EFFECT OF FEDERAL TAX LEINS ON OHIO REAL PROPERTY

It is apparent from the divergent opinions to be found on the subject of federal tax liens that their scope and character are not completely defined. Although in some respects these liens rest upon federal supremacy, it appears that one must go beyond that rather vague concept in analyzing them.[1] The character of the problem has been well circumscribed in these words: "The federal tax lien, though falling within the field of federal taxation, is in truth a part, even if a highly specialized part, of the field of creditors rights."[2] Federal tax liens, however, ". . . do depart in large degree from the ordinary concepts of creditor security laws."[3] In the Internal Revenue Code of 1954 this area has undergone a change in order and in wording, the impact of which cannot as yet be fully ascertained because of lack of judicial interpretation. It is well to keep in mind, therefore, that the cases cited herein were decided prior to the 1954 Internal Revenue Code.[4]

Although the following discussion is focused primarily on Ohio, one may expect the similarity between state statutory law and the underlying federal law frequently to result in like case construction in this rather specialized area of federal-state relations. In the absence, therefore, of clear authority on Ohio law, one may, in many situations, properly look to non-Ohio sources to determine what well may be the law in Ohio. Although realty is the principal consideration, the law discussed herein is not necessarily exclusive of personalty, nor should the law as to personalty be disregarded. The three most important federal tax liens, each of which is to be considered separately in this discussion, are the general tax lien,[5] the estate tax lien,[6] and the gift tax lien.[7] Because the laws

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[1] "Questions of priority and of lien for taxes are closely related and may arise in the same case, but the present annotation does not cover the question of the priority of Federal taxes over other claims except in so far as such priority is based upon a lien. Priority of Federal taxes may also arise under the statute giving preference to 'the debts due to the United States' out of the assets of an insolvent (31 U.S.C.A. §191), since the term 'debts' includes taxes. Price v. United States (1926) 269 U.S. 492, 70 L.Ed. 373, 46 S. Ct. 180. And such priority may arise in bankruptcy under §64 of the Bankruptcy Act (11 U.S.C.A. §104)." 105 A.L.R. 1244, 1245 (1936). The distinction made in the previous quotation from A.L.R. dealing with federal tax liens should also be kept in mind in this discussion of federal tax liens. See also 174 A.L.R. 1373, 1388, 1394, 1399 (1948).

[2] Clark, *Federal Tax Liens and Their Enforcement,* p. 5, SPECIAL ISSUE OF LAWYERS TITLE NEWS. (1949). See also 3 GLENN, MORTGAGES §433 *et seq.* (1943).

[3] Anderson, *Federal Tax Liens-Their Nature and Priority,* 41 CALIF. L. REV. 241 (1953).

[4] References to the Internal Revenue Code, unless otherwise designated, will be to the Internal Revenue Code of 1954.

[5] INT. REV. CODE, §6321 (formerly §3670).

[6] INT. REV. CODE, §6324 (a) (formerly §827).

[7] INT. REV. CODE, §6324 (b) (formerly §1009).

governing these federal liens are in some respects dissimilar, it is of paramount importance when examining title to distinguish the particular type of lien involved. The problems inherent in the determination of the existence of a lien are many, but in all cases one must first decide upon the type of tax debt on which the lien is based.

THE FEDERAL GENERAL TAX LIEN

The federal general tax lien is the so-called "shotgun"[8] type of federal lien. This lien is provided for by §6321 of the Internal Revenue Code, which reads:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.[9]

It will be noted that the language of the statute is broad enough to cover the tax-debtor's liability for "any tax" and to attach to all of his ". . . property and rights to property, whether real or personal." This has been interpreted to include both tangible and intangible property, even that which the tax-debtor acquires after the lien arose.[10] It should be kept in mind that the federal general tax lien, although general in coverage, is specific in nature and can best be understood if one comprehends its rather all-embracive scope.

> To say that the lien provided by this statute is a general lien on all the property of the taxpayer does not help in the solution of the problem presented; for a lien is not deprived of validity because it attaches to a number of pieces of property instead of to a single piece, nor is it for that reason to be subordinated to a junior lien attaching to a single piece of property.[11]

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[8] This apt description of the general tax lien is credited to Wright, *Title Examinations in Michigan as Affected by the General Tax Lien,* 51 MICH. L. REV. 183 (1952).

[9] Formerly INT. REV. CODE §3670. The Committee on Ways and Means of the House of Representatives in revising this section had added, "(including the interest of such person as tenant by the entirety)." H.R. REP. No. 8300, 83rd Cong., 2d Sess. 686 (1954). The accompaning report stated that "This section clarified the term 'property and rights to property' by expressly including therein the interest of the delinquent taxpayer in an estate by the entirety." H.R. REP. No. 8300, 83rd Cong., 2d Sess. A406 (1954). The Finance Committee of the Senate reported that "This section corresponds to that of the House bill, except that the parenthetical phrase '(including the interest of such person as tenant by the entirety)', which phrase is not included in existing law, has been deleted. It is not clear what change in existing law would be made by the parenthetical phrase. The deletion of the phrase is intended to continue the existing law." SEN. REP. No. 8300, 83rd Cong., 2d Sess. 575 (1954). The House receded in conference. CONG. REP. No. 8300, 83rd Cong., 2d Sess. 78 (1954).

[10] Glass City Bank v. United States, 326 U.S. 265 (1945).

