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Tax Lien Priority in Wyoming

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tion for tax purposes in reasonable or arbitrary, and this question must be decided upon the facts and circumstances appearing in each particular case. It is, however, important to note that in making such determination the legislature has the judicial sanction to taking into consideration such elements as "public interest" and "public policy." These elements, standing alone, give the legislature a wide latitude of discretion in determining the subjects of taxation, the kinds of property to be taxed, the rates to be levied and the methods of assessment, valuation and collection; all of which are included within the power to classify.

Perhaps the legislature's right to classify may best be illustrated by *Heisler v. Thomas Colliery Co.*,³⁴ in which it was held that the difference between anthracite and bituminous coal warrants a state in placing them in different classes for the purpose of taxation. This distinction presents a close question and the exact point has been decided contrary to the holding of the *Heisler* case.³⁵

It is unnecessary to discuss the decisions of these two cases, but it should be noted that while the legislative classification must be based upon real and substantial differences, they do not, however, need to be great or conspicuous.

As already pointed out earlier, the courts have substantially justified their decisions that the gross products tax is a personal property tax, and in view of the liberal construction placed upon the constitutional limitations regarding property taxes and the wide discretion given to the legislature in taxing property, it may reasonably be concluded that this type of tax on mine products has adequately met the desired end of enhancing the state's revenue while its natural wealth is being depleted.

HARRY L. HARRIS.

TAX LIEN PRIORITY IN WYOMING

Tax liens were unknown to the common law of the United States and England.¹ Today they do not exist unless they are expressly provided for by statute or constitution,² and being creatures of express legislative intent and action are not to be enlarged by construction.³ The Constitution of the State of Wyoming makes no provision for a tax lien. However, such a tax lien is expressly provided for by statute.⁴ The legislature of the State of Wyoming has seen fit to go further than the mere creation of a tax lien.

It has granted to the lien which attaches to personalty and realty as security for the collection of general state, county, and school taxes priority over all other outstanding encumbrances as against all persons except the United States and the State of Wyoming itself.⁵ Such a provision that the lien for general taxes shall

34. 260 U. S. 245, 43 Sup. Ct. 83 (1923).

35. *Commonwealth v. Alden Coal Co.*, 251 Pa. 134, 96 A. 246 (1915).

1. *Ingraham v. Forman*, 49 Ariz. 29, 63 P.(2d) 998 (1937).

2. *Lobban v. State ex. rel. Carpenter*, 9 Wyo. 377, 64 Pac. 82 (1901); *Wakeman v. Board of Comm'rs of Weston County*, 40 Wyo. 53, 274 Pac. 12 (1929).

3. *Lobban v. State ex. rel. Carpenter*, supra note 2.

4. Wyo. Comp. Stat. 1945, sec. 32-601.

5. Wyo. Comp. Stat. 1945, sec. 32-1603.

be prior in rank to pre-existing and post-existing encumbrances is well within the power of the legislative body to declare; the lien being a mere creature of statute it follows that the hand which gave such creature its very existence may also specify its position. Therefore, the legislature may, if it shall be deemed proper to do so, make the lien a first claim on the property, with precedence over all other claims and liens whatsoever, whether created by judgment, mortgage, execution or otherwise, and whether arising before or after the assessment of the tax.⁶

Statutes giving the lien for a general county, state, and school purpose priority over all other encumbrances are more often the rule rather than the exception today. No two states have identical statutes in this regard, but such priority statutes in the Western States which surround Wyoming seem to embody the same policy if not the letter of the Wyoming statute. Montana has stated that in the absence of any contrary provision the lien for general state, county, and school taxes is superior to the lien of a special assessment.⁷ Utah has established the priority of her general tax lien over all other demands against the taxpayer by Constitutional provision.⁸ Washington is quite emphatic and declares that the general tax lien is paramount to every other lien or burden to which the property may be subjected.⁹ To complete the picture, Idaho has stated by both constitution and statute that taxes for general state purposes are a prior and superior lien to all other taxes, assessments, liens, or encumbrances of whatever kind or nature.¹⁰

