1889

Impeaching a General Assignment for Defect upon its Face

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For degree of Bachelor of Laws.

THE SETTING ASIDE OF AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS, FOR GROUNDS APPARENT UPON THE FACE THEREOF.

Elton Dean Warner.

CORNELL UNIVERSITY - SCHOOL OF LAW.

1889.
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All statutory law may be separated into a few main divisions.

Among those divisions the legislation relating to bankruptcy and insolvency forms an important part and a brief survey of the statutory enactments upon these subjects both in England and America hardly seems improper at this place.

No condition of mankind has perhaps furnished so abundant field for legislation as have his misfortunes, enterprises and the relations growing therefrom.

In the early history of these statutes a distinction was made between bankrupt and insolvent laws.

The English bankruptcy system as established by the earlier statutes was limited in its operation to traders; it was available only to the creditors of the trader and no means were provided by which the trader could voluntarily avail himself of its operation; it did not discharge the debtor from his debts, the dividends under the commission being considered as payment only protanto. Later statutes did release the debtor entirely from the claims of his creditors but the laws were still available to traders only.
Under this condition of circumstances there still remained a large class of citizens, not traders, who yet were engaged in business enterprises and for whom the law offered, upon disaster overtaking them in their financial affairs. This unprotected class were still liable not only to be stripped of their property, but also to be imprisoned for their debts; they were without relief from the bankrupt laws or from any other source.

It was to alleviate the necessities of this class of citizens, not traders, that the insolvency laws were enacted. These laws did not discharge the debtor from his debts; they contemplated only a pro rata distribution of his effects among his creditors, and the immunity of his person from imprisonment. Their operation was gradually extended so as to discharge the debtor from his debts and finally to include all classes of failing debtors, and so the two systems of laws were gradually assimilated.

In the United States the term bankrupt law has been applied to enactments by Congress under its constitutional power to legislate upon bankruptcy in general, while laws passed by the state legislatures, whether technically insolvent or bankrupt laws, are denominated insolvent laws. The distinction is eo nomine, having really no valid ground for its support, and an historical review of the legislation
upon the subject will show that a bankrupt law may contain regulations generally found in insolvent laws while an insolvent law may contain those common to bankrupt laws.

Insolvent laws have existed ever since this state was an independent government, except for a brief period in its history.

They have been frequently amended and as oftentimes repealed, or suspended in their operation by the existence of Federal bankrupt laws, until it may be said that at the present time the legislation in this state upon the subject is comprehended in what are known as the two thirds act, the seventy day act, the fourteen day act, and the general assignment act.

The last in particular is deserving of our attention in this connection.

Assignments for the benefit of creditors although analogous to the relief afforded by the legislation above mentioned form no part of, nor do they trace their beginning to, such statutes. They are of common law growth and all statutory law upon such conveyances merely recognizes their existence by prescribing rules for their creation and safeguards against their abuse.

Our courts seem to have regarded them as peculiarly American in their structure and as of recent origin, but
early English cases are to be found in which assignments for the benefit of creditors practically existed although they were termed acts of bankruptcy.

They are not creatures of statute, nor do they come into being by operation of law or by force of any previous proceedings either by or against the debtor. They are purely voluntary acts like contracts and rest like all contracts upon the assent of the parties.

Their primary object is to afford a speedy and economical method of distributing the debtor's estate among those creditors justly entitled thereto, and at the same time to place such property beyond the direct pursuit of creditors, by a conveyance in trust for them.

They do not relieve the debtor from the payment of his debts; the payments made by his assignee being only pro tanto, the debtor still remaining liable to legal process as before. Although the practice is viewed by the courts with the most extreme jealousy, the debtor may at common law make preferences among his creditors, upon the principle that it is not a fraud for a man to pay one creditor his debt in full and at the same neglect to satisfy the claims of his remaining creditors; that such a privilege existing prior to his insolvency is not removed by his subsequently becoming unable to pay all of his debts in full.
A valid assignment must be a conveyance of the debtor's property in trust, to sell such assigned property and to distribute the proceeds among creditors.

VOID FOR NON-COMPLIANCE TO STATUTE.

