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Federal Tax Liens -- Their Impact on the Law of Real Property

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FEDERAL TAX LIENS—THEIR IMPACT ON THE LAW OF REAL PROPERTY*

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INTRODUCTION

In recent years the federal government has been asserting its tax liens[1] in ever increasing numbers. Most of the force of this new activity

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1. The term "lien" is the name given a charge, security or encumbrance upon property,

has quite naturally been felt by the delinquent taxpayer. However, in a great number of cases innocent third persons have also been seriously affected. Mortgagees, mechanic's lienors and judgment creditors among others have suddenly found their property rights, ordinarily secure under local law, either destroyed or seriously impaired after a priority contest with a federal lien.[2] As a result of these developments the federal tax lien has become of major concern to every active practitioner in the field of real property today.[3]

It is the purpose of this paper to: (1) survey the current state of the law in this area; (2) indicate the particular hazards involved in federal tax lien litigation; and (3) suggest procedures that may aid the practitioner to solve future federal tax lien problems.

SCOPE

Since the legal aspects of this subject are so numerous and complex, space does not permit an extended consideration of *all* federal tax liens. Hence, the first section of this paper is limited to only a brief discussion of the special federal liens pertinent to real property. In the second section of the paper, however, the general federal tax lien[4] is discussed in considerable detail, since it is the one most frequently involved in litigation. This discussion proceeds under three subdivisions: (1) the basic statutory law upon which the lien is founded; (2) examination of the scope and effect of the lien on the taxpayer; and (3) the lien's effect on third persons involved in priority contests. It should also be noted that since this subject is treated from the standpoint of the practitioner in the real property field, certain portions of the law in this area pertaining to personal property are omitted.

I. THE SPECIAL TAX LIENS

A. *Generally*

Congress has enacted three special tax liens concerning real property.[5] Due to the nature of the taxes involved, they have not been an

for payment of some debt, obligation or duty. BLACK, LAW DICTIONARY (4th ed. 1951). The basic purposes of a lien, as far as the federal government is concerned, are to immobilize the taxpayer's property until the tax debt is paid, and to protect the government's interest against subsequent creditors until further enforcement steps are taken.

2. The cases involving priorities are discussed in detail in the general tax lien section of this paper.

3. In 1956 the American Bar Association recognized the increasing importance of the federal lien by establishing a committee on the Relative Priority of Government and Private Liens. Reports of this committee are found in the Annual Proceedings of the American Bar Association's section of Real Property Law.

4. This lien encompasses delinquent federal taxes of all types. Income taxes, withholding taxes, taxes covered by the special liens, and excise taxes are but a few of the levies included. See also note 36 *infra*.

5. Liens to secure taxes did not exist at common law; therefore, all federal tax liens are

important source of litigation.[6] Consequently, they have a rather narrow importance in the field. These liens are briefly discussed below.

B. *Federal Estate Tax Lien*

There is a special lien for federal estate taxes.[7] This lien attaches automatically upon death and extends to the gross estate[8] of the decedent.[9] It is valid immediately, without the necessity of recording, and is effective for a period of ten years.[10] The statute expressly provides for divestment of the lien if the property is conveyed by the surviving spouse, administrator or other beneficiary, to a bona fide purchaser, mortgagee, or pledgee for full and adequate consideration.[11] Judgment creditors seem to have been excepted from this provision, and municipal tax liens attaching to the property subsequent to the death have been held subordinate to the lien.[12] All transfers, mortgages and other liens executed upon the property *before* the decedent's death are definitely superior to the federal lien.[13]

C. *Federal Gift Tax Lien*

Federal law also provides a special lien for gift taxes,[14] which is imposed upon all gifts during the calendar year that exceed the allowable exemptions.[15] Like the estate tax lien, the gift tax lien is valid without recording and is limited to a ten year period from the date of the gift.[16] If the donee transfers the gift to a bona fide purchaser, mortgagee, or pledgee, the subject of the gift is divested of the lien. However, the donee-transferor is held liable to the extent of the value of the gift.[17] It should be noted that both estate and gift tax liens may be released upon proper showing that sufficient assets exist to satisfy the debt.[18]

creatures of statute. The establishment of a tax lien by Congress is an exercise of its constitutional power to "lay and collect" taxes. U.S. CONST. art. I, § 8.

6. The general tax lien also covers these taxes. See note 4 *supra*.

7. INT. REV. CODE OF 1954, § 2001.

8. "Gross estate" means all the assets of the decedent except such part as is used for the payment of charges against the estate and expenses of its administration. This portion is divested of the lien.

9. Usually the final tax assessment is not made for quite some time, so the lien is actually for taxes not yet in existence. INT. REV. CODE OF 1954, § 6324(a)(1).

10. Detroit Bank v. United States, 317 U.S. 329 (1943).

11. INT. REV. CODE OF 1954, § 6324(a)(2). However, after the conveyance is made a like lien attaches to the property of the transferor.

12. Michigan v. United States, 317 U.S. 338 (1943).

13. *Ibid.*

14. INT. REV. CODE OF 1954, § 6324(b).

15. INT. REV. CODE OF 1954, §§ 2501-24.

16. INT. REV. CODE OF 1954, § 6324(b). See also Detroit Bank v. United States, 317 U.S. 329, 336 (1943).

17. INT. REV. CODE OF 1954, § 6324(b).

18. INT. REV. CODE OF 1954, § 6325. For a complete discussion of the effects of this lien on the examination of abstracts see Peters & Maxey, *The Gift Tax Lien and the Examination of Abstracts*, 5 MIAMI L.Q. 66 (1951).

