United States Vs. Hooe

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Decided On : 1805

Appeal No. : 7 U.S. 73

Appellant : United States

Respondent : Hooe

Judgement :

United States v. Hooe - 7 U.S. 73 (1805)
U.S. Supreme Court United States v. Hooe, 7 U.S. 3 Cranch 73 73 (1805)

United States v. Hooe

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ERROR TO THE CIRCUIT COURT OF THE COUNTY

OF ALEXANDRIA IN THE DISTRICT OF COLUMBIA

SYLLABUS

The United States has no lien on the real estate of its debtor until suit brought or a notorious insolvency or bankruptcy has taken place, or, being unable to pay all his debts, he has made a voluntary assignment of all his property, or, the debtor

having absconded, concealed, or absented himself, his property has been attached by process of law.

A mortgage of part of his property, made by a collector of the revenue to his surety in his official bond to indemnify him from his responsibility as surety on the bond and also to secure him from his existing and future endorsements for the mortgagor at bank, is valid against the United States, although it appears subsequently that the collector was unable to pay all his debts at the time the mortgage was given and although it was known to the mortgagee at the time he took the mortgage that the mortgagor was, as collector, largely indebted to the United States.

Mason, attorney of the United States for that district, on 17 August, 1801, filed a bill in equity against Robert T. Hooe, W. Herbert, John C. Herbert, and the executors, widow, and heirs of Col. John Fitzgerald, late collector of the customs for the port of Alexandria, and obtained an injunction to prevent the sale of certain real

estate in Alexandria, advertised for sale by W. and J. C. Herbert under a deed of trust made by Fitzgerald for the indemnification of Hooe.

The material facts appearing upon the record are that Fitzgerald, upon being appointed collector, executed a bond to the United States on April, 1794, with Hooe as surety in the penalty of $10,000 for the faithful performance of the duties of his office. In April, 1798, he was found to be greatly in arrears, and upon a final adjustment of his accounts on 15 August, 1799, the balance against him was $57,157. On 16 January, 1799, Hooe having knowledge that Fitzgerald was largely indebted to the United States but believing that he had sufficient property to discharge the debt, and Fitzgerald being desirous of borrowing money from the Bank of Alexandria to meet the drafts of the Treasury of the United States and for other purposes, made a deed of trust to W. and J. C. Herbert, reciting that Hooe had become surety for Fitzgerald in the bond to the United States, and Fitzgerald

proposing, when he should wish to obtain a loan of money from the Bank of Alexandria, to draw notes to be endorsed by Hooe, whereby the latter might be liable and compelled to pay the same, and the former being desirous of securing and indemnifying Hooe from all damages, costs, and charges which he might at any time thereafter be subject and liable to by reason of any misconduct of Fitzgerald in the discharge of his duty as collector, or for or on account of any notes drawn by him for his particular use and accommodation and endorsed by Hooe and negotiated at the Bank of Alexandria. The indenture then witnessed that for those purposes, and in consideration of the trusts and confidences therein after expressed, &c.;, and of one dollar, &c.;, Fitzgerald bargained and sold, &c.;, to the trustees, W. and J. C. Herbert, the real estate therein described, to have and to hold the same to them and the survivor of them, &c.;,

"in trust to and for the uses and purposes herein after mentioned, and to and for no other use and purpose whatsoever -- that is to say in case he the said John Fitzgerald shall neglect any part of his duty as collector of the said port of Alexandria . . . or in case any note or notes so drawn, endorsed and negotiated at the Bank of Alexandria, for the particular use

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and accommodation of him, the said John Fitzgerald, shall not be taken up and discharged by him when the same shall become payable; that in either case, as soon as any demand shall be made upon him, the said R. T. Hooe . . . for the payment of any sum or sums of money which ought to be paid by the said John Fitzgerald, . . ."

then the trustees should, upon notice given them by Hooe of such demand, proceed to sell the property for ready money, and after paying the expenses of sale, should pay and satisfy the sum or sums of money so demanded of Hooe, either as security for Fitzgerald's due and faithful execution of the office of collector of the said port of Alexandria, or as endorser of any note or notes so drawn by Fitzgerald, "and negotiated at the Bank of Alexandria for the particular accommodation of the said John Fitzgerald," and lastly to pay over to him the

surplus. And in further trust that if Fitzgerald should duly keep Hooe indemnified, &c.;, and should duly pay the several notes which should be so drawn by him and endorsed by Hooe, and negotiated at the said bank, "for the particular accommodation of him, the said John Fitzgerald, as the same shall become payable," then the trustees should reconvey, &c.;

Hooe had endorsed Fitzgerald's notes at the bank to a large amount, and at the time of his death there were unpaid two notes of $1,000 each and one of $1,800, one of which for $1,000, together with interest upon the whole, amounting to $288.94, was afterwards paid by Mr. Keith, one of the executors, in order to prevent a sale of the property under the trust. There was also evidence tending to show that the money borrowed from the bank upon Hooe's endorsement was applied in discharge of warrants drawn by the Treasury upon Fitzgerald.

