Tompkins Vs. Wheeler

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Appellant : Tompkins

Respondent : Wheeler

Judgement :

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Tompkins v. Wheeler

41 U.S. (16 Pet.) 106

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FROM THE DISTRICT OF KENTUCKY

SYLLABUS

A bill to set aside a deed of assignment, made by an insolvent debtor for the purpose of securing the payment of his debts to certain enumerated creditors, to the exclusion of the complainant, also a creditor of the assignor, and of others.

A debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer, and he may elect the time when it is to be done so as to make it effectual, and such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of fraudulent intention.

The case of *Marbury v. Brooks,* 7 Wheat. 556, and 24 U. S. 11 Wheat. 78 cited.

When a deed of assignment is absolute upon its face, without any condition whatever attached to it, and is for the benefit of the grantees, the presumption of law is that the grantees accepted the deed.

The delivery of a deed of assignment for the benefit of creditors to the clerk to be recorded may be considered as a delivery to a stranger for the use of the creditors, there being no condition annexed to the assignment making it an escrow.

After the assignment, the creditors for whose benefit the same was made neglected to appoint an agent or trustee to execute it, and the property assigned remained in the hands of the assignor. The property consisted principally of chosen in action, which the assignor went on to collect, and divided the proceeds among the creditors under the assignment. No one of the creditors was dissatisfied, and at any time the creditors could have taken the property out of the hands of the assignor. *Held* that leaving the property in the hands of the assignor under these circumstances, did not affect the assignment or give a right to a creditor not preferred by it to set it aside.

In the circuit Court of Kentucky a bill was filed on the equity side of the court for the purpose of setting aside a deed of assignment or mortgage made by Leonard Wheeler for the purpose of securing certain of his creditors in preference to the complainant, who was also a creditor.

At the November term, 1837, of the circuit court, the complainants had obtained certain judgments against the defendant Wheeler, and on the application of the defendant it was agreed that no executions should be issued upon those

judgments until February, 1838. The debt on which the judgments had been

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obtained amounted to $12,000, which had been purchased by the plaintiffs for $1,000, the defendant having failed in 1814 and this being one of the debts due by him at the time of his failure. He afterwards entered into business in Kentucky, contracted a large amount of debts, and obtained some property.

Five days before the time when the complainant had a right to issue execution on the judgments, Leonard Wheeler executed a general assignment or mortgage of all his property. The assignment provided for the payment, in the first place, of all his debts contracted since his failure in 1814, giving to them a priority or preference, "as all his means and effects had been accumulated by the credit given to him in Kentucky, the same being divided into two classes." It provided that among his old debts out of the surplus of his estate which was expected to remain after the first and second class of preferred debts had been satisfied certain debts due by him in 1814, the judgments in favor of the plaintiffs not being among them, should be paid, and not believing the effects assigned would extend beyond the payment of these debts, no others were designated. The assignment then proceeded to assign and transfer all the property and effects to the creditors of the first and second class in trust to pay the debts according to the preference and classification in the same, giving to the said creditors, or a majority of them, power to nominate and appoint an agent, attorney, or trustee to carry the purposes of the instrument into full effect.

On 15 February 1838, writs of *fieri facias* were issued on the judgments, which were returned by the marshal " *nulla bona.* " The appellant filed a bill in the circuit court praying that the deed of assignment executed by Wheeler should be decreed fraudulent and void as it regarded the complainant. The bill also alleged acts done by the defendant, Wheeler, for the concealment of property, and also the nominal creation or increase of debts which were included in the preferences made by the assignment, and other acts of fraudulent collusion, and also, it alleged, that the property assigned had been left in the hands of the assignor, and the creditors had

never appointed an agent or trustee, who had taken charge or direction of the property assigned. In the

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opinion of the Court, delivered by MR. JUSTICE THOMPSON, other facts are stated which were taken notice of by the Court. The circuit court made a decree dismissing the bill, and the complainants prosecuted this appeal.

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THOMPSON, JUSTICE, delivered the opinion of the Court.

The bill filed in the court below was for the purpose of setting aside a certain deed of assignment made and executed by the defendant, Wheeler, for the purpose of securing to certain enumerated creditors the avails of his property to the exclusion of the complainant, and that the complainant may be decreed to have satisfaction of his judgments set out in the bill out of the property conveyed by the deed.

