No. 12280

Supreme Court of Illinois

Coffing.

vs.

Taylor.

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Coffing & Coffing
vs
E. D. Taylor } In the Supreme Court

To the Hon the Supreme court of the State of Illinois

The Appellee in the above Entitled cause which was heard and decided at the last Term of this court respectfully requests a rehearing and re argument of the Same, and Submits to the court the following causes and Reasons for the Same.

The case having so recently been under the Consideration and Examination by the Court, the counsel for the appellee deem it unnecessary to enter into any detailed Statement of the facts — They however entertain the belief, that considering the Magnitude of the interests and the intricacy of some of the questions involved, notwithstanding the decided opinion expressed by the Court that their suggestions will receive at least a respectful consideration

One of the reasons given by court for Reversing the Decree of the circuit court, and which, if the view taken by ~~the~~ the court is correct would alone have been sufficient to reverse the Judgment, is, that the suit is prematurely brought.

If the cause had been decided upon this ground alone and the bill dismissed without prejudice, there would perhaps have been no reasonable ground of complaint on the part of the Appellee — And one reason why the counsel for the Appellee are now desirous of a rehearing in the case is — that after examining the opinion of the court with as much attention and care as they are capable of bestowing upon it, they are still in doubt whether the court intended to decide the entire merits of the controversy or not.

If it is understood that the bill is dismissed without prejudice to subsequent proceedings upon the mortgage; we are content — But if it is intended by the decision that Taylor is not the owner of the mortgage, or of an interest in it — or that he is liable to pay Coffing

Out of the Partnership Effects, assigned
Ats, Coffings $10.000. of Stock, put into
the Concern, or that by the contract
upon any Just Construction there is to be
any Settlement or adjustment of the partner-
ship between the parties, or any division
or withdrawal of the Capital Stock
by Either of the parties, It is respect-
fully Submitted that the Contract has
been Misconstrued.

The Counsel for the Appellee in
Sist that whatever construction may
be put upon the contract of the 27th
April A.D. 1852. between Taylor & Coffing
With Reference to the Exception or Reservation
of the Indenture, or Mortgage—

X That the Entire contract Shews, that
if this debt due to the firm did not
pass by the assignment of the partner-
ship property to Taylor. it is Still
due and unpaid to the firm of
Taylor & Coffing— That Coffing
has had the money, that it never
has been paid, and that at all
Events, the firm— for the Benefit of

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the firm, have a right to foreclose this Mortgage, and collect the money due in the same manner as they would have a right to collect any other debt. It is due now to the firm, at least, and is not paid. Taylor is certainly entitled to one half of it. He is in no manner indebted to the firm. He is by the contract the undisputed owner of all the assetts of the firm — Except the amount due by this Mortgage. This "remains as it is," (was) "unaffected by the deed of Sale," — Precisely the same as though the Mortgage had been executed by a third person to the firm of Taylor & Coffing and the same reservation hade been included in the assignment from Coffing to Taylor. The whole Record as before stated shews that Taylor owes nothing to the firm — He owns all the assetts. There is to be, and can be no accounting between the members of the firm; the Partnership is dissolved — Taylor owns all the debts and assetts of the firm Except "this indenture," which remains as it is — the joint property of both

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So far as Coffing is concerned there ~~was~~ to be no adjustment with third persons — Taylor was to pay all the debts and receive and have all the property of the firm; the assignment by Coffing is of all his "right title and interest in and to all property debts, accounts, notes books and papers belonging to the firm" Except the Indenture &c

It is manifest that the parties did not consider the Mortgage paid or satisfied by this arrangement, Else why have the $5000. indorsed upon it? What is the meaning of all this conversation with the witnesses about the reduction of the Mortgage to $13000. and propositions to sell property and borrow money to pay it. It is wholly inconsistent with all the Evidence & all the Conduct of the parties, that Coffing at this time could have understood that his Mortgage was to be considered as satisfied in whole or in part or that his capital stock was to be refunded to him by Taylor — or deducted from his Mortgage.

x

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At the time of the assignment from Coffing to Taylor there was nothing left unsettled between them; Except this Mortgage debt of Coffing to the firm

If Coffing was Entitled to his Capital Stock, he was Entitled to it then - and the question was not one of Contingency at all. If the Capital Stock did not pass under the assignment, it was due to Coffing at the very time of the assignment and when the $5000, which was allowed him for his interest in the Concern was indorsed upon his Mortgage — Why did he not insist upon it then? Why did he not then insist upon his right to a return of his capital, and that, that Sum Should be indorsed upon his Mortgage.

Is the Supposition to be for a moment indulged, that when Taylor had repeatedly offered Coffing $6000. to take the assetts and pay the debts of the firm, that he or Coffing ever intended or designed, that Taylor Should pay Coffing $15000. for the Same property and assetts, Plank Road and Illinois River Bank included

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It is beyond controversy that at the time of this assignment the firm had neither capital stock nor money assetts in hand— that all the other assetts except the mortgage were assigned to, and became Taylors absolutely, and none of them could by the terms of the contract be appropriated to the payment of the capital stock of Coffing— Nothing then was left out of which to pay it but the mortgage— I again inquire why was it not then claimed at the time of the assignment? The answer is obvious— Both parties knew that there was no capital stock remaining and neither of them ever dreamed that they were entitled under the contract to a return of the same, when it should be ascertained that the firm was solvent.

