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Taxation—Priority of Federal Tax Lien—United States v. Vermont

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sufficiently present to justify recovery.[27] In its decision, the court restricted itself merely to announcing the existence of the right to intellectual credit, without elaborating on its protection other than by asserting that "vindication of the claim . . . is readily assimilable to the principle of an action for interference with prospective economic advantage."[28]

Interference with another's obtaining employment, other than in a legitimate competitive situation, is not a novel tort.[29] Yet to use such interference as the basis for a cause of action, the plaintiff must show that it was intentional,[30] and, in New Jersey, the situs of the instant case, that it was wanton, malicious,[31] and unjustifiable.[32] As stated in *Louis Kamm, Inc. v. Flink*,[33] interference with the right "to enjoy the fruits and advantages of [one's] own enterprise, industry, skill and credit" is actionable, but only if it is "without the justification of competition or the service of any interest or lawful purpose." The necessity of proving an intent to interfere fed by malice is obvious. Should the defendant in such an action be found to have received a patent under an honest mistake as to his inventorship, or in ignorance (inexcusable as it may be) of the clear mandate that applications be filed in the name of the true inventor, it could not be said that he intended to interfere with the plaintiff's existing or prospective economic advantage. The law's desire to protect intellectual credit should surely not create what would be a strict liability on a person who blunders, mistakenly or stupidly, onto that privileged field.

The importance of the instant decision lies in its enunciation of the right to intellectual and professional credit for inventions, and not in whatever hope it may raise in the plaintiff that she will prevail on this theory should the case reach re-trial. For the facts as explained in the decision give little indication of the defendants' intent in making the original application in the name of the defendant supervisor. The plaintiff has, however, a new chance to explore these issues and for this reason the instant decision, apart from its value as a contribution to the continuing elaboration of protectible rights, is to be admired.

ROBERT J. MULDOON, JR.

Taxation—Priority of Federal Tax Lien—*United States v. Vermont*.[1]— In October, 1958, the state of Vermont made an assessment and demand for withheld state income taxes of $1628 due from Cutting & Trimming, Inc., a Vermont taxpayer. Under state law a tax lien for the amount due, plus

[27] See Prosser, Torts 3-4 (1955).

[28] Misani v. Ortho Pharmaceutical Corp., 83 N.J. Super. 1, 13, 198 A.2d 791, 798, supra note 1.

[29] See Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 68 So. 2d 314 (1953).

[30] Dade Enterprises v. Wometco Theatres, 119 Fla. 70, 160 So. 209 (1935).

[31] George F. Hewson Co. v. Hopper, 130 N.J.L. 525, 33 A.2d 889 (1943).

[32] Stein v. Schmitz, 21 N.J. Misc. 218, 32 A.2d 844 (1943).

[33] 113 N.J.L. 582, 587, 175 A. 62, 66 (1934), cited with approval in Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 6 N.J. 217, 78 A.2d 69, 75 (1951).

[1] 377 U.S. 351 (1964).

interest and costs arose immediately upon assessment and applied to all the taxpayer's property or rights to property.[2] In February, 1959, the Commissioner of Internal Revenue assessed Cutting & Trimming for taxes of $5365 due under the Federal Unemployment Tax Act. Under federal law, a tax lien was created upon assessment and attached to all the taxpayer's property and rights to property.[3] In May, 1959, the state commenced an action on certain property to foreclose its lien, and in October, 1959, final judgment was obtained. Prior to the securing of this judgment, the federal tax lien had been duly filed.[4] In 1961, the United States brought suit on its lien on the same property and the state was named a party because of its claimed interest in that property. Both the Federal District Court in Vermont and the Second Circuit Court of Appeals held the state lien to be superior,[5] and appeal was taken to the United States Supreme Court. HELD: The state lien has priority over the federal tax lien. The taxpayer was not insolvent, and since the state had a choate or perfected lien under the definition given in *United States v. New Britain*,[6] the rule applied is that "a prior lien gives a prior claim. . . ."[7]

The first version of sections 6321 and 6322 of the 1954 Internal Revenue

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[2] 32 V.S.A. § 5765 (1959) provides:

> If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes . . . .

The Vermont statute is modeled after Int. Rev. Code of 1954 §§ 6321 and 6322, quoted in note 3, infra.

[3] Int. Rev. Code of 1954, § 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . 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.

Int. Rev. Code of 1954, § 6322 provides:

> . . . the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

[4] Filing of the federal tax lien prevented the application of Int. Rev. Code of 1954, § 6323 (a), which provides:

> Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate . . . .

If the state had obtained a final judgment on its lien before the federal lien had been filed, it would have been a judgment creditor without notice, and the present controversy would not have arisen. See United States v. Pioneer Am. Ins. Co., 374 U.S. 84 (1963), and United States v. Scovil, 348 U.S. 218 (1955).

