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BANKRUPTCY - FRAUDULENT TRANSFERS -TRUSTEE'S ASSIGNEE

COMMENTS

BANKRUPTCY — FRAUDULENT TRANSFERS — TRUSTEE'S ASSIGNEE — Since bankruptcy proceedings contemplate a sale of the debtor's assets, the importance of knowing what the trustee may sell is at once obvious. One must, however, go further and inquire as to the rights of purchasers from the trustee. This question assumes importance to the trustee, since it determines what he may sell, and is also important to the purchaser, since it determines what he may buy. The answer determines the efficiency of our bankruptcy machinery. In this comment we propose to consider one phase of this general question: May the trustee assign his right to set aside a fraudulent conveyance made by the debtor?

The situations that may present the question are manifold; we suggest but a few: (1) the trustee may sell all the assets of the debtor, and include also an assignment of all his right, title, and interest in any of the assets of the estate, (2) the trustee may give a deed to the specific property fraudulently conveyed, though actual possession thereof is in the fraudulent grantee, or (3) the trustee may sell as a chose in action

his right to set aside the fraudulent conveyance. The question may be litigated in an ejectment action brought by the purchaser or the grantee, or in a bill to quiet title brought by the purchaser, or in replevin or trover, where personal property is concerned. Strangely enough, the problem has been directly presented to the courts in very few cases. The cases represent an almost equal division in result,[1] and in none of them is the problem subjected to satisfactory analysis. We may say, therefore, that the problem is still an open one. The difficulties presented are of two kinds, procedural and substantive. For convenience we shall consider each aspect separately.

Procedural Problems

Denomination of a conveyance as fraudulent is apt to be misleading unless properly understood. The fraudulent conveyance, one made "with the intent to delay, hinder, or defraud creditors," [2] is not fraudulent in the sense of misrepresentation; it does not necessarily involve moral turpitude, but is unlawful as contrary to a long-standing policy.[3] The conveyance is interdicted only when it interferes with the creditor's right to levy execution upon the debtor's property. As Judge Denio said, "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation." [4] Between the parties to the conveyance the transfer is good,[5] and where the transfer is set aside, this is not in any sense to punish either party.[6]

[1] The trustee may assign: Strong v. Durdle, 94 Wash. 157, 162 Pac. 6 (1916); Murray & Co. v. Jones, 50 Ga. 110 (1873); In re Downing, (D. C. N. D. N. Y. 1912) 192 Fed. 683, affirmed (C. C. A. 2d, 1912) 201 Fed. 93. The trustee may not assign: Annis v. Butterfield, 99 Me. 181, 58 Atl. 898 (1904); McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836 (1879); Neuberger v. Felis, 203 Ala. 142, 82 So. 172 (1919); Parker v. Hand, 299 Ill. 420, 132 N. E. 467 (1921).

[2] Statute of 13 Eliz., c. 5, § 1 (1570).

[3] This idea has been phrased to this effect: "But in reality, an act of the kind is only unlawful; it is called fraudulent only because it is associated with other acts that are really fraudulent, and it is unnecessary in most cases to make any distinction." BIGELOW, FRAUDULENT CONVEYANCES 2 (1911).

[4] Van Heusen v. Radcliff, 17 N. Y. 580 (1858).

[5] Drake v. Thompson, (C. C. A. 8th, 1926) 14 F. (2d) 933; Peintner v. Barnes, (C. C. A. 8th, 1917) 247 Fed. 443; Pigg v. Casper, (C. C. A. 4th, 1912) 196 Fed. 177; Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13 (1889). This result is often reached by an application of the doctrines of *in pari delicto*, or clean hands in equity, so that conveyances once made are negatively held binding between the parties. Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71 (1890). See annotation in 4 A. L. R. 99 (1919). A recent Illinois case reaches an anomalous result by holding that the fraudulent grantee cannot maintain ejectment against a stranger, for the plaintiff's title is void. Zwick v. Catevenis, 331 Ill. 240, 162 N. E. 869 (1928). Criticised adversely in 23 ILL. L. REV. 817 (1929).

