TITLE NEWS

JULY 1930

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NO. 7

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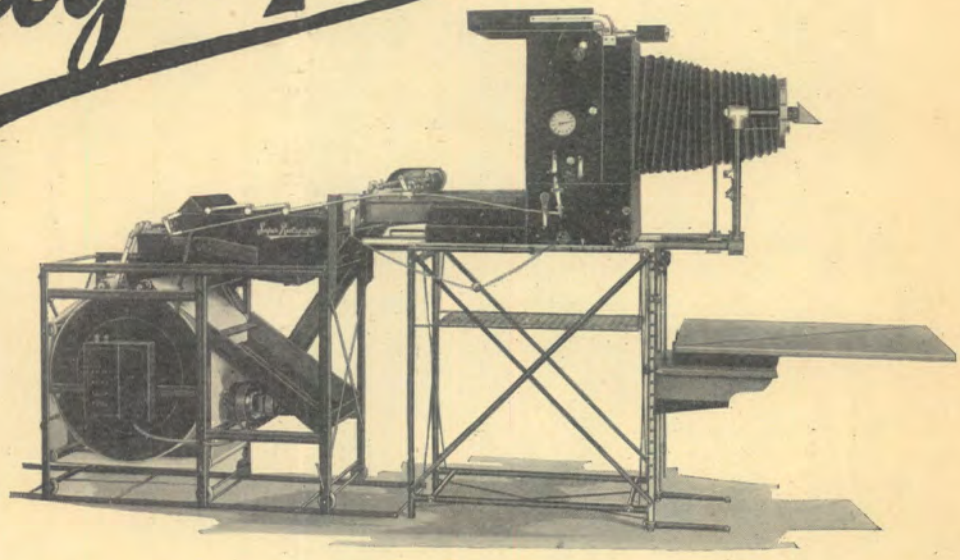

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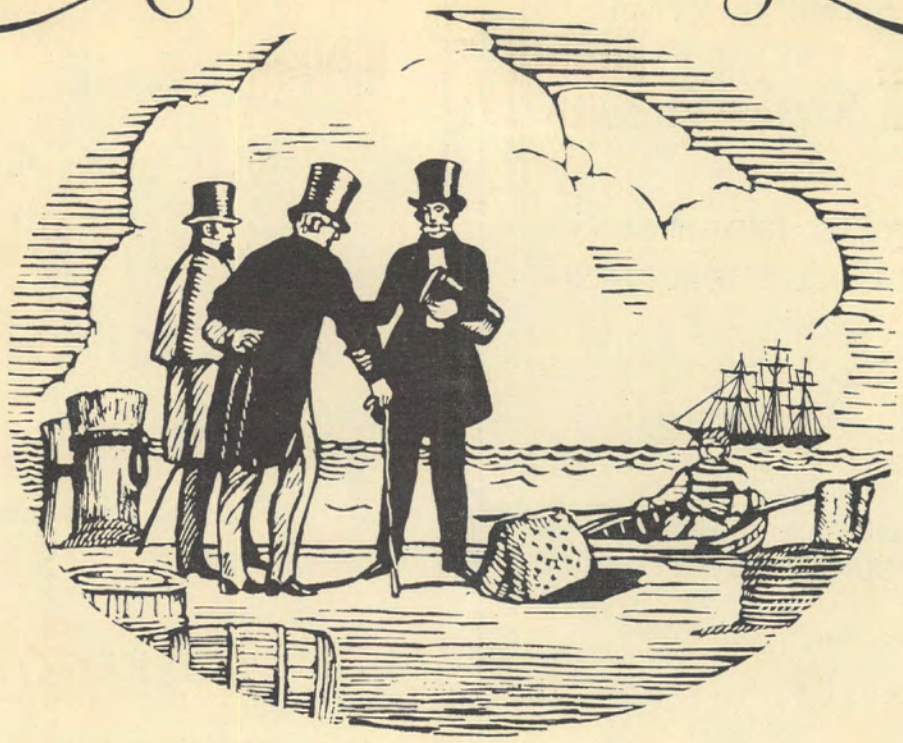

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TITLE NEWS

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Editor's Page

THERE is a jingo-man in the title business. His name is—"The Other Fellow." He muddies-up the water, keeps the bucket kicked over, and disrupts the order of things by playing lone wolf, the game of "me-all-by-myself," and gets his business by the slinking method of cutting prices, giving big concessions and commissions.

It surely would be a great thing if all these other guys could be produced. Why don't the various state associations adopt as a slogan for their next conventions, "Bring the Other Guy"? Get him there by dragging, kidnapping, or otherwise. Maybe there wouldn't be so many other guys either. The other guy sometimes says it's the other guy, too, and sometimes it is.

ANYHOW it's ridiculous—disgusting in fact—to see how really few places there are in the country where there is no such thing as this "other guy." It seems as though in nearly every place some one or more are in the title business who use as their sole stock in trade personality, and methods of getting business, price-cutting and concession giving.

It's the perfect example of asininity. There are only so many title orders in any community. They are going to be handled by those in the business, whether one or a dozen. No others are going to do them, and some one with a brain storm that cuts prices to get them is only kidding himself. The other guy can cut, too, and the thing will always remain on the same level—usually a very low level, right down in the gutter.

