

seed loan\$ 62 and interest
 Claim of Welfare
 Department of Mon-
 tana for old age as-
 sistance\$622

The pertinent part of Section XI of Part III of Chapter 82, Laws of 1937, provides:

“On the death of any recipient of old age assistance, the total amount of assistance paid under this act shall be allowed as a claim against the estate of such person after funeral expenses not to exceed one hundred dollars (\$100.00) have been paid and after the expense of administering the estate has been paid.”

By reason of the provisions of this section the Department of Public Welfare has a preferred claim over the claim for funeral expenses, after applying the sum of \$100 in payment of such funeral expenses, and payment expenses of administrator.

Section 191 of Title 31 U. S. C. A. provides:

“Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (R. S. sec. 3466.)”

Section XV of Part I of Chapter 82 provides:

“Whoever knowingly obtains, or attempts to obtain, or aid, or abets any person to obtain by means of wilfully false statement or representation or by impersonation, or other fraudulent device, public assistance to which he is not entitled, assistance greater than that to which he is justly entitled; or whoever aids or abets in buying or in any way disposing of the property, either personal or real, of a recipient of assistance without the

Opinion No. 48.

Insolvent Estate, Distribution of—Estate, Insolvent—Debts, Priority of.

Held: Generally in the distribution of an insolvent estate, a debt owing the United States is entitled to priority of payment over a debt owing the state, even if the latter debt is the subject of a general unperfected lien. An allowed claim for funeral expenses is entitled to priority of payment from the funds of the insolvent estate to the deceased to the extent of \$100.00 and no more. In the distribution of funds of an insolvent estate where an allowed claim for funeral expenses exceeds \$100.00, a claim by the State Welfare Department is entitled to priority of payment over a debt due the United States to the extent only that the allowed claim for funeral expenses exceeds \$100.00.

April 27, 1943.

Mr. Homer A. Hoover
 County Attorney
 McCone County
 Circle, Montana

Dear Mr. Hoover:

You have submitted the question relative to the proper distribution of funds of a small insolvent estate wherein the time for filing claims has expired, the claims allowed being as follows:

Claim for funeral ex-
 penses\$200
 Claim of Governor,
 Farm Credit Admin-
 istration, U. S. De-
 partment of Agricul-
 ture, for amount due
 on note given for a

consent of the county department and with the intent to defeat the purposes of this act, shall be guilty of a misdemeanor. In assessing the penalty the court shall take into consideration, among other factors, the amount of money fraudulently received."

This latter section, since it condemns transfers of property by recipients of old age assistance without the consent of the county welfare department, may create a lien on the property of the old age recipient.

Assuming, but not deciding, this question operates to create a claim, the question arises to priorities arising between the claim of the State of Montana and the United States. The claim, if any, in favor of the state has not been perfected and is an inchoate claim, if any. The section from the Federal Code above quoted has been the subject of many judicial decisions, the last of which, by the Supreme Court of the United States, is the case of *United States v. Texas*, 314 U. S. 480, 86 L. Ed.—, wherein the Court said:

"We are thus brought to the important issue in the case. Article 7065a—7 of the Texas Civil Statutes declared that all gasoline taxes due by any distributor to the State 'shall be a preferred lien, first and prior to any and all other existing liens, upon all of the property of any distributor. . . .' It is the State's position that under this section it held a specific and perfected lien upon the refinery property which entitled it to priority despite sec. 3466 of the Revised Statutes.

"Section 3466 mentions no exception to its requirement that 'the debts due to the United States shall be first satisfied.' It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson v. Smith*, 2 Wheat. 396, 426; *Conrad v. Atlantic Insurance Co.*, 1 Pet. 386; *Brent v. Bank of Washington*, 10 Pet. 596, 611, 612. This doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. See *Conrad v. Atlantic Insurance Co.*, supra, at 441-442. The question of whether the priority of the United States under section 3466 would also be defeated

by a specific and perfected lien upon property, whose title remained in the debtor was reserved in those cases. *Ibid.*; *Brent v. Bank of Washington*, supra, at 611-612. However, it was determined that a general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor. *Thelusson v. Smith*, supra, at 425-426.

"In more recent years the Court has had occasion to consider the argument that liens created in favor of States or counties by state statutes entitled them to priority over the United States under section 3466. In *Spokane County v. United States*, 279 U. S. 80, the priority of the United States was upheld. The state statutes involved provided that if a certain personal property tax was not paid, and if the personal property against which it had been assessed was no longer in the hands of the delinquent taxpayer, the amount of the unpaid tax should become a lien upon all the real and personal property of the taxpayer. They went on to prescribe the procedure by which the lien was to be enforced. The Court determined that the statutory lien did not become specific until this procedure had been followed. Since these procedural conditions had not been satisfied in the case before it, the Court refused priority to the tax claims of the county. It specifically declined to consider what 'the effect of more completed procedure in the perfecting of the liens under the law of the State' would have been. 279 U. S. at 95.

