Priority of Tax and Special Assessment Liens

THE recent decision of the California Supreme Court in *Balaam v. Pacific States Savings & Loan Company*,¹ holding that where successive bonds are issued against the same land to pay the cost of street improvements made pursuant to the provisions of the Street Improvement Act of 1911² (after the 1921 amendments³ thereto), the liens of such bonds take priority in the inverse order of their creation, has proved a distinct surprise, if not a shock, to many attorneys and investors. The attitude of this group is reflected in the remarks of Mr. Louis Burke, City Attorney of Montebello, in an article appearing in the January, 1934, issue of *The Western City*. Mr. Burke, after asserting that the decision is "one of the most important decisions in recent years in California street bond law" and "one which has caused a substantial shock to attorneys and bondholders," declares that the decision means "substantially the same in street bond law as a holding that a second trust deed is superior to a first trust deed would mean in realty loan law."⁴ It would, of course, be difficult to imagine a more startling or revolutionary pronouncement than one to the effect that a later trust deed is superior to an earlier trust deed in realty loan law, and accordingly, if Mr. Burke's observations were correct we would have here a most remarkable holding.

The above charge together with the general confusion prevalent in the authorities relating to tax and assessment lien priorities⁵ would seem

¹ (Dec. 29, 1933) 219 Cal. 612, 28 P. (2d) 1053, *rev'g* (1932) 71 Cal. App. Dec. 239, 15 P. (2d) 186, which was approved in (1933) 21 CALIF. L. REV. 180. The *Balaam* case was recently followed in *Conley v. Hawley* (Nov. 28, 1934) 88 Cal. Dec. 466, 38 P. (2d) 408, a case involving the priority of successive bonds issued under the Street Bond Act of 1893, with respect to which exactly the same problem as was presented in the *Balaam* case was involved.

² Cal. Stats. 1911, p. 730, CAL. GEN. LAWS, act 8199.

³ Cal. Stats. 1921, p. 292.

⁴ Burke, *Supreme Court Rules on 1911 Bond Act* (1934) 10 WESTERN CITY 19. Mr. Burke was one of the *amici curiae* joining in the petition for rehearing. In the cited article he stated that if the decision were not changed on rehearing "work will be held up until the act can be amended in 1935 so as to provide a proper priority for the first bond." *Ibid.* The petition for rehearing was denied and a bill to amend the act as suggested has been introduced at the present session of the legislature. Assembly Bill No. 828.

⁵ Thus in the space of only one year, we find the supreme court in one case uttering views which are wholly at variance with those uttered in a case decided the previous year, without making any attempt to reconcile, indeed without even mentioning, the previous case. Compare the statement of the court in *Woodill & Hulse Elec. Co. v. Young* (1919) 180 Cal. 667, 670, 182 Pac. 422, 424, 5 A. L. R. 1296, 1298, with its holding in *Guinn v. McReynolds* (1918) 177 Cal. 230, 232, 170 Pac. 421, 422. Furthermore, the *Guinn* case, in turn, contained no reference to the

to warrant a careful consideration of the law of tax and assessment lien priorities, followed by an attempt to determine in the light of the principles established by such authorities, whether the charge is justified. In view of the fact that cases on tax lien priorities seem to have been first on the field, and to have colored considerably the cases on assessment lien priorities, decided later, it seems logical to consider first the principles applicable to tax lien priorities and to follow this by a discussion of those applicable to assessment lien priorities. With these principles in mind we will then be better able to evaluate the *Balaam* case.

I. PRINCIPLES APPLICABLE TO TAX LIEN PRIORITIES IN ABSENCE OF STATUTE

While the general rule ordinarily applied in determining the priority of conflicting liens on the same property is that expressed in the maxim *qui prior est tempore, potior est jure*,⁶ the question whether such ordinary rule does or does not apply where one or more of the liens involved are tax liens has been the cause of great divergence of judicial opinion. This divergence of opinion has been brought about by the early adoption of, and the dogged persistence of numerous courts in adhering to, the view that because of the importance of the functions of government and the necessity of raising promptly the revenues necessary to carry out such functions, the obligation to pay taxes is necessarily of much greater dignity and on a much higher plane than ordinary obligations, whether secured or unsecured, and therefore must be accorded some inherent priority over them. The history of the law on this subject has been colored almost completely by the extent to which this principle, styled here for convenience of reference as the "superior dignity" principle, has been either followed or rejected by the courts. In general, it will be seen that the principle gained an early foothold and was widely

earlier case of *O'Dea v. Mitchell* (1904) 144 Cal. 374, 77 Pac. 1020, in which exactly the reverse was held.

A less glaring example of inconsistency is the unsupported categorical statement made in *San Mateo County Bank v. Dupret* (1932) 124 Cal. App. 395, 396, 12 P. (2d) 669, 670, to the effect that "Liens for taxes and assessments are of course paramount to the rights created by mortgages and deeds of trust."

In view of these authorities, it is virtually impossible to say what the law in California is with respect to priority of tax and assessment liens over private liens. See text, *infra*, p. 272. As we shall see below, the authorities from other jurisdictions do not offend less in this regard.

⁶ CAL. CIV. CODE § 2897. See also *Marshall, C. J., in Rankin & Schatzell v. Scott* (1827) 12 Wheat. (25 U.S.) 177, 179. Cases usually apply the rule without inquiry into the reason for it. See *Littlefield v. Nichols* (1871) 42 Cal. 372, 374; *Vansands v. Middlesex County Bank* (1857) 26 Conn. 144, 154; *May v. Buckhannon River Lumber Co.* (1889) 70 Md. 448, 17 Atl. 274; *cf. Costigan, The Theory of Chancery in Protecting against the Cestui Que Trust One Who Purchases from a Trustee for Value and Without Notice* (1924) 12 CALIF. L. REV. 356, 366.

followed for many years, but that later cases have been a series of recessions from it, until today it seems to have been definitely discredited in so far as it is sought to be used as a justification for holding either that taxes are *ex proprio vigore* "liens" or that tax liens are *ex proprio vigore* "first" liens, *i.e.*, superior to other liens. In the next succeeding pages this development will be traced in greater detail, discussing first the question of priority of tax liens over private liens, and following this with a discussion of priorities between successive tax liens.

A. Early Announcement and Subsequent Repudiation of Principle that Taxes Are Ex Proprio Vigore a Lien.—The "superior dignity" principle was first invoked to justify the fastening of the tax obligation *ex proprio vigore* as a lien upon all the property of the taxpayer, whether the property actually taxed or otherwise. Thus as early as 1800, the Supreme Court of South Carolina in the leading case of *Butler v. Baily*,⁷ held that a tax imposed upon persons "who should refuse or neglect to make a due return, on oath, of all their taxable property" was a "lien" on all the property of the person assessed, and superior to an earlier judgment lien even though there was no language in the taxing statute or in any other statute purporting to create such "lien," or any "lien." Following the lead of the *Butler* case, several other early cases also held that taxes are *ex proprio vigore* "a lien" on all of the property of the taxpayer.⁸ These early cases reasoned that since the maintenance of government and the timely and proper performance of its functions are essential to the peace and good order of society, private obligations

⁷ (S. C. 1800) 2 Bay 244, 249; *cf.* *Public Account Comm'rs v. Greenwood* (1795) 1 S. C. Eq. (1 Dessaus) 450 (state held to have no preference over previous private lien in distribution of decedent's estate).

⁸ *Steubenville & I. R. R. v. Tuscarawas County* (N. D. Ohio 1858) Fed. Cas. No. 13,388, at 1335; *In re Brand* (D. W. Va. 1867) Fed. Cas. No. 1,809, at 17; *State v. Pemberton* (Ga. 1831) Dud. 15; *Doe ex dem. Gledney v. Deavors* (1850) 8 Ga. 479; *Atkins v. Hinman* (1845) 7 Ill. 346, 356; *Rhinehart v. Schuyler* (1845) 7 Ill. 375, 401; *Dunlap v. Gallatin County* (1853) 15 Ill. 8; *Dennis v. Maynard* (1853) 15 Ill. 550; *Almy v. Hunt* (1868) 48 Ill. 45, 46; *Jack v. Weinnett* (1885) 115 Ill. 105, 56 Am. Rep. 129; *Blossom v. Van Court* (1864) 34 Mo. 390, 86 Am. Dec. 114; *McLaren v. Sheble* (1869) 45 Mo. 130; *Staunton v. Harris* (1872) 56 Tenn. (9 Heisk.) 458, 462. The dictum of Marshall, C. J., in *Providence Bank v. Billings* (1830) 4 Pet. (29 U.S.) 514, to the effect that "The power of . . . taxation, operates on all persons and property belonging to the body politic," was probably of considerable influence in reaching this conclusion. See *Rhinehart v. Schuyler*, *supra*, at 401. The case of *Butler v. Baily*, *supra* note 7, was repudiated very early in South Carolina. See *Harth v. Gibbes* (S. C. 1832) 3 Rich. L. 316; *State v. Guerry* (S. C. 1868) 15 Rich. L. 353; see also *Charleston Heights Co. v. City Council* (1926) 138 S. C. 187, 136 S. E. 393. The Georgia Supreme Court also expressed its doubts in the case of *Doane v. Chittendon & Co.* (1858) 25 Ga. 103, 108; see also *Commonwealth v. Logan* (Ky. 1809) 1 Bibb. 529; *Hollingsworth v. Patten* (Md. 1793) 3 Harr. & McH. 125.

would be of little or no value if these functions were not first performed.⁹ It necessarily followed, it was said, that the tax obligation should be satisfied before all private or other claims, of whatever kind or nature, and however or whenever created. To bring about this desired result, the argument went on, all the property in the jurisdiction should be regarded as in effect "mortgaged" or "pledged" *pro tanto* to the payment of taxes.¹⁰ Accordingly, the obligation to pay taxes was said to attach to the very property itself, and not to any particular interest of the taxpayer therein, so that every tax was necessarily and inherently a "lien" on all the property of the taxpayer, paramount to all other private claims or liens thereon.¹¹ While this view found occasional sporadic support in several later decisions,¹² and although it was expressly approved and followed as a *ratio decidendi* after a most exhaustive discussion in the case of *Morey Engineering & Construction Company v. St. Louis Artificial Ice Rink Company*,¹³ decided by the Supreme Court of Missouri in 1912, practically all of the later decisions have repudiated it. The view is now almost universal that taxes are not inherently a "lien" either on the property taxed or on any other property of the taxpayer, but are a lien if, and only if, they are expressly made so by statute.¹⁴

⁹ Jack v. Weinnett, *supra* note 8; see also Albany Brewing Co. v. Town of Meriden (1880) 48 Conn. 243.

¹⁰ The case of Butler v. Baily expressly declares that so high was the nature of the obligation to the public that "it might well be compared to a mortgage *pro tanto*." See also *In re Brand*; Doe *ex dem.* Gledney v. Deavors; Rhinehart v. Schuyler; Almy v. Hunt; Staunton v. Harris, all *supra* note 8.

¹¹ Atkins v. Hinman, *supra* note 8, at 348; Rhinehart v. Schuyler, *supra* note 8, at 401; Dunlap v. County of Gallatin, *supra* note 8, at 10.

¹² State of Minnesota v. Central Trust Co. (C. C. A. 8th, 1899) 94 Fed. 244, 247, *cert. den.*, (1899) 174 U. S. 803 (which cites, among other cases, Butler v. Baily, *supra* note 7; Doe *ex dem.* Gledney v. Deavors; Dunlap v. Gallatin County, both *supra* note 8); Elmhurst State Bank v. Stone (1931) 346 Ill. 157, 178 N. E. 362; Kerr. v. Hoskinson (1896) 5 Kan. App. 193, 47 Pac. 172; Thomas v. Jones (1897) 94 Va. 756, 758, 27 S. E. 813, 814; see also Northern Pac. R. R. v. Traill County (1885) 115 U. S. 600, 610; Bibb Nat. Bank v. Colson (1926) 162 Ga. 471, 134 S. E. 85; 61 C. J. (1933) 925.

¹³ (1912) 242 Mo. 241, 146 S. W. 1142, Ann. Cas. 1913C 1200, 40 L. R. A. (N. S.) 119, which held a special assessment lien inherently superior to an earlier mortgage. In arriving at this conclusion the court first held that taxes and special assessments for local improvements were of so similar a nature that the rules applicable to taxes should also apply to assessments. It then held that the rule applicable to taxes was that a tax was inherently a superior lien upon the property of the taxpayer, and that it followed that assessments were also a superior lien on the property assessed.

¹⁴ This principle is now almost universally recognized. Many cases are cited in 3 COOLEY, TAXATION (4th ed. 1924) § 1230; 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 1420. A leading case is Jaffray v. Anderson (1885) 66 Iowa 718, 24 N. W. 527. The rule is recognized in California. Boskowitz v. Thompson (1904) 144 Cal. 724, 730, 78 Pac. 290, 291; Escondido v. Escondido Lumber Co. (1908) 8 Cal. App. 435, 439, 97 Pac. 197, 198; 24 CAL. JURIS. (1926) 217.

B. View that a Tax "Lien" is Ex Proprio Vigore Superior to Private Liens.—The legislatures of the various states, no doubt cognizant of this shift in judicial opinion, early enacted statutes expressly purporting to make taxes "a lien" on the property of the taxpayer. The question arose very early whether the mere fact that a lien was a tax lien made it superior to private liens. It was held by a substantial group of cases that such "lien" was *ex proprio vigore* so superior.¹⁵ The line of reasoning

¹⁵ *Osterberg v. Union Trust Co.* (1877) 93 U. S. 424, 428; *State of Minnesota v. Central Trust Co.*, *supra* note 12; *Polk County v. Burns* (C. C. A. 8th, 1917) 247 Fed. 399; *Delahunt v. Oklahoma County* (C. C. A. 8th, 1915) 226 Fed. 31; *Tinsley v. Atlantic Mines Co.* (1904) 20 Colo. App. 61, 77 Pac. 12; *Albany Brewing Co. v. Town of Meriden*, *supra* note 9; *Spratt v. Price* (1881) 18 Fla. 289; *Bloxham v. Consumers' Electric Light & Street Ry. Co.* (1895) 36 Fla. 519, 18 So. 444, 29 L. R. A. 507; *Stokes v. Georgia* (1872) 46 Ga. 412, 12 Am. Rep. 588; *Continental, etc., Bank v. Werner* (1923) 36 Idaho 601, 215 Pac. 458; *Bodertha v. Spencer* (1872) 40 Ind. 353; *Isaacs v. Decker* (1872) 41 Ind. 410; *Rinard v. Nordyke* (1881) 76 Ind. 130; *Peckham v. Millikan* (1884) 99 Ind. 352; *Jenkins v. Newman* (1889) 122 Ind. 99, 23 N. E. 683; *Ferris v. Berkshire Life Ins. Co.* (1894) 139 Ind. 486, 38 N. E. 609; *New England Loan & Trust Co. v. Young* (1890) 81 Iowa 738, 39 N. W. 116, 46 N. W. 1103, 10 L. R. A. 478; *Husbands v. City of Paducah* (1883) 5 Ky. L. Rep. 193; *Williams v. Hilton* (1853) 35 Me. 547, 58 Am. Dec. 729; *Cooper v. Holmes* (1889) 71 Md. 20, 17 Atl. 711; *Parker v. Baxter* (1854) 68 Mass. (2 Gray) 185; *Stafford v. Fizer* (1884) 82 Mo. 393; *Gitchell v. Kreidler* (1884) 84 Mo. 472; *Burfiend v. Hamilton* (1897) 20 Mont. 343, 51 Pac. 161; *Mutual Ben. Life Ins. Co. v. Siefken* (1901) 1 Neb. (Unoff.) 860, 96 N. W. 603; *Evans v. Walsh* (1879) 41 N. J. L. 281, 291, 32 Am. Rep. 201, 209; *Faure v. Winans* (N. Y. 1824) 1 Hopk. Ch. 283, 14 Am. Dec. 545; *Gwynne v. Niswanger* (1851) 20 Ohio 556, 564; *People's Sav. Bank v. Tripp* (1882) 13 R. I. 621; *State v. Bank of Mineral Wells* (Tex. Civ. App. 1923) 251 S. W. 1107; *Preston v. Anderson County Levee Inpr. Dist.* (Tex. Civ. App. 1924) 261 S. W. 1077; *Thomas v. Jones*, *supra* note 12; *Gustaveson v. Dwyer* (1914) 78 Wash. 336, 139 Pac. 194; *Minshull v. Douglas County* (1925) 133 Wash. 650, 234 Pac. 661.

See also 3 TIFFANY, REAL PROPERTY (1920) § 673. It should be noted that Judge Cooley considered several of the above cases as holding simply that only where the statute expressly made the tax lien paramount to other liens did the lien attach to the very property itself. 3 COOLEY, TAXATION (4th ed. 1924) 2470, n. 70. It is difficult to believe that these cases have any such limited effect. As the rule is stated in *Continental, etc., Bank v. Werner*, *supra*, at 606, 215 Pac. at 459: "It does not follow that because the legislature failed to expressly declare that a lien for taxes is superior and prior to all other liens that such a lien should be subordinate . . ." This language is apparently the basis for the categorical statement of Mr. Justice Stone in *Portneuf Marsh Valley Canal Co. v. Brown* (1927) 274 U. S. 630, 638, a case holding that a lien created under the Carey Act (for reclamation work) and which provided that the lien created for such work which was by statute to be "in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land" was superior to a lien given for the purchase price of stock even though the latter lien was not a lien "created by the owner." The statement was: "It is of course an implied term of every lien statute that the lien authorized is subordinate to liens for taxes," citing the *Werner* case. This statement is of course a dictum of the lowest order, no tax lien being involved in the case, and no consideration having been given to the many authorities on the question. Until such consideration is given the statement can hardly be taken as indicating the position of the United States Supreme Court.

The best statement of the rule of these cases which the writer has found is that of Judge Thayer in *State of Minnesota v. Central Trust Co.*, *supra* note 12.

used in *Butler v. Baily* and the other early cases discussed above which held that taxes were *ex proprio vigore* a paramount lien, was imported almost *verbatim* into these cases. Thus, in *Osterberg v. Union Trust Company*,¹⁶ a leading case in support of this view, decided by the United States Supreme Court in 1877, Mr. Justice Davis declared that "A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute," and further, that "It attaches to the res without regard to individual ownership, and when it is enforced by sale, pursuant to the statute prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title." Again, in *Albany Brewing Company v. Town of Meriden*,¹⁷ the Court of Errors and Appeals of Connecticut, in holding such a "lien" to be inherently superior to earlier mortgages, said: "This lien takes precedence of all others; mortgagees take their security with knowledge that the sovereignty must and will take by taxation all that is necessary to the preservation of its own life; the life of the State is of higher concern than the protection of a debt due to an individual member of it." And in *New England Loan & Trust Company v. Young*,¹⁸ decided in 1890 by the Iowa Supreme Court, it was held that where taxes on personal property were made a lien on real property the "lien" thereby created was inherently superior to an earlier mortgage on the land of the taxpayer. In so holding the court said it was a general principle in our system of taxation that, "when taxes are made a lien upon real estate they become prior and superior to all mortgage or judgment liens," and "were it otherwise, the state in the collection of her revenues would be placed in the attitude of a junior lienholder, and forced to redeem from prior liens, or be defeated in the collection of her taxes," and that "the power of taxation is an incident of sovereignty, and the exercise of that power cannot be defeated by asserting superiority for the claims of individuals." We thus find the theories of *Butler v. Baily* and the other cases to the same effect, discussed above, coming to life once more after apparently having been effectively buried.

C. View that Tax Liens Are Not Ex Proprio Vigore Superior to Private Liens, but Have Such Superiority only if Expressly Provided by Statute.—However, after the decision of *New England Loan & Trust*

Pennsylvania follows the anomalous rule that a lien for *state* taxes is inherently superior to private liens (*Commonwealth v. Lowe Coal Co.* (1929) 296 Pa. 359, 145 Atl. 916, 918), whereas on the other hand a *city* tax lien has no such priority. *Hopkins v. Rettinger* (1911) 230 Pa. 192, 194, 79 Atl. 255, 256.

¹⁶ (1877) 93 U. S. 424, 428.

¹⁷ (1880) 48 Conn. 243, 247.

¹⁸ (1890) 81 Iowa 732, 740, 46 N. W. 1103, 1104, 10 L. R. A. 478, 479.

