

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3724.

TAXES AND TAXATION—CHATTEL MORTGAGE GIVEN ON PERSONAL PROPERTY—LATER ASSIGNMENT MADE FOR BENEFIT OF CREDITORS—DELINQUENT TAXES AT TIME OF ASSIGNMENT BUT NO PROPERTY SEIZED—MONEY DERIVED FROM SALE OF PROPERTY—MORTGAGE SUPERIOR TO CLAIM FOR TAXES.

In 1920 B. to secure a debt gave a chattel mortgage covering all his personal property.

In November, 1921, he made a general assignment of all such property to J for the benefit of his creditors.

At the time of the assignment a certain amount of delinquent taxes was charged against B on the duplicate, but no property had been seized by the treasurer.

HELD, in the distribution of the money derived from the sale of the property the claim of the mortgage is superior to the claim for taxes.

HON. J. E. STRAYER, *Probate Judge, London, Ohio.*

DEAR SIR:—You have requested the opinion of this department upon the following question:

“On November 29, 1920, one C. D. B. executed and delivered to certain creditors a chattel mortgage covering all of his personal property. This mortgage was duly filed with the Recorder of the proper county, and no question is made as to its validity. The mortgage was given to secure a debt of \$6993.43.

On November 9, 1921, this same C. D. B. made an assignment of all his property to one C. J. in trust for the benefit of all his creditors, and said assignee, on the same date, duly qualified as such assignee and is now administering said trust under the directions of this court.

At the time of the assignment the assignor owned the personal property covered by said mortgage and none other.

On November 9, 1921, the date of the assignment, there stood on the tax duplicate the sum of \$253.42 personal taxes due from said assignor, G. D. B. all of which was delinquent, but no seizure of the property was made by the treasurer and no attempt made by him to collect the same prior to the assignment.

The total amount of money derived from the sale of the personal property covered by said mortgage is \$4245.49, being insufficient to pay the mortgage and taxes.

Upon the foregoing facts is the claim for taxes prior to the claim of the mortgage?"

You call attention to the case of *The Commercial Mortgage Company vs. Syfert*, reported in the Ohio Law Reporter for September 11, 1922, page 157. This case and the authorities referred to in it have been carefully examined, as have certain others, notably *In re City Trust Co.*, 121 Fed. 706, and *Machine Co. vs. Supply Co.*, 68 O. S. 535. None of these cases hold that the preferences created by sections 11138 and 8339 of the General Code are so far operative to create liens for delinquent personal taxes of the insolvent debtor as to give taxes and labor claims priority over prior contract liens acquired in good faith. So far as the preference created by section 11138 is concerned, the question is directly answered by the succeeding section, which provides as follows:

"Sec. 11139. The foregoing provisions shall not prejudice or affect securities given, or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to assignment, or securities given within such time to create a preference among creditors, or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor, in case of assignment, to the extent above provided."

Section 8339 contains no such express saving clause. It provides in part as follows:

"In all cases when property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall first be paid *out of the trust fund*, in preference to all other claims against such employer except claims for taxes and the costs of administering the trust."

The language "out of the trust fund" was construed in *Machine Co. vs. Supply Co.*, supra, as designating simply the fund otherwise subject to distribution among general creditors. See second branch of syllabus and opinion, page 540.

On slightly different theory the Federal Circuit Court of Appeals in *In re City Trust Co.*, supra, arrived at the same result.

These adjudications seem conclusive, and it is accordingly given as the opinion of this department that the lien of the mortgage in the case stated by you is superior to the constructive lien arising by virtue of the preferences given by the statutes cited.

Respectfully,
JOHN G. PRICE,
Attorney-General.