

8452

No. _____

Supreme Court of Illinois

H. Marshall & Co.

vs.

F.D.Preston et al

71641  7

At a regular Term of the Richland Circuit Court began and hld at the Court-House in the town of Olney in said County of Richland and State of Illinois, on Monday the 16th day of June A.D. 1862, before the Hon. James C. Allen presiding Judge of the 25th Judicial Circuit of said State. Among other things the following proceedings were had and determined, viz:—

Henry Marshall,
Jacob May, firm
of H. Marshall & Co.

vs

Finney D. Preston
Henry Boden &
John G. Feutz

Appeal

Be it remembered that on the 23rd day of June 1862 and the 7th day of the term of this Court, the above entitled cause came on to be heard before Hon. James C. Allen Judge and a Jury, and thereupon the plaintiffs introduced an assignment in the words & figures following. "A Schedule of property assigned by William H. Orr to Henry Marshall & Co, in payment or on account of the indebtedness of the said William H. Orr to the said Henry Marshall & Co,

213 cords wood
saw 440 ft. 1 in Oak plank
24 Flour Barrels
used 240 Bushels Rye (estimated)
4 Mashies 240

- 200 Bushels Corn (Estimated)
 26 Whiskey Barrels
 Lot of Grain Sacks estimated 100)
 Wagon & Bed
 10 Bus. Malt
 48 Hogs
 56 Brls Whiskey
 2 Log chains
 4 Scoops
 1 Foot Adze, & Monkey wrench
 3 Rectifying Tubs
 1 Hand Saw & Square
 3 Ox Yokes

I William H. Orr do hereby sell assign and transfer to H. Marshall & Co. the property specified in the foregoing Schedule for the following purposes, that is to say, Whereas I the said William H. Orr am indebted to the said H. Marshall & Co. in the sum of Six hundred and fifty dollars (\$650⁰⁰/₁₀₀) and am also indebted to sundry other persons. The aforesaid assignment is made upon the following conditions, The said H. Marshall & Co. shall take possession of the same and sell and convert the same into cash as speedily as possible and in the manner calculated to realize the best prices for the same, and out of the proceeds to pay first the amount due the said H. Marshall & Co. as aforesaid, and secondly to apply the residue, pro rata upon the debts specified in the following Schedule.

Wm B. Combs, Constable of Richland County, Ills,
I hereby notify you that the
property, viz: a lot of cord wood levied on
by you as the property of Wm H. Orr by
Executions in your hands, one in favor of F. D.
Preston, one in favor of Henry Boden, & one
in favor of J. J. Heutz, and vs. Wm H. Orr,
belongs to me, and I shall prosecute
my claim to the same.

July 20th 1862.

W. Marshall & Co.

State of Illinois } ss.
Richland County }

The people of the State of
Illinois to any Constable of said County -
Greeting: We command you that of the
goods and chattels of Wm H. Orr in
your County, you make the sum of
\$24.00 Dollars and --- cents debt, and
\$2.21 Dollars and --- cents cost, which
John J. Heutz lately recovered before

me in a certain plea, against the said
Orr, and herof make return to me in
Seventy days from this date.

Given under my hand and Seal
this 25th day of Dec, A.D. 1862.

J. Hofman J. P.

Came to hand this 25th day of December
1861 at 5 O'clock. W^m R. Combs C. R. C.

By virtue of the within Execution I have
levied on one hundred cords of wood, more or
less, as the property of William H. Orr,

this 4th day of January 1862.

W. R. Combs, Const.

The above wood not sold, it being claimed
by H. Marshall & Co. this 8th day of January 1862

W. R. Combs Const.

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Given under my hand this 24th day
of December 1861.