Fitzgerald died in December, 1799, having by his will directed his real estate to be sold for the payment of his debts. There was no positive evidence of his insolvency.

The bill charged that he died insolvent and that the United States had a right, in preference to all others, to apply his property to the discharge of the debt, and if there should be a deficiency, to resort to the surety for the balance as far as the penalty of the bond would justify,

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and that the deed of trust was fraudulent as to the United States.

On 1 May, 1802, the injunction was dissolved by consent, and an interlocutory decree entered ordering the trustees to pay the proceeds of the sale into court, subject to future order touching the contending claims of the United States and Hooe.

At November term, 1802, the court passed the following decree:

"The objects of the bill filed in this cause were to set aside a deed executed on 16 January, 1799, by John Fitzgerald to William Herbert and John Carlyle Herbert,

conveying certain property therein mentioned, in trust, for the purpose of indemnifying Robert Townsend Hooe as endorser of certain notes negotiable in the Bank of Alexandria, and as surety of John Fitzgerald in his office of collector of the port of Alexandria; to oblige the said trustees to account with the United States for the said real property, and to compel the executors to account for the personal estate of the said John Fitzgerald, and to pay the same to the United States towards the discharge of the balance due from him, and further to restrain and enjoin the said trustees from making sale of the said real property."

An injunction for the said purpose was granted by one of the judges of this Court, in vacation, and afterwards, *viz.,* at April term, 1802, after the appearance of the defendants, who were of full age, an agreement was made, and entered on the records and proceedings of this Court, to the following effect, *viz.,* that so much of the former order of this Court as restrained the defendants, W. Herbert and John C. Herbert, from selling the property in the deed of trust, in the bill mentioned, be discharged, and it was further decreed and ordered, that the said trustees should pay the proceeds arising from the sale of the said property, or of any part thereof, into this Court, subject to the future order of the court, touching the contending claims of the United States, and of R. T. Hooe, one of the defendants to the said bill, and now, at November term, 1802, the said cause came

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on by consent of parties, and by order of the court, on the bill, and on the answers of the defendants, (those of the infants being taken by their guardians, appointed for that purpose) and on the exhibits in the said bill and answers referred to, and on those afterwards admitted, and the arguments of counsel being heard in the said cause, and the same being by the court fully considered; it is the opinion of the Court that the deed of trust, in the said bill mentioned was made *bona fide,* and for a valuable consideration, and was fairly executed by the said John Fitzgerald, to indemnify, and save harmless, the said R. T. Hooe, from all loss and damage, by reason of his endorsement of several notes, negotiated at the Bank of Alexandria, amounting to the sum of $3,800, to enable the said John Fitzgerald to

pay that sum to the United States, which appears to have been paid accordingly, and also to indemnify and save harmless, the said R. T. Hooe, against all loss and damage by reason of his having become bound in a bond, in the penalty of $10,000, payable to the United States, as security for the said John Fitzgerald's faithful performance and due discharge of the office of collector of the customs, in the District of Alexandria. That there does not appear to have been any fraud in the said parties, or either of them, and that the said deed is not invalidated by any law of the United States.

It is thereupon by this Court decreed and ordered that the bill in this cause as to all the defendants except R. T. Hooe, W. Herbert, and J. C. Herbert, be retained for the further order and decree of this Court, and that as to the said defendants, R. T. Hooe, W. Herbert, and J. C. Herbert, the said bill be dismissed with costs to the said defendants. And as to the money which has arisen from the sale of the said real property, the net amount of which is $14,318.66, after deducting the charges of the sale, and which has been, by the order of this Court, deposited by the clerk thereof in the Bank of Alexandria, this Court doth decree and order that the said clerk do pay the sum of $4,318.66, part thereof, to the said trustees, W. Herbert and J. C. Herbert, to be by them applied to the discharge

of the sum of $3,127 due upon certain notes negotiated in the Bank of Alexandria on which the said R. T. Hooe was an endorser for the said John Fitzgerald, and also to the repayment to the executors of the said John Fitzgerald of the sum of $1,185 advanced and paid by them to the Bank of Alexandria for and on behalf of the said R. T. Hooe, in part payment of the notes negotiated in the said bank, for the said John Fitzgerald, and endorsed by the said R. T. Hooe, which it was intended the said R. T. Hooe should be indemnified against by the said deed, and the residue, if any there should be, of the said sum of $4,318.66 to be paid by the said clerk into the Treasury of the United States in discharge of so much of the balance due from the estate of the said John Fitzgerald, and that as to the residue of the proceeds of the said sale, being the sum of $10,000, the said clerk do pay the same into the Treasury of the United States expressly in discharge of the said

sum of $10,000 for which the said R. T. Hooe is bound in the bond, which, in the said bill and answers is referred to, and to go also in discharge of so much of the claim of the United States against the said John Fitzgerald, and the same is decreed and ordered accordingly.

To reverse this decree, a writ of error issued returnable to February term, 1803, which was dismissed for want of a statement of the facts upon which the decree was founded.

