Supreme Court of Canada

Whitman *v.* The Union Bank of Halifax (1889) 16 SCR 410

Date: 1889-03-18

The Hon. George Whitman J and Others (Defendants)

Appellants

And

The Union Bank of Halifax (Plaintiffs)

Respondents

1888: Nov. 24; 1889: Mar. 18.

Present—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment—In trust for creditors—Preference—Fraud against creditors—Statute of Elizabeth—Resulting trust.

A deed of assignment of property in trust for the benefit of creditors provided for the distribution of the assets by the assignee as follows: First, to pay certain named creditors in full.—Secondly, if sufficient assets remained after such payment to pay certain other named creditors in full, or, if the assets should not be sufficient, to distribute the same *pro ratâ* among such second preferred creditors.—Thirdly, to divide the remaining assets among all the creditors not preferred in equal proportions according to their respective claims and—Fourthly, to pay the balance remaining after distribution to the assignor. The deed required all creditors executing it to release the assignor from any and every claim of the executing creditor against him, and provided that the assignee should not be liable to account for more money and effects than he should actually receive, nor be responsible for any loss or damage to the trust, except such as should happen through his own wilful neglect. In an action to set aside the deed:

*Held*, affirming the judgment of the court below, Gwynne and Patterson JJ. dissenting, that the deed was one to which it was unreasonable to expect unpreferred creditors to become parties, and therefore, and because it contained a resulting trust in favor of the debtor, it was void under the statute, 13 Eliz. ch. 5.

If objection is made to the form of a bond for security for costs on appeal to the Supreme Court it should be by application in chambers to dismiss and if not so made the objection will be held to be waived.

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Appeal from a decision of the Supreme Court of Nova Scotia[[1]](#footnote-2) reversing the judgment for the defendants on the trial.

The action in this case was brought to set aside a deed assigning to the defendant Whitman, in trust for the benefit of their creditors, all the real and personal property of his co-defendants. The deed preferred two sets of creditors who were first to be paid in full; then the remaining assets were to be distributed in equal proportions among the unpreferred creditors and the surplus, if any, was to be returned to the assignors. The deed provided that the execution by each creditor should release and discharge the debtors from all and every claim of such creditor against them, and that the assignee should not be required to account for more money or assets than he should receive, nor be liable for any loss or damage to the trust estate unless the same should be caused by his own wilful neglect.

The trial judge, who tried the case without a jury, gave judgment in favor of the defendants, holding that the deed was not fraudulent under the statute of Elizabeth. The court *in banc* reversed this judgment and ordered the deed to be set aside. The defendants then appealed to the Supreme Court of Canada.

*Borden* for the respondents took as a preliminary objection to the hearing of the appeal, that the bond given as security for costs is not in the statutory form and does not provide for the prosecution of the appeal. The court considered the bond insufficient, but held that an application to dismiss should have been made in chambers, and not having been so made, it must be taken to be waived.

*Harrington* Q.C. for the appellants cited *The Toronto*

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*Bank* v. *Eccles[[2]](#footnote-3)*; *Ex parte Games[[3]](#footnote-4)*; *Alton* v. *Harrison[[4]](#footnote-5)*; *Boldero* y. *London, &c., Loan Co.[[5]](#footnote-6)*.

*Borden* and *W. B. Ritchie* for the respondents referred to *Gallagher* v. *Glass[[6]](#footnote-7)*; *Slater* v. *Badenach[[7]](#footnote-8)*; *Slater* v. *Spencer[[8]](#footnote-9)*; *Cornwall* v. *Gault[[9]](#footnote-10)*; *Larpent* v. *Bibby[[10]](#footnote-11)*; *D'Ivernois* v. *Leavitt[[11]](#footnote-12)*.

Sir W. J. RITCHIE C.J. —I am of opinion the appeal should be dismissed with costs.

STRONG J.—I am of opinion that this appeal must be dismissed. It appears to me that the deed of assignment was fraudulent and void under the statute 13 Elizabeth ch. 5, inasmuch as it imposed unreasonable terms on creditors, requiring them either to release their claims if they assented to the deed, and in default of their doing so, not only excluding them from the benefit of the deed, but subjecting any residue of the estate to a resulting trust in favor of the debtor. The concurrence of these provisions in the same deed shows that it was intended to hinder and defeat creditors. I therefore agree in the main with the reasons given in the judgment of the Chief Justice delivered in the court below[[12]](#footnote-13).

TASCHEREAU J.—I would dismiss this appeal upon the ground taken by McDonald C.J. in the court below, that the assignors by their deed retained a portion of the assets of the estate, by making such a provision as diverted assets for their own use that ought to go to all the creditors. I think that this assignment is fraudulent and void under the 13th Elizabeth ch. 5, *Spencer* v. *Slater* (7).