Witness
Wm Beaird

W. H. Orr

Schedule of the indebtedness of W. H. Orr

Joseph Richie	25.00
Wm Leathers	48.00
Wm Thompson	50.00
Gilman Howell	50.00
Levi Sniff	12.85
Courts for ape W. S. Gunn	33.00
Jno Souner	15.00
N. Salesman	30.00
Jno Bruply	70.00
Wm Beaird Jr	48.00
Peter Kernald	8.00
Wm Bailey	16.00
Lorn Bird	6.80
Sundry Small claims	45.00
H. Marshall & Co.	650.00
	<u>\$ 1108.65</u>

And also introduced William Beaird a witness of lawful age who was sworn and testified that he saw the assignment here shown to witness, on the day it was executed, that Wm H. Orr said he had signed the same and the parties requested him to witness the same whiche he then and there witnessed, that he assisted the parties to measure the wood mentioned in the assignment, that there was a little

over 200 cords which was all the wood that Orr had been delivered to Orr and that had not been used by Orr. The wood was then and there delivered to H. Marshall & Co. that they H. Marshall & Co. for the next 4 or 5 days used some of this wood in running the mill in making whiskey out of the corn mash &c. On his cross examination he stated that said wood was worth about \$1. per cord, that he did not see the Rye nor the corn in said assignment mentioned, that there was 20 or 30 Shoats which would weigh 80 or 100 lbs, worth 2 to 2½ cents per lb - that he did not know what was done with the grain - supposed it was made into whiskey and sold - whiskey worth about \$7. per bbl. The hauled whiskey and put on the Cars for H. Marshall & Co. about bbls. Subs about then sold for \$2. to \$2.50 - about 20 cords of wood used in running the mill by H. Marshall & Co. dont know when the whiskey was sold nor what has been done with the money - this wood was burned before the levy of the Defts. Execution on the wood by Combs.

Warren May was then called as a witness, and who was sworn and testified that he took possession of the property mentioned in the assignment from Orr to H. Marshall & Co. on the day it was executed, for H. Marshall & Co. There was about 113 cords of wood

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measured, that he run the mill 4 or 5 days and manufactured the Rye Corn and mash into whiskey - made 43 bbls, whiskey 40 gals, in a bbl, shipped to Cincinnati, and sold for 13 cents a gallon, freight was about \$1. per bbl, used about 20 cords of the wood - Hogs would weigh about 80 or 100 lbs, each - were sold by W. Marshall & Co.

The wood balance of the wood is there yet, one wagon there yet - Some scoops there worth about \$2.00 - 2 Log chains worth \$2.00 - the corn worth 20 to 25 cts, about bushels - about 100 bushels Rye worth about 30 cts. wood worth about \$1 per cord - sacks 100 of them worth abt 25 cts each,

Clark was called and sworn as a witness, who testified that he saw the wood in controversy - most of the wood is now where it was measured, not been sold to my knowledge.

Evans was called by Defts, and after being sworn as a witness testified that the Hogs spoken of were pointed out by him and there were 25 or 30 head - would weigh 80 or 100 lbs, each - shipped & sold by W. Marshall & Co. do not know that W. Marshall & Co. gave Poteet their note after the assignment to settle a claim that Poteet held against W. H. Orr.

So all the evidence except such as applies to the wood. Plaintiffs at the time ~~excepted~~ objected to its going to the jury, but the Court overruled the objection to the admission of which evidence by the Court the plffs, by their counsel then & there at the time excepted, and this was all the evidence in the case.

The Court instructs the jury on behalf of the Defendant as follows,

1st Parties to whom such assignments are made are required under the law to proceed without delay to close up the business in which the debtor may have been engaged, and not continue to carry on or operate the same beyond what may be necessary to prevent waste. Such assignees are also required in a reasonable time to make sale on the best possible terms and apply the proceeds of such sale in accordance with such assignment, also the jury have a right to infer that such assignment is fraudulent.

2 If the jury believe from the evidence that before the assignment was made from Orr to W. Marshall & Co. that Orr owned the wood and that possession was only surrendered to the assignees for the purposes stipulated in the written assignment, and that the assignees have failed to apply the property as directed in such assignment, or have failed in a reasonable time to sell and account for the same to Orr's creditors, as stipulated in the assignment, the jury have a right to believe the same to be fraudulent, and in such case may find against the claim of Marshall & Co. to said wood levied on.

3 The Court instructs the jury that for the purposes of the assignment from Orr to W. Marshall & Co. it must appear from the evidence that such assignees carried

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out and executed their trust in strict accordance with ^{the} provisions of the assignment, otherwise it is prima facie evidence of fraud.

4 The Court instructs the jury that in order to render an assignment to preferred creditors valid, there must be a substantial compliance with the trust as stipulated in the written assignment.