The November term, 1802, of the circuit court, at which the original decree was entered, being continued by adjournment to April, 1803, Mason, after the dismission of the writ of error, moved the court below to make a statement of the facts upon which the decree was founded, to be sent up with a new writ of error, and urged that as it was in contemplation of law the same term in which the decree was made, it was competent for the court to open it for that purpose. But the court, being of opinion that by the writ of error the record was completely removed

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and the decree thereby made absolute, refused to make the statement.

A new writ of error was sued out by the United States returnable to February term, 1804.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The first point made in this case by the attorney for the United States is that the deed of 16 January, 1799, is fraudulent as to creditors generally.

It is not alleged that the consideration was feigned or that there was any secret trust between the parties. The transaction is admitted to have been, in truth, what it purports to be, but it is contended that the deed on its face is fraudulent as to

creditors.

The deed is made to save Hooe harmless on account of his having become the security of Fitzgerald to the United States and on account of notes to be endorsed by Hooe for the accommodation of Fitzgerald in the Bank of Alexandria.

These are purposes for which it is supposed this deed of trust could not lawfully have been executed, and the deed has been pronounced fraudulent under the statute of 13th of Elizabeth.

That statute contains a proviso that it shall not extend to conveyances made upon good consideration and *bona*

fide. The goodness of the consideration in the case at bar has been admitted, but it is alleged that the conveyance is not *bona fide,* and for this, *Twyne's Case* has been principally relied on. But in that case the intent was believed by the court to be fraudulent, and in this case it is admitted not to have been fraudulent. It is contended that all the circumstances from which fraud was inferred in that case are to be found in this, but the Court can find between them no trait of similitude. In that case, the deed was of all the property; was secret; was of chattels, and purported to be absolute, yet the vendor remained in possession of them, and exercised marks of ownership over them. In this case, the deed is of part of the property, is of record, is of lands, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor. In the case of *Hamilton v. Russel,* 5 U. S. 309 , this Court declared an absolute bill of sale of a personal chattel of which the vendor retained the possession to be a fraud. But the difference is a marked one, between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor until the creditor becomes entitled to his money and either chooses, or is compelled to exert his right. That the grantor is to

receive the rents and profits till the grantee shall become entitled to demand the money which the deed is intended to secure is a usual covenant.

That the property stood bound for future advances is in itself unexceptionable. It may indeed be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted to mortgage property to his creditor as a security for debts to be contracted as well as for that which is already due. All the covenants in this deed appear to the court to be fair, legitimate, and consistent with common usage. It will barely be observed that the validity of this conveyance is to be tested by the statutes of Virginia which embrace this subject. But this is not mentioned as having any influence in this case.

The second point for which the plaintiffs contend is that this is a case in which the priority of payment claimed by the United States in cases of insolvency intervenes and avoids the deed.

This claim is opposed on two grounds. It is contended,

1st. That at the time of making this deed, Fitzgerald was not insolvent in point of fact; and,

2d. That this deed was not a transaction which evidences insolvency under the act of Congress.

In construing the statutes on this subject it has been stated by the Court on great deliberation that the priority to which the United States is entitled, does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected.

In the case at bar it will be observed on the first objection made by the defendants that the insolvency which is the foundation of the claim must certainly be proved by the United States. I t must appear that at the time of making the conveyance,

Fitzgerald was "a debtor not having sufficient property to pay all his debts." The abstract from the books of the Treasury is undoubtedly complete evidence as far as it goes, but it is not intended to show the state of Fitzgerald's accounts in January, 1799. If that had been its object, it would have credited him for the bonds then reported to be on hand. If the case turned entirely on this point, the Court would probably send it back for further explanation respecting it. But this would be unnecessary, as it is the opinion of the Court that the decree is right, however this fact may stand.

If a debtor of the United States who makes a *bona fide* conveyance of part of his property for the security of a creditor is within the act which gives a preference to the government, then would that preference be in the nature of a lien from the instant he became indebted, the inconvenience of which, where the debtor continued to transact business with the world, would certainly be very great.

The words of the act extend the meaning of the word "insolvency" to cases where "a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors." The word "property" is unquestionably all the property which the debtor possesses, and the word "thereof" refers to the word "property" as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words "or part thereof" or others of similar import would have been added.

If a trivial portion of an estate should be left out for the purpose of evading the act, it would be considered as a fraud upon the law and the parties would not be enabled to avail themselves of such a contrivance. But where a *bona fide* conveyance of part is made not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act.

It is observable that the term "insolvency" was originally used, and the subsequent sentence is designed to explain the meaning and intent of the term. The whole

explanation relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense.

It is the opinion of the Court that there is no error in the decree of the circuit court, and that it be

Affirmed.

After the opinion was given, it was stated, that the court below had decreed the United States to pay costs, and it was suggested that that circumstance might have escaped the notice of this Court in affirming the decree generally.

Mason observed that costs were only given by statute, and that the United States is not bound by a statute unless it is expressly named in it. That there was no means of compelling the United States to pay them.

MR. CHIEF JUSTICE MARSHALL. That would make no difference, because we are to presume they would pay them if bound by law so to do.