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GWYNNE J.—The deed assailed in this case is not, in my opinion, void within the statute of Elizabeth as against creditors by reason of any of the objections which have been taken to it nor, so far as I can see, for any reason. It is not, in my opinion, open to the construction that it enables the trustees, who have accepted the burthen of executing the trusts thereof, to withhold at their pleasure any part of the estate conveyed to them from the creditors, or for the benefit of the debtors; their attempt to do anything of the kind would be a plain breach of trust, for which they would be accountable to the creditors. Neither is it at all correct to say that the deed provides, as did the deed in *Spencer* v. *Slater[[13]](#footnote-14)*, that a dividend which would be payable to creditors signing shall, in the cases of any not signing, be paid to the debtors; on the contrary, in the event of a creditor refusing to sign his refusal enures to the benefit of those who do sign, and not to the benefit of the debtors. In short between the deed in the present case and that in *Spencer* v. *Slater* (1) there is the greatest possible difference. That the deed makes provision for certain preferred creditors is no valid objection within the statute of Elizabeth. Neither is the clause which requires all creditors receiving benefit under the trusts of the deed to release the debtors. What is called the resulting trust in favor of the debtors, and which is complained of as unjust and as making the deed void within the statute, is the ordinary trust contained in every trust deed in favor of the debtors in respect of any residue, if any there should be, after payment of all creditors in full; and to such a trust provision no reasonable objection can be taken; *Boldero* v. *London & Manchester Loan Co[[14]](#footnote-15)*.

True it is, that if certain creditors should not sign

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it might happen, but not necessarily, that there might be a surplus, after all who do sign should be paid in full, which would become payable to the debtors, which would not have become payable to them if all should sign; but that would be a result brought about by the default of the creditors themselves in not signing and not by any act of the debtors whose intention, as expressed in the deed, is that all shall sign and that all shall be paid in full before there shall or can be any residue to be paid to the debtors. If there be nothing in the deed which imposes, or affects to impose, an unjust and unreasonable burthen or condition upon those who do sign, a creditor who is unwilling to sign has no basis upon which to found a complaint that the deed is unjust to him. In such a case it is the fact of his not signing which does him prejudice and he cannot attribute such prejudice to any provision in the deed. Now, this deed imposes no condition upon any creditor who signs except that he shall release the debtors, and as this is not a valid objection within the statute, nor is the clause giving preference to some creditors open to objection, I can see nothing in the deed which, viewed in the light of the numerous decisions upon this subject, can be said to avoid the deed within the statute of Elizabeth.

I am of opinion, therefore, that the appeal should be allowed and the judgment of the court of first instance restored with costs.

PATTERSON J.—A deed of assigment for the benefit of creditors, made by Arthur W. Corbitt and George E. Corbitt, merchants, of Annapolis, in N.S., to the defendant Whitman, has been held to be fraudulent and void under the statute 13 Elizabeth, ch. 5, by the judgment of the Supreme Court of Nova Scotia from which this appeal is brought.

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Let us see at the outset what are the precise provisions of the deed.

It bears date the 5th of December, 1884, and purports to be made between Arthur W. Corbitt and George E. Corbitt, formerly doing business under the name, style and firm of A. W. Corbitt & Son, of the first part; the Hon. George Whitman, of the second part, "trustee appointed for the purposes hereinafter mentioned; and the several persons, creditors, indorsers, guarantors, or sureties of or for the said parties of the first part who have or shall hereafter execute or accede to these presents within three months from the date hereof, of the third part."

The deed then recites that the parties of the first part are at present unable to pay immediate demands upon them, and deem it best and resonable to secure, pay' and indemnify the several persons parties to these presents in manner hereinafter mentioned, and goes on to convey to the party of the second part, his heirs and assigns, certain specified lands, some of which are described as being subject to mortgages,

But upon trust that the said party of the second part shall, if he deem it fit and expedient, in a reasonable time, sell and dispose of, at public auction or private sale, for cash or on credit, after due advertisement of the same, the above described lots, pieces or parcels of land and premises for the highest price to be obtained therefor, and to convey the same by deed or deeds to the said purchaser or purchasers, and upon receipt of the purchase money arising from the said sale or sales of the said second lot, to apply the same to the payment of the said mortgages above described, which said mortgages cover the said second lot; and then first to apply the balance of the purchase money arising from the sale of the said real estate, after deducting the expenses of this trust, in payment of the several amounts due and to grow due, the following persons in full as creditors, indorsers, guarantors, sureties, or otherwise of the said parties of the first part, that is to say: [naming six creditors]; and secondly, after paying the said creditors hereinbefore named and the expenses of this trust in full, to apply the balance of the said purchase money in payment of the amounts due and to grow due the following persons in full on account, or as creditors, indorsers,

