SPECIAL ASSESSMENT V. MORTGAGE LIEN

IN EVENT OF CONFLICT, WHICH HOLDS PRIORITY?

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GENERAL FEATURES OF SPECIAL ASSESSMENTS

A special assessment is a charge laid against specific real property, pursuant to legislative direction, for the payment of which the owner is compensated by a resulting benefit in improvement of the property charged, commensurate, in theory at least, with the amount of the assessment. The authority to levy and thus to charge is lodged in the state and is traceable to its taxing power; and this sovereignty, subject to constitutional dictation, as a convenient channel for the accomplishment of its purposes, delegates to municipal bodies the right, and may place on them the duty, to install the improvements and to settle against the benefited property a charge for such proportion of the cost as the property may be shown to have gained by reason of the improvements. This authority must be exercised in accordance with the procedure devised in the instrument of delegation. This is but to say that the agent must follow instructions. It is frequently remarked in the authorities that statutory requirements in this regard must be strictly pursued. And while this pronouncement has been generally subscribed to, it will be found that courts, whether or not they have thereby legislated, have in many instances gone far afield in supplying by intendment deficiencies resulting from legislative dereliction and in upholding the proceedings of municipalities which, in some particulars, were not in fact sanctioned by previous act of the state.

It has sometimes been asserted that in the making of public improvements and levying assessments therefor a municipal body is the agent of the property owner. But this can hardly be so. Such owner has no voice in directing the performance of the work, he cannot order it either to proceed or to cease, and he can exercise no control over the municipality; nor can the municipality in every instance bind the property owner in the same degree as if it were his agent. All the owner can do is to insist that the grant of power be not exceeded and that the procedure outlined by the state be not flagrantly departed from. His duty is to pay the involuntary charge in much the same way that he pays his other taxes.

It is because the proceedings for public improvements are usually *invita Minerva* that the municipality is held to a strict pursuit of its delegated authority. If the property owner be the movant, much is forgiven if the letter of the law be not strictly observed, for the princi-

ples of waiver or estoppel may operate against him to the extent that he ought not in good faith be heard to complain of irregular procedure which, by apparent solicitation, he may have invited.

In thinking of the effect to be given a lien allowed for the cost of public improvements, there necessarily arises a consideration of the purposes to be served. In some quarters it is deemed sufficient to say that the power to levy assessments for such improvements is a derivative of the inherent power of the state to tax, and that a special assessment is a species of taxation. Still, the assessment should not be elevated to the plane of a tax laid for general governmental exigencies, for under the latter private property may in effect be confiscated if public necessity therefor should arise, and the extent of the former is measured by the benefit which specific property receives from the expenditure by means of which it is improved. It is not true, however, that the benefit to the property is the sole basis of the state's power to cause a lien to be fixed on the property for its own improvement. If that were so, the effect would be that the state could compel a property owner to install improvements for his own benefit, whether he would or not. There is a third element that is part and parcel of the source of the state's power in this regard. This element is the benefit of the municipality itself, which is but to say that the improvement is for the public good, inclusive of the good of every inhabitant within it. Streets are improved for the public good. Sewers are laid for the public good; and drains are installed because public benefit is thereby accomplished. That specific property receives a greater benefit than that accruing to the public in general, is but an incident to the public improvement. Yet, incidental as it is, the fact of this special benefit must exist in order to render valid the assessments for which a lien is given against the specific property for its proportion of the cost of the improvement.

It is no longer questioned that such liens may be validly imposed. But question is still frequently made as to the extent to which they may be allowed to operate when other liens and encumbrances covering the same property have intervened. If the assessments could be held on a parity with general taxes, no such question could arise. A general tax, originating in the paramount necessity that the government shall have the means to support itself, is an obligation of the citizen superior to all other demands that may be made against him. And the obligation being of this high order, it has been considered from the very beginning of all systems of taxation that the sovereign must possess the requisite power to enforce payment promptly and without fail. As a means to this necessary end, taxes levied against real estate have been held *ex propria vigore* a lien on the property with priority over all other liens, without express legislative declaration thereof, and without regard to the time or manner in which such other liens may have originated. For these reasons, a mortgage or deed of trust against real property must

be subordinated to the demands of general taxes whether or not they are prior in point of time, and whether or not there is a statute giving such priority.

