TAXATION:
PERSONAL TAXES:
PRIORITY OF LIEN:

The state's lien on personal property seized to satisfy personal taxes is superior to all prior liens, including chattel mortgages.

October 29, 1941

FILE 97

Hon. Mark Wilson
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Dear Mr. Wilson:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of "whether or not a judgment for personal taxes upon execution is prior to a chattel mortgage on an automobile."

This question involves the question of whether or not the state's lien for personal taxes is superior to the lien of a mortgage of the property of the delinquent personal taxpayer. Under what is termed "distress warrant" the collection may seize and sell property for delinquent personal taxes by virtue of the provision of Section 11086, R. S. Mo. 1939. Personal taxes may also be collected by actions at law commenced before the Justice Court or the Circuit Court and against the party assessed. (Section 11112, R. S. Mo. 1939). Under this section an execution on the judgment is issued out of the court in which the judgment is rendered. Under Section 11086, supra, delivering the delinquent tax bill to the officer takes the place of the execution.

With either the tax bill or the execution, the officer is authorized to seize the property of the delinquent, levy upon it and advertize it for sale after being in compliance with the statutes as to notice.

At this stage of the procedure, your question comes in. That is: "If there is a chattel mortgage on the property seized (in your case, a car) does the officer have to sell the property subject to the mortgage or is the lien for the taxes superior to the lien of the chattel?"

In our research, we fail to find where this question has been directly before the courts of this state. In some states it seems that the lien of the state for taxes is inferior to that of the mortgage dated prior to the tax lien unless provided otherwise by statute. The text writers have

differed on this question as well as the courts. In Vol. 61, C. J., Page 925, Section 1176, the rule is stated as follows:

> "Where no preference or priority is given by constitutional or statutory provision, one view recognized in some cases is that a tax lien has no preference over other liens and encumbrances. However, in other cases the view is taken or asserted that real estate taxes constitute ex proprio vigore a prior lien against the property on which they are assessed, not depending on any express declaration of the statute to that effect in the absence of some legislative declaration to the contrary; it having been said that it does not follow that because the legislature has failed to declare expressly that, a lien for taxes is superior to all other liens that such lien is subordinate; but, on the contrary, the inference is that the legislature intended the lien to be superior to all liens, prior or subsequent, claimed by individuals, Under certain constitutional provisions tax liens on real property cannot be made subordinate to other liens."

The Missouri lawmakers have not enacted any statute giving such liens priority, nor have they enacted any statutes providing that such liens are not prior to chattel mortgages. However, the statement of the Supreme Court in Stafford v. Fizer, 82 Mo. 393, 397, clearly indicates that the tax lien is prior to the lien of the mortgage unless the Legislature provides otherwise. There the court said (l. c. 397):

> "* * * The lien of the State is the superior one, although subsequent in time, a superiority invariably accorded to it in absence of some legislative declaration to the contrary. Cadmus v. Jackson, 52 Penn. 295; Doane v. Chittenden, 25 Ga. 103; Hopper v. Malleson, 16 N. J. Eq. 382; Cooper v. Corbin, 105 Ill. 224. No system of jurisprudence would command respect which failed to maintain and enforce the benefits of this priority by all necessary and reasonable proceedings to that end. * * *"

This statement is supported by the statement in the opinion of the Court in State of Missouri, to use of Phillips, Assignee of the Illinois R. P. Co., v. Rowse, 49 Mo. 586, 592, wherein the court said:

> "By the common law all debts due the crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. The liability for them is not an ordinary one, and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government, and I know of no authority that places the obligation to pay them upon a level with liabilities upon contracts. If the claim of the State were an ordinary one, such as might arise on behalf of an individual, the authorities cited might show that its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statutory provision upon the subject."

In the Phillips case, supra, the delinquent personal tax payer had assigned his property to Phillips, and the tax collector seized and sold sufficient of the assigned goods to satisfy the tax claim. There the court held that the lien for personal taxes prevails over claims of creditors.