[6] Over v. Carolus, 171 Ill. 552, 49 N. E. 514 (1898).

Notwithstanding the language of the statute,[7] the courts have uniformly said that the transaction stands as valid until regularly impeached.[8] The most obvious method for the creditor to use to secure his rights is a creditor's bill in equity to set aside the fraudulent conveyance; this procedure is in accord with the theory of a fraudulent conveyance and is also administratively simple.[9] Such procedure accords with the view that the fraudulent conveyance is a wrong personal to the creditor, as it interferes with his process; it also possesses the added merit of settling the question between the parties directly affected and in the most efficient way possible. But is this the only way in which the creditor can avoid the conveyance, and is he the only person who can, directly or indirectly, present the issue? This restates our problem.

At an early date the courts permitted the creditor to disregard the conveyance, and seize the property upon execution as if it were still that of the debtor. "The property of a debtor, which has been transferred by him in fraud of creditors, still remains, as to them, the debtor's property and the lien of the creditor's judgment attaches to the real estate."[10] He may disregard the conveyance or proceed more cautiously by a bill in equity. Although there is some difficulty in justifying execution upon property, title to which is in another person, the courts have held that if execution were possible but for the transfer, the creditor may, by a literal reading of the Statute of Elizabeth, treat the conveyance as non-existent in legal contemplation.[11] The authorities sustaining this view are numerous.[12] The only dissent from this practice is in Louisiana where it has been said:[13] "If the sale was fraudulent,

[7] The statute of 13 Eliz., c. 5, § 2 (1570) declared such transactions " . . . to be clearly and utterly void, frustrate and of none effect. . . . "

[8] Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340 (1902), " . . . the transaction is voidable not void, and the creditor can get the benefit of his right only by assertion of it in the manner provided by law." GLENN, FRAUDULENT CONVEYANCES 160 (1931).

[9] See GLENN, FRAUDULENT CONVEYANCES, ch. 7 (1931). Equity must be resorted to sooner or later in order to clear the title of embarrassments. Partee v. Matthews, 53 Miss. 140 (1876).

[10] Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237 (1904).

[11] Willard v. Masterson, 160 Ill. 443, 43 N. E. 771 (1896); WAIT, FRAUDULENT CONVEYANCES, 3d ed., § 51 (1897).

[12] Frost v. Goddard, 25 Me. 414 (1845); Maxwell v. Gillespey, 116 Okla. 68, 243 Pac. 497 (1925); Owen v. Dixon, 17 Conn. 491 (1846); Rinchey v. Stryker, 31 N. Y. 140 (1865); Turvil v. Tipper, Latch 222, 82 Eng. Repr. 356 (1826); Imray v. Magnay, 11 M. & W. 267, 152 Eng. Repr. 803 (1843); Lovick v. Crowder, 8 B. & C. 132, 108 Eng. Repr. 992 (1828); GLENN, FRAUDULENT CONVEYANCES 97 (1931). The Uniform Fraudulent Conveyance Act embodies the result of these decisions in section 9b where a creditor may "Disregard the conveyance and attach or levy execution upon the property conveyed. . . . "

[13] Yocum v. Bullit, 6 Martin (N. S.) (La.) 324, 17 Am. Dec. 184 (1827). In a note to this case, A. C. Freeman writes, "The doctrine of these cases is derived from

it must be regularly set aside, by a suit instituted for that purpose. It was not less a sale, and binding upon third parties, until declared null in an action which the law gives. . . ."

