1884

*Mar. 19.

*June 23.

GEORGE T. SLATER.....(DEFENDANT) APPELLANT;

AND

WILLIAM BADENACH.....(PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Assignment for benefit of creditors—Power to sell on credit—Fraudulent preference—Rev. St. O. ch. 118, *sec.* 2.

In a deed of assignment for the benefit of creditors, the following clause was inserted:—"And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held,—affirming the judgment of the court below—that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O., ch. 118, sec. 2.

APPEAL from the Court of Appeal for *Ontario* (1), dismissing an appeal from the judgment of the Court of Common Pleas refusing a rule *nisi* to set aside the verdict entered for the plaintiff.

This was an interpleader issue.

The defendant sued *Cornish & Co.*, and on the sixth day of January, 1881, obtained judgment against them for $1,032.21. On the twenty-eighth day of December, 1880, and before the defendant obtained his said judg-

* PRESENT—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, JJ.

(1) 8 Ont. App. R. 402.

ment, *Cornish & Co.* made and executed a deed of assignment of their property to the plaintiff as trustee, for the benefit of their creditors, and plaintiff contended that he entered into possession under the said deed. On the sixth day of January, 1881, the defendant issued execution on his said judgment, and placed the same in the sheriff's hands. The sheriff seized the goods mentioned in the deed of assignment to the plaintiff, and the plaintiff claimed to be entitled to them as against the defendant. Upon the application of the sheriff an interpleader issue in the Common Pleas was directed. The issue was tried before Chief Justice *Wilson* at the *York* spring assizes, 1881, and a verdict entered for the plaintiff. The defendant moved for a rule *nisi* to set aside said verdict, and to enter a verdict for the defendant, which rule was refused. The defendant appealed to the Court of Appeal, which court gave judgment in favor of plaintiff and dismissed the appeal. The defendant then appealed against such last-mentioned judgment to the Supreme Court of *Canada*.

Mr. *Gibbons* for appellant:

The assignment is invalid, because it permits the trustee to sell on credit.

This permission in such deed has been held by the Supreme Court of *New York*, and by decisions in various other states, to invalidate the deed. See *Perry* on Trusts (1) and cases there cited.

If the trustee is allowed to sell "on credit," there is no certainty that the creditor will ever get anything.

The debtor may name his own trustee; transfer all his estate to him; and that trustee may sell the whole out to some one else on credit, and the creditor must stand still and wait the result of the new risk.

It is submitted that he is not called upon to take this risk, and that the result of the American authorities is

(1) 3rd Ed., p. 143.

1884

SLATER v. BADENACH.

founded on the best of reasons, and that the safe rule is, "that the law will not uphold the transaction when "it attempts to confer an authority or discretion upon "the assignee more extensive or liable to greater abuse "than that which the law itself possesses through its "agents and ministers. The assignment to be good, "must devote the debtor's estate unreservedly and un- "conditionally to the payment of his debts." *Murphy* v. *Bell* (1).

In no class of trusts should the powers of trustees be more strictly limited than in the case of trusts for creditors. Experience has taught that it is not wise that trustees should sell on credit, without being personally responsible in case of loss.

It is submitted also that creditors holding securities upon property of the debtor, should only rank for the deficiency over the value of such security. All bankrupt laws, which profess to make an equal distribution of the insolvent's estate, contain provisions for the valuation of such securities; and it is submitted that an assignment which makes no such provision, is not within the meaning of the provision in the statute.

The usual answer to this contention is, that the creditor holding security has his remedy on the covenant for the full amount, and so should rank.

If that rule were to govern, there is no reason why, as is provided in this deed, the joint creditors should not rank on the private estates of the respective partners, until after private creditors are paid in full. They have the covenants of both partners, and would, if they obtained prior execution, have priority as to the separate estates over creditors of such separate estates.

If the equitable doctrine is to be followed, then it is unjust that the secured creditor should rank for his

(1) 8 Howard Practice, Sup. Ct., N. Y., p. 468.

whole debt; and the legislature has always, when it attempted an equitable distribution, so viewed it.

