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Constitutional Law—Federal Control of Escheat as a Necessary War Power—*United States v. Oregon* (Sup. Ct. 1961)

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since it imposes a liability without fault. But it is believed that the rule achieves substantial justice, considering the rights of all involved. Basically, the argument is that the auctioneer is in the business of transferring property from seller to purchaser, and makes a profit from doing so. When a loss occurs, which must inevitably be born by either the auctioneer, the purchaser or an equally innocent third person, the auctioneer should assume the loss as an incident to his business. He is in a position to pass the expense on, through higher fees to the public at large, or to insure himself, and to spread the cost of the insurance.

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CONSTITUTIONAL LAW—FEDERAL CONTROL OF ESCHEAT AS A NECESSARY WAR POWER—*United States v. Oregon* (Sup. Ct. 1961).

Decedent was a veteran who suffered a hip fracture and a cerebral hemorrhage, rendering him unconscious. He was taken to a Veterans' Administration hospital where he died eighteen days later. From the time he was stricken until his death, he was unconscious, or at most semiconscious. Decedent left an estate consisting of approximately $13,000 in cash which had been inherited from a brother. The United States submitted a claim against his estate under the provisions of a federal act[1] since

[1] 72 Stat. 1259-60 (1958), 38 U.S.C. §§ 5220-21 (1958). Section 5220 states: "Vesting of property left by decedents.

"(a) Whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicle, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund . . . .

"(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance and the continued acceptance of care or treatment by any veteran . . . shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the provisions of this subchapter and regulations issued in accordance with this subchapter."

Section 5221 states: "Presumption of contract for disposition of personalty.

the death had occurred in a veterans' facility at a time when the decedent was intestate and without heirs or next of kin. Oregon contested this claim, reasoning that the federal act required a binding agreement between the decedent and the Veterans' Administration, and that no such contract could have been made because the decedent was at all material times mentally incompetent. Oregon therefore contended that the estate escheated to the state under the provisions of their escheat statute.[2] *Held*: the property vested immediately in the United States regardless of whether or not a valid contract had been formed.[3] The United States Supreme Court stated that the devolution of property is an area normally left to the states, but one not immune under the tenth amendment from laws passed by the federal government which are necessary and proper in the exercise of the delegated power to raise and support armies and navies and to conduct wars.[4]

The federal act upon which the United States relied is an amendment to a 1910 act which had quite plainly and unequivocally provided that the admission of a veteran to a veterans' home should:

> . . . be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law or next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed by will . . . shall vest in and become property of the said Board of Managers for the sole use and benefit of the post fund of said home. . . .[5]

"The fact of death of a veteran . . . in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter, but subject to its conditions, of all property described in section 5220 of this title owned by said decedent at death and as to which he dies intestate."

[2] ORE. REV. STAT. § 120.010 (1957) provides: "Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal, or mixed property, interest or estate in this state, the same escheats to and vests in the state, subject only to the claims of the creditors as provided in ORS 120.060 to 120.130; and the clear proceeds derived therefrom shall be paid into and become a part of the Common School Fund of this state and be loaned or invested by the State Land Board, as provided by law."

[3] United States v. Oregon, 366 U.S. 643 (1961).

[4] *Id.* at 648.

[5] 36 Stat. 703, 736 (1910).

All cases decided under the original act were decided on a contract basis.[6]

The amendment to the 1910 act is written in contract terms, but does not clearly and unequivocally state that a contract (between the Veteran's Administration and the veteran) is required before the United States is authorized to take the personal property left in the deceased's estate.[7] In all cases arising under the act, however, courts have continued to base their decisions on contract law.[8] The instant case is the first which could not be decided by the application of such principles.[9] The Court, nevertheless, still allowed the United States to recover the estate on the theory that the act does not require a valid contract, and that if, in fact, a veteran dies intestate and without heirs, the personal property left in his estate automatically vests with the federal government. Furthermore, the Court said that the act was clear and unambiguous,[10] and that, for this reason, it was not necessary to resort to the legislative history of the act in order to determine the intent of Congress.[11]

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[6] In United States v. Stevens, 302 U.S. 623, 628 (1938), the Court stated: "The claim of the government is based on a contract between the veteran and the Home. Nothing in the record indicates that the agreement was not fairly and voluntarily entered into between the parties, or that it was inequitable, unjust or not upon valuable consideration." *Accord,* Mauck v. United States, 94 F.2d 745 (9th Cir. 1938); O'Connell v. United States, 37 F. Supp. 832 (E.D. Ill. 1941); *In re* McGhee's Estate, 144 Misc. 713, 268 N.Y. Supp. 79 (Surr. Ct. 1932).

