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Torts - Fraud Action Not Assignable to Trustee in Bankruptcy - Jones v. Hicks, 100 N.W.2d 243 (Mich., 1960)

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As can readily be seen, the wording of the statute in question has at least in some instances been given a flexible translation. In the present case the court of appeals gave it a limited interpretation by holding that market operating hours is solely a proprietary right which may only "incidentally affect" a firm's employees.

Although in denying certiorari, the Supreme Court did not pass on the question, an inference arises that the Supreme Court did not strongly disapprove of the decision of the court of appeals.

TORTS–FRAUD ACTION NOT ASSIGNABLE TO TRUSTEE IN BANKRUPTCY

In October 1956, a creditor obtained judgment against one LaVoy and a writ of execution was placed in the hands of deputy sheriff Hicks of Ingham County, Michigan. Execution was levied on LaVoy's Ford pickup truck, which was duly advertised for sale. At the time of the execution sale, the truck was worth approximately $1,100.00, but was actually sold for only $375.00. The sale was made by an agent, acting for an undisclosed principal who was, in fact, deputy sheriff Hicks. Shortly thereafter LaVoy filed in bankruptcy and the trustee in bankruptcy brought an action for fraud against deputy sheriff Hicks, joining Hicks' statutory surety as a co-defendant to the action. In his declaration, plaintiff-trustee formally elected to affirm the voidable contract resulting from the fraudulent execution sale, and seek the quintuple damages provided for in such cases by Michigan statute.[1] Defendant's motion to dismiss was granted on the grounds that the trustee could bring only the bankrupt's action of fraud as assignee and that such an action was non-assignable. The Supreme Court of Michigan affirmed the lower court, holding that an action of fraud is not assignable in spite of the fact that it arises out of a tangible property right. *Jones v. Hicks*, 100 N.W. 2d 243 (Mich., 1960).

Section 70 of the Federal Bankruptcy Act makes the following provision for devolution of title to a bankrupt's property:

> (a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt . . . to all of the following kinds of property wherever located . . . (5) property, *including rights of action*, which

[1] Mich. C.L. 1948, § 623.148 provides: "The officer who shall make any sale on execution, shall, in his return on the execution, specify the articles sold, and the sum for which each article or parcel was sold; and if he shall be guilty of any fraud in the sale, or in the return, or shall unreasonably neglect to pay any money collected by him on such execution, when demanded by the creditor therein, he shall be liable to an action on the case, at the suit of the party injured, for five (5) times the amount of the actual damages sustained by reason of such fraud or neglect."

prior to the filing of the petition he [the bankrupt] could by any means have *transferred* or which might have been levied upon and sold under judicial process. . . .[2]

In the instant case, the alleged "property" of the bankrupt is a right of action for fraud arising from a fraudulent execution sale of the bankrupt's property. Therefore, the issue is reduced to a determination of whether a right of action for fraud arising out of such a sale is transferable (i.e., assignable) so as to come within Section 70 (a)(5) and thereby enforceable by the assignor's trustee in bankruptcy.

The early common law did not recognize the assignability of any action *ex delicto*, either in law or equtiy, because of fear of maintenance and champerty.[3] Today a purely personal tort, causing injury only to the person of the individual, or his feelings or reputation, is generally not assignable. "It . . . never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish, or outraged feelings of a bankrupt."[4] Thus, it is generally held that actions for malicious prosecution,[5] seduction,[6] personal injuries,[7] assault and battery,[8] slander,[9] criminal conversion,[10] and even death by wrongful act,[11] are non-assignable as being purely personal to the assignor.

Almost as well settled as the rule of non-assignability of purely personal tort choses in action, is the assignability of those *ex delicto* actions which arise out of injuries to the property or estate of the assignor, i.e., those which involve a tangible property right.[12] The basis for this rule is the common law survival of such actions over to the personal representative of the owner of the property right. In bankruptcy proceedings, the courts generally allow this type of tort action to be brought by the trustee in bankruptcy, either as assignee of an assignable cause of action under Section 70(a)(5), or, more usually, by virtue of Section 70(a)(6) of the Act which provides for title to pass to, "rights of action arising upon

[2] Federal Bankruptcy Act, 1938, § 70(a)(5), 11 U.S.C.A. § 110 (Supp., 1959) (emphasis supplied).