The learned counsel referred also to the following cases: *Nicholson* v. *Leavett* (1); *In re Swoyer's* Appeal (2); *Porter* v. *William* (3); *Mussey* v. *Noyes* (4); *Sutton* v. *Hanford* (5); *Pierce* v. *Brewster* (6); *Barney* v. *Griffin* (7); *Hutchinson* v. *Lord* (8).

Mr. *Foster* for respondent:

The assignment is valid. The objection that the assignment empowers the trustee to sell on credit or for cash, and so enables him to delay creditors, was not taken at the trial or on the application for the rule *nisi*, or as a ground of appeal, but was started, for the first time, in the reply on the argument in appeal. It is not open to the appellant; at least, the respondent is entitled to the benefit of this on the question of costs.

But admitting the appellant is at liberty to avail himself of this ground of objection at this stage, it is not tenable. A power to sell on credit is and has been in unquestioned use in the English forms of assignment for the benefit of creditors. See *Janes* v. *Whitebread* (9); *Forsyth* on Composition (10). Such a sale by an assignee may be an act of good faith and a proper exercise of discretion. *Bump* on Fraudulent Conveyances (11). The power to sell on credit does not necessarily delay creditors; it more frequently facilitates the distribution of the assigned property; it increases the amount of the fund beyond what would be produced by a sale for cash only; it is in some cases essential to the due execution of the trust; it would be implied on the

(1) 2 Selden 510.
(2) 5 Barr. 377.
(3) Seldon App. 142.
(4) 26 Vt. 426.
(5) 11 Mich. 513.
(6) 32 Ill. 268.
(7) 2 Comst. 366.
(8) 1 Wisc. 286.
(9) 11 C. B. 466.
(10) P. 191.
(11) P. 418, 3rd ed.

1884

SLATER v. BADENACH.

ordinary principles which govern the duties of trustees, were it not given; and an authority which the law would give by implication cannot be regarded as illegal and fraudulent when given in terms. *Nicholson* v. *Leavitt* (1).

But the power in question is coupled with a stipulation that in selling the assignee is to have regard to the object for which the assignment was made; so that his discretion is not unfettered as regards the term of credit. Nor is he relieved from the responsibility of taking adequate security; so that an abuse of trust in this particular would expose him to personal liability for loss. Fraud depends not on the fact so much as on the character of delay and the motive which actuated it.

Though *Nicholson* v. *Leavitt* (2), decides against the validity, in the State of *New York*, of an assignment containing a power to sell on credit, yet *Rogers* v. *DeForest* (3) is an adverse decision of great weight. The former case was expressly dissented from by the *Ohio* Court of Appeals--*Conkling* v. *Conrad* (4), and is contrary to the decisions in many other States. See also *Burrill* on Assignments (5); *Perry* on Trusts (6). But the decisions against the validity of the power in question are inapplicable to the present case owing to the difference between Rev. Stat. Ont., ch. 118, and the statutes under which they were pronounced.

The *bonâ fides* of the assignment not being impugned, the power to sell on credit does not take the assignment out of the saving clause in the Act.

Metcalf v. *Keefer* (7); *Gottswalls* v. *Mulholland* (8); *Greenshields* v. *Clarkson* (9); *Meux* v. *Howell* (10).

(1) 6 N. Y. Sup. Court Rep. 252.
(2) 2 Selden 510.
(3) 7 Paige 272.
(4) 6 Ohio 611.
(5) 3 Ed., secs. 453, 466 & 786.
(6) 3rd Ed. p. 154.
(7) 8 Grant 394.
(8) 3 U. C. E. & A. 194; affirming 15 U. C. C. P. 62.
(9) Per Wilson, C.J., Feb. 1883.
(10) P. 4 East 9.

1884

SLATER v. BADENACH.

Then as to the objection that the deed does not provide for a proper distribution of the surplus assets of the partnership among the private creditors of each creditor, the clause is the usual one given in precedents.

