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Richmond, Va.

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Record No. 5033

In the Supreme Court of Appeals of Virginia at Richmond

UNITED STATES OF AMERICA

v.

E. E. LAWLER, ET AL.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5033

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thrusday the 30th day of April, 1959.

UNITED STATES OF AMERICA, Plaintiff in Error,

against

E. E. LAWLER, ET AL., Defendants in Error.

From the Law and Equity Court of the City of Richmond

Upon the petition of the United States of America a writ of error is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 13th day of February, 1959, in a certain proceeding then therein depending wherein E. E. Lawler was plaintiff and Elbridge L. Walker, individually, etc., was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

PETITION.

The petitioner, by counsel, represents unto the Honorable Judges of the Law and Equity Court of the City of Richmond, as follows:

1. Pursuant to a warrant of distress for rent, the High Constable of the City of Richmond, Virginia, has taken into his possession and sold certain personal property of the defendant herein and now holds the proceeds of such sale.
2. Pursuant to a writ of fieri facias issued on a judgment of the Civil Justice Court, Part II, of the City of Richmond, Virginia, the High Constable of the City of Richmond, Virginia, has taken into his possession and sold certain other personal property of the defendant herein and now holds the proceeds of such sale.
3. Petitioner obtained the above referred to distress warrant and judgment and directed the High Constable to make such levies and sales after giving him an indemnifying bond.
4. The United States of America is now claiming a lien for federal taxes against the funds in the hands of the High Constable of the City of Richmond, and the plaintiff is claiming the funds free and clear of such lien.

* * * * *

page 2 } IN CONSIDERATION WHEREOF, petitioner prays that pursuant to Section 8-227 of the Code of Virginia (1950) an order may be entered:

(a) Requiring the United States of America to appear and state the nature of its claim or to relinquish said claim, and if it fails to appear, forever barring the claim of the United States of America;

(b) Directing the High Constable of the City of Richmond, Virginia to pay into this Court the funds presently held in his hands, pending a future determination of the matters in issue here.

(c) Determining that the federal tax lien of the United States of America does not have priority over the landlord's lien held by petitioner and directing that the funds paid into Court by the High Constable of the City of Richmond in this

matter be paid over to petitioner free and clear of any federal tax lien of the United States of America.

E. E. LAWLER
By Counsel.

Filed in the Clerk's Office the 24th day of April, 1957.

Teste:

LUTHER LIBBY, JR., Clerk
By EDWARD G. KIDD, D. C.

* * * * *

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* * * * *

In the Law and Equity Court of the City of Richmond, the 24th day of April, 1957.

INTERPLEADER.

This day came E. E. Lawler, a petitioner and tendered his petition and it appearing to the Court that this is a matter cognizable under Section 8-227 of the Code of Virginia (1950), it is ordered that the said petition be filed.

It is further ordered that the United States of America do appear in this matter and state the nature of its claim or relinquish it, that it be made a defendant herein, as well as Elbridge L. Walker, individually and trading as O. E. Walker Company and H. Calvin Farmer, High Constable of the City of Richmond, Virginia; that a copy of the petition hereby ordered filed be served as hereafter provided and that the High Constable of the City of Richmond, Virginia, do pay into this Court the funds presently held as set forth in said petition, pending the further determination of this matter, and all defendants answer the petition within 21 days from date of service, except that the United States of America have 60 days from service of said petition within which to make response to the said petition. All copies of the petition directed to be served shall be duly certified, and copies of the same shall be served upon each defendant together with a copy of this order, and the copy to be served upon the United States shall be served upon Clifford W. Glotsbach, District Director of Internal Revenue Service, Richmond, Virginia.

* * * * *

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* * * * *

STIPULATION.

The United States and Petitioner, by counsel, stipulate and agree as follows:

1. The allegations contained in Paragraphs 1-4 of the Petition herein by petitioner are true.
2. On January 7, 1957, petitioner had executed against property on the premises of the defendant herein at 1647 West Broad Street, a distress warrant in the Civil Justice Court of the City of Richmond, Part II, such warrant being for rental then past due for such premises in the amount of $600.00, for the period October 1, 1956, through January 31, 1957.
3. On February 6, 1957, petitioner obtained an attachment against the defendant in the Civil Justice Court of the City of Richmond, Part II, in the amount of $750.00 for future rents for said premises.
4. Both such legal actions were taken for the collection of rentals due under a lease between the petitioner and the defendant dated July 1, 1949, for the premises known as 1647 West Broad Street, Richmond, Virginia.
5. On March 15, 1957, the High Constable of the City of Richmond sold the personal property found at 1647 West Broad Street at public sale in execution of such distress and attachment proceedings, and the money received from such sale is the fund presently before the court.
6. The Government exhibits attached hereto and lettered A through K are accurate, authentic and admissible in evidence.

