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Marshaling Claims--The Effect Of State Exemption Laws On Collection Of Government Liens

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mained in California and later moved to Minnesota where the proceedings for extradition were initiated. The court stated that it could not be claimed that the obligor had committed in New York or any third state an act which intentionally resulted in a crime in the state of Minnesota. The obligor had never been present in Minnesota and the court of Minnesota had no jurisdiction over the person of the obligor. Extradition could not be properly granted by the responding state because it could not be said that the obligor committed any crime in the demanding state.

West Virginia has adopted the Uniform Extradition Act and the Uniform Support Act with little variation from those proposed by the commissioners. The Uniform Extradition Act which was enacted in 1937 is now W. VA. CODE ch. 5, art. 1, §§ 7-13 (Michie 1961). The Uniform Support Act which was enacted in 1950 is now W. VA. CODE ch 48, art. 9, §§ 1-20 (Michie 1961).

The court in the instant case based refusal of extradition on lack of jurisdiction over the person of the obligor. The court reasoned that neither the Uniform Extradition Act nor the Uniform Support Act gave the Massachusetts court jurisdiction. Section 6 of the Uniform Extradition Act did not apply because Massachusetts could not, by a legislative act, impose an obligation to support an illegitimate child in Massachusetts and could not impose criminal liability for failure to support such a child where the alleged father had never been within the jurisdiction of Massachusetts. The act of non-support was not sufficient to give the demanding state jurisdiction. Further, the Uniform Support Act did not give Massachusetts jurisdiction over the person of the obligor because during the period for which support was sought the obligor was not present within Massachusetts and no obligation to support could arise under its laws. Thus the majority opinion in the instant case appears to best protect the rights of the individual obligor.

Fred Adkins

Marshaling Claims—The Effect Of State Exemption Laws On Collection Of Government Liens

P was the beneficiary of a life insurance policy insuring the life of *X*. This policy had a cash surrender value of 27,285.87 dollars, and a face value of 50,000 dollars. *B*, bank, had a senior lien on the

policy by way of a pledge from *X*. *G*, the federal goverment, had a junior lien on the cash surrender value. *P* paid *B* 26,844.66 dollars, claiming that the cash surrender value was reduced by this amount, and that *G* could only reach the remainder of the cash surrender value. *G* claimed that *B* should first satisfy its claim from the proceeds, leaving the cash surrender value for *G*. The Court of Appeals for the Second Circuit affirmed a judgment that allowed marshaling. *Held*, reversed. The state law exempts from levy of creditors the proceeds of a life insurance policy. Therefore, it would be inequitable to marshal the claims so as to reduce the proceeds to the injury of the beneficiary. *Meyer v. United States*, 84 Sup. Ct. 318 (1963).

In the principal case the parties did not dispute that: the unpaid federal income tax created a lien on the taxpayer's property and rights to property as provided under section 3670 of the Internal Revenue Code of 1954, and without such a lien the government would not have any right to the proceeds of the life insurance policy, *Commissioner v. Sterm*, 357 U.S. 39 (1958); the insured taxpayer's property and right to property is determined by state law, *United States v. Bess*, 357 U.S. 51 (1958); the cash surrender value of an insurance policy, where subject to the control of the taxpayer, is property and rights to property, *United States v. Bess, supra;* finally, the priority of liens is determined by the principle of first in time is first in right, *United States v. New Britian*, 347 U.S. 81 (1954).

The issue involved in this discussion is founded on the doctrine of marshaling. This doctrine says that where there are two creditors, one senior and the other junior with the senior having a right to collect from two of the same creditor's funds while only one of these is available to the junior creditor, the senior encumbrancer must first satisfy his claim from the fund not doubly charged. 35 AM. JUR. *Marshaling Assets and Securities* § 2 (1941).

Like any other general rule it has exceptions. For example, equity will not marshal assets to the injury of a third person having an equal equity. *Birch River Boom and Lumber Co. v. Glendon Boom and Lumber Co.*, 71 W. Va. 139, 76 S.E. 167 (1912).