D. *Distilled Spirits Lien*

The statutes provide a third special lien for the tax on distilled spirits.[19] This lien is a *first* lien upon the spirits, distillery (including stills and fixtures) and the land on which the operation is located.[20] Furthermore, it is valid against all transfers, without assessment, distraint or other administrative proceedings.[21]

E. *The Priority Statutes*

Two other statutes which do not impose liens, but do confer upon the United States special priorities, have significance. Since references will occasionally be made to these statutes, they are explained at this time.

The first statute, commonly called "section 3466,"[22] is applicable to situations where the delinquent taxpayer is insolvent,[23] deceased, or guilty of an act of bankruptcy without an actual bankruptcy proceeding. In these situations the statute requires that debts due the United States, including unpaid taxes,[24] be satisfied in preference to all other debts.[25] This statutory grant of priority has existed in one form or another since 1797,[26] and was made necessary because the common law priority in favor of a sovereign was not available to the United States as a government of delegated powers.[27] The success of the government in maintaining this priority in competition with private liens is one of the factors rendering this statute pertinent to the present subject.[28]

The other statute bestowing a priority on the United States is section 104 of the Bankruptcy Act.[29] Contrary to section 3466, the United States does not enjoy an absolute priority in the ordinary bankruptcy proceeding.[30] The priority is limited to certain unsecured claims,[31] and does not extend to valid pre-existing liens.[32] Also, when

19. INT. REV. CODE OF 1954, § 5004.
20. INT. REV. CODE OF 1954, § 5004(a)(1).
21. United States v. Rizzo, 297 U.S. 530 (1936).
22. REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1958).
23. "Insolvency" is defined in United States v. Oklahoma, 261 U.S. 253, 261 (1923).
24. Illinois v. United States, 328 U.S. 8, 9 (1946).
25. 31 U.S.C. § 191 (1958).
26. United States v. Emory, 314 U.S. 423, 428 (1941).
27. United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 39 (1832).
28. As to just how well the government has fared, see United States v. Gilbert Associates, 345 U.S. 361 (1953).
29. 11 U.S.C. § 104 (1958).
30. "Section 3466" has been held inapplicable to bankruptcy proceedings. United States v. Gargill, 218 F.2d 556 (1st Cir. 1955); Adams v. O'Malley, 182 F.2d 925 (8th Cir. 1950).
31. *In re* Taylorcraft Aviation Corp., 168 F.2d 808 (6th Cir. 1948); United States Fid. & Guar. Co. v. Sweeny, 80 F.2d 235 (8th Cir. 1935); Claude D. Reese, Inc. v. United States, 75 F.2d 9 (5th Cir. 1935). See also cases at note 30 *supra*. *Contra*, United States v. Reese, 131 F.2d 466 (7th Cir. 1942). In addition to recognizing valid pre-existing liens, the Bank-

special proceedings in bankruptcy occur, such as reorganization or composition, provision for payment of federal taxes must be made before any proposed arrangement can be confirmed.[33] Thus, for the most part, federal lien questions arising during bankruptcy proceedings are governed strictly by the bankruptcy statutes and hence, are little cause for concern to the practitioner.

II. The General Tax Lien

A. *Generally*

During the Civil War federal fiscal requirements expanded greatly, but tax collections were being increasingly frustrated by transfers of the taxpayer's assets before enforcement proceedings could be instituted. To remedy the situation Congress enacted the statutes commonly referred to as the "General Lien Provisions."[34] This lien is imposed for the non-payment of income taxes, withholding taxes,[35] estate and gift taxes, and a wide variety of miscellaneous excise levies.[36] By far, it is the most important lien and the one of greatest concern to the real property practitioner.

B. *Statutory Provisions*

The first two sections of the statute read as follows:

SEC. 6321. LIEN FOR TAXES

> 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 cost 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.

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ruptcy Act permits the perfection of liens after the debtor becomes insolvent and during bankruptcy proceedings. See 11 U.S.C. § 107 (1958).

32. Massachusetts v. United States, 333 U.S. 611 (1948). However, if a § 3466 priority has already attached, it is not lost by the subsequent bankruptcy of the taxpayer.

33. See chapters 8 and 10 of the Bankruptcy Act, 11 U.S.C. A. §§ 201, 501 (1958).

34. 14 Stat. 107 (1866). These provisions are now found in §§ 6321-23 of the Internal Revenue Code of 1954, which were formerly §§ 3670, 3671, 3672 of the 1939 Internal Revenue Code. This fact is noted because it is under the 1939 Code section designations that the applicable provisions have been discussed in cases reported before the 1954 Code became effective. Further references in the text will be to either the 1954 section numbers, or "the Code."

35. When the employer sets aside the employee's income taxes withheld, the employee's responsibility is discharged whether or not the employer pays the government. If the tax is not paid over, a lien arises only on the defaulting employer's property. Furthermore, the lien may include a civil penalty of 100% of the tax if the default is wilful.

36. Other commonly encountered federal taxes included under this lien are employment taxes under the Federal Insurance Contributions Act, the Railroad Retirement Tax Act, the Federal Unemployment Tax Act, and retailers, manufacturers and tobacco excise taxes.

SEC. 6322. PERIOD OF LIEN

> Unless another date is specifically fixed by law, the lien imposed by section 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.