Other questions enter into a consideration of the relative priority of the lien of a special assessment and that of a mortgage against the same property. What if the matter of priority is regulated by the express terms of the statute? What may be implied from the wording of the statute? What if the statute is wholly silent as to the priority? Of what force is the fact that the mortgage may have been executed and recorded before the statute was enacted? All of these questions have been considered by the courts in settling conflicts that have arisen between the lien of a mortgage and that for a special assessment for public improvements.

PRIORITY OF ASSESSMENT LIEN UNDER EXPRESS PROVISION OF STATUTE

The text-writers agree that it is within the province of the legislature to enact that the lien for special assessments shall take precedence over a mortgage lien.

"A lien for public taxes and assessments is upon the property, and is paramount to all liens acquired by personal contract, when so provided by statute. . . . Although the lien of a prior recorded mortgage is superior to that of a special assessment, it is within the power of the legislature to change the rule, and make the mortgage lien secondary to that of the assessments."[1]

"Not only is it competent for the state to charge land with a lien for the taxes imposed thereupon, but the legislature may, if it deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the execution of the tax. When that is done the lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the *res* without regard to individual ownership, and if enforced by sale of the land the purchaser will take a valid and unimpeachable title."[2]

The courts uphold this conclusion of the text-writers, basing their approval of such legislative power largely on the necessity for community advancement through public improvements. This is well explained by the California court thus:[3]

"Whether the power to tax for street improvements is to be referred to the general taxing power and the power of eminent domain, or, as some courts have suggested, to the police power, is not very important. Whatever its source may be, it exists beyond question by reason of its nature and objects, and that it partakes of the nature of the taxing power must be admitted. The power to levy a tax for general purposes,

[1] Hamilton, *Special Assessments* (1907) sec. 708.

[2] 2 Cooley, *Taxation* (3d ed. 1903) pp. 866-868.

[3] *German Savings, etc. Soc. v. Ramish* (1902) 138 Calif. 120, 124, 69 Pac. 89, 92.

which shall be a lien superior to all other liens, prior or otherwise, is not doubted, and it is not because it is called a tax, but because of its object and the necessity for raising revenue in order to execute the functions of government. In modern times, whatever may have been the demands of society in an earlier period of the development of government, the necessity for improving the streets of cities and towns, while perhaps less important in degree than the general objects of government, is yet important and necessary to the welfare of the whole community, and the principles on which the system of general taxation depends, and which govern in the enforcement of tax levies for general purposes, are also applicable to taxation for the improvement of streets, the construction of sewers, and other like public work."

In addition to the element of public interest that enters into a consideration of the question of legislative power to declare the lien of special assessments superior to other liens, courts have thought of the benefit to the property itself in determining what ought to be the rule. It is said that the public improvement enhances the value of the private property to the extent that the cost is laid against it. The mortgage lien being on the entire interest of the owner, the increase in value by reason of the improvement enures to the advantage of the mortgagee by adding to the amount of his security. And since the addition is made without expense to the mortgagee, his lien should be postponed to the claims of the one who has made the improvement.

This argument runs quite generally through the authorities whether there is a statute regulating priority, whether the statute is silent as to priority, or whether a deduction is sought to be made from the implications of a statute. But it must be confessed that the argument is considerably refined and somewhat strained. It is true that in theory the benefit to the property must equal the cost of the improvement with which it is charged. In practice this is frequently a chimera. And especially is there often gross disproportion between the benefit and the charge where the expense for the improvement of an entire district is put in hodge-podge and each owner required to pay the proportion of the whole cost that the frontage of his property bears to the frontage of the district. If it be a fact that the benefit does equal the cost, this benefit is added to the equity of the owner and thus may be made to respond to the claims of the assessment-lien holder. The amount of the benefit is not added to the mortgage. The mortgagee holds no greater claim against the mortgagor than he held prior to the improvement. The improvement is made without his consent. Perhaps it was not even contemplated at the time his mortgage originated. Yet to protect his security he may be called on to discharge a debt for the creation of which he was not responsible, and for which he receives nothing.

