SPIEGELBERG V. HERSCH, 1884-NMSC-024, 3 N.M. 281 (3 N.M. 185, John. ed.), 4 P. 705 (S. Ct. 1884)

Spiegelberg and others
vs.
Hersch and others

No. 164

SUPREME COURT OF NEW MEXICO

1884-NMSC-024, 3 N.M. 281, (3 N.M. 185, John. ed.), 4 P. 705

July 30, 1884, Filed

APPEAL from a judgment of the First Judicial District Court, in favor of defendants.

COUNSEL

BREEDEN & WALDO for appellants.

GILDERSLEEVE & KNAEBEL for appellees.

JUDGES

Axtell, C. J. Bell, J., concurring.

AUTHOR: AXTELL

OPINION

*{*281}* **{1}** The issue in this case was the truth of an affidavit for attachment.

*{*282}* **{2}** The affidavit charges that defendants had fraudulently concealed and disposed of their property with intent to hinder, delay, and defraud their creditors. The facts proved are substantially as follows: Defendants were merchants in Santa Fe, engaged in a general retail trade; they were indebted to plaintiffs in the sum of about $ 1,000; that defendant L. Hersch, at Santa Fe, made his certain promissory note to his brother-in-law, Sigmund Praeger, of New York, for the sum of about $ 6,000; that to secure payment of this note he executed to said Praeger a chattel mortgage upon his stock of goods in his store at Santa Fe, said mortgage covering nearly his entire stock; that it was understood and agreed between Hersch and Praeger that Hersch was to remain in possession of said goods and carry on the business exactly the same as before the mortgage was given, and in fact he did so remain and so conducted the business.

{3} There are some other circumstances in proof which might slightly vary or shade the above statement of facts, but it is believed that there is enough stated to bring out clearly the point made by plaintiff in favor of sustaining the attachment. Plaintiff asked the court to instruct the jury as follows:

"In law no one can mortgage a stock of goods, and yet remain in possession and carry on the business in the usual way, without paying all the proceeds on the account of the mortgage debt. If there be other creditors, such mortgage is a fraudulent transfer as to creditors; and if the jury believes, from the evidence, that such were the facts in this case, they must find for the plaintiff."

{4} The effect of this instruction was to take the case from the jury by instructing them that such a mortgage was a fraud in law as to other creditors. The court refused to give the instructions. The jury found for defendant and against the truth of the affidavit for *{*283}* attachment, and plaintiff appeals to this court. Substantially, there was no other proof of fraud, or hindering, delaying, and defrauding, except giving this mortgage. Is such a mortgage a fraud in law as to creditors? In **Robinson** v. **Elliott,** 22 Wall. 513, Mr. Justice Davis elaborately reviews the authorities, and reaches the conclusion that such a mortgage is a fraud in law as to creditors.

{5} In the language of that opinion: "It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession, accompanied with power to dispose of it for the benefit of the mortgagor alone." The latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and, of itself, furnishes a pretty effectual shield to a dishonest debtor;" and, as in that case, so in the case at bar. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell their goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.

{6} The mortgage in the case at bar is simply a fraudulent attempt, under the forms of law, to provide a shield by means of which a dishonest tradesman might ward off his creditors for an indefinite period, and the transaction reflects discredit upon all persons connected with it. The note pretended to be secured is on demand. There is no provision in the mortgage *{*284}* when it is to be paid; but, for fear this should not be a sufficient protection, there is a provision in this dishonest instrument that it shall be a mortgage on goods thereafter to be bought, so long as such purchases shall not exceed the limit mentioned, which is set at $ 30,000, -- about three times as large a stock as the store usually carried. There is also a provision in this fraudulent and scandalous instrument that Praeger, the mortgagee and brother-in-law of the mortgagor, may at any time, upon default of payment of said note, which is payable upon demand, take

immediate possession of said stock of goods. So, if the court upholds this mortgage, the mortgagee can at any moment demand his money, and, upon failure to pay, take immediate possession of all the goods in the stock, leaving other creditors without remedy. In this case, according to the testimony, "the business was to go on just as it had been going on; the store was to be kept open, and Hersch was to go on selling goods; that he was to use the proceeds of sales for expenses and pay his debts in Santa Fe, and remit to Praeger **as he could.**" And it might have been well added that when he got ready to break, Praeger would own the store in Santa Fe, and he would probably own the one in New York. That this fraudulent transaction should be carried up under the forms of law is simply a scandal to an honorable profession. The law gives no sanction to such arrangements, and will hold them void as against creditors, as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands. **Davis** v. **Ransom,** 18 Ill. 396; **Ford** v. **Williams,** 3 Kern. 13 N. Y. 577; **Edgell** v. **Hart,** 13 Barb. 380; **McLean** v. **Lafayette Bank,** 3 McLean, 185, 415, 503, 587; **Addington** v. **Etheridge,** 12 Grat. 436; **Freeman** v. **Rawson,** 5 Ohio St. 1; **Brooks** v. **Wimer,** 20 Mo. 503; **Reed** v. **Pelletier,** 28 Mo. 173; **Armstrong** v. **Tuttle,** 34 Mo. 432.

{7} Judgment reversed.

CONCURRENCE

Bell, J. concurred in the result.