1. CREATION OF THE LIEN

The steps taken by the government in imposing the lien normally include the following sequence of events. First, the taxpayer is given an opportunity to present his side of the tax controversy. Thereafter, if no settlement is reached and the deficiency remains unpaid, the Commissioner signs an assessment list containing the tax, penalty, and interest outstanding. This is the exact point in time when the lien arises, but as a condition precedent to the lien's becoming enforceable, a demand must first be made of the taxpayer.[37] Therefore, the list is delivered to the Director of Internal Revenue having jurisdiction over the taxpayer, who forthwith issues the necessary demand for payment.[38] Thereafter, upon the neglect or refusal of the taxpayer to pay, the lien automatically becomes effective and relates back to the time of assessment, with the demand date having no relevance at all.[39] The lien is then considered perfected as of the assessment date,[40] and is entirely valid, without recording being necessary as against all subsequent creditors (except as to mortgagees, purchasers, pledgees and judgment creditors).[41] It is evident then, that except for the taxpayer, the lien is secret from all other individuals. This means that a creditor, for example, a building contractor, who extends credit on the face of clear title, has no guarantee that he is not already subordinate to an unrevealed federal assessment. To the attorney this situation is doubly dangerous, for he must advise his clients with regard to their rights in the property without any practical way of determining whether a federal tax lien already exists.[42]

2. DURATION OF THE LIEN

There is another situation which can cause difficulty and loss to the client if there is not complete awareness of the federal law. The

37. Detroit Bank v. United States, 317 U.S. 329 (1943).

38. The demand need not be formal, and may be waived, but the total absence of *any* demand will defeat the government's lien. Cattani v. Korsan, 29 N.J. Super. 581, 103 A.2d 51 (1954).

39. United States v. Roanoke Motor Co., 8 F. Supp. 228 (W.D. Va. 1934).

40. United States v. City of Greenville, 118 F.2d 963 (4th Cir. 1941).

41. The federal tax lien must be filed before it becomes valid against subsequent creditors in this class of individuals. See text following note 51 *infra*.

42. Government employees are not permitted to disclose the existence or the amount of the lien. INT. REV. CODE OF 1954, § 7213. Impossible a situation as this may be, the problems faced by the attorney representing a client whose lien antedates the federal lien are far worse. See the priority discussion, Section II(D) of this paper *infra*.

statute says the lien shall remain enforceable "until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."[43] Under the statute of limitations,[44] a lien for taxes ceases six years after date of assessment, unless within that period it is enforced,[45] or extended by written agreement with the taxpayer.[46] Thus, there being no requirement that the consent agreement be recorded,[47] it cannot safely be assumed that a federal lien assessed over six years from the date the records are searched, has expired.[48] The dangerous possibilities inherent in this situation were dramatically revealed in several recent cases in which consent agreements, extending liens, resulted in losses to purchasers and mortgagees who assumed that the lien had expired six years after the date of the original and *only* notice of lien on file.[49]

An interesting recent Eighth Circuit Case[50] involved the question of when a tax liability would be considered "satisfied" according to the terms of the statute. Enforcing its lien, the government sold the taxpayer's property at a price which exceeded the tax indebtedness. However, the sale was made partially on credit. The court ruled that although the government agreed to the sale on credit and the taxpayer lost his property by the sale, the liability for the tax was not satisfied until the government received *payment in cash.* Therefore, the taxpayer was not entitled to release of the lien against the balance of his property.

3. RECORDING REQUIREMENT — PROTECTION FOR CERTAIN LIENORS

Prior to 1913, great hardships were caused to innocent purchasers by the type of unrecorded lien just described. The harsh result reached in the landmark case of *United States v. Snyder*[51] aptly illustrates the point. Real estate in Louisiana was sold after a tax lien was assessed

43. INT. REV. CODE OF 1954, § 6322, quoted in text following note 36 *supra.*

44. INT. REV. CODE OF 1954, § 6502(a).

45. Once the debt is reduced to judgment, the lien will last forever because time limitations do not run against judgments in favor of the government. United States v. Ettleson, 67 F. Supp. 257 (E.D. Wis. 1946).

46. Usually such an agreement comes about as a provision in a compromise offer. See United States v. Havner, 101 F.2d 161 (8th Cir. 1939). Various other provisions also suspend the time, such as military service, 50 U.S.C. § 573 (App. 1952); INT. REV. CODE OF 1954, § 7508.

47. Equitable Life Assur. Soc'y v. Moore, 29 F. Supp. 179 (E.D. Ill. 1939).

48. Information concerning the amount outstanding under a *filed* lien may be obtained upon application to the District Director. INT. REV. CODE OF 1954, § 6323(d). Also, upon being satisfied as to the nullity of a lien, the Director will issue, upon application, a "Certificate of Non-Attachment" which should remove the cloud on the title created by the lien.

49. United States v. Vassallo, Inc., 274 F.2d 791 (3d Cir. 1960); United States v. Mojac Constr. Co., 190 F. Supp. 622 (E.D.N.Y. 1960); United States v. Herman, 186 F. Supp. 98 (E.D.N.Y. 1960).

50. United States v. Heasley, 283 F.2d 422 (8th Cir. 1960).

51. 149 U.S. 210 (1893).

against the owner. The innocent purchaser for value took possession and shortly thereafter the United States brought an action to foreclose its lien. The purchaser contended the federal lien was ineffective because it was not recorded as required by Louisiana law. The Supreme Court held the United States was not subject to the recording laws of the state and that therefore, the lien was valid and enforceable. This decision led to proposals for modifications in the law, and in 1913, relief legislation was enacted. The new provisions expressly removed mortgagees, purchasers and judgment creditors from the effects of the secret lien by making the lien invalid against them until recordation. This section reads as follows:

> SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS AND JUDGMENT CREDITORS
>
> (a) Except as otherwise provided in subsection (c)[52] the lien imposed by section 6321 shall not be valid against any mortgagee, pledgee,[53] purchaser or judgment creditor until notice thereof has been filed by the Secretary or his delegate . . . in the Office designated by the law of the State or Territory in which the property subject to the lien is situated . . . or . . . in the office of the clerk of the United States district court . . . whenever the State or Territory has not by law designated an office . . . .