One notable exception to the rule that the lien for general state taxes is prior to all other encumbrances is present in Wyoming. This lone exception to the rule was brought into focus by a 1944 decision¹¹ of the Wyoming Supreme Court. The State of Wyoming had purchased refunding bonds issued by a drainage district. These bonds were acquired by the use of money from the permanent school fund. General taxes were later levied by Big Horn County against these lands and the land was sold to Big Horn County for the unpaid taxes. The lien of the State was held to be superior to that of Big Horn County. Since the statute giving liens for general taxes gives priority over all other encumbrances expressly excepted the United States and the State of Wyoming the court would not construe its effect to be otherwise. Thus it appears that the State is in a unique and envious position. The case also illustrates the policy of the Supreme Court to construe such tax statutes strictly and to the letter if it is possible to do so consistently. This is the only exception known to date in which the general tax lien is held junior.

Special assessment liens present no problems of superiority in Wyoming as concerns the lien for general taxes as the general tax lien is clearly superior to them.¹² After such express statutory sovereignty had been granted the general tax

6. *Big Horn County v. Bench Canal Drainage District*, 56 Wyo. 260, 108 P.(2d) 590 (1940); *Eddy v. Kimerer*, 61 Neb. 498, 85 N. W. 540 (1901); *Hewitt v. Trader's Bank*, 18 Wash. 326, 51 Pac. 468 (1897); *Cooley, Taxation* 445 (2d. ed. 1886).

7. *Cascade County v. Weaver*, 108 Mont. 1, 90 P.(2d) 164 (1939).

8. *State v. Salt Lake County*, 96 Utah 464, 85 P.(2d) 851 (1938).

9. *Rem. Rev. Stat.*, Sec. 11260; *City of Walla Walla v. State*, 197 Wash. 357, 85 P. (2d) 676, 119 A.L.R. 1327 (1938).

10. *Smith v. City of Nampa*, 57 Idaho 736, 68 P.(2d) 344 (1937).

11. *Alamo Drainage District v. Board of County Comm'rs of Big Horn County*, 60 Wyo. 177, 148 P. (2d) 229 (1944).

12. *Wyo. Comp. Stat.* 1945, Sec. 29-2021.

lien over the special assessment lien it would seem no valid question could arise in this regard. A recent Wyoming case¹³ has removed any doubt that could exist that the statute would be closely followed. This result was reached when the Supreme Court decided that when a county acquired land through the medium of a tax deed and later sold this property to a private citizen all special assessment liens were cut off and the purchaser took his title clear and free from such special assessment liens.

The problem does not always involve a general tax lien about whose sovereignty there can be no question. Often the situation will involve two special assessment liens arising at different times, in which case the Wyoming statutes do not aid in the solution of this difficulty. The Wyoming courts have not chosen to follow the common law rule with reference to priority in the absence of a specific statute. The common law rule seems to be "*last in time first in right.*" In *Willard et al. v. Morton*¹⁴ the court stated the Wyoming rule to be that in such a situation none of the special assessment liens has priority over the others regardless of the purpose for which the lien attached or the time at which it arose. That case is also illuminating as to the reason for the rule that the special assessment lien is inferior to the lien for general taxes in Wyoming. The policy seems to be that the general taxes are levied, collected, and used to support the general governmental functions of the State and are therefore *ex proprio vigore* of superior right in comparison to the special assessment lien which merely exists in relation to a benefit bestowed on a particular piece of property. This reason seems well founded in theory.

Drainage districts are given special statutory consideration in Wyoming as regards the tax assessed against drainage district realty.¹⁵ A special tax lien in favor of such drainage districts is expressly provided.¹⁶ The statute states that such a lien for unpaid assessments on drainage districts shall be inferior only to the general tax lien for state, county, city, town or school taxes, but a tax sale to enforce such liens for general taxes is said not to cut off the drainage district lien. The statute would seem to be inconsistent on its face. The lien for general taxes is given express superiority over the drainage district lien. This being so how can it logically be said that a sale of the lands under a lien for general taxes will not extinguish the lien given the drainage district? In 1940 the Supreme Court construed this statute¹⁷ and held that it does not and cannot mean what it appears to say. The opinion states that the statute gives the drainage district lien no priority over other liens and that a sale of the land to a county under a lien for general taxes operates to extinguish *in toto* the drainage lien for both past and future assessments. The word "sale" as used in the instant statute was said not to be construed so extensively as to forbid that such a tax deed should cut off the drainage lien. Reasoning behind such a construction was said to be that at the

13. *Barlow et al. v. Lonabaugh et al., Massey v. Same*, 61 Wyo. 116, 156 P. (2d) 289 (1945).