Company v. Young,¹⁹ referred to above, the law on this subject took a definite swing in the opposite direction. Starting with the case of *Miller v. Anderson*²⁰ in South Dakota, followed closely by the overruling of *New England Loan & Trust Company v. Young* by the Iowa Supreme Court in *Bibbins v. Clark*,²¹ in 1894, and culminating in the recent cases of *Scottish American Mortgage Company v. Minidoka County*,²² in Idaho, *City of Marianna v. Russ*,²³ in Florida, and *Maricopa County v. Equitable Life Assurance Society*,²⁴ in Arizona, the trend has been so completely away from the *Osterberg* case and the "superior dignity" principle as used in that case, that it may be asserted with a definite degree of assurance that such view has been definitely discredited; and that the presently approved view is that a tax lien is not inherently superior to private liens, but is superior thereto if, and only if, it is expressly provided to be so by statute.²⁵ While it is true that many of

¹⁹ Prior to this case, *Gormley's Appeal* (1856) 27 Pa. 49, 51, and *Hopper v. Malleson* (1863) 16 N. J. Eq. 382, seem to have been the leading exponents of this view.

²⁰ (1891) 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317.

²¹ (1894) 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278.

²² (1928) 47 Idaho 33, 272 Pac. 498, 65 A. L. R. 663.

²³ (Fla. 1934) 154 So. 317, 320-321.

²⁴ (Ariz. 1934) 28 P. (2d) 821.

²⁵ *Central Trust Co. v. Third Avenue R. R.* (C. C. A. 2d, 1911) 186 Fed. 291, *cert. den.*, (1911) 223 U. S. 721 (tax on dividends made lien on real property—lien subordinate to earlier mortgage); *Sherwood v. United States* (E. D. N. Y. 1925) 5 F. (2d) 991 (lien of federal income tax subordinate to earlier mortgage.—But see *Minnesota Mut. Life Ins. Co. v. United States* (N. D. Tex. 1931) 47 F. (2d) 942, 944); *Ormsbee v. United States* (S. D. Fla. 1928) 23 F. (2d) 926 (same); *Fox v. Queens County Sales Co., Inc.* (E. D. N. Y. 1931) 52 F. (2d) 794 (same); *Trust Co. of Texas v. United States* (S. D. Tex. 1933) 3 F. Supp. 683 (same); *First Nat. Bank of Chicago v. Central Coal & Coke Co.* (D. Wyo. 1933) 3 F. Supp. 433 (lien of personal property taxes on real property held subordinate to earlier mortgage); *Walker v. Nogales Bldg. & Loan Ass'n* (1925) 28 Ariz. 484, 237 Pac. 1094 (same); *Maricopa County v. Equitable Life Assur. Soc.*, *supra* note 24 (same); *Gifford v. Callaway* (1896) 8 Colo. App. 359, 46 Pac. 626 (same); *Stratton v. People* (1902) 18 Colo. App. 85, 70 Pac. 157 (same); *Ferris v. Chic-Mint Gum Co.* (1924) 14 Del. Ch. 232, 124 Atl. 577 (federal tax lien subordinate to previous mortgage); *City of Marianna v. Russ*, *supra* note 23 (lien of personal property tax on real property held subordinate to earlier mortgage); *Scottish American Mtge. Co. v. Minidoka County*, *supra* note 22 (same); *Federal Land Bank v. Stewart* (1928) 47 Idaho 161, 272 Pac. 1029 (same); *Gaar, Scott & Co. v. Hurd* (1879) 92 Ill. 315 (lien of personal property tax on property taxed held subordinate to earlier chattel mortgage); *Binkert v. Wabash Ry.* (1881) 98 Ill. 205 (tax on personal property of railroad expressly made a "lien" held subordinate to earlier mortgage on railroad property); *Ream v. Stone* (1882) 102 Ill. 359 (lien of personal property tax on personal property other than that taxed held subordinate to earlier chattel mortgage); *Cooper v. Corbin* (1883) 105 Ill. 224 (same); *Carter v. Rodewald* (1884) 108 Ill. 351 (lien of personal property tax on real property held subordinate to earlier mortgage); *Parsons v. Gas Light & Coke Co.* (1884) 108 Ill. 380 (same); *Bibbins v. Clark*, *supra* note 21 (same); *Bibbins v. Polk County* (1897) 100 Iowa 493, 69 N. W. 1007 (same); *In re Cutler & Horgan* (1932) 213 Iowa 983, 238 N. W. 80 (lien of personal prop-

the cases to this effect have involved attempts to hold taxes assessed on personal property and expressly made simply a lien on real property by statute, superior to earlier private liens on such real property, and that this fact is stressed in several of these cases,²⁶ it is not perceived

erty taxes on property taxed held subordinate to earlier mortgage); Lucking v. Balantyne (1903) 132 Mich. 584, 94 N. W. 8 (same); Chamberlain Banking House v. Woolsey (1900) 60 Neb. 516, 83 N. W. 729, *aff'd*, (1903) 70 Neb. 194, 97 N. W. 241 (lien of personal property tax on personal property other than that taxed held subordinate to earlier chattel mortgage); Blanchard v. Logan County (1902) 2 Neb. (Unoff.) 516, 89 N. W. 376 (lien of personal property tax on personal property taxed held subordinate to earlier chattel mortgage); Hopper v. Malleson, *supra* note 19 (lien of real property tax held subordinate to earlier mortgage on property taxed); Dows v. Drew (1876) 27 N. J. Eq. 442 (same); O'Neill v. Dringer (1879) 31 N. J. Eq. 507 (same); State v. Newark (1880) 42 N. J. L. 38 (lien of personal property tax on land held subordinate to earlier mortgage); Woody v. Jones (1893) 113 N. C. 186, 18 S. E. 205 (lien of personal property tax on property taxed held subordinate to earlier chattel mortgage); American Agricultural Chem. Co. v. Williamson (1926) 191 N. C. 484, 132 S. E. 146 (same); Advance Thresher Co. v. Beck (1910) 21 N. D. 55, 128 N. W. 315 (same); Fidelity Trust Co. v. Pumroy (1914) 45 Okl. 66, 144 Pac. 1052 (same); First Nat. Bank of Comanche v. Young (1932) 155 Okl. 282, 8 P. (2d) 1108 (same); Algyre v. Seminole County (1932) 156 Okl. 251, 10 P. (2d) 677 (same); Gormley's Appeal (1856) 27 Pa. 49, 51 (lien of real property tax on land taxed held subordinate to earlier mortgage); Brigg's Appeal (Pa. 1881) 1 Wald. 199 (same); State v. Guerry (S. C. 1868) 15 Rich. L. 353 (same); Miller v. Anderson, *supra* note 20 (lien of personal property tax on real property held subordinate to earlier mortgage); McGillivray v. McGillivray (1896) 9 S. D. 187, 68 N. W. 316 (same); Buell v. Boylan (1897) 10 S. D. 180, 72 N. W. 406 (same); Parlin & Orendorff Co. v. Howard (Tex. Civ. App. 1899) 52 S. W. 631 (lien of personal property tax on property taxed held subordinate to earlier attachment lien); Lippincott v. Taylor (Tex. Civ. App. 1911) 135 S. W. 1070 (tax lien on land held subordinate to earlier vendor's lien); Salt Lake City Co. v. Padgett (Tex. Civ. App. 1916) 186 S. W. 391 (lien of personal property tax on property taxed held subordinate to earlier chattel mortgage); Scandinavian American Bank v. King County (1916) 92 Wash. 650, 159 Pac. 786 (lien of personal property tax on real property held subordinate to earlier mortgage); Lobban v. State (1901) 9 Wyo. 377, 64 Pac. 82 (same); Wakeman v. Board of Comm'rs (1929) 40 Wyo. 53, 274 Pac. 12 (same). In California the case of Guinn v. McReynolds, *supra* note 5, supports the above principle by way of *ratio decidendi*.

²⁶ Scottish American Mtge. Co. v. Minidoka County, *supra* note 22; Miller v. Anderson, *supra* note 20; see also Polk County v. Burns, *supra* note 15; Stratton v. People, *supra* note 25; Carstens & Earles v. Seattle (1915) 84 Wash. 88, 146 Pac. 381, Ann. Cas. 1917A 1070.

This distinction seems rather tenuous and in fact more fanciful than real. Whether the tax lien is on the very property taxed or on other property, the statutes do not vary in the language used in creating the lien, and each is in express terms made a lien *on* the property, whether that taxed or not taxed. It is difficult to see how the circumstance that the property to which the lien is attached is also the very property taxed is in any way material, or affords the basis for any implication as to superiority over private liens. Such is the view of Judge Thayer in *State of Minnesota v. Central Trust Co.*, *supra* note 12, at 248-249. After all, the mere fact that a tax is "on" property does not make it a lien on such property or any other property, as we have seen. Since all taxes require express legislative enactments to make them liens, whether on the property taxed or on any other property, it would seem that once they are made liens all such liens are on a parity as respects previous private liens. The contrary view, expressed in these cases, seems to be a reversion back to

why this is any ground of distinction. The language in nearly all of these cases is broad, and amounts to a repudiation of the principle that tax liens are inherently first liens.

Even in California, where the *ratio decidendi* of *California Loan & Trust Company v. Weis*²⁷ and *O'Dea v. Mitchell*²⁸ had apparently settled the rule to the contrary, the supreme court in 1917 virtually repudiated the holdings of these cases in so far as they were based upon the principle that tax liens are inherently first liens. This happened in *Guinn v. McReynolds*,²⁹ where a governmental charge upon land (which the court assumed to be analogous to and to be governed by the principles applicable to tax liens) which was made simply a "lien" by the statute creating it, was held subordinate to the lien of an earlier mortgage. While it is true that in *Woodill & Hulse Electric Company v. Young*,³⁰ the view that tax liens are inherently first liens was reiterated in the opinion of Mr. Justice Olney (and made partially the basis of the decision therein), the decision of *Guinn v. McReynolds* was not mentioned, and this fact, together with the facts that the precise point was not involved therein and that the *Guinn* case was decided in bank while the *Woodill* case was simply a department decision would seem to pre-

the exploded doctrine of *Butler v. Baily* (S. C. 1800) 2 Bay 244, and the other analogous cases discussed above. See *Minneapolis Threshing Machine Co. v. Roberts County* (1914) 34 S. D. 498, 500-503, 149 N. W. 163, 164-165. But see (1929) 42 HARV. L. REV. 961.

²⁷ (1897) 118 Cal. 489, 50 Pac. 697, where, apparently as an alternative ground of decision, the court relied on the principle of the *Osterberg* case, *supra* note 15, to justify holding the lien of a personal property tax on land to be superior to an earlier mortgage. It quoted the language quoted above in the text from the *Osterberg* case. As a matter of fact, however, the court also held that the statute expressly made the lien so superior by virtue of the following provisions: (1) that the lien should not be removed "until the taxes are paid or the property sold for the payment thereof—" *Eaton's Appeal* (1876) 83 Pa. 152 (see *infra* note 38), and (2) that the deed to the purchaser at a tax sale conveys to the grantee absolute title to the land described therein "free of all encumbrances, except the lien for taxes which may have attached subsequent to the sale."

It would seem that the real decision of the *Weis* case was based on the express statutory provisions above mentioned, which were clearly a sufficient justification. The reference to the *Osterberg* case may even be only a dictum, although it is impossible to tell from the context of the opinion whether it is dictum or an alternative ground of decision. In *Woodill & Hulse Elec. Co. v. Young* (1919) 180 Cal. 667, 669-670, 182 Pac. 422, 424, Mr. Justice Olney clearly regarded it as the latter.

²⁸ (1904) 144 Cal. 374, 381, 77 Pac. 1020, 1022.

²⁹ *Supra* note 5, where it was held that a charge upon land for the purpose of eradicating insects or pests, which by Political Code section 2322a was made simply a "lien" on the land, was subordinate to an earlier mortgage on such land.

The case rests on two basic assumptions: (1) that the charge involved was governed by the same rules as were applicable to "tax or assessment liens," and (2) that tax liens are governed by the same rules as are assessment liens. The latter ground flatly conflicts with the earlier case of *Wood v. Brady* (1885) 68 Cal. 78, 5 Pac. 623, *aff'd*, 8 Pac. 599, referred to below, although the latter case is not cited.

³⁰ *Supra* note 27.

clude the claim that the *Guinn* case is not still the law. This was apparently the view of both the district court of appeal and the supreme court in *Bolton v. Terra Bella Irrigation District*.³¹

If it is asked what prompted this abrupt about-face³² on the part of the authorities it may be said that perhaps the underlying reason was a feeling that private lienholders had in effect acquired an interest in the property of the taxpayer and that there was no more reason for holding this interest liable for the taxes of another person than there was for holding any other property owned by the lienholder subject to the taxes of such other person. To hold otherwise, it was felt, would be exactly equivalent to holding one man liable to pay the debts of another.³³ So strong was the feeling against the holding that tax liens were inherently first liens that it was intimated in several cases that even if a statute should expressly make taxes a lien superior to private liens, such statute would be unconstitutional as a deprivation of property without due process of law.³⁴ The courts had come a long way indeed from the view that taxes are inherently "first liens" expressed in *Butler v. Baily*.

³¹ (1930) 106 Cal. App. 313, 289 Pac. 678, Sup. Ct. *hearing den.*, Aug. 7, 1930.

³² This change of view is strikingly illustrated by text writers. Compare 2 DESTY, TAXATION (1884) 739, and COOLEY, TAXATION (2d ed. 1886) 445, with 27 AM. & ENG. ENCYC. OF LAW (2d ed. 1904) 741, 742; 37 CYC. (1911) 1144; 3 COOLEY, TAXATION (4th ed. 1924) 2470; see also 61 C. J. (1933) 925.

³³ *Miller v. Anderson*, *supra* note 20; *City of Marianna v. Russ*, *supra* note 23; *Walker v. Nogales Building & Loan Ass'n*; *Gifford v. Callaway*; *State v. Newark*; *Advance Thresher Co. v. Beck*; *Lobban v. State*, all *supra* note 25; *Trustees of Public Schools v. Trenton* (1879) 30 N. J. Eq. 667, 679; see also GRAY, LIMITATIONS OF TAXING POWER (1906) 591. For a vigorous denial that any injustice or unfairness results from such a situation, see *Minneapolis Threshing Machine Co. v. Roberts County*, *supra* note 26.

³⁴ The following cases doubt the power of the legislature to make a tax lien superior to an earlier private lien, even prospectively: *City of Marianna v. Russ*, *supra* note 23; *Scottish American Mtge. Co. v. Minidoka County*, *supra* note 22; *State v. Newark*; *Advance Thresher Co. v. Beck*, both *supra* note 25; *Miller v. Anderson*, *supra* note 20; *Carstens & Earles v. Seattle*, *supra* note 26.

However, the power of the state to make a tax lien so superior is usually not doubted. Practically all of the cases cited in note 25, *supra*, other than those above referred to in this note concede the power but deny that the legislature has shown an intention to exercise it. Several cases doubt only the power of the legislature to make the priority retroactive; *i.e.*, to make it applicable to private liens existing prior to the enactment of the tax lien priority statute. *Provident Inst. for Sav. v. Jersey City* (1885) 113 U. S. 506, 515; *In re Prince & Walter* (M. D. Pa. 1904) 131 Fed. 546, 549; *Maricopa County v. Equitable Life Assur. Soc.*, *supra* note 24, at 823; *Finn v. Haynes* (1875) 37 Mich. 63, 65; *Berry v. Davis* (1912) 158 N. C. 170, 73 S. E. 900; *Minneapolis Threshing Machine Co. v. Roberts County*, *supra* note 26. No case has been found where a statute was expressly held unconstitutional upon the ground suggested in these cases. But see *Yeatman v. King* (1892) 2 N. D. 421, 51 N. W. 721.

It would seem difficult, if not impossible, to establish the invalidity of such statutes as prospectively applied, in view of the decision of the United States Supreme Court in *Provident Inst. for Sav. v. Jersey City*, *supra*, where a statute pro-

It should be noted, however, that the notion that taxes are of superior dignity to private liens still persists as a justification for upholding as constitutional, contrary to the intimations of the above cases, statutes which expressly make tax liens superior to private liens.³⁵ It is also the basis of the preference given to the state's claim for taxes in the distribution of insolvent's estates over other private non-lien claims.³⁶

viding that a lien for water rents should have the dignity of a tax lien (and therefore be superior to private liens), was upheld as to a mortgage given after its enactment. To the same effect are *Lydecker v. Palisade Land Co.* (1881) 33 N. J. Eq. 415, 416; *Berry v. Davis*, *supra*; *California Loan & Trust Co. v. Weis*, *supra* note 27.

Furthermore, many of the cases sustaining the power to make assessment liens a first and prior lien do so upon the supposed analogy to the rule as to tax liens. See *German Sav. & Loan Soc. v. Ramish* (1902) 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; *Shibley v. Fort Smith & V. B. Dist.* (1910) 96 Ark. 410, 132 S. W. 444; *Gailey v. Robertson* (1929) 98 Fla. 176, 123 So. 692; *Wabash East. R. R. v. Commissioners* (1890) 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285; *Baldwin v. Moroney* (1910) 173 Ind. 574, 91 N. E. 3, 30 L. R. A. (n. s.) 761; *Murphy v. Beard* (1894) 138 Ind. 560, 38 N. E. 33; *State v. Kansas City* (1931) 134 Kan. 157, 4 P. (2d) 422, 78 A. L. R. 507; *Albuquerque v. City Elec. Co.* (1927) 32 N. M. 401, 258 Pac. 574; *Clifton v. Cincinnati* (1878) 5 Ohio Dec. 570, 7 Ohio Dec. 540; *Donohue v. Brotherton* (1930) 7 Ohio N. P. 367; *Johnstown v. Dibert* (1926) 88 Pa. Super. Ct. 117. The above cited cases are also to the effect that such statutes are valid even as to mortgages which precede their enactment. Cf. *Kirby v. Waterman* (1903) 17 S. D. 314, 320, 96 N. W. 129, 131. In *Note* (1932) 78 A. L. R. 513, an exhaustive review of the cases relating to assessment statutes only is set forth.

³⁵ *Lydecker v. Palisade Land Co.* (1881) 33 N. J. Eq. 415, 416; *Minneapolis Threshing Machine Co. v. Roberts County*, *supra* note 26; see also the statement of Kephart, J., in *Schoyer v. Comet Oil & Ref. Co.* (1925) 284 Pa. 189, 193, 130 Atl. 413, 414, as to the policy behind such statutes. See *German Savings & Loan Soc. v. Ramish*, *supra* note 34; *Gifford v. Callaway*, *supra* note 25.

³⁶ It is held by the highest courts of Alabama, Connecticut, Georgia, Illinois, Iowa, Maryland, Missouri, Montana, New Mexico, New York, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and West Virginia, that unsecured claims of the state, whether for taxes or otherwise, are inherently superior to private unsecured claims in the distribution of assets of insolvent estates. See cases cited in *Notes* (1927) 51 A. L. R. 1355, 1356; (1930) 65 *ibid.* 1331, 1332; (1934) 90 *ibid.* 184, 185; see also *Montgomery v. State* (1934) 228 Ala. 296, 153 So. 394; *State v. Soo Oil Co.* (S. D. 1934) 252 N. W. 494. In Washington the rule is held applicable to taxes only and not to other unsecured claims. *State v. Carlyon* (1932) 166 Wash. 498, 7 P. (2d) 572. The basis of this view is: (1) that by the common law of England, the Crown, by virtue of the royal prerogative, had preference over private claims; (2) that the states, by virtue of having adopted the common law of England and also by virtue of the Tenth Amendment to the Federal Constitution reserving to the states all rights not granted to the federal government, retained this sovereign right of preference; and (3) that in any event, public policy necessitates such preference. The policy back of the rule is well stated by Story, J., in *United States v. Bank of North Carolina* (1832) 6 Pet. (31 U. S.) 29, 35. *American Bonding Co. v. Reynolds* (D. Mont. 1913) 203 Fed. 356, 357; *Robinson v. Bank of Darien* (1855) 18 Ga. 65, 96. As intimated above, this prerogative right of preference cannot be exercised as against prior lienors. See cases cited in *Note* (1927) 51 A. L. R. 1355, 1371. This qualification is well expressed in *In re Lord & Polk Chemical Co.* (1895) 7 Del. Ch. 248, 259, 44 Atl. 775, 776. By the weight of authority the sovereign right of preference does not extend to political subdivisions of the state. See *Note* (1934) 90 A. L. R. 208.

