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Federal Tax Lien—Effect of State Statute of Limitations

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number of directors to be elected, the less the representation accorded to a minority. The minority was entirely deprived of representation in the Syphers case, and this was held to be in violation of article XI, section 4, before amendment. This decision is criticized in 19 U. PrrT. L. Rev. 806 (1958). The holding in the principal case was expressly stated not to be contrary to the Syphers holding. Now that it is constitutional to limit the power of stockholders to vote for directors it is foreseeable that the validity of staggered directorates will be litigated again.

The majority opinion in the principal case does operate to serve the best interests of corporations doing business in West Virginia. Furthermore the decision sets at rest a confusion which has existed some sixty years, and clearly gives a corporation the right to issue stock giving holders "full, limited, or no voting powers" in the election of directors or managers.

John Everett Busch

Federal Tax Lien—Effect of State Statute of Limitations

The United States brought an action to recover so much of a debt owed to a delinquent taxpayer that would offset the tax deficiency. The debtor contended that the state statute of limitations had run against a preponderance of the obligation, W. Va. Code ch. 55, art. 2, § 6 (Michie 1955); therefore, the United States was partially barred from recovery. Held, the statute of limitations was tolled prior to the commencement of this action, and the United States is entitled to all money not paid by the debtor before notice of levy. United States v. Polan Indus., Inc., 196 F. Supp. 333 (S.D. W. Va. 1961).

This decision held that the federal government was immune to a state statute of limitations when enforcing a tax lien perfected under federal law. The brunt of the debtor's argument was based on the derivative nature of the government's claim. It asserted that the government stepped into the shoes of the taxpayer and could attain no greater rights than the taxpayer itself could claim. Thus, the government could only stop the statute by starting suit. The court admitted that the United States took the claim with all its attendant infirmities. United States v. Summerlin, 310 U.S. 414
(1939). Had the statute run against the debt before the assessment was made, the government could not circumvent that defense. United States v. Jacobs, 155 F. Supp. 182 (D. N.J. 1957). But if such were not the case, the lien in effect operated to transfer the claim to the government. United States v. Eiland, 223 F.2d 118 (4th Cir. 1955). The statute was at that instant tolled, since the government acting in its sovereign capacity is immune from the state statute. United States v. Nashville, C & St. L. R.R., 118 U.S. 120 (1886).

The court in the instant case relied heavily on United States v. Jacobs, supra. The taxpayer in default, a family corporation, had made loans to a director and principal stockholder. The debtor pleaded the state statute of limitations which was found irrelevant for two reasons. First, applying New York corporation law, the court held that the debtor was continually liable on the loans because of his relationship with the corporation. Second, proceeding on the debtor-creditor theory, the state statute of limitations was not pertinent because the government had done everything required to perfect its lien. From that point the statute was tolled. Granted the derivative nature affected the government’s right, but not its remedy.

Upon what ground does the federal government proceed against a debtor in apparent repose? The government is an instrument of the people and out of necessity is clothed with sovereign immunity. This immunity doctrine is traceable to England and the crown prerogative. The king was the representative of the people, and it was the British conception that he could only act for their benefit. Being busy with the affairs of state, no British subject could hold the king accountable for the misdoings of his officers. Therefore, no time ran against the king. 1 Blackstone, Commentaries *247. This fictional basis crumbles before modern constitutional government which demands a different rationale. This rationale was provided by Justice Story in United States v. Hoar, 26 Fed. Cas. 329 (No. 15373) (C.C.D. Mass., 1821). The true foundation currently rests on public policy. Citizens ought not pay for the negligence of their representatives especially in the collection of revenue. This view was exemplified in dicta where a foreign government’s claim had been transferred to the United States. A state limitations statute would ordinarily apply to a claim of a sovereign government notwithstanding the argument for inherent sovereign immunity. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938). A law review comment upon the preceding case adversely criticized
the modern rationale. The writer felt that the government's legal staff was more than competent to settle existing claims promptly. Note, 47 Yale L.J. 132 (1938). In rebuttal it is well to note that some fifty statutes of limitations effective against the Internal Revenue Service would produce an insuperable maze. This lack of uniformity and the attendant consequences was early recognized by Justice Story in United States v. Hoar, supra. A comprehensive collection of cases on this topic may be found in Note, Immunity from Statutes of Limitations and Other Doctrines Favoring the United States as Plaintiff, 55 Colum L. Rev. 1177 (1955).