5 The Court instructs the jury that an assignment for the benefit of preferred creditors must disclose specifically who said preferred ^{creditors} are, that unless such disclosure is made, it is fraudulent as to other creditors and consequently void.

That if they believe from the evidence that said assignment is fraudulent, they will find for the Defendants.

And also on behalf of Plaintiff gave the following viz.

1st That the only question for the jury to determine is whether the property claimed by the Plaintiffs is their property or not.

2nd If the property was assigned for a particular purpose in good faith such as assignment is valid and will be good against any levy of execution made subsequent to said assignment, unless it is proven that the property was fraudulently assigned.

3rd If by the terms of the assignment of the property, the assignees were authorized to dispose of it in the manner best

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calculated to realize the best price, it devolves upon the Defendants to show that the manner it was disposed of was prejudicial to creditors.

4th Debtors have a right to prefer their creditors in making an assignment of property, and such assignment will be valid unless tainted by fraud.

5th The wood having been levied upon by Execution, the assignees were excused from disposing of the wood until the trial of the right to the property was disposed of and tried.

6th If property is assigned for payment of debts, and the property assigned has been disposed of, the assignee cannot be called on to account for the proceeds of the sale of the property in this suit, another and different remedy is given to creditors.

7th The Court instructs the jury that on actual removal of an entire mass of a cumbrous article (as a pile of cord wood) is not necessary to constitute a delivery and change of possession.

8th The Court instructs the jury that the law permits W^m H. Orr, to make an assignment of his property for the benefit of his creditors, and if fairly made to H. Marshall & Co, it passes the title to such property to H. Marshall & Co.

9th That on an assignment, in good faith, of personal property, the title vests and becomes complete against creditors and

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subsequent purchasers, by a delivery to the assignee possession of chattels is notice prima facie and evidence of ownership.

10 The Court instructs the jury that fraud is not to be presumed, but must be proven by the party alleging it. The law presumes good faith controlled the transaction by Th. Marshall & Co., unless the contrary appears from the evidence in the cause.

The Court instructs the jury that if they find from the evidence that the assignment from Wm Th. Orr, to Th. Marshall & Co. was fairly made and not shown to be fraudulent as to creditors, then neither mismanagement nor fraudulent disposition of the property, render the assignment by Th. Marshall & Co. null and void. The title of Th. Marshall & Co. will effect the instrument or the title of Th. Marshall & Co.,

And they returned into Court the following verdict, viz: "We the jury find for the Defendants."

Whereupon the Plaintiff, by his counsel, moved the Court for a new trial, for the following causes, that the verdict of the jury is contrary to the evidence.

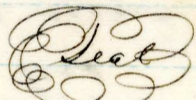
2nd That the verdict is contrary to the instructions of the Court.

3rd The verdict is contrary to the law and the evidence.

Which motion the Court overruled and rendered judgment on the verdict,

to-wit: "Therefore it is ordered and adjudged by the Court that the Defendants recover of and from the said Plaintiff their costs and charges by them about this suit in their behalf expended, and thereof have execution &c."

To the overruling of which motion for a new trial and entering of judgment on the verdict of the jury, the Plaintiff at the time excepted by his counsel, and then and there tendered this his bill of exceptions, which is signed and sealed by the Court, and ordered to be made a part of the Record in this cause,

J. C. Allen 

It is ordered by the Court that the Plaintiffs file their appeal bond within thirty days from this date, in the sum of four hundred dollars with security to be approved by the Clerk, which said approval by the Clerk, is by agreement of parties.

It is further ordered by the Court that said Plaintiffs may file their bill of exceptions at the next term of the Lawrence County Circuit Court,

Know all men by these presents, that we Henry Marshall & Jacob May firm of H. Marshall & Co, and Horace Hayward are held and firmly bound unto Finney D. Preston, Henry Boden and John J. Feutz in the penal sum of four hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs and ad-

= administrators, jointly severally and
by these presents.

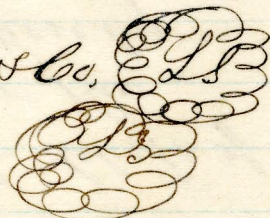
Witness our hands and seals this
11th day of July A.D. 1862.