(Although even here, the view that no such preference exists seems rapidly to be becoming the majority view.³⁷) However, it seems to the writer to be clear at the present time that any use of the "superior dignity" theory of the nature of the tax obligation to justify according either taxes or tax liens an inherent preference over private liens is against the trend of modern authority. Accordingly, the modern view would seem to regard tax liens as on no higher plane than private liens, in the absence of express statutory provision to the contrary.³⁸

³⁷ It is held by the Supreme Court of the United States, the lower federal courts and by the highest courts of Arizona, Arkansas, Colorado, Florida, Indiana, Kentucky, Michigan, Minnesota, Mississippi, New Jersey, North Carolina, Ohio, South Carolina, and apparently Virginia, that no such sovereign or other right of preference exists unless expressly declared by statute. See *Price v. United States* (1926) 269 U. S. 492; *Stripe v. United States* (1926) 269 U. S. 503, *aff'g* (C. C. A. 2d, 1925) 6 F. (2d) 752; *United States v. Middle States Oil Corp.* (C. C. A. 8th, 1927) 18 F. (2d) 231. The cases from the state courts are collected in *Notes* (1927) 51 A. L. R. 1355, 1360; (1930) 65 *ibid.* 1331, 1332; (1934) 90 *ibid.* 184, 185. In *State v. Carlyon* (1932) 166 Wash. 498, 500, 7 P. (2d) 572, 573, the court said: "In our cited case, there is a comprehensive review of authorities, English and American, pro and con, and we deliberately adopted the so-called minority rule which apparently is gradually growing into a majority rule." The basis of this "so-called" minority rule seems to be a conception of public policy quite different from that expressed in the cases cited in note 36, *supra*. See *Fry v. Equitable Trust Co.* (1933) 264 Mich. 165, 174, 249 N. W. 619, 622, 90 A. L. R. 175, 181; *Note* (1933) 31 MICH. L. REV. 970.

³⁸ As to the language necessary to give a tax lien superiority over private liens, the authorities are not entirely in accord. If the tax lien is made a "first" lien, the authorities unanimously agree that the effect is to give it superiority over private liens. Tax: *Campbell v. Gawlewicz* (1902) 3 Neb. (Unoff.) 321, 91 N. W. 569; *Cranbury Township v. Chamberlain & Barclay Inc.* (1928) 6 N. J. Misc. 39, 139 Atl. 800, *aff'd*, (1928) 105 N. J. L. 236, 143 Atl. 920; *Shell v. Duncan* (1889) 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821; *Minneapolis Threshing Machine Co. v. Roberts County*, *supra* note 26; *Massey-Harris Co. v. Lerum* (1932) 60 S. D. 12, 242 N. W. 597. Assessment: *German Savings & Loan Soc. v. Ramish*; *Murphy v. Beard*; *State v. Kansas City*, all *supra* note 34; *Farmers' State Bank v. McReynolds* (Tex. Civ. App. 1927) 1 S. W. (2d) 322; *Nalle v. Eaves* (Tex. Comm. App. 1928) 5 S. W. (2d) 500. *A fortiori* is the lien so superior when it is made "first and paramount," "first and superior," or "first and prior." *People v. Denver* (1928) 85 Colo. 61, 273 Pac. 883 ("first and prior"—tax); *Federal Land Bank v. Bissonnette* (1931) 51 Idaho 219, 4 P. (2d) 364 ("first and prior"—assessment); *Baldwin v. Moroney*, *supra* note 34 ("first and paramount"—assessment); *Shaler v. McAleese* (1907) 73 N. J. Eq. 536, 68 Atl. 416 (same); *Lydecker v. Palisade Land Co.*, *supra* note 35 ("first and paramount"—tax); *Marriott v. Corder* (Tex. Civ. App. 1927) 4 S. W. (2d) 213 ("first and superior"—assessment). Other expressions which have been held sufficient indication of an intent to prefer the tax lien to private liens are as follows: that the lien shall be "prior and superior" to all other liens, *Steinfeld v. State* (1930) 37 Ariz. 389, 294 Pac. 834 (tax); that the lien shall be "superior to any other lien or claim," *Atlanta Trust Co. v. Atlanta Realty Co.* (1933) 177 Ga. 581, 170 S. E. 791 (tax); *Albuquerque v. City Elec. Co.*, *supra* note 34 (assessment); *Drainage Comm'rs v. East Carolina Home & Farm Ass'n* (1914) 165 N. C. 697, 81 S. E. 947 (same); *Kinston v. Atlantic & N. C. R. R.* (1922) 183 N. C. 14, 110 S. E. 645 (same); *Farmers' State Bank v. McReynolds*, *supra* (same); that the lien shall be "paramount" to all other liens, *Pascagoula v. Valverde* (1925) 138 Miss. 399, 103 So. 198 (assessment); that the tax shall be a lien "until paid," *Eaton's Appeal*

The modern view would seem to be eminently sound. According to tax liens a preference over private liens seems to work out badly in practice and to result in frequent examples of injustice. Furthermore, if the prior satisfaction of earlier private liens will have the effect of hampering the government in the collection of its revenues, it would seem to be the peculiar province of the legislature to say so by expressly making taxes a preferred lien, which it unquestionably has the power to do. Its failure to say so would seem to be conclusive evidence that no such hampering effect is deemed by the legislature to exist. For courts to undertake to say that it does exist, when the legislature has not, seems to the writer to be the baldest example of judicial legislation.

D. Priority as Between Successive Tax Liens.—The rule is practically universal that successive tax liens upon the same property take priority in the inverse order of their creation.³⁹ This seems always to have been the rule in California.⁴⁰ The rule usually is applied regardless of the

(1876) 83 Pa. 152 ("until fully paid and discharged"); *California Loan & Trust Co. v. Weis*, *supra* note 27 ("until the taxes are paid or the property sold for the payment thereof"); *Union Central Life Ins. Co. v. Black* (1926) 67 Utah 268, 247 Pac. 486, 47 A. L. R. 372 (same); *New York Terminal Co. v. Gaus* (1912) 204 N. Y. 512, 514, 98 N. E. 11, 13 ("until the same is paid in full"); *In re Century Steel Co.* (C. C. A. 2d, 1927) 17 F. (2d) 78 (following *Gaus* case); *Seaboard Nat. Bank v. Rogers Milk Products Co.* (C. C. A. 2d, 1927) 21 F. (2d) 414, 418 (same).—*Contra*: *Central Trust Co. v. Third Avenue R. R.*, *supra* note 25; *Scottish Am. Mtge Co. v. Minidoka County*, *supra* note 22; that the taxes shall be a "perpetual lien . . . against all persons," *California Loan & Trust Co. v. Weis*, *supra* note 27 (approving); *Bibbins v. Clark*, *supra* note 21; *Miller v. Anderson*, *supra* note 20.—But see *Hefner v. Northwestern Life Ins. Co.* (1887) 123 U. S. 747 ("perpetual"); *St. Clair v. Jones* (1915) 58 Ind. App. 280, 285, 108 N. E. 256, 257 (holding "perpetual" not sufficient); that the lien shall have "priority" over other liens or claims, *Wyman v. Noonday Min. Co.* (1921) 100 Ore. 211, 197 Pac. 289 (tax); *Getchell v. Walker* (1929) 129 Ore. 602, 278 Pac. 93 (tax); *Parker's Appeal* (Pa. 1844) 8 W. & S. 449, 452 (tax); *Appeal of City of Allegheny* (1861) 41 Pa. 60 (assessment); *Appeal of City of Titusville* (1885) 108 Pa. 600 (tax).

³⁹ *Thorington v. City Council of Montgomery* (1889) 88 Ala. 548, 7 So. 363; *Thomas v. State* (1915) 17 Ariz. 18, 147 Pac. 914; *Anderson v. Rider* (1873) 46 Cal. 134; *Dougherty v. Henarie* (1873) 47 Cal. 9, 14 (dictum); *Chandler v. Dunn* (1875) 50 Cal. 15; *Henrylyn Irr. Dist v. Patterson* (1918) 65 Colo. 385, 176 Pac. 493; *Law v. People* (1886) 116 Ill. 244, 4 N. E. 845; *Phillips v. Wilmarth* (1896) 98 Iowa 32, 66 N. W. 1053; *Board of Regents v. Linscott* (1883) 30 Kan. 240, 1 Pac. 81; *Keen v. Sheehan* (1891) 154 Mass. 208, 28 N. E. 150; *Auditor-General v. Clifford* (1906) 143 Mich. 626, 107 N. W. 287; *Gould v. City of St. Paul* (1913) 120 Minn. 172, 139 N. W. 293; *Medland v. Van Etten* (1906) 75 Neb. 794, 106 N. W. 1022; *Smith v. Specht* (1899) 58 N. J. Eq. 47, 42 Atl. 599; *Eminons County v. Bennett* (1899) 9 N. D. 131, 81 N. W. 22; *Buckley v. Osburn* (1837) 8 Ohio 184; *State v. Moore* (1920) 78 Okl. 164, 189 Pac. 511; *Irwin v. Trego* (1853) 22 Pa. 368; *Allen v. State Mtge. Corp.* (Tex. Civ. App. 1928) 12 S. W. (2d) 249; *Whatcom County v. Black* (1916) 90 Wash. 280, 155 Pac. 1071; *State v. Jackson* (1904) 56 W. Va. 558, 49 S. E. 465; *Pereles v. Milwaukee* (1933) 213 Wis. 232, 251 N. W. 255; see also 3 COOLEY, TAXATION (4th ed. 1924) 1242.

⁴⁰ The earliest case is *Cowell v. Washburn* (1863) 22 Cal. 519, where it was held that tax liens take priority in the order of their creation by virtue of a statute

type of tax lien involved; *i.e.*, there is no preference between tax liens based upon the size of the taxing unit, state, county, municipal and district tax liens all being on a parity.⁴¹

While the rule is conceded on nearly all sides, yet few cases have ever stopped to consider the reasons, if any, which justify the rule. The recent decision of the Florida Supreme Court in *Allison Realty Company v. Graves Investment Company*,⁴² holding successive tax liens to be

providing that the lien of taxes shall attach to all the property of the taxpayer, and that "such lien, to the absolute exclusion of all other liens, shall continue till all taxes thereon shall be paid." The decision is obviously unsound, since the provision was just as applicable to the later lien. In *Anderson v. Rider*, *supra* note 39, the court held that tax liens were prior in the inverse order of their creation, without citing any authority, statutory or otherwise. In *Dougherty v. Henarie*, *supra* note 39, at 14, although the only point held was that a tax lien was superior to an assessment lien by virtue of a statute which provided that a tax deed shall convey to the grantee an absolute title, "free and clear of all incumbrances, liens, claims, rights, titles and interests of every kind," the court seems also to have considered the case on the assumption that the assessment was a "tax." On the latter assumption the court held that nevertheless the tax lien proper was superior, since it was later in time, thus adopting the general rule of inverse priority. In *Woodill & Hulse Elec. Co. v. Young*, *supra* note 30, the court held that successive assessment liens were governed by the same rule of priority as was applicable to successive tax liens, which rule was that the liens rank in the inverse order of their creation. See *Chandler v. Dunn*, *supra* note 39; *Cooper v. Gibson* (1933) 133 Cal. App. 532, 24 P. (2d) 952.

⁴¹ *Denike v. Rourke* (C. C. N. D. Ill. 1871) Fed. Cas. No. 3,787, at 460; *Knowles v. Morris* (Del. 1906) 65 Atl. 782; *Allison Realty Co. v. Graves Inv. Co.* (Fla. 1934) 155 So. 745; *Justice v. Logansport* (1884) 101 Ind. 326; *Dennison v. Keokuk* (1876) 45 Iowa 266; *Kentucky Lands Inv. Co. v. Fitch* (1911) 144 Ky. 273, 277, 137 S. W. 1040, 1043, Ann. Cas. 1913A 672, 674; *Gamet's Estate v. Lindner* (1925) 159 La. 658, 662, 106 So. 22, 24; *Rochester v. Kapell* (1903) 86 App. Div. 224, 83 N. Y. Supp. 640, *aff'd*, (1904) 177 N. Y. 550, 69 N. E. 1121; *Saluda v. Polk County* (N. C. 1934) 176 S. E. 298; 26 R. C. L. (1920) 404, n. 11; *Note*, Ann. Cas. 1913A, 675, 677.

Diametrically opposed to the above line of cases is the Supreme Court of Pennsylvania which seems to hold that liens of state taxes are superior to those of local subdivisions of the state. *Commonwealth v. Lowe Coal Co.*, *supra* note 15. Cases holding that the sovereign right to a preference in the distribution of the assets of insolvent estates (see *supra* note 36) does not extend to a city or political subdivision of a state would seem to lend some support to the Pennsylvania rule. See *Note* (1934) 90 A. L. R. 208, collecting such cases.

As to priority between federal and state tax liens, while Congress apparently has power expressly to give preference to a federal over a state tax lien (*Spokane County v. United States* (1929) 279 U. S. 80), it is held by several cases that in the absence of such declaration the federal lien is not superior to the state lien. *In re Wyley Co.* (N. D. Ga. 1923) 292 Fed. 900; *City of Winston-Salem v. Powell Pav. Co.* (M. D. N. C. 1934) 7 F. Supp. 424; *In re Mt. Jessup Coal Co., Ltd.* (M. D. Pa. 1934) 7 F. Supp. 603, 606; *Ferris v. Chic-Mint Gum Co.*, *supra* note 25; *cf.* *United States v. San Juan County* (W. D. Wash. 1922) 280 Fed. 120; *Stover v. Scotch Hills Coal Co.* (W. D. Pa. 1924) 4 F. (2d) 748; *United States v. Bliss* (D. Neb. 1930) 40 F. (2d) 935, *aff'd*, (C. C. A. 8th, 1930) 44 F. (2d) 909. But see *In re Fountain, Inc.* (S. D. N. Y. 1924) 295 Fed. 873.

⁴² (Fla. 1934) 155 So. 745.

equal, causes us to wonder what reasons, if any, exist in support of this well-established rule.

The usual reason given for preferring later to earlier tax liens is that the tax lien attaches to the very property itself and not to any interest of the taxpayer therein, so that all other interests must necessarily be subordinated to this new charge, even though such interests happen to be earlier interests of exactly the same character, *i.e.*, earlier tax liens.⁴³ This line of reasoning seems unconvincing. There are many types of statutory liens which are expressly made liens on the very property itself, and yet no one has ever suggested that such liens have any higher status or dignity than any other type of lien solely because of that fact.⁴⁴ Furthermore, it is equally true of the earlier tax lien as it is of the later that it attaches to the very property itself, and accordingly there seems to be no basis for any preference on this ground.

Another reason frequently used as a basis for preferring the later tax lien is the principle frequently used in admiralty and corporate receivership cases to justify preferring later claims to earlier ones, even to earlier claims of a similar nature, where such claims represent money, labor, or material furnished to preserve property from threatened destruction or irreparable injury, *e.g.*, to preserve a vessel as an instrument of commerce⁴⁵ or to preserve corporate property as a going concern.⁴⁶

⁴³ See *Jaicks v. Oppenheimer* (Mo. App. 1914) 168 S. W. 216, 217, *aff'd*, (1915) 264 Mo. 693, 175 S. W. 972; see also *Olney, J.*, in *Woodill & Hulse Elec. Co. v. Young* (1919) 180 Cal. 667, 670, 182 Pac. 422, 424; *cf. Lee v. Silva* (1925) 197 Cal. 364, 240 Pac. 1015.

⁴⁴ A judgment lien purports to be on the very property itself, as such, and not upon any interest of the judgment debtor therein (see CAL. CODE CIV. PROC. §674), yet it is well understood that such lien is subordinate to all liens previously attaching to the property, including previous judgment liens. 15 CAL. JURIS. (1924) 228. By section 2872 of the Civil Code, the very definition of a lien is that it is a charge "upon specific property," rather than upon any interest of the debtor therein. Accordingly, if there is any virtue in charging a lien "upon the very property itself as such," all liens have such virtue, by very definition. For other examples of liens expressly made "on the very property itself," see CAL. CIV. CODE §3050 (vendee's lien); *ibid.* §3046 (vendor's lien); *ibid.* §3051 (artisan's lien); *ibid.* §3053 (factor's lien); *ibid.* §3054 (banker's lien); *ibid.* §3055 (shipmaster's lien); *ibid.* §3057 (officer's lien); *ibid.* §3061 (threshing machine lien); *ibid.* §3065 (loggers' and lumbermen's lien); CAL. CODE CIV. PROC. §1183 (mechanic's lien); *ibid.* §542a (attachment lien). It would be a strange argument to urge that any of these liens displaced earlier liens because of the fact that the statute provided that they should be liens "upon the property." See *Bibbins v. Clark*, *supra* note 21; *Miller v. Anderson*, *supra* note 20.

⁴⁵ As between maritime and non-maritime liens the former are superior. The *St. Jago de Cuba* (1824) 9 Wheat. (22 U.S.) 409, 416; The *Orelia* (1833) 3 Hagg. 75, 83, 166 Eng. Repr. 334, 337; HUGHES, ADMIRALTY (2d ed. 1920) 386.

While there are various degrees and types of maritime liens with definite priorities among such liens when all arise out of the same voyage, it is unnecessary to go into that subject here. Suffice it to say that maritime liens given on the last voyage have priority over those given on all previous voyages, regardless of the

The basis of these well-established deviations from the ordinary rule is urgent necessity.⁴⁷ The case of tax liens seems on first impression to fall exactly within the principle of these cases, and some courts have followed this analogy.⁴⁸ The importance of raising revenue to meet the current expenses of government—of keeping the government a going concern—would seem sufficient justification for preferring the later tax lien. However, we are faced with a dilemma at this point. If such principle is to be used to prefer later tax liens to earlier tax liens, it would

dignify the maritime lien involved, the rule being based: (1) on the theory that the later liens really benefit the older ones; (2) on the necessity of obtaining credit to preserve the ship; and (3) on the theory that the last liens contribute "most immediately" to the preservation of the ship. *The St. Jago de Cuba*, *supra*; *The Paragon* (D. Me. 1836) Fed. Cas. No. 10,708, at 1084; *The Guiding Star* (C. C. S. D. Ohio 1883) 18 Fed. 263, 268; *The Andree* (S. D. N. Y. 1930) 41 F. (2d) 812; *HUGHES, op. cit. supra*, at 391. The following cases apply the inverse priority rule irrespective of the dignity of the maritime liens involved: *Collins v. The Ft. Wayne* (S. D. Ohio 1861) Fed. Cas. No. 3,012, at 119 (salvor's lien superior to earlier wage lien); *The Grapeshot* (E. D. N. Y. 1868) Fed. Cas. No. 5,702, at 986 (money raised by giving lien on cargo—lien held superior to earlier claims of materialmen); *The Rodney* (S. D. N. Y. 1831) Fed. Cas. No. 11,993, at 1090.

⁴⁶ *Wallace v. Loomis* (1877) 97 U. S. 146, 162-163; *Miltenberger v. Logansport Ry.* (1882) 106 U. S. 286, 309-310; *Union Trust Co. v. Illinois Midland Ry.* (1886) 117 U. S. 434, 455; Notes (1927) 50 A. L. R. 146 (rule as applied to railroads and public utilities); (1926) 40 *ibid.* 244, 251 (rule as applied to ordinary corporations). The reason for the rule is well expressed by the court in *Union Trust Co. v. Illinois Midland Ry.*, *supra*, and in *Van Frank v. Missouri Pac. Ry.* (1901) 89 Mo. App. 460, 470. See also *Beach, Receivers' Certificates* (1887) 3 L. Q. Rev. 429; *Carr, Receiver's Certificates* (1893) 1 PA. LEGAL. SER. 593; *Clayton, On Postponing Priorities of First Mortgage Liens* (1879) 13 AM. L. REV. 40; *Gallup, Railway Mortgages and Receivers' Debts in the United States* (1888) 4 L. Q. Rev. 300; *Jones, Claims and Equities Affecting the Priority of Railroad Mortgages* (1878) 12 AM. L. REV. 660; Notes (1920) 5 A. L. R. 709; (1902) 16 HARV. L. REV. 53; (1909) 22 *ibid.* 373; (1929) 38 YALE L. J. 548.

