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Liquor License Refund--Priority of Judgment Creditor's Lien Over Equitable Assignment (City of New York v. Bedford Bar and Grill, 2 N.Y.2d 429 (1957))

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fund is here. It is, therefore, suggested that a statute be enacted to extend the trust fund benefits to those who deposit money in New York for the improvement of foreign realty.

LIQUOR LICENSE REFUND—PRIORITY OF JUDGMENT CREDITOR'S LIEN OVER EQUITABLE ASSIGNMENT.—Bedford Bar and Grill received a loan from appellant bank for renewal of its liquor license. The bank received as security an assignment of any refund that might become due from surrender of the license, under Section 127(1) of the New York Alcoholic Beverage Control Law.[1] Upon default, the bank filed the assignment with the State Comptroller and then Bedford surrendered the license. Subsequently, the City of New York docketed a warrant for taxes due against Bedford[2] and then, in supplementary proceedings,[3] obtained a judgment creditor's lien on the refund. The Court of Appeals *held* the bank's assignment to be subordinate to the lien of the City. *City of New York v. Bedford Bar and Grill,* 2 N.Y.2d 429, 141 N.E.2d 575 (1957).

Assignments of choses in action have long been recognized in equity.[4] In New York, even if the property assigned did not exist *in praesenti,* but had only a potential existence, the assignor was still bound.[5] When the property did come into *esse,* the equitable title to it would mature, and vest in the assignee.[6] Hence his rights were enforced even against a creditor who had obtained a judgment after

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[1] "If a person holding a license to traffic in alcoholic beverages . . . shall voluntarily . . . cease to [do so] . . . during the term for which the license fee is paid, such person may surrender such license to the liquor authority for cancellation and refund . . . ." N.Y. ALCO. BEV. CONTROL LAW § 127(1).

[2] ". . . [T]he chief fiscal officer may issue a warrant . . . for the payment of the amount [of taxes due] . . . . [After it is docketed] the sheriff shall . . . proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record . . . ." N.Y. GEN. CITY LAW § 24-a (§ 10(b)).

[3] "The attorney for the judgment creditor may at any time within two years from the date of such judgment, issue a subpoena directed to a third party . . . where such attorney has reason to believe that such third party has property of the judgment debtor exceeding ten dollars . . . requiring the attendance of such third party for examination . . . whether or not such . . . money . . . appears to belong to or to be due to a person or corporation other than the judgment debtor." N.Y. CIV. PRAC. ACT § 779(2).

[4] See Stover v. Eycleshimer, 3 Keyes 620 (N.Y. 1867); Meechett v. Bradshaw, Nels 22, 21 Eng. Rep. 779 (Ch. 1633); Earl of Suffolk v. Greenvill, 2 Freem. 146, 22 Eng. Rep. 1119 (Ch. 1631).

[5] See Fairbanks v. Sargent, 117 N.Y. 320, 22 N.E. 1039 (1889).

[6] Stover v. Eycleshimer, 46 Bar. 84 (N.Y. 1865), *aff'd,* 3 Keyes 620 (N.Y. 1867).

the assignment, but before the fund came into being.[7] The creditor was limited to the judgment debtor's interest in the property [8] and hence, like a subsequent assignee of a chose in action, his rights were subordinate to the previous assignment.[9] This was true, with the exception of those specific cases dictated by public policy,[10] even if the creditor had obtained a lien on the assigned future property.[11]

But the lower courts have not applied this doctrine to assignments of liquor license refunds.[12] In *Alchar Realty Corp. v. Meredith Restaurant*,[13] a creditor who had procured a judgment before the emergence of the fund was given priority over a previous assignee. The court reasoned that when the fund became payable the assignee's title was enforceable in equity, and then only as against the assignor. While later cases agreed in this result, they did so because, at the time of the judgment, no fund susceptible of assignment was in existence.[14] However, it was not until 1943 that the Court of Appeals answered the question of when the fund began to exist.[15] *Strand v. Piser* [16] held that this occurred at the surrender of the license, not at the presentation of the receipt to the Comptroller.[17]

In *Matter of Gruner*,[18] the proceeds of any future sale of a stock exchange seat were assigned as security. After the assignor's death and the sale of the seat, the State of New York sued for taxes owed for 1933 and 1937.[19] The court stated that at the time of the assign-

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[7] Williams v. Ingersoll, 89 N.Y. 508 (1882).