It is a plain and palpable contradiction in terms to say— that all the assetts and property of the firm became Taylors by the assignment and that those very assetts and property so assigned may be converted into money, to pay the parties back their original invested capital

For Example, Two men form a copartnership — They put in $5000. Each as capital Stock — The Money is wholly invested in purchasing goods — The goods then are the property of the firm — The capital which was before individual, has by the investment become joint & partnership property. One sells and assigns to the other "all his right title and interest in and to all property debts accounts notes, ~~bills~~ books and papers belonging to the firm," in consideration of Five thousand dollars. He would be a bold man who would hazzard the assertion that the assignor was still entitled to a return of his capital invested —

In such a state of case, there would be no capital remaining. It would be sunk and merged in the investment and would have become property and assetts and not capital of the firm, and the whole property of the firm including what was originally capital would pass to the assignee precisely in the same manner, that it would have passed to a stranger if both parties had united in an assignment to Such Stranger.

If Taylor & Coffing had assigned to a third person for the same consideration and upon the same terms and conditions that Coffing did to Taylor — What would have become of their capital stock? Where would it have been found? and by what process could it have been collected or realized? It passes the understanding of the Counsel of the appellee, to comprehend wherein consists the difference between an assignment by one partner to another of all *his* interest; and the assignment by both partners to a third person of all *their* interests in the assetts and Effects of the firm — and how in the one case, there can be a mental or legal Reservation of the capital Stock of the assignor — and not in the *assignors*, in the other.

For authority upon the proposition that where one partner deals with the firm he is to be treated, and his contracts construed in the same manner as dealings, and contracts with strangers we refer to

Hobart v. Howard, 9 Mass. 303

upon any ground then and in any light in which it may be viewed we think it clear, that Coffing owes this debt - If not to Taylor alone, to Taylor & Coffing and that Taylor has an Equitable right to foreclose this Mortgage for the purpose of recovering the sum which is due to him as Joint partner and owner of the Mortgage with Coffing - and that as fully and effectually as though the same Mortgage had been Executed to Taylor & Coffing by a Stranger, and that, if when the Court say in the conclusion of its opinion it is "unable to discover any ~~any~~ Equity in the Appellee's case" it is intended to be understood as determining that the Appellee could not foreclose this Mortgage after its maturity, and that the Mortgage debt had become extinguished or liable to be used only for the purpose of repaying to the Appellant his capital Stock or any portion of it, then we would respectfully request the Court to consider, whether it may not in the multiplicity of business and burden of labor with which this Court is oppressed, have mistaken the law.

It is not usual that a debt of $13000. is thus easily paid. But if it means only that the action or proceeding is premature and that therefore the Complainant has no Equitable right to recover in the case, then we earnestly desire to save all controversy as to the appellee's right to prosecute a subsequent suit upon this Mortgage that if the Court shall decline a rehearing in this cause that a further order may be made dismissing said appellee's bill "without prejudice"

It may probably be the misfortune of the Counsel for the appellees ~~[illegible]~~ that with all the care and attention, they have been able to give to the Opinion of the Court, they are still unable distinctly to understand, what interpretation the Court puts upon the contract of assignment and the reservation therein contained: Whether the mortgage is in fact and is in law still ~~alive~~ in force and a subsisting lien and incumbrance against the premises or not — and whether the mortgage debt did or did not pass to Taylor by the contract of assignment ———

The Counsel for the Appellee confidently believe that the debt secured by this mortgage to Taylor Hoffing passed by the assignment to Taylor, and that the debt being so assigned the security ~~for~~ which is given for the ~~the~~ debt ~~is~~ ~~given~~ as an incident to the debt passed with it, and that Taylor had a right, at least when the debt became due to foreclose the mortgage and thereby collect the debt.

This assignment is a deed and liable like all other deeds to the fixed rules of construction applicable to all

One of these rules is that in cases of doubt, or of a Patent ambiguity upon the face of a deed, and the same can not by the rules of law be explained by parol — the

the same shall be taken and construed most strongly against the grantor and in favor of the grantee.

Mills vs County of St Clair 2. Scam 227. and authorities there cited.