⁴⁷ *The Aurora* (1816) 1 Wheat. (14 U. S.) 96, 102-103. As to the limitation of corporate receivership "first liens" to cases of strict necessity, see Notes (1927) 50 A. L. R. 146, 159 (railroads); (1926) 40 *ibid.* 244, 251 (private non-public utility corporations); see also *Supreme Fuel Sales Co. v. Peerless Plush Mfg. Co.* (N. J. Eq. 1934) 175 Atl. 358.

⁴⁸ *Dougherty v. Henarie* (quoted with approval in the *Woodill* case, 180 Cal. at 670, 182 Pac. at 424); *Auditor-General v. Clifford*, both *supra* note 39; *Hollenbeck v. Seattle* (1925) 136 Wash. 508, 240 Pac. 916, 917; see also *Robbins v. Barron* (1875) 32 Mich. 36 (emphasizing any other rule would chill bidding at tax sales and thus delay collection of revenue); *Cahill v. Harrison* (1917) 87 N. J. Eq. 524, 100 Atl. 625 (same); *Irwin v. Trego* (1853) 22 Pa. 368 (same); *Hough v. Easley* (1877) 47 Iowa 330, 332 (emphasizing necessity of "promptness" in the collection of taxes). The cases of *Parker-Washington Co. v. Corcoran* (1910) 150 Mo. App. 188, 129 S. W. 1031 (holding assessment liens rank in order of creation), *Jaicks v. Oppenheimer*, *supra* note 43 (holding assessment liens rank in inverse order of creation), and *Missouri Real Estate & Loan Co. v. Burri* (1919) 202 Mo. App. 242, 216 S. W. 570 (holding tax lien superior to assessment lien), all contain valuable discussions emphasizing this as a basis of the tax lien rule.

The only cases found which specifically refer to admiralty and receivership are *Jaicks v. Oppenheimer*, *supra* note 43, and *Provident Inst. for Sav. v. Jersey City*, *supra* note 34, at 516. See Note (1919) 68 U. OF PA. L. REV. 72, 73.

seem to be applicable *a fortiori* in giving tax liens priority over private liens, a priority which recent cases say does not exist, as noted above. Accordingly, it would seem that the admiralty and receivership analogy fails.

What have we left to justify this well-established principle that the first shall be last and the last first? The writer has been unable to discover that there is anything left, and must necessarily conclude that the rule is grounded on a fallacy—on the exploded theory that tax liens, because of their superior dignity, are *ex proprio vigore* superior to any other type of lien whatever. Certain it is that if a tax lien is not inherently superior to an earlier private lien there is even less reason for holding it superior to an earlier tax lien.⁴⁹

What rule should be applicable to conflicting tax liens? In the opinion of the writer, the only proper rule is that in the absence of express statutory provision to the contrary, successive tax liens should be equal. All taxes have benefited the community to an equal extent, and if the legislature finds that such a principle unduly obstructs the collection of the revenue necessary to maintain the government it may quickly remedy such situation by express statutory provision. The holding of the Florida court in the *Allison* case is therefore to be commended. However, it must be recognized that the Florida Supreme Court stands alone in its view.⁵⁰ The overwhelming weight of authority, as noted above, still adheres to the view that the last tax lien is superior. In view of the fact that this conclusion has been reached in most instances without reasons, and without citation of authority, it is possible that the authorities may still right themselves on this question. The Florida decision is an entering wedge.

To recapitulate, the law on this subject started out with the view that taxes are inherently liens. Later this view was repudiated, and the view adopted practically universally that taxes are not a lien unless some statute expressly so provides. When statutes did expressly so provide, the view was entertained for some time that tax liens are inherently superior to private liens. Later, however, and at the present time, the prevailing view is that tax liens are not inherently superior to private liens, but are so superior if expressly declared to be so by statute, and not otherwise. With respect to successive tax liens, the rule has been followed practically without question that such liens have priority in the inverse order of their creation.

⁴⁹ The Arizona Supreme Court seems to have been the only court to recognize that recent cases have resulted in placing tax liens on a parity with private liens, in the absence of express statutory provision to the contrary. See *Steinfeld v. State*, *supra* note 38.

⁵⁰ With the exception of the dictum in *Steinfeld v. State*, *supra* note 38.

II. PRINCIPLES APPLICABLE TO ASSESSMENT LIEN PRIORITIES IN ABSENCE OF STATUTE

The foregoing principles being applicable as to tax liens, the question then arises as to whether the same principles should not be applicable to liens of special assessments for local improvements. It is well settled, of course, that the levy of such assessments is an exercise of the power of taxation.⁵¹ However, it is equally well settled that an assessment differs from a general tax in many respects. A tax is levied for the purpose of meeting the expenses of carrying on the government and all of its functions for the benefit of the whole community. If property is taxed for this purpose, it is not a requisite that it receive any compensating benefit itself.⁵² The benefit is received by the taxpayer personally as a member of organized society, and therefore the taxpayer may be made personally liable for non-payment of the tax.⁵³

Special assessments for local improvements, on the other hand, are predicated on the theory that part of the land in a community receives a special and peculiar benefit from a public improvement in excess of that received by the community generally, and consequently should be required to pay therefor to the extent of such benefit.⁵⁴ An assessment is levied on specific property on the theory that the very property assessed has been benefited in an amount at least equal to the sum assessed. Accordingly, assessments can never exceed benefits.⁵⁵ The property

⁵¹ *People v. Mayor of Brooklyn* (1851) 4 N. Y. 419; *Macon v. Patty* (1879) 57 Miss. 378, 34 Am. Rep. 451; *Illinois Cent. R. R. v. Decatur* (1893) 147 U. S. 190; 2 COOLEY, *TAXATION* (2d ed. 1886) 416; 1 PAGE & JONES, *TAXATION BY ASSESSMENT* (1909) § 89. See HAMILTON, *SPECIAL ASSESSMENTS* (1907) §§ 46-47, pointing out that originally, to avoid constitutional provisions requiring taxes to be equal and uniform, courts were inclined to and did rest the exercise of all authority for special assessment on the power of eminent domain.

⁵² *Illinois Cent. R. R. v. Decatur*, *supra* note 51, at 197-198; COOLEY, *loc. cit. supra* note 51; GRAY, *LIMITATIONS OF TAXING POWER* (1906) 942; 1 PAGE & JONES, *op. cit. supra* note 51, at 59.

⁵³ The power of the legislature to make taxes a personal liability on the owner of the property taxed is unquestioned. See 3 COOLEY, *TAXATION* (4th ed. 1924) §§ 1327, 2624; GRAY, *op. cit. supra* note 52, § 1172; 61 C. J. (1933) 1040; 26 R. C. L. (1920) 380; Note (1913) 41 L. R. A. (N. S.) 730. This follows from the fact that "The taxes are in fact assessed against the owners in respect of such property, although it is common to speak of them as being assessed against the property." GRAY, *loc. cit. supra*; see also *Rundell v. Lakey* (1869) 40 N. Y. 513, 516, 517.

⁵⁴ *Illinois Cent. R. R. v. Decatur*, *supra* note 51, at 199; 3 COOLEY, *loc. cit. supra* note 50; GRAY, *op. cit. supra* note 52, at 995; HAMILTON, *op. cit. supra* note 51, at 45-46; 1 PAGE & JONES, *op. cit. supra* note 51, at 589.

⁵⁵ *Village of Norwood v. Baker* (1898) 172 U. S. 269; see Henshaw, J., in *Spring Street Co. v. Los Angeles* (1915) 170 Cal. 24, 28-30, 148 Pac. 217, 219, L. R. A. 1918E 197, 200-201; *cf. Louisville & N. R. R. v. Barber Asphalt Pav. Co.* (1905) 197 U. S. 430 (per Holmes, J.).

While the above principle has been followed and recognized for years as the basis, and the only basis, upon which special assessments for local improvements

assessed, and that alone, is liable for the assessment, any attempt to make the assessment a personal liability of the landowner being unconstitutional.⁵⁶

We see, therefore, that the concept of a special assessment for a local improvement, although similar to that of a tax, in that it is levied to pay for a public improvement made pursuant to the exercise of governmental powers by the state or a subdivision thereof, differs quite considerably from the latter. The question whether such similarity, not-

could be levied (see HAMILTON, *loc. cit. supra* note 51; 1 PAGE & JONES, *op. cit. supra* note 51, §§ 11, 118; 44 C. J. (1928) 483, 490; 25 R. C. L. (1919) 142), and was recognized and applied as recently as 1926 in the "Archer County Case" (Browning v. Hooper (1926) U. S. 396, 405-406), yet in 1933 the Supreme Court seemed completely to forget the principle in deciding the case of Roberts v. Richland Irr. Dist. (1933) 289 U. S. 71. The decision is wholly inexplicable in view of what went before in this branch of the law and in making it the Court seems not to have given the question that thorough and adequate consideration which it is accustomed to give. See also American Securities Co. v. Forward (1934) 220 Cal. 566, 32 P. (2d) 343, *aff'd*, (Jan. 21, 1935) 79 L. Ed. *352; Thatcher v. County of San Diego (1934) 138 Cal. App. 503, 32 P. (2d) 979, *aff'd*, (Jan. 21, 1935) 79 L. Ed. *352.

But even if we assume that the Roberts case has revolutionized assessment law, and that assessments may now constitutionally exceed benefits, it is true notwithstanding that in all assessment projects conscious efforts are made to confine assessments to the benefits received from the improvement by the assessed property. These efforts take the form of: (1) conducting of a hearing for the sole purpose of determining whether the property proposed to be assessed for the improvement will be benefited thereby, and if so, to what amount it will be so benefited (such a hearing is indispensable where a legislative body does not itself determine that the property will be benefited. Fallbrook Irr. Dist. v. Bradley (1896) 164 U. S. 112; Embree v. Kansas City Road Dist. (1916) 240 U. S. 242, 251; Browning v. Hooper (1926) 269 U. S. 396, 405); (2) if no such hearing is had it is a requisite to due process of law that some legislative body declare that the property proposed to be assessed will be benefited thereby, such a declaration rendering a hearing on benefits unnecessary. Withnell v. Ruecking Constr. Co. (1919) 249 U. S. 63; Hancock v. Muskogee (1919) 250 U. S. 454; Goldsmith v. Prendergast Coustr. Co. (1920) 252 U. S. 12; Valley Farms Co. v. Westchester County (1923) 261 U. S. 155; St. Louis & S. W. R. R. v. Nattin (1928) 277 U. S. 157; Memphis & C. R. R. v. Pace (1931) 282 U. S. 241. Where the latter method is used the property owner is protected from arbitrary exactions: (1) by the principle that however the tax be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process or equal protection clauses of the 14th Amendment. Houck v. Little River Dr. Dist. (1915) 239 U. S. 354; Myles Salt Co. v. Board of Comm'rs (1916) 239 U. S. 478; Valley Farms Co. v. Westchester County, *supra*; Gast Realty Co. v. Schneider Granite Co. (1916) 240 U. S. 55; Kansas City So. R. R. v. Road Impr. Dist (1921) 256 U. S. 658; Thomas v. Kansas City So. R. R. (1923) 261 U. S. 481; Road Impr. Dist. v. Missouri Pac. R. R. (1927) 274 U. S. 188; Memphis & C. R. R. v. Pace, *supra*, at 246, and (2) by the practical fact that "the legislature acts upon its constituents." McCulloch v. Maryland (1819) 4 Wheat. (17 U. S.) 316, 428

⁵⁶ This is clearly established in California by the case of Taylor v. Palmer (1866) 31 Cal. 240. The rule is the same elsewhere. See Notes (1910) 133 Am. St. Rep. 929, 930, 931; (1897) 35 L. R. A. 58; (1909) 18 L. R. A. (N. S.) 1259; see also HAMILTON, *op. cit. supra* note 51, §§ 668, 670; GRAY, *op. cit. supra* note 52, at 612.

withstanding the differences, justifies an application of the same rules of priority will now be considered.

A. View that Tax Liens Are Inherently Superior to Assessment Liens.

—At the outset, it should be noted that the authorities hold, virtually without dissent (Mississippi alone⁵⁷ dissenting), that a tax lien has inherent superiority over an assessment lien.⁵⁸ This holding is based on the

⁵⁷ *Howie v. Panola-Quitman Dr. Dist.* (Miss. 1933) 151 So. 154. That the Mississippi court may be correct as a matter of policy is indicated by the "growing tendency, as shown by the statutes adopted by the legislature, to treat the taxes or assessments levied under such delegated authority as equal." *Bolton v. Terra Bella Irr. Dist.*, *supra* note 31, at 318, 289 Pac. at 680; see also *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornbeck* (1932) 216 Cal. 730, 17 P. (2d) 143; *Gould v. St. Paul* (1913) 120 Minn. 172, 139 N. W. 293; *Midway Realty Co. v. St. Paul* (1914) 124 Minn. 300, 145 N. W. 21; *Holzman v. Spokane* (1916) 91 Wash. 418, 157 Pac. 1085; *Seattle v. Equitable Bond Co.* (1923) 126 Wash. 111, 217 Pac. 721; *Tacoma v. Fletcher Realty Co.* (1928) 150 Wash. 33, 272 Pac. 43 (*cf.* *Maryland Realty Co. v. Tacoma* (1922) 121 Wash. 230, 209 Pac. 1); *Investment Co. v. Tacoma* (1925) 132 Wash. 645, 233 Pac. 287. A statute expressly placing special assessment liens on a parity with tax liens is not void as being in derogation of the sovereignty of the state. *In re Gould* (1910) 110 Minn. 324, 125 N. W. 273.

⁵⁸ *City of Winston-Salem v. Powell Pav. Co.*, *supra* note 41; *Little Red River Levee Dist. v. State* (1932) 185 Ark. 1170, 52 S. W. (2d) 46; *Sanford v. Dial* (1932) 104 Fla. 1, 142 So. 233; *Allison Realty Co. v. Graves Inv. Co.*, *supra* note 41; *Bosworth v. Anderson* (1929) 47 Idaho 697, 280 Pac. 227, 65 A. L. R. 1372; *Iowa Securities Co. v. Barrett* (1930) 210 Iowa 53, 230 N. W. 528; *Missouri Real Est. & Loan Co. v. Burri*, *supra* note 48; *State v. Board of Comm'rs* (1931) 89 Mont. 37, 296 Pac. 1; *Saluda v. Polk County*, *supra* note 41; *Franklin Securities Co. v. Clay* (1930) 146 Okla. 102, 293 Pac. 529; *Studley v. Luse* (1918) 89 Ore. 338, 173 Pac. 1182; *Robinson v. Hanson* (1929) 75 Utah 30, 33, 282 Pac. 782, 784; *McMillan v. Tacoma* (1901) 26 Wash. 358, 67 Pac. 68; *In re Dancy Dr. Dist.* (1929) 199 Wis. 85, 225 N. W. 873; see *Note* (1930) 65 A. L. R. 1379; *cf.* *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornbeck*, *supra* note 57; *Neary v. Peterson* (Cal. App. 1934) 30 P. (2d) 55, *aff'd*, (1934) 88 Cal. Dec. 384, 37 P. (2d) 82; *Warren v. Blackman* (S. D. 1933) 250 N. W. 681.

The principle that a tax lien is superior to an assessment lien is so firmly embedded in the law that even where the legislature enacts statutes which, ordinarily construed, would seem either to prefer the assessment lien to the tax lien or at least to place it upon a parity therewith, such statutes are nevertheless held not to have that effect. Thus a tax lien is superior to an assessment lien even though a statute provides that an assessment shall be a first and prior lien "with like force and effect as taxes levied for state and county purposes." *State v. Board of Comm'rs*, *supra*; or that the assessment shall constitute a lien "of the same nature and to the same extent as the lien for general city taxes." *Tampa v. Lee* (Fla. 1933) 151 So. 316; *Tampa v. Suarez* (Fla. 1934) 155 So. 804; or that the assessment "shall be collected as other taxes are collected." *Robinson v. Hanson*, *supra*; *Keene v. Seattle* (1903) 31 Wash. 202, 71 Pac. 769. And a statute providing that an assessment lien shall be superior to all other liens "except the lien for general taxes" is construed as not affecting the priority of tax over assessment liens (*Denver v. Keeler* (1910) 48 Colo. 54, 108 Pac. 998; *Sanford v. Dial*; *Iowa Securities Co. v. Barrett*; *Franklin Securities Co. v. Clay*; *McMillan v. Tacoma*; *In re Dancy Dr. Dist.*, all *supra*), whereas, on the other hand, where the statute enacts that the tax lien shall be superior to all other liens "except assessment liens," the effect is not to give the assessment liens priority over tax liens, but simply to place them on a parity therewith. *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornbeck*, *supra* note

view that the claim for taxes is of a higher order than that for assessments; that the latter, while levied for a public and governmental purpose, are not indispensably necessary to the maintenance of the government, while general taxes are.⁵⁹ As stated in *McMillan v. City of Tacoma*,⁶⁰ "General taxation is enforced to serve the necessary purposes of government, while local assessments are enforced to serve mere local convenience, and for the additional benefit of private property holders." This view has been followed in California by way of *ratio decidendi* in the case of *La Mesa Lemon Grove & Spring Valley Irrigation District v. Hornbeck*,⁶¹ in 1932, and more recently in 1934 in the case of *Neary v. Peterson*.⁶²

This rule may well be questioned on two grounds: (1) It seems but a new and clearly unwarranted application of the "superior dignity" principle discussed above. If a tax lien is not, as held by most cases, inherently superior to private liens, *a fortiori* it is not inherently superior to assessment liens. (2) It seems to have little foundation in fact, for the presently approved view is that anything that can be done by way

57; *Neary v. Peterson*, *supra*; *Bolton v. Terra Bella Irr. Dist.*, *supra* note 57. And a statute providing that tax liens shall be prior to all other liens is held expressly to give the tax lien preference over assessment liens (*Studley v. Luse*, *supra*; *Dougherty v. Henarie*, *supra* note 39; *White v. Knowlton* (1901) 84 Minn. 141, 86 N. W. 755; *White v. Thomas* (1904) 91 Minn. 395, 98 N. W. 101; *State v. Jeffries* (1928) 83 Mont. 111, 270 Pac. 638; *McMillan v. Tacoma*, *supra*), even though a statute providing that an assessment lien shall be superior to all other liens does not operate to give assessment liens priority over tax liens. *Little Red River Levee Dist. v. State*; *Bosworth v. Anderson*, both *supra*; *Saluda v. Polk County*, *supra* note 41. *Contra*: *North Spokane Irr. Dist. v. Spokane County* (1933) 173 Wash. 281, 22 P. (2d) 990; *Yakima County v. Stephens* (Wash. 1934) 33 P. (2d) 93. See Note (1933) 21 CALIF. L. REV. 376, 380.

In view of the foregoing authorities it is difficult to see how the legislature may effectuate an intention to place tax and assessment liens on a parity other than by a most explicit declaration to that effect. Such a declaration was made and upheld in *Gould v. St. Paul*, *supra* note 57.

⁵⁹ *Missouri Land & Real Est. Co. v. Burri*, *supra* note 48 (quoted with approval in the *La Mesa* case, *supra* note 57, at 735, 17 P. (2d) at 146); see *Robinson v. Hanson*; *Bosworth v. Anderson*, both *supra* note 58.

⁶⁰ (1901) 26 Wash. 358, 362, 67 Pac. 68, 69.

⁶¹ *Supra* note 57, at 735, 17 P. (2d) at 145, holding that under section 3787 of the Political Code tax liens were on a parity with irrigation district assessment liens. See *supra* note 58. The case of *Dougherty v. Henarie*, *supra* note 39, cited by the court in support of this statement, obviously lends no support thereto, it being based upon an express statutory provision. The *Burri* case, *supra* note 48, and the *Robinson* case, *supra* note 58, also cited by the court in the *La Mesa* case, do support the proposition, however. For a fuller discussion of the *La Mesa* case, see Note (1933) 21 CALIF. L. REV. 376.