In such cases, the mortgagee gets slight comfort from the courts. He is usually dismissed as he was in a New Jersey case with the blunt statement that[4] "it is well settled that, in the exercise of its sovereign

[4] *Doremus v. Cameron* (1891) 49 N. J. Eq. 1, at p. 7, 22 Atl. 802, at p. 804.

power of taxation, the state may displace prior encumbrances, although the displacement may be prejudicial to individual right." That pronouncement was at least frank. There was no pretense that through the reversing of his priority the mortgagee was left as well off as he was before. The decision was on the theory of paramount necessity.

It is not incumbent on courts to advance these refined considerations. The inherent nature of special assessments, the need of public improvements for community advancement, the knowledge imputed to one contemplating the acceptance of a mortgage that such improvements may be ordered in, are sufficient to make his lien secondary.

Whatever the arguments or reasoning of the courts, it is universally held that it is within the legislative prerogative to enact that a mortgage lien, whether anterior or subsequent in point of time to that of the special assessment, shall be subordinated in effect to the latter.[5]

PRIORITY IMPLIED FROM OTHER STATUTORY PROVISIONS

As previously suggested in this article, the courts have in many instances reached out and supplied by intendment many deficiencies in proceedings relating to public improvements for which the legislature could have provided but did not. It is not my purpose to consider here the question of how far the courts should go in this regard; it is sufficient to state what they have actually done.

The cyclopaedic statement of the rule to be followed in construing such statutes as to lien priority has not apparently met with judicial approval. "Taxes and assessments levied upon land which is already subject to a mortgage do not displace or outrank the lien of the mortgage in the absence of an express legislative declaration that they shall constitute a paramount lien."[6] This doctrine has been subscribed to by one court,[7] which held that in order to give the lien of a special assessment priority over existing encumbrances there must be words in the statute expressing such legislative intent.

Text-writers approach the subject cautiously. Thus, by one it is said:[8] "In the absence of a statute giving an assessment priority over an earlier mortgage lien, an assessment has no such priority." The

[5] *Bauman v. Ross* (1897) 167 U. S. 548, 17 Sup. Ct. 966; *Provident Inst. v. Jersey City* (1885) 113 U. S. 506, 5 Sup. Ct. 612; *Weinreich v. Hensley* (1898) 121 Calif. 647, 54 Pac. 254; *State v. Kilburn* (1908) 81 Conn. 9, 69 Atl. 1028; *People v. Weber* (1896) 164 Ill. 412, 45 N. E. 723; *O'Brien v. Bradley* (1901) 28 Ind. App. 487, 61 N. E. 942; *Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa, 307, 79 N. W. 77; *Dressman v. Simonin* (1898) 104 Ky. 693, 47 S. W. 767; *Gomeringer v. McAbee* (1917) 129 Md. 557, 99 Atl. 787; *Smith v. St. Paul* (1911) 116 Minn. 44, 133 N. W. 74; *Keating v. Craig* (1881) 73 Mo. 507; *Shaler v. McAleese* (1907) 73 N. J. Eq. 536, 68 Atl. 416; *Pittsburg's Appeal* (1871) 70 Pa. 142; *Krutz v. Gardiner* (1901) 25 Wash. 396, 65 Pac. 771.

[6] 27 Cyc. 1176.

[7] *Moody v. Sewerage Board* (1906) 117 La. 360, 41 So. 649.