This departure from the usual procedure acquires significance when we realize that the purchaser at the creditor's execution sale is protected in his purchase. If he were not protected it would be futile to say that the creditor may disregard the conveyance. We find numerous decisions in which the right of the purchaser to protect his acquisition against the fraudulent conveyance is upheld. In *Garrish v. Mace*,[14] it is said: "In order to avoid the conveyance in this case, the creditor was not bound to levy specifically; he had his option to levy or sell on execution, and if he elected to sell at auction, the purchaser would take the right to avoid all fraudulent conveyances and incumbrances." Apparently there is no dissent in recent decisions from this procedure.[15] The cases show that such a purchaser may assert his title by bill to remove a cloud on title, or in ejectment, or by bill in equity to cancel the fraudulent conveyance. The only difference between purchase on execution and purchase from the trustee is that here a sheriff's sale intervenes between the creditor and the purchaser. But the sale is one at which no issue as to the character of the former (allegedly fraudulent) conveyance is adjudicated. Query, whether this procedural difference is enough to justify a different result? [16]

the civil law, and although well established in Louisiana, has never gained any recognition in any of the other states of this Union, nor in England. In fact it is directly contrary to the whole current of English and American authority on this subject." 17 Am. Dec. 184.

[14] 75 Mass. 235 (1857).

[15] BIGELOW, FRAUDULENT CONVEYANCES 504 (1911); GLENN, FRAUDULENT CONVEYANCES 98 (1931); Kulp & Sons v. Irr, 210 App. Div. 587, 206 N. Y. S. 700 (1924); Hess v. Hess, 117 N. Y. 306, 22 N. E. 956 (1889); Starin v. Kelly, 88 N. Y. 418 (1882); Kimmel v. M'Right, 2 Pa. 38 (1845); Kingman Plow Co. v. Knowlton, 143 Ia. 25, 119 N. W. 754 (1909); Millis v. Lombard, 32 Minn. 259, 20 N. W. 187 (1884); Lynch v. Burt, (C. C. A. 8th, 1904) 132 Fed. 417; Lawrence v. Lippencott, 6 N. J. L. 473 (1799); Teague v. Martin, 87 Ala. 500, 6 So. 362 (1888). But see Thigpin v. Pitt, 54 N. C. 49 (1853), where the purchaser was refused relief on the ground that the fraud had not been directed as to him.

[16] The cases usually cited to show that the purchaser cannot dispute the validity of fraudulent conveyance contain a large proportion of fraudulent conveyances in the form of mortgages. It is submitted that a critical examination will show that the cases do not substantiate this position. There are some cases that hold that where the subsequent purchaser (whether he be technically another mortgagee or assignee of the mortgagor or purchaser at a foreclosure sale of a junior mortgage) acquires his interest in the property subject to a mortgage by express stipulation, he cannot afterwards dispute the validity of the encumbrance. McMurphy v. Adams, 67 N. H. 440, 39 Atl. 333 (1893); Ritter v. Phillips, 53 N. Y. 586 (1873); Bunch v. Grave, 111 Ind. 351, 12 N. E. 514 (1887). Other courts require more than a general assumption of the mortgage indebtedness, and insist that by some act or word the validity of the encumbrance must be

The procedural difficulties of the purchaser from the trustee are due not only to the peculiar nature of a creditor's rights as regards fraudulent conveyances, but also to the historic prejudice of the courts against assignments. It is only in comparatively recent times that the courts have allowed assignments, and the text-writers are still wrangling over the nature of the assignee's rights.[17] Assignment of the right to set aside a fraudulent conveyance is interdicted by charges of champerty and maintenance. Lord Coke tells us:[18] "It is one of the maxims of the common law that no right of action can be transferred because under the color thereof pretended titles might be granted to great men whereby rights might be trodden down and the weak oppressed, which the common law forbiddeth." We might remark parenthetically at this point that the reason advanced by Lord Coke was merely another of the great lawyer's innovations and merely an afterthought.[19] The