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guarantors, sureties or otherwise of the said parties of the first part, that is to say: [naming 24 creditors]; thirdly, after paying the expenses" of this trust and the creditors hereinbefore named as first and second preferential creditors of the said parties of the first part, and in case there shall be any surplus of the said property or funds after fulfilling the said trusts, then that said party of the second part do and shall divide, distribute and pay over to the other creditors of the said parties of the first part, who shall become parties hereto in manner hereinbefore described ratably and in proportion to the amounts due to each of them respectively, without any preference or priority, and if anything shall remain thereafter the said party of the second part shall convey, deliver and pass over the same to the parties of the first part, their executors, administrators and assigns.

Then follows a general assignment of stock-in-trade and all personal effects to the party of the second part upon trust to sell with all reasonable speed and to get in debts or other outstanding interest; and forthwith, after deducting the expenses of executing the trust, the cost of preparing and executing the deed of assignment, and his own charges and commission as assignee, to deal with the fund in the same manner as directed with regard to the proceeds of the real estate. This trust is expressed at length, as in the former case, the only difference being the omission of one name from the list of second preferred ereditors. We have then the ordinary power of attorney; power to the trustee to adjust the amounts due to creditors, including power to compound and to arbitrate; proviso that no person shall be entitled to be a creditor under that deed, unless notice shall have been given by him of his debt or demand to the trustee before a final dividend shall have been made of the trust property; a covenant by the trustee with the parties of the first and third parts to execute the trusts to the best of his judgment and discretion,

Provided always and it is hereby agreed, that the said party of the second part, his executors or administrators shall not be liable or accountable for more money or effects than he shall receive, nor for any loss or damage which he may receive, nor for any loss or damage

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which may happen in reference to the said trusts, unless it arise by or through his own wilful neglect.

I may remark, in passing, that this expression "any loss or damage which he may receive," which is not a happy one, looks as if it got there by an error in engrossing the document, perhaps, by erroneously writing in ten words from the word "damage" where it first occurs to and including the second word "damage."—I make this observation assuming the document to be correctly printed in the book before me. I am not sure that the words which seem interpolated are not here owing to a misprint, because I find the passage quoted without them in the judgment, as printed, of Mr. Justice McDonald, when he is made to say:—

The deed contained a release of all claims against the debtors, together with the following provisions: "And it is hereby agreed that the said party of the second part, his executors or administrators shall not be liable or accountable for more money or effects than he shall receive, nor for any loss or damages which may happen in reference to the said trusts, unless it shall arise by or through his own wilful neglect."

yet that learned judge in the same judgment treats the clause as if the words were there, and the same reading of it has been made the ground of some argument before us. I apprehend that it makes no difference whatever whether the words are in the original deed or not, because, if they are, they are manifestly governed by the qualification "unless it shall arise by or through his own wilful neglect."

The learned judge seems to have fallen into a misapprehension on this point, as I shall further notice by and by.

The remainder of the deed is the release clause which I quote in full:—

And the said respective creditors, parties hereto, each and every of them for himself and herself severally and respectively, and for their

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several and respective executors and administrators, do hereby accept and take the estate and effects hereinbefore assigned in full payment, satisfaction and discharge of all their respective debts, demands, and of all loss or damage to be sustained by reason of any liability aforesaid, and do and each of them doth absolutely remise, release, discharge and quit-claim the said parties of the first part, their executors and administrators, of and from all demands which they or any or either of them now have against them.

The issue was tried before Mr. Justice Weatherbee, who found that there was no fraud on the part of the defendants and gave judgment for the defendants.

That judgment was reversed by the court in banc. The judgment, which I understand to express the opinions of all the learned judges who heard the motion, except the Chief Justice, was delivered by Mr. Justice McDonald. The Chief Justice concurred in the conclusion, but limited himself to one of the reasons for which the other members of the court held the deed to be void.

The deed had attached to it certain statements purporting to show the debts and the assets of the assignors. I think the only allusion to it, contained in the deed itself, is in the following passage from the clause relating to the power of the trustee to adjust claims.

And it is further agreed that the naming of any debt or debts due or owing in any schedule hereto annexed shall not prevent the parties of the first and second part from calling into question or controverting the amount of the same, and if the amount of any creditor shall have been stated as being greater or smaller than it really is, such creditor shall be entitled to the benefits of these presents upon and only upon and for the amount which may be found to be justly due him.

