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**Taxation--Priorities--Loss of Federal Tax Lien**

E. H. B.

*West Virginia University College of Law*

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parently a minority of courts distinguish between fraud and mistake where the right to avoid a release at law is concerned. Our own court has in other instances placed fraud and mistake on the same footing as to concurrent jurisdiction of law and equity though never before considering the case of a release turning on the question of mutual mistake. The court is emphatic in reaffirming its former decisions holding that a release may be repudiated at law for fraud and misrepresentation and to many it will no doubt seem that the court is drawing an unrealistic hair-line distinction between fraud and mutual mistake. Though it appears that the court is acting wisely in this instance, it is difficult to conceive of an argument which would apply in the case of mistake which would not apply equally in the case of fraud.

A. L. B.

TAXATION — PRIORITIES — LOSS OF FEDERAL TAX LIEN. — In a lien creditor’s bill, the State of West Virginia and the government of the United States proved claims for taxes. The government’s claim for income tax for the year 1921 became a lien upon assessment, and was recorded as such in 1923. The state’s claim arose from property taxes for the year 1924. The state had enforced its lien by a purchase of the property at a delinquent tax sale and the period for redemption had expired, but in disregard of this fact, the land was sold as that of the original deliquent taxpayer. Although the state actually held title, it is content to claim the proceeds of this sale in lieu of the property. The United States maintains that since it had a lien on the land, it may, at its option, follow the lien into those proceeds; and since its lien was perfected prior to the state’s claim, it has prior rights in this money. Held,


10 Harman & Crockett v. Maddy Bros., 57 W. Va. 66, 49 S. E. 1009 (1905) (distinguished by the court on the ground that the situation then merely involved the correction of mathematical calculation); State v. Carfer, 83 W. Va. 331, 97 S. E. 825 (1919); McCary v. Traction Co., 97 W. Va. 306, 125 S. E. 92 (1924).


1 Recordation was in the office of the clerk of the Federal District Court for southern West Virginia.
that a tax lien of the federal government is subordinate to the state's lien for taxes; that since the state purchased the land for delinquent taxes and the land was not redeemed in the statutory period, title vested in the state free from the lien of the federal government; and that therefore the state is entitled to the entire fund. *Berrymont Land Co. v. Davis Creek Land & Coal Co.*

Pointing out that a private lienor's rights are cut off by the state's foreclosure for taxes, the West Virginia court remarks, "We know of no reason why the [federal] government is not amenable to the rule governing private lienors." The effect of this statement is to subordinate the taxing rights of the federal government to the state's taxing privileges, an astounding result in view of the decision of *McCulloch v. Maryland* and the innumerable decisions consistently based thereon for over one hundred years. The Circuit Court of Appeals for the Fourth Circuit held in a recent decision that "... the power of the states over Federal tax liens is limited to that granted them by Congress", and here there is no allegation that Congress has given the state power to extinguish the lien of the national government by a tax sale.

The Federal Constitution rather clearly gives federal taxes preeminence. After declaring that "... the laws of the United States ... shall be the supreme law of the land, ... laws of any state to the contrary notwithstanding," it is provided that "The Congress shall have power to lay and collect taxes on incomes." Under this authority, Congress created a lien in favor of the federal government for unpaid income taxes. By its decision, the state court takes away much of the efficacy of that statute.

For the state it was argued that since the federal statute allowed the lien to be cut off if not recorded, Congress showed clearly

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2 *S. E. 577* (W. Va. 1937).
3 *Wheat.* 316, 4 L. Ed. 579 (U. S. 1819). Marshall, C. J., said, "... the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.


5 *U. S. Const. Art. VI, § 2.*

6 *Id. Amendment XVI.*

7 "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." *R. S. § 3186, 45 Stat. 875 (1928), 26 U. S. C. A. § 1560 (1935).*
that it did not intend the lien to have any greater standing than a private encumbrance. This does not necessarily follow. Prior to the requirement of recordation, it was held that an unrecorded lien of the government was superior to other liens, that to hold otherwise would put the federal collection of taxes at the mercy of state legislation.\(^9\) The requirement of recordation was made for the sole purpose of giving purchasers of real estate greater assurance of the state of the title.

One case\(^10\) is cited as authority for the court’s decision, and it, like the West Virginia case, was decided on the principle that if the federal lien were given priority, the state would be denied its necessary income for carrying on the government. This argument does not seem altogether convincing when it is considered that the other claimant is also a government; that the same public policy should favor the federal tax; that, adopting the view less favorable to the national government, the two governments should at least be on the same footing, so that the one prior in point of time should prevail.

In Ferris v. Chic-Mint Gum Co.,\(^11\) there were three liens against a piece of property — an unrecorded federal tax lien, a recorded private lien, and a state tax lien, respectively. The federal statute gave the private lien priority over the unrecorded federal lien; the state statute gave the state lien priority over the private encumbrance. Since, to give the federal lien preference over the state lien would place both of them ahead of the private lien, and this priority is expressly denied by the federal statute, it was held that the state must necessarily take priority over the federal lien; the order of priority becoming: the state lien, the private lien, and the federal lien. Although the holding in this case would appear to support our own court’s decision, it can be distinguished on the ground that it involved a problem in triple priorities\(^12\) whereas the West Virginia case was concerned with only the two governments.