14. 50 Wyo. 72, 59 P. (2d) 338 (1936).

15. Wyo. Comp. Stat. 1945, Sec. 71-1401-1569.

16. Wyo. Comp. Stat. 1945, Sec. 71-1549.

17. *Big Horn County v. Bench Canal Drainage District*, 56 Wyo. 260, 108 P. (2d) 590 (1940); *accord, Western Beverage Co. v. Hansen*, 98 Utah 332, 96 P. (2d) 1105 (1939).

time the statute was enacted the only sale provided for was one by the county treasurer and the court felt it could not interpret the intent of the legislature as extending such a statute to cover any other sales. The construction by the Supreme Court would seem to be one which is logical and consistent in the light of all the other statutes regarding tax liens. Drainage district liens and liens for general taxes are not then on a parity; the lien for general taxes maintaining its usual sovereignty.

Not all taxes which attach to realty are assessed against the realty itself. A Wyoming statute¹⁸ provides that any delinquent taxes on personal property due from any person or corporation shall constitute a perpetual lien on the realty of such person or corporation. But the statute does not give such an attaching tax priority over all other encumbrances as is done if the tax is assessed directly against the realty. Instead this lien is expressly made subject to all prior existing valid liens. Such a provision has now become quite prevalent in the United States and there can be no doubt of its constitutionality.¹⁹ But regardless of the apparent clarity of the statute most of the tax litigation in Wyoming has had its source here.

The first direct case on the subject decided in Wyoming was adjudicated in 1901.²⁰ The purchasers at a mortgage foreclosure sale sought to clear the land of all tax claims and tendered the correct amount for taxes on the realty but nothing for personal taxes assessed against the mortgagee. The court found that since the mortgage was prior to the personal tax lien the foreclosure wiped out the tax lien. It was also pointed out that such a decision was necessary if every mortgage on land was not to be made insecure by unforeseeable events.

Four years after this decision the court was again called on to adjudicate a substantially similar case.²¹ No mortgage was here involved but the question was as to the power of the collector to sell realty after the realty taxes on the land had been paid but the personal taxes of the owner remained unpaid. The decision was that such land could be sold for personal taxes alone. This case is also authority for the proposition that the county assessor had a right to refuse payment of the realty taxes if the personal taxes remained unpaid. Taken together these decisions clearly establish that while both types of taxes may be attached to the same piece of realty one is clearly superior and the other inferior to prior encumbrances.

Directly in point with the two previous cases was a 1929 case²² which held that a mortgagee whose mortgage was prior in time to an attachment of a personal tax lien against the realty could redeem such realty by a payment of the real estate taxes alone. The court disposed of the case in a rather summary fashion indicating that this question was so well settled that no problem should remain. It was only four years later, however, that the legislative intent was again put in

18. Wyo. Comp. Stat. 1945, sec. 32-1603.

19. Home Owner's Loan Corp. v. Phoenix, 51 Ariz. 455, 77 P. (2d) 818 (1938); Minneapolis Threshing Machine Co. v. Roberts, 34 S. D. 498, 149 N. W. 163, L.R.A. 1915 D. 886 (1914).

20. Lobban v. State ex. rel. Carpenter, 9 Wyo. 377, 64 Pac. 82 (1901).

21. Ricketts v. Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1 (1905).

22. Wakeman v. Board of Comm'rs of Weston County, 40 Wyo. 53, 274 Pac. 12 (1929).

issue in a case in the federal court for the district of Wyoming.²³ The issues here were not so clearly presented as they had been formerly, as the gross products tax²⁴ which is authorized by the Constitution of Wyoming²⁵ was involved. The main issue was whether or not the gross products tax could be considered a tax on personalty and therefore inferior to a prior mortgage on the realty. The court agreed that the phrase "in lieu of taxes on the realty" found both in the statute and constitution was only consistent with the theory that such gross products taxes were meant to be taxes on personalty and hence inferior to a prior mortgage. Also any taxes assessed on temporary buildings on the realty were of the same class. Because a receiver had taken over the mine and produced coal therefrom the court held that the case was a novel one and as the production inured to the mortgagee's benefit as much as to the benefit of anyone else the lien on such coal produced under the receivership was held to be superior to the lien of the prior mortgage. On appeal to the Circuit Court of Appeals for the 10th District the decision was affirmed.²⁶