⁶² *Supra* note 58, holding that tax lien was on a parity with an 1893 Bond Act (Cal. Stats. 1893, p. 33) assessment lien under section 3787 of the Political Code. The district court of appeal clearly stated the rule that tax liens are superior to assessment liens, but the supreme court omitted any such statement, simply citing the *La Mesa* case as controlling.

of special assessment may also be done by the levy of a general tax.⁶³ Such being the fact, there seems to be little basis for the claim that either is inherently or necessarily superior to the other. As a matter of fact, if we confine ourselves strictly to general principles, there is greater reason for preferring an assessment lien over a tax lien in view of the fact that the former must necessarily benefit the property assessed, while no such requirement exists for the latter. This argument will be developed in greater detail under the next heading.

Notwithstanding the seeming weakness of these holdings, however, their existence cannot be denied nor their effect minimized. Their effect would seem to be to preclude the claim that assessment liens are *ipso facto* subject to the same rules of priority as are applicable to tax liens.

B. Priority Between Assessment Liens and Private Liens.—Since it cannot be said that the rules of priority applicable to tax liens are *ipso facto* applicable to assessment liens, it follows that the mere fact that a tax lien is not inherently superior to private liens will not necessarily preclude a holding that an assessment lien is so superior. As a matter of fact, wholly different considerations seem applicable to questions of priority between special assessment liens and private liens than are applicable to those between tax liens and private liens. Since a special assessment cannot exceed the benefits to the very property assessed, it is obvious that earlier lienholders are benefited by the enhanced value of the property caused by the improvement as much as the owner is, and accordingly there is no injustice comparable to that existing where tax liens are made superior to earlier private liens. In the latter case the private lienholder's property is made liable to pay the personal obligation of the landowner to the government. In the former it simply pays for the benefit it has itself received.

While the overwhelming weight of authority favors the view that

⁶³ The United States Supreme Court adopted very early and has steadily adhered to the view that the legislature has absolute discretion to determine what proportion of the cost of an improvement, if any, shall be defrayed by the levy of special assessment and what proportion, if any, by the levy of taxes. *Mobile County v. Kimball* (1880) 102 U. S. 691, 703; *Joslin Mfg. Co. v. Providence* (1923) 262 U. S. 668, 674; *Houck v. Little River Dr. Dist.*; *Valley Farms Co. v. Westchester County*; *Memphis & C. R. R. v. Pace*; *Roberts v. Richland Irr. Dist.*, all *supra* note 55; *Board of Comm'rs v. Ohio* (1932) 286 U. S. 526; *American Co. v. Lakeport* (1934) 220 Cal. 548, 562, 32 P. (2d) 622, 628.

Since, under these authorities, the legislature may, by simply establishing a taxing district with boundaries co-extensive with those of a given assessment district and levying a tax in lieu of said assessments, perform any function which it could have performed by means of the assessment district, it is difficult to see how a tax lien can be regarded as superior to an assessment lien, in the absence of express statutory provision making it such. See *Brunswick v. Gordon Realty Co.* (1927) 163 Ga. 636, 136 S. E. 898.

assessment liens are *ex proprio vigore* superior to private liens,⁶⁴ most of the cases so holding do not base their conclusion on the principle contended for above, but reason that since an assessment is like a tax, an assessment lien should be governed by the same rules of priority as are tax liens and that since a tax lien is inherently superior to private liens, an assessment lien must also be so superior.⁶⁵ *Wabash Eastern Ry. Company v. Commissioners of East Lake Fork Special Drainage District*,⁶⁶ *Morey v. City of Duluth*,⁶⁷ *Lybass v. Town of Ft. Myers*,⁶⁸

⁶⁴ *Greene & Griffin Co. v. Salt River Valley Water Users' Ass'n* (1923) 25 Ariz. 354, 217 Pac. 945; *Odell v. Wilson* (1883) 63 Cal. 159; *Wilson v. California Bank* (1898) 121 Cal. 630, 54 Pac. 119; *O'Dea v. Mitchell*, *supra* note 28; *Lybass v. Town of Ft. Myers* (1908) 56 Fla. 817, 47 So. 346; *Wabash Eastern Ry. v. Commissioners of East Lake Fork Dr. Dist.*, *supra* note 34; *Dressman v. Farmers' & Traders' Nat. Bank* (1898) 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; *Lilly v. Irvine* (1930) 233 Ky. 528, 26 S. W. (2d) 566; *Gomeringer v. McAbee* (1917) 129 Md. 557, 99 Atl. 787; *Auditor Gen. v. Bishop* (1910) 161 Mich. 117, 125 N. W. 715; *Morey v. Duluth* (1899) 75 Minn. 221, 77 N. W. 829; *Morey Eng. & Constr. Co. v. St. Louis Artif. Ice Rink Co.*, *supra* note 13; *Morrissey v. Shriver* (1923) 88 Okla. 269, 214 Pac. 702; *Beatty v. Wittekamp* (1933) 171 S. C. 326, 172 S. E. 122; *Kirby v. Waterman* (1903) 17 S. D. 314, 96 N. W. 129; *Preston v. Anderson County Levee Impr. Dist.* (Tex. Civ. App. 1924) 261 S. W. 1077; *Lannan v. Waltenspiel* (1915) 45 Utah 564, 147 Pac. 908; *Carstens & Earles v. Seattle*, *supra* note 26.

While several of the above cases purport to base their decision upon "implication" from the wording of the statutes involved, it will be found that as a matter of fact the "implication," so-called, is drawn from the mere fact of the lien being an assessment lien, there being no language expressly giving the preference. See *Lannan v. Waltenspiel*, *supra*.

In the following cases, express statutory provisions existed preferring the assessment lien to private liens, yet the court in each case seemed to rest its holding on the general principle enunciated above. *Weinreich v. Hensley* (1898) 121 Cal. 647, 54 Pac. 254; *Williams v. Cooper* (1899) 124 Cal. 666, 57 Pac. 577; *Chase v. Trout* (1905) 146 Cal. 350, 365, 80 Pac. 81, 87; see *San Mateo County Bank v. Dupret* (1932) 134 Cal. App. 755, 12 P. (2d) 669.

⁶⁵ *Greene & Griffin v. Salt River Valley Water Users' Ass'n*; *Weinreich v. Hensley*; *O'Dea v. Mitchell*; *Lybass v. Town of Ft. Myers*; *Wabash Eastern R. R. v. Commissioners of East Lake Fork Dr. Dist.*; *Dressman v. Farmers' & Traders' Nat. Bank*; *Morey v. City of Duluth*; *Morey Eng. & Constr. Co. v. St. Louis Artif. Ice Rink Co.*; *Beatty v. Wittekamp*; *Kirby v. Waterman*; *Preston v. Anderson County Levee Impr. Dist.*; *Carstens & Earles v. Seattle*, all *supra* note 64.

Frequently statutes provide that assessments shall be collected in the same manner as taxes are collected, and such provision is held expressly to make the assessment lien superior to private liens where taxes are expressly made so superior. *Seattle v. Hill* (1896) 14 Wash. 487, 45 Pac. 17; *Morrissey v. Shriver*, *supra* note 64. *Contra*: *Pierce v. Aetna Life Ins. Co.* (1892) 131 Ind. 284, 31 N. E. 68. A provision making the assessment a lien in the same manner as taxes are a lien, taxes being expressly made a first lien, would seem to give the assessment lien superiority over private liens where tax liens have such superiority. *Provident Inst. for Sav. v. Jersey City*; *German Sav. & Loan Soc. v. Ramish*, both *supra* note 34; *Brunswick v. Gordon Realty Co.* (1927) 163 Ga. 636, 136 S. E. 898.

⁶⁶ *Supra* note 34.

⁶⁷ *Supra* note 64. While this case purports to be based upon a construction of the charter provisions involved, it will be found that there was no express language in the charter giving the preference—that in truth the implication of priority was made wholly from the fact that the power of assessment had been exercised.

⁶⁸ *Supra* note 64. In *Gailey v. Robertson* (1929) 98 Fla. 176, 123 So. 692, even

Morey Engineering & Construction Company v. St. Louis Artificial Ice Rink Company,⁶⁹ and *Carstens & Earles v. City of Seattle*,⁷⁰ are leading examples of this type of reasoning. It is of course obvious, from what has been said, that there is a double fallacy in the above line of reasoning, viz.: (1) in assuming that tax liens are inherently superior to private liens, which, as we have seen, is not the law; and (2) in assuming that the rules applicable to tax lien priorities necessarily apply to assessment lien priorities, which, as we have also seen, is equally devoid of support, either in reason or authority.

On the other hand, some cases do base their holding that assessment liens are inherently superior to private liens on exactly the reasoning suggested above. Thus in *Dressman v. Farmers & Traders National Bank*,⁷¹ the Kentucky Court of Appeals said, in holding an assessment lien to be inherently superior to an earlier mortgage: "He, with the owner, has profited by the enhanced value given the property by the improvements which the assessment is made to pay for." And in the leading case of *Lannan v. Waltenspiel*,⁷² the Supreme Court of Utah said in making the same holding on the same facts that if it held to the contrary, "The lienholder would thus reap where he had not sown, and from a source other than from the mortgagor. Why should a mortgagee be in any better position than the owner?"⁷³

The California cases on the point are in a most confusing state. Starting with the early case of *Odell v. Wilson*,⁷⁴ in 1883, followed by *Wilson v. California Bank*,⁷⁵ in 1898; *Weinreich v. Hensley*,⁷⁶ in 1898;

though the statute provided that the assessment should be a lien "superior in dignity" to all other liens, the court, in holding an assessment lien superior to a mortgage given prior to the enactment of the assessment statute, based its decision on the general principle rather than the statute.

⁶⁹ *Supra* note 13.

⁷⁰ *Supra* note 26.

⁷¹ (1897) 100 Ky. 571, 38 S. W. 1052.

⁷² (1915) 45 Utah 564, 570, 147 Pac. 908, 910.

⁷³ This theory seems to be a partial basis for the decision in the following cases: *Lybass v. Town of Ft. Myers*, *supra* note 64; *Morey Eng. & Constr. Co. v. St. Louis Art. Ice Rink Co.*, *supra* note 13; *Morey v. Duluth*; *Beatty v. Wittekamp*, both *supra* note 64; *Carstens & Earles v. Seattle*, *supra* note 26; *Richmond v. Williams* (1904) 102 Va. 733, 740, 47 S. E. 844, 846.

⁷⁴ (1883) 63 Cal. 159, deciding the point without discussion, involving street assessment lien and mortgage.

⁷⁵ (1898) 121 Cal. 630, 54 Pac. 119, also deciding the point without discussion—and involving street assessment lien and mortgage.

⁷⁶ (1898) 121 Cal. 647, 656, 54 Pac. 254, 257. Although the decision seems to be based on the general principle, still the statute expressly gave priority, as pointed out in *Guinn v. McReynolds* (1918) 177 Cal. 230, 233, 170 Pac. 421, 422, so that it is impossible to ascertain whether the court had the provision in mind.

Williams v. Cooper,⁷⁷ in 1899; and *O'Dea v. Mitchell*,⁷⁸ in 1904, the California courts quite generally adhered to the view that assessment liens were inherently superior to private liens. The basis of these holdings, in whole or in part, was that mentioned above, *viz.*, that since a tax lien is inherently superior to private liens, an assessment lien must likewise be so superior, in view of the similarity between a tax and an assessment. However, the case of *Guinn v. McReynolds*⁷⁹ seems to have overruled all of these cases. There the burden imposed on the land was held to be in the nature of, and to be governed by the same rules as if it were, "a tax or assessment lien." In holding such charge to be subordinate to an earlier mortgage, the court did not mention the *Odell*, *Wilson*, and *O'Dea* cases, but, nevertheless, clearly and unequivocally adopted the rule that a tax or assessment lien is not, merely by virtue of its being a tax or assessment lien, inherently superior to private liens.⁸⁰

There are very few cases in accord with the holding of the *Guinn* case in so far as it relates to assessment liens.⁸¹ However, the decision seems to stand as the law of California on this subject.

⁷⁷ (1899) 124 Cal. 666, 57 Pac. 577, holding irrigation district assessment lien superior to earlier mortgage.

⁷⁸ (1904) 144 Cal. 373, 381, 77 Pac. 1020, 1022. The court cited *German Sav. & Loan Soc. v. Ramish*, *supra* note 34, declaring that while in the latter case "the bond act, which expressly provides that the bond shall be a first lien, was involved, still the decision went on the broad ground that an assessment for street improvement was paramount to all other liens." 144 Cal. at 382, 77 Pac. at 1023. This characterization of the holding of the *Ramish* case, although apparently reiterated in *Chase v. Trout* (1905) 146 Cal. 350, 365, 80 Pac. 81, 87, is repudiated in *Guinn v. McReynolds*, *supra* note 76.

It would seem that the *Guinn* case is clearly correct, for the court in the *Ramish* case was considering only the question of whether a statute expressly making the bond lien superior to an earlier mortgage was constitutional and it was assumed that the statute expressly made the assessment lien so superior.

⁷⁹ *Supra* note 76; see also *supra* note 29.

⁸⁰ This generalization is somewhat impaired by two factors: (1) that the court in the *Guinn* case, after setting forth clearly and unequivocally the ground of its decision, added the following gratuitous statement: "In the case of assessments for local improvements, it may be said that the improvement confers a benefit on the land itself, and thus enhances the security of the mortgagee. But this is not necessarily true of expenditures made under the law here in question. The destruction of infected or diseased trees may diminish the value of the land, for the benefit, primarily, of adjoining property." 177 Cal. at 234, 170 Pac. at 422; (2) that in the later case of *Woodill & Hulse Elec. Co. v. Young* (1919) 180 Cal. 667, 670, 182 Pac. 422, 424, the court, in holding successive assessment liens to rank in the inverse order of their creation, rested its conclusion in part upon the principle that assessment liens are *ex proprio vigore* first liens.

⁸¹ *Cook v. State* (1884) 101 Ind. 446; *State ex rel. Ely v. Aetna Life Ins. Co.* (1889) 117 Ind. 251, 20 N. E. 144; *Killian v. Andrews* (1892) 130 Ind. 579, 30 N. E. 700; *Pierce v. Aetna Life Ins. Co.*, *supra* note 65; *State ex rel. Vawter v. Loveless* (1893) 133 Ind. 600, 33 N. E. 622; *Dixie Inv. Co. v. Player* (1934) 178 La. 1010, 152 So. 688; *Cook v. Lemoine* (1934) 178 La. 1014, 152 So. 689; *Eagle Point Irr. Dist. v. Cowden* (1931) 137 Ore. 121, 1 P. (2d) 605 (*ratio decidendi*); *Appeal of City of Pittsburg* (1861) 40 Pa. 455; *Seattle v. Hill*, *supra* note 65; see 2 PAGE & JONES, *TAXATION BY ASSESSMENT* (1909) §1050.

C. Priority Between Successive Special Assessment Liens.—We come now to a consideration of the priority of successive special assessment liens. The courts have entertained almost every view that could possibly be entertained on this question, *viz.*: (1) that all liens are equal; (2) that liens rank in the order of their creation, *i.e.*, that the first in time is first in right; and (3) that they rank in the inverse order of their creation—the last in time is first in right, and the first last. We will consider these views in the order named.

(1) *View that All Liens are Equal*: As noted above, special assessments are always levied on the basis of benefits to the property assessed—benefits in the form of a direct enhancement of the pecuniary value of such property in the amount of the assessment.⁸² Thus there is theoretically a guarantee that all assessments will benefit the property assessed at least to the extent of the amount of such assessment. Assuming, as we must, that this guarantee is effective, the property itself is directly increased in value to the amount of the assessment, and this increase in value necessarily inures to the benefit of all earlier lienholders. Such being the case, there seems to be no good reason why earlier lienholders should not pay for such increased value. On this theory, as we have seen above, assessment liens are held superior to earlier private liens. When the earlier lien as well as the later is an assessment lien, however, it is true of each assessment that it has necessarily benefited the property to the extent of the assessment, and there is no reason for preferring either on this ground. Accordingly, as between successive assessment liens, the proper rule seems to be that all such liens should be of equal rank, regardless of when they accrue. All have benefited the property and all have therefore benefited each other, and there seems to be no reasonable basis for any preference.

Furthermore, there is a direct analogy from another field of the law in favor of the equality rule. Thus successive mechanics' liens on the same property are all on a parity, in the absence of express statutory provision to the contrary.⁸³ The fact that all have necessarily benefited the property as well as each other seems to be the basis of this rule.⁸⁴

The view here contended for has been followed in several cases,⁸⁵

⁸² See *supra* note 56.

⁸³ BOISOT, *MECHANIC'S LIENS* (1897) § 261; BENDER-MOSS, *MECHANIC'S LIENS* (1908) 463; 40 C. J. (1926) 282. Such is the rule in California. *Moxley v. Shepard* (1852) 3 Cal. 64; *Crowell v. Gilmore* (1861) 18 Cal. 370. This rule is of little practical importance today inasmuch as mechanics' lien laws so fully cover all questions of priority by express provision.

⁸⁴ *Crowell v. Gilmore* (1861) 18 Cal. 370, 371-372.

⁸⁵ *Board of Comm'rs of McKinney Bayou Dr. Dist. v. Board of Dir. of Garland Levee Dist.* (1930) 181 Ark. 898, 28 S. W. (2d) 721; *Sanford v. Dial*, *supra* note 58 (but see *State Adjustment Co. v. Winslow* (1934) 114 Fla. 609, 154 So.

the leading one being *Brownell Improvement Company v. Nixon*,⁸⁰ decided in 1910 by the Indiana Court of Appeals, which overruled the

325); *Brownell Impr. Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, *rel'g den.*, 95 N. E. 585; *Citizens Trust & Sav. Bank v. Fletcher American Co.* (Ind. 1934) 190 N. E. 868, *rel'g den.*, 192 N. E. 451; *Douglas County v. Shannon* (1934) 125 Neb. 783, 252 N. W. 199; *Hollenbeck v. Seattle*, *supra* note 48. All of these cases, with the exception of the Florida and Nebraska cases (which do not discuss the point), rest their decision to some extent on the theory advocated above. The Arkansas, Indiana (1934) and Washington cases rely to some extent on the additional point that because the statutes make each assessment in effect a "first" lien, all such liens must be on a parity. See *infra* note 140.

A somewhat analogous holding is made where revenues of a public district are insufficient to pay all of the bonds of such district. It is held by most cases that all bond issues of such a district stand on a parity, *i.e.*, that no priority can be predicated upon the fact that one bond issue preceded another, or *vice versa*. *McNear v. Little Red River Levee Dist.* (C. C. A. 8th, 1923) 293 Fed. 717; *Rowekamp v. Commerce Bank & Tr. Co.* (C. C. A. 8th, 1934) 72 F. (2d) 852; *Kriemeyer v. Hemphill* (C. C. A. 5th, 1927) 19 F. (2d) 513, *cert. den.*, (1927) 275 U. S. 496; *Hoehler v. W. B. Worthen Co.* (1922) 154 Ark. 444, 253 S. W. 822; *Howe v. Long Prairie Levee Dist.* (1933) 187 Ark. 725, 62 S. W. (2d) 10; *First Nat. Bank of Meridian v. Commissioners of Lake Cormorant Dr. Dist.* (Miss. 1933) 147 So. 807. That the holding in this line of cases is persuasive authority in favor of the rule that successive assessment liens on the same property are equal, is the conclusion of Board of Comm'rs of McKinney Bayou Dr. Dist. v. Board of Dir. of Garland Levee Dist., *supra*.

Cf. *State Bank of Wellston v. Mississippi Valley Tr. Co.* (C. C. A. 8th, 1924) 297 Fed. 563 (where bonds are made a "prior" lien on assessment revenues, it is superior to a later issue in such revenues); *St. Louis Union Tr. Co. v. Franklin Amer. Tr. Co.* (C. C. A. 8th, 1931) 52 F. 431, *cert. den.*, (1932) 286 U. S. 553 (conclusion that first bond issue superior rested primarily on express statutory provisions); *Bechtel v. Mostrom* (1932) 214 Iowa 623, 243 N. W. 361 (holding bonds first maturing superior by analogy to rule applicable to priority of successive notes secured by same mortgage—see *Whitney v. Eichner* (1927) 204 Iowa 1178, 216 N. W. 625; *White v. Gutshall* (1931) 213 Iowa 401, 238 N. W. 909; Note (1927) 50 A. L. R. 543. The rule in California is that all such notes are equal. *Phelan v. Olney* (1856) 6 Cal. 478; *Grattan v. Wiggins* (1863) 23 Cal. 16, 30; 18 CAL. JURIS. (1923) 108; see *Martin, J.*, in *Powell v. Amarillo* (Tex. Civ. App. 1933) 57 S. W. (2d) 233, 234.

