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Creditors' Rights—Third Party Restraining Order in Supplementary Proceedings

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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.

the equitable assets of the debtor."¹¹ This in turn presupposes the existence of a fund held by a third party, which is property of the debtor or a debt owing to him or it.

The characterization of moneys paid to the debtor in an alleged violation of such a subpoena, was in question in *Cosmopolitan Mutual Casualty Co. of New York v. Monarch Concrete Co.*¹²

Psaty and Furman, Inc., the third party, had been served with a subpoena under Section 781, which was in substantially the same language as the above provision. Psaty was the general contractor in the construction of an incinerator, and the judgment debtor, Monarch, was a sub-contractor on the same job. In 1956 Monarch notified Psaty that it could not fulfill its obligation under its contract with Psaty. At the time of the service of the subpoena, the full contract price had been paid to Monarch, and nothing further was owing to it under the contract. Rather than discharge Monarch, and retain a right to sue for breach of contract, Psaty elected to subsidize the completion of the sub-contract by Monarch. The apparent reason for this arrangement, was that Psaty was under a time limit for the completion of its contract with the City of New York. The majority held that such payments were not for a debt or obligation owing to Monarch, and as such were not restrained by the subpoena. Psaty had no further obligation for any payment under the contract, nor under the subsequent arrangement. The arrangement was not a contract because under it, Monarch offered nothing in consideration which it was not obliged to do under the prior agreement. Since the arrangement was not supported by any consideration, it created no enforceable rights of any nature in Monarch. Thus, if Monarch had no enforceable rights under the agreement, there are likewise no obligations to which a third party subpoena can apply.¹³

The Court also found, that there was no presumption that the payments made by Psaty were for a debt owed to Monarch, and that Psaty must show the non-existence of such an obligation. Rather, it is the judgment creditor who must show that the payments were of an indebtedness owing to the debtor. The judgment creditor must also show that such payments resulted in his damage.¹⁴ Here, rather than depleting the debtor's assets, Psaty was reducing the liability of Monarch.

The dissent, would not reverse the lower courts unless, as a matter of law, there was no evidentiary basis for finding a violation of the subpoena.

11. *Wickwire Spencer St. Co. v. Kemkit Sc. Co.*, 292 N.Y. 139, at 142, 54 N.E.2d 336, 337 (1944).

12. 6 N.Y.2d 383, 189 N.Y.S.2d 893 (1959).

13. The dissent in the Appellate Division would phrase it thus: "Monarch had no right to collect or even demand anything from the third party except as Psaty was willing to make payments. There was nothing due to Monarch at any time between the service of the subpoena and the contempt finding. Monarch could not have compelled Psaty to make any payment to it, and consequently the judgment creditor was in no better position to do so for it stands on the same footing as its debtor." 6 A.D.2d 163, 169, 176 N.Y.S.2d 122, 127 (1st Dep't 1958).

14. *Short v. B.R.T. Corp.*, 279 App. Div. 631, 107 N.Y.S.2d 719 (1st Dep't 1951).

They would hold that any proof of a payment after the issuance of the subpoena, was a *prima facie* violation of the injunction, and that Psaty had failed to overcome this presumption. However, upon considering the provision of Section 779, which requires an affidavit from the judgment creditor showing that he has reason to believe that the third party has property of the debtor, before a subpoena can issue, it appears that the judgment creditor should be required to prove these allegations in a contempt action. This would appear to argue against a *prima facie* violation by payment.

The rationale of the majority in applying basic contract principles, appears to have reached a just result which is in keeping with the purpose of Section 781. It is evident from the facts that there is no property of the debtor in the third party's hands, and that no arrangement subsequent to Monarch's default created an obligation owing to Monarch. Monarch appears to have been merely an agent of Psaty, rather than an independent contractor.

RIGHT OF REDEMPTION AFTER TAX SALE

Title to the real property in dispute was held by the estate of Emma Gerow.¹⁵ Since the 1949-50 taxes were not paid on the land, the property was sold at a tax sale, the defendant having possession of the tax certificate resulting from that sale. Within three years from the date of the sale, plaintiff, desiring to buy the property, paid, and the County Treasurer accepted, the full payment required to redeem these premises from the tax sale.¹⁶ Thereafter, plaintiff obtained title to the property in question from the estate of Emma Gerow, and brought this action pursuant to Article 15 of the Real Property Law to quiet title.¹⁷ The Supreme Court, Suffolk County entered judgment against defendant, which was affirmed by the Appellate Division, and the Court of Appeals by a unanimous vote.

There are two types of statutes that have dealt with the above problem. One uses the words, as to who may redeem, "the owner, occupant, or any other person having an interest in any real estate sold for taxes. . . ." The other is essentially the same, albeit the words "having an interest in any real estate sold for taxes" are omitted.¹⁸ As to an interpretation of the latter, one may not redeem who is a complete stranger to the land.¹⁹ Only a person having or claiming in good faith to have an interest in the property is entitled to that right.²⁰ However, this has been qualified somewhat to permit a redemption by one having no interest, but the result of this places title not in he who has redeemed, but in the original owner, who may later take advantage of the

15. *Johnson v. Stein*, 6 N.Y.2d 413, 189 N.Y.S.2d 915 (1959).

16. Section 49 of the SUFFOLK COUNTY TAX ACT provides for the redemption of any real estate sold for taxes by the owner or any person interested in the property within thirty-six months after the date of the tax sale.

17. An action under Article 15 of the N.Y. REAL PROP. LAW compels the determination of a claim to real property.

18. Section 152 of the N.Y. TAX LAW is an example of this.

19. "Stranger," as used here, is one having no legal or equitable interest in the property involved.

20. *People v. Campbell*, 143 N.Y. 335, 38 N.E. 300 (1894).