This decision was in complete harmony with an earlier case²⁷ decided by the Supreme Court. The earlier case had already decided that a tax upon oil being produced was a tax on personalty and in the absence of an express agreement the lessor and lessee should bear the tax burden in proportion to the interest each held.

Thus it appears that the courts of Wyoming have followed the statute giving general tax liens priority²⁸ very closely. Taxes on personalty which attach to the realty of the taxpayer are valid liens but take no priority over encumbrances which are prior in point of time except in unusual situations.²⁹ However, taxes on the realty itself have both a retrospective and prospective effect and take precedence over all other liens except those acquired by the State of Wyoming or the United States.

The lien for taxes due on personalty attaches to the taxpayer's realty in Wyoming but is the opposite ever true? Can the lien for taxes due on realty be collected out of the personalty of such taxpayer? The answer to such question would seem to be negative as there is no *direct* statutory authority for such a proposition. Also, there is no need for such a result as the realty cannot change its situs whereas this is always a danger to the collector in the case of personalty, and would appear to be the reason for the enactment of the statute attaching the lien for taxes due on personalty to the realty. Justice Blume stated in a 1940 case³⁰ that "in this state, no provision has been made, as has been in a number of states, that a tax is a personal obligation of the party whose property is assessed for taxes." While the case before the court involved the realty tax the statement

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23. *First National Bank of Chicago v. Central Coal and Coke Co.*, 3 F. Supp. 433 (D. Wyo. 1933).
 24. Wyo. Comp. Stat. 1945, sec. 32-1001.
 25. Wyo. Const., Article XV, sec. 3.
 26. *Board of Comm'rs of Sweetwater County v. Bernardin, Green River Water Works Co. v. Same*, 74 F. (2d) 809 (C. C. A. 10th 1949).
 27. *Miller v. Buck Creek Oil Co.*, 38 Wyo. 505, 269 Pac. 43 (1928).
 28. Wyo. Comp. Stat. 1945, sec. 32-1603.
 29. *First National Bank of Chicago v. Central Coal and Coke Co.*, 3. F. Supp. 433 (D. Wyo. 1933).
 30. *Board of County Comm'rs of Big Horn County v. Bench Canal Drainage District*, 56 Wyo. 260, 108 P. (2d) 590 (1940).

would seem to be equally applicable to personalty taxes. Therefore, if there is no personal liability for realty taxes it is difficult to understand how such a tax lien could be collected out of personalty in the absence of express statutory sanction. Taxes levied against one class of property do not become a lien on the property of a completely different class.³¹ This situation may still conceivably be a source of litigation however, depending upon the manner in which two Wyoming statutes³² are construed. The second in order of these two statutes gives express authority to the tax collector to collect any of the taxes mentioned in the preceding section by distraint of personalty even though the taxpayer has realty situated in the county. The first statute does not mention personalty taxes alone but speaks in terms of *all taxes* due from any person or corporation. If taken literally the statutes would seem to authorize the seizing of personalty for taxes due on realty. This question has apparently never been raised nor decided. Perhaps the statutes merely have reference to the right of the collector to seize and sell goods for the personalty taxes due even though such taxes have become a lien on the realty. However the question remains undecided and should be carefully considered by the reader should this problem present itself.