THEY'LL get the business anyhow, so why not get it on a profitable and price-maintained basis, rather than on a cellar-rat proposition? They'll all meet each other's prices anyway, so why not meet on a high ground?

SOME think they will create more title orders by reducing prices. This is a terrible idea. People don't use an abstract or title policy until and unless they absolutely have to have it. The price makes no difference so far as the necessity or demand is concerned.

THE "other guy" is always a bull-headed cuss too; just can't do a thing with him. It is now getting to be the custom for abstracters in the same town to speak together, but this has been on the increase in just the last few years. It's too bad, for it's a costly proposition. Other businesses—barbering, undertaking, laundrying, dry cleaning, law, plumbing, and all others—not only speak, but work hand in hand and have made their businesses profitable.

BUT not so the title business. It is so peculiar and unique, and each company has very extraordinary conditions and circumstances.

As a result, in so many places, the business is suffering because a cut price schedule is maintained instead of an established one. It's honestly sad to hear so many times the same old story from so many places—that no money is being made because of the price maintenance condition.

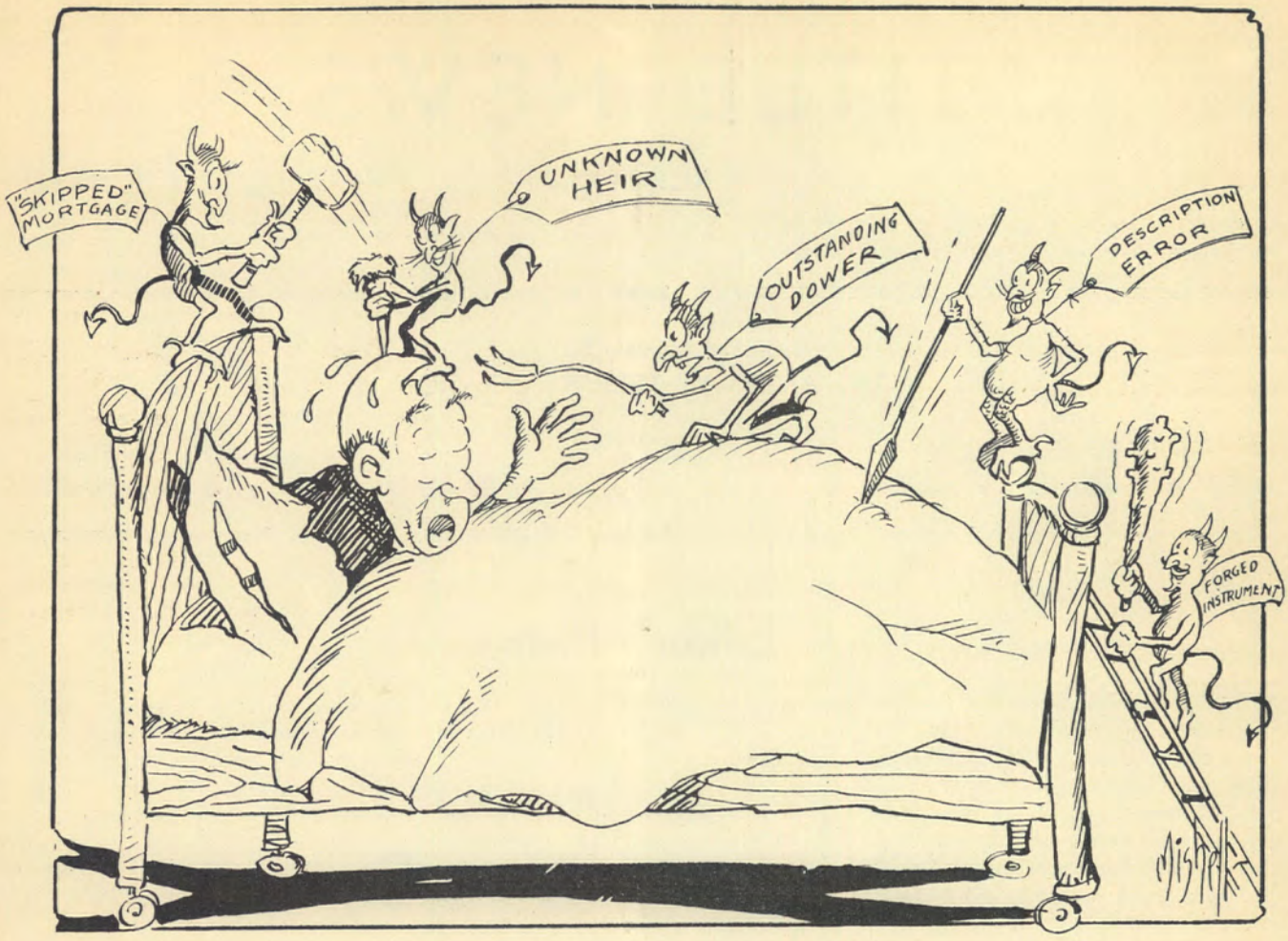
BUT it's apt to change. Business has diminished—might as well be frank about that and not try to kid others, much less ourselves—and there are no prospects that it will improve immediately.

