

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFF AND APPELLANT, VS. WILLIAM A. WILSON ET AL., DEFENDANTS AND APPELLEES.

G.R. No. 2684. March 15, 1907

Ponente: MAPA, J.

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MAPA, J.:

The defendant Wilson was, on the 1st of October, 1902, an employee of the Government of the Philippine Islands, as disbursing officer of the Bureau of Coast Guard and Transportation. For the security of the Government the plaintiff company and another company, The American Surety Company of New York, became sureties on the official bond of Wilson for the sum of \$15,000, United States currency. Wilson defaulted in the sum of \$8,931.80, United States currency, and the said two surety companies, after demand duly made upon them by the Government, were compelled to pay and, as a matter of fact, did pay to said Government, in accordance with said bond, the sum of \$4,465.90, United States currency, each.

Wilson, who had left the Philippine Islands, was captured in the city of Montreal, Canada, for the purpose of being tried before the courts of the Philippine Islands for the defalcation of said sum. When apprehended Wilson had on his person the sum of \$785 in gold, consisting of the following:

- 1 bill of \$5, No. 333,448, on the Bank of Montreal.
- 1 United States bill, silver certificate, \$10, series of 1891.
- 3 United States \$10 notes, series of 1882.
- 5 United States \$10 notes, series of 1891.
- 24 United States \$10 notes, series of 1880.
- 45 United States \$10 notes, series of 1901.

This sum and amount was turned over to the custody of Mr. Branagan, the Insular Treasurer.

The facts of this case, among others, are the following: On October 17, 1904, the plaintiff filed a complaint against Wilson and The American Surety Company asking, first, that judgment be rendered against Wilson for the sum of \$4,465.90, that amount having been paid by plaintiff to the Government under plaintiff's surety bond; second, that there be applied to the payment of said judgment the said sum of \$785 found in possession of Wilson and that said plaintiff be preferred in its right to the said money and to receive the same; and third, that a depositary be named by the court for the purpose of caring for and administering said amount during the pendency of the case.

On the same date, October 17, a depositary was named, such depositary taking in charge the said \$785 on that date, the said sum of money being at this time in the possession of said depositary.

On October 26, 1904, H. D. Terrell filed a complaint as intervenor in the case, alleging that on September 3, of the same year, the defendant Wilson had ceded and transferred to the said Terrell all of his, the said Wilson's, rights in and to the said \$785 in payment on account of a larger sum then owed by said Wilson to the said H. D. Terrell for professional services already rendered and to be rendered as attorney for said Wilson, under agreement with the same; that Treasurer Branagan was duly notified on the 17th day of October, 1904, of this transfer, at which time the Treasurer had said sum in his care, and this before the notification of the appointment of said depository in the principal case. Basing his claim on these facts, Terrell claims the right of ownership in and to the said sum and asks that the same be delivered to him as the legitimate owner to the exclusion of the other parties in the case.

In this case of intervention The Fidelity and Deposit Company of Maryland, the plaintiff in the principal cause, and The American Surety Company of New York together in cooperation and against the claim of the intervenor Terrell, both of them, alleging on their part, better right than the intervenor to receive the sum in question, asked that the said sum be delivered to them in equal shares and portions as part payment and on account of the amounts which they had paid respectively to the Government as sureties on the bond of Wilson. In this way the first pretension or claim of preference as alleged by The Fidelity and Deposit Company in its complaint was modified with respect to and as against The American Surety Company of New York. It is asserted by these companies, as a basis of their right and claim, that the funds in question are a portion of the money taken from the Government by Wilson and therefore the property of the said Government and that they became subrogated to rights of the Government in and to the said sum by reason of the payment by them as sureties on the bond of Wilson.

Judgment was rendered against Wilson by default, the latter not having answered to the complaint of The Fidelity and Deposit Company. In regard to the intervention of Terrell, Wilson answered, affirming that all the allegations contained in the complaint of Terrell were true, in this way coming into the case in cooperation with said Terrell in his pretension.

After due trial of the cause a judgment was rendered by the court declaring proven, among others, the facts as stated in the first part of his decision and found as a conclusion of law that the said intervenor Terrell "became the owner and with the right to the possession of said funds before the commencement of this action and still has the right to the possession of the same."