What property is covered by a tax lien in Wyoming? Does a tax assessed against one class of personalty become a lien against all the personalty of the taxpayer? Does the lien for realty taxes attach to other parcels of realty owned by the taxpayer? Such problems can become of great moment if property is conveyed by the taxpayer after the taxes have been levied. Unfortunately the Wyoming statutes offer little aid in solving the question other than asserting that a lien shall attach to personalty when the tax is levied against such personalty. Generally whether or not the lien attaches to all the taxable personalty of the owner or separately to each item or piece of property for the tax assessed against such parcel depends on the particular provision.³³

In 1926 the Supreme Court of Wyoming decided that where various kinds of personal property are listed for taxation, the lien of the tax on one class of property is not a lien on another class of personal property.³⁴ But if the collector can show that the tax was levied against that class of property in a valid proceeding then the tax becomes a valid lien against every piece and parcel of property in that class. The burden is on the collector to prove the property is of the class assessed and not on the owner to prove it is not. This rule is analogous to that applied to parcels of realty. The tax lien attaches to each separate tract or parcel for its own taxes, and each tract stands as security only for the portion of tax which has been assessed against it.³⁵ However, where a lien is imposed on a tract of land, consisting of contiguous lots, belonging to one owner, the tax lien is co-extensive with the tract and each separate or separable portion is liable for the taxes due on the whole.³⁶

31. *Farm and Cattle Loan Co. v. Faulkner*, 34 Wyo. 199, 242 Pac. 415 (1926).

32. *Wyo. Comp. Stat. 1945, secs. 32-1607, 32-1608.*

33. *Farm and Cattle Loan Co. v. Faulkner*, 34 Wyo. 199, 242 Pac. 415 (1926).

34. *Ibid, accord, Chicago Bazaar Co. v. Nichols*, 13 Colo. App. 154, 56 Pac. 672 (1890); *Lee v. Stannard*, 15 Colo. App. 101, 61 Pac. 234, 37 Cyc. 1140 (1900).

35. *Anchor v. Wichita County Water Imp. Dist. 2*, 129 Tex. 385, 103 SW. (2d) 135, 112 A.L.R. 70 (1937).

36. *Webb v. Phoenix Title and Trust Co.*, 20 Ariz. 580, 185 Pac. 128 (1919).

The question at once arises as to whether or not a tax which has been levied against a class of personalty and which has become a lien against the entire class will also attach to after acquired property of the same class. In the case of *Farm and Cattle Loan Co. v. Faulkner*³⁷ the court stated that there was no statutory provision that a tax is a lien on any after acquired property of the taxpayer, and tax statutes are not to be enlarged by construction. An analogy was drawn to another Wyoming case³⁸ in which it was declared that taxes levied on personal property did not become a lien on real estate which was subsequently acquired, therefore the same rule doubtlessly applied to personal property which was subsequently acquired.

In the above case taxes were assessed against cattle of the taxpayer. The next year this taxpayer gave a mortgage on a herd of cattle to the appellant. The taxes of the mortgagor being in default the county treasurer seized sixty head of cattle from the mortgagee to satisfy these taxes. The mortgagee brought replevin and recovered possession of the cattle. Such a chattel mortgage was said to make out a *prima facie* first right in the mortgagee. This was so because the treasurer had failed to meet his burden of proving that these cattle were part of the band against which the taxes were assessed. The burden of proving the cattle were part of the band assessed was clearly placed on the collector. However, if the mortgagee had permitted the cattle which were covered by his mortgage to become comingled with those against which the tax had been assessed then the burden would be placed upon the mortgagee to point out, and prove, to the satisfaction of the collector, those cattle which were not part of the band so assessed. The original burden is still on the collector to prove such a comingling has taken place and calls the doctrine of *confusion of goods* into operation. Once this burden has been met by the collector then the burden is shifted to the complaining party to show his cattle are not subject to the lien.

Thus it clearly appears that when a third party acquires an interest in the after acquired personalty of the taxpayer such property may not become subject to the lien for taxes assessed against the taxpayer unless the collector can prove a comingling with property of the same class which has been properly assessed.

As the reader can observe, there has been comparatively little tax lien litigation in Wyoming. This logically can be said to be due to the outstanding clarity of the statutes dealing with this subject. The legislative purpose is quite clear and well expressed. Little room is left for doubt as to the rank to be given to each lien. For this reason the decisions appear to be in accord. Thus one can be said to be apprised of the probable result of any future tax lien litigation in Wyoming. The court has declared by consistent decisions that it will follow the statute in minute detail.

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37. *Farm and Cattle Loan Co. v. Faulkner*, supra note 33.

38. *Board of Comm'rs v. Shaffner*, 12 Wyo. 177, 74 Pac. 88, 109 Am. St. Rep. 971 (1903).