charter to exist and perform the functions for which it is organized, and not to cease its existence by voluntary general assignment for the benefit of creditors; and

(1) *Ringoe vs Biscoe*, 15 Ark. 563.

especially when in so doing it discriminates between them. They may justly demand a pro: rata distribution of its assets. The capital stock is a trust fund held equally for the benefit of the creditors. When the corporation becomes insolvent the creditors rights are fixed, and these rights ought not to be prejudiced by the favoritisms which may be shown by corporate directors. Ultimately assignments by corporations will be held to be ultra: vires and void as is shown by recent legislative and judicial tendencies.

In some of the states, as in New York, corporations are prohibited by statute from making assignments for the benefit of their creditors. Whenever it becomes necessary to make a distribution of its assets by reason of insolvency, the distribution is accomplished by the appointment of a receiver but no preferences are allowed.

Who may be an assignee? ----- An assignee may be any person capable of executing the trust. The duty

may be imposed on one or more persons, or on a partnership, and no regard need be taken as to whether they are creditors or not.

Care should be taken in the selection of a suitable assignee for, if an improper person is chosen, it may serve as evidence of a fraudulent intent; as, where the debtor selects a relative over whom he is apt to have great influence and thus gain complete control over the property. (1)

Requisites of an assignment.----- The statutory law of assignments for the benefits of creditors is now found in the Laws of 1877, ch. 466 as amended by the Laws of 1878, ch. 518. The committee on revision of the laws of New York have made a new, complete, and accurate draft of the law of assignments which will undoubtedly be adopted at the next session of the legislature as an amendment to the Code of Civil Procedure. It will be called "The Insolvent Debtor's Law". It does not

(1) Cram vs Mitchel, 1, Sanford's Ch. 251.

Currie vs Hart, 1 " " " " 353.

change the requisites of an assignment but expresses them in a clear concise manner. And it cannot be better stated than by quoting that section: "Every conveyance or assignment by a debtor of his property to an assignee, for the creditors of the debtor, shall be in writing, and shall specifically state therein the residence, and kind of business carried on by him at the time of the assignment, the place at which such business shall then be conducted, and, if in a city, the street and number thereof, and, if in a village or town, such apt designation as shall reasonably identify the debtor. It shall be duly acknowledged or proved, and shall have annexed thereto or endorsed thereon the assent of the assignee, subscribed and acknowledged by him, and shall be recorded in the clerk's office of the county where the debtor shall reside or carry on his business at the date thereof. If made by co-partners, it shall be recorded in the county where the principal place of business of the co-partners is situated. If

real property is assigned and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of the assignment shall be filed and recorded in the county where the property is situated." The requisites in the other states are substantially the same.

What title vests in the assignee?----- By assignment the assignor conveys all his property, both real and personal, legal and equitable, not exempt by law from levy on execution. Some of the early decisions in Michigan, Missouri, Virginia, and New York held that the assignee was a bona fide purchaser and entitled to his rights. The correct rule, however, is that the assignee does not take the property with the rights of a bona fide purchaser. He takes it subject to all liens, equities, and incumbrances which existed against it at the time of the assignment. If it is real property which there is a mortgage or a lien for the purchase

money, a house or other property on which there is a mechanic's lien, or personal property on which there is a chattel mortgage, the assignee takes it subject thereto. Also all interests, vested or contingent, and choses in action are taken subject to their equities and conditions. (1)

Title acquired in property in another state or country.----- The question often arises as to what title an assignee has in the property located in a state prohibiting preferences under an assignment made in a state allowing them.

In regard to the transfer of personal property the well recognized principle that the law of the situs of the owner or of the place where the transfer is made governs as to mode and sufficiency of the transfer, and if it is valid where made, it will be recognized everywhere. This is true as a general rule but is subject to exceptions. It proceeds on the fiction of law that

(1) Hutchinson vs Murchie, 74 Me. 187.

the domicile draws to it the personal estate of the owner wherever it may happen to be. But it has been held that this fiction is not of universal application, and yields whenever it is necessary for the purposes of justice that the actual situs of the things should be examined and always yields when the law and policy of the state where the property is situated have prescribed a different rule of transmission from that of the state where the owner lives. (1)

The law of assignment for the benefit of creditors is regulated by statute in each particular state. These laws have not extra-territorial force but through the comity of states they are observed and the rights of parties resting upon them are enforced unless they are at variance with positive law, expressed in statute, by judicial decision, or the public policy of the state. It is well established by leading cases of this country that preferential assignments, made in a state allowing them, do not convey either real or personal property

(1) Warner vs Jaffray 96 N.Y. 248.

being at the time in a state prohibiting them(1)

Under the General Statute of South Carolina providing that any assignment for the benefit of creditors, containing a preference of one creditor over another, shall be absolutely void, an assignment preferring employees executed under the laws of New York conveying property in South Carolina was held to be void; though by the laws of New York such preference is not only permitted but required.(2) Attaching creditors in a state prohibiting preferences can hold property against the foreign assignee. (3) The rule seems to be somewhat qualified where the assignee has come into actual possession of the assigned property in the foreign state before it is attached. (4)

The law of the lex loci governs the conveyance of real estate, and in order to make a valid assignment of real property in a foreign state, it must conform strictly to the provisions of the assignment law of that state,

(1) Juillard vs May, 130 Ill. 87.