All states have exemption statutes. These exemption laws create new equities based on public policy that prevents creditors from reaching certain property. Because of the creation of these equities there has developed a well recognized exception to the rule of marshaling. Basically it is that if a creditor has a claim against exempt

property and also against other property, a junior creditor cannot compel the senior creditor to resort first to the exempt property for payment. Annot., 77 A.L.R. 371 (1932); Annot., 44 A.L.R. 758 (1926).

The basis for such a rule is that when the state creates an exemption law they are giving to the beneficiary of this law new equities and protections equal to those given to the creditors. They are saying that it is just as important to preserve exempt property as it is to allow a creditor to collect his claim. Because the equities are equal, equity will not allow marshaling. *In re Bailey,* 176 Fed. 990 (8th Cir. 1910); *Sims v. McFadden,* 127 Ark. 810, 233 S.W.2d 375 (1950).

West Virginia, like New York in the principal case, has a statute creating a new equity in the beneficiary of life insurance. Our statute provides that if a policy of insurance is effected by any person on his own life or on another life, in favor of a person other than himself, the lawful beneficiary or assignee shall be entitled to its proceeds and prevails against the creditors and representatives of the insured, whether or not the right to change the beneficiary is reserved or permitted. W. VA. CODE ch. 33, art. 6, § 27 (Michie 1961).

The effect of these exemption statutes is to change the state procedure governing claim enforcement by changing the marshaling rule. They affect the system of collection and not the right of the government to attach. The state law can not prevent a federal lien from attaching to the property of the taxpayer, but the state does have the right to change its collection procedure. *United States v. Bess, supra.* The lien still attaches. The rules for collection are the ones changed. Exemption statutes affect the rights of all state creditors, including the federal government if they choose to use them.

The objection raised by the dissent is that the majority is allowing the state exemption law to create a new equity for the people of their state to the detriment of the federal government. In *United States v. Behrens,* 230 F.2d 504 (2d Cir. 1956), and *United States v. Winters,* 312 F.2d 749 (6th Cir. 1961), the courts under similar fact situations as are presented in the principal case simply stated that the funds should be marshaled and that it would not be inequitable to do so. They ignored the equity created by the state law, and indicated that to recognize this equity would be inequitable to the federal government.

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Certainly the exemption statute is no more inequitable to the federal government than any other statute the state might pass changing the enforcement procedures for creditors' claims.

In *United States v. Bosman,* 363 U.S. 237 (1960) the Supreme Court gave recognition to the fact that Congress has not provided a system to supplement or replace the state procedure governing claim enforcement, and that until they do the system provided by the state is the most desirable to follow. This has always been the general rule. Therefore, if you look to the state system of collection you will be under the same rules that apply to the rest of the state creditors in this regard.

As long as the federal government is looking to the state law to determine priorities and rights of creditors, once their claim has attached, the holding of the principal case must follow. West Virginia, having created an equity by providing for the beneficiary an exemption of certain insurance proceeds, must be considered one of the states that comes within the law stated by the Supreme Court in the principal case.

Boyd Lee Warner, II

Property—Joint Tenancy in Joint Bank Accounts

P, the committee for *W,* an incompetent, sought to recover money representing the proceeds of two bank accounts alleged to be wrongfully withheld by *D. W's* husband, *H,* had opened an account in the name of *H* and *W* "payable to either or the survivor." *H* subsequently closed this account and opened a new one in the name of *H* and *D, H's* son. *H* died shortly thereafter. The lower court dismissed the proceeding and *P* appealed. Held, reversed, new trial granted. The withdrawal was held not to have destroyed the joint tenancy. The court held that evidence would have to be introduced to determine whether or not the presumption created by the statute that a joint tenancy was intended was rebutted. If not, *W* would be entitled to her moiety of the account (one half) or to all of the account if the proof established that the closing of the account was not voluntarily and understandingly made by *H,* i.e., that fraud, undue influence, or lack of mental capacity resulted in *H's* closing the account. *Bricker v. Krimer,* 13 N.Y.2d 22, 241 N.Y.S. 2d 413, 191 N.E.2d 795 (1963).

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