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Marshaling Assets in Favor of Judgment Creditor

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In the case first above cited the law of Kentucky, in which state the contract in question was made, had been settled by judicial decision since 1892. Under those decisions the contract in question would have fallen as monopolistic. Thus the public policy of Kentucky was involved, the merits of which do not concern us here. The federal court chose to find what the law and public policy of Kentucky ought to be rather than the law of the case. It happened (due to the work of some lawyer familiar with the federal rule, no doubt) that one of the contracting parties was a foreign corporation. If it had been a local one and the case had arisen in Kentucky the ruling would doubtless have been the reverse of that actually made. The case leaves Kentucky with two conflicting rules of decision with reference to the same transaction. It certainly does not strike one as a case involving the independence of the federal judiciary versus subservience to the state courts, but rather as one wherein the federal courts failed in their obligation to apply state law as they find it. Whatever justification there may be in the historical background of the law merchant for the federal rule as applied to commercial paper, that very rule itself fails of application in a case like the Kentucky one, which involves a question of local interest only.

J. B. Fordham.

MARSHALING ASSETS IN FAVOR OF JUDGMENT CREDITOR

Where one creditor has a lien on two properties in the hands of the same debtor, and another creditor has a lien on only one of them, the latter, in equity, may frequently force the former to proceed first against the singly charged estate, provided the rights of the double lienholder are not prejudiced thereby, and provided also that the two properties so charged are more than sufficient to satisfy

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25 Cab Co. v. Cab Co., supra note 2.
27 Cab. Co. v. Cab Co., supra note 2. The fortunate cab company was a Tennessee corporation. One issue in the case was whether there was a genuine diversity of citizenship since it appeared that the Tennessee cab company had only recently changed its place of incorporation from Kentucky to Tennessee.
the double lienholder's claim. Otherwise, such a course would be unnecessary. The reason usually given for this procedure is that it prevents the paramount creditor by his caprice from exhausting the estate against which the junior creditor is secured, and prevents the debtor from getting back either fund free of any incumbrance.  

Where, however, the doubly charged estate has already been proceeded against before the singly secured creditor has taken any steps, or where, in a proceeding of the sort first referred to, it seems best to permit the senior lienholder to go first against the doubly charged estate, the junior creditor is held to be subrogated to the senior creditor's interest, to the extent that the latter has exhausted the singly secured creditor's original resources. Frequently, the junior creditor proceeds by way of injunction, if he has been alert enough to anticipate the other's tactics. And sometimes the question is raised in connection with a decree for distribution of the proceeds of the sale of both properties. While the term "marshaling of assets" is commonly used with reference to all of the situations here suggested, it is more characteristic of that first mentioned. There are a few statutes regulating marshaling, but these seem only declaratory of the case law.

In favor of what types of interest and against what types will a court of equity invoke marshaling?

A junior creditor may not thus proceed against the government for taxes due in respect to the two lots. Nor can he compel a senior creditor first to proceed against the homestead, unless, except where one is not permitted to waive the homestead exemption, that estate has been encumbered by the debtor's consent. These results

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4 Ross v. Duggan, 5 Colo. 85 (1879); Jones v. Zollicoffer, supra, note 2; Hudkins v. Word, 30 W. Virginia 204, 3 S. E. 600, 8 Am. S. R. 22 (1887).
8 Husbands v. Paducah, 12 Ky. Op. 201 (1883), holding that taxes are not debts, and thus not subject to marshaling. But see Darby v. Vinnedge, 53 Ind. A. 525, 100 N. E. 852 (1913).
9 Pope v. Harris, supra, note 1; Butler v. Stainback, 87 N. C. 216 (1882); Harris v. Allen, 104 N. C. 86, 10 S. E. 127 (1889).
are due to the effect of the countervailing policies involved. And in *Winston v. Biggs*,\(^{10}\) the North Carolina court refused to permit a trustee for the benefit of otherwise unsecured creditors to compel one of the beneficiaries to proceed first under a prior mortgage upon part of the property conveyed in the deed of trust, before resorting to the funds held by the trustee. This was apparently because of the supposed impropriety of the trustee interfering with an advantage conferred by the direction of the settlor. The result, however, seems unfair to the other creditors. The doctrine of marshaling has been criticized as being unfair to the unsecured creditors,\(^{11}\) by giving to an already secured creditor an advantage never bargained for. It would seem that the failure to marshal in this case would be subject to the same criticism.