specifically recognized. Thus, in McFaddin v. Bell, 168 Ark. 826, 272 S. W. 62 (1925), it was held: "The doctrine is that, before the mortgagee or grantee will be estopped to deny the validity of prior incumbrances upon land by recitals in the conveyance, they must amount to a recognition on his part that the outstanding incumbrances are valid, and that nothing short of a certain and definite reference in some way to particular incumbrances thereon will evidence an intention on his part to recognize such incumbrances." In 2 JONES, MORTGAGES, 8th ed., sec. 930 (1928), we find: "Recitals in a conveyance, in order to estop the grantee from asserting invalidity of an incumbrance . . . , and in order to evidence an intention to recognize such validity there must be a definite reference to the particular incumbrance." A recital that the premises were subject to a mortgage was held no evidence of an intention to recognize the validity of the mortgage, but merely to show that the grantor did not warrant the title. Allen-West Co. v. Brown, 69 Ark. 163, 61 S. W. 913 (1901). See also Sherman v. Goodwin, 11 Ariz. 141, 89 Pac. 517 (1907); Sherman v. Goodwin, 12 Ariz. 42, 95 Pac. 121 (1908). Some courts hold that the purchaser from the sheriff's sale on creditor's execution is purchaser of the equity of redemption that belonged to the creditor, i.e., only as concerns valid mortgages. Gerrish v. Mace, 75 Mass. 235 (1857). If the mortgage was no lien as to the creditor, it is no lien as to the purchaser who traces through the creditor. Porter v. Parmley, 52 N. Y. 185 (1873). A senior mortgagee may likewise resist a suit to redeem by a junior mortgagee on the ground that the junior encumbrance was a fraudulent conveyance. Shrively v. Jones, 45 Ky. 274 (1845). See GLENN, FRAUDULENT CONVEYANCES, sec. 12 (1931). We can conclude from these cases that the basis on which a purchaser cannot dispute the validity of a mortgage fraudulently made is not a want of power but an estoppel. In the absence of estoppel the mortgage may be attacked by persons other than the creditor, and without a bill to set aside.

[17] See for example the very interesting debate between Cook, "The Alienability of Choses in Action," 29 HARV. L. REV. 816 (1916), and Williston, "Is the Right of an Assignee of a Chose in Action Legal or Equitable?", 30 HARV. L. REV. 104 (1916); rebuttal by Cook, "The Alienability of Choses in Action: A Reply to Professor Williston," 30 HARV. L. REV. 449 (1917).

[18] 2 Coke's Inst. 210a.

[19] "The traditional opinion that this rule had its origin in the aversion of the 'sages and founders of our law' to the 'multiplying of contentions and suits' shows the power of a great name for the perpetuation of error. . . . The rule is not only older than

more fundamental reason is the ancient belief that a cause of action was as personal as one's wife. The doctrine had its first application to our type of case in *Prosser v. Edmonds*,[20] where it was held that a deed to property due to the grantor under the will of his late father could not be set aside by a subsequent grantee, though the first deed was obtained by fraudulent misrepresentations. The ground of decision was that such a practice encouraged champerty. The decisions in which the rule of *Prosser v. Edmonds* is followed are numerous.[21] But on principle, the application of champerty doctrines to such situations seems misplaced, and not in accord with the spirit of our times.[22]

The old champerty policy seems especially inappropriate where the sale is made through an officer of the court or by the sheriff on execution. And there is ample authority for the view that such sales are neither within the letter nor the spirit of the rule.[23] A good example is the New York case of *Coleman v. Manhattan Beach Improvement Co.*,[24] where a deed by a trustee to land in possession of another was upheld as not champertous.

the doctrine of maintenance in English law, but is believed to be a principle of universal law." AMES, LECTURES ON LEGAL HISTORY 211 (1913). Dean Ames further points out that when powers of attorney became a favorite device for making assignments the courts seized upon the rules of maintenance to prevent evasions of what was believed to be a wholesome principle.

[20] 1 Y. & C. Ex. 481, 160 Eng. Repr. 196 (1835). In the headnote of the case it is said: "A chose in action not coupled with any partial interest in possession, and which cannot be reduced into possession without a suit, is not assignable in equity.—Court of equity will give no encouragement to contracts which savor of maintenance or champerty, though such contracts may not be within the strict legal limits assigned to those offences." On champertous contracts, see 27 COL. L. REV. 981 (1927).