Moreover, in directing that the separate creditors of the individual partners shall be satisfied primarily from the separate estate of each partner respectively, and restricting them to such separate estate, unless the joint estate be more than sufficient to pay the joint creditors, then the assignment provides not only a just and reasonable mode of distribution, in accordance with relative legal rights, but also that which the law sanctions and requires—*Baker* v. *Dawbairn* (1), and which prevailed under the Insolvent Act (2). Were the assignment silent as to the mode of distribution, the mode set forth would be taken to have been intended. *Murrill* v. *Neil* (3). That the rights enforceable by the joint creditors by execution are restricted, is not a valid objection in the face of the statutory recognition of assignments for the benefit of creditors. The form adopted is usual. *Burrill* on Assignments (4).

RITCHIE, C. J.:—

This is an appeal from the Court of Appeal for *Ontario*. It is an interpleader issue to test the ownership of a certain stock of goods, formerly the property of the firm of *Cornish & Co.*, retail dealers, carrying on business in the city of *Toronto*. The plaintiff claims under an assignment from *Cornish & Co.*, for the general benefit of creditors, dated the 28th December, 1880. The defendant claims under an execution placed in the sheriff's hands on the 7th January, 1881. The issue turns on the validity of the assignment to the plaintiff.

(1) 19 Grant 113.
(2) 6 Ont. App. R. 169.
(3) 8 How. 414.
(4) P. 773.

1884

SLATER v. BADENACH.

Ritchie, C.J.

The defendant contends that the assignment is invalid, because it permits the trustee to sell on credit.

The clause in question is as follows:

> And it is hereby declared and agreed that the party of the third part, his heirs, executors or administrators, shall, as soon as conveniently may be, collect and get in all outstanding credits and sums of money due to the parties of the first part, or either of them, and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the objects of these presents.

I cannot think that this clause necessarily invalidates this deed. Would any prudent man convey his property for the benefit of his wife or child and require that the property should, on sale, be sold for cash? Is it not for the benefit of the estate and of the creditors that the trustee should have this discretionary power, which he can only exercise in good faith and having due regard to the object of the conveyance. Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price, and that in the execution of the trust they will pay equal and fair attention to the interests of all persons concerned. If they fail in reasonable diligence; if they contract under circumstances of haste or improvidence; if they make a sale to advance the purpose of one party interested at the expense of another, or in contravention of the fair and honest object of the deed, they would be amenable to the law. So far from this power, honestly and fairly acted upon, defeating or delaying creditors, it might be the means of enabling the trustee to realize on the property, when compelling him to sell for cash might not only delay creditors for want of cash purchasers, but defeat creditors by causing the property to be sacrificed for less than its value by selling for cash when a sale on credit would enable its fair value to be obtained.

1884

SLATER v. BADENACH.

Ritchie, C.J.

Assuming the transaction to be *bonâ fide* and the trustee honest, I think the insertion of such a clause can be looked on in no other light than a prudent precaution to enable the property to be realized to the best advantage for the benefit of the creditors.

I desire by no means to be understood as saying that such a clause as this, taken in connection with other circumstances, may not be matter proper to be considered in determining the intention and effect of the deed as bearing on the rights of creditors; but in this case no fraud in fact is attempted to be shown; and, I think, this deed, so far from exhibiting on its face a fraudulent intention of defeating or defrauding creditors, exhibits an honest intention by the debtor of appropriating his property to be distributed for the benefit alike of all his creditors, and as Lord *Ellenborough* remarked of the assignment in *Pickstock* v. *Lyster* (1) so it may be said truthfully of this: "such an assignment is to be referred to an act of duty rather than of fraud, when no fraud is proved. The act arises out of a discharge of the moral duties attached to the character of the debtor, to make the fund (here the property) available for the whole body of creditors;" and as *Bayley*, J., says:

> This conveyance so far from being fraudulent was the most honest act the party could do. He felt he had not sufficient to satisfy all his debts, in the absence of a bankrupt law, he proposes to distribute his property in liquidation of them, and so prevent one execution creditor from sweeping away, (as this execution creditor proposes doing,) the whole to be detriment of his co-creditors."