The existence of voluntary assignments for the benefit of creditors was fully recognized, and the general requisites essential to their validity established, prior to any statutory enactments in this state.

Owing to the vague and incomplete rules laid down by the courts in regard to the creation and fulfilment of such trusts great facilities were furnished for fraudulent and dishonest acts by the parties thereto, hence it was rendered necessary that there should be some explicit statutory regulations upon the subject and accordingly the statute of 1860 was enacted. This was subsequently superseded by what is known as the General Assignment Act, (L. 1877, ch., 466.) This act with its various amendments comprise our statutory provisions upon the subject.

Perhaps one of the most frequent of causes for the setting aside of an assignment for grounds apparent upon its face arises from the failure to comply with the statutory regulations just mentioned.

As to what portions of these statutes are merely directory or affirmative, and what are mandatory in their
character, has from the very beginning afforded opportunity for much dispute and the adjudications thereupon are extremely multifarious.

It is quite unnecessary to enter into discussion of the earlier of those cases as the later decisions of our courts, (Warner v. Jaffray 96 N.Y. 248; Nicoll v. Spowers 105 N.Y. 1; Bloomingdale v. Seligman 3 N.Y. Supp. 248, Com. Pleas N.Y. city, Dec., 3, 1888.) seem to have somewhat essentially modified those rulings and quite clearly established the law upon the question.

Prior to those decisions it seems to have been quite uniformly settled that the statute had been sufficiently complied with if the assignment was in writing, duly acknowledged, assented to by the assignee in writing and duly recorded; that all other parts of the statute, such as those requiring the filing of schedules or the giving of a bond, were merely directory, non-compliance with the same not being considered a cause for invalidating the assignment itself.


Rennie v. Bean 24 Hun 123.

The case of Warner v. Jaffray, supra, modifies the proposition above stated by holding that the record of the assignment is unnecessary to its validity. Earl J., page 252 says of the assignment: "It must be in writing and
the assignee must assent thereto in writing and when it has thus been executed and delivered it takes effect and the title to the property passes to the assignee. All other requirements subsequent to the execution and delivery of the assignment are merely directory and there is ample power in the courts to enforce their observance."

Subsequent to the decision in that case the legislature amended the general assignment act by adding, ch., 294 L.1888., which requires in addition to those essentials already stated, that the assignment state the residence of the debtor, his business, and if in a city, his street and number. Upon this amendment arose the late case of, Bloomingdale v. Seigman, supra. The court in that case held the assignment invalid for failing to comply with the recent amendment.

It would accordingly seem from the most recent decisions that an assignment will not be set aside for non-compliance to the statute unless it fails to conform to the provision of the statute in one of the four particulars already mentioned.

--PROVISIONS TENDING TO DELAY.--

Under the statute of frauds any conveyance made with the intent to hinder, delay or defraud creditors, is void.
At first thought such hindrance or delay would seem to be the natural result of all assignments for the benefit of creditors. Certainly it must be true of every assignment, even if the creditors are to be paid pari passu, that they are to some extent hindered or delayed in the collection of their debts. This objection, if it be one, is overthrown by the facts, that the debtor has in good faith dedicated all of his property to the payment of his debts, which, in cases especially where preferences are absent, is all that the creditors have any right to expect and all that the law ought to exact; and also that whatever delay or hinderance there may be present is merely incidental to the creation and execution of the trust.

Such delay, however, must be only incidental and necessary to the fulfillment of the trust or the execution of the power. When it becomes more than that, when from the intent of the assignor as evinced by the instrument itself and the surrounding circumstances, delay and hinderance to creditors are the primary objects to be accomplished by the creation of the trust, then such assignment is unquestionably void.


Such intent to hinder and delay may be apparent from the face of the assignment itself or it may be evinced
from the surrounding facts and circumstances.

It is here purposed to treat of those instances in which the face of the assignment furnishes sufficient evidence of such fraudulent intent.

-- PROVISIONS IN FAVOR OF ASSIGNOR.--

The very large number of cases, in which assignments have been held invalid, have for the most part arisen from an attempt on the part of the draughtsman to reserve some form of benefit to the assignor.

An assignment for the benefit of creditors is a conveyance the very nature of which is to devote the whole of an insolvent debtor's property to the payment of his debts. It operates to place such debtor's property beyond the reach of creditors by a legal process.