The bill sets out, that at the November term of the Circuit Court of the United States in Kentucky in the year 1837, the complainant recovered two judgments against Leonard Wheeler, one for the sum of $4,000, with interest, from 21 February 1814, and the other for $891.53, with interest for the same time, upon which judgments executions were not to issue until 1 February 1838, at which time executions were duly issued and put into the hands of the marshal of the district to be executed, upon which the marshal returned that he found no property of which to make the money on the executions. The bill further states that on 27 January 1838, the said Leonard Wheeler, by deed of trust or assignment, made a conveyance to certain of his preferred and specified creditors (of

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which the complainant was not one) of certain property therein specified, to pay and discharge certain specified debts, which deed was duly acknowledged and recorded in the proper county, and the bill charges generally that this deed is

fraudulent and void. It particularly charges that the deed was made without the knowledge, privity or assent of the creditors named therein, and who are the parties to whom the deed is given; that the deed was never delivered to nor accepted by the grantees; that it was made with intent to deceive and defraud his just creditors, who were not included in its provisions; that the possession of the property conveyed by said deed was retained by the said Wheeler, and never delivered to the parties of the second part or any one of them; that the deed was lodged in the clerk's office for record after the rendition of the complainant's judgments and but a short time before he was authorized to issue execution upon his judgments. It further charges that the sale of the goods to Joseph Putnam, one of the creditors named in the deed of trust, was fraudulent and without any valuable consideration, and that the business was afterwards conducted in the name of the said Putnam, but for the use, in whole or in part, of the said Wheeler. It further charges that Joseph Swift, another defendant, has for several years past been employed in carrying on the grocery business, in which the said Wheeler was interested, and that the said Swift is now in possession of goods or money or other property belonging to the said Wheeler, or is indebted to him for the same. It also charges that Norman Porter, another of the preferred creditors, had money in his hands belonging to the said Wheeler, and to be used for his benefit, and that the note mentioned in the said deed of $3,170 was purchased by said Porter for Wheeler's benefit and with his money. The bill likewise prays that Abel Wheeler, one of the preferred creditors, may answer and state particularly whether he has at any time lent and advanced to Wheeler money or other property and whether he now holds any note or memorandum or other evidence of debt against him. The bill prays that the said Leonard Wheeler and the above-mentioned

preferred creditors may answer specially and particularly to the several interrogatories put in the bill, in reference to the transactions between them severally and respectively.

The several answers of Leonard Wheeler, Porter Putnam, Swift and Abel Wheeler, contain a full and explicit of all the charges contained in the bill tending in the least

manner to sustain the allegations of fraud or collusion or any secret or unfair transactions between them or either of them with Leonard Wheeler. And there is no proof offered to sustain these allegations; they may therefore be dismissed as wholly unsupported.

The bill calls upon the said Leonard Wheeler to state how and to whom he delivered the deed of trust, in answer to which he states that every creditor provided for by the deed was a real and *bona fide* creditor. That he consulted with a number of his creditors, naming them, before making the deed, all of whom approved of it, and that he knows of none who disapproved of it or rejected the benefit of its provisions, and some of them have accepted of it in writing, which appears by the exhibits annexed to the answer. That being satisfied with the propriety of the measure, he made and executed the deed and left it in the proper office to be recorded for the use of his creditors. He admits that the funds mentioned in the deed of trust remained in his possession, and that the creditors have never availed themselves of the privilege of appointing a trustee, having confidence, as he presumes, in the correctness of his management of the business. And he further states that he has gone on in collecting the choses in action and paying over the proceeds to the creditors according to the provisions of the deed of trust. The answer of Wheeler with respect to the delivery of the deed and the possession and management of the funds is corroborated by the answers of a number of the creditors who are made parties and called upon to answer on these points. They say that they were consulted before the deed was executed, and approved of it then and accepted it when made. That no trustee has been appointed, because they had full confidence in Wheeler and desired him to continue in the management of the business.