[21] De Houghton v. Money, L. R. 2 Ch. 164 (1866); Ryan v. Miller, 236 Mo. 496, 139 S. W. 128 (1911); Gruber v. Baker, 20 Nev. 453, 23 Pac. 858 (1890); 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., sec. 1276 (1918). But see Conaway v. Co-operative Homebuilders, 65 Wash. 39, 117 Pac. 716 (1911), where it was held that statutes permitting assignments and suits by the real party in interest made the old objection of champerty no longer valid. The fact that one is out of possession when he deeds the property is the particular champertous element emphasized by most courts. Milton v. Danford, 100 Fla. 761, 130 So. 435 (1930).

[22] In the dissenting opinion to Milton v. Danford, supra, it is said: "The ancient policy which prohibited the sale of pretended titles and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance was founded upon a state of society which does not exist in this country."

[23] In a complete annotation in 71 A. L. R. 593 (1931) the authorities are summarized to this effect: "It is now well settled as a general rule that a judicial sale or a conveyance made under court order or decree of a court of competent jurisdiction is not within the application of the champerty doctrine or statute, and hence is not rendered invalid by the fact that the land is in the adverse possession of a third person." But see to the contrary, Campbell v. Point Street Iron Works, 12 R. I. 452 (1879), where the court said: "Mischiefs arising from the sheriffs sales of disputed titles may in many cases be greater than in sales made by the claimant himself."

[24] 94 N. Y. 229 (1883). Another objection frequently raised in connection with

Courts of equity have not been willing to follow the decision of *Prosser v. Edmonds* literally, and have with characteristic ingenuity found means for departure. Lord Romilly, M.R., held:[25]

> "The distinction is this: If *James Dickinson* had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A.B., to maintain the bill; but if A.B. had bought the whole of the interest of *James Dickinson* in the property [that is, his whole estate] then it would. The right of suit is a right incidental to the property conveyed. . . . "

The subtle distinction here enunciated was also endorsed by the great Judge Story,[26] and is followed by the Supreme Court.[27] There is also support for this view in the state reports.[28] A case that illustrates the lengths to which this exceptioun is taken is illustrated by *Adcock v. New Crystal Ice Co.*[29] where the bankrupt made a down payment of $1,700 on a contract void as in restraint of trade; on subsequent bankruptcy the trustees sold all the assets of the bankrupt ice company to the plaintiff (the deed was broad enough to include this chose in action) who sued to recover the $1,700 and prevailed. There seems no good reason for holding that the rule against assignments does not apply where the plaintiff has purchased not only the right of action but also other property of the estate. As far as the property fraudulently conveyed is concerned the case is not logically stronger because the plaintiff has purchased other property as well.[30]

That the trustee's position is not worse than that of a creditor seems

assignments of this kind is that all that can be conveyed is the equitable interest, and hence the action still remains where it was before. King Bros. & Co. v. Central R. R., 135 Ga. 225, 69 S. E. 113 (1910). Prof. Glenn also raises this objection. GLENN, FRAUDULENT CONVEYANCES, sec. 132 (1931).

[25] Dickinson v. Burrell, L. R. 1 Eq. Cas. 337 (1866).

[26] Comegys v. Vasse, 1 Pet. (U. S.) 193 (1828).

[27] Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. ed. 467 (1885).

[28] Smith and Wade v. Harris, 43 Mo. 557 (1869); Haseltine v. Smith, 154 Mo. 404, 55 S. W. 633 (1900); Howd v. Breckenridge, 97 Mich. 65, 56 N. W. 221 (1893).

[29] 144 Tenn. 511, 234 S. W. 336 (1921). See also 6 REMINGTON, BANKRUPTCY, 3d ed., § 2562 (1923).