If such a conveyance should be allowed, in view of those facts, to either expressly or impliedly create a trust in favor of the assignor the very result thereby attained would defeat the purpose of making assignments. Such a trust would be a palpable fraud upon creditors. The wary creditor would be powerless, while others would be deprived of a ratable distribution of the whole of the debtor's property, and by his own fraudulent act such assignor might safely retain for himself that belonging in equity and justice to his creditors.
There can be no question but that any assignment of the whole of the debtor's property which contains a trust for, or reserves any benefit out of such assigned property to, such insolvent debtor, is unqualifiedly void.

This doctrine is explicitly and clearly stated in the holding in Mackie v. Cairns, 5 Cowen 547, a case argued in 1825 in the Court for the Correction of Errors. The decision is a leading and authoritative one upon this question, and has been repeatedly approved in respect to the point under consideration, by the subsequent decisions of the courts of this state.

In the course of his opinion in that case, ch.,J. Savage, page 580, said: "When a debtor fails, either from misfortune of folly, or from dishonest motives, his property in moral justice belongs to his creditors. He is permitted to prefer in payment such creditors as he pleases. This is giving him power enough - but when he appropriates the property to his own use the act becomes fraudulent. Nor does it lie in his power to prescribe terms to his creditors. The law is open to them. They have a right to pursue the debtor in the mode pointed by law and any act which obstructs them in their pursuit is against the law and of course void, unless such act appropriates the property to the payment of debts."
II.

"Is it law that every insolvent debtor in this state may by assigning all his property in trust, secure to himself an allowance of $2000 a year, or any other sum from his own property? To state such a proposition is a sufficient refutation of it. It offends the moral sense - it shocks the conscience and produces an exclamation."

There exists considerable conflict among the cases, as to the reasons for invalidating such assignments, some authorities holding them void because in conflict with that portion of the statute of frauds, declaring all transfers, sales and assignments, in trust for the use of the person making the same, to be void as against creditors existing and subsequent. Other equally reliable authorities hold that such statute has no application to assignments for the benefit of creditors but expressly that such assignments in those instances are void for actual fraud. Being void in any event it is here immaterial as to which line of decisions is superior in authority.

Where the assignment is of all the debtors property for the benefit of a portion of the creditors only, and an express reservation of the surplus to the assignor such reservation will avoid the assignment.


If however the assignment be of all the debtors
property for the benefit of all of his creditors such reservation would result in no harm for it would only be an expression in the instrument of what must in such a case necessarily occur by operation of law, upon the full and complete liquidation of the claims of his creditors.

A reservation of such property as is by law exempt from levy and sale by execution will not invalidate the assignment, since the creditors are not hindered by the debtor's retaining that which they had no right to touch. This proposition seems to be well by authorities in the various states.


The assignment is not void by reason of the failure of the debtor to convey all of his property, but rather by reason of his reservation of some part of the property conveyed.

The debtor may except a portion of his property from the assignment the operation of the assignment since as the title to such portion has never passed it remains in his hands open to the pursuit of creditors as if no assignment had been made and their remedies against it have never been hindered or delayed.

Carpenter v. Underwood 19 N.Y. 520.
A provision in an assignment which provides for the payment of future advances to the assignor out of the proceeds of the assigned property, or for the liquidation of future liabilities which the assignee may assume for such debtor in preference or to the exclusion of debts due to creditors contracted prior to such assignment, is a sufficient ground for setting the assignment aside. Such an attempt to secure future benefit or credit to the assignor will not be sustained. But a provision authorizing the assignee to pay, "debts due or to grow due" is unobjectionable if it appear that such debts only were referred to as were in actual existence at the time of making the assignment whether matured or yet to mature. It is perhaps unnecessary to add that existing contingent liabilities may be protected by a provision to that effect.

Brainerd v. Dunning 30 N.Y. 211.

Bank of Silver Creek v. Talcott 22 Barb. 550

An assignment containing a provision to the effect that the assignee shall pay all costs and expenses necessarily incurred by the assignor in defending suits that might be instituted against him by any creditor or other person for anything growing out of the assignment, is fraudulent and will be set aside upon the motion of the creditors.

