

Merillat Vs. Hensey

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Court : US Supreme Court

Decided On : May-15-1911

Appeal No. : 221 U.S. 333

Appellant : Merillat

Respondent : Hensey

Judgement :

Merillat v. Hensey - 221 U.S. 333 (1911)

U.S. Supreme Court Merillat v. Hensey, 221 U.S. 333 (1911)

Merillat v. Hensey

No. 107

Argued March 17, 1911

Decided May 15, 1911

221 U.S. 333

APPEAL FROM THE COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA

SYLLABUS

Both courts below having found that no actual fraud was intended in this case, this Court considered only the question of constructive fraud.

Where, as in the District of Columbia, the assignment of a chose in action does not have to be recorded and there is no way in which constructive notice can be given, the assignment, if valid upon its face, is ineffective only in case of actual bad faith established by the facts.

Knowledge of one's own insolvency, except in cases provided by statute, does not render it illegal or criminal to prefer one creditor above another. *Huntley v. Kingman*, [152 U. S. 527](#) .

The fact that the amount alleged to be due on an unliquidated chose in action is greater than the amount of the debt in payment of which it is assigned is not necessarily evidence of fraud against other creditors, and where the amount actually recovered is less than the amount of the debt, this Court will not disturb the finding of both courts below that there was no fraud.

Reservation to the assignor of surplus of a chose in action given in payment of a debt does not of itself constitute fraud in law. To be fraud in law, the reservation must be of some pecuniary benefit to the assignor

Page 221 U. S. 334

at the expense of creditor and a prime purpose of the conveyance. Section 1120, Code of the District of Columbia.

The assignment of a mere chose in action, not subject to legal process and of uncertain value, given to secure an honest debt will not be set aside by this Court as fraudulent in law because the surplus, if any (there actually being a deficit), was reserved to the assignor by a separate instrument, for the recording of which there was no provision, after two courts have held that the assignment was not made with intent to hinder and defraud creditors and as matter of law had no such result.

34 App.D.C. 398 affirmed.

The facts are stated in the opinion.

Page 221 U. S. 339

MR. JUSTICE LURTON delivered the opinion of the Court.

This is a bill filed by a creditor of the defendant Hensey, attacking as fraudulent an assignment by him of a certain cause of action against the defendant the Mercantile Trust Company. The, bill upon final hearing, was dismissed by the trial court, and this judgment was affirmed in the Court of Appeals of the District of Columbia. From that decree an appeal has been perfected to this Court.

The thing assigned was a claim for damage under an indemnity bond made by the Mercantile Trust Company upon which an action was at the time pending. The assignment was in these words:

"Washington, D.C. October 21, 1903 "

"For value received, I hereby sell, assign, transfer, and set over to Frederick Mertens and Park Agnew my cause of action in the above-entitled suit, and all the proceeds which may be derived from the prosecution thereof from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact."

"In witness whereof, I have hereunto set my hand, this twenty-first day of October, 1903."

"(Signed) Melville D. Hensey "

Page 221 U. S. 340

The assignor took from the assignees an agreement to return to him any balance after paying the debt due to the assignees. This defeasance was in these words:

"This agreement, entered into this 21st day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part."

"Whereas, the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company at law No. 44,822, in the Supreme Court of the District of Columbia:"

"Now therefore it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens and Agnew against Melville D. Hensey, and any balance then remaining over to the said Hensey."

"Witness the signatures and seals of the parties, this twenty-first day of October, 1903."

"(Signed) Frederick Mertens"

"Park Agnew"

"Melville D. Hensey"

The assignment was filed with the clerk of the court, and the defeasance was delivered to Messrs. Birney & Woodard, the attorneys conducting the action for Hensey.