[8] 2 Page and Jones, *Taxation by Assessment* (1909) sec. 1068.

authors, it will be noticed, do not say that the statute must expressly declare such priority. In another treatise on the subject there is an apparent contradiction in consecutive sentences:[9] "It is, for these reasons, often proper to deduce from the general language of the statute giving a lien the conclusion that it gives a paramount lien to which mortgage estates or judgment liens must yield. But this conclusion cannot, perhaps, be inferred where no provision is made for giving those who hold such interests a hearing, and where there are no words declaring the superiority of the lien." Of course, if there are words declaring the superiority of the assessment lien, it is not necessary to look further. But suppose there are no such words?

The courts, in nearly all cases where the question has been raised, have not been ambiguous in expressing their views. They adhere to the rule that the statute must itself determine the character and extent of a lien given for public improvements. But they say that it is not necessary that the state should in express terms declare that the lien shall be a paramount one. If the intent can be gathered from the general provisions and purposes of the law, the courts will enforce it.

"We can readily perceive that there are cases in which the adjudication in favor of the priority of a mortgage lien would seriously interfere with the prosecution of a work for the promotion of the public welfare, but the creation of liens and their incidents is a legislative matter, and the courts cannot create such liens.

The statute must determine the character and extent of the lien. It is not necessary that it should in express terms declare that the lien shall be a paramount one, for if the intention can be gathered from the general words and purposes of the statute, the courts will give it effect."[10]

The Kentucky court has gone as far in implying the priority of an assessment lien over that of a mortgage as any adjudication that has come under the writer's notice. The charter of a city merely gave the municipality power to cause the improvements to be made, allowed a lien for their cost with authority to direct a sale of the property improved in accordance with by-laws and regulations to be adopted by the city. There was a clash between the assessment lien and that of a prior mortgage.

"Whilst this language [the above charter provisions] does not expressly say that such liens shall be prior in rank to other liens on said property, it seems to us that it does this by necessary implication. This power the city can exercise against the owner of the property, and certainly a mortgagee can have no higher equity or claim in the property than the mortgagor gave him. His interest and title in same are conditional and less than that of the mortgagor, and his rights in the property are entitled to no greater consideration than those under whom he claims. He, with the owner, has profited by the enhanced value given

[9] 2 Elliott, *Roads and Streets* (3d ed. 1911) sec. 749.

[10] *State v. Aetna Life Ins. Co.* (1888) 117 Ind. 251, 252, 20 N. E. 144.

the property by the improvements which the assessment is made to pay for. . . .

We are of the opinion that the lien provided for in the section of the charter quoted, *supra,* existed from the date when such charter became operative against all the real property within the limits of the city. It was simply a suspended power which the council could enforce whenever, in their discretion, the public interests required it, and all persons dealing in such real property were bound to take notice."[11]

Perhaps the real reason of the court's conclusion is found in these words immediately following the above statements:

"Any other construction gives to the landholder the power to so encumber his land as to render nugatory the power vested in the common council for the benefit of the whole community to improve streets at the expense of the abutting property holders."

To this reasoning it might be answered that, since there is no common law of assessments, there should be an expression of the legislature as to priority, or language should be used which would disclose an intent of the lawmakers that such assessment lien should be superior to others, that in the charter in question no language was used in any way showing such intent, and that therefore the implication was an arbitrary one.

The authorities are practically unanimous, however, in holding that, in the absence of express statutory declaration of priority in favor of the assessment lien, such priority will be implied if the general language in the act will permit.[12]

This rule is undoubtedly the correct one. The proceeding by which the cost of the improvement is allowed to be charged against the land to the extent of benefits is *in rem* in its nature. It is the whole interest in the land that is charged, not merely a part of it, or some particular interest in it. The improvement is for the benefit of every interest in the land, for the lien-holder as well as the owner, from which arises the necessity that the lien allowed for the improvement expenses must be coextensive with the estate benefited.