[7] *Supra* note 1.

[8] Typical language of the courts may be found in *In re* Witte's Estate, 174 Kan. 360, 368, 255 P.2d 1039, 1045 (1953): "In the instant case the contract is clearly established, it is conceded that for a period of seventeen months Witte received hospital care, treatment and maintenance, and if in equity and good conscience there is any reason why the contract should not be enforced it has not been made to appear. And perhaps another reason why the appellant cannot prevail is that the contract was authorized by a controlling statute of the United States, the validity of which has been upheld. The contract was valid under the statute." *Accord,* United States v. The Mid-City Nat'l Bank, 121 F. Supp. 402 (N.D. Ill. 1953); United States v. Peoples Nat'l Bank, 121 F. Supp. 331 (N.D. Ill. 1953); United States v. Gallagher, 97 F. Supp. 1014 (S.D. Cal. 1951); United States v. Essex Trust Co., 44 F. Supp. 476 (D. Mass. 1942); *In re* Turner's Estate, 171 Cal. App. 2d 591, 341 P.2d 376 (Dist. Ct. App. 1959); *In re* Gonsky's Estate, 79 N.D. 123, 55 N.W.2d 60 (1952).

[9] It is a principle universally recognized that only the mentally competent can enter into a binding contractual relationship. See Dexter v. Hall, 82 U.S. (15 Wall.) 9 (1872).

[10] This is questionable in view of the fact that so many earlier decisions were based on a contract. See, *e.g.,* those cases found at note 8 *supra.*

[11] Such a determination was definitely adverse to Oregon's case because Representative Rankin, as Chairman of the Committee handling the

Under the Supreme Court's interpretation of the act, a question of state's rights emerges. Previously, the courts had said that the act did not encroach upon the state's reserved powers[12] to control the devolution of property, reasoning that the United States was merely the promisee of a valid contract,[13] and that the law was well settled that the government could maintain such a position.[14] Under such circumstances the act is clearly one governing escheat.

The principal case involves only escheat of personal property, but it is well settled that local law governs testate and intestate succession of both realty[15] and personalty,[16] and also controls

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bill on the floor, expressed his view during the course of discussion of the bill by saying that the act would not apply to insane veterans who were incompetent to enter into a valid contract. 87 CONG. REC. 5203-04 (1941). In regard to the purpose of the act, the Court stated: "The bill was drawn up and sent to the Speaker of the House, in the very form in which it was passed, by the Veteran's Bureau itself. And that Bureau, we are told, has consistently interpreted the 1941 Act as making the sanity or insanity of a veteran who dies in a veterans' hospital entirely irrelevant to the determination of the Government's rights under the act." United States v. Oregon, 366 U.S. 643, 648 (1961).

It is difficult to comprehend why the Court used the intent of the drafters rather than the intent of Congress in whom the legislative power is vested by the Constitution.

[12] U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[13] The courts were continually faced with the problem of whether the act was in direct contravention of the tenth amendment of the United States Constitution. In each instance the courts used language which is typified in *In re* Turner's Estate, 171 Cal. App. 2d 591, 595, 341 P.2d 376, 379 (Dist. Ct. App. 1959): "Appellant's argument is that section 17 (5220) is an attempt by the federal government to usurp the exclusive power of the state over the devolution of property within its jurisdiction in violation of the Tenth Amendment to the United States Constitution misconceives the nature of the statute under consideration. This statute is not an attempt to regulate and control the devolution of property, but is based on contractual relationships." *Accord,* United States v. Gallagher, 97 F. Supp. 1014 (S.D. Cal. 1951); Mauck v. United States, 94 F.2d 745 (9th Cir. 1938); *In re* Witte's Estate, 174 Kan. 360, 155 P.2d 1039 (1953); *In re* Gonsky's Estate, 79 N.D. 123, 55 N.W.2d 60 (1952).

[14] See, *e.g.,* United States v. Stevens, 302 U.S. 623 (1938).