[8] *Id.* at 523. It is the duty of the assignee to notify the debtor of the assignment, for without notice, the latter is not liable if he makes payment to another assignee. See Wangner v. Grimm, 169 N.Y. 421, 62 N.E. 569 (1902); Heermans v. Ellsworth, 64 N.Y. 159 (1875).

[9] See Williams v. Ingersoll, *supra* note 7, at 523.

[10] See Williams v. Ingersoll, *supra* note 7, at 519. See, *e.g.*, Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907), where it was held that the claim of a mortgagee of after-acquired chattels was subordinate to the claims of subsequent creditors. The reason for this rule was to protect these creditors who loaned money in reliance upon the borrower-mortgagor's stock in trade (which they at least indirectly furnished) from having the proceeds of their credit go to the mortgagee, and as a result not be able to collect their debt. See also Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894), where a similar rule was applied to mortgages of future crops.

[11] See Niles v. Mathusa, 162 N.Y. 546, 57 N.E. 184 (1900).

[12] Such an assignment has been recognized as enforceable. N.Y. ATT'Y GEN. REP. 149 (1935).

[13] 256 App. Div. 853, 8 N.Y.S.2d 733 (3d Dep't 1939) (mem. opinion).

[14] See, *e.g.*, Matter of Guarino, 285 App. Div. 1161, 140 N.Y.S.2d 370 (2d Dep't 1955) (mem. opinion); Frank v. Lutton, 267 App. Div. 703, 48 N.Y.S.2d 137 (3d Dep't 1944); Palmer v. Tremaine, 259 App. Div. 951, 20 N.Y.S.2d 145 (3d Dep't 1940) (mem. opinion).

[15] See Strand v. Piser, 291 N.Y. 236, 52 N.E.2d 111 (1943).

[16] *Ibid.*

[17] See Palmer v. Tremaine, note 14 *supra*.

[18] 295 N.Y. 510, 68 N.E.2d 514 (1947).

[19] The United States also claimed satisfaction for income taxes owed for 1933 and 1941. The court held that the government, by virtue of statute [REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1952)] had a right of priority in

ment, the assignee had received an "inchoate equitable lien" [20] on the proceeds of the sale which attached to the fund when it became available to the assignor's administratrix. Thereupon, the assignee's lien was immediately perfected and he became a secured creditor. Because the state had not enforced its claim [21] before the assignee's lien had so matured, it was held subordinate. Upon remand,[22] new evidence showed that the state actually did file a claim with the administratrix before the fund became available for payment, and it was awarded the money.

In the instant case, the Court indicated that the general rule in this area is that:

> . . . as between a judgment creditor's lien and the equitable lien of an assignee of property subsequently to be acquired, the latter, while his rights will be enforced in equity as against his assignor, has no right at all as against the former.[23]

The Court maintained that this rule was applied in the *Gruner* case [24] when, on remand,[25] the State was given priority. However, it was

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payment which arose at the moment of the death of the assignor, and not a lien. Matter of Gruner, 295 N.Y. 510, 520-21, 68 N.E.2d 514, 519-20 (1947).

[20] Matter of Gruner, 295 N.Y. 510, 518, 68 N.E.2d 514, 518 (1947). An equitable lien arises from a contract, express or implied, which deals with a debt in favor of one and against the other contracting party and which shows the intent of the assignor to transfer a particularly described fund as security. See Fiore v. Smith, 96 N.Y.S.2d 610 (Sup. Ct. 1950). When the presence of these elements is clear to the court, equity will give to the transaction the result that it was intended to produce and will enforce the promise where no paramount rights intervene. *In re* Friedlander's Estate, 178 Misc. 65, 32 N.Y.S.2d 991 (Surr. Ct. 1941). Hence an equitable lien is available only to one without notice, active or constructive. Elar Development Co. v. Sullivan County, 279 App. Div. 949, 110 N.Y.S.2d 869 (3d Dep't 1952).