While the implication of priority should be a reasonable one and have some relevancy to the context of the statute, the construction of such laws is ordinarily not a difficult matter. Where the statute provided that, "any person interested in any property assessed may file objections," and after sale the title was "subject to redemption by the former owner or his grantee, mortgagee, etc. . . .," it was clear that the legislature meant to subordinate the mortgage lien to that of the

[11] *Dressman v. National Bank* (1897) 100 Ky. 571, 576-577, 38 S. W. 1052, 1054.

[12] *Lybass v. Ft. Myers* (1908) 56 Fla. 817, 47 So. 346; *Wabash E. Ry. v. East Lake, etc. Drainage District* (1890) 134 Ill. 384, 25 N. E. 781; *Morey v. Duluth* (1899) 75 Minn. 221, 77 N. W. 829; *Richmond v. Williams* (1904) 102 Va. 733, 47 S. E. 844; *Carstens v. Seattle* (1915) 84 Wash. 88, 146 Pac. 381; Ann. Cas. 1917A 1079, note.

assessment.[13] And the same inference was irresistible where, in addition to a right of redemption given a mortgagee, it was enacted that his rights should not be divested until after six months' written notice to him of a sale under the assessment.[14] The same was true under a provision that all "persons interested" and the "owner" might appear and oppose the confirmation of the assessments and the entry of judgment therefor, and the further direction that if they failed to do so they were concluded thereby.[15] This construction was likewise adopted under a statutory provision that the "owner or any other person having an interest in the property charged with the tax bill" might pay the sum due in a given time.[16] The provision that the assessment should be collected as other taxes were was also held a sufficient basis for an implied priority of the assessment lien.[17] And even where the statute merely directed that the municipal charge should remain a lien until fully paid, it was said that this would warrant the same implication.[18] But in another case it was held that no such implication would arise from the provision that the charge should be a lien "from the time of filing the petition."[19]

WHERE STATUTE IS SILENT AS TO PRIORITY

The above discussion has practically covered a consideration of those instances where the state has given a lien for improvement assessments but has failed to lay down any express rule regulating priority. It has been seen that the courts are insistent in giving such a lien priority over that of a mortgage. In fact, it would appear that the mortgage lien would be held superior only under an express provision of the law subordinating the assessment.

There have been instances where it has been held that if the statute is silent as to priority, an assessment lien will be secondary to that of an existing mortgage.[20] Such effect was given to the mortgage lien in the case cited, on the ground that there was nothing in the statute from which priority of the assessment could be implied. The court agreed, however, that it was not necessary that the law should expressly declare the assessment lien a paramount one; such could be implied from other provisions of the statute. But another court found, in a statute which was entirely silent as to priority, an intent of the legislature to favor the assessment over the mortgage.[21]

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[13] *Carstens v. Seattle, supra* note 12; *O'Brien v. Bradley, supra* note 5.

[14] *Howell v. Essex County Road Board* (1880) 32 N. J. Eq. 672.

[15] *Morey v. Duluth, supra* note 12.

[16] *Morey Engineering Co. v. St. Louis Ice Rink Co.* (1912) 242 Mo. 241, 146 S. W. 1142.

[17] *Seattle v. Hill* (1896) 14 Wash. 487, 45 Pac. 17; 35 L. R. A. 372, note.

[18] *Germania Savings Bank v. Miller* (1900) 48 Pittsb. L. J. 16.

[19] *Killian v. Andrews* (1892) 130 Ind. 579, 30 N. E. 700.

[20] *State v. Aetna Life Ins. Co., supra* note 10.

[21] *Lannan v. Waltenspiel* (1915) 45 Utah, 564, 147 Pac. 908.

The case of *Carstens v. Seattle,* already cited as an instance of upholding the priority of the assessment by implication from other provisions of the statute, comes very near on its reasoning to a support of priority even though the statute be silent as to such priority. The reasoning of the court was as follows:[22]

"In addition to the remedy by sale of the land as above noticed, the city may enforce the lien of the assessment by an ordinary civil action of foreclosure in court. The statute contains no express provision in terms making the assessment lien superior to prior mortgages or other prior private liens. This procedure, we are of the opinion, points to a legislative intent to charge the assessment against the land itself regardless of its ownership and regardless of all prior liens upon its ownership which rest upon private contract, or which of necessity are only a charge upon some person's title or interest in the land. Such private liens, of course, can rise no higher than their source. For, manifestly, no person can by contract create a lien upon land superior to his own title or interest therein, while the sovereign power of taxation can create a lien superior to every private interest in the land."