Such a clause is clearly an attempt to reserve to
the assignor some benefit from the assignment and if upheld would enable the debtor to drive his creditors into almost any terms of compromise.

As said by the Vice Chancellor in Mead v. Phillips I Sandf. Ch. 85., "It is standing notice to all creditors that any attempt which they may make to question the amount due to them or to others as stated in the assignment, or to compel its execution will be resisted by the debtor; that he will contest such efforts to the end of the law, and will subtract the costs and expenses incurred by him in so doing from the fund they are looking to for a dividend."

More than that, if occasion should require the enforcement of such a clause the effect would certainly be to postpone a distribution for an indefinite length of time, and consequently the creditors must thereby be hindered and delayed in the collection of their debts.

-- PROVISIONS IN FAVOR OF THE ASSIGNEE.--

We have thus far considered those instances in which provisions securing favor to the assignor have afforded just grounds for the setting aside of an assignment. We have found that such provisions render the assignment void because indicating an intent to hinder and delay creditors in the enforcement of their demands.
Upon the same theory of reasoning the courts have ever been ready and almost eager to set aside an assignment containing anything in the nature of a provision favorable to the assignee. Provisions favoring the assignee may of course be of various kinds, but the usual form is one in the nature of an attempt to exempt the assignee from liability occurring, "from any loss or injury to the trust estate unless the same should happen by reason of his gross neglect or wilful misfeasance."

The courts regard such a provision as a badge of fraud, and as an attempt by the debtor to hinder and delay creditors by exempting the assignee from a liability imposed upon him by law. Even where such a provision is succeeded by a covenant of the assignee to execute the trust to the best of his ability and to exercise all the diligence required by virtue of his office as a trustee, such former exemption notwithstanding this amendment is held to invalidate the entire instrument.

Such clauses, it is said, by Sandford J., in Litchfield v. White 2 N.Y. 553-4, "which in their operation may lead to the waste and loss of the property, declare an intention on the part of the insolvent debtor to devote his property to some purpose other than that of the payment of his debts. The assignor is in law deemed to have
intended all the consequences which may legitimately flow from the provisions of such assignments. The intent to hinder, delay and defraud the creditors becomes a necessary legal inference from the provision under such circumstances."

Assignments occasionally contain provisions undertaking to secure to the assignee a larger compensation than that designated by law. The statutes prescribe the rate of commission to be allowed to the assignee for his services and any attempt to increase the same will be regarded as prejudicial to the rights of the creditors and will not be tolerated.

If the assignor selects a member of the legal profession for a trustee and inserts in the assignment a provision authorizing the payment to such assignee of a reasonable counsel fee in addition to his regular commission and expenses such a provision renders the assignment utterly void. The law it is said makes no distinction between professional and non-professional assignees, as all are expected labor to their utmost capacity for the benefit of the trust estate and the fact that one is perhaps better qualified to act than another entitles him to no greater reward for his superior excellence.

-- PROVISIONS IN RESPECT TO THE SALE OF THE ASSIGNED PROPERTY.--

Creditors are entitled to have the assigned property converted into money without any unreasonable delay and applied to the payment of their debts. A provision therefore in an assignment evincing an intent in the mind of the assignor to prevent the immediate conversion into money of such property invalidates the assignment as exhibiting an intent on the part of the assignor to hinder and delay creditors in the collection of their claims.

The rule of construction in the earlier cases went so far as to hold a provision improper which merely made the time of sale discretionary with the assignee, the exercise of such discretion being limited to a reasonable time. The later authorities however seem to be more favorable to the validity of assignments in this particular.


It may be stated as fully settled that an assignment containing a provision authorizing the assignor to make sales of the assigned property upon credit will vitiate the assignment.


The insolvent debtor having placed his property beyond the control of his creditors in the hands of trustees of
his own selection, while pretending to provide for those creditors, cannot at the same time by authorizing a sale of the assigned property upon credit hinder and delay their right to have such property converted into cash for their benefit. Whether such property shall be sold upon credit or not, the creditors alone have the right to determine.