There are several amended bills, with the answers thereto,

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bringing up some new matters, but not of sufficient importance to require any special notice. The above statement of the bill and answers presents all the material questions which arise upon the merits of this case. It is deemed

unnecessary to notice the objections made to the jurisdiction of the court below either on the ground that Elisha I. Winter, the real party in interest, should have been made the party complainant in this suit or that there is a want of proper parties, defendants, to enable the court to make a decree upon the merits. The conclusion to which we have arrived supersedes the necessity of considering these questions.

Although the right and power of a debtor to give a preference to some of his *bona fide* creditors to the exclusion of other has not been denied on the part of the complainant, yet it has been urged in argument that such preferred creditors are no favorites in a court of chancery, where, it is said, equality is equity, and that a court of chancery will look narrowly into all the circumstances, and if it be found that the deed is tainted in the smallest degree with fraud, it will be declared void. And it has been insisted that in the present case there are strong circumstances to show that in making this deed of trust, the defendant Wheeler did not act in good faith towards the complainant. That he obtained from him an agreement to postpone issuing executions upon his judgments until after the first of February, and that a few days before that time, he made the assignment in question, so as to put all his property out of the reach of the executions, and that this was in bad faith, which ought not to receive the sanction of a court of equity.

It may be observed in the first place that there is no evidence of any deception practiced by Wheeler to lull him to sleep or procure any delay in issuing executions on the judgments. It was done in the ordinary course in judicial proceedings. And if the principle be sound that a debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer, he may certainly elect the time when it is to be done, so as to make it effectual. And such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of a fraudulent intention. But the circumstances of the present case are such as not only to remove all ground for any charge of fraud,

but even of injustice or unfairness in the conduct of Wheeler. Although it may be admitted that John Tompkins is properly made complainant, yet it is manifest from the record that he is a mere nominal party and that Elisha I. Winter is the real party in interest. This is shown by the answer of Wheeler and proved by the testimony of William Fellows, who swears that in the latter part of 1836 or the beginning of 1837, Winter, through his agent, applied to him to purchase the claim of Tompkins, which had been sent to him for collection. That he offered $1,000 for it, which was not at that time accepted. That in the summer of 1837, Winter himself made the same offer which his agent had made, and again in the fall of 1837 he renewed the offer of $1,000 and expressed his opinion of Wheeler's condition when, with the opinion of some others, who he supposed knew Wheeler's circumstances, he in the month of October 1837 sold the claim to Winter for $1,000, believing that he was purchasing it for the benefit of Wheeler. That a few days after the sale, he received a written request from Winter not to let it be known that he had the control over the claim.

Thus we see great anxiety in Winter to purchase a claim against a man embarrassed and in failing circumstances, and the consideration paid for it shows that the claim must have been considered almost desperate. Only $1,000 given for a claim which, by the judgments stated in the complainant's bill, including interest, amounted to between $11,000 and $12,000. These circumstances, independent of the statements in Wheeler's answer, are calculated to cast some suspicion upon the conduct of Winter and to justify the inquiry whether he comes into court with clean hands and can justly reproach Wheeler with bad faith and unfairness towards him. Wheeler's circumstances were extremely embarrassed, if not desperate, and he found impending over him two judgments amounting to nearly $12,000 in the hands and under the control of Winter, who he had certainly no reason to believe was friendly to him, and which judgments, if they could have been enforced to their full amount, would have swallowed up a great proportion of his property. Was he not, under such circumstances, authorized by every principle of justice and honesty to secure, so far forth as he could, his *bona*

fide creditors? That the debts of all the creditors preferred in the deed of trust are *bona fide* debts is fully established not only by the proofs, but is admitted on the record by an agreement which, among other things, states "that the genuineness of the debts provided for in Wheeler's assignment will not be contested or called in question on the argument."

That a debtor has a legal right to prefer one or more of his creditors over others when the transaction is *bona fide* is not an open question in this Court. That point was settled in the case of *Marbury v. Brooks,* which came twice before the Court under circumstances somewhat different, and is reported in 20 U. S. 7 Wheat. 556 and in 24 U. S. 11 Wheat. 78. That this assignment was a *bona fide* transaction between Wheeler and his preferred creditors is clearly established by the proofs. Every allegation in the bill suggesting fraud or collusion is fully met and denied by the several answers and is wholly unsupported by any proofs.