[11] United States v. Greenville, 118 F. 2d 963, 965 (4th Cir. 1941). See also

A reference to §6321 of the Internal Revenue Code, which indicates the scope of the federal general tax lien, will show that a lien should arise "after demand" for the tax debt. An apparent incongruity, however, may be observed if one compares this with §6322 which states that "Unless another date is specifically fixed by law, the lien imposed by §6321 shall arise at the time the assessment is made. . . ." The former provision (§3671) had stated, "Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector. . . ." The molding of these provisions into workable procedure was accomplished by the doctrine of relation-back,[12] that is, if the tax was not paid on demand,[13] it was regarded as having been a lien since ". . . the time the assessment list was received by the collector. . . ."[14] It is probable that the present provisions of the Internal Revenue Code will receive like interpretation and that the relationship of the tax-debtor and the tax-creditor will remain fairly clear-cut. A difficulty presents itself, however, with the appearance of an intervening third party where the federal government's general tax lien has arisen without notice to such third party. The Supreme Court, faced with this problem in *United States* v. *Snyder*, 149 U.S. 210 (1893), recognized the rather perilous position of an intervening third party, but held that the federal government's general lien for taxes was valid without recording, even against a bona fide purchaser. The Supreme Court indicated that it felt compelled to arrive at this decision in the absence of countervailing legislation and at p. 214 said, "A government that cannot,

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Metropolitan Life Insurance Co. v. United States, 107 F. 2d 311 (6th Cir. 1939), *cert. denied,* 310 U.S. 630 (1940), and Clark, *op. cit. supra,* note 2, at 17.

[12] United States v. Pacific Railroad, 1 Fed. 97 (Circuit Court, E.D. Missouri, 1880). The approach of the court in this case should be compared with that of the later case of United States v. Snyder, 149 U.S. 210 (1893). The pertinent part of the syllabus of United States v. Pacific Railroad, *supra,* reads, "The lien of the income tax (Act July 13, 1866, 14 St. at Large, 107; Rev. St. §3186) relates back, upon demand, to the time when the tax was due but only attaches to the property belonging to the person from whom the tax was due at the time when the demand for the payment of the tax was made." The result of this case as to the protection of third parties is certainly of greater comfort than is the *Snyder* case, *supra,* which will be discussed in more detail later. The syllabus of the *Pacific Railroad* case, *supra,* was cited and approved in Metropolitan Savings and Loan Co. v. Parrock, 6 Ohio Op. 518, 47 N.E. 2d 638 (1935).

[13] Although the meaning of "demand" is indefinite, it would seem that an informal demand would be sufficient. United States v. Ettelson, 159 F. 2d 193 (7th Cir. 1947) held that the filing of a claim in a probate court against the estate of a deceased tax-debtor was a sufficient demand to create a lien in favor of the United States. See also Clark, *op. cit. supra,* note 2, at 11.

[14] The Ways and Means Committee of the House of Representatives and the Finance Committee of the Senate reported in identical language that "This section, which provides that the lien arises at the time the assessment is made, conforms existing law to the change made in section 6203." H.R. REP. No. 8300, 83rd Cong., 2d Sess. A406 (1954). SEN. REP. No. 8300, 83rd Cong., 2d Sess. 575 (1954). Section 6203 relates to the method of assessment.

by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name."

A lien with the tremendous scope and far reaching effects of the federal government's general tax lien, coupled with the interpretation of the *Snyder* case, *supra*, which extended unrecorded liens even as against bona fide purchasers, made property transactions a somewhat hazardous gamble. The decision brought forth a storm of protest and legislation was sought to quell it.[15] This storm, however, was not soon quieted, and similar results were reached in other cases[16] in the interim between the *Snyder* case, *supra*, and protective legislation. Piecemeal legislation to ameliorate this situation was only slowly passed by Congress. In 1913[17] protection from unrecorded general tax liens was given to purchasers,[18] mortgagees, and judgment creditors,[19] whereas protection to pledgees[20]

[15] An illustration of this feeling can be found in the address of the president of the American Bar Association, William Wirt Howe, "And it may here be remarked, that there are other elements of danger in land titles which might be guarded against by proper legislation in Congress, or by the several states. Such a latent defect, for example, as the Federal lien for internal revenue taxes ought not to exist. Witness the injustice which was done, though not by any fault of the court, in the case of the United States vs. Snyder, 149 U.S. 210, where an ancient lien for internal revenue taxes on property which had been used as a tobacco factory, was enforced against a subsequent purchaser and possessor of the land, although that purchaser never knew, or had reason to know, that the land had ever been used for such a factory, or that any taxes were unpaid. We ought to have an act of Congress for the recording in the mortgage office of county or parish where the land is situate of some notice at least of the license and establishment of a factory which may become indebted for internal revenue taxes, and that such taxes will remain a lien if unpaid. It would probably be well also to provide for the recording of notice of *lis pendens* in cases in the Federal Courts, in which the judgment or decree may affect the title to property." XXI REPORTS OF THE AMERICAN BAR ASSOCIATION 235, 261 (1898). For a more recent consideration on this matter see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien.* 63 YALE L. J. 905, 920 (1954).