In the case of real estate, the mechanics of searching for a filed lien are extremely simple.[54] The notice, with the name of the delinquent taxpayer and the claim, will be filed, if at all, in the county where the property is situated. A notice filed under an incorrect name is ineffective,[55] unless the searcher would not be misled.[56] Also, it should be noted, the statute does not say anything about the protected classes being "bona fide" or "without notice." Therefore, lienors do not lose their protection, if in the course of a credit investigation they gain knowledge of an unfiled lien.[57]

52. This subsection refers to the special treatment accorded securities in order to maintain their negotiable character. Congress has, in effect, removed them from the reach of the lien by providing that although notice is filed, it shall not be valid as against a mortgagee, pledgee, or purchaser of a security without *actual* notice of the existence of the lien. (A security within the meaning of this provision consists of stocks, bonds, negotiable instruments or money).

53. Pledgees were added to this protected class in 1939.

54. However, the present state of the law makes it virtually impossible to determine whether a federal lien against *personal* property has been filed. Relying on the doctrine that the situs of personal property is the domicile of the owner, tax liens filed in the county of the delinquent taxpayer have been held sufficient, even though the chattel was actually situated in another city. Grand Prairie State Bank v. United States, 206 F.2d 217 (5th Cir. 1953). The problems of a record search presented by this holding are obvious.

55. Continental Invs. v. United States, 142 F. Supp. 542 (W.D. Tenn. 1953) (lien against W.B. Clark, Sr. did not affect property of W.R. Clark, Sr.).

56. Richters' Loan Co. v. United States, 235 F.2d 753 (5th Cir. 1956) (lien filed against "Freidlander" effective against Friedlander).

57. United States v. Beaver Run Coal Co., 99 F.2d 610 (3d Cir. 1938); Smith v.

All of the states have enacted legislation regulating the filing of notice for federal tax liens.[58] However, there have been attempts by the states to require the notice of lien to take a certain form, or that the lien be noted on the Torrens Title Certificate. Recently, the Supreme Court settled this matter in *United States v. Union Central Life Ins. Co.*[59] The Michigan statute had required that the notice contain a legal description of the property before it was acceptable for filing. The Court held that the Revenue Code did not permit a statute to prescribe a form of notice, thus invalidating the Michigan requirement. Hence, a notice filed in the district court gave the tax lien priority over a real estate mortgage recorded under state law subsequent to the filing of the lien in the district court.

It should be re-emphasized that the above mentioned classes of individuals are the only ones the statute seeks to remove from the hazards of the secret lien. Although each class is not specifically defined by the statute, the courts have shown little inclination to expand them by interpretation.[60]

C. *The Effect of the Tax Lien on the Taxpayer—"Property or Property Rights"*

1. GENERALLY

In any case where the federal government asserts its tax lien, the threshold question is whether and to what extent the taxpayer had "property" or "property rights" to which the lien could attach.[61] Thus, in this section we are interested only in the tax lien's relationship to the taxpayer's rights, and not to the rights of third parties.

The Supreme Court has held "state law controls in determining the nature and the legal interest which the taxpayer had in the property."[62] At first blush, this concept seems quite simple. However, without a clear understanding of its terms, the practitioner can be easily misled. First, and most important, state law controls only as to the *creation* and *nature* of the estate or property right. Once the estate or right is established,

United States, 113 F. Supp. 702 (D. Hawaii 1953). However, where the parties are closely related there is authority that the lienor *is* bound by knowledge. See Heyward v. United States, 2 F.2d 467 (5th Cir. 1924). See also Comptroller General's Decisions B-135474, 37 DECS. COMP. GEN. 817 (1958).

58. See 4 CCH 1952 STAND. FED. TAX REP. ¶ 1765(B)(29); 3 P-H 1955 FED. TAX SERV. ¶ 19,912. In Florida, the provision is found in FLA. STAT. § 28.20 (1961).

59. 386 U.S. 291 (1961).

60. Mr. Justice Jackson, after reviewing the history of the lien section, said: "My conclusions from this history is that the statute excludes from the provisions of this secret lien those types of interests which it specifically included in the statute and no others." United States v. Security Trust, 340 U.S. 47, 53 (1950) (concurring).

61. Aquilino v. United States, 363 U.S. 509 (1960).

62. Morgan v. Commissioner, 309 U.S. 78, 82 (1940).

any other state laws, as for example, creditor exemption statutes, *do not control.*[63] Secondly, state law controls only as to the existence of property or property rights in the taxpayer; *it never governs the property rights of third persons, which are governed by federal law.*[64] The practitioner must grasp this distinction at the outset because a failure to understand it, or to apply it in the proper case, can cause much lost time and futile argument.

Thus, if the government fails to establish under state law that the taxpayer has an interest in the property it seeks to reach, the lien cannot attach.[65] Or, if the taxpayer holds under an imperfect title, the tax lien will fail if the interest fails, even if the lien has already attached.[66]

2. JOINTLY OWNED PROPERTY

It now appears firmly established that jointly owned property can be partitioned in order to enforce a tax lien against the delinquent taxpayer's share. A partition excludes any right of survivorship in the other owner.[67] However, there is a problem of determining the extent of the taxpayers' interest, with the burden of proof falling on the government.[68] If the indebted joint tenant dies before the lien is enforced, his interest in the property is extinguished and the survivor is not held liable as a transferee.[69] One writer[70] has raised the question whether a lien arising before death would continue to attach to the decedent's former share in the survivor's hands, based on an analogy with the facts in an insurance case.[71] There, the beneficiary of the insurance proceeds took subject to the lien that attached before death, and so it is argued that the survivor in a joint ownership should take subject as well.