CHARLES W. LAUGHLIN
Cousel for Petitioner

JOSEPH S. BAMBACUS
Counsel for United States

* * * * *

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* * * * *

STIPULATION.

The United States and Petitioner by counsel stipulate and agree as follows:

The lease between petitioner and defendant provides for payment by defendant to petitioner as additional rental of reasonable fees of attorneys and others employed by petitioner in any proceeding brought for enforcement of any of the provisions of the aforesaid lease.

CHARLES W. LAUGHLIN
Counsel for Petitioner

SHANLEY KEETER
Counsel for United States

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Law and Equity Court
of the
City of Richmond
Richmond, Virginia

December 22, 1958

Charles W. Laughlin, Esq.
c/o Christian, Barton, Parker and Boyd
Attorney at Law
506 Mutual Building
Richmond 19, Virginia

Joseph S. Bambacus, Esq.
Assistant U. S. District Attorney
Post Office Building
Richmond, Virginia

In *Re*: E. E. Lawler
v.
Elbridge L. Walker, etc., et al.
No. A-2051

Gentlemen:

After mature consideration of the issues in this action and arguments of counsel, the Court is of the opinion that the United States Government has failed to establish its claim to the fund in the custody of the Court in this action.

The Assistant District Attorney is relying upon the cases of *U. S.* v. *Waddill, Holland and Flynn,* 323 U. S. 353, and *U. S.* v. *Scovil,* 348 U. S. 218, and the provisions of Rev. Stat. Section 3466 31 U. S. C. A. 191. However it is to be noted that under the statute cited, and as interpreted by The Supreme Court, the priority given to the United States is predicated upon the *insolvency* of the debtor, or upon the fact that the debtor is dead.

In this case no issue was tendered in the pleadings by the United States as to the solvency or insolvency of the debtor, Elbridge E. Walker, nor is it asserted that he is dead. In fact there is no evidence upon either of these possible issues. Such being the situation, and the case having been submitted upon the pleadings and stipulation of facts by the United States as one claimant and the landlord E. E. Lawler, there is nothing for the Court to do but enter judgment in favor of the latter in respect to the fund which was paid into court under statutory interpleader.

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Upon presentation of a sketch for the final judgment order, the Court will enter the same. Counsel will please confer relative to the form and substance of the sketch.

Very truly yours,

J. H. RIVES, JR.
Judge

JHRJR:k

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* * * * *

NOTICE.

Please take notice that on January 8, 1959, at 10:00 A. M., or as soon thereafter as the undersigned may be heard, the United States of America, by its Assistant United States Attorney, will move the Law and Equity Court of the City of Richmond in its Courtroom in the City Hall in the City aforesaid for a rehearing of this proceeding.

JOSEPH S. BAMBACUS
Assistant United States Attorney

I hereby certify that the foregoing notice was served on the petitioner this 23rd day of December, 1958, by mailing a true

copy thereof to Charles W. Laughlin, Esquire, c/o Christian, Barton, Parker and Boyd, Attorneys for the petitioner, 506 Mutual Building, Richmond, Virginia.

JOSEPH S. BAMBACUS
Assistant United States Attorney

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* * * * *

JUDGMENT ORDER.

This day came the plaintiff, E. E. Lawler, by counsel, and the intervenor, the United States of America, by Shanley Keeter, its Assistant United States Attorney for the Eastern District of Virginia, and pursuant to due notice to the plaintiff, the intervenor moved the Court as follows:

I. To defer entering judgment in accordance with the tenor of the opinion of the Court in the form of a letter addressed to said counsel, dated December 22, 1958;

II. To permit the parties to re-argue the issues heretofore submitted to the Court without the intervention of a jury upon the evidence and exhibits contained in the stipulations of facts submitted in writing by said counsel, heretofore treated as filed and now hereby ordered filed; and

III. To altogether reverse its holding expressed in the said letter opinion, dated December 22, 1958, and to enter judgment in favor of the United States of America, said motion being based upon the following grounds:

a. That the letter opinion of this Court, dated December 22, 1958, is contrary to the law and the evidence for the following reasons:

1. On August 31, 1956, a tax assessment for income taxes due by Elbridge L. Walker arose in favor of the United States of America which said tax assessment constituted a lien on all of the property belonging to the said Elbridge L. Walker in favor of the United States of America pursuant to Section 6321 of the Internal Revenue Code of 1954.

2. That on October 26, 1956, a notice of Federal Tax Lien under Internal Revenue laws of the United States of America was duly docketed and recorded in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia.

3. That on January 7, 1957, the plaintiff had executed against the property of the defendant, Elbridge L. Walker,

situated at 1647 West Broad Street, Richmond, Virginia, a distress warrant returnable to the Civil Justice Court of the City of Richmond, Part II, for rent past due under
page 40 } the terms of a lease agreement in the amount of six hundred dollars ($600.00) for the period from October 1, 1956 through January 31, 1957; and on February 6, 1957, petitioner obtained an attachment against the aforementioned property returnable to Civil Justice Court of the City of Richmond, Part II, in the amount of seven hundred fifty dollars ($750.00) for future rents for said premises.