The condition of the above obligation
is such, Whereas the said Finney D,
Preston, Henry Boden and John J,
Feutz, did at the June term A.D.
1862, of the Circuit Court for the County
of Richland, recover a judgment
against the above bounded Henry
Marshall and Jacob May firms of
Marshall & Co. for the sum of

Dollars and cents the costs
of suit, from which judgment the
said H. Marshall & Co. have taken an
appeal to the Supreme Court of the
State of Illinois. Now if the said
Henry Marshall & Jacob May firms of
H. Marshall & Co. shall prosecute their
appeal with effect, and shall pay
whatever judgment may be rendered
by the Court, upon dismissal or trial
of said appeal, then the above
obligation is void, otherwise to
remain in full force and effect.

In presence of }
John Wolf Clerk }

H. Marshall & Co. }
H. Hayward }



Approved and filed
July 11th 1862,

John Wolf Clerk,

State of Illinois } ss.
Richland County }

I, John Wolf Clerk of
the Circuit Court within and for the
County and State aforesaid, do hereby
certify that the foregoing is a full and
complete copy of the record and proceedings
in the above entitled cause remaining
in this office.

In Witness Whereof I have
hereunto set my name and
affixed the Seal of said Court
at Olney this 1st day of Novem-
ber A.D. 1862.

John Wolf Clerk

And the said appellants say the said record
is erroneous in this:

- 1st. The Court erred in giving the Instructions for the
Jury.
- 2d. The Court erred in overruling the Pleff's motion for
a new trial.

J. G. Berenson
for Pleff

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H. Marshall & Co.

vs.

H. D. Preston et al.

Filed Nov. 11. 1862.

St. Johnston City
Paid by Beecher \$5.00

Beecher

In Supreme Court of the State of Illinois,

FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1862.

HENRY MARSHALL, and others, } Appellants.
vs. } Appeal from Richland.
F. D. PRESTON and others. } Appellees.

ABSTRACT.

This was a trial of the rights of property. Appellees levied on the property (a lot of cord wood) which the appellants claimed under a deed of assignment dated 24th Dec. 1861. Appellees executions were issued Dec. 25, and levied on the 4th of January, 1862.

1] The Appellants (piffs below) introduced in evidence an assignment made by Orr to them of the property in controversy, as also other property
3] to secure, 1st, the appellants in the payment of a debt of \$650 due them from the said Orr. 2ad. Sundry other persons mentioned in schedule to said deed in their debts, pro rata; the property to be disposed of or converted into money in the manner best calculated to realize the greatest sum in the shortest time.

3] Notice of Appellants and execution of Appellees:

William Baird, for Appellants, testified that he saw and witnessed the assignment by request of the parties, on the day it was executed. That he assisted to measure the wood, about 200 cords, and was all the wood Orr had, and was delivered to appellants, who, for the next four or five days used some of the wood to run the mill and make the rye, corn and mush into whisky.— That wood was worth \$1,00 per cord. Twenty or thirty hogs weighing from eighty to one hundred pounds, worth two cents and a half per lb. Whisky worth \$7,00 per barrel. About twenty cords of wood burnt in making the whisky before the levy of the executions.

4] Warren May testified that he took possession of the property mentioned in the assignment for the appellants, on the day the assignment was made; that there was 103 cords of wood; that he run the mill four or five days; made the rye, corn and mush into whisky; 43 barrels, about 40 gallons to the barrel; shipped to Cincinnati and sold at 13 cts., per gallon, freight \$1,00 per barrel; hogs would weigh from eighty to one hundred lbs., and were sold by appellants; burned about twenty cords of wood, balance still on hand, also wagon, scoops worth \$2,00; two log chains worth \$2,00; 100 sacks worth 25 cts., each.

5] Evans for appellees testified in relation to hogs same as Warren May did. And this was all the evidence in the cause.

6] The court then instructed the jury on behalf of appellees. 1st. Parties to whom such assignments are made are required under the law to proceed without delay to close up the business in which the debtor may have been

engaged, and not continue to carry on or operate the same beyond what may be necessary to prevent waste. Such assignees are also required, in a reasonable time, to make sale on the best possible terms and apply the products of such sale in accordance with such assignment. The jury also have a right to infer that such assignment is fraudulent.