[15] In regard to the devolution of real property the Court in United States v. Fox, 94 U.S. 315, 320 (1876) stated: "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere

escheat.[17] The title and modes of the disposition of property within the state are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the federal government was created and would seriously affect the interests of the state.[18] Here, the federal government took the estate of a veteran which was totally derived from a personal inheritance. The deciding factor seems to have been the fact that the death occurred while the veteran was within the confines of a veterans' hospital. Such a result would have been proper had a valid contract existed between the veteran and the United States, but a different result would logically seem to follow where, as in the instant case, the veteran came into the hospital in a mentally unsound condition and not by his own direction. Is it reasonable to assume that the intent of Congress was to place such importance on the veteran's location at the time of his death?

The Supreme Court has suggested that the states are not forbidden by the federal constitution to limit, condition, or even abolish the power of disposition of property within their jurisdiction.[19] The power of the state to govern the property of one dying intestate has never been overridden by a federal act,[20] although some local inheritance laws have been affected by treaty.[21] There is no treaty problem in the principal case, however, and the Supreme Court must therefore justify its actions on other grounds.

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recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. . . . . The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority."

16 As the states control the devolution of realty, they also determine the laws concerning personalty as there is no distinction made in this respect, *e.g.*, Wilkins v. Ellett, 108 U.S. 256 (1883).

17 Hamilton v. Brown, 161 U.S. 256, 263 (1896): "By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign lord . . . . In this country, when the title to land fails for want of heirs and devisees, it escheats to the State as part of its common ownership . . . ."

18 United States v. Fox, 94 U.S. 315 (1876).

19 Irving Trust Co. v. Day, 314 U.S. 556 (1942); United States v. Perkins, 163 U.S. 625 (1896); United States v. Fox, 94 U.S. 315 (1876); Mager v. Grima, 49 U.S. (8 Howard) 490 (1850).

20 United States v. Oregon, 366 U.S. 643, 650 (1961) (Douglas, J., dissenting).

21 Kolovrat v. Oregon, 366 U.S. 187 (1961); Clark v. Allen, 331 U.S. 503 (1947); Hauenstein v. Lynham, 100 U.S. 483 (1880).

This the Court attempted to do by basing its decision on the constitutional provision providing that federal acts which are passed in pursuance of the Constitution are the supreme law of the land and override any conflicting state laws.[22] However, is this act, in fact, one in pursuance of the Constitution? Clearly the Constitution does not expressly authorize Congress to provide for veterans' benefits or for the taking of an intestate veteran's property. If such authority rests with the federal government, it must rise through a non-enumerated power. And, the constitutionality of such a power is dependent upon its being "necessary and proper" for carrying into execution an expressly delegated power.[23] Can it, in truth, be said that an act which provides for the escheat of the estates of veterans is necessary and proper to carry into effect the delegated power of raising and supporting armies and the conducting of wars?[24]

In the classic case[25] dealing with the necessary and proper clause, Mr. Chief Justice Marshall stated:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. . . . Let the end be legitimate, let it be within the scope of the constitution and all means which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

A review of the cases arising under the war power provisions of the Constitution is needed in order to determine what is necessary and proper in this area. The power to declare war and to raise

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[22] U.S. CONST. art. VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or shall be made, under the Authority of the United States, shall be the Supreme Law of the land."

[23] U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[24] The reasoning of the Court in the instant case is that the 1949 act is necessary and proper because the government is entitled to the property in view of the services rendered to the veteran, and that such revenue should be devoted to the comfort and recreation of other ex-service people who must depend upon the federal government for care. Mr. Justice Douglas criticizes such reasoning in his dissent by saying: "The need of the Government to enter upon the administration of Veteran's estates—made up of funds not owing from the United States—is no crucial phase of the ability of the United States to care for ex-service men and women or to manage federal fiscal affairs. United States v. Oregon, 366 U.S. 643, 650 (1961) (Douglas, J., dissenting).