The case of State of Minnesota v. Central Trust Co. of N. Y., 94 Fed. 244, 36 C. C. A. 214, dated April 10, 1899, was a case in which a question similar to the one here presented was in issue. The opinion was issued from the U. S. Supreme Court of Appeals, Eighth Circuit. The Minnesota tax statute at that time was quite similar to the Missouri statutes pertaining to procedure, (l. c. 245). The contention of the taxpayer, whose property was about to be sold for delinquent personal taxes, was stated as follows (l. c. 246):

> "It is contended in behalf of the appellee, and so the lower court appears to have held, that the lien created by the mortgage in favor of the Central Trust Company, from the time when that instrument was recorded, to wit, February 23, 1889, was and is paramount, so far as the personal property conveyed by the mortgage is concerned, to any lien thereon which the state can assert under a

> subsequent assessment of such personal property for taxation, and in accordance with that view it was held that the personal taxes due to the State of Minnesota from the Water Company for the years 1894, 1895, 1896 and 1897 could not be paid out of the proceeds of the foreclosure sale, the amount received at such sale being insufficient to discharge the mortgage indebtedness." * * * * * * * * *

After reviewing a number of state decisions the court further said, (l. c. 247):

> "It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but is an obligation which by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority. And in some well-considered cases the same priority has been accorded to a tax, although the statute imposing it failed to provide in so many words, that it should be a lien on the property of the taxpayer. Such decisions proceed on the theory that the maintenance of good government and the public welfare are to such an extent dependent upon the prompt collection of taxes that demands of that nature should take precedence of all claims founded upon private contracts. (Citing cases) Greeley v. Bank, 98 Mo. 458, 460, 11 S. W. 980. These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has

> been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts. * * * * * * * * *"

We call attention to the fact that in support of this rule the court cited the case of Greeley v. Bank, 98 Mo. 458, 460. In the Greeley case, supra, the assets of the bank had been placed in the hands of a receiver and the tax collector had intervened, asking that the receiver be ordered to pay the delinquent personal taxes of the bank. In treating this question, the court said (l. c. 460):

> " * * * It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets (Acts, 1881, p. 180, sec. 7; Ib. p. 35; State to use v. Rowse, 49 Mo. 586), a right which it could have enforced through its revenue officers by the summary process of distress (R. S. 1879, sec. 6754) but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which, depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets in custodia legis except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the courts, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be

> reduced to the level of an ordinary debt and be cut off unless presented to the court for allowance within a given time."

The court there ordered that the tax claim be paid.

Referring back to the Minnesota case, supra, l. c. 248, the court further said:

> " * * * * The sole question at issue, then, is whether the lien of the state should be regarded as inferior to that of the mortgagee because the legislature did not expressly declare that it should be paramount. In behalf of the appellee it is conceded, apparently, that if the taxes in question had been levied upon real property the lien would prevail over a prior incumbrance thereon, without any express legislative declaration to that effect, and so it has been held on several occasions. Parker V. Baxter, 2 Gray, 185; Eastman v. Thayer, 60 N. H. 408, and cases heretofore cited. This rule with respect to the lien for real taxes is said to be due, however, to the fact that such taxes are assessed originally against the very thing to which the lien applies, whereas personal taxes are assessed against the person, and that when, as in the case at bar, the statute gives a lien for personal taxes on personal property of the taxpayer owned at a certain time, it is not a lien upon the same property on account of which the assessment was levied, and is therefore a lien of less dignity. With reference to this distinction between personal and real taxes, it is only necessary to say that, while it is doubtless true that in some cases personal property owned by the taxpayer when he is assessed for taxation is not identical with that which he owns when the lien attaches, yet we can perceive no reason why this fact should have any effect upon the paramount character of the lien imposed for personal taxes. The state has an undoubted power to create a lien for a personal tax on other property of the

tax debtor than that which was assessed for the tax, and to make the same superior to all other liens. It will also be found, we think, that taxpayers generally retain the bulk of their personal property from the time when they are assessed for taxation until the tax becomes a lien, so that in the majority of cases the statute with which we are now dealing will impose a lien on the bulk of the same property on account of which the tax was assessed. But whether it will or will not have such effect must be deemed immaterial in considering the paramount nature of the lien.