The position of the plaintiffs with reference to the estate is thus correctly stated by Mr. Justice McDonald:

It appears by the statement attached to the deed of assignment that the plaintiff bank at that time held notes and drafts, indorsed by the debtors, to the amount of $28,500, for which no provision was made except as just mentioned, so that the plaintiff was not only excluded from the list of first and second preferential creditors, but was expected to look for payment of the large sum just named to what appears to be

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a most uncertain source, and even that upon his becoming a party to a document which released the debtors from all further claims, indemnified the assignee, except as we have seen, and provided that if any balance remained after paying those who became parties to the deed as prescribed the same should be paid over by the trustee to the debtor himself, excluding altogether creditors who did not sign the deed.

The decision was that the deed was one which it was unreasonable to expect the plaintiffs to become parties to, and was bad under the statute, by reason of three things: the release clause, the clause that was taken to indemnify the assignee against loss and damages not occasioned by his wilful neglect, and the trust to hand over to the assignors any balance that might remain after paying in full all the creditors who became parties to the deed.

It was upon the last ground alone that the learned Chief Justice rested his concurrence.

No notice is taken in the judgments of reasons outside of the deed itself on which also it was attacked as fraudulent. I do not think it necessary to say more respecting those extraneous matters than that the attention which I gave to the evidence during the argument, when Mr. Ritchie left nothing unsaid that could aid his contention, and a second careful examination of it, have failed to create any doubt in my mind of the correctness of Mr. Justice Weatherbee's finding.

I am satisfied that the deed must be dealt with, as it was by the court in banc, upon the effect of what we find within its four corners.

The three grounds acted upon are reduced to two by the circumstance that the learned judge overlooked for the moment the qualification of the indemnity clause, which clause, properly construed, is merely the ordinary clause found in every trust deed, and which, if it had not been expressed in this deed, would have been imported into it by the statute R.S.N.S. 4th series, ch. 108, sect. 24.

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The other objections require a glance at the operation of the statute of Elizabeth as it is to be gathered from decisions.

We have always to remember that it does not, like a bankrupt act, contemplate an equal distribution of the assets of a debtor among his creditors. This may be almost a truism. Every one will admit it in terms, without hesitation; but it is not unusual to find arguments on the validity of deeds of this class influenced, consciously or unconsciously, by the notion that to prefer one creditor to another is an offence against the statute, if not a fraud at common law.

"All deeds of this sort," as observed by Maule J. during the argument in *Janes* v. *Whitbread[[15]](#footnote-16)*, "are within the letter of the 13th Elizabeth, ch. 5, sec. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed, shall be void,—that is, all deeds made to or for any of the intents or purposes mentioned in section 1, viz., 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits and debts, &c.'" He referred to *Pickstock* v. *Lyster[[16]](#footnote-17)*, where it was decided that if a man assigns all his property to a trustee simply with the purpose of having it fairly distributed amongst all his creditors, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the spirit of the act, and therefore is not void,—because it does not deprive any of the creditors of his fair share of the debtor's property if he chooses to become a party to the deed. Then he refers to *Owen* v. *Body[[17]](#footnote-18)*, in which it was held that creditors could not reasonably be asked to be parties to deeds containing the terms as to carrying on the business which were then in question, and distinguishes

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from it the deed in *Janes* v. *Whitbread*[[18]](#footnote-19) which provided for carrying on the business with the object of winding it up, not as in *Owen* v. *Body*[[19]](#footnote-20) for the purpose of making money to pay the creditors who became parties to the deed.

We have a key to the spirit of the statute in the full reading of the language "feigned, covinous, and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, &c."

This is noticed in the very instructive judgment of Sir J. B. Robinson in a case in Upper Canada, *Bank of Toronto* v. *Eccles[[20]](#footnote-21)*. That judgment and the judgment of Mr. Justice Burns in the same case, as also the judgment of the present Chief Justice of Ontario, then Mr. Justice Hagarty, when the case was before the Court of Common Pleas[[21]](#footnote-22) will be found to contain an exhaustive discussion of the decisions, English and American, down to the year 1862. The deed in that case, like the deed before us, assigned all the estate of the debtor to trustees for the satisfaction of his debts, preferred some creditors to others, and contained a release by the creditors who should execute, providing that those who did not sign should not receive dividends, and excluding all creditors who did not come in within thirty days. The validity of the assignment was sustained by the Court of Error and Appeal, affirming the judgment of the Common Pleas. Two of the learned judges dissented, considering that it was unreasonable to demand a release when the preferences created by that assignment were given. For my own part, I entirely agree with the reasoning and the conclusions of the majority of the court, and with the greatest respect for the opinions of the late Chief Justice of Ontario, then Vice-Chancellor Spragge,

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by whom the dissenting judgment was delivered, I am obliged to regard that judgment as an example of the occasional tendency, of which I have spoken, to import into the statute of Elizabeth the idea of equal distribution of assets, which is something outside of its contemplation, although it obtains in the administration of estates in equity, and is a principle of bankruptcy law.