[25] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

armies and navies rests with Congress.[26] Such authority extends to every matter and activity so related to war as substantially to affect its preparation and conduct.[27] During actual war it appears that the "war powers" are liberally construed so as to give the federal government a large degree of authority. Thus it has been held constitutional to compel private business to support the militia;[28] to order evacuations of persons of Japanese ancestry from designated military areas;[29] to provide for the requisition of prop-

[26] The basis for having the federal government control the war powers is set forth by the Supreme Court in United States v. Macintosh, 283 U.S. 605, 621 (1931): "There are few finer or more exalted sentiments than that which finds expression in opposition to war. Peace is a sweet and holy thing, and war is a hateful and an abominable thing to be avoided by any sacrifice or concession that a free people can make. But thus far mankind has been unable to devise any method of indefinitly prolonging the one or of entirely abolishing the other; and, unfortunately, there is nothing which seems to afford positive ground for thinking that the near future will witness the beginning of the reign of perpetual peace for which good men and women everywhere never cease to pray. The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense.' In express terms Congress is empowered 'to declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective . . . ."

[27] Hirabayashi v. United States, 320 U.S. 81, 93 (1943): "The war power of the national government is 'the power to wage war successfully.' [citation omitted] It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war."

[28] United States v. Bethlehem Steel Corp., 315 U.S. 289, 305 (1942): "The Constitution grants to Congress power 'to raise and support armies,' 'to provide and maintain a Navy,' and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Its power to draft business organizations to support the fighting men who risk their lives can be no less."

[29] Korematsu v. United States, 323 U.S. 214, 219 (1944): "We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of

erty,[30] and to control prices.[31] Such authority must be granted Congress in order to effectuate the nation's right of self-preservation.[32]

The war power of Congress is also extended to permit the enactment of legislation during the period immediately following the conflict; the purpose being to remedy the evils created by the hostilities. Enactments during this period are necessarily limited,[33] however, since the perilous condition of the country has been lessened.

The constitutional provisions conferring upon Congress the power to declare war and maintain armies and navies are extended to validate enactments during peacetime if the purpose is to prepare the country for any future conflicts which might arise. Accordingly, it has been held that compulsory military service does not violate the provisions of the Constitution,[34] and that the federal government may construct and operate dam sites so that the nation would have ample electrical energy in the event of war.[35]

Thus, the various legislative enactments under which the foregoing cases arose were deemed to be within the spirit of the Constitution, and were based on the federal government's inherent power to prepare the nation for war, or to protect national interests in time of war, or to remedy immediate evils resulting from

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modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."

30 International Paper Co. v. United States, 282 U.S. 399 (1931).

31 Yakus v. United States, 321 U.S. 414 (1944).

32 The necessity of the war powers being within the control of the federal government is emphasized by Mr. Justice Sutherland in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936): "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."

33 In upholding a federal statute governing rent control after the conclusion of World War II, the Court in Woods v. Miller Co., 333 U.S. 138, 143 (1948) stated: "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no implications in today's decision."

34 Selective Draft Law Cases, 245 U.S. 366 (1918).

35 Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

the conclusion of hostilities. In view of these earlier decisions, it is impossible to understand how federal control of escheat is "necessary and proper" for carrying into effect a delegated power. There is an insufficient connection between the means and the end. It is a foundation of our national system that the federal government, which the people ordained as a government of limited powers, should not be converted into a government of unlimited powers. The tenth amendment disclosed the widespread fear that the national government might attempt to exercise powers which had not been granted.[36] James Madison, in his writings during the formation of the Constitution, stated the intention of the founders:[37]

> Those [powers] which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs concern the lives, liberties, and properties of the people. . . .

It is submitted that it is contrary to the "spirit" of the Constitution for Congress to provide a statute which, under its present interpretation, overrides the state's control of escheat, under the guise of maintaining the militia. It is recognized that the "necessary and proper" clause has no definite boundaries, but powers arising under this clause are not unlimited. If the Court is to allow the federal government to control the escheat of personal property, there is nothing to stop their controlling the escheat of real property, there being no distinction made in this area.[38] As Mr. Justice Douglas points out, the next step might well be for Congress to pass an act allowing the federal government a portion of a veteran's estate regardless of the existence of a will.[39] The power of the United States in such an area would be virtually unlimited.

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[36] Kansas v. Colorado, 206 U.S. 46 (1907).

[37] THE FEDERALIST No. 45, at 290 (Lodge ed. 1888) (Madison).

[38] *In re* Hammond's Estate, 205 Misc. 309, 127 N.Y.S.2d 702 (Surr. Ct. 1954).

[39] United States v. Oregon, 366 U.S. 643, 653 (1961) (Douglas, J., dissenting).