"It is manifest from a glance at the situation that if the view which prevailed in the lower court is approved, and the lien for the taxes in controversy is reduced to the grade of a lien created by private contract, no more serious obstacle could be interposed in the way of the collection of personal taxes in the state from whence the appeal comes. A large percentage of personal property in nearly every community is usually subject to liens which, in one form or another, have been created by the owners thereof, and, if these shall be held to be of the same dignity as the lien given by a public statute for taxes, the state and the political subdivisions thereof will doubtless lose a considerable portion of the revenues which would otherwise be derived from taxes assessed on personal property. In the present case personal property of great value was covered by a mortgage for a period of 10 years, on account of which the state will lose personal taxes, assessed during a period of 4 years, to the amount of about $60,000, if the contention of the appellee shall prevail. Besides, a construction of the statute which will make a tax lien subordinate to a private lien will afford a ready means of enabling those who are so disposed to avoid the payment of personal taxes altogether, and thereby afford additional ground for the complaint so frequently heard, because so much of the

> taxable wealth of the country escapes taxation. No state, so far as we are aware, has ever made provision for redeeming property on which it imposes taxes from prior liens in favor of individuals, in order to secure its own revenue therefrom; nor is it either expedient or desirable that laws of that nature should be enacted, and that the state, like an individual, should be compelled to indulge in a race of diligence to secure its taxes. If it is deemed best for any reason to make a lien for taxes which are imposed on personal property subordinate to private liens, then we perceive no reason why it would not be equally wise to exempt all mortgaged personal property from taxation. * * * * * * "

And at l. c. 250, the court further said:

> "In view of what has already been said, we are of opinion that it cannot be inferred that the lien for personal taxes declared by section 1623, supra, was intended to be subordinate to all prior private liens, because the legislature failed to say that it should be deemed paramount. On the contrary considering the character of the obligation and the dignity usually accorded to such liens, in public estimation, and above all, considering the necessity which exists for giving them priority in order that the public revenues may be promptly and faithfully collected, we conclude that the inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself. * * * * * * "

The U. S. Supreme Court of Appeals for the Second Circuit in the case of Liberty Mutual Insurance Co. v. Johnson Shipyards Corporation, 6 F. (2d) 752, dated April 24, 1925, had before it the question of the priority of claims of the United States in receivership cases. In

speaking of claims due the sovereignty and especially taxes, the court at l. c. 756 said:

> "It has frequently been pointed out that a tax lawfully imposed is not to be regarded as an ordinary debt, but is an obligation which is to be regarded as paramount to all other demands, although the law imposing the tax does not expressly provide that it is to have priority. These cases proceed upon the theory that the maintenance of the government and the public welfare are so dependent upon the collection of taxes that payment should have precedence over all other claims; and it is thought that taxes levied for the support of government are founded upon a higher obligation than other demands. See State of Minnesota v. Central Trust Co., 94 F. 244, 247, 248, 36 C. C. A. 214, and cases there cited.
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> "These courts have sustained in numerous cases the right to priority of payment of taxes over all other claims (Citing cases)."

A review of the decisions of the Missouri courts reveals that the rule enacted in the Minnesota case, supra, is being followed in this state. We refer to the opinion of the Supreme Court of Missouri in the case of Construction Co. v. Ice Rink Co., dated April 9, 1912, 242 Mo. 241, l. c. 253, wherein the court said:

> "Our conclusion on this point rests as well upon sound reason. It is uniformly recognized that the claim of the State for the taxes necessary for its support is superior to demands created by private contract. In State of Minnesota v. Central Trust Co., 36 C. C. A. 214, Thayer, J., discusses this subject fully upon authority and reason. He cites numerous cases to sustain the proposition which he enunciates thus: 'It has been held frequently that a tax lawfully imposed by the State on its citizens is not an ordinary debt, but is an obligation which by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare

such priority.' And then he says: 'These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the State for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has been a common practice to provide summary remedies by enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts.'

" This thought is in line with what is said by the Supreme Court of Illinois in Dennis v. Maynard, 15 Ill. 477: 'All the principles applicable to the prerogative priority of the crown in this respect equally apply to public dues for taxes.'"