As long as there was a volume and the income exceeded the overhead, it was fine. But now that the number of orders has dwindled, it's going to be a case of struggling along, or, as will be the case with the price cutters, of having to close up shop and "go back to the mines," or elsewhere.

MONEY could be made in the title business easier than in any other. It's a necessary business; they have to go to those in it when needed, and since there are no orders except for needed business, it most certainly is hard to understand why there is so much bidding for business by price-cutting, when the same ones could get the same work on a profitable basis.

THE title business has never been sold except on a selling argument of cheapness and low price. It's a service proposition of great value. Why don't those in the business try to sell it as a commodity—one of great value and worth—rather than just on an underbidding proposition?

1930 CONVENTION, RICHMOND, VA., Oct. 7-8-9-10



Repose for the Title Examiner

This delving into musty lore,
'Midst legal cobwebs I deplore,
And yet am bound to snoop around,
Where buried errors may be found,
And as the antiquarian rakes,
So I must search for old mistakes,
And though my own would keep from sight
Bring those of wiser men to light.
Like deeds not executed right,
Or misdescribing land or lot,
Or wife or husband who forgot
To sign or state was married not,
Or notary who omitted to
Affix his seal when he got through,
Or have a witness, witness too,
Or will some fine old banker drew,
But failed to tell how to construe
Or mortgage that has not been seen,
Or taxes, or a judgment lien,
Or mortgage paid, but not released
And held by assignee deceased,
Or corporation deed not sealed,
Or law amended or repealed
Or by decision nullified,
Or case on which we had relied
Just overruled or modified,
So as to raise some questions new
Of jurisdiction or venue.
Or of plaintiff's right to sue,
Or case we chanced to overlook
Back yonder in old shelf-worn book,
And though John Doe had acted for
And thought he was executor
Of the estate of Richard Roe
Cum testamento annexo,
Was ab initio de son tort,
As held by court of last resort,
For no petition for probate
Was ever filed in the estate,
And though he made a full divide,
And all the heirs were satisfied,
And all the creditors have died,
And fifty years have passed beside,
And though the statute has begun
For the third time its course to run,
The court may yet make dough of Doe
And all proceedings had below,
Though I'm inclined to think she will
Will be the will of Richard still.

Status of the Lien of Federal Judgments*

By W. T. STOCKTON**
Jacksonville, Fla.

THE decision in Rhea v. Smith (Mo. 1927) 47 S. Ct. 698, 274 U. S. 434, 71 L. Ed. 1139, has caused a tremendous amount of study and discussion throughout the United States. The opinion in that case by Mr. Chief Justice Taft held that Missouri had failed to conform to the Act of Congress of 1888 and that, therefore, the lien of a judgment rendered in the United States District Court of that state extended throughout its district.

Very naturally the national title insurance companies were particularly perturbed. The New York Title & Mortgage Company, through its solicitor, George S. Parsons, has published a pamphlet entitled "The Lien of Federal Court Judgments in the Various States of the Union." The conclusion of this pamphlet, rather astounding, is that there are twenty-three states in which the necessary legislation to secure conformity has not been adopted. Therefore, the question is undoubtedly of great national importance.

Analysis of Act of 1888

The question involved, to be understood, should be considered, not only in the light of its history, but also in the light of an analysis of the Act of Congress of 1888, which is at the basis of the matter, and in the light of an analysis of the Rhea v. Smith case itself.

In 1849 the United States Supreme Court, speaking through Mr. Justice McLean, handed down a decision in the case of Massingill v. Downs (Miss. 1849), 7 How. 760, 768, 12 L. Ed. 903. This decision has been regarded as the fountainhead of the rule therein set forth as follows:

"In those states where the judgment on the execution of the state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."

In this state of the law, Congress passed an Act on Aug. 1, 1888, now to be found in U. S. Comp. St. 1916, Sec. 1606; 4 Fed. Stat. Ann. (2nd Ed.) 608; Ch. 729 25 Stat. L. 357; and in U. S. C. A., Tit. 28, Sec. 812. The Act itself originally contained three sections. Subsequently the third section was amended and afterwards repealed. Section 1 of the original Act remains in force and that is all with which we are concerned.

The decision of the Supreme Court of the United States in Rhea v. Smith has thrown the spotlight on the question of Federal liens and called for an interpretation of conformity.

Several articles on the subject have appeared in former issues of TITLE NEWS and here's another discussion of some of the salient points involved.

Briefly, Section 1 of this Act provides that federal judgments—decrees also are to be included in this terminology—shall be liens throughout a state in the same manner and to the same extent and under the same conditions only as if such judgments had been rendered by a court of general jurisdiction of that state. In other words, Congress did not give up its rights to fix the terms and conditions of a federal lien, but affirmatively enacted that liens of federal judgments should be in exactly the same category as the liens of judgments of state courts of general jurisdiction. It made no difference what a state should enact as to the lien of its own judgments, that same thing was to be true of federal judgments. The Act contained a proviso that this rule should not be applicable under certain conditions, and we will deal with that proviso later. The main rule is as stated and applies to every state, unless the proviso has not been complied with.