King vs Glass, 73 Ia. 205.

Smedley vs Smith, 8 N.Y. Supp. 100.

(2) Sheldon vs Blauvelt, 7 S.E. (S.C.) 593.

(3) Bryan vs Brisbin, 72 Am. Dec. 219.

(4) Whipple vs Thayer, 26 " " (Mass.) 626.

Duties of an assignee.----- The assignee holds a fiduciary relation with the insolvent's creditors and, as such, the principles governing trustees in general apply to him. He is required to execute his trust according to the legal expressed provisions of the assignment. He must due care and diligence and exercise such discretion, in matters where it is allowed, as an ordinarily prudent man would manage his own affairs.

The principle duties which devolve upon the assignee by his acceptance of the trust are to take possession of the property assigned, to convert it into money by the process of sale and collection, and to distribute the proceeds among the creditors entitled thereto. (1)

The assignee at all times is bound to look first to the interests of the creditors for whom he represents the insolvent debtor. By accepting the trust he takes the place of the debtor and, therefore, has the power to compromise or enter into any agreement with the creditor for the benefit of the other creditors or which op-

(1) Burrill on Assignments Sec. 541.

erates no injustice to them. He may be assisted by the assignor but in no case should the assignor be allowed to direct the management and disposition of the property.

The Assignee's Bond.----- Within a limited time after the date of the assignment and before the assignee has any power or authority to sell or convert to the purposes of the trust any of the designated property he is required to file a bond with sufficient sureties for the faithful discharge of his duties and for the due accounting of all moneys received.

The question has often come before the courts whether a non-compliance with the provision invalidates the assignment. Although the assignee has no power to dispose of the assets until he has filed his bond, yet failure to do so does not effect the validity of the assignment. (1) When an assignment is properly executed by both parties, delivered and recorded, the title to the property vests in the assignee and his failure to

(1) Smith vs Newall, 32 Hun, 501.

give a bond will not divest him of the title so acquired, or enable any one, as a creditor, to levy upon the assigned property as that of the assignor.(1) The general tenor of the cases seem to be that what the statute specifies shall be done after the delivery and record is merely directory and an omission to obey ~~the~~ it does not avoid the assignment.

Earl J. in Warner vs Jaffray (2) says: "If the assignee fail to record the assignment and to give ~~the~~ bond, he may, under Sec. 6 of the act of 1877, as amended by the act of 1878, be removed by the county judge. All the requirements subsequent to the execution and delivery of the assignment are merely directory and there is ample power in the county judge to enforce their obedience." In Wisconsin it has been held directly contrary. If the required bond is not filed before taking possession of the property it renders the assignment absolutely void. The statute is mandatory and **must** be strictly pursued. (3) In some states the assignee

(1) Ryan vs Webb, 39 Hun, 488.

(2) Warner vs Jaffray, 96 N.Y. 248. *Supra*.

(3) Gall vs Hubbell, 61 Wis. 298.

takes an oath to honestly to perform the duties of his office.

Giving the bond is not a condition precedent to the vesting of the estate in the assignee nor does the failure to give a security within the limited time invalidate the transfer and restore the title of the assigned property to the assignor.(1) The only remedy of a creditor for the failure of the assignee to give a bond is by having him removed. (2) Until he gives his bond he holds as a dry trustee.

Books of Account.----- The assignee as a trustee, should keep full, exact, and regular books of account of all his transactions in regard to the trust estate and keep them open to the inspection of all persons interested in the estate. This inspection can only be ordered by the court, in aid of the assignment and is not to enable the creditor to get evidence to assist him in the prosecution of the suit against the assigned estate. (3) This examination is not necessarily hostile to the assignment but is rather a proceeding in aid of it.

-
- (1) Fant vs Elsbury, 2 S.W.(Tex) 866.
Syracuse &c, R.R.Co. vs Collins, 57 N.Y. 641.
- (2) Bryant vs Langford 22 Pac. (Cal) 219.
- (3) Matter of Everit, 10 Daly, 99.