[16] Blacklock v. United States, 208 U.S. 75 (1908), held that a lien for unpaid internal revenue taxes was valid against one who had taken a mortgage without notice of such lien. United States v. Curry, 201 Fed. 371, 374 (D. Md. 1912), held that, "The government's lien is unaffected by the fact that a subsequent incumbrancer or purchaser became such without knowledge that the government had any interest in the property or claim upon it."

[17] 37 STAT. 1016 (1913).

[18] In interpreting "purchasers" under §3672(a) former INT. REV. CODE, it was stated ". . . that one who, for a valuable present consideration, acquires property or an interest in property is a 'purchaser' within the meaning of U.S.C.A. Int. Rev. Code, §3672." National Refining Co. v. United States, 160 F. 2d 951, 955 (8th Cir. 1947).

[19] Miller v. Bank of America, 166 F. 2d 415, 417 (9th Cir. 1948) held that "In all these cases it is certain that it is the *lien* created by the claim of a creditor within the meaning of recording acts which is contemplated, and not just the claim itself . . . . A judgment in and of itself does not necessarily constitute a lien upon any property unless made so by statute."

[20] 53 STAT. 882 (1939).

and to those dealing in securities[21] was not enacted until 1939.[22] The embodiment of this legislative protection is to be found in INT. REV. CODE §6323(a), which, in part, reads, "Except as otherwise provided in subsection (c), the lien imposed by §6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—." It is assumed that those not listed under the protective legislative provisions, such as unsecured creditors, are to be treated like the tax-debtor in relation to the recording requirements of the general federal tax lien as affects its validity to them.[23]

The next problem, practically speaking, is that of the way in which one is put on notice of a federal general tax lien. Filing of notice is provided for in INT. REV. CODE §6323,[24] which sets forth the ways in which the collector may file.

> (1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or
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> (2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice: . . .[25]

Since all states have enacted legislation designating a place for the recordation of federal general tax liens, only the first provision is commonly used.[26] In essence, all of the state statutes have for their central purpose the provision of notice to third persons, although a variation in the wording of the statutes exists.[27] The relevant part of Ohio's statute for recordation of general federal tax liens provides that:

> Notices of liens for internal revenue taxes and of any other lien in favor of the United States, as provided in the statutes of the United States or any revision thereof, and certificates dis-

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21 53 STAT. 883 (1939).

22 Under the former INT. REV. CODE this protection for pledgees was provided for by §3672(a) and for those dealing in securities by §3672(b).

23 United States v. Sampsell, 153 F. 2d 731 (9th Cir. 1946). See also Clark, *op. cit. supra,* note 2, at 17.

24 Essentially this was part of former INT. REV. CODE §3672(a).

25 This section also provides a method for the collector to give notice of liens on land in the District of Columbia. "(3) *With clerk of district court for District of Columbia.*—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia."

26 New Hampshire was the last state to provide for recording in this manner. (REV. LAWS, c. 264, secs. 44-48, 1951 laws, c. 107).

27 For a breakdown of the various state statutes into groupings, see Wright, *op. cit. supra,* note 8, at 184.

> charging such liens may be filed in the office of the county recorder of the county wherein the property subject to such lien is situated. When such notice is filed with him, the recorder shall enter it in a book known as the "federal tax lien index," in alphabetical order, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and the hour of the filing, and the amount of tax and penalty assessed. The recorder shall file and keep all original notices in numerical order. When a certificate of discharge of any tax lien issued by the collector of the internal revenue, or other proper officer, is filed in the office of the recorder where the original notice of lien is filed, such recorder shall enter the certificate, with the date of filing, in the federal tax lien index, on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of the lien. . . .[28]

In addition to the mechanical features set forth by the statute, it should be observed that the statute provides for little more than a blanket notice of possible federal general tax liens. Until 1942 the applicable provision for filing of notice had been "In accordance with the law of the State or Territory . . .," but at that time the language was revised to read, "In the office in which the filing of such notice is authorized by the law of the State or Territory. . . ."[29] The Internal Revenue Code of 1954 now reads, "In the office designated by the law of the State or Territory. . . ." The net result of these statutory changes of wording thus indicates a Congressional intent to make the state statutes applicable only in so far as to provide a place for notice to be filed. The type of notice, that is, a blanket notice, however, is to be controlled by federal law. "For example, the omission from the notice of lien of a description of the property subject to the lien would not affect the validity thereof, even though the law of the State or Territory requires that the notice of

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[28] OHIO REV. CODE §317.09 (2757-1).

[29] Blanket liens were held ineffective to give notice under applicable state law providing for specific description in a Michigan case under the pre-1942 language. United States v. Maniaci, 36 F. Supp. 293 (W.D. Mich. 1939), *aff'd per curiam,* 116 F. 2d 935 (6th Cir. 1940). A later case from the same district interpreting the 1942 statutory language also arrived at a similar result. Youngblood v. United States, 141 F. 2d 912 (6th Cir. 1944). See Clark, *op. cit, supra,* note 2, at 15. An account of this phase of the Michigan situation is given in Wright, *op. cit. supra,* note 8, at 190, where the author states that ". . . the future may hold in store a decision to the effect that the collector in Michigan has been entitled since 1942 to validate liens against third parties by filing blanket notices with the clerk of the appropriate federal district court in Michigan." The author had previously assumed that the change in the federal statutory language was not an attempt to coerce the state officials of Michigan to record blanket notices in violation of their state duty to take only those liens providing specific descriptions of the property involved.