[3] Delfries v. Milne, [1913] 1 Ch. 98.

[4] Sibley v. Nason, 196 Mass. 125, 130, 81 N.E. 887, 889 (1907).

[5] Slauson v. Schwabacher, 4 Wash. 783, 31 Pac. 329 (1892).

[6] Drake v. Beckham, 152 Eng. Rep. 823 (1843).

[7] Grinnell v. Carbide & Carbon Chemicals Corp., 282 Mich. 509, 276 N.W. 535 (1937).

[8] Whitaker v. Gavit, 18 Conn. 522 (1847).

[9] Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207, 51 N.W. 440 (1892).

[10] Howard v. Ward, 31 S.D. 114, 139 N.W. 771 (1913).

[11] Furman v. Polin Poultry Farms, 90 A.2d 670 (Del Super. Ct., 1952).

[12] Delval v. Gagnon, 213 Mass. 203, 99 N.E. 1095 (1912); Holmes v. Loud, 149 Mich. 410, 112 N.W. 1109 (1907); North Chicago St. Ry. Co. v. Ackley, 171 Ill. 100, 49 N.E. 222 (1897).

contracts, or usury, or the unlawful taking or detention of or injury to his property."[13] Thus, the courts have held that a trustee in bankruptcy as assignee can recover for a nuisance which is causing injury to the real property of the bankrupt;[14] for negligently caused injury to the personalty of the bankrupt;[15] for trover and conversion of bankrupt's property;[16] for breach of duty by an officer of the bankrupt corporation;[17] for replevin of bankrupt's property as owner;[18] for breach of federal antitrust laws;[19] and even in an action to recover bankrupt's gambling losses.[20]

There is a lack of uniformity in the decisions as to the assignability of the tort action of fraud and deceit, which, while often arising out of a loss or injury to tangible property of assignor, remains, in essence, personal to the party deceived. In a few states, statutory authority solves the problem by declaring all tort actions assignable;[21] in others the courts have looked to the survival statutes, holding the fraud action to pass by assignment if the statute declares it to survive to the personal representative of the wronged party.[22] In the absence of statutory authority, the courts have held the fraud non-assignable in cases where it constitutes only an injury to the person of the assignor, and, conversely, assignable where it is declared to arise out of an injury to his property.[23] Thus, where the defendant fraudulently misrepresented the amount due under a contract, the right of action was held not assignable, since a mere pecuniary loss is purely personal and can never amount to an injury to property;[24] or, when a notary falsely certified to the fact of an execution and acknowledgment of a transfer in property, the action was held not assignable as being purely personal to the wronged party.[25]

In cases where the assignment conveys an actual interest in the property involved, along with (but independent to) the collateral fraud, the

[13] Federal Bankruptcy Act, 1938, § 70a(6), 11 U.S.C.A. § 110a(6) (Supp., 1959).

[14] In re Torchia, 188 Fed. 207 (C.C.A.3rd, 1911).

[15] Borden v. Bradshaw, 68 Ala. 362 (1880).

[16] In re Mid-Columbia Publishers, 129 F. Supp. 704 (E.D. Wash., 1954).

[17] McEwen v. Kelly, 140 Ga. 720, 79 S.E. 777 (1913).

[18] Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89 (C.C.A.6th, 1941).

[19] Vance v. Safeway Stores, Inc., 239 F.2d 144 (C.A.10th, 1956).

[20] Charness v. Katz, 48 F. Supp. 374 (E.D. Wis., 1943).

[21] McLaury v. Watelsky, 39 Tex. Civ. 394, 87 S.W. 1045 (1905).

[22] Shepard v. Cal-Nine Farms, 252 F.2d 884 (C.A.9th, 1958), Cert. den. 356 U.S. 951 (1958); Tufts v. Matthews, 10 Fed. 609 (D.R.I., 1882).