General Power of Sale.----- Power of sale is sometimes given by the assignment itself or by statute; but, if not expressly granted, it is necessarily implied in every conveyance for the satisfaction of debts. (1)

These sales, as a general rule, may be either private or public. If public, they must be duly advertised and notice sent to the creditors so that they may be present and see that the property is not sold at a sacrifice. As a rule, the assignee cannot be a purchaser either directly or indirectly at one of these sales of the effects of the assignor; but if a purchase is made by him, he takes the property subject to the right of the creditors to have it set aside. The sale should be conducted by the assignee himself or by his duly authorized agent or attorney.

An assignment which directs the assignee to sell on credit is void. It is construed by the courts as tending to hinder and delay creditors in the collection of their debts. Where a discretion is vested in the assignee, as to the manner in which the property shall

(1) Perry on Trusts, 147, 398.

be disposed of, it will be understood as legal discretion and not necessarily an authority to sell on credit. Where the assignee was authorized to "sell and dispose of the property conveyed upon such terms and on such conditions as in his judgement may seem best and most for the interests of the parties concerned and convert the same into money," it was held to be a legal discretion and the assignment was valid. (1)

It may be of interest to note that it was held in a Canadian supreme court that an explicit power to sell on credit in an assignment for creditors does not render it void. (2)

Continuation of the Assignor's unfinished Business.----- Somewhat analogous to directions to sell on credit is an authority to complete the unfinished contracts of the assignor, to continue his business, or to convert raw material into manufactured products before the sale for the benefit of his creditors.

The general rule seems to be, that, where the

(1) Cribben vs Ellis, 69 Wis. 337.

(2) 30 A.L.J. 503.

stipulations of the assignment are intended chiefly to benefit the assignor, they will be ⁱⁿ valid; and, if for the benefit of the creditors, valid. The courts will ordinarily construe a positive authority by the assignor to continue his unfinished business as tending to delay and hinder the creditors and will declare it void. It should not be understood that the assigned property must be immediately sold. The sale must be made within a reasonable time and the reasonableness of any delay for which the assignment provides will depend on the character of the property and the particular circumstances surrounding each case.

Many cases, however, where the assignee is placed in a delicate situation to rely upon his own judgement, arise. As for instance, where material, in a rough state, adapted to but one use, is assigned and by an immediate sale the creditors might realize but a small percentage of what they would receive if the assignee were permitted to continue the manufacture of the goods

on hand. In such a situation he should apply for the instruction of the court; for, if he continues the business under the order of the court and loss should result, he would become personally liable and subject to removal; while the profits, if any, would go to the estate.

The provision that "should it be necessary and to the better performance of the trust" the assignees should have authority to complete unfinished work, was held to be valid. (1) The power to judge what is necessary in such a case does not rest in the assignee but in the court, and its supervision is neither suspended nor destroyed by such a provision. The assignee cannot safely spend money in completing the unfinished articles without the order of the court and, acting without its order, he acts at his peril and can be restrained at any moment.

As a general rule the assignee cannot expend money in safety to complete the unfinished contracts of

(1) *Hobbins vs Butcher*, 104 N.Y. 575.

the assignor (1) nor can he be compelled to do so. (2)

Where a stock of goods in a retail business is assigned, the assignee cannot continue the business and retail the goods as before with a view of obtaining higher prices. He should generally close the business within a reasonably short time after the assignment is made. Where he continues the business several months after the assignment he is chargeable with the difference between what he received and what he would have realized from the sale had it taken place at public auction within a reasonable time making the necessary allowances for insurance, packing, etc. (3)

Compromises.--- He may compromise the debts which come into his hands as assignee if they cannot be wholly collected. In this also he must act in good faith for the best interest of the creditors. If he enters into a compromise without the authority of the creditors, he will be held responsible to them if it should

(1) Patton vs Royal Baking Powder Co. 114 N.Y. 1.

(2) 15 Abb. N.C. 61.--- Matter of Adams.

(3) Matter of Rice 10 Daly 1.

See 13 Daly 105.

be found to be an improper arrangement.

An assignee will be protected if he compromise debts due the assignor which will be likely to be lost by insisting on a settlement in full. It is his duty to make the estate avail as much for the credits as possible. If it is a debt which an ordinarily prudent man in his own business would settle at a discount the assignee may do so in safety; but, if the claim is one about which there is doubt as to the feasibility of compromise the only judicious method would be to make application to the court of equity for instruction and give notice of such application to all the creditors.

When controverted rights or doubtful acts are to be determined, notice should always be given to the parties interested, and the omission of such notice would render it entirely inoperative as to them. It can be assailed collaterally at the time of the accounting and it would constitute no justification or excuse whatever for the disposition made of the debts by the

assignee. (1) He is the agent of the creditors of the insolvent as well as of the law; and is the instrument by which, instead of by attachment, the property of the insolvent is secured for the benefit of creditors.