6] 2nd. If the jury believe, from the evidence, that before the assignment was made from Orr to H. Marshall & Co., that Orr owned the wood, and that possession was only surrendered to the assignees for the purposes stipulated in the written assignment, and that the assignees have failed to apply the property as directed in said assignment, or have failed, in a reasonable time, to sell and account for the same to Orr's creditors, as stipulated in the assignment, the jury have a right to believe the same to be fraudulent, and in such case may find against the claim of Marshall & Co., to said wood levied on.

6] 3d. The court instructs the jury that for the purpose of the assignment from Orr to H. Marshall & Co., it must appear from the evidence that such assignees carried out and executed their trust in strict accordance with the provisions of the assignment; otherwise it is *prima facie* evidence of fraud.

7] 4th. The court instructs the jury that in order to render an assignment to preferred creditors valid, there must be a substantial compliance with the trust as stipulated.

7] 5th. The court instructs the jury that an assignment for the benefit of preferred creditors must disclose specifically who said preferred creditors are, that, unless such disclosure is made, it is fraudulent as to other creditors and consequently void.

6th. If they believe, from the evidence, that said assignment is fraudulent, they will find for the defendants.

The court also gave the following instructions on behalf of plaintiffs.

1st. The only question for the jury to determine is whether the property claimed by the plaintiffs is their property or not.

2nd. If the property was assigned for a particular purpose, in good faith, such assignment is valid, and will be good against any levy of execution made subsequent to the assignment, unless it is proven that the property was fraudulently assigned.

3d. If, by the terms of the assignment, the assignees were authorized to dispose of the property in the manner best calculated to realize the best price, it devolves upon the defendants to show that the manner it was disposed of was prejudicial to creditors.

8] 4th. Debtors have a right to prefer their creditors in making an assignment of property and such assignment will be valid unless tainted by fraud.

5th. The wood having been levied on, the assignees were excused from disposing of the wood until the trial of the right of property was disposed of.

6th. If the property is assigned for the payment of debts, and the property assigned has been disposed of, the assignee cannot be called on to account for the proceeds of the sale of the property in this suit; another and different remedy is given to creditors.

8th. The court instructs the jury that the law permits W. H. Orr to make an assignment of his property for the benefit of his creditors and if fairly made to H. Marshall & Co., it passes the title to such property to them.

9th. That an assignment in good faith of personal property, the title rests and becomes complete against creditors and subsequent purchasers by a delivery to the assignee. Possession of chattels is notice *prima facie* and evidence of title.

10th. Fraud is not to be presumed, but must be proven by the party alleging it. The law presumes that good faith controlled the transaction by H. Marshall & Co., unless the contrary appears from the evidence in the cause.

11th. The court instructs the jury that if they find, from the evidence, that the assignment from W. H. Orr to H. Marshall & Co., was fairly made and not shown to be fraudulent as to creditors, then neither mismanagement nor fraudulent disposition of the property, under the assignment by H. Marshall & Co., will effect the instrument or the title of H. Marshall & Co.

Verdict for the defendants, and motions for a new trial overruled, and judgment on verdict and plaintiffs excepted.

Errors—1. The court erred in giving the instructions for the Def't.

2 The court erred in overruling the Plff's motion for a new trial.

J. G. BOWMAN,

For Appellants.

BRIEF OF APPELLANT.

The 1st instruction given by the Court for the appellees is erroneous, so far as it authorizes the jury to infer that the assignment was fraudulent.

The 2d, 3d and 4th instructions are also wrong. The Court in *Wilson vs. Pierson, assignee*, 20 Ill. 81, recognizes the following instruction in that case as the law: "If an assignment is bona fide, and not shown to be fraudulent, then neither mismanagement nor fraudulent disposition of the property under an assignment, by an assignee, can effect the instrument or his title under it; they may be grounds for his removal by a Court of Equity, but cannot be inquired into in an action at common law, to try his title to the property assigned." The omission of the assignee to execute his trust affords no evidence that the assignment was made in bad faith, nor does it lie in the mouth of the defendants to urge that the assignee failed to execute the trust when he was prevented, by the act of the defendant, who seized the property assigned with an execution.

J. G. BOWMAN,

For Appellants.

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H. Marshall et al

v.

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Abstract, and
Briefs Appellants.