In June, 1905, there was judgment for Hensey for \$8,468, which was finally affirmed by this Court some two years later. Thereupon, this bill was filed by the appellants, who are judgment creditors, charging that the assignment of October 21, 1903, was made for the purpose of hindering, delaying, and defrauding creditors. Both the Supreme Court and the Court of Appeals concurred in holding that the appellants had failed to show fraud, actual or constructive, and that the single purpose of the

assignment was to secure the payment of a just indebtedness to the assignees, the defendants Mertens and Agnew. After paying the attorneys' fees and court costs, the surplus is not enough to pay the debt secured in full.

In view, therefore, of the concurrence of both courts in finding that no actual fraud was intended, we shall pass at once to the question of constructive fraud.

Fraud in law is predicated upon the fact that the assignor took from the assignees the agreement above set out, and did not file it with the clerk of the court, as he did the assignment itself.

It has been argued that the assignment was misleading, as not indicating the consideration or purpose, and because not accompanied by the defeasance. But the assignment of a chose in action was not required to be recorded, and there was no way in which constructive notice might be given. The filing with the clerk was, of course, not constructive notice; the obvious purpose being to protect the assignees against the dismissal of the suit by the assignor, or the payment of the proceeds of the suit to him. Indeed, on the day before, the clerk was directed to "enter the case as to the use of Mertens and Agnew."

That the assignment upon its face is valid is clear. If it is ineffective as to the appellants, it must be because of something behind it constituting evidence of bad faith. Are the inferences to be drawn from that evidence consistent with good faith, or do the facts indubitably establish fraud as matter of law? What are the facts from which we are to conclude as matter of law that the purpose was to hinder, delay, or defraud? It is said that the assignment was not absolute, but was a transfer to secure a debt, with a reservation, by an unpublished agreement, of any balance. The honesty of the debt intended to be secured was attacked, but that this was a baseless charge is hardly doubtful, especially after two courts have adjudged the debt just. It is then said that the assignor was

Page 221 U. S. 342

at the time insolvent and intended to prefer the assignees, and that they knew it. This would be effective if bankruptcy, had ensued within four months, and the

trustee had sought to set it aside as a preference, but that, on one side, it is neither immoral nor illegal for a failing debtor to prefer one creditor over another. *Huntley v. Kingman & Co.*, [152 U. S. 527](#) .

But it is said that the value of the claim assigned was far beyond the amount of the debt secured. Here again we find both lower courts disagreeing with this contention.

The thing assigned was of uncertain value. It was an action for damages upon an indemnity bond. The plaintiff made a large claim and doubtless had some of the enthusiasm usual to plaintiffs seeking damages. One jury said he should have \$18,000. The court said it was too much, and set the verdict aside. Another jury said he would be compensated by a little more than \$8,000. The defendant thought this a monstrous sum, and carried the case first to the Court of Appeals of the District and then to this Court before the judgment stuck. The costs, attorneys' fees, and interest upon the debt due the assignees more than consumed the whole, and the only question now is whether the assignees shall get a part of their debt or none.

But it is said that they have agreed to pay back any surplus, if any there should be after paying their debt, and that this is a reservation by the assignor of an interest in the subject assigned, which operates not as a circumstance of fraud, but as that kind of indubitable evidence which makes fraud in law.

Let us look at it. It did not show fraud in fact or law that this assignment was not an absolute sale or transfer of the chose assigned, but a mere security for an honest debt. If the claim came to nothing, the debt was unpaid. If, as proved to be the case, enough was realized to pay a part, the rest is a debt to be paid. But if there should be a

Page 221 U. S. 343

surplus, what then? If nothing had been agreed about the surplus, is there any doubt that the law would have implied a promise to account to the assignor for that surplus? Is it, then, the law that a promise made to do that which, without the

promise, the law would have compelled the assignee to do, constitutes such evidence of fraud as to be fraud in law?