But several objections have been taken to the legal effect and operation of this deed on other grounds that that of fraud. That it was made by Wheeler without the knowledge or consent of the creditors therein named; that it was never delivered to nor accepted by the creditors; that possession of the fund was retained by Wheeler, and no trustee appointed according to the provisions of the deed.

Some of these objections are not founded in fact. It is true that it does not appear that all the creditors had any knowledge of the deed before it was executed. But it does appear from the answer of a number of the creditors named in the deed that they were advised of the necessity of Wheeler's securing them, and informed of his intention to secure them, before the deed was executed, and approved of it, and accepted the benefits of its provisions, and since that time have been paid their debts in full. And there is no evidence that anyone dissented. F. S. Fuller says he was never consulted with about making the deed or informed of it before its execution, and that he has never accepted of its provisions. But he does not say that he has ever refused to accept of the provisions in his favor, and he may not, therefore, have precluded himself from still accepting. This deed is absolute upon its face, without any condition whatever attached to it, and being for the benefit of the grantees, the presumption

of law is, in the absence of all evidence to the contrary, that the grantees accepted the deed. In the case of *Marbury v. Brooks* it is said by the Court that an assignment for the benefit of preferred creditors is valid although their assent is not given at the time of its execution if they subsequently accept in terms or by actually receiving the benefit of it. Deeds of trust, said the Court, 24 U. S. 11 Wheat. 96, are often made for the benefit of persons who are absent, and even for persons who are not in being, whether they are for the payment of money or for any other purpose, and no expression of the assent of the persons for whose benefit they are made has been required, as preliminary to the vesting of the legal estate in the trustee; such trusts has always been executed on the idea that the deed was complete when executed by the parties to it. The omission of creditors to assent to the deed or to claim under it may, under suspicious circumstances, afford some evidence of fraud. But real *bona fide* creditors are rarely unwilling to receive their debts from any hand that will pay them.

It is not true that the deed remained in the possession of Wheeler; it was sent to the clerk's office to be recorded. It was, of course, placed in the hands of the clerk to be recorded for the uses and purposes expressed in the deed, and of course for the benefit of the creditors named in it. It was put out of the possession and control of the grantor. The grantees in the deed are numerous, and all could not have the actual possession of it. It is laid down in Sheppard's Touchstone 58 that if a deed be delivered to a stranger for the use of the grantee without any condition annexed making it an escrow, it is a delivery to the grantee. The delivery to the clerk to be recorded may well be considered as falling within this rule. This principle is fully recognized in the case of *Garnons v. Knight,* 5 Barn. & Cres. 471, that a delivery of a deed to a third person for the use of the party in whose favor it is made, where the grantor parts with all control over the deed, is effectual and operates from the instant of such delivery.

If the fund had remained in the possession of Wheeler for his own benefit, it might have cast a suspicion upon the fairness of the transaction; but there is no proof of any such object or design, nor of any fact from which an inference of *mala fides*

can be drawn, but on the contrary the object of his continuing in the possession of the property is satisfactorily accounted for by the

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circumstances of the case. It consisted principally of unsettled accounts and choses in action which he was much more competent to settle than a stranger could have been. It was therefore for the benefit of the creditors that he continued to settle up these accounts and pay over the money to his creditors, as the proofs show that he did. This was by the express consent of some of the creditors and the presumed consent of all, as no dissent or complaint appears to have been made by any, and no one had any right to complain but the parties who were to receive the benefit of the assignment. This possession was held at the will and pleasure of the creditors, which they could have withdrawn at any time if dissatisfied with the management of Wheeler, and this was a substantial compliance with that part of the assignment which relates to the appointment of an agent or trustee for the purpose of executing and fulfilling the trusts and purposes of the assignment. The creditors were, of course, to be the judges of the fitness and competency of such agent or trustee, and they were the only parties interested in the faithful discharge of his duties. No formal appointment was necessary; an express or implied assent of the creditors to Wheeler's acting as agent or trustee, was all that could be required according to the fair interpretation of the assignment.

We are accordingly of opinion that the decree of the circuit court dismissing the bill without prejudice be affirmed.

Decree affirmed.