

1968

## Great States Life Insurance Company v. Toledo Metal Arts, Aka Toledo Metal Arts, Inc., et al : Respondent's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

GREAT STATES LIFE INSUR-  
ANCE COMPANY, a corporation,  
*Plaintiff and Respondent,*

— vs. —

TOLEDO METAL ARTS, a Utah  
corporation, aka TOLEDO  
METAL ARTS, INC., et al,  
*Defendants.*

Case  
No. 11274

• • • • •  
UTAH STATE TAX COMMISSION,  
*Defendant and Appellant.*

## RESPONDENT'S BRIEF

Appeal From the Judgment of the  
Third District Court for Salt Lake County  
HONORABLE MERRILL C. FAUX, Judge

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LED

NOV 11 1908

Supreme Court, Utah

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\* \* \* \*

UTAH STATE TAX COMMISSION,  
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## RESPONDENT'S BRIEF

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### STATEMENT OF THE NATURE OF THE CASE

Appellant's Statement fairly states the case, except, that Appellant errs in referring to the Commission as the holder of judgments. The Commission had no judgments. The Commission had only and nothing more than "Warrants" filed. The "Warrants" were inchoate.

## DISPOSITION IN LOWER COURT

Plaintiff and Respondent Great States Life Insurance Co. was awarded judgment, in its mortgage foreclosure action, constituting a first, paramount and prior lien on the real property being foreclosed. The Commission received judgment, "by reason of tax Warrants for delinquency" constituting a priority junior to Plaintiff.

## STATEMENT OF FACTS

Appellant's statement of facts are fairly stated except that Appellant errs in referring to the Commission as the holder of a judgment lien; and errs in stating that a "Warrant" has the force and effect of a judgment; and errs in implying that the word "judgment" is contained in Utah Code Annotated, Sec. 59-14-71 (3) (e), being the Section the Commission relies upon.

The Commission assesses a tax delinquency and if the assessment is not satisfied then a "Warrant" is later filed with the County Recorder to establish a priority date for a lien. Utah District Courts have consistently recognized the "Warrant" filing date as the date for establishing a lien for priority purposes. In many cases where District Courts have awarded absolute priority to the "Warrant," except for federal tax liens, the amounts of the Warrants were small, therefore, the first priority holder paid off the "Warrant" to the Commission rather than defend a costly appeal.

The assessment and amount remains "hidden" from public knowledge until the "Warrant" is filed showing the taxable amount due with the taxpayer's name.

## ARGUMENT

### POINT I

THE TRIAL COURT DID NOT ERR IN GIVING PLAINTIFF JUDGMENT WITH A FIRST PRIORITY, WITH THE COMMISSION A JUNIOR PRIORITY, IN THIS REAL ESTATE MORTGAGE FORECLOSURE ACTION BY PLAINTIFF.

On September 18, 1963, Plaintiff received a Note Obligation from Toledo Metal Arts, Inc., in the principal amount of \$43,000.00 and as security a real estate Mortgage. The County Recorder recorded the mortgage on September 19, 1963. The public recording created a first, paramount, prior and subsisting lien, on the real property, in favor of Plaintiff. Sec. 57-3-2 U.C.A.

Thereafter the Commission privately assessed the taxpayer and was unable to collect the money and then recorded "Warrants" on October 19, 1965 in the amount of \$266.47 and on January 14, 1966, in the amount of \$265.43, these being the effective public dates for establishing an obligation unto the Commission.

The "Warrants" were *unenforceable* until the trial court pronounced judgment. As the Utah Supreme Court said in *In Re Capitol Cleaners & Dyers, Inc. v. Capitol Cleaners et al*, 120 Utah 285, 233 P.2d 377:

“A tax obligation which is given the effect of a judgment is not a judgment as that term is used. It cannot be sued on in another state. The effect of a judgment is that it is a final determination of amount and nature of the obligation imposed and that it is a lien against the judgment debtor’s real estate in the county where docketed.”

The *private* “assessment” by the Commission is in-choate. A taxpayer in a court defending against the recorded “Warrant” may defeat the “Warrant” and the amount thereof. Therefore, the “Warrant” is “in-choate” until reduced to a court judgment. “As for a lien created by state law, its priority depends on the time it attaches to the property and becomes choate,” *U. S. v. Pioneer American Insurance Co.*, 374 U.S. 84. Liens are perfected in the sense that there is nothing more to be done to have a choate lien, *U. S. v. New Britain*, 347 U. S. 81.

The Legislature intended Sec. 59-14-71(3)(e) U.C.A. to provide an *obligation* unto and for the Commission, effective on the date the “Warrant” is publicly recorded in the County Recorder’s Office. The “Warrant” amount is perfected when it becomes a court judgment.

The legislature did not intend in Sec. 59-14-71(3)(e). U.C.A. to tell the Courts to allow “Warrants” recorded in 1965 and 1966 to be prior and superior to the recorded mortgage of 1963. Appellant argues otherwise which is unthinkable, unreasonable and unjust, and unconstitutional as to the interests of Respondent.



We firmly believe that for Sec. 59-14-71(3)(c) U.C.A. to be constitutional, the amount of the proposed assessment against the taxpayer, by the Commission, should be identified in a "Warrant" and the "Warrant" publicly recorded with the County Recorder with the docket date being the effective lien date for priority purposes. Otherwise this Section would be unconstitutional as to plaintiff;

(No person shall be deprived of life, liberty or property without due process of Law, Utah Const. Art 1, Sec. 7; U. S. Constitution 5th and 14th Amendments.)