And in this case it would be most unreasonsonable to set aside this deed, made for the equal benefit of all the creditors, at the instance of this judgment creditor, and allow him to come in and sweep the whole property into his own pocket.

(1) 3 M. & S. 37.

1884

SLATER v. BADENACH.

Ritchie, C.J.

In this case no inference whatever can be drawn that this assignment was intended to defeat or delay creditors and therefore void. The property, it is admitted, is insufficient to pay the creditors in full; there can therefore be no resulting trust for the benefit of the debtor, except a benefit can enure to the debtor and his creditors from realizing as much as possible and as soon as possible from the property. There are no reservations to the debtor, no exclusion of creditors who do not comply with certain conditions, and no release insisted on by the debtor; all the property is devoted to the payment of the creditors, and in the realization of it no other discretion is vested in the trustee than that which every prudent owner desiring to realize the largest amount would exercise. The clause complained of under these circumstances was but to enable the property to be made available in the most judicious manner, for the benefit of the creditors, by not compelling the trustee to sacrifice the property for cash when a much more judicious and profitable disposal might be made by selling on credit, whereby the fair value of the property might be obtained, when by selling for cash there would be a ruinous loss, such as too often results from a forced cash sale, or by delaying creditors by keeping the property on hand till a suitable cash purchaser could be found, when a fair sale on reasonable credit could be readily effected. This amounts to no more in effect than giving a trustee power to sell in such manner as he may think proper, and we have the case of *Boldero et al.* v. *The London and Westminster Loan & Discount Co., limited* (1,) where such a deed was held not to be void under the 13 *Eliz.*, ch. 5.

Debtors in insolvent circumstances executed a deed by which they conveyed all their estate to trustees

(1) 5 Ex. Div. 47.

1884

SLATER v. BADENACH.

Ritchie, C.J.

on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds, after paying expenses, rateably among the creditors, parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and, if the trustees thought proper, but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. The deed provided for the payment of maintenance to the debtors, if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory notes made or endorsed to them respectively by the debtors in respect of the schedule debts:—and *Pollock*, B., said:

The defendants further rely on the general tendency of the deed itself and argue that on the whole the deed sweeps away all that the creditors have to look to, and so defeats the claims of such of them as are not assenting. But we are here dealing, not with the Bankruptcy law but with the statute of *Elizabeth*, and without going back to older cases, as Lord Justice *Giffard* pointed out in *Alton* v. *Harrison* (1), the statute of *Elizabeth* does not touch the question of equal distribution of assets; this assignment, therefore, though it preferred certain creditors and tended to defeat the others might be good.

If such a deed as the one objected to in this case was held good, surely the one we are dealing with cannot be complained of.

To use the language of *Ashhurst*, J., in *Estwick* v. *Caitland* (2), "it appears to be a fair transaction calculated to answer a fair and legal purpose by legal means. I can discover no evidence of fraud or design to defeat or delay creditors in any part of the transaction" but the exact opposite.

All the other points were disposed of on the argument and satisfactorily in the court below.

I am of opinion the appeal should be dismissed with costs.

(1) L. R. 4 Ch. 622.

(2) 5 T. R. 425.

1884

SLATER v. BADENACH.

STRONG, J.:—

At the argument, I had some doubt upon the point raised by this appeal, which subsequent consideration has however entirely removed. *Pickstock* v. *Lyster* (1) having shown that an assignment for the benefit of creditors generally was not avoided by the 13 *Elizabeth*, but was good against a particular execution creditor of the assignor, I think it must necessarily follow that every power or trust conferred upon the trustee for creditors which is for their benefit must also be valid. I cannot agree that a clause which invests such a trustee with a discretionary power, which so far from being necessarily prejudicial to the general body of creditors is actually essential to their protection, renders the assignment invalid merely because it "hinders and delays" them. It is to be presumed that the trustee will do his duty, in other words, that he will execute the trust in the interest of the creditors exclusively, and that he will not sell on credit unless it is for their benefit that he should do so. If he fails in his duty, or proposes to act in contravention of it, his conduct can be controlled by a Court of Equity, who can also supersede him in the office of trustee.