⁸⁰ (1910) 48 Ind. App. 195, 92 N. E. 693, *rel'g den.*, 95 N. E. 585; *cf.* *Charles City v. Ramsay* (1925) 199 Iowa 722, 202 N. W. 499; *Crumley, Jones & Crumley Co. v. Hermann* (1933) 249 Ky. 300, 306, 60 S. W. (2d) 618, 620. Both of these cases fail to recognize that the fact of special benefit conferred by each assessment is used not to displace the earlier lien, but simply to place the later lien on a parity therewith.

The answer given in *Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa 307, 79 N. W. 77, *i.e.*, that "in many instances" the benefit is "more fanciful than real" (108 Iowa at 310, 79 N. W. at 78), while no doubt stating a fact, would nevertheless seem to have no bearing whatever on the question. That it is a fact is due to faulty or lax administration and not to the rule of law. In *Burke v. Lukens* (1895) 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539, the point that the later assessment benefits the property is used as a ground of preferring the later to an earlier assessment lien. This would seem clearly unwarranted, for it is equally true of the earlier assessment as it is of the later that it benefits the property to the extent of the assessment. See Note (1920) 68 U. OF PA. L. REV. 72, 74.

earlier case of *Burke v. Lukens*,⁸⁷ decided in 1895. The *Brownell* case was expressly approved and followed by the Indiana Supreme Court in 1934 in the case of *Citizens' Trust & Savings Bank v. Fletcher American Company*.⁸⁸ In like manner, the Supreme Court of Washington, after adopting the rule last in time first in right in *City of Seattle v. Everett*,⁸⁹ decided in 1923, expressly repudiated such view two years later in *Hollenbeck v. City of Seattle*,⁹⁰ and adopted the view that all liens are equal. Perhaps the best reasoned case of all in support of this view is *Board of Commissioners of McKinney Bayou Drainage District v. Board of Directors of Garland Levee District*,⁹¹ decided in 1930 by the Arkansas Supreme Court.

(2) *View that First in Time is First in Right*: The view of another group of cases on this subject is that the liens take priority in the order of their creation.⁹² In some cases it is either stated categorically or assumed without argument that the general rule applicable to all liens, *i.e.*, first in time first in right, is applicable, in the absence of express statutory provision to the contrary.⁹³ The reasoning used in support of the view in other cases is purely negative, *i.e.*, that since an assessment does not have the dignity and importance of a tax the rule of last in time first in right applied to successive tax liens does not apply to assessment liens. The deduction from this premise is that since the tax rule does not

⁸⁷ *Supra* note 86, holding that successive assessment liens are prior in the inverse order of their creation.

⁸⁸ (Ind. 1934) 190 N. E. 868, *reh'g den.*, 192 N. E. 451.

⁸⁹ (1923) 125 Wash. 39, 215 Pac. 337.

⁹⁰ *Supra* note 48. The court felt that the *Everett* case, *supra* note 89, should be reexamined, because it seemed apparent that the reasons for the application of the general tax rule do not apply to assessment liens, since (1) the tax rule is based upon the imperative necessity of collecting revenue for the support of the government, and preserving its very existence—a reason clearly inapplicable to assessments, and (2) assessments benefit the property assessed to the extent of the assessments. See (1926) 1 WASH. L. REV. 215.

⁹¹ *Supra* note 85, holding lien of levee district equal to that of drainage district.

⁹² *Des Moines Brick Mfg. Co. v. Smith*; *Charles City v. Ramsay*; *Crumley, Jones & Crumley Co. v. Hermann*, all *supra* note 86; *Anderson-Deering Co. v. Boone* (1925) 201 Iowa 1129, 205 N. W. 984; *Bell v. City of New York* (1901) 66 App. Div. 578, 73 N. Y. Supp. 298; *Scott-McClure Land Co. v. Portland* (1912) 62 Ore. 462, 125 Pac. 276; *Philadelphia v. Meager* (1871) 67 Pa. 345; *Oil City Bldg. & Loan Ass'n v. Shanfelter* (1905) 29 Pa. Super. Ct. 251; *Powell v. Amarillo*, *supra* note 85; *Herbert C. Heller & Co., Inc. v. Duncan* (1931) 110 W. Va. 628, 159 S. E. 52; *Mortgage Co. of Md. v. Lory* (1932) 112 W. Va. 475, 164 S. E. 665.

The view was also adopted and then repudiated by California and Missouri. *Brady v. Burke* (1891) 90 Cal. 1, 27 Pac. 521 (overruled by *Woodill & Hulse Elec. Co. v. Young*, *supra* note 5); *Parker-Washington Co. v. Corcoran*, *supra* note 48 (overruled by *Jaicks v. Oppenheimer*, *supra* note 43).

⁹³ *Des Moines Brick Mfg. Co. v. Smith*; *Charles City v. Ramsay*, both *supra* note 86; *Anderson-Deering Co. v. Boone*; *Bell v. City of New York*; *Scott-McClure Land Co. v. Portland*; *Philadelphia v. Meager*; *Oil City Bldg. & Loan Ass'n, v. Shanfelter*; *Mortgage Co. of Md. v. Lord*; *Brady v. Burke*, all *supra* note 92.

apply, the general rule first in time first in right does apply.⁹⁴ As we have seen above, this is a *non sequitur*.

The reason less frequently urged in support of the first in time rule is that contractors would refrain from bidding on public works if they knew the liens given them for their work are likely to be or may possibly be either shared or wholly displaced by later similar liens.⁹⁵ This argument seems to be based on pure conjecture. It may be and has been doubted that such would be the effect. In *Woodill & Hulse Electric Company v. Young*, the California Supreme Court declared this argument to be "almost entirely fanciful." Since most of the cases following this view have not considered the argument of the cases supporting the equality rule,⁹⁶ it is possible even for these courts to follow that rule.

(3) *View that Last in Time is First in Right*: The view has been adopted in Missouri⁹⁷ and California,⁹⁸ and adopted and then repudiated

⁹⁴ Notwithstanding the case has been overruled, *Parker-Washington Co. v. Corcoran*, *supra* note 48, remains the best and the most frequently cited statement of the first in time rule. It should be noted that the case did not answer or even refer to the argument that all liens should be equal. In *Powell v. Amarillo*, *supra* note 85, the court after referring to *Jaicks v. Oppenheimer*, *supra* note 43, disagreed with the conclusion there reached and declared that the rule applicable to tax liens had no application to assessment liens. After asserting that it was his personal view that all liens should be equal, Martin, J., nevertheless followed the first in time rule. See also *Crumley, Jones & Crumley Co. v. Hermann*, *supra* note 86; *Herbert C. Heller & Co., Inc. v. Duncan*, *supra* note 92.

⁹⁵ This point is made in (1933) 21 CALIF. L. REV. 180. See also *Des Moines Brick Mfg. Co. v. Smith*; *Crumley, Jones & Crumley Co. v. Hermann*, both *supra* note 86; Note (1926) 1 WASH. L. REV. 215, 217.

⁹⁶ The only case attempting to answer the equality argument is *Crumley, Jones & Crumley Co. v. Hermann*, *supra* note 86. That this case does not furnish any adequate or other reasons against the equality rule has been demonstrated above. In *Powell v. Amarillo*, *supra* note 85, the court honestly believed that the equality rule was the better rule, but did not have the courage of its convictions, saying that notwithstanding such belief, the view first in time first in right was more "logical." Why such view is more "logical" the court does not endeavor to enlighten us, nor could it, it is submitted.

It should also be noted that the equality rule is the only rule which has not been later repudiated after once having been adopted by a state, the first in time rule having first been adopted and then repudiated in favor of the last in time rule in California and Missouri, see *supra* note 92; while the last in time rule was first adopted and then repudiated in favor of the equality rule in Indiana (*Burke v. Lukens*, *supra* note 86, adopted, and then *Brownell Impr. Co. v. Nixon*, *supra* note 86, and *Citizens' Tr. & Sav. Bank v. Fletcher Amer. Co.*, *supra* note 88, repudiated it), and Washington (*Seattle v. Everett*, *supra* note 89, adopted, and *Hollenbeck v. Seattle*, *supra* note 48, repudiated it). It appears, therefore, that the equality rule is the only one that has successfully withstood later attacks.

⁹⁷ *Jaicks v. Oppenheimer*, *supra* note 43; *Redemeier v. Perkinson* (Mo. App. 1916) 186 S. W. 1107; *Springfield v. Ransdell* (Mo. App. 1922) 240 S. W. 867, *aff'd*, (1924) 305 Mo. 43, 264 S. W. 771; *McGrew v. Carr* (1929) 223 Mo. App. 1231, 21 S. W. (2d) 640; *Dickey v. Andover Inv. Co.* (Mo. App. 1932) 45 S. W. (2d) 1086.

⁹⁸ *Woodill & Hulse Elec. Co. v. Young*, *supra* note 5; *Balaam v. Pacific States Sav. & Loan Co.*; *Couley v. Hawley*, both *supra* note 1.

in Indiana and Washington,⁹⁹ that as between successive assessment liens the last in time is first in right. The leading case in support of this view and which is strongly relied on by the other cases is the Missouri case of *Jaicks v. Oppenheimer*,¹⁰⁰ decided in 1916, which overruled the earlier Missouri case of *Parker-Washington Company v. Corcoran*,¹⁰¹ decided in 1910. The basis of the decision in the *Jaicks* case is clear, *viz.*: (1) that assessments are clearly referable to the taxing power, and are in the nature of a tax; that like a tax, they are made a lien not on any particular interest in the property, but upon the very property itself, necessarily displacing, *ex proprio vigore*, every previous interest, claim, or lien of every kind; that therefore the rule applicable to successive tax liens is also applicable to successive assessment liens;¹⁰² and (2) that since assessments are based upon benefits to the property assessed, they are analogous to liens created by courts of equity in railroad receiverships for betterments to the property in the hands of the receiver, which have been held to displace earlier mortgage liens, as noted above.¹⁰³

These reasons may well be questioned. In the first place, they are based very strongly on the principle that tax liens are inherently "first liens," which, as we have seen, has been repudiated.¹⁰⁴ Wholly apart from this consideration, it would seem that assessments differ considerably from general taxes. While it is true that such assessments are levied in the performance of a governmental function, just as taxes are, and that there is nothing done by way of special assessment which may not also be done by the levy of a tax,¹⁰⁵ it is also true that such assessments are not ordinarily levied to discharge the absolutely indispensable functions of government. While local improvements are important, and their cost may be met by the levy of a tax if the legislature chooses, they are not of such primary importance that the government cannot go on without them. The primary purpose of a tax is ordinarily to provide funds with which to maintain the government as a going concern. The primary purpose of an assessment, on the other hand, is not this, but is to improve private property in a designated part of the community.

Nor does the analogy to railroad receiverships seem apt. It is well known, as noted above,¹⁰⁶ that only such claims are preferred in a railroad receivership as are indispensably necessary to the preservation of

⁹⁹ See *supra* note 96.

¹⁰⁰ (1915) 264 Mo. 693, 175 S. W. 972, three justices dissenting.

¹⁰¹ (1910) 150 Mo. App. 188, 129 S. W. 1031.

¹⁰² See *Woodill & Hulse Elec. Co. v. Young*, *supra* note 5; *Seattle v. Everett*, *supra* note 89.

¹⁰³ *Supra* note 46.

¹⁰⁴ *Supra* note 25.

¹⁰⁵ *Supra* note 63.

¹⁰⁶ *Supra* note 47.

the property as a going concern. The basis of the rule is urgent necessity. The basis of an analogous rule in admiralty law with respect to maritime liens is also urgent necessity. In either case, the rule extends no farther than the necessity demands. In our own case, therefore, the analogy to admiralty and receivership is sound only if we assume that the functions performed by means of the levy of assessments are indispensably necessary to the maintenance of the government as a going concern. From what has been said above, it is clear that no such assumption may be indulged.¹⁰⁷

A further reason for the rule last in time first in right was advanced in *Woodill & Hulse Electric Company v. Young*, decided by the California Supreme Court in 1919, which expressly followed and approved the holding of *Jaicks v. Oppenheimer*. In the *Woodill* case the court made the argument that progress in public improvements would be obstructed, if not entirely thwarted, by the delay incident to the satisfaction of earlier liens; that therefore the rule last in time first in right is necessary to avoid such a result.¹⁰⁸ This argument seems equally devoid of support. On the contrary, it would seem that the encouragement given to unsound assessment projects by the rule preferring later assessment liens to earlier ones more than overshadows any possible advantage that may be derived from allowing property which is already heavily encumbered with assessments to bear the expense of still more improvements, however necessary they may seem to be. After all, if the necessity of having more public improvements on property already encumbered with assessment liens is urgent enough, the legislature can always remedy the situation by enacting in express language that later assessment liens shall displace earlier ones.

III. THE BALAAM CASE

Coming now to the case of *Balaam v. Pacific States Savings & Loan Company*,¹⁰⁹ it is not an overstatement to say that it involves at once both the whole history of the law of assessment lien priorities and that of street improvement legislation in California.

A. Historical Derivation of Sections 23 and 66 of 1911 Act.—Under the Constitution of 1848 the legislature provided for the opening and

¹⁰⁷ *Parker-Washington Co. v. Corcoran*, *supra* note 101; *Hollenbeck v. Seattle* (1925) 136 Wash. 508, 512, 240 Pac. 916, 917-918 (quoted with approval in *Crumley, Jones & Crumley Co. v. Hermann* (1933) 249 Ky. 300, 304, 60 S. W. (2d) 618, 619); see also *Powell v. Amarillo*, *supra* note 85, and the passage from *Wood v. Brady* (1885) 68 Cal. 78, 5 Pac. 623, *aff'd*, 8 Pac. 599, quoted in the text, *infra*, p. 298 Note (1920) 68 U. of Pa. L. Rev. 72, 73.

¹⁰⁸ 180 Cal. at 673-674, 182 Pac. at 425; *cf.* *Lee v. Silva* (1925) 197 Cal. 364, 372, 240 Pac. 1015, 1018.

¹⁰⁹ (1933) 219 Cal. 612, 28 P. (2d) 1053.

improvement of streets by special statutes relating to specific cities, and before 1885 there were no general laws on the subject. These early statutes usually provided a procedure, which has been varied only in detail in later acts, whereby the city council or other legislative body initiated an improvement project by passing a resolution of intention. This was followed by a hearing at which property owners in the proposed district were given the opportunity to object to the proposed improvement and to the inclusion of their property therein. After the hearing the contracts were let and the work done. The property within the district was thereupon assessed to pay the cost thereof. The contractor was then given what was called a "warrant" entitling him to demand and receive the several amounts assessed, and the whole amount of the assessments became immediately due and payable. Provision was made for recordation of the warrant, and upon such recordation the several amounts assessed became a lien on the land within the district. It is with this lien provision that we are primarily concerned, and the history of which we must carefully trace.

The special improvement acts during the early period which require our most careful scrutiny are those relating to the City and County of San Francisco, since these acts seem to have been the basis for the general laws which followed. The lien provision seems first to have appeared in the charter provision relating to street improvements in the City and County of San Francisco, enacted in 1859,¹¹⁰ and providing:

"Every assessment and charge made and recorded according to the provisions of this article, shall be a lien upon the property, and take precedence of all other liens, prior, as well as subsequent in date, for the period of two years, unless sooner discharged;"

In 1861 a new charter provision was enacted¹¹¹ providing that from the date of the filing of the warrant:

"... the amount due shall become a lien upon the property charged therewith, which lien . . . shall take precedence of all other liens or incumbrances, on said property, and shall remain in force for two years, unless sooner paid or discharged."

It is to be noted that both of these early acts expressly made the lien created superior to private liens by providing that it should "take precedence of all other liens."¹¹² After 1862, this provision was omitted from the lien provision of the charter. In that year the lien provision was amended¹¹³ to read:

"When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portion of lots, assessed, respectively for the period of two years from the date of said recording, unless sooner discharged."

¹¹⁰ Cal. Stats. 1859, pp. 141, 145.

¹¹¹ Cal. Stats. 1861, pp. 544, 548, 549.

¹¹² See *supra* note 38.

¹¹³ Cal. Stats. 1862, pp. 391, 397, 398.

The lien provision of the San Francisco charter of 1872¹¹⁴ practically repeated the above language word for word, being:

" . . . when certified and so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged;"

The Constitution of 1879 prohibited special legislation,¹¹⁵ and in subsequent years many general laws on the subject of street opening and street improvement were enacted. The first of these, and the only one we are really concerned with at this point, was the Vrooman Act,¹¹⁶ passed in 1885. This act was substantially a reenactment of the provisions of the San Francisco charter of 1872, referred to above.¹¹⁷ The lien provision was contained in section 9 of the act, and read:

"When so recorded, the several amounts assessed shall be a lien upon the lands, lots or portions of lots assessed, respectively, for the period of two years from the date of said recording unless sooner discharged;"

It should be noted that none of the acts previously discussed provided for the issue of bonds to represent assessments. In none was the lien created given a longer or other life than two years. This naturally tended toward a speedy liquidation of assessments, and the desire arose to help the landowner—to give him more time in which to pay his assessment. Accordingly, the Street Improvement Bond Act of 1893 was passed,¹¹⁸ providing for the issue of bonds to represent assessments levied under the Vrooman Act which had gone unpaid for a specified period. The procedure was that if the city council, in undertaking an improvement under the Vrooman Act, desired that bonds be issued later, it would so declare in its resolution of intention; the proceedings would go along just as before, the assessments becoming due and payable in their entirety when the warrant was delivered to the contractor; and after remaining unpaid for a specified period, bonds were automatically issued to represent such assessments, separate bonds being issued against each parcel of land so that each bond was a lien on a single parcel of land and no other parcel.¹¹⁹ Section 4 of this act contained an entirely separate and distinct lien provision for bonds, to the effect that:

¹¹⁴ Cal. Stats. 1872, pp. 804, 814.

¹¹⁵ CAL. CONST. (1879) art. IV, §25.

¹¹⁶ Cal. Stats. 1885, pp. 147, 155.

¹¹⁷ This is recognized in *Lee v. Silva* (1925) 197 Cal. 364, 370, 240 Pac. 1015, 1017.

¹¹⁸ Cal. Stats. 1893, p. 33.

¹¹⁹ The procedure of having a separate bond issue against each separate parcel of land, introduced by this act, was also followed in later acts, including the Street Improvement Act of 1911. This is in marked contrast with the procedure followed in the other type of street improvement act, of which the Road District Improvement Act of 1907 (Cal. Stats. 1907, p. 806, CAL. GEN. LAWS, act 3276) and the Acquisition and Improvement Act of 1925 (Cal. Stats. 1925, p. 849, CAL. GEN.

"... said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid."¹²⁰

It is obvious that the above language from the 1893 Bond Act makes provision for a lien of a different character and quality than that which was provided for in section 9 of the Vrooman Act. The latter was made "a lien . . . for . . . two years," the former "a first lien" until the bond was paid.

In 1911, the legislature, desiring to clarify street improvement procedure, enacted the comprehensive Street Improvement Act of 1911.¹²¹ This act was, for the most part, simply a combination of the Vrooman Act and the Bond Act of 1893.¹²² Part I of the act is, generally speaking, a substantial reiteration of the provisions of the Vrooman Act. It relates to the proceedings had prior to the issue of bonds, *i.e.*, the initiating of the improvement, the hearing, the award of the contract, the performance of the work, the levy of the assessments, and the issue of the warrant to the contractor. Section 23 of this part of the act is identical with section 9 of the Vrooman Act, in so far as it provides that:

"When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged;"¹²³

On the other hand, part III of the 1911 Act deals exclusively with proceedings for the issue of bonds to represent assessments, and seems to be a substantial reiteration of the provisions of the Bond Act of 1893,

LAWs, act 3276a) are leading examples. The latter was repealed in 1933. Cal. Stats. 1933, c. 346. In these acts provision is made for the issue of bonds to the contractor, and only bonds—there are no cash assessments. The bonds so issued differ from those issued under the 1911 and kindred acts in that they are payable by the levy of *ad valorem* assessments on all property in the assessment district until they are paid. Thus a bond is not a lien on any particular tract of land but each tract is assessed to contribute to a fund to be used to pay all bonds, in the same manner as bonds of irrigation districts. Cal. Stats. 1897, p. 254, CAL. GEN. LAWS, act 3854. The method used under the 1907 and 1925 acts makes possible "pyramiding" of assessments (Roberts v. Richland Irr. Dist.; American Securities Co. v. Forward; Thatcher v. County of San Diego, all *supra* note 55; Municipal Improvement Co. v. Thompson (1927) 201 Cal. 629, 258 Pac. 955; O. T. Johnson Corp. v. County of Los Angeles (1932) 128 Cal. App. 440, 17 P. (2d) 792, which is not possible under those acts following the plan of the 1911 and kindred acts.