lien contain a description of the property subject to the lien."[30] Ohio's requirement that only a blanket notice need be filed is adequate. If Ohio should require more than blanket notice, that is, specific description of the property involved, the federal government still would have recourse to filing a blanket notice with the clerk of the district court in accordance with INT. REV. CODE §6323(a) (2), since §6323(b) provides that

> If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.[31]

Because the Ohio statute[32] provides only for blanket notice, which is all that would be effective, one examining title in Ohio must be wary of such blanket notices and not rest merely with the examination of title to specifically described property.[33]

As noted earlier in connection with the creation of the federal general tax lien, the Internal Revenue Code in §6322 provides that "Unless another date is specifically fixed by law, the lien imposed by §6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." Thus the obvious method of extinguishing the lien is by satisfaction of the underlying tax debt. Another method by which the lien can be terminated is by permitting the statute of limitations, which is controlled by federal law,[34] to run.[35]

[30] H.R. REP. No. 8300, 83rd Cong., 2d Sess. A407 (1954). SEN. REP. No. 8300, 83rd Cong., 2d Sess. 576 (1954). The same sections further stated that "Subsection (b) of this section is declaratory of the existing procedure and in accordance with the long-continued practice of the Treasury Department."

[31] Possibly the same assumption can be made now as was made by Wright, *supra*, that the change in statutory language is not an attempt to coerce state officials to violate their state duty.

[32] OHIO REV. CODE §317.09 (2757-1).

[33] It is of merit to note that INT. REV. CODE §6323(d) provides, "If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed." "This is necessary for the protection of persons dealing with property subject to the lien who have a legitimate interest in determining the amount of the outstanding obligation, as well as to aid reestablishment of the taxpayer's credit." SEN. REP. No. 8300, 83rd Cong., 2d Sess. 576 (1954). H.R. REP. No. 8300, 83rd Cong., 2d Sess. A407 (1954).

[34] Taylor v. United States, 342 Mass. 639, 642, 88 N.E. 2d 121, 123 (1949) states, "We consider it settled that a claim of the United States is not barred, even in a State Court, by a State statute of limitations or by the laches of officers or agents of the United States."

[35] Although the date of assessment is of particular importance, one should note that United States v. Ettelson, 159 F. 2d 193, 196 (7th Cir. 1947) held that "The District Court erred in holding that the precise date that the lien arose had to be proved and that the Government had no lien because of failure to make such proof."

According to INT. REV. CODE §6502,[36] an assessed tax may not be collected after six years from the assessment date[37] unless there has been an agreement or waiver[38] to extend the statutory period.[39] Logically, then, when the tax debt can no longer be collected, it would seem that the federal general tax lien could no longer be enforced.[40] Such is not always the case, however, for the situation may arise in which the underlying tax debt has been reduced to a federal judgment with the result that execution apparently can be had indefinitely.[41]

THE FEDERAL ESTATE TAX LIEN

It will be recalled that the tax-debtor's neglect to pay "any tax" can result in the creation of a lien upon all the tax-debtor's ". . . property and rights to property, whether real or personal. . . ." The language of this general provision appears broad enough to cover the federal estate tax lien, but a specific statutory provision has been made for it.[42] Section

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[36] Section 6502(a) states that "Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—(1) within 6 years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release). The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

[37] See §6322, *supra.*

[38] Cases prior to the 1954 INT. REV. CODE have held in effect that a waiver may be good as against third parties. United States v. Spreckels, 50 F. Supp. 789 (N.D. Cal. 1943), Bank of Commerce and Trust Co. v. United States, 32 F. Supp. 942, *aff'd,* 124 F. 2d 187 (6th Cir. 1941). Also see 174 A.L.R. 1378 (1948).

[39] The mechanics of recording the discharge of a lien are set out in OHIO REV. CODE §317.09 (2757-1), *supra,* note 28.

[40] United States v. Spreckels, 50 F. Supp. 789, 791 (N.D. Cal. 1943) states that "Section 3671 provides that 'unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.' To determine when the lien becomes 'unenforceable by reason of lapse of time' these two sections should be read together, for if the statute ran on the tax itself the lien, which is only security therefor, should simultaneously expire." Former §3671 has now been changed to read, in §6322, ". . . the lien . . . shall arise at the time the assessment is made . . . ."

[41] Investment and Securities Co. v. United States, 140 F. 2d 894, 896 (9th Cir. 1944), states that "There is no federal statutory provision as to a period of limitations on this judgment; it follows that in the absence of such a limitation a tax can be collected at any time; therefore, the liability of the tax now merged in the judgment has not become unenforcible by reason of lapse of time." See also Clark, *op. cit. supra,* note 2, at 12.

[42] The estate tax lien and the gift tax lien are often considered together in both practice and discussion. Sanford v. Commissioner of Internal Revenue, 308 U.S. 39, 44 (1939) reads that "the gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together . . . . An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance

6324(a) (1) provides that "Unless the estate tax imposed by chapter 11 is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent. . . ."[43]

> The general definition of gross estate is given in §2031(a): The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

The property is described in the INT. REV. CODE §§2033 to 2044 as follows: Property in Which the Decedent Had an Interest; Dower or Courtesy Interests; Transactions in Contemplation of Death;[44] Transfers With Retained Life Estate; Transfers Taking Effect at Death; Revocable Transfers; Annuities; Joint Interests; Powers of Appointment; Proceeds of Life Insurance; Transfers for Insufficient Consideration; Prior Interests. It should be emphasized that these federal provisions[45] rather than state law,[46] are controlling as to what constitutes the "gross estate."