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63. See also text following note 78 *infra.*

64. See text following note 94 *infra.*

65. Two insurance proceeds cases, though not exactly pertinent to this subject, are good illustrations of this point. In one, the government's lien was assessed against the insured taxpayer after his death for income taxes incurred while living. The court held that the estate of the taxpayer had no property rights in the policy to which the lien could attach. Commissioner v. Stern, 357 U.S. 39 (1958). In the other case, since the tax was assessed *before* the insured died, the insured at that time had property rights in the policy to the extent of its cash surrender value, and so the lien attached to these rights and the beneficiary took subject to it. United States v. Bess, 357 U.S. 51 (1958).

66. Reiter v. Kille, 143 F. Supp. 590 (E.D. Pa. 1956); United States v. Dickerson, 101 F. Supp. 262 (E.D. Mo. 1951).

67. United States v. Brandenburg, 106 F. Supp. 82 (S.D. Cal. 1952); United States v. Beggerly, 52-1 U.S. Tax Cas. ¶ 9304 (S.D. Cal. 1952). This rule was also applied to joint bank accounts in United States v. Third Nat'l Bank & Trust Co., 111 F. Supp. 152 (M.D. Pa. 1953). *But see* Raffaele v. Granger, 196 F.2d 620 (3d Cir. 1952), wherein a joint bank account by husband and wife was treated by state law as a tenancy by the entirety and held free from the demands of creditors.

68. United States v. Stock Yards Bank, 231 F.2d 628 (6th Cir. 1956).

69. Irvine v. Helvering, 99 F.2d 265 (8th Cir. 1938).

70. Plumb, *Federal Tax Collection and Lien Problems*, 13 TAX L. REV. 247 (1958).

71. See the discussion of United States v. Bess, note 65 *supra.*

3. TENANCIES BY THE ENTIRETIES

Whether a tax lien attaches to property held by the entireties is solely a question of local law. In those jurisdictions that retain the theory that the property is owned by a fictional unity of husband and wife and that while each owns the whole, neither owns a separate interest, then the lien does not attach.[72] Florida adheres to this theory, and in *United States v. American Nat'l Bank of Jacksonville*,[73] the Fifth Circuit followed it. After the government had filed a tax lien against the husband, the bank took back a mortgage to both the husband and wife on property which they held by the entireties. The wife thereafter died, and the husband became the owner in fee simple. The husband then defaulted and the bank foreclosed. The court held that since one tenant in a tenancy by the entirety cannot charge the joint title for his separate debts, the tax lien was not a valid lien against the tenancy prior to the death of the wife. Thus, the mortgage executed by both was valid and entitled to priority although subsequent in time to the filing of the husband's tax lien, because the lien did not attach until the time of the wife's death.

There has been criticism of the immunity accorded to the estate by the entireties. As a practical matter, however, little could be realized if one of the spouse's interests could be sold subject to the rights of the other.[74]It has been suggested that the lien be allowed to attach without the power to enforce, on the theory that the mere recording of the lien would prevent the joint owners from disposing of the property by rendering the title unmarketable. Thereafter, the lien might be enforced, when and if the delinquent taxpayer survives.[75]

In other jurisdictions local law modifies the estate by the entireties and allows creditors to levy on the interest of the indebted spouse. This converts the estate into what, in effect, would be a tenancy in common with a right of survivorship. In these states, of course, the tax collector can reach the taxpayer's interest.[76]

4. DOWER RIGHTS

The federal tax lien of a delinquent taxpayer-husband does not reach either the *consummate* or *inchoate* dower rights of a widow.[77]

72. United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951); Shaw v. United States, 94 F. Supp. 245 (W.D. Mich. 1939); United States v. Nathanson, 60 F. Supp 193 (E.D. Mich. 1945).

73. 255 F.2d 504 (5th Cir.), *cert. denied*, 358 U.S. 835 (1958).

74. For a note on the dilemma created when a creditor becomes entitled to equal possession of a residence with a non-indebted spouse, see 23 CORNELL L.Q. 598, 602 (1938).

75. Note, however, that if the property has not been disposed of by the time the taxpayer becomes the owner by survivorship, then the delinquent taxpayer's individual lien attaches to it at the time of death, as after-acquired property. See note 86 *infra*.

76. Cooley v. Commissioner, 75 F.2d 188 (1st Cir. 1935); G.C.M. 1310, VI-1 CUM. BULL. 101 (1927).

77. Cobb v. Shore, 183 F.2d 980 (D.C. Cir. 1950); United States v. Ettleson, 67 F.

The lien may be enforced by a sale of the husband's property, but it must be made subject to the wife's dower rights, unless she is willing to join in the sale.

This rule seems more the result of a sentimental attitude towards dower than of pure logic and reasoning. Strictly speaking, dower is derivative and until death, remains inchoate. In reality, then, dower is nothing more than a lien on the taxpayer's property. Therefore, in view of the current trend concerning inchoate liens, this writer believes there may be future decisions holding inchoate dower rights subordinate to the federal lien.[78]

5. HOMESTEAD AND OTHER CREDITOR EXEMPT PROPERTY

The rule seems well established that exemptions from tax liens are governed solely by federal law and that state exemption statutes are not operative.[79] These decisions are based on the supremacy clause of the Constitution which forbids each state to preclude the right of the United States to collect its revenue by passing exemption laws. Thus, homestead protections, designed by state law to free certain property from creditors' liens, are of no effect against the federal tax liens.[80] Two federal cases originating in Florida involving homestead have followed the rule.[81] Personal property exemptions, as provided by the statutes, likewise do not apply.[82]

6. PARTNERSHIP PROPERTY

Liens for income taxes of individual partners do not attach to the assets of the partnership, but reach only the interests of the partner.[83] On the other hand, if the lien is for taxes of the partnership itself, such as social security or withholding taxes, then the total assets are vulnerable, as is the individual property of the partners to the extent they are liable for the debts of the partnership.[84] In the recent case of *Baugh v.*

Supp. 257 (E.D. Wis. 1946). "Inchoate" is defined as that which is not complete or perfected. BOUVIER, LAW DICTIONARY (8th ed. 1914).