"The New York statute in *New York v. McClay*, 288 U. S. 290, declared that the corporate franchise tax there involved should 'be a lien and binding upon the real and personal property of the corporation . . . until the same is paid in full.' 288 U. S. at 292. Although the franchise taxes in question were overdue, the State had taken no steps to perfect and liquidate its lien at the time the receiver was appointed for the insolvent corporation. Under such circumstances, the Court was of the opinion that the tax claim of the State did not deprive the claim of the United States of its priority under section 3466. It was at pains to make

clear, however, that it intended by its decision to lend no support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien. 288 U. S. at 293-294."

It is clear from the above quotation that under this section the United States has a prior claim for debts due it from insolvent estates over the claim of one due the state.

The question suggests itself as to whether the claim of an instrumentality of the United States is a claim of the United States within the meaning of that section.

The rule is that any debt due an instrumentality or agency of the United States, regardless of the status of the debt at the time of its inception, comes within the terms of this statute.

In the case of *Wagner v. McDonald*, 96 Fed. (2d) 273, the Court said:

"Neither is there merit in the first contention; that, because the right of priority did not attach to the notes in the hands of the bank when they were executed, the attribute of priority was not created when they became the property of the United States. Under section 3466, priority of payment does not depend upon how the United States acquired title to the notes, nor upon their status prior to their transfer. Priority is the result of insolvency of the debtor and ownership of the claim by the United States. In *Howe v. Sheppard*, 12 Fed. Cas. pp. 672, 675, No. 6,772, 2 Sumn. 133, Mr. Justice Story, as Circuit Judge for the District of Maine, held that a private judgment assigned to the United States prior to the death of the insolvent judgment debtor was entitled to priority over debts of the estate due private creditors under the statute. He said: 'And, if (the estate be) insolvent, are not the United States necessarily entitled to a priority as to all their debts by the very terms of the statute?' He answered: 'That the priority of the United States attaches to all debts, equitable, as well as legal.'

"In *United States v. Fisher*, 6 U. S. 358, 2 Cranch 358, L. Ed. 304, the question was 'whether,' under the statute, 'the United States are entitled to be first paid and satisfied,

in preference to the private creditors, a debt due to the United States by Peter Blight, as endorser of a foreign bill of exchange, out of the estate of the bankrupt in the hands of assignees?' The bill has been purchased by an agent of the United States, but who did not declare himself to be such. In an opinion by Chief Justice Marshall the court held that the government was given priority by the statute.

"In *Lewis v. United States*, 92 U. S. 618, 621, 23 L. Ed. 513, in considering the priority in bankruptcy of a debt due the Navy Department, the court said:

"This language is general, and it is without qualification.

"The form of the indebtedness is immaterial.

"It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute.

"The debtors may be joint or several, and principals or sureties.

"Here, again, no distinction is made by the statute. All are included

"Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe."

There is no question here involved as to priorities between governmental departments. It is true that section 303 of Title 42 provides that recoveries from recipients of old age assistance, or their estates, is to be credited and taken into account in the settlements between the state and Federal Government. It is likewise true that one-half of the payments made to old age assistant recipients is made from funds supplied by the Federal Government, but the Federal Government has no claim against such old age recipients and it is not required that the states make such recoveries. The credit due the Federal Government only arises when the state makes a recovery.

Therefore the claim in favor of the instrumentality or agency of the United States is, generally speaking, prior to the claim of the state.

However, the claim for funeral expenses and expenses of administration and old age assistance are not debts owing by the decedent at the time of his death, and it is only as to such claims that the claim of the governmental agency has priority. But for the filing of the claim by the State of Montana, the claim for funeral expenses would be entitled to be paid as against the United States in its entirety.

Therefore, in my opinion, the proper application of the funds in the hands of the administrator of the insolvent estate is as follows:

1. The payment of the charges and expenses of administration.
2. The payment of \$100 on the claim for funeral expenses.
3. The payment of \$100 on the claim of the State of Montana.
4. The application thereafter of any residue to the claim of the governmental agency.
5. And if there be any further residue the application thereof to the claim of the State of Montana.

Sincerely yours,
R. V. BOTTOMLY
Attorney General