Although §6324(a) (1) clearly provides for a federal estate tax lien, the language does not specify when such lien comes into existence. It was noted that the federal general tax lien comes into being when the assessment is made and is held to exist from that time by the doctrine of relation-back from the time of demand.[47] The separate statutory provision for the federal estate tax lien raises the question of whether or not it is also given separate judicial construction as to the time it arises.[48] An affirmative answer was given to this question in the leading case of

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of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." A comparison of the estate tax lien and the gift tax lien is of value and should be noted by the reader. To a large extent, such a comparison has been made in Peters and Maxey, *The Gift Tax Lien and the Examination of Abstracts,* 5 MIAMI L.Q. 64 (1950). The separate consideration of these two liens was used in this article as a matter of mechanics to emphasize the particular lien involved, as was also done with the federal general tax lien.

[43] Formerly INT. REV. CODE, §827(a).

[44] "A finding by Internal Revenue Commissioner that motives connected with anticipation of death were impelling or dominant in making a gift, so that transfer was in contemplation of donor's death within statute requiring inclusion of property so transferred in deceased transferor's taxable estate, must stand, unless its factual conclusion as to motive is clearly erroneous." In re Belyea's Estate v. Commissioner of Internal Revenue, 206 F. 2d 262 (3rd Cir. 1953). This particular case, however, did reverse the finding of the Internal Revenue Commissioner.

[45] These provisions were formerly in INT. REV. CODE §811.

[46] See Detroit Bank v. United States, 317 U.S. 329 (1943); see also Clark, *op. cit. supra,* note 2, at 20.

[47] See discussion relating to note 12, *supra.*

[48] The question of separate judicial construction of the federal estate tax lien from the federal general tax lien should also be used in distinguishing the latter from the federal gift tax lien.

Detroit Bank v. United States, 317 U.S. 329, 332 (1943), which states that "The lien attaches at the date of the decedent's death . . . and the estate tax itself becomes an obligation of the estate at that time without assessment." In this case the United States Supreme Court stated at p. 334 that "The differences between R.S. §3186 [now §6321] and §315(a), [now §6324(a) (1)] and their legislative history as separate enactments, indicate that each was intended to operate independently of the other." Within this discussion, of course, it is implicit that "The federal 'estate tax' is not a debt of the deceased, but is an excise levy upon transfer or transmission or deceased's estate, the liability for payment of which arises at [the] moment of [the] deceased's death."[49]

Although the federal estate tax lien attaches to all of the gross estate,[50] protection has been afforded to certain third parties in limited situations. Former INT. REV. CODE §827(b) provided that "Any part of such property sold by such spouse, transferee, trustee, . . . or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien."[51] Since only bona fide purchasers were given protection by the above statute, there was no protection extended to others of a bona fide status dealing with the ". . . spouse, transferee, trustee . . . or beneficiary. . . ."[52] This lack was recognized, and additional protection was given in the 1954 INT. REV.

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[49] Bigoness v. Anderson, 106 F. Supp. 986 (D. D.C. 1952).

[50] One should distinguish the lien itself from the recipient's personal liability, which is provided for in INT. REV. CODE §6324(a) (2) which reads, "If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee . . . or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax." Peters and Maxey, *op. cit. supra*, note 42 at 65, in interpreting similar statutory language under the former INT. REV. CODE §827(b), commented on this point as follows, ". . . the property required to be included in the gross estate of the decedent is regarded as being of two kinds; type 1, the interest of the decedent in the property at the time of his death; and type 2, the interests of others, in property which must be included in his gross estate, which mature by reason of the death of the decedent. It is only in connection with type two that the personal liability of the recipient for any of the estate tax arises, although the estate tax lien itself attaches to all the property of the estate."

[51] Peters and Maxey, *op. cit. supra*, note 42, at 68, in completing their analysis, comment that, "As to the estate tax lien, only those specified property interests received by the beneficiaries which made them personally liable for the tax (type two above) are divested of the lien when sold to a bona fide purchaser for an adequate consideration."

[52] In commenting upon former INT. REV. CODE §827(b), Wright, *Title Examinations as Affected by the Federal Gift and Estate Tax Liens*, 51 MICH. L. REV., 325, 326 (1953), had suggested that perhaps "purchaser" could be so interpreted to include a "mortgagee" and stated that ". . . the scales before a federal court might well be tipped by a policy argument, namely, that the merits of a mortgagee's case are the same as are those of the purchaser—a matter which has led state

CODE §6324(a) (2), which reads, "Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee . . . or beneficiary, to a bona fide purchaser, mortgagee, or pledgee, for an adequate and full consideration in money or money's worth shall be divested of the lien provided in paragraph (1). . . ."[53]

The statutory limitation of the divestment of the lien to a "bona fide purchaser, mortgagee, [or] pledgee" raises the question of just who comes within these classifications. "It is a general rule that a purchaser, who in good faith acquires the legal title to lands for a valuable consideration without notice of an existing equity, takes title free from such equity."[54] It will be noted that there are three general prerequisites for becoming a bona fide purchaser: (1) a general presence of good faith, (2) a valuable consideration, (3) a purchaser without notice. In each of these three elements we are confronted with the problem of making distinctions which, of course, cannot be abstractly generalized upon in the scope of this discussion and which are dependent upon the particular facts in the individual cases. Probably an adequate definition of a person acting in good faith is "One who acts without covin, fraud, or collusion; one who . . . [is] in the commission of or connivance at no fraud. . . ."[55] The older notion of a merely adequate consideration seemingly has been extended to something more, since Section 6324(a) (2) of the Internal Revenue Code provides that ". . . an adequate and *full* consideration in money or money's worth . . ." must be given to divest the lien. (Italics added.)