In accordance with this conclusion and the facts as set out in the judgment, the following order was made by the court: "Let judgment be entered in favor of the party plaintiff, The Fidelity and Deposit Company of Maryland, and against the defendant Wilson, for the sum of \$4,465.90, United States currency, the equivalent of P8,931.80, Philippine currency, together with interest on the same at the rate of 6 per cent per annum from the 22d day of October, 1903, and for the costs of this action, and in favor of the intervenor H. D. Terrell and against all the other parties to this action, plaintiff and defendant, for the possession of the funds now in the hands of the depository appointed by this court, * * * amounting in value to the sum of \$785, United States currency, and in the event that the identical money can not be delivered, then its equivalent of the total of the same—that is to say, 1,570 pesos, Philippine currency—without costs. * * *"

The plaintiff only in the principal suit—that is to say, The Fidelity and Deposit Company—filed its exception to the judgment. The American Surety Company of New York failing to appeal, the judgment with respect to that company became final, hence this court can not decide with regard to that. The same should be said with regard to that part of the judgment against Wilson for the payment to The Fidelity and Deposit Company of the sum of \$4,465.90, no appeal from said judgment having been made by Wilson.

There was no new trial asked for and the parties in this instance expressly admit, as proven, the facts as set out in

the decision rendered.

The only assignment of error alleged by the appellant in its brief, is in the following terms: "The court erred" its says, "in rendering judgment in favor of the intervenor H. D. Terrell for the \$785 in the hands of the depository.". Therefore, that part of the judgment of the lower court that refers to this point is the only thing, in fact, submitted to us for review.

According to our point of view, the only question here is to deduce and determine the true legal effects of the transfer made by Wilson in favor of Terrell.

This transfer is made literally in the following terms:

"MANILA, P. I., September 3, 1904.

"To whom it concerns:

"For value received, I hereby transfer and cede to Judge H. D. Terrell all my rights, title, and interest in the following-described property belonging to me and now in the hands of Frank A. Branagan, Treasurer of the Philippine Archipelago, under the attachment of the court of Manila:" (Here appears the description of the bank bills transferred, hereinabove described.)

(Signed) "W. A. WILSON."

As is seen, this transfer was made before the filing of the complaint of the appellant, and in addition thereto, it is said that the Insular Treasurer, Mr. Branagan, was also notified before the filing of said complaint. The last does not appear to be clear in the record for the reason that the said notification served on Branagan was so served on October 17, 1904, precisely the same date upon which the complaint was filed and the appointment of the depository was made by the court in virtue of the same, and upon which said date the depository took possession of the said funds, the subject-matter of this suit. There is no data at hand to show in a precise manner which of the said acts took place before the other. It is true that the judgment of the lower court states that Terrell became the owner of the funds before the commencement of the action, but we consider this rather as a conclusion of law than of fact; that is to say, that fact that the notification of the said transfer had been served on Treasurer Branagan before the filing of the complaint. However it may be, this may be admitted as true and so taken into consideration in this decision.

Terrell claims, and the court below so holds in its judgment, that in virtue of said transfer the ownership of Wilson in and to the funds was transferred to Terrell in fact and in law. If this had been the case, the judgment would have been just and legal and would, therefore, be affirmed herein.

But our opinion is contrary to that sustained by the trial court in regard to this point. We are of the opinion that the transfer by itself, and afterwards the notification of the same to Treasurer Branagan, did not produce nor could it produce the effect of transfer to Terrell of the ownership of the funds so transferred and which were then in the possession of the said Treasurer. To have this effect, it would have been necessary that the delivery of the funds had been made directly to Terrell, which fact has not been proved at any time. There is no question as to this last point. The funds were in the possession of Branagan and afterwards were transferred to the possession of the depository appointed by the court where such funds now are, and this without their ever having been taken possession of by the intervenor Terrell. It is not alleged, nor is it claimed by Terrell, that the delivery of the funds was ever made in any manner recognized by law. He claims the right of ownership from the mere fact of having derived the same, not from the fact of any delivery, but from the very fact of the transfer and of his subsequent notification to Treasurer Branagan, it being, in addition, very clear that such notification does not constitute, in any manner, the fact of delivery as established by articles 1462, 1463, and 1464 of the Civil Code, all of which

cover, in full, this subject-matter.