The construction of the language employed in assignments has given rise to much discussion as to when an authority to sell on credit will be inferred and the rule of construction is well illustrated in the cases of, Bagley v. Bowe 105 N.Y. 171; and Rapalee v. Stewart 27 N.Y. 310.

The language of the provision in controversy in the last case was, "to convert into cash or otherwise dispose of to the best advantage". These words clearly conferred a discretion upon the assignee to dispose of the property otherwise than for cash and they were consequently declared fatal to the validity of the assignment, Emott J. saying, "An authority to do an illegal act is not to be sustained or overlooked because it may or may not be exercised. An authority to do what the law forbids is as fatal as a direction to do it. The law exercises no discretion or control over illegal acts. We have no right to say that where power is given to do either a legal act or an illegal one the latter is nugatory because the discretion to do the one or
the other will be controlled by the rules of law and these will forbid the violation of the rights of creditors.

Upon such a principle it would be difficult to condemn an assignment for anything which might contain of a permissive character merely."

"The instrument should contain no provision imposing a duty upon the assignee which conflicts with the obligations conferred by law. He is legally bound to bring the property to sale in a manner most advantageous to the creditors, which may be either at public auction or at private sale, hence a restriction in the assignment limiting the mode of sale to the one or the other might render the assignment void, especially when taken in connection with other circumstances, it is apparent that the evident object of the transaction was to coerce or persuade the creditors into a settlement.

Hart et al. v. Crane 7 Paige Ch. XXX 37.
Work v. Ellis 50 Barb. 512.

--PROVISIONS FOR NURSING THE ESTATE--

May a failing debtor provide by his assignment for the continuance of his business by the assignee?

Such a provision if made with honest intentions, to the effect that the assignee shall use up material on hand
and finish partially manufactured goods would certainly at first thought and perhaps with good reason be considered unobjectionable. It is indisputable that the creditors would realize more from the estate if the materials on hand could be worked up, and partially finished goods completed, that they would if the business should be immediately closed up by the assignee in the incomplete and unfinished condition in which it was conveyed to him by the assignor. Surely it would seem that the assignment might provide for that which the law itself would compel, for it will not be denied that in the absence of such a provision the court would order the assignee to continue the business with a view to closing it up profitably for the creditors.

The early case of Cunningham v. Freeborn II Wend. 241 held such a provision for the continuance of the assigned business to be proper and though the decision has since been overruled by the Court of Appeals in this state yet it possesses some considerable amount of reason and is still followed by courts of the highest resort in some other states.

The better and more logical doctrine it would seem is to be found in Dunham v. Waterman I7 N.Y. 9, where such a provision is held to invalidate the assignment. The principle there asserted is that the debtor can authorize no
delay whatever, except that incident and necessary to the creation of the trust. Because of that principle, provisions authorizing sales of the assigned property upon credit and numerous other provisions are not to be tolerated. The argument used against such sales is certainly valid when directed against a provision for the continuance of the assigned business by the assignee. As to the position that by such a provision the situation of the creditors would be improved and that what the court would order an assignee to do, he might be expressly authorized to do by the assignment, Selden J., in that case said, "that such a provision overlooks the distinction between a duty imposed by law and a power conferred by an individual. The first would be under the entire control of the courts. If an assignee should err in the exercise of that legal discretion incident to his trust the courts on application could correct the error. If the sale of the assigned property was unreasonably delayed the courts could hasten it. Not so however in respect to a discretionary power expressly vested in him by the assignment. Nothing short of fraud or want of good faith in the exercise of such a power would authorize the courts to interfere."

The doctrine in the case of Dunham v. Waterman, is to be carefully distinguished from the holding of the late
case of Robbin v. Butcher 104 N.Y. 575.

In that case the assignment contained a provision to the effect, "that should it be necessary to the better performance of the trust that the party of the second part shall have full power and authority to finish such work as is unfinished." The assignment was held valid upon the ground that no power to determine as to the necessity of such a continuation was thereby vested in the assignee but rather such power was conferred conditional upon the necessity to be determined by the court; that the assignee could not safely exercise such power except under the order of the court and in case he attempted it might be restrained at any moment.