The first case in the federal courts to consider the question after the passage of this Act was Dartmouth Sav. Bk. v. Bates (C. C. Kan. 1890), 44 Fed. 546. This case is frequently cited, and it is, therefore, important to know what this case held. Kansas had passed an Act which was obviously intended to comply with the proviso of the Act. The question arose whether it had done so. In deciding that it had, the Court stated as follows:

"The first clause of the Act places judgment liens in a federal court on the same footing in all respects as a judgment lien in a state court of general jurisdiction. But the power of Congress was *not adequate* to the task of extending the territorial operation of a judgment lien in the mode provided by state laws for a judgment in the state court. * * * Congress could not make it obligatory on the state clerks to docket and enter a judgment of a federal court on their records. But it was entirely competent for the state to require her clerks to perform this service, and the proviso in Section 1 of the Act declares, in legal effect, that when the laws of a state provide for docketing in her clerks' offices, or other offices, the judgments of federal courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a federal court in that state shall be the same as that of a judgment in the state court."

The next case dealing with the question was Cooke v. Avery (Texas 1893) 13 S. Ct. 340, 147 U. S. 375, 37 L. Ed. 209. Mr. Chief Justice Fuller, after considering the general question, shed light upon its history as follows:

"There was no law of Congress, however, prior to Aug. 1, 1888, which expressly gave a lien to the judgments of the courts of the United States or regulated the same, but on that day an Act was approved, which made such judg-

*This article appeared in the American Bar Association Journal, and is reprinted by permission of this magazine and the author.

**W. T. Stockton of the Jacksonville, Fla., bar.

ments liens on property throughout the state in which the federal courts sat, in the same manner and to the same extent and under the same conditions only as if rendered by the state courts."

Powers of states in the premises

Obviously, a state has no power to provide a different rule. The only thing a state can do is to legislate concerning the lien of its own judgments, and whatever rule it establishes will apply to federal judgments, provided only that if for its own judgments something more than the mere rendition of the judgment has to be done, then the same thing must be authorized to be done for the federal judgment.

One of the purposes of this paper is to assist in pointing the way to desirable legislation. To arrive at satisfactory conclusions, we must first analyze Rhea v. Smith and the Act of 1888. Let us take the Act first. We are concerned only with Section 1 as heretofore explained. That Section as set forth in 4 Fed. Stat. Ann. (2nd Ed.) 608 reads:

"That judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: *Provided*, That whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana before a lien shall attach, this Act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

Provisions of Act

The Act itself is very carefully drawn. First, it lays down the broad general rule that federal judgments shall be liens in the several states just as if they had been rendered by the courts of general jurisdiction of such states. In Missouri, for instance, the circuit courts are the courts of general jurisdiction. Thus the same rules which a particular state provides as to the liens of judgments of its courts of general jurisdiction are to be in effect for federal judgments.

But Congress could easily see that the different states frequently made rules for recording or doing something additional in order for the lien of state judgments to attach. Now Congress has no power to require any state to permit the recording or additional thing to be done for federal judgments. The power to permit such things is vested solely in the several states.

While Congress could not require a state to permit the recording or additional thing to be done for federal judgments, it could provide that unless express permission was given by a state, the general rule indicated by this Conformity Act of 1888 should not apply. This is exactly what was done.

After setting forth the general rule, Congress then provided that if any state required any recording or additional thing to be done then before the Act should apply that state should also expressly authorize for the federal judgments such recording or additional thing to be done.

Thus the Act resolves itself into two main parts: (1) the enactment of the general rule; (2) the condition necessary for application. The condition itself does not apply unless there is some state requirement for recording or additional thing to be done. If there is nothing of this kind, then the whole proviso is of no effect and the main rule will operate, but if there is a state requirement of recording or something additional to be done before the lien of a state judgment attaches, then the main rule is not to operate unless the state also expressly authorizes the recording of, or other additional thing to be done as to, the federal judgment.

The proviso does not necessarily require any state action whatsoever. If, for instance, a state provides that the lien of a judgment of its court of general jurisdiction upon rendition shall extend throughout the state and nothing more is required, then in that jurisdiction the lien of a federal judgment similarly extends throughout the state on rendition. In this illustration there is nothing more required by the state. Therefore, the proviso has no application and the main rule applies.

Examining the various publications of Section 1 of this Act of 1888, we find that it appears mostly in one sentence with a colon and "provided that" separating the main rule from the proviso. In the U. S. C. A. there is a period after the statement of the main rule. The proviso starts off without any "provided that." There is no other difference to be inferred therefrom except only that the meaning thus appears more clearly.

Classes of state requirements

Let us now proceed to examine in detail the proviso of the Act. It will be noted that five different classes of things are contemplated as possibly being required by a state before the lien of its own judgments may attach, as follows: 1. Registering. 2. Recording. 3. Docketing. 4. Indexing. 5. "Or any other thing to be done."

Obviously, the intention is to cover all the known different kinds of state requirements with a general inclusion to cover any extra or new requirements. At any rate, if a state requires any of these five things to be done for its own judgments before a lien may attach, then the state must authorize the same one of these five things to be done for federal judgments. If it does, the Act applies; and if not, the Act does not apply. In other words, if a state requires that a state judgment, in order for a lien to attach, must be registered in a particular way, then that state must expressly authorize a federal judgment to be registered in the same way. If it does, the Act applies; and if it does not, the Act does not apply.