[23] Constant v. Kulukundis, 125 F. Supp. 305 (S.D.N.Y., 1954).

[24] Grabow v. Bergerth, 59 N.D. 214, 229 N.W. 282 (1930).

[25] Tufts v. Matthews, 10 Fed. 609 (D.R.I., 1882).

courts have almost uniformly declared the fraud actionable by the assignee.[26] In the leading case of *Traer v. Clews*,[27] Clews was the owner of $50,000.00 worth of stock in a construction company, on which dividends amounting to $10,500.00 were declared in 1873 and 1874. He was afterwards adjudicated a bankrupt and the stock, with the dividends, passed to Tappan, his assignee in bankruptcy. The construction company went bankrupt and Traer was appointed one of its trustees. Knowing of the dividends of which Clews and Tappan were ignorant, Traer bought stock of the assignee, Tappan. Afterwards, Tappan, the assignee sold to Clews all claims on account of the stock and the latter brought suit for fraud against Traer for the value of the stock. The Supreme Court of the United States held the assignment from Tappan to Clews was a transfer, not merely of a naked right to bring a suit, but of a valuable right of property, and the action was therefore valid and effectual as being a right incident to the property conveyed.

In *Mayer v. Rankin*,[28] the defendant, by misrepresentation of value, defrauded the plaintiff's assignor in the sale of certain securities. The plaintiff corporation bought up the securities after recision of the contract and took an assignment of all of plaintiff's interest therein. The court, holding plaintiff's assignee entitled to bring the action of fraud, said:

> While a mere naked right to recover for fraud is not assignable, still, by what we conceive to be the weight of authority and bottomed on sound legal principles, an assignment is upheld when it carries with it a subsisting substantial right to property independent of the right to sue for fraud.[29]

In bankruptcy, when the issue of assignments arises, the majority of the courts, while allowing the trustee to bring suit for the fraud, do so by authority of Section 70(a)(6) rather than Section 70(a)(5), thereby often avoiding the entire question of assignability. Under this approach, it has been held that a right of action for fraud by the defendant who fraudulently induced the bankrupt to purchase certain bonds at a price which was greatly in excess of their value, was actionable by his trustee as a right of action arising from an injury to property;[30] as was a right of action for fraud, inducing the bankrupt to pay excessive commissions to defendant for selling its coal;[31] likewise, fraudulent misrepresentations,

[26] Pattiz v. Semple, 12 F.2d 276 (E.D. Ill., 1926); Appliance Inv. Co. v. American Telephone & Telegraph Co., 23 N.Y.S.2d 27 (1940); Prince v. DuPuy, 163 Ill. 417, 45 N.E. 298 (1896).

[27] 115 U.S. 528 (1885).

[28] 91 Utah 193, 63 P.2d 611 (1936).

[29] Ibid., at 196, 616, 617.

[30] In re Gay, 182 Fed. 260 (D.Mass., 1910).

[31] Henderson v. Binkley Coal Co., 74 F.2d 567 (C.C.A.7th, 1935).

inducing the bankrupt to sign a contract, enter into a partnership, buy property at excessive prices, and extend credit, all to his pecuniary loss, constituted a cause of action for fraud arising out of an injury to property.[32] It is to be noted in bankruptcy cases under Section 70(a)(6), what amounts to a mere pecuniary loss, which in other cases is often held to be a purely personal injury, often constitutes the requisite injury to property so as to bring it within the Act.

In the *Jones* case the court denied plaintiff-trustee's right to sue for the alleged fraud perpetrated by deputy sheriff Hicks at the execution sale of the bankrupt's property.[33] In its reasoning, the court noted the right which the trustee had to replevy the pick-up truck in a proper action, had he so chosen, and plead the fraud as grounds for such action. It likewise indicated the right of the bankrupt to proceed personally against Hicks in an action of fraud. But, it stated, if the alleged fraud of the defendant can be proceeded upon by the plaintiff-trustee, it can only be done so by assignment and to allow this would be, "at variance with the long recognized rule in this state that an action for fraud may not be prosecuted by an assignee thereof."[34] In further support of this conclusion, the court stated that had the bankrupt elected to affirm the voidable title of the defendant, instead of his trustee, the cause of action alone could not have passed to said trustee because of the rule of non-assignability of actions of fraud. Thus, with this type of circular reasoning and with the conclusion that all actions of fraud are personal, the court failed to discuss the question in relation to the property right from which the action arose.