Every argument adduced in support of the contention that such a clause as this necessarily makes an assignment fraudulent strikes at the doctrine of *Pickstock* v. *Lyster*, for so soon as it is once admitted that a particular creditor may lawfully be hindered or delayed by an assignment for the whole body of creditors, it necessarily follows that every reasonable and useful power for the protection of the whole body of creditors must also be valid. It would, therefore, be impossible to hold this deed void for the reasons assigned without impugning the authority of *Pickstock* v. *Lyster*, which

(1) 3 M. & S. 371.

1884

SLATER v. BADENACH.

Strong, J.

I am not prepared to do. Whilst I thus hold as to the effect of such a clause as this in the abstract, I do not of course mean to say that a clause authorizing a sale on credit may not, coupled with other circumstances, lead to an inference of fraud which would invalidate the deed of assignment: all I mean to determine is, that by itself such a provision does not make the deed illegal. I am of opinion that this is the law under 13th *Elizabeth*, and that we need not seek the aid of the Provincial statute to enable us to reach such a decision.

I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J., stated that as no case of fraud or collusion had been made out, he was of opinion that the appeal should be dismissed with costs.

GWYNNE, J.:—

I concur in the opinion that this appeal should be dismissed.

The clause at the end of the second sec. of chap. 118 of the Revised Statutes of *Ontario* appears to me to have the effect of giving statutory recognition to a doctrine already well established by the decisions of the courts, viz.: that a deed of assignment made by a debtor for the purpose of paying and satisfying rateably and proportionably, and without preference or priority, all the creditors of such debtor their just debts, shall not be construed to be a deed made either to defeat or delay the creditors of such debtor, or to give one of such creditors a preference over another. Unless then there be something on the face of the deed which is assailed here as being void against creditors which *ex necessitate rei* has the effect of raising a presumption *juris et de*

1884

SLATER v. BADENACH.

Gwynne, J.

jure that the intention of the debtors in executing the deed was to defeat or delay their creditors in the sense in which such an act is prohibited by the statute—for there is no suggestion that the deed gives to any creditor a preference over another—the question of intent was one of pure fact to be passed upon by the jury who tried the issue, and the proper way of submitting that question to them would be to say, that if they should find the intent of the debtors in executing the deed was for the purpose of paying and satisfying rateably and proportionably and without preference or priority all the creditors of the defendants their just debts. they should find that it was not made with the faudulent intent which is prohibited, and that they should render their verdict for the plaintiff.

The words of the deed as affects the selling on credit in short substance are, that the trustee shall, *as soon as conveniently may be*, collect and get in all sums of money due to the debtors and sell the real and personal property assigned by auction or private contract as a whole or in portions *for cash or on credit* and generally on such terms and in such manner as he shall deem best *or suitable having regard to the object of these presents*; such object, as expressed in another part of the deed, being to pay and divide the proceeds among all the creditors of the grantors rateably and proportionably according to the amount of their respective claims.

This language, as it appears to me, merely expresses an intention that the trustee may at his discretion, sell for cash or on credit, accordingly as he shall deem best calculated in the interest of the creditors, to realize the largest amount for general distribution among them rateably and proportionably, according to the amount of their respective claims.

To hold that this clause in the deed operates so as to compel the court to hold as an incontrovertible conclu-

sion of law that the deed was not made and executed as in its terms it professes to be for the purpose of paying and satisfying rateably and proportionably all the creditors of the debtors their just debts, but was made and executed with intent to defeat and delay such creditors, appears to me to involve a manifest perversion of the plain language of the deed, and such a construction of the clause in question is not warranted by any decision in the English Courts, or in those of the Province of *Ontario*, from which this appeal comes, and there is in my judgment nothing in it which so recommends it as to justify us in making a precedent by its adoption. If it be said that the clause in question, although not operating as such a conclusion of law, at least affords evidence of the deed having been executed with an intent to defeat and delay creditors, and not for the purpose of paying and satisfying the creditors their just debts rateably and proportionably, and for that reason was proper to have been submitted to the jury to be taken into consideration by them, the answer is, that such a point should have been made at the trial, and not for the first time, as it was here, in the Court of Appeal for *Ontario* in the argument of the counsel for the appellant in his reply. And as the jury have rendered a verdict for the plaintiff, they must on this appeal be taken to have found as matter of fact that the deed was not executed with intent to defeat and delay creditors, but was executed for the purpose of paying and satisfying them their just debts rateably and proportionably.