In many states, as in Florida, for instance, the lien of a judgment of a court of general jurisdiction attaches upon rendition throughout the county and the only requirement for the lien to be extended throughout the balance of the state is that a certified copy of the judgment must be recorded in a particular book in the other counties. Therefore, if a state should expressly authorize a certified copy of a federal judgment to be recorded in the same book in every other county of the state, the Act would apply. Then a federal judgment would be a lien outside the county where rendered only if recorded as authorized.

If a state does not require that its own judgment be registered, recorded, docketed or indexed, but does require any other thing to be done, then that state must expressly authorize the same thing to be done for federal judgments so as to provide conformity to the rules and requirements relating to the judgments and decrees of the courts of that state. In some states there is nothing else required but recording. We are not, therefore, concerned in those states with this fifth category of extra things. And similarly we are not concerned with this last category if the only other thing required is registering, docketing or indexing.

The Act of 1888 is in its policy most cordial and generous. It lays down the rule that the lien of a federal judgment in a particular state is to be exactly the same as the lien of a judgment of a court of general jurisdiction of that state. The only condition attached to this rule is that whatever extra machinery a state requires to effect the lien of state judgments shall also be authorized for and placed at the disposal of the federal judgments. Now, a state may fail to provide that its own machinery be placed at the disposal of federal judg-

ments. If it so fails, the Act does not apply, but a state has no power to make any rules whatsoever for the lien of federal judgments except indirectly by laying down the rules for its own judgments. The state never had any such power before the Act of 1888, nor has it had any such power since that Act.

Effect of Law Discriminating Against a Federal Judgment

If a state should attempt to pass any law to discriminate against a federal judgment, the law would have no effect. It would be contrary to the fundamental law. The national government alone has the right to settle the rules for the federal courts and the lien of its judgments. The state may not in any way change those rules, except in so far as the change is expressly permitted by an Act of Congress. But the Act of 1888 does not authorize a state to make any rules for the lien of a federal judgment different from the rules it makes for the lien of a judgment of its own courts of general jurisdiction. In fact, that Act does not authorize a state to make any rules at all for the lien of a federal judgment except only that under certain specified conditions the same rules made by a state for the lien of a judgment of its own courts of general jurisdiction shall likewise apply to federal judgments. Thus indirectly, and only so, can a state affect the rules concerning the lien of a federal judgment. If a state passes a law which in terms attempts to discriminate against a federal judgment, it is without any authority of Congress, and, therefore, will not be enforced. It would be futile and the attempt of no avail. The excessive authority assumed would be declared of no effect. It would be unconstitutional and void *ab initio*.

The Act of 1888 is not concerned with the motives of states or even with their attempt to do an unwarranted thing. No state legislature can discriminate against a federal judgment and its lien. Federal courts under the Constitution are the creatures of Congress, not of the states. The Act of Congress ignores all attempts at discrimination. They merely fall by the wayside. It is concerned, however, with having equal machinery so that a federal judgment can be in the same category with judgments of courts of general jurisdiction. That done, the Act of Congress is satisfied, and the main rule prevails.

The United States Constitution, Art. III, Sec. 1, provides for a Supreme Court and such inferior courts as Congress may establish, while Art. I, Sec. 8, gives Congress power to pass all necessary laws for carrying into execution all powers vested in the United States. The Judiciary Acts of 1789 provided for the rules and processes in federal courts. The Process Act of 1828 further defined matters. Thus federal courts, their rules and processes, even to the territorial lien of its judgments, are governed by the Constitution of the United States and the Acts of Congress passed in pursuance thereof. This is clearly established by Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, in which Mr. Chief Justice Marshall, considering these matters, held that there was no doubt whatever but that Congress had full power to carry into execution all the judgments of the federal courts. If this is so, state legislation on the subject must be unconstitutional.

Our analysis of the Act of 1888 may then be summarized as follows: That the Act sets forth a main rule; that this rule is that federal judgments shall have the same lien as the state provides for its judgments of courts of general jurisdiction, whatever that may be; and that the Act is applicable without further ado unless a state requires something more to be done for the lien of a state judgment to attach, and that if something more is thus required to be done, then the state must also provide that the same thing shall be authorized for federal judgments, and that if under these circumstances the state does provide the same thing, the Act applies and the main rule is in effect.

Point involved in Rhea V. Smith case

We are now ready to examine the Rhea v. Smith case. The exact point involved was whether a federal judgment was, upon its rendition, a lien in the county where rendered without further action. Three sections of the Missouri statutes were involved. Sections 1555 and 1556 (Mo. Rev. Stat. 1919) provided that judgments rendered by any court of record should on the day of rendition become liens throughout the county where rendered. Section 1554 provided that federal judgments and judgments of certain high state courts should be liens upon filing transcript with the clerk of the circuit court. No transcript of the federal judgment involved in this case had been filed. The decision was that, nevertheless, the federal judgment was a lien. What was the reasoning of the opinion?

In the first place, it held that in Missouri the conformity required should obtain with respect to the circuit courts and not with respect to the high state courts. Therefore, we shall hereafter refer to the circuit courts in place of using the longer phrase of "courts of general jurisdiction."

The opinion, after a statement of the facts and a few references, cites Massingill v. Downs, supra. We have already seen that this case is recognized as the fountainhead for the rule that the lien of a federal judgment extends throughout its district. As heretofore pointed out, this rule continued until the Act of 1888. The opinion then sets forth that Act in full.

