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Creditors' Rights—Federal v. State Determination of Property Rights Subject to Federal Liens

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Special Term granted petitioner's application, but the Appellate Division reversed the order and dismissed the petition, as did the Court of Appeals by a unanimous vote.

Although the Court held that the sale was not within the regular course of business, they denied petitioner's suit on the ground that Section 20 did not apply to circumstances such as those in the present case.

The purpose of Section 20 as announced in *In re Timmis*, was to protect the minority stockholders from requiring them to abandon, change, or limit their business, if the majority should have the power to direct such a sale.³⁶ However, where a minority stockholder agreed to the sale of the assets pursuant to a plan of dissolution, he is no longer a party that was intended to be protected by Section 20. Thus, the Court held that once a stockholder has agreed to a sale of substantially all the assets of a corporation, he no longer has rights under Section 20, but his remedy lies elsewhere.

It seems clear that had petitioner been faced with a resolution of sale alone, his vote would have been negative to such an idea, and his rights established under Section 20. Because of the addition of the further provision of dissolution combined with the sale, his affirmative vote deleted his rights under Section 20. *Queare* whether the remedies now available to petitioner, if any, are sufficient to offset the loss of his remedy at hand, and, if not, did the legislature really intend that his minority interest should be impaired at the hands of the majority stockholders pursuant to a resolution that was proposed primarily to get the minority vote, thus vitiating the effect of Section 20.³⁷ Would this not be contrary to the purpose of Section 20 as already established in the *Timmis* case?³⁸

CREDITOR'S RIGHTS

FEDERAL V. STATE DETERMINATION OF PROPERTY RIGHTS SUBJECT TO FEDERAL LIENS

In *In re Washington Square Slum Clearance*¹ there occurred in sequence: (1) an attorney's retainer contract was signed by the client providing that the client agreed "to pay and do hereby assign" twenty per cent of any award to be made for the attorney's services in representing the client in a

holders at a regularly called stockholders meeting where there is a sale of substantially all the assets of a corporation, not made in the regular course of business.

Section 45 N.Y. STOCK CORP. LAW requires that whenever, under this law, stockholders are required to take any action at a regularly called meeting, written notice of the meeting must be sent to each stockholder entitled to vote at such a meeting, informing him of the time and place of the meeting, and its purpose.

36. *In re Timmis*, 200 N.Y. 177, 93 N.E. 522 (1910).

37. It should be noted that there was no allegation of fraud in the present case. The writer offers the above explanation to show how the Court's interpretation here offers an opportunity, in future cases, to the majority to defraud the minority stockholders.

38. *Supra* note 36.

1. 5 N.Y.2d 300, 184 N.Y.S.2d 585 (1959).

condemnation proceeding, (2) the attorney fully performed the services, and the condemnation order was entered, (3) the Federal Government duly filed a tax lien against the client, and (4) the final decree of condemnation granting the award was signed. The attorney moved at Special Term to have his lien enforced out of the condemnation award fund held by the condemnor. The Federal Government intervened, asserting the priority of its lien.

Had the attorney asserted the priority of his lien, the Government's lien would have had priority.² Rather, the attorney claimed that under State law the assignment to him of the twenty per cent interest in the award under the retainer contract operated as a purchase by him of that interest at the time the contract was signed, and therefore, the Government's lien could not attach to his interest since it was directed against property owned only by the client. The Government contended that the attorney was attempting to exempt himself from the Government's lien by showing that he purchased the property in dispute, that whether he was a "purchaser" is a question of Federal and not State determination, that he was not a purchaser by Federal standards because the contractual agreement did not evidence the normal attributes of a conventional purchase, and, therefore, the Government's lien could attach to his interest.

The Court of Appeals held that prior to the attachment of the Government's lien the attorney acquired, under New York law, a property interest in the award,³ which, when the Government filed its lien, could not be disturbed by the client. Since that Government lien could only attach to the client's property,⁴ as ascertained by State law,⁵ the attorney's property interest was free of the lien. The Court reasoned that since the property interest passed to the attorney prior to the attachment of the Government lien, there could be no contention by the Government that its lien was being sabotaged.

