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## Attachment and Garnishment--Property of Prisoner in Hands of Officer--Custodia Legis

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## RECENT CASE COMMENTS

ATTACHMENT AND GARNISHMENT — PROPERTY OF PRISONER IN HANDS OF OFFICER — *Custodia Legis*. — Defendant, indicted for embezzlement, petitions to compel the return of a sum of money taken from his person by the arresting officer and now in the custody of the superintendent of the Department of Public Safety. The superintendent resists the petition on the grounds that a valid notice of an execution lien has been served on him by third party claimants, and that the money in controversy is the fruit of the crime charged. *Held*, that money taken from the person of a felony indietee is in *custodia legis* and not subject to garnishment, attachment or other civil process. *State v. George*.<sup>1</sup>

The prevailing authority supports the common law rule advanced in the principal case.<sup>2</sup> The reasons assigned to justify this result are predicated upon public policy. They may be classified as follows: (1) the due and orderly administration of criminal justice without interference, in the nature of collateral proceedings, which might impair the control of the court over its officers and procedure;<sup>3</sup> (2) the confusion, inconvenience and expense to which public officers would be put;<sup>4</sup> and, (3) the violation of a prisoner's rights by opening the door to trumped-up charges, and collusion between an officer and a creditor, thus undermining the respect of the people for their courts.<sup>5</sup>

A minority of jurisdictions at common law, while recognizing the preponderant rule generally, have established exceptions to it when the reason for the rule appears to have ceased.<sup>6</sup> It has been held that the following condition must be present: (1) where there is no evidence of fraud or collusion and the purpose of the criminal process is clearly *bona fide*; (2) where the property sought to be subjected to civil process is the fruit of the crime charged;<sup>8</sup>

<sup>1</sup> 181 S. E. 713 (W. Va. 1935).

<sup>2</sup> *Hughes v. Svoda*, 178 Atl. 108 (Md. 1935); *Outerbridge Horsey Co. v. Martin*, 142 Md. 52, 120 Atl. 235 (1923); *Robinson v. Azel Howard and Trustee*, 61 Mass. 257 (1851); *Hubbard v. Garner*, 115 Mich. 406, 73 N. W. 390 (1897); *Kuehn v. Faulkner*, 136 Wash. 676, 241 Pac. 290, 45 A. L. R. 571 (1925).

<sup>3</sup> *Outerbridge Horsey v. Martin*, *supra* n. 2.

<sup>4</sup> *Hughes v. Svoda*, *supra* n. 2.

<sup>5</sup> *State v. George*, *supra* n. 1; 45 A. L. R. 571.

<sup>6</sup> *Gaston v. Jackson Nat. Bank*, 45 Ga. App. 106, 163 S. E. 265 (1932); *Fitzgerald v. Nickerson*, 443 R. I. 396, 113 Atl. 290, 16 A. L. R. 373, and note (1921).

<sup>7</sup> *Golden Gate Candy Products Co. v. Superior Ct.*, 1 Cal. App. (2d) 426, 36 P. (2d) 834, 48 A. L. R. 835 (1934).

<sup>8</sup> *Fitzgerald v. Nickerson*, *supra* n. 6.

and (3) where the plaintiff in the civil proceedings is the person who has suffered the loss of the property by reason of the crime charged against the prisoner.<sup>9</sup> While expressly supporting the majority view, the California decisions make two additional exceptions to its operation: (1) where the property sought to be garnished was not taken from the prisoner's person but from its resting place elsewhere, at his voluntary suggestion, on the theory that the officer became merely a bailee in an individual capacity, and therefore subject to civil process;<sup>10</sup> and (2) where the prisoner is taken into custody as a fugitive from justice, property found on his person is subject to execution under a judgment returned against him because of transactions occurring after his conviction.<sup>11</sup>

Under statutes in some of the states, property in the possession of a public officer is subject, at least under certain conditions, to civil process although taken from a person arrested on a criminal charge.<sup>12</sup> It has been held that general attachment and garnishment statutes, however, are not to be construed as applying to property coming into the hands of an arresting officer.<sup>13</sup>

The instant case is a decision of first impression in West Virginia. The reasoning of the court and the rather narrow construction placed upon the principle of *custodia legis* by decisions in the past would indicate that a recognition of exceptions to the general rule is improbable in this state.<sup>14</sup> There is no statute which would warrant a sufficiently broad construction to justify a contrary result in this case. It is well understood that the attachment and garnishment statutes are construed strictly in West Virginia.<sup>15</sup> On principle it would seem that the majority decisions are sound, since the minority view of necessity requires a determination of collateral issues, foremost of which would be whether, as a matter

<sup>9</sup> Golden Gate Candy Products Co. v. Superior Ct., *supra* n. 7.