MORTGAGE GIVEN BEFORE THE ENACTMENT OF THE IMPROVEMENT STATUTE

Where a state, either by the express provisions of its legislative enactments or by implications to be clearly drawn therefrom, attempts to give priority in favor of a special assessment lien over an existing mortgage, constitutional considerations arise as to the power to make such law retroactive. And it is a question to be resolved according to the constitution of the particular state by which the law was enacted. The United States Constitution contains no expression as to the power of a state in regard to retrospective legislation. The Supreme Court has gone far enough to say that it was not prepared to hold it violative of the Federal Constitution for a state to enact that a local improvement lien should have precedence over other existing encumbrances.[23]

In some states there is an express constitutional prohibition against the passage of retroactive laws. Under such a provision, it has been held that the legislature cannot give preference to an assessment lien to the detriment of an existing mortgage.[24] In Illinois, on the other hand, the court announced the doctrine that such a law does not impair the obligation of contracts nor interfere with vested rights. In so holding, the court said:[25]

"It is urged that the Drainage Law, so far as it attempts to give a lien for assessments superior to the liens of existing encumbrances, is unconstitutional because it violates the obligation of contracts or divests vested rights. This clearly cannot be so. Every property-owner holds his

[22] *Carstens v. Seattle, supra* note 12.
[23] *Provident Inst. v. Jersey City, supra* note 5.
[24] *Mellinger v. Houston* (1887) 68 Tex. 37, 3 S. W. 249.
[25] *Wabash E. Ry. v. East Lake Drainage District, supra* note 12.

property subject to the exercise of the taxing power, and it is immaterial, so far as this question is concerned, what may be the nature of his interest, whether the fee, an estate in expectancy, an estate for years or a mere lien. This is true, as every one must admit, in relation to general taxes, where the only return to the tax-payer is the protection and security which the government gives him, and *a fortiori* should it be true in case of special assessments where, in theory at least, he receives an adequate and complete return for the money assessed in the enhanced value of the estate or property which he owns or to which his lien attaches." The Indiana court has held similarly.[26]

The intention of the legislature to make the law retroactive, and thereby to supplant an existing private lien with a statutory one, should be plain. There is a presumption against anything but a future effect from the enactment. Especially is this true of taxes or assessments that are to be collected for future use.[27]

It is apparent, in considering the decisions of the courts that have been called on to determine the relative priority of special assessment and mortgage liens, that they have arrived at singularly uniform results in view of the widely separated roads which they have traveled. There is noticeable strain in some of the reasoning advanced to sustain the desired conclusion. But this is found true in nearly all decisions which in any way involve a discussion of the law governing assessments for public improvements. This will remain true until courts abandon all inclination to assign the power to levy the assessments to any other branch of the sovereignty than the power to tax. The assessment is a tax. Why say it approximates a tax? The theory of benefits is a convenient one to lean on, but it is largely a hoax. Especially is this true where authority is given to lay the entire cost of the improvements against the abutting property.

Whatever be the reasoning, however, it is sure that the mortgagee—the ancient forecloser—has himself been foreclosed by the legislatures and the courts. There is very little comfort for him when he locks horns with a special assessment lien. He seldom has cause to hope for anything better than second-money.

[26] *Baldwin v. Moroney* (1910) 173 Ind. 574, 91 N. E. 3, under Acts, 1891, ch. 196, a statute enacted after the decision of *State v. Aetna Life Ins. Co., supra* note 10.

[27] *Pittsburg's Appeal* (1861) 40 Pa. 455.