In support of this blanket rule, the court referred to the leading Michigan case of *Cochran Timber Company v. Fisher*.[35] In that case the plaintiff sued to remove a cloud of title to land, arising from a later quitclaim deed from the plaintiff's own grantor to the defendant. The defendant's cross-bill raised fraud allegedly perpetrated by the plaintiff in the conveyance from the common grantor of the parties. In ruling that the quitclaim deed did not assign the fraud action, the court used the following language, quoted in *Jones:* "The general rule is well established and has been often recognized by this court in varying language that a right of action for fraud is personal and not assignable. . . ."[36]

The dissenting opinion in the *Jones* case raised the question of

[32] In re Harper, 175 Fed. 412 (N.D.N.Y., 1910).

[33] Contra: In re Geiser, 129 Fed. 237 (D.Mont., 1904); Sullivan v. Bridge, 1 Mass. 511 (1805).

[34] Jones v. Hicks, 100 N.W.2d 243, 245 (Mich., 1960).

[35] 190 Mich. 478, 157 N.W. 282 (1916).

[36] Ibid., at 481, 283.

the property right to the truck, which LaVoy passed to the plaintiff-trustee by his assignment in bankruptcy, as the factor which prevented the Michigan minority rule of non-assignability of fraud actions from applying to this case. The opinion noted that no title passed to Hicks until plaintiff elected to affirm the voidable sale and the right of election carried with it the right to sue either for conversion, or for fraud; citing *Sweet v. Clay*,[37] where the Michigan court said, "that the rule . . . that a right of action for fraud is not assignable, has no application to an assignment of something which is *in itself tangible;* capable of delivery; involving a right of property. In such case, the right to whatever remedy the assignor has follows the assignment."[38]

The *Jones* case is a clear departure from the majority rule, which will allow a trustee to sue for a bankrupt's action of fraud arising out of a property claim, either under sections 70(a)(5) or 70(a)(6) of the Federal Bankruptcy Act. This conclusion is made especially apparent from the fact of the actual property interest—the title to the truck—which was passed to the trustee by LaVoy's assignment in bankruptcy, a factor which even the Michigan court has held to render the above rule inapplicable. The majority opinion in *Jones* leaves unresolved the question as to what remedy plaintiff would have had, had the sheriff sold the truck to a bona fide purchaser for value before plaintiff avoided, as well as to what remedy now remains, after plaintiff has formally affirmed defendant's voidable title. In any event, *Jones* stands both as a re-affirmance of the minority common law rule and its reasoning.

[37] 88 Mich. 1, 49 N.W. 899 (1891).

[38] Ibid., at 12, 901 (emphasis supplied).

TRUSTS—CY PRES NOT APPLICABLE TO CHARITABLE BEQUEST "FOR WHITE CHILDREN"

Emma Katherine Sagendorph, deceased, provided in her will for the balance of her estate to be given to the City of Detroit, Wayne County, Michigan, "for a playfield for white children, and known as the 'Sagendorph Field.'" It was agreed that to carry out the bequest would be contrary to the laws of Michigan and the United States of America. The plaintiffs contended that since the residuary clause is void, they, as heirs, should take the balance through descent. The defendant-city contended the bequest should be made under the doctrine of *cy pres*. For that reason, they unanimously adopted a resolution in the Detroit Common Council accepting it. The defendant construed the clause: "[A]s giving the City of Detroit the right to make the playfield available to all children, without regard to race, color or creed." An evenly divided Michigan Supreme Court upheld the Ingram County Circuit Court, which had de-