[5] United States v. Cutting & Trimming, Inc., 206 F. Supp. 951 (D. Vt. 1962), aff'd sub nom. United States v. Vermont, 317 F.2d 446 (2d Cir. 1963).

[6] 347 U.S. 81, 84 (1954). A lien is choate when "the identity of the lienor, the property subject to the lien, and the amount of the lien are established."

[7] Rankin & Schatzell v. Scott, 25 U.S. 175, 179 (1827).

Code was passed in 1865.[8] Prior to 1913 it had the rather harsh effect of giving the federal tax lien priority over the rights of a subsequent bona fide purchaser who had no knowledge of the lien.[9] In 1933, the equivalent of section 6323(a) was added to protect mortgagees, purchasers and judgment creditors from an unfiled federal tax lien.[10] Subsequently, pledgees were added to this group.[11] The necessity of filing a federal tax lien is absolute.[12] Even if a person who falls into a section 6323(a) category has actual notice of an unfiled federal lien he will prevail.[13] It follows then that a lienor who can qualify under section 6323(a) as a mortgagee, pledgee, purchaser or judgment creditor, and who can prove that his lien was recorded before the filing of the federal lien, will have priority.

However, this statute has not clarified the more perplexing problem of whether the federal tax lien is to have an absolute priority over liens of *others* than mortgagees, pledgees, etc., which were prior to the federal tax lien, or whether the federal lien is to be subject to the common law rule that the first in time is the first in right. There is by statute an absolute rule of priority in cases where the taxpayer is insolvent,[14] and it has been held that a lien on property of an insolvent person must be reduced to *title or possession* in order that it prevail over the federal claim.[15] But where the creditor is solvent and sections 6321 and 6322 apply, no statute establishes priorities. The case of *United States v. Security Trust & Sav. Bank*[16] introduced the idea that an antecedent lien might prevail over the federal tax lien if it were choate or perfected. In that case the court held that an attachment lien was not choate because it created no right to proceed against the property until a judgment was acquired.[17] The lien was "merely a *lis pendens* notice that a right to perfect a lien exists."[18] The court also stated that it would not be bound by state law in determining whether a lien was choate but would make that determination as a matter of federal law.[19] Following the *Security Trust* case, a garnishment lien existing prior to the federal tax lien

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[8] Act of May 3, 1865, ch. 78, 13 Stat. 470.

[9] United States v. Snyder, 149 U.S. 210 (1893); United States v. Curry, 201 Fed. 371 (D. Md. 1912). See Plumb, Federal Tax Collection and Lien Problems, 13 Tax L. Rev. 247, 459 (1958).

[10] Act of March 4, 1913, ch. 166, 37 Stat. 1016.

[11] Int. Rev. Code of 1939, § 3186, added by ch. 614, § 505, 56 Stat. 957 (1942).

[12] Int. Rev. Code of 1954, § 6323(c) states an exception to § 6323(a). It provides that even though a tax lien on *securities* is filed, it does not take priority if the subsequent lienor had no *actual* notice of it.

[13] United States v. Beaver Run Coal Co., 99 F.2d 610 (3d Cir. 1938); Smith v. United States, 113 F. Supp. 702 (D. Hawaii 1953); See Plumb, supra note 9, at 465.

[14] Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1958) provides:
Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied. . . .

[15] United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953).

[16] 340 U.S. 47 (1950); cf. United States v. Acri, 348 U.S. 211 (1955).

[17] Before judgment was obtained, the United States filed notice of its lien, so that the lienor could not qualify as a judgment creditor under § 6323(a).

[18] United States v. Security Trust & Sav. Bank, supra note 16, at 50.

[19] Id. at 49-50.

was held inferior because it could not be perfected until final judgment was awarded.[20]

Neither of these cases offered a suggestion about what might be a choate lien, and it was not until *New Britain*[21] that one was forthcoming. There the Court said that a perfected lien is one on which nothing more need be done in order that it be choate, and that perfection was accomplished when "the identity of the lienor, the property subject to the lien, and the amount of the lien are established."[22] Under this test, certain municipal liens for real estate taxes and water rent due which attached to the specific property were held perfected. However, the federal tax lien was also perfected even though it attached to all the taxpayer's property. Consequently the case was remanded for a finding as to which municipal liens were perfected before the federal lien.[23]

Admittedly, the test of choateness offered in *New Britain* is subject to considerable judicial interpretation. Following a policy that the purpose of the federal tax lien is to insure prompt and certain collection of taxes due to the United States from tax delinquents,[24] the Supreme Court in a series of decisions (most of which are per curiam) has consistently reversed cases which had held liens choate under the definition in *New Britain*.[25] These cases severely limit the applicability of the *New Britain* case, and it is apparent that when the Court said a lien was choate if "nothing" remained to be done to perfect it, it meant "nothing." It appears that no lien held by an individual can be sufficiently choate if it must be enforced by court judgment.[26]