One need not, however, be technically a creditor, in order to invoke marshaling. Before the Married Women's Property Act, where the husband had died indebted, the English court of equity frequently required his creditors, at the request of the widow, to go first against the other personal estate, and then the land, before resorting to the widow's personal paraphernalia.\(^{12}\) And in *Young v. Trustees of Davidson College*,\(^{13}\) the North Carolina court permitted the purchaser of land subject to a charge incident to partition to institute proceedings to compel the owner of that charge to marshal. The decision, however, went off on the ground that the owner of the charge had a claim against only the plaintiff's lot.

Under what circumstances may a judgment creditor invoke marshaling? The distinction has been made that a subsequent judgment creditor who has obtained a specific lien by virtue of an attachment, execution or otherwise, is not in a position, as is a subsequent contractual lienholder, to object to marshaling as between prior lienholders.\(^{14}\) This is both because he stands in the position of the debtor, and because he did not give value, without notice of the other

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\(^{10}\) 117 N. C. 206, 23 S. E. 316 (1895).


\(^{12}\) Snelson v. Corbett and Delves, 3 Atkins 370, 26 English Reports 1013 (1746); Tipping v. Tipping, 1 Peere Williams 729, 24 English Reports 589 (1721); Tynt v. Tynt, 2 Peere Williams 542, 24 English Reports 853 (1729). See also Howard v. Menifee, 5 Pike (Ark.) 668 (1842).

\(^{13}\) 62 N. C. 261 (1867).

\(^{14}\) The Oliva A. Carrigan, 7 Fed. 507 (1881); Kendig v. Landis, 135 Pa. 612, 19 A. 1058 (1890).
creditor's equity, in reliance on the security offered by the debtor, as would often be true of the contractual lienholder.

It has been held in Ireland that "a judgment creditor has no specific lien on the land, but only a general lien over all the estate of his debtor. A general creditor does not stand in the same right as a specific incumbrancer, and therefore, in ninety-nine cases out of one hundred, he cannot have any relief against a mortgagee who has a specific lien." On the contrary, it has frequently been stated by American courts and writers that a judgment creditor may invoke marshaling. These remarks, however, are largely if not uniformly found in connection with situations where the judgment creditor had already obtained a specific lien by attachment, execution, or otherwise. And relief by way of marshaling has usually been given to one in the postion of a mortgagee, an equitable mortgagee, the holder of a mechanic's or vendor's lien, or other specific incumbrance.

In this connection, the recent Virginia case of Kidwell v. Henderson is of particular interest. There a judgment creditor sought to compel marshaling, claiming a specific lien both by virtue of the fact that his judgment was for the unpaid balance of the purchase price of one of the lots, and because his judgment, by confession, had been made a lien upon this lot only. The court, however, refused to accord to his judgment any more or different significance by way of lien than that incident to any other judgment. He had no vendor's lien, his position being apparently due to his having financed the purchase. And the restriction of the judgment as a lien to one upon the particular lot mentioned was held beyond the power of the court. While the refusal of the court to permit marshaling in favor of the judgment creditors was due in part to certain other
factors, it seems to rest, so far as this aspect of the case is concerned, upon the tacit assumption that a mere judgment creditor is not in a position to invoke marshaling of assets. So long as the process is to be confined to the relative privileges of specific lienholders, the result seems sound.

J. W. Crew, Jr.

**Banker's Liens on Deposits Subsequent to Indebtedness**

The question arises in a recent Virginia case as to a bank's right to set off a depositor's indebtedness to it against his balance on simple account when the money deposited was of a fiduciary character, the bank having no notice or knowledge of this fact, and when the debt had been created before this deposit. These funds were the proceeds of a note collected by the depositor for the plaintiff, another bank, which now seeks to show its equities and defeat the set-off. Held: Plaintiff bank cannot recover.

There is an absence of decision on this question in North Carolina. The cases in other states are in conflict, the weight of authority, however, being in accord with the principal case.

Where the depositary has knowledge that the money deposited belonged to a third person, or where the circumstances are such as to compel an inquiry as to the relation between the depositor and the funds deposited, no set-off is allowed, on the equitable principle that one who knows or should know that certain property belongs to another cannot deal with it in such manner as to interfere with or extinguish the other's rights thereto. Where, however, the depositary has extended credit or has in any other way changed its position to its detriment in reliance upon the credit of the funds deposited without notice of another's interest therein it is conceded that the bank may retain as against the beneficial owner. This conclusion is reached in some jurisdictions on the general grounds that where

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1 Federal Reserve Bank v. State and City Bank, 143 S. E. 697 (Va., 1928).