[30] In O'Neil v. Int'l Trust Co., 183 Mass. 32, 66 N. E. 424 (1903), the court held that the trustee who sold the property subject to a mortgage could not thereafter proceed to set aside the mortgage. Thus, the trustee who doesn't want to give the purchaser the mortgage value must hold up the sale while he proceeds to set the mortgage aside. In such an instance the trustee could have the mortgage assigned to him and then sold; this possibility was not argued in the case. The same result was reached in Colt v. Sears Comm. Co., 20 R. I. 64, 37 Atl. 311 (1897). The basis for these cases is that

settled by the present bankruptcy statute. Reading sections 47a, 70a, 70e, and 67e together there seems no doubt that the trustee may avoid fraudulent conveyances as if he were an ordinary judgment creditor.[31] It should follow that the trustee should be able to give his assignee the same rights that a purchaser through a creditor's execution sale would have. It has been argued that the trustee's right to set aside fraudulent conveyances is a statutory one, to be exercised by him alone as an officer of the court, and for the benefit of creditors.[32] Professor Glenn argues in support of this view that an assignment of the trustee's right is contrary to the spirit of the Bankruptcy Act.[33] Whatever may be meant by "spirit" of the Bankruptcy Act, there is no provision in it that would require the trustee to proceed directly, rather than indirectly by selling his right.[34]

We can see, therefore, that although there are procedural difficulties barring the assignment of the right to set aside a fraudulent conveyance, none of these difficulties is insuperable. There are adequate grounds on which to sustain the right of the trustee to assign — provided of course (which is our next question), this is a sound and desirable result. The most rational approach to the problem is that of Massachusetts where the only question is whether the trustee actually did make the assignment. Thus, in *Freeland v. Freeland* [35] where the trustee informed the fraudulent grantee that he did not consider the conveyance valid, the assignee was allowed to assert the right. But in *Morgan v. Abbott*,[36] where the assignee's deed was in terms of all the right, title and interest of the trustee, but where there was no evidence that the trustee knew of the fraudulent conveyance, the assignee did not prevail. The fact that the trustee did make an assignment should not be a mere matter of implication.[37]

when the property left the trustee, the right of action left him too, even though the grantee might be denied the right of action.

There are several other analogous situations that weaken the cases holding against the right to assign a fraudulent conveyance. The trustee was allowed to assign the bankrupt's right to a legacy, In re Gutterson, (D. C. Mass. 1905) 136 Fed. 698, and to a pending suit to the proceeds of which the trustee was entitled, In re Vanoscope Co., (C. C. A. 2d, 1917) 244 Fed. 445.

[31] See also GLENN, FRAUDULENT CONVEYANCES 142 (1931).

[32] Neuberger v. Felis, 203 Ala. 142, 82 So. 172 (1919). See also Judge Lacombe's dissenting opinion in In re Downing, (C. C. A. 2d, 1912) 201 Fed. 93.

[33] GLENN, FRAUDULENT CONVEYANCES 183 (1931).

[34] In re Downing, (D. C. N. D. N. Y. 1912) 192 Fed. 683, aff'd (C. C. A. 2d, 1912) 201 Fed. 93. See also 6 REMINGTON, BANKRUPTCY, 3d ed., § 2562 (1923).

[35] 102 Mass. 475 (1869).

[36] 148 Mass. 507, 20 N. E. 165 (1889).

[37] Ellis v. Feeney & Sheehan Bldg. Co., 187 App. Div. 481, 176 N. Y. S. 61 (1919).

Substantive Problems

Aside from technical procedural difficulties, the question whether as a matter of policy such assignments should be allowed is clearly debatable. Although the decisions are worded in terms of technical objections, the crux of the opinions is clearly the conviction that public policy favors or disfavors the practice of assigning the right to set aside a fraudulent conveyance. It is urged that to permit assignments of this nature is to provide a means for secret advantages by persons with inside information. Thus, in *Cleland v. Taylor*,[38] the court points out that where the conveyance is an incumbrance which all the bidders except one believe to be valid, the assignee with secret information is able to bid a higher figure. In *Delaware and Hudson Canoe Co. v. Bonnell*,[39] the assignee if he had prevailed would have secured property worth $22,000 for only $8,445.76. Again, it is urged that the purchase of such a right is a mere speculation on the probability of a successful law suit and should not be encouraged by the courts. In *Parker v. Hand*,[40] the court said: "There is no perceivable reason why, as a mere purchaser and speculator, he should be allowed to have the relief sought by his bill." The dissenting opinion in the *Downing* case[41] presents still another objection, that such a right has no real marketable value. The same view was expressed by Judge Mitchell when he wrote:[42] "The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation." It is certainly clear that the best price would usually be realized by direct action in a creditor's bill by the trustee.[43]