78. As was pointed out in the text following note 61 *supra*, state law does not govern the property rights of third party lienors. Federal law controls. See discussion concerning inchoate liens in priority section II(D) of this paper *infra*.

79. United States v. City of Greenville, 118 F.2d 963 (4th Cir. 1941).

80. Fidelity & Deposit Co. v. Lovell, 108 F. Supp. 360 (S.D. Miss. 1952), *aff'd*, 214 F.2d 565 (5th Cir. 1954); United States v. Heffron, 158 F.2d 657 (9th Cir. 1947).

81. Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962); Bedami v. Tomlinson, 54-1 U.S. Tax Cas. ¶ 9227 (S.D. Fla. 1954).

82. The taxpayer is allowed only such exemptions as are provided by federal law in INT. REV. CODE OF 1954, § 6334. Accordingly, the lien also applies to the taxpayer's salary or wages without even a minimum for subsistence. Antrum v. United States, 127 F. Supp. 54 (D. Conn. 1953).

83. United States v. Kaufman, 267 U.S. 408 (1925); United States v. Worley, 213 F.2d 509 (6th Cir. 1954), *cert. denied*, 348 U.S. 917 (1955); Adler v. Nicholas, 166 F.2d 674 (10th Cir. 1948).

84. Heller v. United States, 55-1 U.S. Tax Cas. ¶ 49,084 (S.D. Cal. 1954).

Little Lake Lumber Co.,[85] the Ninth Circuit decided that notice of federal lien for delinquent partnership taxes, filed against only one partner, was notice to a lender on a mortgage subsequently executed by the partnership on partnership property. Therefore, the court concluded, the federal lien was prior to the mortgage to the extent of the named partner's property interest in the partnership.

7. AFTER-ACQUIRED PROPERTY

Sometimes a taxpayer has no assets reachable for the satisfaction of his tax liability at the time the lien is imposed. However, the lien has been construed to attach to all after-acquired property automatically upon acquisition, with no other action needed to perfect it.[86] Furthermore, a previously recorded security interest in the after-acquired property is subordinate to the federal lien, whether the security interest relates to future advances or not.[87]

D. *The Effect of the Tax Lien on Third Parties—"Priorities"*

1. GENERALLY

Priority determinations involving the general federal lien are vastly different from the ordinary priority contest. Consequently, before we examine the cases in this area, it is important to note the four basic principles controlling such litigation. These are separately discussed.

a. Property of the Taxpayer Doctrine

The first inquiry made in any federal tax lien case, before consideration is ever given to the priority issues involved, is whether the taxpayer had any *property or rights to property* to which the federal lien could attach.[88] Too often in the past, the practitioner and the courts have failed to make this fundamental determination. Yet a proper disposition of this question could well be decisive in many a case.[89] As was pointed out earlier,[90] the *existence* and *nature* of the property interest of the taxpayer is controlled by state law.

b. First in Time—First in Right

The statutes themselves do not confer upon the federal government a special priority in rank.[91] Thus, a second controlling principle is the common-law rule—First in order of time, first in order of rank.[92] This

85. 297 F.2d 692 (9th Cir. 1961), *cert. denied*, 370 U.S. 909 (1962).

86. Glass City Bank v. United States, 326 U.S. 265 (1945).

87. United States v. Phillips, 198 F.2d 634 (5th Cir. 1952) (after-acquired increased cash value of an insurance policy held by a bank as security).

88. See note 61 *supra*.

89. See text following note 163 *infra*.

90. See text following note 61 *supra*.

91. Ersa v. Dudley, 234 F.2d 178 (3d Cir. 1956).

92. United States v. City of New Britain, 347 U.S. 81 (1954); Rankin v. Scott, 25 U.S. (12 Wheat.) 177 (1827).

rule governs the priorities in federal lien litigation except as specifically modified by statute.[93]

c. Federal Law Controls

Before any lien other than the federal lien can qualify as "first in time, first in right," it must be *perfected at the time it attaches*.[94] This qualification applies to all classes of private lienors, mentioned or not mentioned in the lien statutes. The question then arises: which law, state or federal, determines this perfection? The Supreme Court has answered this question by ruling:

> The relative priority of the lien of the United States for unpaid taxes is . . . always a federal question to be determined by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court.[95]

In short, state-determined property rights of third party lienors do do not apply to *priority* litigation involving a federal lien. The rationale behind this rule is that fifty states cannot be allowed to govern what constitutes a perfected competing lien, or there would be absolutely no uniformity in the collection of federal taxes. For this same reason, state homestead, recording, and exemption laws, while applicable to private lienors, have been held not to affect the federal lien.[96] Thus, state property laws affecting the perfection of private liens, such as overriding priorities,[97] or relation back statutes,[98] while accepted in ordinary priority cases, do not govern federal priority cases.[99] The writer believes that the failure of many attorneys to accept this proposition—or worse, the mistaken application of state standards—has led to most of the confusion and controversy in this area.[100] Therefore, it must be re-

93. Although the federal lien might attach first, it is not first in rank until recorded when it is in competition with a purchaser, mortgagee, pledgee or judgment creditor. See text following note 51 *supra*.