In 1931 the legislature attempted to allow Road District Act of 1907 and Acquisition and Improvement Act of 1925 bonds to be refunded into obligations of the type issued under the 1911 Act, *i.e.*, making each refunding bond a lien against one and only one specific parcel of land. Cal. Stats. 1931, p. 2339, CAL. GEN. LAWS, act 3276d (1907 Act Bonds); Cal. Stats. 1931, p. 1861, CAL. GEN. LAWS, act 3276c (1925 Act bonds). The Acquisition and Improvement Refunding Bond Act attempted to impose additional burdens on the landowners and was for this reason held void in County of San Diego v. Childs (1932) 217 Cal. 109, 17 P. (2d) 734.

¹²⁰ Cal. Stats. 1893, p. 36.

¹²¹ Cal. Stats. 1911, p. 730, CAL. GEN. LAWS, act 8199.

¹²² 19 CAL. JURIS. (1925) 363; PAGE, CALIFORNIA STREET LAWS (1911) §40.

¹²³ Cal. Stats. 1911, p. 744.

so far as the lien provision for bonds is concerned. It contains a section numbered 66 which corresponds to section 4 of the 1893 Bond Act, quoted above, and provides that:

"... said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid."¹²⁴

Here again, as was true of the Vrooman Act and the 1893 Bond Act, we note that the lien arising upon the recordation of the warrant referred to in section 23, seems to be of a different character and quality than that arising upon the issue of bonds, referred to in section 66. The former is "a lien" for two years, the latter "a first lien" until the bond is paid.

B. California Cases on Priority of Successive Assessment Liens.—

Having clearly in mind the lien provisions of the 1911 Act (sections 23 and 66) and the earlier acts from which such provisions were derived,¹²⁵ we turn now to an examination of the California cases on priorities between successive assessment liens.

The first case on this subject was *Wood v. Brady*,¹²⁶ decided in 1885, where the purchaser at a sale following foreclosure of a street assessment lien arising under the San Francisco charter of 1872 sued to enjoin the holder of an earlier street assessment lien arising under the same act from proceeding with an action to foreclose his lien on the ground that such lien had been cut off by foreclosure under the later lien. It was contended that the rule applicable to conflicting tax liens was also applicable to conflicting assessment liens. The court rejected the contention and denied the injunction, saying:

"Taxes are a public imposition, levied by authority of the government, upon the property of the citizen generally, for the purpose of carrying on the government, while the more restricted term 'assessment' is usually, as it was in the present case, induced by the request, made known according to the provisions of the charter of the municipal government, of a majority of the inhabitants of the assessment district, and is levied for the benefit of the property situated within the particular district; the assessment being an equivalent from the owner for the improvement made to the value of the property . . . The statute in the present instance does not purport

¹²⁴ Cal. Stats. 1911, p. 760.

¹²⁵ That many of the provisions of the 1911 Act are derived from the earlier improvement acts, including the San Francisco charter provisions referred to above, is the position of the California Supreme Court in *Lee v. Silva* (1925) 197 Cal. 364, 370, 240 Pac. 1015, 1017, where the court traced the history of the provision there involved back to three of the very acts reviewed above, *viz.*, the Vrooman Act, the San Francisco charter provisions of 1872 (Cal. Stats. 1872, p. 804), and those of 1862 (Cal. Stats. 1862, pp. 391, 397-398), saying that the 1911 Act, so far as the question there involved was concerned, was "but a composite reiteration and re-enactment of the earlier improvement acts." The similarity of the language of the lien provisions of all these acts leads us to believe that the provision here involved is also derived from these earlier acts.

¹²⁶ (1885) 68 Cal. 78, 5 Pac. 623, 8 Pac. 599.

to attach to the proceedings for collection the effect claimed by appellant, and there are no considerations of public policy that require that it should be given." ¹²⁷

It is to be noted that the only point held in *Wood v. Brady* was that the later assessment lien was not superior to the earlier. The case does not hold, or even intimate, that the earlier lien was superior to the later. In other words, everything that was held and everything that was said in *Wood v. Brady* is just as consistent with the equality theory as it is with the first in time theory.¹²⁸ Its only holding was as to the theory not applicable to conflicting assessment liens—not which theory was applicable.

The next case was *Brady v. Burke*,¹²⁹ decided in 1891, which involved a conflict between the holders of assessment liens arising under the same act. The holder of the lien first accruing was allowed to show that the later lien was void because of a failure to follow the procedure laid down by the charter. On appeal it was contended that this was improper, but the supreme court held otherwise. In the course of its opinion it said:

"... although the sheriff's deeds made to appellants Wood and Diggins antedated those of plaintiff, and are based upon judgments rendered prior to those under which plaintiff claims, yet, as the liens under which plaintiff's title has its origin are older than the liens to which the deeds of appellants relate, plaintiff has the superior legal title." ¹³⁰

While this statement has been said to be a dictum,¹³¹ it would seem to the writer that it was at least an alternative ground of the decision. But whether dictum or not dictum this view was thought to express the law of the state on this subject for many years.¹³²

In 1919, however, the whole question was again presented in the case of *Woodill & Hulse Electric Company v. Young*.¹³³ In that case the question of the priority of two assessment liens arising under the 1911 Act was involved. The lien earlier accruing was a bond lien while the later lien was a cash assessment lien. After a lengthy review of the whole subject, the court, without even noticing the case of *Wood v. Brady*, expressly approved and followed the view repudiated in that case, *i.e.*, that conflicting assessment liens should follow the same rules of priority as do conflicting tax liens and consequently that the later cash lien was superior to the bond lien. In reaching this conclusion the court first

¹²⁷ 68 Cal. at 80, 5 Pac. at 623, italics added.

¹²⁸ Note (1920) 5 A. L. R. 1301, 1302.

¹²⁹ (1891) 90 Cal. 1, 27 Pac. 52.

¹³⁰ 90 Cal. at 6, 27 Pac. at 53.

¹³¹ *Woodill & Hulse Elec. Co. v. Young* (1919) 180 Cal. 667, 669, 182 Pac. 422, 423.

¹³² PAGE, CALIFORNIA STREET LAWS (1911) §231.

¹³³ *Supra* note 131; see McMurray, *Review of Recent Cases* (1919) 7 CALIF. L. REV. 442, 453; (1920) 8 *ibid.* 95, 106; Notes (1921) 9 CALIF. L. REV. 244; (1920) 68 U. OF PA. L. REV. 72.

stated that the case of *Brady v. Burke* did not decide the question because the only point held therein was that the later liens were void *in toto* and that the case did not involve a determination of the rank of conflicting valid liens. Consequently the court felt free to examine the question anew.

After noting the conflicting decisions from other jurisdictions on the point the court stated that, "In spite of this conflict, . . . the underlying principles . . . are clear and lead with certainty to the conclusion that in liens of this character, imposed on property—that is, on a thing itself regardless of ownership—by public authority for a public purpose, the one last imposed is paramount."¹³⁴ There could be no question but what that conclusion stated the well-established rule as to liens for general taxes, the court reasoned, and the basis of the rule as to general taxes was that "the law for the purpose of insuring a payment required for a public purpose creates a lien for such payment, not upon any particular interest or set of interests in the property, but upon the property itself as such, so that all interests in it of every nature are made subject to the lien, with the result that although there may be no explicit statutory provision, there is implicit the rule that the tax lien shall be paramount to all other prior existing liens, even to prior existing tax liens."¹³⁵ The court concluded that the case of assessment liens "comes exactly within the foregoing principle," since it is for a public purpose and to insure its payment it is made a charge, not against any person, but against the property itself. To support its conclusion the court cited *German Savings & Loan Society v. Ramish*¹³⁶ and *Jaicks v. Oppenheimer*, both of which it quoted at great length. Thus we see that the court relies heavily upon a principle which, as noted above, has been discredited, *viz.*, that tax liens are inherently "first" liens. In so doing it completely overlooked the case of *Guinn v. McReynolds*, which held to the contrary by way of *ratio decidendi*, both as to tax and assessment liens.

It was contended that the court's holding would permit the municipality or other public authority to give one party a lien and then, without his consent and against his will, displace and perhaps destroy it by creating another lien in favor of another party.¹³⁷ In reply to this contention the court stated that it overlooked the fact that all property and every interest in property, no matter how acquired or what its origin, must be held subject to the right of subsequent taxation.

¹³⁴ 180 Cal. at 669, 182 Pac. at 423.

¹³⁵ 180 Cal. at 670, 182 Pac. at 424.

¹³⁶ (1902) 138 Cal. 120, 69 Pac. 89. That this case does not stand for any such proposition is clear. See *supra* note 78.

¹³⁷ This argument was successfully urged in *Des Moines Brick Mfg. Co. v. Smith*, *supra* note 86.

It was also contended that to hold the later lien superior would defeat the purpose of the statute by preventing contractors from taking work through fear of subsequent liens. As to this objection the court declared that it was "almost entirely fanciful;" that "The same reason would apply to any acquisition of property which could not be concealed from the taxing authorities, and as yet there has not been observed any great reluctance to purchase real estate, which cannot be so concealed, or to loan money secured by lien upon it, although it is well understood that real estate and any mortgage lien upon it may at any time be subjected to assessment for public work."¹³⁸ In further answering this objection the court noted that

"On the other hand, to hold that a street assessment lien is superior to any subsequent lien of the same character would most certainly interfere with the making of public improvements and seriously tend to frustrate the purpose of the statute. The lien of the assessment exists for two years, and if suit to foreclose is brought the lien exists until the termination of the suit . . . *If bonds are issued to represent the assessment . . . the possibility of obstructing the making of public improvements is still greater, for the life of the bonds is ten years and during this whole period any contractor doing public work payable by assessment must take a second lien.*"¹³⁹

It was next contended that the language of section 66 of the Act of 1911 to the effect that the "assessment shall be a first lien until fully paid" compelled the conclusion that the earlier assessment lien was superior. In reply to this point the court stated that if it be assumed that this section was intended to apply to conflicting assessment liens we would be faced with a dilemma, inasmuch as the language of the statute is just as applicable to an assessment for subsequent work as to the one first proposed; that the statute equally as well in the case of the second assessment as in the first, provides that the lien shall be a first lien. The only escape from this dilemma, said the court, is to conclude that the language of section 66 was not intended to apply to the case of conflicting assessment liens both arising under the statute; that "it cannot so apply, since it would make both liens, though in conflict, first liens, a manifest impossibility."¹⁴⁰ Consequently, since the statute contains

¹³⁸ 180 Cal. at 673, 182 Pac. at 425.

¹³⁹ *Ibid.* (Italics added.)

¹⁴⁰ *Ibid.* The authorities are in conflict on whether sections which purport to make tax or assessment liens "first" liens are intended to govern as between successive tax or assessment liens respectively. That such provisions indicate an intent to prefer earlier over later tax liens or earlier over later assessment liens, is the conclusion reached in *State Bank of Wellston v. Mississippi Valley Tr. Co.*, *supra* note 85; *Cowell v. Washburn* (1863) 22 Cal. 519, 522; *Des Moines Brick Mfg. Co. v. Smith*; *Charles City v. Ramsay*; *Crumley, Jones & Crumley Co. v. Hermann*, all *supra* note 86; *Anderson-Deering Co. v. City of Boone*, *supra* note 92. That such a provision operates to prefer the later to the earlier lien is the conclusion reached in *Burke v. Lukens*, *supra* note 86; *Citizens' Tr. & Sav. Bank v. Fletcher American Co.*, *supra* note 88; and *Balaam v. Pacific States Savings & Loan Co.*, *supra* note 1.

nothing concerning such conflicting liens the case must be determined by the general principle applicable to conflicting assessment liens, set forth in the earlier part of the opinion. It is to be noted that in the above argument on the interpretation of section 66 the court assumed, contrary to the fact, that both of the liens involved in the case were expressly made "first" liens by the statute. As a matter of fact, as noted above, the later lien was a cash assessment lien;¹⁴¹ and as to such lien section 66 had no application, the applicable section being section 23 which provided only that the cash assessment shall be "a lien" and not "a first lien." Consequently, as far as the language of the statute was concerned, there was no dilemma, since only one of the liens before the court was by the statute expressly made a "first" lien. However, since the court did decide the case on the erroneous assumption that both of the liens involved were expressly made "first liens," the case is persuasive authority for a case involving successive bond liens. In the following year just such a case arose.

In *Barber Asphalt Paving Company v. Armstrong*,¹⁴² decided by the district court of appeal in 1920, it was held that as between two bonds each issued under the Street Improvement Bond Act of 1893 to represent assessments levied under the Vrooman Act, the bond later issued was superior. Since, as noted above, the Street Improvement Act of 1911 is practically only a combination of the Vrooman Act and the Street Improvement Bond Act of 1893, the lien provisions being practically identical, the *Armstrong* case directly involved what the supreme court erroneously thought was involved in the *Woodill* case, *i.e.*, two conflicting bond liens each of which was made a "first lien" by statute. The

That such provisions operate to make all liens of the same character equal is the conclusion of *McNear v. Little Red River Dr. Dist.*; *Board of Comm'rs of McKinney Bayou Dr. Dist. v. Board of Dir. of Garland Levee Dist.*, both *supra* note 85; *Allison Realty Co. v. Graves Inv. Co.*, *supra* note 42; *Board of Comm'rs v. State* (1926) 125 Okl. 287, 257 Pac. 778, 53 A.L.R. 1128; *Hollenbeck v. Seattle*, *supra* note 107. That such provisions do not and were not intended to govern the priority of successive tax or successive assessment liens—the conclusion reached in the *Woodill* case, and, it is submitted, the only sound conclusion that can be reached—is the holding of *Smith v. Specht* (1899) 58 N. J. Eq. 47, 42 Atl. 599; *cf. Herbert C. Heller & Co., Inc. v. Duncan*, *supra* note 92.

It is held in *In re Mt. Jessup Coal Co.*, *supra* note 41, that where tax liens are expressly made "first" liens by different statutes, the lien given by the statute last enacted is superior, the theory being that such statute impliedly repeals the earlier statute.

¹⁴¹ It does not clearly appear from the opinion of the court in the *Woodill* case that the plaintiff's lien was a cash assessment lien. That such was the fact, however, is made clear by examining the transcript and briefs in the case. See Appellants Opening Brief, p. 4; Brief of Gray and Ellis as *Amici Curiae*, p. 2.

¹⁴² (1920) 48 Cal. App. 70, 191 Pac. 954, stating that since the *Woodill* case the question "may therefore be deemed settled."

district court of appeal did not recognize any distinction between the two cases, however, and regarded the *Woodill* case as clearly controlling.

C. 1921 Amendment to Section 23 of 1911 Act.—The *Woodill* and *Armstrong* cases seemed to clarify and settle the law of this state relating to assessment lien priorities. But the law was not destined to remain in that state for very long—at least not with respect to assessment liens levied under the various street improvement acts then existing, which were, of course, by far the most numerous of all assessment liens. In 1921 the legislature decided to inject itself into the controversy and accordingly passed laws¹⁴³ amending the three most important street improvement acts, *i.e.*, the Vrooman Act, the Street Improvement Act of 1911, and the Street Improvement Act of 1913¹⁴⁴—all in exactly the same way. With respect to each of these acts there was added to the respective sections providing for the creation of a lien upon the recordation of the warrant (section 9 of the Vrooman Act, section 23 of the 1911 Act, and section 12 of the Street Improvement Act of 1913) the following language:

“Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property;”¹⁴⁵

It should be noted, however, that although all three of these acts contained separate provisions dealing with “liens” of assessments represented by bonds,¹⁴⁶ none of these provisions was altered in any way by the 1921 legislature.

Whether the 1921 amendment to section 23 of the 1911 Act was applicable to liens represented by bonds issued under the provisions of part III of that act was the only question before the court in *Balaam v. Pacific States Savings & Loan Company*.¹⁴⁷ That case involved the

¹⁴³ Section 23 of the 1911 Act was amended by Cal. Stats. 1921, p. 292; section 9 of the Vrooman Act by Cal Stats. 1921, p. 551; and section 12 of the 1913 Act by Cal. Stats. 1921, p. 268.

¹⁴⁴ Cal. Stats. 1913, p. 954, CAL. GEN. LAWS, act 8205, superseding the Street Improvement Act of 1909 (Cal. Stats. 1909, p. 1042) which it repealed. See 19 CAL. JURIS. (1925) 158, 159.

¹⁴⁵ The 1921 amendments to section 23 of the 1911 Act and to section 9 of the Vrooman Act are identical. The amendment to section 12 of the 1913 act is practically identical, the only difference being that the words “same” and “said” are interchanged—probably a legislative slip.

¹⁴⁶ Section 66 of the 1911 Act; section 4 of the 1893 Bond Act (for assessments levied under the Vrooman Act), quoted in the text, *supra* p. 297; and section 28 of the 1913 Act which reads: “The amount due upon any such bond shall be a lien upon the lot described in such bond superior to all other liens, charges and encumbrances, except the liens of prior assessment and of municipal, state and county taxes.”

¹⁴⁷ *Supra* note 109. In this case the plaintiff sued to foreclose his bond, which had been issued October 3, 1925, under the 1911 Act. Subsequently, the defendant brought a cross-action to foreclose its bond issued October 29, 1926, under the

question of whether a bond assessment lien accruing in 1925 had superiority over a bond assessment lien accruing in 1926. The solution of the above question depended solely on whether the "lien" referred to in section 23 of the 1911 Act was the same lien as was referred to in section 66 of that act, since the 1921 amendment purported to apply only to the lien referred to in section 23. If it was, it followed that the 1921 amendment applied to assessments represented by bonds; if not, said amendment did not apply, the rule of the *Woodill* case did apply, and the later lien would be superior.

That the latter was the correct interpretation is clearly indicated by the following considerations:

(1) The lien referred to in section 23 is subordinate to previous private liens—it being made simply a lien,—while that referred to in section 66, by virtue of the use of the word "first" and the language making it a lien until the bond is paid,¹⁴⁸ is superior thereto. This follows because: (a) The use of express language making the lien referred to in section 66 superior to private liens, as contradistinguished with the absence of such language in section 23, shows the legislative intent to be such, as was expressly held in similar situations in *Bibbins v. Clark*¹⁴⁹ and *Miller v. Anderson*,¹⁵⁰ discussed above. (b) The legislative history of section 23 of the act, discussed above, shows that the statutes from which it was derived (*i.e.*, the charter provisions of the City and County of San Francisco) originally contained language expressly making the lien superior to private liens, but that such language was later stricken out, thereby indicating a legislative intention that

same act. The trial court held that the plaintiff's lien was superior, and ordered it first satisfied out of the proceeds of the sale. The district court of appeal affirmed. (1932) 71 Cal. App. Dec. 239, 15 P. (2d) 186. The latter court held the various provisions of the act all pointed to the conclusion that there was but one lien created by the act and that arose upon the recordation of the warrant, the bond simply representing the assessment created by section 23 and creating no new lien or obligation.

¹⁴⁸ See *supra* note 38.

¹⁴⁹ (1894) 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278, where a statute provided that real property taxes should be "a perpetual lien against all persons" on the land, whereas on the other hand it provided that personal property taxes should be simply "a lien" upon land, the court holding that the omission of the words "perpetual . . . against all persons" clearly and unequivocally showed the legislative intention to be that the personal property tax lien had no priority over private liens. This point of the *Bibbins* case is approved by the California Supreme Court in *California Loan & Tr. Co. v. Weiss* (1897) 118 Cal. 489, 494-495, 50 Pac. 697, 699-700.