Essentially the requisites for becoming a bona fide mortgagee are the same as those for becoming a bona fide purchaser, namely, (1) a general presence of good faith, (2) a valuable consideration, (3) absence of notice.[56] Thus the previous discussion of the first two of these elements in connection with becoming a bona fide purchaser is applicable here.

The elements necessary for becoming a bona fide pledgee are similar to those needed for the other two classifications. The second element of

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courts in some cases arising in the context of property law to treat mortgagees as 'purchasers *pro tanto*.'" To support this suggestion he cited Bacon v. Van Schoonhoven, 87 N.Y. 446 (1882).

[53] The complete list of those enumerated in INT. REV. CODE §6324(a) (2) is ". . . spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary. . . ."

[54] Shaker Corlett Land Co., v. City of Cleveland, 139 Ohio St. 536, 541, 41 N.E. 2d 243, 246 (1942). Here it was decided that absence of notice is not an essential element in being a bona fide purchaser of registered lands, and, although this is not a federal lien case, it would still be applicable in this discussion since the case points out that "(i)t is a general rule. . . ." See also, 3 POMEROY, EQUITY JURISPRUDENCE 3 (5 Ed. 1941); 5 WORDS AND PHRASES 623 et seq. (1940).

[55] Sanders v. McAffee, 42 Ga. 250 (1870). See generally BLACK'S LAW DICTIONARY 224 (4th Ed. 1951).

[56] Companaro v. Gondolfo, 60 F. 2d 451, 452 (3rd Cir. 1932).

consideration requires that ". . . the pledgee must have a lien on the property for the payment of a debt or the performance of an obligation due him by the pledgor . . .";[57] this would seem to exist in the property involved only to the amount of being ". . . adequate and *full* consideration in money or money's worth. . . ." (Italics added.)

The third essential element in attaining a bona fide status has not as yet been considered in any of the three classifications. As a practical matter, the problem of ascertaining what constitutes notice is perhaps the most difficult of the three. It is possible that the issue of notice might, for various reasons, receive similar treatment in the cases of bona fide purchaser, mortgagee,[58] and pledgee.[59] The possibility of similar interpretation is suggested by the fact that the presence of absolute knowledge of an existing federal estate tax lien would appear to prevent one from attaining a bona fide status in any of the three classifications. Another reason for suggesting that these three classifications might be given corresponding judicial interpretation is that the prior treatment of bona fide purchaser (the only exception made for one with a bona fide status under former INT. REV. CODE §827 (b)) would probably be the same under the present Internal Revenue Code. Thus, to achieve uniformity of treatment in considering these three bona fide classes, it would be necessary to extend the same judicial interpretation to the two new classes.

It has already been noted that a generalization of who may become a bona fide purchaser, mortgagee, or pledgee is at best inadequate because the number of fact situations that may arise in making such a determination are legion; but it is possible that the nature of the most pressing of the three elements, notice, can best be explained by generalization. If one were in a position in which he could reasonably be put on notice of a federal estate tax lien, it seems that he would be denied a bona fide status; and, since the passing of property by death is normally by a proceeding of public notoriety, such proceeding also would probably operate to deny bona fide status.[60] If one were not apprised, however, of any circumstances which would lead him to believe that an estate tax lien exists, then either (1) no estate tax lien does in fact exist, or (2) the unrecorded estate tax lien does exist, but it is not valid against a bona fide purchaser, mortgagee, or pledgee. It will thus be seen in the second

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[57] BLACK'S LAW DICTIONARY 1312 (4th Ed. 1951).

[58] Although a mortgagee does not have the first lien, he still may attain bona fide status if there is enough property left to cover his own interest. See 3 GLENN, MORTGAGES §378 *et seq.* (1943).

[59] This would seem to be applicable also in the case of the federel gift tax lien.

[60] Peters and Maxey, *op. cit. supra,* note 42, at 67, comment that "Property passing at death is normally dealt with by probate proceedings of public notoriety and there is less need to protect third parties by requiring notice of a lien." The two authors then surmise, in commenting upon the case of Detroit Bank v. United States, 317 U.S. 328 (1943), that "In any event the mortgagee could have protected himself by securing a certificate of release from the commissioner."

alternative that if the lien does not exist as to the bona fide purchaser, mortgagee, or pledgee, it is in effect the same as saying that it no longer attaches to the property transferred to these persons. This does not mean that the lien no longer exists, but that it no longer attaches to the property transferred to the bona fide purchaser, mortgagee, or pledgee; that is, the lien now attaches to other property of the transferor.[61] The lien now existing on such other property should be considered as an independent lien and treated as such.