And, at l. c. 250, the court further said:

"* * * It will be observed that we are dealing with two liens, one created by law in favor of the State which necessarily takes precedence of other prior as well as subsequent liens, on account of its peculiar character (R. S. 1879, secs. 6831, 6832; Blossom v. Van Court, 34 Mo. 390; McLaren v. Shieble, 45 Mo. 130; Dunlap v. Gallatin Co., 15 Ill. 7; Almy v. Hunt, 48 Ill. 45; Binkert v. Wabash Ry. Co., 98 Ill. 205); the other in favor of creditors, created by the act of the debtor. Those two liens have been foreclosed, and the purchasers stand opposed to each other with deeds under the proceedings respectively employed for enforcing them.

> The lien of the State is the superior one, although subsequent in time, a superiority invariably accorded to it in the absence of some legislative declaration to the contrary."

In all of these decisions it will be noted that the courts all held that the lien of the sovereign tax is superior unless there is some legislative declaration to the contrary.

In State ex rel. v. Farmers' Exchange Bank of Gallatin et al, dated December 14, 1932, 56 S. W. (2d) 129, 331 Mo. 688, the priority of a claim for license fees deposited in a bank which was in liquidation was before the court. In that case the State based its contention that the State's claim for this deposit should be preferred over all other claims on the provisions of Sec. 3542, R. S. Mo., 1939, which is as follows:

> "Whenever any person indebted to the state of Missouri 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 state of Missouri shall be first satisfied, and the priority hereby 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: Provided, that nothing in this article contained shall be construed to interfere with the priority of the United States as secured by law, or the payment of the expenses of the last sickness, wages of servants, demands for medicine and medical attendance durin the last sickness of the deceased, nor funeral expenses."

In considerin this contention, the court said (l. c. 697):

> "* * * * Respondents contend that Section 3152 applies only to debts in the strict sense of that term, or as respondents phrase it, 'merely provided for priority to the State amounting to a preference on obligations arising out of the debtor and creditor relationship and which ordinarily and otherwise would constitute simply a general claim entitled to no preference over other general creditors.' In view of the principle of public money underlying the common-law right of the sovereign to priority of payment and said statute which is substantially declaratory thereof (In re Holland Banking Co., supra, 313 Mo. l. c. 321), respondents' said contention is, to say the least, open to serious question. The statute seems to have been given a more liberal construction in favor of the State in Greeley v. The Provident Savings Bank, 98 Mo. 458, 11 S. W. 980, wherein it was held that the obligation to pay taxes on personal property comes within the purview of said priority statute. * * * * * * * * * * * *"

It will be noted here that the court indicated that Section 3152 R. S. Mo. 1929 (now 3542 R. S. Mo. 1939) was substantially declaratory of the common law. It will also be noted in this case that the court cited the case of Greeley v. Provident Savings Bank, 98 Mo. 458, without criticism. This same case was cited as authority by the Federal Court in the Minnesota case, supra. Again the court said in the Farmers' Exchange Bank of Gallatin case, supra:

> "* * * * That the State's right to priority of payment of demands due to it may be waived by legislative enactment will be conceded. * * * * * * *"

We have failed to find where the legislature has waived the State's right to priority of payments of its demands for personal taxes. The case of State ex rel. Bardell v. Cardwell Bank, et al, 124 S. W. (2d) 677 and 678, the court in speaking of the allowance of a tax attorney's fee, said:

"(4,5) It is our conclusion that a judgment for taxes, such as in this case, should be paid prior to all other claims (unless it be a claim of the United States, a point not at issue in this case, and not passed on by us). Section 3152, R. S. 1929, Section 3152, page 4969, Mo. St. Ann. * * "

Since the lien of the sovereign state is, under the common law, superior to all other claims, and since the state has not waived its right to this priority, then it seems that the state's lien is superior and prior to all claims, whether secured or not.

CONCLUSION

The opinion of this department is, therefore, that a judgment for personal taxes upon execution is prior to a chattel mortgage on an automobile or any other property seized under such execution. We are further of the opinion that this rule applies also in cases where property is seized and levied upon by virtue of a tax bill in the hands of the proper official who has seized such property for the payment of taxes.

Respectfully submitted,

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