94. United States v. City of New Britain, 347 U.S. 81, 86 (1954).

95. United States v. Acri, 348 U.S. 211, 213 (1955).

96. See notes 51 and 79 *supra*.

97. See United States v. City of New Britain, 347 U.S. 81 (1954), where a state statute providing that real estate tax liens shall have precedence over *all* encumbrances was held ineffective as to the federal lien.

98. Typical is the Florida mechanic's lien statute, which provides that once the lien is filed it relates back to the day the work commenced. See FLA. STAT. §§ 84.01-84.35 (1961).

99. United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950). See also text following note 107 *infra*.

100. Since its inception, the American Bar Association's Committee on Federal Liens has been unyielding in its assertion that *all* property rights, both of the taxpayer and third parties, should be determined according to the laws of the states. In support of this position, the committee has gone as far as to argue *Erie v. Tompkins* as authority, contending that since there is no federal common property law, the courts must defer to the common law of the states. The fact that *Erie* applied only to diversity cases and that federal lien litigation involves a federal question seems to have been completely overlooked, perhaps because this is the flaw in the whole argument against federally defined property rights. Priority litigation

emphasized that *a private lienor's property rights are determined solely by federal law* and that in order to be declared superior to a federal lien, the competing lien must not only be first in time, but perfected according to *federal standards*.

d. The Federal "Choateness" Test

Before discussing the actual standards the federal courts apply in determining whether a lien is perfected or "choate,"[101] a few words should be given to the background of the test.

The test originated in another class of cases involving the federal priority statute.[102] The early cases construing this statute held that antedating private liens were superior to the priority granted the federal government in section 3466.[103] However, in the landmark case of *City of Spokane v. United States*,[104] the Court launched the doctrine of the "inchoate" lien, holding that a federal priority defeats an antedating private lien that is not specific and definite.[105] In subsequent cases, this concept proved a most potent weapon in maintaining the government's priority in section 3466 litigation, as the Court always found new features of "inchoateness."[106] With this success in the insolvency field, the government began to argue that the rationale of section 3466 should be followed in determining priority of liens under the general lien statute. The government analogized that since an "inchoate" lien was subordinate to a debt in section 3466 cases, surely the more formal government lien should fare no worse. This proposition was finally accepted in the landmark case of *United States v. Security Trust & Sav. Bank*.[107] Briefly, the facts were that real estate had been attached in a suit filed in a state court, but before judgment was obtained, notices of a federal tax lien were filed. Under state law, the recording of the suit of attachment was sufficient to effectuate a lien against the property. The Court said, however:

> In cases involving a kindred matter, i.e., the federal priority

involving a federal lien is in reality a contest between state and federal interests. Therefore, the concept of federal supremacy as enunciated by the Constitution, must be controlling.

101. "Choate" is not as yet included in any of the legal dictionaries, but the courts have used the word to describe perfected rights—in other words, as an opposite to the word "inchoate."

102. See note 22 *supra*.

103. See Kennedy, *The Relative Priority of the Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905, 911 n.37 (1954), for a list of cases. This article will hereafter be referred to as *Kennedy*.

104. 279 U.S. 80 (1929).

105. The claimant in this case, trying to assert its prior lien ahead of the debt owed the government, was a city, which under state statute had a lien upon the debtor's real estate for unpaid real estate taxes. The Court held, that as the state statute provided for execution, which had not yet occurred, the lien was not as perfected as it could have been, and thus was subordinate to the government's claim.

106. For an illustration of the facility of the Court, see note 177 *infra*.

107. 340 U.S. 47 (1950), *reversing* 93 Cal. App. 2d 608, 209 P.2d 657 (1949).

> and R.S. Sec. 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it.[108]

Thus, the Court held the attachment was the equivalent of a lis pendens or simply a caveat of a more perfect lien to come, and so the federal lien was superior. This was a significant ruling for the government because prior to it, at least thirty cases in the lower courts had held antedating liens, perfected under state law, superior to the federal lien.[109]

The test of "choateness" as the federal courts apply it seems to involve three requirements: (1) the lien must identify the lienor; (2) the amount of the lien must be certain; and (3) the lien must attach to specific property.[110]

The first requirement presents no problem at all, and the third requirement, that the lien attach to specific property, has frustrated only those lienors whom the state has tried to protect with a general statutory lien on all the debtor's assets. However, the second qualification has proved a major obstacle to most private lienors. It now seems that nothing short of judgment on the competing lien before the federal lien attaches will comply with the requirement that the amount be certain.[111] In the light of today's overburdened dockets, this requirement presents quite a difficult task. Furthermore, there are indications that the courts may not even be satisfied with judgment and would require recording in the judgment lien record book of the state.[112]

With these principles in mind, we can now examine the cases involving particular competing liens.

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108. *Id.* at 51.

109. See *Kennedy*, at 294 n.115.

110. See United States v. City of New Britain, 347 U.S. 81 (1954), noting these three standards in the opinion.

111. In United States v. White Bear Brewing Co., 350 U.S. 1010, 1011 (1956), Mr. Justice Douglas said in dissent: "The Court apparently holds that under 26 U.S.C. § 3670, a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment." See text preceding note 159 *infra*, for a discussion of the facts of the case. The only exception to this rule seems to be real property taxes. See text following note 179 *infra*. Contractual liens, such as mortgages, have also been excepted, but see text with note 143 *infra*, indicating a possible change.

112. In United States v. Bond, 279 F.2d 837, 841 (4th Cir. 1960), the Court discussed the choate lien test as follows: "In establishing the 'choate lien test', these cases have developed exacting requirements, the substance of which is to require that state created liens be specific to the point that *nothing further need be done to make the lien enforceable.*" (Emphasis added.) See FLA. STAT. § 55.10 (1961), pertaining to filing of judgment in official records.