The last thing to be mentioned in connection with the federal estate tax lien is its possible duration. Section 6324(a) (1) of the 1954 Internal Revenue Code provides that "Unless the estate tax imposed by chapter 11 is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent. . . ."[62] Again, the obvious method of eliminating the estate tax lien is by payment of the underlying tax debt; if payment is not made, the statute clearly provides a ten year duration for the federal estate tax lien.[63]

The Federal Gift Tax Lien

The statutory provision for the federal gift tax lien is found in the Int. Rev. Code §6324(b), the pertinent part of which states that

> . . . the gift tax imposed by chapter 12 shall be a lien upon all gifts made during the calendar year, for 10 years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.

It is often difficult to determine whether a federal gift tax lien exists, since the question of the existence of a gift must sometimes be decided by judicial determination. In the absence of such judicial action, there still are various factors that might suggest a gift. Where it is not apparent that a gift has been made, one examining title to property could well be justified in being suspicious of such factors as merely nominal consideration which, if correctly indicating a gift, might mean an unpaid federal

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[61] Int. Rev. Code §6324(a) (2) provides in part that ". . . a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, beneficiary, or transferee of any such person, except any part transferred to a bona fide purchaser, mortgagee, or pledgee for an adequate and full consideration in money or money's worth." See Smythe v. United States, 169 F. 2d 49 (1st Cir. 1948), a case involving eminent domain in which it was held that an estate tax lien attaches to the money substituted in place of the land. A provision similar to the one quoted above covering the case in which the executor has been discharged is provided for in Int. Rev. Code §6324(a) (3) which states, ". . . the lien shall attach to the consideration received from such purchaser, mortgagee, or pledgee by the heirs, legatees, devisees, or distributees."

[62] The remainder of Int. Rev. Code §6324(a) (1) provides that ". . . except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien."

[63] See also possibility raised by note 41, *supra*.

gift tax resulting in a federal gift tax lien; or recorded nominal consideration with parties not dealing at arms' length where the last names of the transferor and the transferee are the same. One might also be wary of a transfer of property in which an entry for revenue stamps is absent. The situations that could arise from such facts cannot, of course, be easily narrowed down within the limitations of this paper but must again rest upon the particular fact pattern involved in the individual case. It seems readily apparent that the determination of whether or not a gift exists is no easy matter but requires the consideration of numerous factors.

The time at which the lien arises is clearly stated in the statute, that is, immediately upon the making of the gift. This lien is, in its relationship to third parties, much like that of the federal estate tax lien as is apparent from the relevant portion of the statute regulating the federal gift tax lien in relation to third parties:

> Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a bona fide purchaser, mortgagee, or pledgee for an adequate and full consideration in money or money's worth shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a bona fide purchaser, mortgagee, or pledgee for an adequate and full consideration in money or money's worth.[64]

The question has been asked, "Should an attorney unconditionally pass upon the title to real property without first determining whether any owner, including any co-tenant, had acquired or transferred the property within the past ten years for less than an adequate and full consideration in money or money's worth?"[65]

Here, as with the federal estate tax lien, there is the problem of who may attain the status of bona fide purchaser, mortgagee, or pledgee. Although the material concerning the estate tax lien as to attaining a bona fide status will, for the most part, suffice in the present discussion, there are significant points of difference which call for further elaboration. The first requisite of general good faith is essentially the same. As to the second element of consideration the statute demands that there be ". . . adequate and *full* consideration in money or money's worth."[66] (Italics added). The problem of notice becomes more burdensome in this discussion of the federal gift tax lien than it was with the federal estate tax lien, because of the additional issues brought about by having to determine in the first instance whether or not a gift exists between the

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[64] INT. REV. CODE §6324(b).

[65] Peters and Maxey, *op. cit. supra,* note 42, at 64.

[66] INT. REV. CODE §6324(b).

original donor and donee. But if the three essential elements have been met, then, of course, a bona fide status has been attained.

The two logical alternatives, then, are (1) that there is presently no federal gift tax lien existing on the involved property, or (2) that there is an unrecorded gift tax lien existing on the involved property which is not valid as against a bona fide purchaser, mortgagee, or pledgee. The situation resulting from either of the above alternatives as to the bona fide purchaser, mortgagee, or pledgee would apparently be the same. If (2) were the case, however, one would be confronted with the transfer of the lien to the property ". . . of the donee (or the transferee) . . ."[67] as under similar circumstances with the federal estate tax lien. The lien provided by the transfer to the property of the donee, of course, now must be considered as a separate problem in itself, "And, so, the circle starts again; and years later perhaps in some obscure and unrelated transaction, some piece of property may be found subject to lien for unpaid, long forgotten, gift taxes."[68]

The final point to be considered in connection with the federal gift tax lien is its possible duration. Section 6324(b) of the 1954 Internal Revenue Code provides that ". . . the gift tax imposed by chapter 12 shall be a lien upon all gifts made during the calendar year for 10 years from the time the gifts are made."[69] It is obvious that paying the underlying liability will free the property from the lien, and a release may be provided by ". . . the Secretary or his delegate. . . ."[70] Perhaps this gives as good as answer as any to the problem of finding out whether or not a federal gift tax lien presently exists on the involved property. Of course, "The very method by which the property is to be certified as free of the lien may well have been provided by Congress as one of the more effective means by which the gift tax was to be enforced."[71]

Release of Lien or Partial Discharge of Property

The previous discussion of the federal tax liens has made some mention of the subject of this section of the article, which may be found in §6325 of the 1954 Internal Revenue Code.[72]

A release of a federal tax lien may be made, "Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—(1) Liability satisfied or unenforceable . . . or (2) Bond accepted. . . ." In subsection (1) the

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[67] Ibid.