Next, the opinion proceeds to set forth the three sections of the Missouri statutes. It then proceeds to state that Congress intended to change the other rule, but

"Only in those states which passed laws making the conditions of creation, scope, and territorial application of the liens of federal court judgments the same as state court judgments."

This is practically true, but a rather dangerous statement of the effect of the statute. Full force must be given to the word "conditions," or otherwise the meaning will be entirely lost. In other words, if a state makes the conditions the same the Act shall be effective. It does not mean that a state must pass laws making the creation, scope and territorial application of liens of federal judgments the same as of state judgments. The meaning is merely that the conditions of these things must be the same. Thus, all the state can do is either to make the conditions the same or fail to do so. Failure in making the conditions the same will result in the Act not operating, while making the conditions the same will result in the Act applying. State action attempting to put an additional burden upon federal judgments not put upon its own judgments is merely ineffective and of no avail. All this is necessary to be pointed out, because many in reading the decision have failed to grasp the full force of the word "conditions."

The opinion, after stating the rule just quoted, which carries the germ of the decision, proceeds to apply it to the Missouri statutes. It continues that if effect is given to those statutes, a federal judgment cannot be a lien in the county where rendered unless a transcript is filed. Does not this pronouncement quite overlook the rule of decision of Metcalf v. Watertown, 153 U. S. 671, 14 S. Ct. 947, 38 L. Ed. 861? In that case Mr. Chief Justice Fuller had before him the statutes of limitation of Wisconsin. The words of those statutes appeared to say that ten years was the bar "upon a judgment * * * of any court of the United States," while it was twenty years "Upon a judgment * * * of any court of record of this state." Note that the language "any court of record" is the same both in this Wisconsin case and in this Missouri case under discussion. Pertinent sentences from the

opinion of Mr. Chief Justice Fuller are as follows:

"We are not obliged to take those words literally, but they are open to construction."

And again:

"The true rule for construction of statutes is, to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law; and thus, to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words."

By application of these rules the conclusion was reached that "any court of record of this state" included United States courts held within the state, and the twenty-year rule applied. The ten-year rule in so far as it applied to United States judgments was held to refer only to such judgments as were entered in United States courts held outside of Wisconsin. The opinion held that the Supreme Court could not attribute to Wisconsin any desire to discriminate against United States judgments.

If this rule of interpretation had been applied, Section 1555 of the Missouri statutes would have been construed to include United States judgments, especially as the Supreme Court ought not to imply any desire to discriminate. This reasoning may not be applicable, but it appears to be very much in point.

The opinion in Rhea v. Smith next deals with the decision of the Supreme Court of Missouri, from which certiorari had been taken. The Missouri Court had taken the position that the difference between the requirements for federal judgments and for circuit court judgments was so slight that there was no discrimination. This very properly was answered by saying that the conformity required should obtain as between the federal court and the circuit court, and not as between the federal court and the state appellate courts. The word "conformity" is again used, but again passed over without any definition. Approximate conformity is held insufficient and this is illustrated. The reasoning is beyond dispute.

Then ensues a discussion of Jackson Light & Traction Company, 269 Fed. 223, to the effect that in Mississippi conformity existed. So far as the opinion shows, there is no doubt about it. Examination of the cited case shows that as to both judgments of state and federal courts enrollment is required, but that a state judgment when enrolled becomes a lien dating back to rendition —by words of the Mississippi statutes— but so far as those words go, federal judgments do not date back. Now, either a federal judgment upon enrollment, in spite of the apparent favor to the state judgments, becomes a lien from rendition or the Act is not in conformity. It may be safely concluded that the opinion in Rhea v. Smith approves the cited decision. We may, therefore, conclude that a federal judgment in Mississippi upon its enrollment similarly becomes a lien dating back to its rendition. The opinion does not expressly hold this, but if the state has conformed, the main rule of the Act is bound to apply, namely, that the lien of the federal judgment shall be the same as that of the state judgment, and this rule, therefore, in Mississippi requires a relation back. What the Mississippi case actually decided was that, enrollment within twenty days of all judgments being required, and the federal judgment involved not having been enrolled within that time, the judgment was not a lien at all.

Again discussing the Missouri opinion with regard to the arguments based upon the repeal of the additional section of the Act of 1888, the Supreme Court disposes of those arguments and continues:

"It is the inequality which permits the lien instantly to attach to the rendition of the judgment without more in the state court which does not so attach in the federal court in that same county that prevents compliance."

For the reasons stated hereinabove, the quoted section seems not to be entirely supported by the Act. The only thing which can prevent compliance is the failure of a state to permit the same thing to be done for a federal judgment as is required to be done for a state judgment before the lien attaches. The state cannot and never did have, either before or after the Act of 1888, the power to do anything to prevent the lien of a federal court judgment from attaching in the county where rendered if nothing more was required for a state judgment for its lien to attach in the county where rendered. Before 1888 the lien attached on rendition, not only in its home county, but throughout the district. After 1888 this rule continued unless the Act of that year applies. Now, if the Act applies, the lien of the federal judgment is to the same extent and under the same conditions only as the lien of the state judgment. Therefore, if the state judgment requires nothing more to be done for a lien to attach in the county where rendered, so nothing more needs to be done for a federal judgment lien to attach.