Liabilities of the Assignee.---- The liabilities of the assignee are, for the most part, commensurate with the duties imposed on him by the deed of assignment. He must observe good faith in all his transactions and for a violation of it, and certainly for a gross negligence of the management of his trust, he is not only personally liable but may be discharged from his office. In many cases his conduct need not amount to gross negligence in order to make him liable, and the assignor cannot exempt him from this liability by stipulations in the deed of the contract. In fact if the assignment provided for such an exemption it is void. (2

An assignee under a voluntary assignment being entitled to a compensation for his services in the ex-

(1) Shaffer vs Child, 7 Watts, 84.

Anonymous vs Gelpcke, 5 Hun ~~200~~ 245.

(2) Litchfield vs White, 7 N.Y. 438.

ecution of the duties of his trust is chargeable with the care and diligence of a provident owner and is liable for a loss occasioned by ordinary negligence. The assignee is often a particular friend of the assignor and one in whom the creditors would be unwilling to impose a trust. Although the debtor has an interest in the distribution of his effects the creditors have a greater one and that interest often depends on the competency and diligence of the assignee. Accordingly the debtor will not be allowed to place his property beyond the reach of legal process and at the same time exempt his assignee from proper responsibility to his creditors. If the assignee is also a creditor of the assignor he can gain no advantage by the situation. If an assignee pay a creditor in full who is not preferred and does not have sufficient assets in his hands to pay all creditors in full he is liable to the aggrieved creditors to the difference between the amount distributed pro rata and what he actually paid such

creditor. He should be very careful in paying the preferred claims to pay them in their exact order of preference as set forth in the assignment. A failure to do this with insufficient funds remaining to pay the injured creditors would render the assignee personally liable to them. It seems however, that these overpayments or mispayments can be recovered by the assignee for the creditor would hold them nearly as a trustee. (1) If his conduct is questioned the presumption is that he faithfully discharged his duties. When he acts bona fide he will receive the due protection of the courts, but if his conduct is mala fide he will be rigorously dealt with.

Actions by and against the assignee.---The assignee should act on the offensive as well as on the defensive in the interests of the assigned estate. If transfers of the property or confessions of judgment which are tinged with fraud or tend to evade the stat-

(1) Matter of Morgan, 99 N.Y. 145.

utery limit of preferences are made the assignee should bring action to have them set aside. (1) If the assignee refuse or neglect to sue and thereby subject the creditors' interests to loss they may bring the action themselves. It has been held that they may set aside as fraudulent judgments confessed by the assignor immediately before making a general assignment in case the assignee refuses to sue. (2) His refusal may not be expressed positively and openly but where he temporizes upon a request to sue in a manner threatening speedy loss, it will be deemed a sufficient refusal to justify the creditors in suing. (3) In cases where, ~~before~~ before assignment, the assignor induces a sale of goods by false representations and the goods are delivered, if the vendor demand delivery of the assignee and he refuses, an action for conversion will lie against him. (4)

In proving claims under the assignment only those debts which are ascertained and fixed or capable of com-

-
- (1) Kessel vs Drucker, 23 Abb. N.C. 1.
 (2) Spelman vs Jaffray, 6 N.Y. Supp. 570.
 (3) Sweetser vs Smith, 5 " " " 378.
 (4) Goodwin vs Wertheimer, 99 N.Y. 149.

putation can be allowed. Unascertained claims for damages are not provable as debts. Daly, CH. J., in the Matter of Adams (1) says: "The reason of it was, that, as the bankrupt under the act was to be discharged from his debts, the proceeding was to be strictly confined to what was regarded as a debt, and for the further reason, that the creditors whose claims were ascertained and fixed, were entitled to share in the distribution of the estate, as soon as it was gathered in, and were not to be delayed by claims against him sounding in damages which it might take years to determine. The rule applies with equal force in assignments for the benefit of creditors and, indeed, more so, because there the instrument itself provides how and to the payment of what debts the property assigned shall be applied; and, unless the assignment is impeached for fraud or is otherwise invalid, the question is one to be gathered from a fair construction of the instrument and not from the provisions of the statute."

(1) Matter of Adams 15 Abb. N.C. 61, *supra*.

When a creditor has communicated his acceptance of the assignment he is bound, irrespective of estoppel, from maintaining an action to set aside as fraudulent unless it is made to appear that such acceptance was made in ignorance of facts which justify granting relief. (1) A person cannot accept the benefits of an instrument and at the same time attack it.

For the faithful discharge of his duties the assignee is entitled to a reasonable compensation. In New York it is five percent of the property which passes under his control but he cannot receive any direct profit from the estate by reason of his connection with it.

After distribution, accounting, and discharge the obligations of the assignee are concluded.

(1) Levy vs James, 49 Hun 161.