--PROVISIONS AUTHORIZING THE ASSIGNEE TO COMPROMISE--

The validity of an assignment containing a provision authorizing the assignee to compound or compromise debts and demands due the creditors of the insolvent has been denied in many states and was first questioned in this state in the early case of Grover v. H. Wakeman II Wend. 187. If such an assignment is to be conceded valid, the trust to compromise is to be observed and enforced by the courts and a delay for that purpose would therefore be justifiable by the assignee. It is also apparent that such a power is one which, if exercised must operate in favor of the assig-
nor. To compromise such debts implies that by so doing the creditors will receive less than the amount of their claims, and the debtor's property of course going so much farther in the payment of his debts, the ultimate result must be that the more favorable compromises the assignee may succeed in effecting the more free the insolvent will be from indebtedness upon the settlement of the estate. Further, the exercise of the power does not rest in the discretion of the assignee. If it be valid, like all valid trusts, it must be exercised by him and if it be compulsory the duty of the assignee would be to dictate terms upon which the creditors might share in the estate. It would virtually give the assignee power to declare future preferences which has always been denied as prejudicial to the rights of creditors. It is clear therefore as is said by Danforth J. in McConnell v. Sherwood 84 N.Y. 523., "that it cannot be said in such a case that the assignor has devoted his property absolutely and unconditionally to the payment of his debts. Compromise, or an attempt at compromise may precede payment and with either is delay. It seems evident therefore that the intent was to delay the payment of the debts and create a trust for the use of the assignor and either of these intents both by the common law and by the statute is a fraud in the face of which the assignment cannot stand."
On the other hand, a power to compound or compromise debts due to the assignor is sustained as a power to be exercised by the assignee with a sound discretion and in the interest of the trust. Such power is construed to apply only to doubtful or dangerous debts and to merely an affirmation of that portion of the general assignment act which permits the court to authorize such compromise.

Coyne v. Weaver 84 N.Y. 386 and cases cited.

---PREFERENCES---

It would be hardly proper in this connection to elaborate upon the doctrine of preferences in general.

The iniquities flowing from the recognition of the doctrine which allows an insolvent debtor, who by his own free act has placed his property beyond the pursuit of his creditors, at the same time to pay in full the claim of one creditor to the utter exclusion of the remainder equally worthy, has at all times merited the strongest condemnation of wisest statesman and most enlightened jurists.

Courts of the highest authority, filled with apparent unrest because compelled by precedent to recognize the legality of preferences, have ever been ready to reproach
the law for their existence.

Judicial disapprobation of the doctrine has been constantly expressed in the strongest terms, as contrary to justice, honesty and morality; the root of all vice in assignments; to be vigilantly watched with the greatest of jealousy and never to be regarded otherwise than in a spirit of toleration.

In Nicholson v. Leavitt 4 Sand. 252, Mr. Justice Duer employed the following emphatic language: "The preference which leaves to those who remain only a faint hope and doubtful chance of a miserable dividend, we condemn as a positive injustice and lament that the law has denied to us the power of redressing the wrong. We know that the custom of giving such preferences has extensively prevailed, and is warranted in a measure by public opinion as well as by the decisions of our courts; but we are not the less persuaded that it is forbidden by public policy and is inconsistent with a sound morality. It is now the undoubted law of this state and however serious may be the conviction of judges, that the allowance of the practice tends to injustice and tempts to fraud, the legislature alone is competent to apply the remedy. Until the existing law shall have been altered by the national or state legislatures, our jurisprudence must remain liable to the reproach that we are the only
nation in the civilized world, in which a merchant, knowing or contemplating his insolvency is allowed to place his whole property beyond the reach of the body of his creditors by devoting its avails principally or exclusively to the satisfaction of the claims of a few."

Yet with this spirit of judicial discontent exhibited by nearly all of the states the right to prefer has continued to be unwillingly tolerated in conformity to precedent, until the legislatures of many states have either totally swept away, or most essentially modified the privilege.

The legislature of this state have well deemed it necessary to impose essential restrictions upon this right. Debts owing to employees for services are preferred by operation of law and a further right of preference is given to the debtor of one third only of the residue of the estate. Limited partnerships and business corporations are expressly prohibited from making assignments containing preferences.