The opinion in Rhea v. Smith concludes that as the Missouri statutes do not secure the needed conformity the lien of a federal judgment in Missouri attaches throughout the district. This appears to overstate the requirements of the case. The only actual question before the court was whether the federal judgment was a lien in the county where rendered without any transcript being filed in that county with the clerk of the circuit court. The irreducible minimum of the decision is merely that the federal judgment in question was a lien in its home county without further recording. The case may properly be quoted as authority for that conclusion and for no more. The rest is *obiter dicta.*

Effect of Decision

We are informed that the decision of Rhea v. Smith has led many to seek an amendment of the Act of Congress of 1888. The matter has even gone so far as to have the attention of Senator G. W. Norris, Chairman of the Judiciary Committee of the United States Senate. However, it is difficult to see what good could be thus accomplished. Any new Act or amendment must necessarily face the same necessity for some state action just as the Act of 1888 did, and if so, must similarly carry a proviso just as the former Act. This being the case, the situation would not be improved but rather further complicated. Many states have already complied with the Act of 1888, and in these states, as well as the others, further state action might then become necessary.

Certainly it appears that it would be better for the non-complying states to proceed with the necessary legislation under the existing Act, since it is easier so to do once this Act is understood, than for the whole situation to be complicated with another Act of Congress.

LAW QUESTIONS AND THE COURTS' ANSWERS

Compiled from Recent Court Decisions by

McCUNE GILL

Vice-President and Attorney

Title Insurance Corporation of St. Louis, St. Louis, Mo.

Is devise of "all my possessions" an exercise of a power of appointment?

It is in Wisconsin. First v. Helmholz, 225 N. W. 181.

Is grantee, personally assuming mortgage, liable, if his grantor is not personally liable?

Not liable; because he assumes only the liability of his grantor. Worthington v. Hess, 225 N. W. 225, (South Dakota).

If trust agreement names three trustees, and one declines to act, can the others act?

No; a third trustee must be appointed by court. Loughery v. Bright, 166 N. E. 744 (Massachusetts).

Is devise good if "to Mary for life with power to appoint by will to such charities" as she may wish?

Sometimes held void, as too vague, but held good in Massachusetts, Reilly v. McGowan, 166 N. E. 766.

When is insane person's deed good?

It is good if he is not under guardianship and the purchaser did not have reason to know of his condition. Goldberg v. McCard, 166 N. E. 793 (New York).

Can executrix waive statue of limitations barring claim against estate?

No; it will be barred any way. Everett v. Waltham, 166 N. E. 831 (Massachusetts).

Is a clause valid in a building restriction, authorizing the grantor to change or cancel the restrictions?

Held good in Ohio, if exercised reasonably, Dixon v. Van Sweringen, 166 N. E. 887.

Is an abstract by an irresponsible abstracter merchantable?

No; Kennedy v. Wilbur, 166 N. E. 541 (Illinois).

What commission can broker collect if he acts for both parties without their knowledge?

He cannot collect from either. Delaney v. Russell, 166 N. E. 623 (Massachusetts).

Can a suit to sell contingent remainders be maintained if none of the remaindermen are in being?

Held that suit is good if remainder was to children of son, even though son had no children, and hence there were no representatives of the class in existence. Schneider v. Wolf 166 N. E. 679 (Ohio).

Who is entitled to rents of tenancy by entireties?

The husband only, in Massachusetts. Cunningham v. Ganley, 166 N. E. 712.

Is color of title necessary to support adverse possession?

Not if occupant claims under verbal gift and has erected improvements. Davis v. Biddle, 166 N. E. 301 (Indiana).

Does adverse possession of owner bar the city's sewer easement?

Usually not because statutes of limitation do not run against holdings for a public purpose. Bach v. City, 166 N. E. 495 (Illinois).

The Last Will and Testament of Charles Lounsbury

Many TITLE NEWS readers have undoubtedly read one version or another of the "Last Will and Testament of Charles Lounsbury," by Williston Fish. The Title and Trust Company, of Portland, Ore., has published a pamphlet containing this will, together with a preface by Mr. Fish, in which he tells of the true origin of this famous will. We reprint the preface and the will by permission of the Title and Trust Co.

Preface

I wrote "A Last Will" in 1897. It was published first in *Harpers Weekly* in 1898. Shortly afterwards it began to appear in a sporadic way in the newspapers. Whenever a newspaper did not have at hand what it really wanted, which was a piece entitled "Reunion of Brothers Separated for Fifty Years," or "Marriage Customs Among the Natives of the Fricassee Islands," it would run in this piece of mine. In return for the free use of the piece, the paper, not to be outdone in liberality, would generally correct and change it, and fix it up, often in the most beautiful manner; so that I am forced to believe that nearly every paper has on its staff a professor of literature and belles-lettres, always ready to red-ink the essays of the beginner and give them the seeming of masterpieces, and gradually to unfold to the novice all the marvels of the full college curriculum.