Judge Fuld dissented on the ground that the purchase was not operative until the attorney's property interest became choate, which was subsequent to the attachment of the Government's lien. Until the order of condemnation was entered, the attorney had no more interest than his statutory lien granted him.⁶ Since the property interest did not in fact pass until after the Govern-

2. *Aquilino v. United States*, 3 N.Y.2d 511, 169 N.Y.S.2d 9 (1957); *United States v. Pay-O-Matic Corp.*, 162 F. Supp. 154 (S.D.N.Y. 1958); *United States v. Goldstein*, 256 F.2d 581 (2d Cir. 1958); *United States v. City of New Britain, Conn.*, 347 U.S. 81 (1954).

3. There is apparently no dispute that the attorney's lien interest is property. While the Court assumes that it is property and rights to property, there is, however, no authority suggesting the validity of the assumption.

4. INT. REV. CODE OF 1954 § 6321 provides that a lien against a taxpayer "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." § 6323 provides that the lien imposed under Section 6321 "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed. . . ."

5. *Commission v. Stern*, 357 U.S. 51, 57 (1959); *Aetna Cas. & Sur. Co. v. United States*, 4 N.Y.2d 639, 176 N.Y.S.2d 961 (1958); *Fidelity & Deposit Co. of Maryland v. New York City Housing Authority*, 241 F.2d 142 (2d Cir. 1957).

6. N.Y. JUDICIARY LAW § 475 provides that an attorney has a lien on his client's cause of action which attaches to the judgment from the commencement of the action, which lien is extant to the value of the services rendered.

ment's lien attached, whether the attorney was a "purchaser" must be Federally determined,⁷ and the attorney was not a conventional purchaser as he must be to satisfy the Federal determination.⁸

The policy underlying the Court's decision is that the Government, when it proceeds in a State court asserting an interest against the taxpayer's property, is in no better position as claimant because it is the Government. This is so because there is no requirement that the States uniformly determine whether a particular interest is property and whether it belongs to the taxpayer in a given instance.⁹

There is, however, the competing policy that the words "mortgagee, pledgee, purchaser, or judgment creditor," as set forth in the Federal statute as classes excepted from the liens under defined circumstances, should be uniformly interpreted by the States to prevent any State from expanding its definition of any of these exceptions to impede the imposition of Federal liens.¹⁰ The result obtained apparently enables New York State to accomplish the very thing sought to be prevented.

This decision poses the anomaly of irreconcilable policies basic to Federal lien statutes clashing within the same case. It is suggested that this Court was not without a choice in reaching its result, and that it characterized the issues to reach the result favorable to the State's interest in protecting an attorney's lien.

The Court avoids the Federal constitutional issue present in the case. If Federal liens can reach and confiscate a property interest which, under State law, is no longer owned by the taxpayer, is there not a taking of property without due process of law?

THIRD PARTY RESTRAINING ORDER IN SUPPLEMENTARY PROCEEDINGS

Section 781 of the New York Civil Practice Act provides that: "Upon the service of the subpoena upon any third party who has in his or its possession property or moneys belonging to the judgment debtor or who is indebted to the judgment debtor, such . . . third party is hereby forbidden to make or suffer any transfer or other disposition of, . . ." such property. A violation of the above restraining provision is punishable as a contempt of court, by either a fine or imprisonment.

"Proceedings supplementary to a judgment in this state furnish a substitute for the creditor's bill formerly used in aid of execution to reach intangible assets of the debtor. The service of the third party subpoena . . . gives the judgment creditor the priority of a vigilant creditor and a lien upon

7. *United States v. Scovill*, 348 U.S. 218 (1955); *In re Litt*, 128 F. Supp. 34 (D.C. Pa. 1955). See also *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953); *United States v. Kings County Iron Works, Inc.*, 224 F.2d 232 (2d Cir. 1955).

8. *United States v. Scovill*, *supra* note 7; *In re Litt*, *supra* note 7; *United States v. R. F. Ball Const. Co.*, 355 U.S. 587 (1958); *United States v. Acri*, 348 U.S. 211 (1955).

9. *Commissioner v. Stern*, *supra* note 5, at 44-45, 47.

10. *United States v. Gilbert Associates, Inc.*, *supra* note 7.