Seemingly, the most effective argument that a debtor can propose when pleading a state time statute rises from the Judiciary Act of 1789, 28 U.S.C. § 1652 (1952). Where the Constitution, laws, and treaties of the United States are not in question, the law of the state governs. Some cases have simply found that a federal law was determinative. In Board of Comm'rs v. United States, 100 F.2d 929 (1939), modified, 308 U.S. 343 (1939), the United States brought an action on behalf of an Indian ward to recover back property taxes. The statute of limitations if effective would have barred recovery. However, it was not applicable because the Judiciary Act of 1789 does not control in the face of a federal treaty. Accord, United States v. Thompson, 98 U.S. 486 (1878). But assuming that a federal law is not conclusive, it follows that a district court must apply the statute of limitations of the state in which it hears the case. This assertion, however, was rejected in United States v. Middler, 127 F. Supp. 686 (E.D. Mich. 1955). Unless Congress intended the government to be bound it will not be. Legislatures deal with the rights and privileges of the people, and generally any restraints placed thereon are for reasons not common to government. Further, even a federal statute of limitations was held inapplicable to the federal government where there was no clear indication from Congress that it intended otherwise. United States v. De Queen & E. R.R., 271 F.2d 597 (8th Cir. 1959). The emphasis then is on the express assent of federal law.

Accordingly, Congress has provided a statute of limitations for collection. The Commissioner is required to bring his action six years from the date of assessment. Int. Rev. Code of 1954, § 6502. Thus, the assertion that a state statute of limitations is a controlling factor after the assessment is substantially controverted.
Finally, the state courts have recognized the federal position. *Taylor v. United States*, 224 Mass. 639, 88 N.E.2d 121 (1949), *cert. denied*, 338 U.S. 948 (1949). A state probate court had ruled a United States tax claim barred by a short state time statute. Reversing, the Supreme Judicial Court of Massachusetts held that the United States as a creditor of the alleged insolvent estate was not barred by the statute in a state court. The principal case would strengthen this holding and the federal government's position before state courts.

In summary, for reasons of public policy and the maintenance of a uniformity of laws, state time limitations do not apply to the federal government when reducing a perfected tax lien to judgment.

*James Kilgore Edmundson, Jr.*

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**Instructions—Binding Instruction on Contributory Negligence Need Not State Specific Acts of Negligence**

*P*, a pedestrian, was struck and injured by an automobile operated by *D*. At the trial, the court, at the request of *D*, instructed the jury that it must find for *D* if it should believe that "... both plaintiff and defendant were guilty of negligence which combined and contributed to cause the accident..." On cross-appeal, *P* averred that this instruction was erroneous. *Held*, instruction proper. It is not necessary for a binding instruction on contributory negligence to state specific acts of negligence by the plaintiff, disapproving *Walker v. Robertson*, 141 W. Va. 563, 91 S.E.2d 468 (1956). *Graham v. Wriston*, 120 S.E.2d 713 (W. Va. 1961).

The problem of phrasing instructions on contributory negligence has been the subject of much litigation in the West Virginia courts. In expressly disapproving the holding in *Walker v. Robertson*, *supra*, the West Virginia Supreme Court of Appeals has decisively settled any doubt concerning the requirements of such an instruction in this state. The *Walker* case disrupted a previously unbroken line of decisions in this state concerning contributory negligence, and the holding in the principal case has now removed that blemish from the law.

In the *Walker* case, the court instructed the jury that if it believed from the evidence that "... the plaintiff was guilty of