*Holbird* v. *Anderson*[[22]](#footnote-23) settled the question of the right of a debtor to prefer one creditor to another without offending against the statute of Elizabeth.

*Pickstock* v. *Lyster*[[23]](#footnote-24) was upon an assignment of all the goods of a debtor for the general benefit of his creditors; which was held to be valid on the principle of *Holbird* v. *Anderson.* There was no release clause in the assignment.

In *The King* v. *Watson*[[24]](#footnote-25) the insolvent assigned all his estate to trustees for creditors, stipulating expressly for a release. Counsel pressed on the court that the deed was void under 13th Elizabeth, and the more strongly "as there was a condition imposed on all who should entitle themselves by signing it, that they should release the debtor from the rest of their demand in consideration of such dividend as they should receive." *Per curiam*—"There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all creditors. \* \* \* This is a very common arrangement which it would be very injurious to disturb where there has been no commission of bankruptcy."

In *Goss* v. *Neale*[[25]](#footnote-26) certain chattels were assigned for the benefit of certain creditors of the assignor for four years; at the expiration of two years, or sooner if the assignor should so direct, the trustees were to

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sell and pay the creditors named in the schedule, and there was a covenant that the creditors should not molest the assignor for the space of two years; the deed was held valid against an execution creditor, first by Abbott C.J. and afterwards by the full court.

*Wells* v. *Greenhill*[[26]](#footnote-27) may be referred to as an early case upon a deed of all a debtor's property conveyed for distribution among his creditors, but not equal distribution, some who were specified by name to be paid in full; then all creditors for less than £10 to be paid in full; then all other creditors named in the schedule to be paid 5 s. in the £; then upon the winding-up, respecting which directions were given, the scheduled creditors to be paid the residue of their claims, and the surplus, if any, to be paid over to the debtor. There was a covenant by the creditors to release the debtor at any time after eighteen months if the deed did not become void, under a proviso by which it was to become void if any creditor for over a specified amount should not execute the deed within three months. All the creditors, including the plaintiff who was now attacking the deed under the proviso, executed it within three months with the exception of one of those who were to be paid in full. The decision was that his failure to sign did not avoid the deed. We have nothing to do with the goodness or badness of the reason given, which was that he could not be intended to release the debt which was to be paid to him in full. Still it is not very convincing, because the release, while it discharged the debtor personally, left the creditors' remedy against the assigned estate untouched. See *Ellis* v. *McHenry[[27]](#footnote-28)*.

*Tatlock* v. *Smith*[[28]](#footnote-29) incidentally recognizes the propriety of a debtor, who surrenders all his property for

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distribution among his creditors, insisting on being released from his debts. There was not in that case any question of preferring one creditor to another. It had been agreed that in order to carry out a scheme of equal distribution the debtor should execute a conveyance to trustees. When the conveyance was tendered for execution he refused to execute it, because it did not contain such a release as he thought he should receive. It was held at the trial at Guildhall of an action by one of the creditors upon a bill of exchange accepted by the debtor, as a defence to which the composition agreement was pleaded, that the defendant's objection to execute the conveyance was reasonable, and *in banc* Chief Justice Tindal said:—

It is unreasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to, hostile proceedings at the suit of their creditors. Their situation itself seems to preclude the possibility of any such intendment.

The plaintiff was non-suited on the ground that forbearance to sue was involved in the composition agreement, and that nothing had occurred to remit the creditors to their rights.

In *Small* v. *Marwood*[[29]](#footnote-30) which was decided in the same year (1829) as *Tatlock* v. *Smith*, we have another express, though incidental, recognition of the right to insist, as a condition of admission to share in the estate, on the execution of a release within a limited time. This will sufficiently appear from a passage from the considered judgment of the court pronounced by Bayley J. Then came the following proviso:—

Provided that the said parties of the second and third parts shall on or before the first day of February next make such proof, if required, and execute these presents. It was contended that the words "and execute these presents" constitute a condition, and that the deed having been executed by Barr and Hudson only, and not by the other two

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trustees, was void for non-performance of that condition; and, being void altogether, that Barr's debt was not extinguished, and therefore was a good petitioning creditor's debt to support the commission. We are of opinion that the effect of those words in the proviso is not to avoid the deed, if the parties therein named shall not execute it, but merely to take away from such parties the right to recover a dividend.

