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CORPORATIONS-INSOLVENCY-CORPORATE OFFICERS AS PREFERRED WAGE CLAIMANTS

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CORPORATIONS—INSOLVENCY—CORPORATE OFFICERS AS PREFERRED WAGE CLAIMANTS—A closed corporation, soon after its formation, executed an assignment for the benefit of creditors. One of the large creditors objected to a preferred wage claim allowed by the assignee to a vice-president and director of the assignor, the officer who had in fact been instrumental in executing the assignment. The claim was for wages amounting to two hundred fifty dollars for alleged manual work for the assignor prior to the assignment and was granted by the assignee on the theory that preferential treatment was authorized by the New York debtor and creditor statutes. The applicable statute reads as follows: "The wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment for services rendered within three months prior to the execution of the assignment, not exceeding three hundred dollars to each employee, shall be preferred before any other debt. . . ." [1] *Held*, the director and vice-president was not an "employee" within the meaning of the New York debtor and creditor law so as to warrant preference as a wage earner. *In re Macton Textile Processing Co., Inc.*, (N.Y. Sup. Ct. 1947) 72 N.Y.S. (2d) 553.

Early New York decisions refuse to give effect to literal interpretation of the statutory language so as to include corporate officers as "employees." [2] Later cases, however, clarify the earlier position to the extent that officers in name only are not denied the preference.[3] Courts in other states faced with the same problem in construing analogous statutes assert two distinct basic views as to the intent of the legislatures in enacting this type of legislation. (1) Reaching the conclusion of the principal case, many courts have agreed that the primary purpose of such statutes is to protect employers who are most likely to be totally dependent for their livelihood on the salaries or wages owed to them by their corporate employer.[4] Other courts reach the same result on slightly different reasoning, concluding that the intent of the legislature was to protect those who were in no position to know of the credit standing of the employer.[5] Still others have agreed, on the theory that it is manifestly inequitable to allow preferential treatment to the very presons who managed the corporation into a condition of insolvency, as against those who loaned money to the corporation or furnished it with goods.[6] (2) On the contrary, a few courts conclude that the intent of the legislature was to prevent a general exodus of all individuals in the service of a corporation in times of financial stress. Such a view leads inevitably to the conclusion that officers are even more necessary to continued operations

[1] 12 N.Y. Consol. Laws (McKinney, 1945) § 22, at p. 83.

[2] People v. Remington, 45 Hun. (52 N.Y. Super. Ct.) 329 at 343 (1887), affd., 109 N.Y. 631, 16 N.E. 680 (1888).

[3] Hopkins v. Cromwell, 89 App. Div. 481, 85 N.Y.S. 839 (1903).

[4] Pullis Bros. Iron Co. v. Boemler, 91 Mo. App. 85 (1901); McCracken v. Slemmer, 112 Pa. Super. 135, 170 A. 453 (1934); Davis v. Nanty Glo Auto Co., 123 Pa. Super. 349, 187 A. 227 (1936).

[5] National Bank of Augusta v. Carolina, K. & W. R. Co., (C.C. S.C. 1894) 63 F. 25.

[6] State ex rel. McConnell v. Peoples Bank & Trust, 155 Tenn. 519, 296 S.W. 12 (1927).

than other employees and therefore should be preferred.[7] The analogous construction problem presented by the wage priority provision of section 64a (2) of the Federal Bankruptcy Act of 1938[8] offers a solution to the problem of the principal case. As to claims by minor officers the question has been dealt with as essentially one of dual capacities.[9] Often the officer performs services which alone would entitle him to a priority, and the problem is then one of determining which of his activities was the "principal service."[10] While this test is not infallible, it has been thought by the federal courts to bring about a just solution in the great majority of cases, allowing the preference to so-called officers in name only, and denying it to those who were obviously hired to exercise discretion.[11] Prior to the 1938 amendments to the Bankruptcy Act, priorities authorized by state statutes,[12] were recognized under federal proceedings, but since the 1938 amendments, no effect can be given to such priorities.[13] The intent of Congress in withdrawing the effect of state-granted priorities was to bring about uniform treatment of creditors in insolvency proceedings.[14] Therefore, it is submitted that the advantages of uniformity sought to be attained by this change in the Bankruptcy Act should be effectuated wherever possible by the states through construction or amendment of their own laws so as to conform to the tests used by the federal courts in construing section 64a (2) of the Bankruptcy Act. Tested in the light of such a criterion, the result in the principal case is not unreasonable, because it appears that the officer denied a preference therein was not performing manual labor as his "principal service" to the assignor.

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[7] Cases setting forth this view are: Buvinger v. Evening Union Printing Co., 72 N.J. Eq. 321, 65 A. 482 (1907); Lammerding v. Lammerding Lumber & Supply Co., Inc., 107 N.J. Eq. 551, 153 A. 380 (1931). The two previous cases, dealing with claims of relatively minor officers, were distinguished by the New Jersey court when faced with a claim asserted by the president of an insolvent corporation on the theory that knowledge of the credit of the corporation was inherent in such an officer. Martin v. Dyer-Kane Co., 113 N.J. Eq. 88, 166 A. 227 (1933).

[8] 52 Stat. L. 874, § 64a (2) (1938); 11 U.S.C. (1940) § 104.

[9] 3 COLLIER, BANKRUPTCY, 14th ed., § 64.204 (1941).

[10] A recent case applying this test to facts similar to those of the principal case, and reaching the same result, is Matter of Ko-Ed Tavern, Inc., (C.C.A. 3d, 1942) 129 F. (2d) 806.

[11] See leading case, In re Progressive Luggage Corp., (C.C.A. 2d, 1929) 34 F. (2d) 138. See also a recent California case applying the test of "principal service" and granting a preference to a foreman and large stockholder, Clark v. Marjorie Michael, Inc., 34 Cal. App. (2d) 775, 90 P. (2d) 866 (1939).

[12] See 3 COLLIER, BANKRUPTCY, 14th ed., § 64.201 (1941), for differences as to the effects of state-granted liens and state-granted priorities.

[13] 3 COLLIER, BANKRUPTCY, 14th ed., § 64.202 (1941).

[14] 3 COLLIER, BANKRUPTCY, 14th ed., § 64.02 (1941).