Unless there be something on the face of the deed which in law nullifies and avoids it, the verdict of the jury in maintaining its validity must be upheld. Upon this appeal nothing as it appears to me is open to the appellant to contend but the points contained in his motion in the Common Pleas Division of the High

1884

SLATER v. BADENACH.

Gwynne, J.

Court of Justice for *Ontario* for a rule for a non-suit or judgment to be entered for the defendant, the judgment of which Court refusing such rule, sustained by Court of Appeal for *Ontario*, is what is before us, and I am of opinion that the verdict of the jury should be upheld, and that the rule moved for was properly refused.

I have, however, carefully perused the judgments in the case of *Nicholson* v. *Leavitt*, so much relied upon by the learned counsel for the appellant, as it was decided in the Court of Appeals for the State of *New York*, as reported in 6 N. Y. R. 510, and also the same case as decided in the Superior Court of that State and reported in 4 Sandf. 254. The Court of Appeals when reversing the judgment of the Superior Court seem to me to rest their judgment in a great degree upon a proposition which they lay down, to the effect that a debtor might with equal justice prescribe any period of credit which to him should seem fit, as that which the trustee should give upon sales of property assigned to him, as assume to vest in him a discretion to sell upon credit, if such a mode of selling should seem reasonable and proper and in the best interests of the creditors.

With the utmost respect for the high authority of the Court of Appeals for the State of *New York*, this seems to me to be equivalent to saying, that to express an intent of vesting in the trustee authority and permission to exercise his best judgment by selling on credit, if such mode of disposing of the property should seem to be in the interest of the creditors, whose trustee he is made, and to express an intent of *divesting* such trustee of all such authority and to *prescribe* to him a rigid unalterable course, which, in the discharge of his trust, he must pursue against the dictates of his own judgment, and against the will of the creditors whose trus-

tee he is made, are one and the same thing. There are other parts of the reasoning upon which this judgment is rested which seem to me to lead to the conclusion that delaying a creditor in obtaining satisfaction of his debt by the particular process of execution in a suit at law is equally a defeating and delaying of him within the prohibition of the statute as the vesting the trustee with authority in his discretion to sell upon credit, if such would be a reasonable and proper course to pursue in the interest of the creditors, would be, and that the former is not within the prohibition of the statute is established in our courts beyond all controversy.

Upon the whole, therefore, after a careful perusal of both judgments, I must say that that of the Superior Court is, in my opinion, based upon much sounder reasoning, and is more reconcilable with the English authorities than is that of the Court of Appeals, and I think it to be a sound rule to lay down as governing all cases like the present, that an assignment of property by an insolvent debtor can never be declared void under the statute in question here, if in the opinion of the tribunal for determining matters of fact in each case, the actual intent of the debtor, as matter of fact, in executing the deed was, as the jury must be taken to have found to be the fact in this case, to provide for the payment and satisfaction of the creditors of the debtor rateably and proportionably without preference or priority according to the amount of their respective claims; and, in my opinion, the mere fact that the deed contains a clause authorizing the trustee in his discretion to sell the property assigned, or any part of it, on credit, if such a mode of selling it should seem reasonable and proper and in the interest of the creditors, does not justify as a conclusion of law an adjudication that the grantor's intent in executing the deed was not to provide for such payment, but on the contrary, in violation of

1884

SLATER v. BADENACH.

Gwynne, J.

the provisions of the statute in that behalf, was to defeat and delay his creditors.

Appeal dismissed with costs.

Solicitors for appellant: *Gibbons, McNab & Mulkern.*

Solicitors for respondent: *Foster, Clarke & Bowes.*