Therefore, in our Civil Code it is a fundamental principle in all matters of contracts and a well-known doctrine of law that "non mudis pactis, sed traditione dominia rerum transferuntur." In conformity with said doctrine as established in paragraph 2 of article 609 of said code, that "the ownership and other property rights are acquired and transmitted by law, by gift, by testate or intestate succession, and, in consequence of certain contracts, by tradition." And as the logical application of this disposition article 1095 prescribes the following: "A creditor has the rights to the fruits of a thing from the time the obligation to deliver it arises. However, he shall not acquire a real right" (and the ownership is surely such) "until the property has been delivered to him."

In accordance with such disposition and provisions the delivery of a thing constitutes a necessary and indispensable requisite for the purpose of acquiring the ownership of the same by virtue of a contract. As Manresa states in his Commentaries on the Civil Code, volume 10, pages 339 and 340: "Our law does not admit the doctrine of the transfer of property by mere consent but limits the effect of the agreement to the due execution of the contract. * * * The ownership, the property right, is only derived from the delivery of a thing * * *."

Applying this doctrine concretely to the contract of transfer set up by Terrell as the basis of his complaint in intervention, the author says, at page 341 of the volume and work above cited: "The transfer of the ownership in the contract of such transfer, does not produce the effect by the fact of the mere consent, but is acquired by tradition and in the due observance of general precepts." Therefore, by reason of the nondelivery Terrell did not acquire the ownership of the property transferred to him by Wilson. It is only the *jus ad rem*, and not the *jus in re*, that was acquired by Terrell by virtue of the transfer, made by the consent of the transferor and the transferee but not consummated by the delivery which never came to pass and which delivery was the object of such transfer.

But if Terrell could not be considered as the owner of said funds in question, it is undeniable that he had rights with regard to the same as a creditor by virtue of that transfer. The same right, that of a creditor, and no other is the right of the appellant in that it has not been contradicted that the rights of the Government, in its judicial relation to Wilson, had not been subrogated to the appellant. The allegation of the appellant that the bank bills taken from the person of Wilson are the property of the Government, in order to be taken into consideration, is to conclude that they belong to the appellant as owner of the same by reason of said subrogation of right, as aforesaid. This has no fundamental basis for the reason that such bank bills have never been duly identified. Without any proof of identification it is not possible to know if said bank bills are really a part of the funds of the Government appropriated by Wilson. The Government under such circumstances could not allege specifically the right of ownership of said bank bills.

Now, the creditors, the appellant and the appellee are both claiming at the same time the delivery of the funds in question for the payment of their respective credits and it becomes a question of preference of creditors, since the sum, the object of the suit, is not sufficient to satisfy the claims of both parties.

According to our view, neither of the two creditors should enjoy preference with regard to the other. Preference is determined by the nature of the credit in some cases and by the priority of date in others. The first, when it deals with privileged credits, which different kinds of privileged credits are enumerated in articles 1922, 1923, and 1924 of the Civil Code; and the second, when such credits are without special privilege, but are set forth in a public document or a final judgment. (Par. 3, article 1924.) In neither of these two classes do we find the credit of the appellant or that of the appellee. The credit of the appellee is only shown in a private document, and the right, or credit, of the appellant is that derived by reason of the payment made by appellant to the Government as a surety on the bond of Wilson, and nothing more than this appears in the allegations and admissions of the parties during the trial of the case. It does not appear by the bill of exceptions in this case that any document was ever

presented in justification of such payment. Neither does the decision refer to any document as showing, as proven, said payment. These two credits not coming under any of the articles herein cited, the same pertain to a general class, and therefore do not enjoy any preference, in accordance with the provisions of article 1925 of the Civil Code. This being so, the two creditors should be paid pro rata from the funds in question and without consideration of the dates. (Rule 3, of article 1929.)

The judgment appealed from is, therefore, reversed with respect to the order of the trial court ordering the delivery of said funds, in their total amount, to the intervener, H. D. Terrell, and in place of said order of said trial court we order that the payment and delivery of said funds be made to said Terrell and to the appellant, The Fidelity and Deposit Company of Maryland, pro rata, with respect to their respective credits, without special provision as to the costs of this instance. After the expiration of twenty days from the notification hereof let judgment be entered in accordance herewith, and ten days thereafter let the case be remanded to the court from whence it came for proper action. So ordered.

Arellano, C. J., Torres, and Tracey, JJ., concur.

Johnson and Willard, JJ., dissent.

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