[68] Peters and Maxey, *op. cit. supra,* note 42, at 71.

[69] See also the possibility raised by note 41, *supra.*

[70] Int. Rev. Code §6325(a). This will be dealt with in greater detail later.

[71] Peters and Maxey, *op. cit. supra,* note 42, at 72.

[72] Formerly this subject was covered by Int. Rev. Code §§827(a), 1009, 3673(a), 3673(b), 3674(a), 3674(b), 3675. For a discussion of these sections see Clark, *op. cit. supra,* note 2, at 27.

statute distinguishes the general tax from the estate and gift taxes and provides that:

> The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for. . . .

The second method provided for the release of a federal tax lien is by the furnishing of ". . . a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof. . . ."

Section 6325(b) of the Internal Revenue Code provides that there also may be a partial discharge of the involved property through either of two methods: "(1) Property double the amount of the liability" and "(2) Part payment or interest of United States valueless." Under the first method of partial release the standards of fair evaluation would be used in arriving at a conclusion that the property is double the amount of the lien, although a natural reluctance on the part of the revenue officers to release the property in the close cases should probably be expected. The second provides two methods of receiving a partial discharge of the involved property. The first method of part payment seems clear enough to pass without further comment. The second method of receiving a partial discharge under this section is if ". . . the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value."[73] Again it is to be expected that revenue officers would be hesitant to declare property as valueless to the United States.

Section 6325(c) of the Internal Revenue Code relates to the matter of the effect of a certificate of release or partial discharge, and provides that, "A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished." In an earlier case interpreting a provision similar to the one under discussion it was held that if one procured a certificate by fraud, such certificate could later be set aside.[74] Thus the certificate itself is not always a guarantee that the underlying tax debt has been paid.[75]

Conclusion

For a government to exist it clearly must have the ability to lay and to collect taxes. One of the more effective methods by which a

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[73] Int. Rev. Code §6325(b) (2) (b).

[74] In re Bowen, 151 F. 2d 690 (3rd Cir. 1945).

[75] Related topics that were not included in this article are found in Int. Rev. Code §7424, a provision for suits to clear title to realty which is dealt with in Clark, *op. cit. supra,* note 2, at 22; and in Int. Rev. Code §7403, a provision relating to suits to enforce liens which is dealt with in Clark, *op. cit. supra,* note 2, at 21.

government can do this is the use of tax liens on property, three types of which have been discussed. The nature of these liens is such that it is not always easy to determine when they exist. The question of whether or not the government holds a lien is one with many ramifications, and those concerned with examining title to property must be wary lest they find themselves entangled in one of them. The various matters which must be considered in determining whether or not a lien exists require a thorough understanding of the manner in which they arise and are extinguished as well as their duration. These factors cannot be summarily dismissed, and to lay some of the stepping stones to arrive at a satisfactory conclusion has been the purpose of this article.

Charles R. Leech, Jr.

COMMON CARRIERS—DUTY TO SERVE STRIKEBOUND SHIPPER

The plaintiff, a shipper sought damages from railroad for failing to switch in cars to its plant, while plant was under strike and picketed by its employees. The district court allowed plaintiff damages. On appeal by railroad, *held,* affirmed on the law, but remanded for redetermination of damages. Railroad has duty to provide service upon reasonable request. 49 U.S.C.A. §1 (4). Shipper must expressly request cars even though he knows request may be futile where the tariff prescribes that orders must be given for any cars desired. Damages are allowable to the shipper on basis of actual reasonable requests with which carrier failed to comply. *Minneapolis and St. Louis Ry. Co. v. Pacific Gamble Robinson Co.,* 215 F. 2d 126, (8th Cir. 1954).

The shippers suit was based on the duty to provide cars under §184 of the Interstate Commerce Act. 36 STAT. 545 (1910), as amended. 49 U.S.C. §1(4) (1946). This statute is declaratory of every carrier's common law duty. *Lucking v. Detroit & C. Navigation Co.,* 273 Fed. 577 (E.D. Mich. 1921); *Farmer's Grain Co. v. Toledo, P. & W.R.R.,* 66 F. Supp. 845 (S.D. Ill. 1946); 10 CORPUS JURUS, CARRIERS §66.

At common law a carrier was obligated to accept and transport all commodities which it held itself out to transport and further to serve all persons without unreasonable advantage to any. *Jackson v. Rogers,* 2 Shaw (K.B.) 327, 89 Eng. Rep. 968 (1695); *Coggs v. Bernard,* 2 Ld. Raymond 909, 92 Eng. Rep. 107 (1703); *Gibbon v. Paynton,* 4 Burr. 2298, 98 Eng. Rep. 199 (1769); *Niagara v. Cordes,* 21 Howard 2, 62 L.Ed. 41 (1858). The essentials of the common law duty are to receive, carry, and deliver goods. *Wabash Railroad v. Pierce,* 192 U.S. 179 (1904). At common law, a verbal request for service indicated goods were to be transported and imposed a duty. *Bell v. Norfolk Southern Ry. Co.,* 163 N.C. 180, 79 S.E. 421 (1913).

At early common law, the carrier was excused from his duty only in the event of an act of God or interference by enemies of the king.