*Owen* v. *Body[[30]](#footnote-31)*, in which there was no question of preferences, is a more indirect recognition of the propriety of the release clause by the circumstance that the opinion that it was unreasonable to insist on the creditors becoming parties to that deed was not placed to any extent upon the release which the deed contained, nor was any objection, founded on the release, made in *Janes* v. *Whitbread*[[31]](#footnote-32) or *Coates* v. *Williams*[[32]](#footnote-33) where the deeds were upheld against objections for which the decision in *Owen* v. *Body* (1) was relied on. We do not find the precise terms of the release mentioned in the reports of either of those two cases. In *Coates* v. *Williams* (3) the deed is said to be "in the usual form," to be precisely in the same terms as that in *Janes* v. *Whitbread*, (2) and to be "a stereotype, and to be had at any law stationer's in London." The statement of the case does not contain the word "release" but it is said that the deed contained a proviso that creditors not signing within three months should be excluded from the benefit of the assignment, and the trust was to pay ratably such creditors as should execute the deed. There can be no doubt that the ordinary release was contained in the deeds. The validity of the clause excluding creditors who do not execute within a certain time is recognized in *re Baber[[33]](#footnote-34)*, where Malins V.C. allowed a creditor to come in after the time under special circumstances.

In the much litigated case of *Cox* v. *Hickman*[[34]](#footnote-35)

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in which the House of Lords decided that creditors by joining in a deed such as that in *Owen* v. *Body*[[35]](#footnote-36) did not become partners in the business that was carried on by the trustees under the deed, there was no question of the validity of the deed. The object of the action was to make creditors who had joined in the deed liable as partners for debts incurred in carrying on the business. We see, however, from the report in 18 C. B. 617 that the deed contained a special release clause, and that the creditors were to share rateably and without preferences.

*Alton* v. *Harrison*[[36]](#footnote-37) was decided in 1869. In that case Lord Justice Giffard, affirming a judgment of Vice-Chancellor Stuart, upheld a mortage made in expectation of the issue of a writ of sequestration, which vested substantially all the property of the debtor in trustees for five of his creditors, and contained a proviso for the debtor remaining in possession for six months, if the sequestration was not issued. It was pointed out that the statute of Elizabeth differed from the bankrupt laws by not having for its object the equal distribution of assets, and that the question was whether the deed was *bonâ fide* and not a mere cloak for retaining a benefit to the grantor. Ten years later similar language was used by Pollock B. delivering the judgment of the divisional court in *Boldero* v. *London & Westminster Discount Co.[[37]](#footnote-38)*.

We are here dealing, he said, 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*, (2) 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.

The deed which was upheld in that case conveyed the estate to trustees to sell in such manner as.

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they should think proper, and to divide the residue of the proceeds after paying expenses ratably among the creditors parties to the deed, including, if the trustees thought fit but not otherwise, creditors who refused or neglected to execute, and if the trustees thought fit but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. There does not appear to have been a release clause in the ordinary form. The objections to the deed were chiefly on the ground of provisions for carrying on the trade, *Spencer* v. *Slater*[[38]](#footnote-39) being relied on. That case was distinguished by reason of its special circumstances which are described by Pollock B., as being, in the first place, that the deed contained not merely the ordinary resulting trust as to the surplus which would be found in every deed, but a resulting trust under which, at the expiration of twelve months, the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then if the creditors did not within seven days assent or execute, the money was to be paid to the debtor. This, the learned baron said, was much beyond the ordinary resulting trust. Then again the primary trust was to carry on the business, while in Boldero's case the principal object was to sell the business, and it was subsidiary to that object that power was given to carry it on till the sale.

In that case too, he continued, there was a very special and general indemnity, \* \* \* and from all the circumstances of that case taken together the court came to the conclusion that they ought to draw the inference that the assignment was intended to defeat creditors, and was therefore void under the statute of Elizabeth.

But little further reference is necessary to *Spencer* v. *Slater*, which was a good deal relied on in the court below, and that little may be made by quoting from

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the judgment of Mellor J., who puts the turning point of the judgment in these words:

By this scheme the trustees may carry on the business, if they think fit, and the creditors, in order to get their dividends, must enter into obligations not required of them in the ordinary course of law, for the executing or assenting creditors are to indemnify the trustees against personal risk and loss. If any creditor refuses to come in there is a resulting trust in favor of the debtor in respect of the dividend that would otherwise have been due to such creditor.

The effect of the deed is even more strongly put by Manisty J.

The resulting trust in the deed before us would be implied by law, if not expressed in the deed. Nothing results to the grantors until all the creditors entitled to share under the deed are paid in full. If the deed is valid as against the objection founded on the release clause, and the creditors to share under it are therefore only those who execute, it follows that, when they are paid in full and the trust is thus fully executed, the surplus must result to the grantors. The remedy which the non-assenting creditors may have as between themselves and the debtor is an entirely separate consideration.