\(^12\) This doctrine arises from the theory that if \(A\) must prevail over \(B\), and \(B\) must prevail over \(C\), therefore \(A\) must prevail over \(C\) although an opposite result would be reached if only \(A\) and \(C\) were involved.
The federal statutes create the lien\textsuperscript{13} and also provide means by which it may be extinguished: (1) by a \textit{bona fide} purchase of the property before the lien has been recorded;\textsuperscript{14} (2) by satisfaction of the tax;\textsuperscript{15} (3) by the tax becoming unenforceable;\textsuperscript{16} (4) by a discharge by the commissioner on his receipt of a bond to cover the whole amount of the tax;\textsuperscript{17} (5) by a discharge by the commissioner of a part of the taxpayer's property, so long as he retains a lien on property of at least twice the value of the taxes owed;\textsuperscript{18} (6) by a discharge by the commissioner of property for which he has been paid an amount proportionate to the government's claim;\textsuperscript{19} (7) by a determination of the federal district court, on a bill in chancery brought by the commissioner, that the claim of the government is subordinate to other claims;\textsuperscript{20} and (8) by such a bill in chancery, brought in a federal district court by any person who had a lien upon or interest in the realty prior to the filing of notice of the lien of the United States, or who bought the property at a sale to satisfy such prior lien, for a final declaration of the rights of the various parties, the United States having given its consent to be made a party to such action.\textsuperscript{21}

It would seem that after providing these various methods by which the federal lien can be extinguished, Congress intended that they should be exclusive and not subject to such additions as the various state courts should see fit to make. If such was the intent, it has not been well respected, as evidenced by the principal case and, for example, the \textit{Texas Trust Co.} case\textsuperscript{22} which held that a sale of real estate under an ordinary trust deed extinguished all subsequent liens, including the lien of the United States for taxes. However, some federal courts have observed what would seem to be the intent of the statute, holding that the tax lien was not extinguished by a judgment in the state court foreclosing a mortgage on the premises;\textsuperscript{23} that the lien could not be removed by a strict

\textsuperscript{13} See note 8, supra.
\textsuperscript{14} R. S. § 3186, 45 STAT. 875 (1928), 26 U. S. C. A. § 1562 (1935).
\textsuperscript{15} R. S. § 3186, 45 STAT. 876 (1928), 26 U. S. C. A. § 1563 (1935).
\textsuperscript{16} Ibid. As to when it becomes unenforceable, see Kohlmeier, \textit{Federal Tax Liens Under Revised Statutes — Sec. 3186 (1935) 13 Tax Mag. 191, 196.}
\textsuperscript{17} See note 15, supra.
\textsuperscript{18} R. S. § 3186, 45 STAT. 876 (1928), 26 U. S. C. A. § 1564 (1935).
\textsuperscript{19} Ibid.
\textsuperscript{22} Trust Co. of Texas v. United States, 3 F. Supp. 683 (S. D. Tex. 1933).
\textsuperscript{23} Sherwood v. United States, 5 F. (2d) 991 (E. D. N. Y. 1925).
foreclosure, but only by a sale as provided by statute\textsuperscript{24} that a
government tax lien cannot be removed by judicial proceedings
unless the United States is a party, and it consents to be a party
only if the suit is brought under the statute;\textsuperscript{25} and that the lien
is a right of the United States which no collector of internal revenue
can release except as provided by statute.\textsuperscript{26}

It is thus believed that the United States should have been
given priority in the fund in the hands of the court; but the case
having been decided as it was, it is submitted that the federal gov-
ernment probably has a lien which continues to exist against the
land, in whatever hands it is at present, and the lien could be en-
forced against such land as a charge which cannot be extinguished
by the decision of a state court.\textsuperscript{9}

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\textsuperscript{24} Integrity Trust Co. v. United States, 3 F. Supp. 577 (D. N. J. 1933).
\textsuperscript{25} Oden v. United States, 33 F. (2d) 553 (W. D. La. 1929); Minn. Mut. Life
Ins. Co. v. United States, 47 F. (2d) 942 (N. D. Tex. 1931). However, in the
latter case, it was held that a sale, as required by statute, was unnecessary be-
cause useless.
\textsuperscript{26} Maryland Casualty Co. v. Charleston Lead Works, 24 F. (2d) 836 (E. D.
S. C. 1928).
\textsuperscript{9} The briefs and a petition of the United States for a rehearing of the
principal case were examined only after this comment was written. It is
interesting to note that most of the contentions made herein were brought up
by counsel for the United States in that petition, and were there presented
for the first time in this litigation. The petition for a rehearing was denied.