There are some cases which seem to hold that, if one makes a general assignment to secure creditors, and inserts a clause reserving to himself any surplus, that he thereby delays his creditors who might seek that surplus until the trust should be wound up, and therefore comes under the condemnation of the statute against conveyances to hinder, delay, or defraud creditors, however innocent his purpose, or the existence of a surplus. There are New York cases which seem to go so far, and perhaps others. *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffin*, 2 N.Y. 365; *Curtis v. Leavitt*, 15 N.Y. 9, 124; *Collomb v. Caldwell*, 16 N.Y. 486. But the same court, in *Leitch v. Hollister*, 4 N.Y. 211, held that the principle did not apply to assignments in good faith "of a part of a debtor's property to creditors themselves, for the purpose of securing particular demands." "The conveyance," said the New York court,

"whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity. The creditor attaches that interest as the property of the debtor, and is not obliged to postpone action until the determination of any trust. He is

Page 221 U. S. 344

therefore neither delayed, hindered, or defrauded in any legal sense."

That the mere reservation of a balance under an assignment to pay debts, one or many, is enough, as matter of law, to make the transaction void, whether the reservation be in or out of the instrument, has not been generally accepted. *Muchmore v. Budd*, 53 N.J.L. 369, where many cases are cited, among them

being *Rahn v. McElrath*, 6 Watts, 151; *Floyd & Co. v. Smith*, 9 Ohio St. 546; *Ely v. Hair*, 16 B. Monroe 230; *Didier v. Patterson*, 93 Va. 534. In *Huntley v. Kingman Co. supra*, the New York rule is impliedly disapproved. The assignment in that case was of a stock of merchandise to a third person as trustee, to sell and pay a particular debt and "hold the remainder subject to the order of the assignor." The instrument was attacked as fraudulent in law by reason of this reservation, and the trial court instructed the jury to find for the plaintiff on account of this reservation. This Court reversed the judgment, holding the charge erroneous. Mr. Justice Brown, for the Court, after saying that the agreement to account to the assignor for any surplus was no more than the law would have implied, said:

"Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that, in cases of chattel mortgages (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage), the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a reservation, and is no evidence of a fraudulent intent. This was the ruling of the Court of Appeals of New York in *Leitch v. Hollister*, 4 N.Y. 211, 216, where the assignment was to the creditors themselves for the purpose of securing their demands. 'A trust,' said the court,"

"as to the surplus, results from the nature of the security, and is not the object, or one of the objects, of the

Page 221 U. S. 345

assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity."

The reservation which the law pronounces fraudulent is of some pecuniary benefit at the expense of creditors, especially when secretly secured -- such benefit to the assignor being presumed a prime purpose of the conveyance. [*Lukins v. Aird*](#), 6

Wall. 79. Other cases are considered and reviewed in *Huntley v. Kingman & Co. supra.*

Section 1120 of the District of Columbia Code provides that in suits to set aside transfers or assignments as made with intent to hinder, delay, or defraud creditors, "the question of fraudulent intent shall be deemed a question of fact, and not of law."

Counsel have argued, as courts have ruled, that no amount of evidence will assign to an instrument an operation which the law does not assign to it. Thus, a mere deed of gift which actually deprives existing creditors of property which was subject to their claims, or a transfer of property grossly disproportioned to a debt secured under a conveyance apparently absolute, but subject to a secret agreement that the surplus should be held for the assignor, could not be saved, for the necessary legal effect would be to hinder, delay, or defraud creditors, and the law could but assign to such conveyance the intent which must indubitably appear from the facts. *Edgell v. Hart*, 9 N.Y. 213, 217.

But the assignment here was of a mere chose in action, not subject to legal process, but to be reached through equity only. There was no requirement of law that such an assignment should be recorded, and no legal way to give constructive notice. The debt secured was an honest

Page 221 U. S. 346

one, and the security was of uncertain value and character, involving great expense and delay in collection. The fact that the reservation of any surplus after paying the debt secured was not disclosed in the assignment itself was a circumstance of suspicious character, but not, as matter of law, inconsistent with an honest intent. Two courts have held that, under all the circumstances, the assignment was not made to hinder, delay, or defraud creditors, and as matter of law had no such result.

We are content to affirm this judgment.

Affirmed.

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