It does not seem to have been necessary in any English case to pronounce upon the validity, in view of the statute of Elizabeth, of a deed in which the two things co-existed—the preference of some creditors, and the execution of a release from all the creditors who were to share under the deed. To that extent it may be said that there is no English case which, like the Upper Canada case of *Bank of Toronto* v. *Eccles[[39]](#footnote-40)*, is on all fours with that before us. But the principles established by the decisions really cover the whole ground.

A debtor whose estate is sufficient to pay only one half of his debts is not hindered by the statute from conveying his whole estate to pay off half his creditors,

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leaving the other half unprovided for. A deed made for the purpose of such payment is safe against any attack by a creditor who is left out, notwithstanding the intention and design to defeat him. That is one well established proposition.

Then it must be held as the result of the numerous cases in which assignments containing the release clause and excluding all creditors who did not execute, or who did not execute within the time prescribed by the debtor, were upheld, and in which the consistent absence of objection to the clause is as significant as a decision against such an objection, that an assignment is not to be pronounced "feigned, covinous and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors of their just and lawful actions, suits and debts," merely because the release is exacted.

These two propositions are in effect but one proposition put in two forms. It is the same thing in principle whether the whole assets are made over in full payment of some of the creditors, or whether they are made over to those creditors who will agree to take them in full satisfaction of their demands.

The proportion which the assets bear to the debts, when the debts exceed the assets, is not, for the present purpose, a material consideration. The rule must apply to an estate that will pay only ten per cent. as well as to one that will pay ninety per cent. of the debts.

Nor can the position be affected by the fact that the attenuated condition of the estate has been produced by applying the assets in the payment of some creditors in full, when such payments are not struck at by the statute. The corollary follows that what may lawfully be done by satisfying some creditors in full to-day, and

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by to-morrow assigning what remains for distribution among such of the other creditors as will accept it in full of their demands, may also be lawfully done by the operation of one instrument such as that with which we are dealing.

The impulse which may be felt to characterise such arrangements as a fraud upon creditors will mislead, so long as the debtor is under no duty to treat all his creditors alike.

For the purpose of bankrutcy laws, where such laws exist, and of laws founded on the same principle, as in Quebec and Ontario, such a duty may be recognised, but, as we have seen, it is not a duty within purview of the statute of Elizabeth.

In every case where it was held that an assignment contained something which, by making it unreasonable to expect a creditor to sign evidenced a design to delay, hinder or defraud, that something imposed a burden on the creditors, as *e.g.*, the danger apprehended in *Owen* v. *Body*[[40]](#footnote-41) of incurring the liability of a partner, or the covenant in *Spencer* v. *Slater*[[41]](#footnote-42) to indemnify the trustees against personal loss; or it has appeared from the deed that the surrender was not for the sole purpose of making the assets available for the payment of the debts. Such was the provision for carrying on the business in *Owen* v. *Body*, (1) and such was the trust in *Spencer* v. *Slater* (2) to pay over to the debtor, in place of distributing among the assenting creditors, the dividends of the creditors who refused to come in. This feature, by the bye, is not peculiar to the deed in *Spencer* v. *Slater* (2), but is found in some others that survived the contest over them. (See *Alton* v. *Harrison[[42]](#footnote-43)*.) I believe there is no case, not even *Spencer* v. *Slater* (2) which certainly did not err on the side of undue leniency towards the assignment, but went so far the

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other way as to create doubts of soundness of the decision[[43]](#footnote-44), where the presence of the release clause has been made a reason for avoiding the deed at the instance of a non-assenting creditor.

I may refer, more as a matter of curiosity than for any particulary direct application, to a late case, *in re Stephenson*[[44]](#footnote-45) where it was contended, with more ingenuity than success, that the release contained in a deed of assignment, which had been treated as an act of bankruptcy, remained valid while the conveyance became void, and, by extinguishing the debt of a creditor who had executed the deed, disabled him from proving under the bankruptcy.

In addition to the grounds on which the judgment in the court below proceeded, and in which, for the reasons I have given, I think the court fell into error, some other objections to the deed were urged before us. One of these, and the only one which was founded on anything that appeared in the deed itself, was that the trustee was given power to keep the real estate unsold as long as he pleased. I think the contention went so far as to urge that it was left to his discretion whether it should ever be sold and distributed. It is proved that no such effect was in fact intended, that the discretion intended to be vested in him was merely as to the mode of sale. He did not understand that he had power to defer the sale of the land, and acting on what he supposed to be his duty as trustee, he took steps with reasonable promptitude to make sales, and he sold several parcels, some absolutely, and one subject to the event of this litigation. It must, nevertheless, be held that if, by the legal operation of the deed, the trustee had power to keep from the creditors what the deed seemed to give to them, a creditor could not reasonably be expected to become party to it.