4. That the High Constable of the City of Richmond sold the personal property found at 1647 West Broad Street at public auction in execution of such distress and attachment proceedings, and the following commissions and costs were deducted:

Proceeds of Sale		$2,695.00
Commissions		73.05
		$2,621.95
Advertising	$ 18.38	
Locksmith	12.00	
Insurance	49.85	
Drayage and Labor	390.00	
Labor	105.00	
Boarding and Padlocking	14.45	
Storage	131.63	
Total		$ 721.31
Balance		$1,900.64

The balance of $1,900.64 is the fund in controversy.

5. That the plaintiff's claim is as follows:

Rent	$1,350.00
Court Costs	36.35
Attorney's Fees Provided for in Lease	337.50
	$1,723.85

which leaves a balance of $176.79 to apply toward the intervenor's claim.

6. That the petitioner is not entitled to Court costs or attorney's fees incurred in this proceeding for the reason that the intervenor's Federal Tax Lien is prior to the petitioner's

claim for Court costs and attorney's fees, and said costs and attorney's fees should be adjudged against the petitioner, E. E. Lawler.

7. That the lien of the intervenor, the United States of America, *consittutes* a lien prior in point of time to the lien for rent of the plaintiff, E. E. Lawler, and the United States of America is, therefore, entitled to have all of the funds in controversy in this action applied to the above claim of the United States of America against Elbridge L. Walker.

8. That the lien of the petitioner E. E. Lawler, was inchoate, and became certain as to amount, the identity of the lienor, and the property subject thereto, only at some time subsequent to the date the lien of the intervenor, the United States of America, attached, and therefore petitioner's lien cannot be permitted to displace the intervenor's lien by the doctrine of relation back.

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Upon consideration of the said motion of counsel for the United States of America, the Court doth defer entry of judgment in accordance with the tenor of its said opinion and pursuant to the said motion, having heard argument upon the motion to reverse its opinion, said argument amounting to a full reargument by the parties upon the issues, and having maturely considered the same;

It is ORDERED that the motion of the intervenor that the Court reverse the holdings set out in its letter opinion, dated December 22, 1958, and enter final judgment in favor of the United States of America be overruled, and in accordance with the holding of the Court, it is ORDERED that the plaintiff have judgment for the sum of $1,723.85, the amount claimed, free of any lien for taxes claimed by the United States of America, and that the intervenor, the United States of America, have judgment for the sum of $176.79, to all of which action of the Court, the intervenor, the United States of America, by counsel, duly objected and excepted upon the grounds hereinabove set out, and the Court hereby appoints Luther Libby, Jr., Special Commissioner and directs him to draw a check in the amount of $1,723.85, payable to "E. E. Lawler and Charles W. Laughlin, his attorney", and to draw a check in the amount of $176.79, payable to the Treasurer of the United States, said checks to be drawn against the funds to the credit of the Court in this proceeding, to deliver said checks to counsel of record, upon presentation to The State Planters Bank of Commerce and Trusts of Richmond, Virginia, of an attested extract of this order.

And it appearing to the Court that the intervenor, the United States of America, by counsel, has indicated its inten-

tion to appeal the judgment order of this Court, it is ORDERED that the mandate of this judgment order be stayed for a period of one hundred twenty (120) days in order to enable the intervenor to effect its appeal.

Nothing further remaining to be done, it is ORDERED that this can be stricken from the docket of this Court and the papers placed among the ended cases of this Court, properly indexed, the Court reserving jurisdiction of the funds and the parties for the entry of any further orders which may be necessary or desirable.

J. H. R.

Enter 2/13/59.

I ask for this: except that the stay granted hereby is objected to.

CHARLES W. LAUGHLIN
Counsel for Petitioner

Seen:

SHANLEY KEETER
Assistant United States Attorney

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To the Clerk of the Law and Equity Court of the City of Richmond:

The United States of America, intervenor in the above-styled cause, in the Law and Equity Court of the City of Richmond, Virginia, hereby gives notice of appeal from the order entered in this cause on February 13, 1959, and sets forth the following assignments of error:

1. That the Court erred in holding that the petitioner's lien for rent was entitled to priority over the intervenor's

Federal Tax Lien because it related back to the date of the lease executed by the petitioner and defendant.

2. That the Court erred in holding that the petitioner's claim for Court costs and attorney's fees was entitled to be paid ahead of the intervenor's Federal Tax Lien.

THE UNITED STATES OF AMERICA
By: SHANLEY KEETER
Assistant United States Attorney.

Received and filed February 20, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By: EDW. G. KIDD, D. C.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME
RECEIVED
AUG 13 1959
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RICHMOND, VIRGINIA