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J. D. BOWMAN

For Appellants

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Filed Nov. 13. 1862.

N. Schuster *clerk*

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3] to secure, 1st, the appellants in the payment of a debt of \$650 due them from the said Orr. 2nd. Sundry other persons mentioned in schedule to said deed in their debts, pro rata; the property to be disposed of or converted into money in the manner best calculated to realize the greatest sum in the shortest time.

3] Notice of Appellants and execution of Appellees:

William Baird, for Appellants, testified that he saw and witnessed the assignment by request of the parties, on the day it was executed. That he assisted to measure the wood, about 200 cords, and was all the wood Orr had, and was delivered to appellants, who, for the next four or five days used some of the wood to run the mill and make the rye, corn and mush into whisky.— That wood was worth \$1,00 per cord. Twenty or thirty hogs weighing from eighty to one hundred pounds, worth two cents and a half per lb. Whisky worth \$7,00 per barrel. About twenty cords of wood burnt in making the whisky before the levy, of the executions.

4] Warren May testified that he took possession of the property mentioned in the assignment for the appellants, on the day the assignment was made; that there was 103 cords of wood; that he run the mill four or five days; made the rye, corn and mush into whisky; 43 barrels, about 40 gallons to the barrel; shipped to Cincinnati and sold at 13 cts., per gallon, freight \$1,00 per barrel; hogs would weigh from eighty to one hundred lbs., and were sold by appellants; burned about twenty cords of wood, balance still on hand, also wagon, scoops worth \$2,00; two log chains worth \$2,00; 100 sacks worth 25 cts., each.

5] Evans for appellees testified in relation to hogs same as Warren May did. And this was all the evidence in the cause.

6] The court then instructed the jury on behalf of appellees. 1st. Parties to whom such assignments are made are required under the law to proceed without delay to close up the business in which the debtor may have been

engaged, and not continue to carry on or operate the same beyond what may be necessary to prevent waste. Such assignees are also required, in a reasonable time, to make sale on the best possible terms and apply the products of such sale in accordance with such assignment. The jury also have a right to infer that such assignment is fraudulent.

6] 2d. If the jury believe, from the evidence, that before the assignment was made from Orr to H. Marshall & Co., that Orr owned the wood, and that possession was only surrendered to the assignees for the purposes stipulated in the written assignment, and that the assignees have failed to apply the property as directed in said assignment, or have failed, in a reasonable time, to sell and account for the same to Orr's creditors, as stipulated in the assignment, the jury have a right to believe the same to be fraudulent, and in such case may find against the claim of Marshall & Co., to said wood levied on.

6] 3d. The court instructs the jury that for the purpose of the assignment from Orr to H. Marshall & Co., it must appear from the evidence that such assignees carried out and executed their trust in strict accordance with the provisions of the assignment; otherwise it is *prima facie* evidence of fraud.

7] 4th. The court instructs the jury that in order to render an assignment to preferred creditors valid, there must be a substantial compliance with the trust as stipulated.

7] 5th. The court instructs the jury that an assignment for the benefit of preferred creditors must disclose specifically who said preferred creditors are, that, unless such disclosure is made, it is fraudulent as to other creditors and consequently void.

6th. If they believe, from the evidence, that said assignment is fraudulent, they will find for the defendants.

The court also gave the following instructions on behalf of plaintiffs.

1st. The only question for the jury to determine is whether the property claimed by the plaintiffs is their property or not.

2nd. If the property was assigned for a particular purpose, in good faith, such assignment is valid, and will be good against any levy of execution made subsequent to the assignment, unless it is proven that the property was fraudulently assigned.

3d. If, by the terms of the assignment, the assignees were authorized to dispose of the property in the manner best calculated to realize the best price, it devolves upon the defendants to show that the manner it was disposed of was prejudicial to creditors.

8] 4th. Debtors have a right to prefer their creditors in making an assignment of property and such assignment will be valid unless tainted by fraud.

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8th. The court instructs the jury that the law permits W. H. Orr to make an assignment of his property for the benefit of his creditors and if fairly made to H. Marshall & Co., it passes the title to such property to them.

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J. G. BOWMAN,

For Appellants.

No 41

Marshall Ho

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Trustee et al

Appeal from

Richmond

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