Yet there is apt to be another side of the picture presenting appealing facts in favor of permitting assignments. Such a case was *In re Downing*,[44] where the trustee who desired to set aside the fraudulent conveyance found himself without the necessary funds. The creditors of the estate were unwilling to chance another penny on the hapless

[38] 3 Mich. 201 (1854). See also Marshall v. Blass, 82 Mich. 518, 46 N. W. 947 (1890).

[39] 46 Conn. 9 (1878). Disclosure of such facts is not encouraged by permitting assignments. GILBERT'S COLLIER ON BANKRUPTCY, 2d ed., 1256 (1931).

[40] 299 Ill. 420 at 425, 132 N. E. 467 (1921).

[41] In re Downing, (C. C. A. 2d, 1912) 201 Fed. 93.

[42] Hospes v. N. W. Mfg. & Car Co., 48 Minn. 174 at 199, 50 N. W. 1117 (1891).

[43] Kinmonth v. White, 61 N. J. Eq. 358, 48 Atl. 952 (1901). In New Jersey the practice is that if the creditor who does not proceed by creditor's bill later seeks to hold the debtor for the deficiency, he must first credit the debtor with the fair value rather than the sale price of the property. This would indicate a substantial depreciation in returns by short-cut procedure.

[44] (C. C. A. 2d, 1912) 201 Fed. 93.

bankrupt. A purchaser was willing to give what the court thought a substantial sum, and the sale was approved. In such an instance there is a strong equity favoring assignability. The speculative nature of the enterprise is not a fatal objection, since judicial sales always present something of that nature discouraging to the ordinary purchaser.[45] If the claim is speculative as to the purchaser, it is as speculative for the estate. The net result is that the estate acquires a substantial sum (the court, of course, would not approve of a sale for a mere nominal sum) for what may turn out to be a worthless asset to the purchaser.[46] The practice does not seem any less advantageous or more objectionable than the compromising of claims which is permitted by the Bankruptcy Act.[47] Whatever is paid for the claim is put into the estate for the benefit of creditors. If the conveyance is really fraudulent there is a possibility, a strong one, that the grantee will not risk a law suit.[48] Another consideration that is of prime importance is that the estate should be administered as expeditiously as possible; the practice of assigning doubtful claims instead of suffering the delay of a lawsuit makes for speed, to the advantage of the creditors and the debtor himself.

In short, while it may be inexpedient in most cases to assign the bankrupt's claim to set aside a fraudulent conveyance, the question ought to be considered and decided on the facts of the individual case. A general rule invalidating assignments seems undesirable. Instead the matter should be left to the discretion of the trustee, controlled by the necessity of obtaining the approval of the bankruptcy court. Such a rule certainly possesses flexibility.

C. H. U.

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[45] See dissenting opinion in Thigpen v. Pitt, 54 N. C. 49 at 65 (1853).

[46] In re Gutterson, (D. C. Mass. 1905) 136 Fed. 698.

[47] Sec. 50 provides: "The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate." 30 Stat. 553 (1898), U. S. C. tit. 11, § 50 (1926). A case directly in point is In re Riggi Bros. Co., (C. C. A. 2d, 1930) 42 F. (2d) 174, where the validity of a mortgage was in dispute. The trustee agreed not to question further the validity of the mortgage; the mortgagee agreed not to file a claim for the deficiency owing. The court approved of this as a means of saving the estate time and money.

[48] This view is urged by WAIT, FRAUDULENT CONVEYANCES, 3d ed., § 69 (1897). Its weakness is that it overlooks the litigious characteristic of the human race.