Expressions are to be found in many cases to the effect that an assignment containing preferences will not be tolerated unless it convey the whole of the debtor's property. The weight of recent authority seems to indicate a contrary doctrine.
In re Gordon 49 Hun 370, and cases cited.

In that case Follett J., said, "The validity of an assignment by an insolvent debtor of a part of his property in trust for the benefit of a part of his creditors (no fraud being intended) must be regarded by this court as settled."

The debtor cannot defer the naming of the preferred creditors to a time subsequent to the making of the assignment. Such a reservation of a right to name future preferences will not be tolerated. Neither can he leave the selection of such preferred creditors to the discretion of his assignee. The preferences must be named by the assignor himself and must be clearly and explicitly expressed upon the face of the assignment or must accompany it. To permit the assignor to subsequently name preferences or to delegate such power to the assignee would be to place the creditors in the power of the debtor and to compel them to acquiesce in such terms as he might think proper to prescribe as the only condition upon which they are to be permitted to share in the distribution of his property. This would be as is readily recognized, a fraud upon creditors and would hinder and necessarily delay them in the collection of their debts.

Maack v. Maack 49 Hun 507 and cases cited.
The claims preferred must be legal debts and liabilities. If intentionally excessive or of fictitious claims or mere moral obligations the assignment will be set aside, such provisions, it being held evincing a fraudulent intent on the part of the assignor.


Assignments are frequently drawn containing a provision to the effect that the creditors shall execute a release of their claims to the debtor as a condition precedent to their receiving any benefit under the assignment, or as a condition of preference, or as a condition of sharing in the surplus remaining after the payment of absolutely preferred creditors.

Great conflict of opinion exists in the decisions of the courts of the various states upon the validity of such provisions and their effect upon the assignment of which they form a part. In some states such provisions have been sustained to the extent of wholly excluding non-releasing creditors; in other states they have been sanctioned only so far as they operate to postpone non-releasing creditors to others and in some states, notably in New York, they have been pronounced, under all circumstances to be fraudulent and absolutely void, invalidating the entire instrument.
Such a power given to the creditors has been justly denounced as coercive to their interests; as rigorous and unjust to a tyrannical degree and as equivalent to legalized fraud. The law never contemplated that by making an assignment the debtor could escape liability for the balance remaining due his creditors after an administration of the assigned estate. Such a coercive power would enable the insolvent to extort from his creditors an absolute discharge from all liability upon a part payment of his honest debts. It would enable the debtor to despotically dictate terms upon which his creditors should be suffered to take whatever he might choose to give them. Assignments of this character if permitted would secure to the insolvent the power in effect to enact a bankrupt law for himself. It is well determined that such assignments will not be sustained in this state.

Grover v. Wakeman II Wend. 187.

A discussion has been attempted herein of the various general grounds apparent from the face of the assignment which will justify a judicial interference to the extent of invalidating the entire conveyance.

Many other provisions of course might be inserted which would affect the legality of the instrument but it
is thought that an examination of those most frequently before the courts will be sufficient in this connection.

A discussion of these general grounds alone cannot fail to suggest to the mind the great difficulty of drawing an assignment which will bear the scrutiny of our courts of equity, whose tendency it must be admitted is against sustaining this class of trusts.

The language of the Vice Chancellor in Litchfield v. White 3 Sandf. 554, in this relation is appropriate:

"The whole difficulty consists in the insertion of clauses beyond, or varying, the necessary provisions for transferring the debtor's property and appropriating it to the payment of his debts. We have never heard of a case, nor do we believe there has ever been one decided in this state in which an assignment has been held fraudulent which simply vested the debtor's estate in trustees, and directed them to convert in into money and apply it absolutely and without reserve, to the payment of his debts, whether equally among all the creditors or with preferences. But so long as failing debtors will make assignments containing provisions directly or indirectly for their own benefit to the detriment of their creditors, or vesting in assignees the power of giving preferences or excluding creditors who will not release
the debtor, or exempting the assignee from his proper legal responsibilities to those for whom he is to act, or otherwise deviating from the direct appropriation of the assets to the payment of debts, so far as they be reasonably secured and applied; so long it will be the duty of the courts to pronounce such assignments fraudulent whenever they are presented for adjudication.