[21] "At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it . . . whether the property remained in the hands of the debtor, or had been placed in the possession of a third person . . . [and] could be defeated . . . only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right . . . . The first constitution of . . . New York . . . provided that the common law of England . . . should be and continue the law of the State. . . . [Hence] the State . . . succeeded to the crown's prerogative right of priority . . . to all debts due to the State . . . ." Marshall v. New York, 254 U.S. 380, 382-83 (1920).

[22] Matter of Gruner, 4 M.2d 471, 74 N.Y.S.2d 38 (Surr. Ct. 1947).

[23] City of New York v. Bedford Bar and Grill, 2 N.Y.2d 429, 432-33, 141 N.E.2d 575, 576 (1957). The test of an equitable assignment is the inquiry whether or not the assignment makes an appropriation of the fund so that the debtor would be justified in paying the debt or the assigned part to the person claiming to be the assignee. Hinkle Iron Co. v. Kohn, 229 N.Y. 179, 128 N.E. 113 (1920). As to an equitable lien, see note 20 *supra*.

[24] Matter of Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1947).

[25] Matter of Gruner, note 22 *supra*.

the dissent's interpretation of *Gruner*[26] that the judgment lienor would have priority *only* if its lien had been perfected first. They also restricted the application of the majority's "general rule" to pledges of future crops[27] and mortgages of after-acquired property.[28] That rule would not apply here where there is an assignment of a future fund which is to arise out of a present property right, and which was originally advanced by the assignee. However valid this may appear,[29] the law now seems to be that an assignment of after-acquired property is inferior to a subsequent judgment creditor's lien. This is true even if the property had come into existence before the creditor's lien was obtained.[30]

Absent successful legislative action,[31] we may expect a decrease in the use of such assignments of future property as security, since such assignees will never be "secured" unless they enter into litigation. One wonders if justice, and business, would not be better served by giving priority to the first perfected claim.[32]

MOTION PICTURE CENSORSHIP—LICENSE DENIAL ON GROUNDS OF INDECENCY—HELD INVALID. — The New York State Board of Regents unanimously denied a license[1] to exhibit the film *Garden of*

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[26] See Matter of Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1947); Matter of Gruner, 4 M.2d 471, 74 N.Y.S.2d 38 (Surr. Ct. 1947).

[27] Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894).

[28] Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907).

[29] It is to be noted that the reason for the "general rule" (see note 11 *supra*) actually does not apply. Only the proceeds of the assignee's extension of credit are governed by the assignment. Hence the proceeds of the property furnished by subsequent creditors do not go to the assignee.

As to the correct interpretation of *Matter of Gruner*, it is important to note that the state made no claim for taxes due for 1942 since it had not filed a claim for them until after the perfection of the assignee's lien. Matter of Gruner, 4 M.2d 471, 473, 74 N.Y.S.2d 38, 40 (Surr. Ct. 1947). Also, Chief Judge Conway, who concurred with the dissent in the instant case, wrote the majority opinion in the *Gruner* case.

[30] City of New York v. Bedford Bar and Grill, 2 N.Y.2d 429, 141 N.E.2d 575 (1957).

[31] In 1953, 1954 and 1955, the legislature introduced bills to give priority to bank-assignees. While both houses passed the bills in 1954 and 1955, the governor vetoed them without memoranda. See City of New York v. Bedford Bar and Grill, *supra* note 30, at 434, 141 N.E.2d at 577. This could be construed to mean that the legislature attempted to either nullify the lower court decisions in this area, or to change the existing law as expressed by the majority in the instant case.

[32] See Matter of Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1947); Matter of Gruner, 4 M.2d 471, 74 N.Y.S.2d 38 (Surr. Ct. 1947).

[1] N.Y. EDUC. LAW § 122, which provides that the Regents may refuse a license to exhibit if it finds the motion picture to be ". . . obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."