The words of the assignment are — "has sold, transferred, assigned and set over and by these presents do sell, transfer assign and set over — all my right title and interest in and to all property debts accounts notes, books and papers belonging to the firm of Taylor and Coffing"

Setting aside the saving or exception in the deed of assignment the language here employed would pass the interest in the debt for the security of which the mortgage was given to Taylor, and the same does pass to and become vested in Taylor as a right and as a portion of the property of the firm unless it can be shown that by this subsequent clause of the instrument it has been reserved and specially excepted

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Now it is the business of the appellant under the rule of construction before laid down, to Show Clearly Not that Some Senseless and unmeaning paragraph, which no body can understand now, and which the Court Say, and the parties Seem to admit neither of them under-Stood then, has been introduced as a Saving or exception into this deed, But that there is a clear, definite distinct reservation of this particular debt and that the Same did not pass to Taylor by the assignment If the intention of the parties is doubtful, and that doubt by the rule of law is incapable of parol explanation, the very doubt or ambiguity resolves the question in favor of the assignee or grantee in the deed; If all is first granted or assigned, and then Something is reserved, and that Something is doubtful uncertain or ambiguous The reservation is a nullity, and the Residue of the instrument must remain in full force and Effect.

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Now what is this Reservation?

"Excepting the Indenture given by the said ~~Taylor and Coffing~~ Coffing to Taylor and Coffing aforesaid which is to stand and remain as it is unaffected by this deed of sale"

What does this mean?

In their argument, the counsel for the appellant construed it one way, and the counsel for the appellee another and perhaps it may be admitted that the constructions sought to be given by the same parties are somewhat inconsistent with each other, with the land and the legal effect sought to be given to each and with the allegations in the bill of mistake and fraud in ^procuring^ the execution of the contract; and the court say in substance in the opinion that if either party had understood it as it is alledged the other did, the contract probably would not have been made.

In this connexion allow us to suggest that probably a little reflection would satisfy the court that that portion of the argument used in the Opinion that because the leaving out of the saving or exception in the instrument of assignment would leave the deed liable to the same legal construction as the appellee contends for, with it in; is deprived of much of its force, when it is considered that it often happens and with good lawyers too sometimes that in their over anxiety to make an instrument of writing remarkably plain, they obscure its meaning past all ordinary comprehension. In as much then as most of us seem to have difficulty in understanding the legal meaning and effect of this paragraph now it is not surprising that the appellee may have misunderstood its legal intendment then.

But has the court in its opinion given any interpretation to this portion or clause of this contract? Has the court decided, or determined whether the debt secured by this mortgage passed to Taylor under this assignment or not?

We have examined with considerable care and have not been fortunate enough to discover any definite indications of an opinion or decision of these questions.

We desire also to remark by way of argument in this case that as a matter of fact, proceedings have been instituted in the circuit court of Lasalle County by Coffing against Taylor to recover back the rent received by Taylor or Taylor & Coffing arising from the premises so mortgaged by Coffing to said Taylor & Coffing and for on account of the partnership aforesaid and the Counsel under the circumstances earnestly desire to know more fully (if not inconsistent with the views of the court), the rights and liabilities of the appellee relative to the several matters and things herein before referred to and which from the decision appear to them to be still left doubtful and uncertain; and particularly the undersigned renew their request, that if the Court shall come to the conclusion to

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In relation to the propriety of dismissing bills without prejudice and under what circumstances such order is proper we refer to 2. Daniel's Chancery Practice p. 1199–1200 being a rehearing in this cause that an order may be made dismissing the complainants bill without prejudice

June 17 1856.

S. H. Treat
R S Blackwell

Counsel for Defendant

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Coffings vs Taylor

Petition for Rehearing

Filed June 20, 1856
L. Leland
Clerk

Churchill Coffing et al
vs
Edmund D. Taylor } Appeal from LaSalle.

This day this cause came on to be heard upon the Petition for a rehearing, or in the alternative for an amendment of the order entered herein at the last term of this court and the court having duly considered the same, do order and adjudge that the said Petition so far as a rehearing is prayed be denied, and that the said order of last term be amended by the following additional order "It is therefore considered and adjudged by the court that so much of the said Bill as seeks to reform or correct the contract in said Bill described, be and the same is dismissed upon the merits — and that so much of said Bill as seeks to foreclose the Mortgage in said Bill described be and the same is hereby dismissed without prejudice to any subsequent suit or proceeding to foreclose said Mortgage"

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Coffing vs Taylor

Filed June 23. 1856
L. Leland
Clerk

Supreme Court - of the State of Illinois -
June Term 1856 -

Churchill Coffing -
Aseneth C. Coffing &
John H. Coffing -
vs
Edward D. Taylor

On motion of said Churchill Coffing - Aseneth C. Coffing and John H. Coffing - by T. L. Dickey their attorney - it being made to appear to the Court - that an execution dated 11th of February 1856 in favor of said Coffings and against said Taylor - for the sum of $ 311.15 - was issued under the seal of this Court and directed to the Sheriff of Cook County to be Executed - and that said Execution was duly delivered to Saml S. Beach Coroner and acting Sheriff of Cook to be executed - and that he has not made return thereof - It is therefore ordered that a rule be entered requiring said Saml S. Beach Coroner & acting Sheriff as aforesaid - to make immediate return of said Execution ~~instanter~~ - with the manner of his execution of the mandate thereof - and that a copy of this rule be served upon him -

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147,

Coffing
vs
Taylor

Coffing
vs
Taylor
Order of Court

Filed June 25: 1856
L. Leland
Clerk

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Churchill Coffing
by
Edmund D Taylor
1858

12280

1856