<sup>10</sup> Coffee v. Haynes, 124 Cal. 561, 57 Pac. 482 (1899). However, the court in this case did say the property in question was in *custodia legis*.

<sup>11</sup> Emmanuel v. Sichofsky, 198 Cal. 713, 247 Pac. 205 (1926).

<sup>12</sup> *Ex parte Hurn*, 92 Ala. 102, 9 So. 515, 13 L. R. A. 120 (1890); Reifsnnyder v. Lee, 44 Iowa 101, 24 Am. Rep. 733 (1876); Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459 (1867); Fitzgerald v. Nickerson, *supra* n. 6; and see 45 A. L. R. 571.

<sup>13</sup> Kuehn v. Faulkner, *supra* n. 2.

<sup>14</sup> Brewer v. Hutton, 45 W. Va. 106, 30 S. E. 81 (1898); Boylan v. Hines, 62 W. Va. 48, 59 S. E. 503 (1907).

<sup>15</sup> Altmeyer v. Caulfield, 37 W. Va. 847, 17 S. E. 409 (1893); Cosner v. Smith, 36 W. Va. 788, 15 S. E. 977 (1892); Pennsylvania R. R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300 (1903); and see Strauss v. Chesapeake, etc. R. Co., 7 W. Va. 368, 2 A. L. R. 506n (1874), to the effect that property not under the control of the defendant cannot be subjected to the levy of an attachment writ.

of fact, there was fraud or collusion in procuring criminal process. The result would inevitably be the thwarting of the ideal of speedy justice, a tendency to impair respect for criminal proceedings, and to inconvenience public officers. It is believed these considerations outweigh the possible advantages, under the minority rule, of helping to perfect a third party's civil rights and remedies.

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**BANKRUPTCY — OIL AND GAS — DISCRETION IN FEDERAL COURT TO PERMIT DETERMINATION OF BOUNDARIES OF BANKRUPT'S LEASEHOLD BY STATE COURT.** — The original order to an approved petition in bankruptcy under the provision of Section 77B of the Bankruptcy Act<sup>1</sup> enjoined the state court from proceeding further with a trespass suit to determine the title to certain oil allegedly removed by the bankrupt oil company from under plaintiff's land through a slanting well.<sup>2</sup> *Held*, that on motion to dissolve injunction it was within the discretion of the federal court to permit the state court to determine ownership of the oil, and previous order so modified. *In re Sentinel Oil Company*.<sup>3</sup>

This holding seems unusual since the power to pass uniform bankruptcy laws is given to Congress<sup>4</sup> and it has said expressly that the federal court shall "have exclusive jurisdiction of the debtor and its property wherever located".<sup>5</sup> The cases likewise state the same broad rule of an exclusive and paramount jurisdiction in the federal court.<sup>6</sup> But this begs the very point in issue, namely, whether this oil is the debtor's property and more particularly whether a federal or state court shall decide its ownership.

On this question the cases are not in complete harmony. When a bankruptcy court acquires possession of the property the general practice is to try all disputed titles by summary proceedings be-

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<sup>1</sup> 11 U. S. C. A. § 207.

<sup>2</sup> See generally, *Lahee, Problems of Crooked Holes* (1929) 13 AMERICAN ASS'N OF PETROLEUM GEOL. BULL. 1095-1161.

<sup>3</sup> *In re Sentinel Oil Co.*, 12 F. Supp. 294 (1935).

<sup>4</sup> United States Constitution, art. 1, § 8.

<sup>5</sup> 11 U. S. C. A. § 207(a).

<sup>6</sup> *Ex parte Baldwin*, 291 U. S. 610, 54 S. Ct. 551, 78 L. Ed. 1020 (1934); *Isaacs v. Hobbs Tie and Timber Co.*, 232 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645 (1931); *Grand Boulevard Inv. Co. v. Strauss*, 78 F. (2d) 180 (1935); *In re Greyling Realty Corp.*, 74 F. (2d) 734 (1935); *Irving Trust Co. v. Fleming*, 73 F. (2d) 423 (1934).