This simple work of mine has been constantly undergoing change and improvement. Sometimes the head has been cut off; sometimes a beautiful wooden foot has been spliced on. When a certain press at Cambridge reprinted it—Cambridge is undoubtedly the home of acute belles-lettres—it used a copy in which the common word dandelions was skilfully changed to flowers, daisies was changed to blossoms, and creeks, which is only a farmer-boy word, was changed to brooks. When I said that I gave "to boys all streams and ponds where one may skate," this Cambridge printer added, "when grim winter comes."

Some writers can boast that their works have been translated into all foreign languages, but when I look pathetically about for some little boast, I can only say that this one of my pieces has been translated into all the idiot tongues of English.

The name, Charles Lounsbury, of the devisor in the will, is a name in my family of three generations ago—back in York State where the real owner of it was a big, strong, all round good kind of a man. I had an uncle, a lawyer, in Cleveland named after him, Charles Lounsbury Fish, who was a most burly and affectionate giant himself and who took delight in keeping the original Charles Lounsbury's memory green. He used to tell us of his feats of strength: that he would lift a barrel by the chimes and drink from the bung-hole, and that in the old York State summer days he used to swing his mighty cradle —undoubtedly a "turkey-wing,"—and cut a swath like a boulevard through incredible acres of yellow grain. His brain, my uncle always added, was equal to his brawn, and he had a way of winning friends and admirers as easy and comprehensive as taking a census. So I took the name of Charles Lounsbury to add strength and good will to my story.

WILLISTON FISH.

A Last Will

He was stronger and cleverer, no doubt, than other men, and in many broad lines of business he had grown rich, until his wealth exceeded exaggeration. One morning, in his office, he directed a request to his confidential lawyer to come to him in the afternoon—he intended to have his will drawn. A will is a solemn matter, even with men whose life is given up to business, and who are by habit mindful of the future. After giving this direction he took up no other matter, but sat at his desk alone and in silence.

It was a day when summer was first new. The pale leaves upon the trees were starting forth upon the yet unbending branches. The grass in the parks had a freshness in its green like the freshness of the blue in the sky and of the yellow of the sun—a freshness to make one wish that life might renew its youth. The clear breezes from the south wantoned about, and then were still, as if loath to go finally away. Half idly, half thoughtfully, the rich man wrote upon the white paper before him, beginning what he wrote with capital letters, such as he had not made since, as a boy in school, he had taken pride in his skill with the pen:

In the Name of God, Amen

I, Charles Lounsbury, being of sound and disposing mind and memory (he lingered on the word memory), do now make and publish this my last will and testament, in order, as justly as I may, to distribute my interests in the world among succeeding men.

And first, that part of my interests which is known among men and recognized in the sheep-bound volumes of the law as my property, being inconsiderable and of none account, I make no account of in this my will.

My right to live, it being but a life estate, is not at my disposal, but, these things excepted, all else in the world I now proceed to devise and bequeath.

Item: And first, I give to good fathers and mothers, but in trust for their children, nevertheless, all good little words of praise and all quaint pet names, and I charge said parents to use them justly, but generously, as the needs of their children shall require.

Item: I leave to children exclusively, but only for the life of their childhood, all and every the dandelions of the fields and the daisies thereof, with the right to play among them freely, according to the custom of children, warning them at the same time against the thistles. And I devise to children the yellow shores of creeks and the golden sands beneath the waters thereof, with the dragon-flies that skim the surface of said waters, and the white clouds that float high over the giant trees.

And I leave to children the long, long days to be merry in, in a thousand ways, and the Night and the Moon and the train of the Milky Way to wonder at, but subject, nevertheless, to the rights hereinafter given to lovers; and I give to each child the right to choose a star that shall be his, and I direct that the child's father shall tell him the name of it, in order that the child shall always remember the name of that star after he has learned and forgotten astronomy.

Item: I devise to boys jointly all the useful idle fields and commons where ball may be played, and all snow-clad hills where one may coast, and all streams and ponds where one may skate, to have and to hold the same for the period of their boyhood. And all meadows, with the clover blooms and butterflies thereof; and all woods, with their appurtenances of squirrels and whirring birds and echoes and strange noises; and all distant places which may be visited, together with the adventures there found, I do give to said boys to be theirs. And I give to said boys each his own place at the fireside at night, with all pictures that may be seen in the burning wood or coal, to enjoy without let or hindrance and without any incumbrance of cares.

Item: To lovers I devise their imaginary world, with whatever they may need, as the stars of the sky, the red, red roses by the wall, the snow of the hawthorn, the sweet strains of music, or aught else they may desire to figure to each other the lastingness and beauty of their love.

Item: To young men jointly, being joined in a brave, mad crowd, I devise and bequeath all boisterous, inspiring sports of rivalry. I give to them the disdain of weakness and undaunted confidence in their own strength. Though they are rude and rough, I leave to them alone the power of making lasting friendships and of possessing companions, and to them exclusively I give all merry songs and brave choruses to sing, with smooth voices to troll them forth.

Item: And to those who are no longer children, or youths, or lovers, I leave Memory, and I leave to them the volumes of the poems of Burns and Shakespeare, and of other poets, if there are others, to the end that they may live the old days over again freely and fully, without tithe or diminution; and to those who are no longer children, or youths, or lovers, I leave, too, the knowledge of what a rare, rare world it is.

WILLISTON FISH.

The American Title Association

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