To allow appellant to prevail in this case would do violence to *every* financial transaction in Utah. Abstracts and title searches for *loan purposes* would be untrue and uninsurable if a later recorded "Warrant" were allowed a first priority over a prior recorded mortgage.

The 4th Circuit in 1966 in *U. S. v. Clover Spinning Mills Co., S. C. Tax Commission, etc.*, 373 F. 2d 274 said, "A careful reading of the state statutes does not indicate an intent to create a "trust" for the benefit of the state in other property of an employer who fails to perform his withholding obligation."

In the present case, whatever might have been the result had the Commission been able to point to any fund actually withheld by the employer-taxpayer for the taxes here in question, no such fund existed in the taxpayer's hands, and in the absence of any *res*, no "trust" existed, that was depleted by taxpayer, which could defeat the first security interest of the plaintiff.

Sec. 59-14-71(3)(e) U.C.A. was not intended to give the Tax Commission a comprehensive *secret lien* relating back for priority and distribution purposes ahead of the plaintiff's mortgage.

At the time plaintiff acquired an equitable and vested *first security* interest in the real property by his recorded mortgage of September 19, 1963, there was no money due, owing and payable by the taxpayer to the Commission and the Tax Commission had not assessed any amount due by the Taxpayer. The *obligations* to the Commission, by the Taxpayer, came into public existence by the recording of "Warrants" on October 19, 1965, and January 14, 1966.

The effective dates of the *obligations* ("Warrants") being in 1965 and 1966 cannot relate back to become effective prior to the Mortgage recorded in 1963. If this were now declared to be the law of this case it would deprive plaintiff of his property (Equitable Title) without due process of law. Chaos with confusion would ensnare the financial industry of this State.

## POINT II AND POINT III

THE TAX OBLIGATION MUST BE PERFECTED INTO A LIEN AND ONCE PERFECTED THE LIEN DATE TAKES ITS PLACE IN THE FIRST IN TIME IS FIRST IN RIGHT CATEGORY FOR PRIORITY PURPOSES IN DISTRIBUTION.

"First in time is first in right" was declared in *New Britain*, supra. Also the "*Federal Tax Lien Act*" of

1966" (PL 87-719) furthered this policy and established some super priorities. Plaintiff is squarely within the "first in time is first in right" policy. Plaintiff could and did rely upon the *notice* of the public records and the provisions of Sec. 57-3-2 U.C.A., that it had a first priority and secured position with its recorded mortgage in 1963. See *Western Mortgage Loan Corp. v. Cottonwood Const. Co.*, 424 P.2d 437 for public notice, recorded vs. unrecorded interests and "first in time is first in right" theory by the Utah Supreme Court.

The legislature did not intend Sec. 59-14-71(3)(e) U.C.A. to be self-serving and automatic. Something more must be done by the Commission to perfect a lien. An example is the Wisconsin Industrial Commission Statute. There, Sec. 108.22(2) Stats., provides that the amount due the Commission is to be determined by an administrative proceeding pursuant to Sec. 108, 10 Stats. Once this amount is determined, Sec. 108.22(2) specifies that:

"The clerk shall enter in the judgment docket the name of the employer mentioned in the Warrant and the amount of the contributions, interest, costs and other fees for which the warrant is issued and the date when such copy is filed. Thereupon the warrant so docketed shall be considered in all respects as a final judgment creating a perfect lien upon the employer's right, title and interest in all of his real and personal property located in the county wherein the warrant is docketed."

In *North Gate Corp. & Wisconsin Ind. Com. v. North Gate Bowl*, 149 N.W.2d 651, 67-1 U.S.T.C. Sec. 9384 (1967), the Commission's *tax warrant* for an amount was

*docketed* with the Clerk of the Circuit Court for Dane County on June 17, 1965.

“Thus, the Industrial Commission becomes a judgment creditor only because the statute makes the commission’s lien a judgment lien. The lien is not obtained by going through a court procedure nor is it obtained by obtaining a judgment in a state court.”

Appellant’s reliance on 31 U.S.C., Sec. 191 is ill founded. Sec. 191 *does not* create a lien. It merely establishes a priority in favor of the U. S. *when* the insolvent debtor’s property is distributed, *U. S. v. Menier Hardware, Inc.*, 219 F. Supp. 448, with the Bankruptcy Statute, 11 U.S.C., Sec. 104, establishing the state’s priority as 4th for distribution purposes and the United States priority as 5th.

## CONCLUSION

The plaintiff’s priority and judgment should be upheld. Section 59-14-71(3)(e) U.C.A. should be declared unconstitutional insofar as it attempts to deprive Respondent of its priority. Otherwise, the Section could allow a *secret* obligation (*assessment*) subsequently determined to be due and owing by a taxpayer to the Commission to become a recorded public *notice* (*Warrant*) perfected for lien security purposes ahead of established liens. All liens should be ranked with the recording date being the effective date, chronologically, for priority and distribution purposes. The Section should not be allowed to destroy public confidence in financially secure.

recorded transactions. The “first in time is first in right” theory should prevail here on plaintiff’s behalf.

Respectfully submitted,

JOHN G. MARSHALL  
and  
WALKER E. ANDERSON