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The language is "upon trust that the party of the second part shall, if he deem it fit and expedient, in a reasonable time, sell and dispose of, at public auction or private sale, for cash or on credit, after due advertisement of the same, the above described lots, &c."

The expression "if he deem it fit and expedient" is not well chosen, but it would never be interpreted in the sense on which the objection is founded. The creditors are to have the benefit of the property vested in the trustee. By the concluding clause of the deed, which I have already quoted, they accept and take the estate and effects assigned in full payment, &c. They are the beneficial owners to the extent of their claims, and can enforce the execution of the trusts in their favor. No creditor who executed the deed could be met by the objection that defeated the plaintiff's action in *Johns* v. *James*[[45]](#footnote-46) where the trustee was held not to be a trustee for the plaintiff who, though he was to be paid his debt out of money which the trustee was to raise, was not a party to the assignment.

I see no difficulty in the way of understanding the language as giving the trustee a discretion to decide what should be a reasonable time to sell as well as the best mode of selling, just as if the words were "as he shall deem it fit and expedient" in place of "if he deem it fit and expedient."

If this does violence to the language it is violence of a gentle character, and may properly be resorted to in order to carry out the intention manifest from the whole instrument and *ut res magis valeat quam pereat.*

In my opinion the appeal should be allowed with costs and the action dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: T. D. Ruggles & Sons.

Solicitors for respondents: Ritchie & Ritchie.

1. 20 N. S. Rep. 194. [↑](#footnote-ref-2)
2. 2 E. & A. (Ont.) 53. [↑](#footnote-ref-3)
3. 12 Ch. D. 314. [↑](#footnote-ref-4)
4. 4 Ch. App. 622. [↑](#footnote-ref-5)
5. 5 Ex. D. 47. [↑](#footnote-ref-6)
6. 32 U. C. C. P. 641. [↑](#footnote-ref-7)
7. 10 Can. S. C. R. 296. [↑](#footnote-ref-8)
8. 4 Q. B. D. 13. [↑](#footnote-ref-9)
9. 23 U. C. Q. B. 46. [↑](#footnote-ref-10)
10. 5 H. L. Cas. 481. [↑](#footnote-ref-11)
11. 23 Barb. at p. 80. [↑](#footnote-ref-12)
12. 20 N. S. Rep. p. 194. [↑](#footnote-ref-13)
13. 4 Q. B. D. 13. [↑](#footnote-ref-14)
14. 5 Ex. D. 47. [↑](#footnote-ref-15)
15. 11 C. B. 406, 416. [↑](#footnote-ref-16)
16. 3 M. & S. 371. [↑](#footnote-ref-17)
17. 5 A. & E. 28. [↑](#footnote-ref-18)
18. 11 C. B. 406. [↑](#footnote-ref-19)
19. 5 A. & E. 28. [↑](#footnote-ref-20)
20. 2 E. & A. Ont. Rep. 53. [↑](#footnote-ref-21)
21. 10 U. C. C. P. 282. [↑](#footnote-ref-22)
22. 5 T. R. 235. [↑](#footnote-ref-23)
23. 3 M. & S. 371. [↑](#footnote-ref-24)
24. 3 Price 6. [↑](#footnote-ref-25)
25. 5 Moore 19. [↑](#footnote-ref-26)
26. 5 B. & Ald. 869. [↑](#footnote-ref-27)
27. L. R. 6 C. P. 228, 239. [↑](#footnote-ref-28)
28. 6 Bing. 339. [↑](#footnote-ref-29)
29. 9 B. & C. 300. [↑](#footnote-ref-30)
30. 5 A. & E. 28. [↑](#footnote-ref-31)
31. 11 C. B. 406. [↑](#footnote-ref-32)
32. 7 Ex. 205. [↑](#footnote-ref-33)
33. 18 W. R. 1131; 40 L. J. Chy. 144. [↑](#footnote-ref-34)
34. 8 H. L. Cas. 268. [↑](#footnote-ref-35)
35. 5 A. & E. 28. [↑](#footnote-ref-36)
36. 4 Ch. App. 622. [↑](#footnote-ref-37)
37. 5 Ex. D. 47. [↑](#footnote-ref-38)
38. 4 Q. B. D. 13. [↑](#footnote-ref-39)
39. 2 E. & A. Ont. 53. [↑](#footnote-ref-40)
40. 5 A. & E. 28. [↑](#footnote-ref-41)
41. 4 Q. B. D. 13. [↑](#footnote-ref-42)
42. 4 Ch. App. 622. [↑](#footnote-ref-43)
43. Winslow on arrangements between Debtor and Creditor, p. 114. [↑](#footnote-ref-44)
44. 20 Q. B. D. 540. [↑](#footnote-ref-45)
45. 8 Ch. D. 744. [↑](#footnote-ref-46)