¹⁵⁰ (1891) 15 S. D. 539, 47 N. W. 957, involving a statute identical with that considered in *Bibbins v. Clark*, *supra* note 149. But see *In re Dancy Dr. Dist.* (1926) 190 Wis. 327, 334, 208 N. W. 479, 482.

such lien should not be so superior.¹⁵¹ (c) The lien referred to in section 23 is merely declared to be a "lien," without more, and by the decision in *Guinn v. McReynolds* such language is not sufficient to give the lien superiority over previous private liens, and it is therefore subordinate thereto. On the other hand, the lien referred to in section 66 is expressly made superior to private liens, as just noted. From these considerations it follows that one lien is subordinate to previous private liens while the other is superior thereto, indicating that they are not the same liens, but separate and distinct liens.

(2) The only words in section 23 which could be regarded as creating a lien are the words "shall be" appearing in the clause "the several amounts assessed 'shall be' a lien." But the same creative words "shall be" are used in section 66 in the clause "said assessment 'shall be' a first lien." If such words are sufficient to create a lien when used in section 23, as cannot be disputed, they must necessarily be sufficient to create a lien when used in section 66. Furthermore, the words "shall be" are almost invariably used to indicate the creation of a lien.¹⁵² It follows that separate and distinct liens were created.

(3) The decision of the California Supreme Court in *German Savings & Loan Society v. Ramish*¹⁵³ expressly recognizes that the liens are separate and distinct.

¹⁵¹ The rule is well established that in ascertaining the purpose and intent of the legislature, "the source in previous legislation of the particular provision in question" may be examined. *United States v. Katz* (1926) 271 U. S. 354, 357; 59 C. J. (1932) 1047. As a matter of fact, the California Supreme Court in *Lee v. Silva* traced a provision of the 1911 Act to the very acts which are here invoked. See *supra* note 125.

¹⁵² The Federal Revenue Acts provide that the amount of any tax levied thereunder "shall be" a lien. Revenue Act of 1928, §613(a); Revenue Act of 1932, §809(a); 26 U. S. C. A. (1926) §115. The same is true of the California Street Improvement Acts. See Appellants' Opening Brief in the Balaam case, pp. 38-39. All of these acts use the words "shall be" to indicate the creation of the lien. See Appellants' Reply Brief in the Balaam case, pp. 55-57.

¹⁵³ (1902) 138 Cal. 120, 124-125, 69 Pac. 89, 91, where, in holding a lien arising under the 1893 Bond Act, which was expressly made a "first" lien by that act, was superior to an earlier mortgage, the court very clearly pointed out that its decision was confined to "the bond lien" and that "*The view we take of the statute makes it unnecessary to inquire as to the effect of the lien which attaches upon the recording of the warrant.*" (Italics added.) This language is again quoted with approval in the Woodill case, 180 Cal. at 671, 182 Pac. at 424. Thus we find a clear recognition, in both the Ramish and Woodill cases, that the bond lien is separate and distinct from "the lien which attaches upon the recording of the warrant," applying a rule of priority as to previous mortgages as to one, and at the same time declaring that such rule is not necessarily applicable to the other. It would be difficult to find a clearer or more unequivocal recognition of the separate existence and difference in priority between the two liens. The fact that the case arose under the 1893 Bond Act is certainly immaterial, for the pertinent and corresponding provisions of the 1911 Act are practically identical, as noted above, the latter Act being simply a combination of the Vrooman Act and the 1893 Bond Act. See *supra* note 122; *United Real Estate & Tr. Co. v. Barnes* (1911) 159 Cal. 242, 244, 113 Pac. 167, 168; *Thompson v. Hance* (1917) 174 Cal. 572, 575-576, 163 Pac. 1021, 1022; *Blake v. Eureka* (1927) 201 Cal. 643, 649, 258 Pac. 945, 948; *Noyes v. De Golyer* (1927) 202 Cal. 542, 261 Pac. 1006.

Additional evidence of the legislative intent, noted in the margin, also supports the view that the 1921 amendment to section 23 was not intended to apply to liens of assessments represented by bonds.¹⁵⁴

¹⁵⁴The statute, as well as other statutes *in pari materia*, fairly abounds with "tokens" of intention (see Cardozo, J., in *Norwegian Nitrogen Products Co. v. United States* (1933) 288 U. S. 294, 319) of the legislature. Thus: (1) Section 27 of the 1911 Act as it existed in 1925 refers to a "lien" which could not possibly be a bond lien, since the section authorizes the contractor to sue the landowner after 35 days from the issue of the warrant, "or any day thereafter during the continuance of the lien of said assessment"—a clear recognition that more than one lien is created by the act. (2) The very fact that a separate and distinct provision is made for liens of assessments represented by bonds indicates that two separate and distinct liens are referred to in the act, for if the legislature had intended the same lien to be applicable both to bonds and cash assessments, it would have enacted but a single "lien" provision and expressly made it applicable to both, as it did in the Local Improvement Act of 1901, section 8 of which provides: "All special assessments levied under the provisions of this Act shall . . . be a lien . . . paramount to all other liens, except prior assessments and general taxes." As noted above, this act provides for both cash and bond assessments. (3) The provision in section 23, as it read prior to 1927, that the lien therein referred to shall exist for two years (stricken out by Cal. Stats. 1927, p. 1407) in contradistinction to the provision in section 66 that the lien therein referred to shall exist, not for a period of two years, but until the bond is paid, which may be as long as nine years, indicates two separate and distinct liens. The contention of respondent that section 66 merely operated to "extend" the lien referred to in section 23 and was the same lien seems untenable, for (a) words of extension are entirely lacking, all we have being words of creation (*i.e.*, "shall be," as noted above) and accordingly if an "extension" is to be made it must be done by construction or implication. But it is settled that a tax lien may not be extended by construction or implication. *Bibbins v. Clark*, *supra* note 149; *Brady v. Burke*, *supra* note 129; *Creech v. David* (1932) 19 La. App. 301, 306, 140 So. 265, 267; *J. I. Case Threshing Mach. Co. v. Bentson* (1930) 57 S. D. 244, 231 N. W. 948; *Lobban v. State* (1901) 9 Wyo. 377, 64 Pac. 82; 61 C. J. (1933) 914; (b) the section (66) does not say that assessments represented by bonds shall be a first lien *after* two years from the recordation of the warrant, which it certainly would have done had an extension been intended, but simply said that any bond assessment at any time, whether before or after two years from the date of recordation of the assessment "shall be" a first lien. The provisions seem clearly to indicate an intention to substitute one lien for the other. (4) A consideration of the Improvement Act of 1913, an act *in pari materia*, shows that the same language as was added to the warrant section of the 1911 Act (§ 23) in 1921 was in the same year also added to the warrant section of the 1913 Act (§ 12); that said language so added to the 1913 Act could not have been intended to apply to liens of assessments represented by bonds, since the act already contained a provision (§ 28) corresponding to section 66 of the 1911 Act which provided that such liens should be superior to all other liens "except the liens of prior assessments." The effect of this exception was either to make the earlier assessment lien equal (*La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornheck* (1932) 216 Cal. 730, 17 P. (2d) 143) or to make it superior thereto. *In re Dancy Dr. Dist.* (1926) 190 Wis. 327, 208 N. W. 479. But whatever its effect, there can be no question but that the presence of such exception precludes the claim that the 1921 amendment to section 12 of the 1913 Act was intended to apply to liens of assessments represented by bonds, and since it was not intended so to apply when used in the warrant section of the 1913 Act, neither was it intended so to apply when used in that of the 1911 Act, for the rule is well established that the meaning of doubtful words in one statute may be determined by

As against the above considerations, the following points were urged by the district court of appeal in support of a contrary construction: (1) It was claimed that the bond "represented" or stood in place of the assessment and created no new debt or obligation but simply gave the landowner additional time within which to meet the obligation of the assessment; that therefore, since there was but one assessment there must have been but one lien.¹⁵⁵ But this argument overlooks the fact that it is a "lien" and not an "assessment," "debt" or "obligation" which is given the priority mentioned in the 1921 amendment to section 23, and the fact that there is but one assessment does not mean that there is but one lien, for the assessment is not in and of itself a lien, but is a lien only if and so far as statutes expressly make it a lien.¹⁵⁶ Furthermore, there is no logical or other reason why the same assessment or obligation might not have applicable to it at one time a "lien" which is an entirely separate, distinct, and different lien from a lien applicable to it at a different date. This simply means that one lien is substituted for another previously existing one. (2) The next point urged was that undesirable confusion would result if a different rule of priority were applicable to successive bond liens than was applicable to successive cash liens. But since, as noted above, the 1911 Act expressly provides that the bond lien shall be superior and the cash lien subordinate to earlier private liens, there is certainly no greater confusion here than exists with respect to private liens—a confusion which was expressly sanctioned by the legislature. (3) It was then urged that any other construction would increase the cost of public improvements by causing contractors to bid a larger amount for doing public work in fear of having their liens displaced by later assessment liens. But this argument is simply a restatement of the point made in the *Woodill* case and rejected therein as being "almost entirely fanciful."¹⁵⁷

their meaning in other statutes where the same words are used in a more obvious sense. See particularly *Murphy v. San Luis Obispo* (1898) 119 Cal. 624, 629-630, 51 Pac. 1085, 1087; see also *Rowland v. Deck* (1921) 108 Kan. 440, 446, 195 Pac. 868, 871; 59 C. J. (1932) 1042-1049; BLACK, *INTERPRETATION OF LAWS* (2d ed. 1911) 346.

¹⁵⁵ In support of this conclusion the court relied on: (1) language in *German Sav. & Loan Soc. v. Ramish*, *supra* note 153, and *Cohn v. Federal Constr. Co.* (1915) 171 Cal. 547, 153 Pac. 916, pointing to the obvious fact that the purpose of the bond is simply to give the landowner more time in which to pay his assessment; (2) the frequent use of language that the bond "represents" the assessment; (3) that whether bonds are or are not issued, the record in the office of the superintendent of streets continues at all times to be the record upon which payments may be shown in order to discharge the lien of the assessment.

¹⁵⁶ 4 DILLON, *MUNICIPAL CORPORATIONS* (5th ed. 1911) § 1420; 2 PAGE & JONES, *TAXATION BY ASSESSMENT* (1909) § 1050. See analogous rule as to taxes, *supra* note 14.

¹⁵⁷ The point was made on petition for rehearing in the supreme court that the rule adopted by the court would (1) violate a rule of property or a well-established rule of practice, and (2) practically put a stop to public improvements inasmuch

Accordingly, it would seem that bond liens remained unaffected by the 1921 amendment to section 23 of the act, and that the rule of the *Woodill* case was applicable to the liens involved in the *Balaam* case, unless the court should decide that the *Woodill* case was itself wrong, and should be overruled.

In this connection, however, it should be noted that no attack upon the holding of the *Woodill* case was made by either side in the *Balaam* case.¹⁵⁸ Both sides conceded that it was sound and that its rule was applicable to the liens involved therein unless the 1921 amendment to section 23 required a different conclusion. The supreme court, after due consideration, found that said amendment did not require a different conclusion, that the rule established in the *Woodill* case was applicable and that the later lien was superior.

After referring to numerous incidents of the lien referred to in section 23 which are not possessed by that referred to in section 66 and *vice versa*,¹⁵⁹ which incidents seem not at all determinative of the question whether two separate and distinct liens are or are not created by these two sections, the court reasons that where bonds are to be issued the council must so declare at the commencement of the proceedings, in which event no liability to pay the assessment accrues, and no lien attaches, on the recordation of the warrant, but a lien arises only on the issue of bonds.¹⁶⁰ This line of reasoning seems flatly contradictory

as contractors would refrain from bidding on public works if they knew that their liens would be displaced by later liens. Clearly objection (1) was untenable, for rules of property, so called, are based upon judicial precedents (*Sacramento Bank v. Alcorn* (1898) 121 Cal. 379, 53 Pac. 813; *Hawks v. Hamill* (1933) 288 U. S. 52, at 58), and there have been no decisions construing the 1921 amendment to section 23. Nor was any well-established rule of practice made out, since the asserted rule was based upon nothing more than the unsupported categorical statements of counsel that such rule existed, no evidence having been introduced at the trial in support of such statements. Objection (2) was simply a reiteration of that urged in the *Woodill* case, which was there held to be "almost entirely fanciful."

¹⁵⁸ Appellants' Opening Brief, p. 5; 219 Cal. at 615, 28 P. (2d) at 1054.

¹⁵⁹ The supreme court pointed out: (1) that section 23 was found in part I which deals entirely with assessments for street improvements where the work is to be paid for in cash, whereas, on the other hand, section 66 is found in part III, which deals primarily with proceedings in which the assessments are payable in bonds, and not cash; (2) that the lien given in section 23 exists only for two years, is enforceable by action in court at any time after final delivery to the contractor and within two years thereafter, and does not run in favor of the holder of any bond but is evidenced by the assessment on file with the superintendent of streets, whereas the lien referred to in section 66 exists for a period not to exceed nine years, in which event the assessment "shall be a first lien," is evidenced by a bond, and is enforceable either by summary sale or foreclosure. 219 Cal. at 616, 28 P. (2d) at 1055.

¹⁶⁰ 219 Cal. at 616-617, 28 P. (2d) at 1055. The correct analysis seems to be that even where bonds are to issue the warrant and cash assessment issue as in other cases and the two year "lien" attaches, but that upon the issue of bonds such two year lien is displaced and a separate and distinct "first" lien substituted by section 66, each lien being applicable to the same assessment at different times.

to the express words of the act, which seem clearly to provide that the liability to pay the assessment and the two year lien referred to in section 23 attaches whether or not bonds are later to be issued. Furthermore, it seems inconsistent with section 62 of the act providing that after 30 days from the issue of the warrant the street superintendent shall certify to the city treasurer a complete list of all unpaid assessments. There is no reason for this 30 day period except as a period of grace, and it indicates that the liability to pay the assessment accrues before the bond is issued. The argument is also inconsistent with section 65 of the act which gives the owner the option to stop the issue of bonds. If he exercises such option, it is inconceivable that the legislature did not intend the lien and enforcement provisions of part I of the act to apply to such assessments.

In answer to the contention that section 66 merely continues and extends the lien created in section 23 of the act the court replied that "there is not one word to be found in the act which supports such a statement." By section 23, said the court, the precise words used are that the several amounts assessed "shall be" a lien upon the lands, and these words must be conceded to be sufficient to create a lien since they are the only words in section 23 which could be construed as "creating" a lien. But, noted the court, the same creative words "shall be a lien" also appear in section 66 and if such words created a lien by their use in section 23, it must follow that they created another separate and distinct lien when used in section 66. This argument seems unanswerable, especially in view of the fact that the words "shall be" are almost universally the only words used by legislatures to indicate the creation of a lien, as noted above.

It was next contended that the lien was given in each case to secure the assessment and not the bond. The court doubted this in view of the language of section 66, *viz.*, that "said assessment shall be a first lien . . . until a bond issue for the payment thereof . . . shall be fully paid," saying that the words "for the payment thereof" strongly indicate that the assessment was paid and discharged and no longer in existence.¹⁶¹ It is difficult to see how the language "for the payment thereof" can overcome or overshadow the fact that it is the assessment and not the bond which purports to be made a first lien. If the court had based its decision on this point one would find it difficult to avoid charging it with the very thing disclaimed by it later on in the opinion, *viz.*, judicial legislation. However, the court declared that it was immaterial whether the lien was given the assessment or the bond, since in any event this did not detract in any way from the conclusion that there were two separate and distinct liens created; that "Where the assessment

¹⁶¹ 219 Cal. at 618-619, 28 P. (2d) at 1055-56.

is the result of proceedings carried forward under part I of the Act, it is secured by a lien in accordance with the terms of section 23 of the Act. But when the assessment results from proceedings carried forward under part III of the Act the lien securing the same is that given by section 66 of the Act."¹⁶²

In reply to the contention that the legislature must have intended the 1921 amendment to apply to liens of bonds the court made the point that section 23 is barely mentioned in the *Woodill* case while section 66 is set forth in full "and is made the real basis of the decision."¹⁶³ This point is sound only if understood as meaning that since section 66 was discussed so much more fully in the opinion than was section 23, which was barely mentioned, if the legislature had desired to change the rule of the *Woodill* case as to bonds it would have amended section 66 rather than section 23. As we have seen above, it is obviously not true that section 66 was "the real basis of the decision" in the *Woodill* case. What the court did say in the *Woodill* case was that section 66 contained *nothing* with respect to conflicting assessment liens on the same property, and it was therefore necessary to decide the case according to the general principle applicable to conflicting assessment liens in the absence of an express statutory provision governing their priority.

The court in the *Balaam* case next declared that there is ample reason why the legislature may have desired to leave bonds unaffected by the 1921 amendment,—that:

"It is apparent that the rule making liens for street improvements superior to any subsequent liens of the same character would have a tendency to interfere with future public improvements, and might result in the cessation of all further improvements of the street thereby affected until the improvements already made were fully paid. The Legislature might have considered that a cessation of public improvement for a period of two years, the life of the lien under section 23, would not seriously hamper a community in its efforts to promote public improvements. On the other hand, the lien given under section 66 as we have seen is made to continue for a possible term of 9 years. If this lien is made prior and superior to all other liens of the same character subsequently imposed upon the same property, then we have a situation which practically puts a stop to public improvements for a long period of years, for few contractors would want to bid upon the work of an improvement when the property sought to be improved was already encumbered by prior liens. They would either refuse outright, or, if they submitted a bid it would be in many cases at so high a figure as to make the improvement too costly and burdensome for the property owner to bear."¹⁶⁴

This point is obviously correct and in exact accord with the language of the *Woodill* case itself, noted above,¹⁶⁵ which clearly recognized that the evils of a rule preferring earlier to later assessment liens were much

¹⁶² *Ibid.*

¹⁶³ 219 Cal. at 620, 28 P. (2d) at 1056.

¹⁶⁴ *Ibid.*

¹⁶⁵ See text, *supra*, p. 301.

greater in cases where bonds were issued under the 1911 Act than in those involving only cash assessments.

The court concludes that

"whatever reason may have prompted the Legislature to amend section 23 and to leave section 66 intact, the fact remains that that is just what the Legislature did. We are satisfied that this was designedly done. To hold now with respondent and decree his lien superior to that of appellant would virtually be an act of legislation on the part of this court, a course which we have neither the power nor the inclination to pursue."¹⁶⁶

From what has been said above, it is clear that the decision in the *Balaam* case is supportable on at least some of the grounds given by the court. It is also supported by many other arguments not used by the court, noted above. The *Balaam* case was recently followed and extended by the California Supreme Court in *Conley v. Hawley*,¹⁶⁷ where it was held that as between two bonds issued pursuant to the Street Bond Act of 1893, the lien of the bond later issued was superior.

What, then, of the charges of Mr. Burke, referred to at the commencement of this article? We see that the claim that the decision means "substantially the same in street bond law as a holding that a second trust deed is superior to a first trust deed would mean in realty loan law" is wholly without foundation; that far from being a radical or revolutionary holding, it is the only conclusion that properly could have been reached by the supreme court; that the decision disturbs no rule of property since no case had ever previously construed the 1921 amendment to section 23; and that the charge that the rule therein established would put a stop to public improvements because contractors would refrain from bidding on public works is one already expressly held by the supreme court to be "almost entirely fanciful" and one which, even if correct, would go to the soundness not of the *Balaam* case but to that of the *Woodill* case, which, as noted above, was not questioned by either side in the *Balaam* case (nor is it questioned by Mr. Burke) but was conceded to be correctly decided. It would seem, therefore, that the decision furnishes no occasion for either surprise or shock.

It is to be regretted, however, that no attempt was made in the *Balaam* case to persuade the court to follow the equality rule and to abandon the rule of the *Woodill* case, which, as noted above, is based on premises which are highly questionable. The fact that the Supreme Court of Washington, after following the principle of the *Woodill* case,¹⁶⁸ repudiated it two years later¹⁶⁹ would seem to indicate that such a contention might have been successfully maintained.

SAN FRANCISCO, CALIFORNIA.

J. C. Peppin.

¹⁶⁶ 219 Cal. at 621, 28 P. (2d) at 1057.

¹⁶⁷ (1934) 88 Cal. Dec. 466, 38 P. (2d) 408.

¹⁶⁸ *Seattle v. Everett*, *supra* note 89.

¹⁶⁹ *Hollenbeck v. Seattle*, *supra* note 90.