The result in *United States v. Vermont* was reached presumably on the following reasoning. The *New Britain* case held the federal tax lien choate. Consequently Vermont, by copying the federal statute, created a choate lien which was judged by the same standard as the federal lien. In the absence of legislative action, the Supreme Court apparently refuses to establish an *absolute* priority of the federal lien against a solvent taxpayer. When Vermont assesses its lien before the United States it will prevail, and the federal government may be put to additional expense and difficulty in securing property to satisfy its lien. Such a result seems incongruous with the tax lien's purpose of insuring *prompt and certain* collection of taxes due to the United States.

Although at first glance the decision might not seem very far reaching, its results may be felt for some time. It will not affect prior decisions which interpret choateness strictly, and instances of choate liens will probably

[20] United States v. Liverpool & London Ins. Co., 348 U.S. 215 (1955).

[21] United States v. New Britain, 347 U.S. 81 (1954).

[22] Id. at 84.

[23] United States v. New Britain, supra note 21.

[24] United States v. Security Trust & Sav. Bank, supra note 16, at 51.

[25] United States v. Hulley, 358 U.S. 66, reversing, 102 So. 2d 599 (Fla. 1958); United States v. Vorreiter, 355 U.S. 15, reversing, 134 Colo. 543, 307 P.2d 475 (1957); United States v. White Bear Brewing Co., 350 U.S. 1010 (1956), reversing, 227 F.2d 359 (7th Cir. 1955); United States v. Colotta, 350 U.S. 808, reversing, 224 Miss. 33, 79 So. 2d 474 (1955); United States v. Scovil, 348 U.S. 218 (1955), reversing, 224 S.C. 233, 78 S.E.2d 277 (1953).

[26] Plumb, supra note 9, at 470.

remain quite scarce. However, it seems probable that most states, if not all, will adopt statutes similar to the federal tax lien statute, thus giving each state's tax lien priority over the federal lien when the state makes its assessment first. This might eventually lead to congressional declaration of a superiority of the federal lien.

ROBERT M. STEINBACH

Unfair Competition—Preemption by Federal Patent Law.—***Sears, Roebuck & Co. v. Stiffel Co.;***[1] ***Compco Corp. v. Day-Brite Lighting, Inc.***[2]— The Supreme Court recently decided two cases which will affect the area within which the states may employ their laws of unfair competition. In the first, Sears, Roebuck & Co. marketed a pole lamp substantially identical to a patented lamp[3] which Stiffel Co. had previously placed on the market. Stiffel immediately began an action in the United States District Court for the Middle District of North Carolina, which was transferred to the Northern District of Illinois,[4] charging Sears in the first count with patent infringement, and in the second, with unfair competition in that the sale of the Sears lamp resulted in consumer confusion. The district court, invalidating the patent for want of invention,[5] decided for Sears on the first count; but observing that the Sears lamp could cause consumer confusion and had, in fact, already caused such confusion, found for Stiffel on the second count. The Court of Appeals for the Seventh Circuit affirmed, and the Supreme Court granted certiorari. HELD: The law of unfair competition may not be used to prohibit the copying of an article which is unprotected by federal law and which is in the public domain.

In the second case, Day-Brite Lighting, Inc. sold a patented[6] lighting fixture which had a distinctive cross-ribbed light reflector. Subsequently, Compco Corporation's predecessor[7] placed a very similar fixture on the market. Day-Brite then began an action for patent infringement, also charging that Compco had copied the distinctive reflector, which the public had come to associate with Day-Brite as the manufacturer, so as to confuse and deceive purchasers, and thus constitute unfair competition. The district court held Day-Brite's patent invalid, but found Compco guilty of unfair competition despite the absence of fraudulent practices on the ground that the fixture identified Day-Brite as its source and the presence of a similar fixture on the market was likely to cause, and had in fact caused, public confusion. The Court of Appeals affirmed, and the Supreme Court granted certiorari.

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[1] 376 U.S. 225, rehearing denied, 376 U.S. 973 (1964).

[2] 376 U.S. 234 (1964).

[3] The pole lamp was protected by design and mechanical patents.

[4] The district courts have original jurisdiction in any civil action based upon unfair competition if joined with a substantial and related claim under federal copyright, patent or trademark laws. 62 Stat. 931 (1948), 28 U.S.C. § 1338(b) (1948).

[5] See 66 Stat. 797 (1952), 35 U.S.C. § 101 (1958).

[6] Day-Brite's fixture was protected by a design patent.

[7] Compco Corporation had acquired the Mitchell Lighting Co. prior to the filing of the complaint in the district court.