2. PARTIES MENTIONED IN THE STATUTE

a. Mortgagees Generally

Until recent years, mortgage lenders have not encountered much difficulty with federal revenue liens against the mortgaged property. This quietude was warranted mainly by the security provided in section 6323 which gives priority to mortgages recorded[113] before a tax lien is filed. Furthermore, the ordinary mortgage easily met the choate standards, because the identity of the lienor, property and amounts were specified under contract. Thus, the mortgagee, with a title report indicating no tax liens on the property, might give as little thought to the effect of a subsequent federal lien as he would to any other junior encumbrance. However, in the light of several recent Supreme Court decisions, discussed below, mortgage lenders should reappraise their position.

Open End Mortgages.—The decision in *United States v. Ball Const. Co.*[114] is of landmark importance. The case involved a bonding company that had bonded a contractor, in return for a pledge of the contract proceeds as security. Subsequent to the execution of the bond, a federal lien was recorded against the contractor, who thereafter defaulted, and the bonding company was required to advance its monies to complete the work. When the contract proceeds became payable, the government claimed an interest in competition with the company.

These facts seem far removed from an ordinary mortgage lender's situation. However, the case is significant to mortgagees because the Supreme Court reversed the lower court's decision, which held that the bonding company should prevail because it had the *status of a mortgagee.*[115] Four dissenting judges adopted the lower court's view, but the majority reversed per curiam because of "the *instrument involved* being inchoate and unperfected."[116]

This holding still would not seem to affect the usual mortgage, which is specific as to property and amount. However, the open-end mortgage[117] has definitely been put into jeopardy.

113. Under the wording in § 6323, the fact of recording would seem to be immaterial. However, when the mortgage is recordable, the courts, fearing collusion on the part of the taxpayer and the mortgagee, have held that a mortgage is not entitled to a priority over a federal tax lien unless recorded before the notice of tax lien is filed. Underwood v. United States, 118 F.2d 760 (5th Cir. 1941); Edmundson v. Scofield, 92 F. Supp. 91 (S.D. Tex. 1950).

114. 355 U.S. 587 (1958).

115. The determination of whether a person falls within the class [mortgagee] is made by reference to the realities and facts in a given case rather than to the technical form and terminology used to designate such a person. Rev. Rul. 56-592, 1956-2 CUM. BULL. 945.

116. United States v. R. F. Ball Constr. Co., 355 U.S. 587 (1958). (Emphasis added.)

117. An open-end mortgage provides that future loans may be made on the same security as the original loan, and may be repaid over the life of the mortgage at the same loan interest rates charged in the original mortgage.

Prior to this decision, the law in regard to open-end mortgages was thought to depend on the nature of the advance. If the advances made after notice of the intervening lien were at the option of the mortgagee, then they would be subordinated to the federal lien.[118] The theory was that the advances, although made under a prior recorded mortgage, were too uncertain and indefinite and thus "inchoate." On the other hand, it was generally believed that future advances that were *obligatory* on the mortgagee, though conditioned on events beyond his control, were entitled to the same priority as the prior recorded loan.

The impact of the *Ball* case is that now *both* optional and obligatory advances made by a mortgagee on an open-end mortgage, after notice of a federal lien, will be considered subordinate. The rationale of *Ball* seems to be that the advances to be made, though obligatory, were *contingent*. Therefore, until the additional loan was made, there was no perfected loan at the time the lien attached. Further, a state doctrine of relation back to the original loan date would not save the mortgage in the light of another Supreme Court holding.[119]

The recent case of *American Sur. Co. v. Sundberg*[120] seems to support this conclusion. A surety company took a mortgage to secure future advances which it might be required to make under a performance bond. The court held that federal liens arising after the execution of the mortgage were entitled to priority over the obligatory advances subsequently made. The decision was grounded on the "lack of certainty as to whether future advances would be made and, if so, the amount thereof . . . ."[121]

The implications of these decisions are far-reaching. Apply this kind of reasoning, for example, to a mortgage lender who has made a mortgage commitment relying on clear title, but for some reason does not disburse all the proceeds of the loan immediately upon execution of the mortgage. During this interval, suppose a federal lien is recorded against the mortgagor. Conceivably, the federal lien could be held superior to the balance of the proceeds issued subsequent to the lien's attachment.

Construction Mortgages.—Construction mortgages are also in danger as a result of the aforementioned decisions. The normal construction loan, where periodic advances are made *as the need arises*, is certainly susceptible to the charge that it is "inchoate." Thus, any advances made after a notice of lien is filed would be subordinated to the federal lien.

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118. Rev. Rul. 56-41, 1956-1 CUM. BULL. 562.

119. United States v. Acri, 348 U.S. 211 (1955). See note 95 *supra*, and text accompanying note 98 *supra*.

120. 58 Wash. 2d 337, 363 P.2d 99 (1961), *cert. denied*, 368 U.S. 989 (1962).

121. *Id.* at 348, 363 P.2d at 106. See also United States v. L. R. Foy Constr. Co., 300 F.2d 207 (10th Cir. 1962).

Purchase Money Mortgages.—Purchase money mortgages have a unique status in relation to the federal lien, because such a mortgage, executed after a federal lien is filed, still enjoys priority over the tax lien.[122] This priority is a result of the rule which regards purchase money mortgages as a limitation on the estate which a purchaser takes. In other words, while the taxpayer may acquire legal title to the property, the beneficial interest in whole or in part still remains in the seller.[123] This applies, whether the mortgage is executed to the seller or to a third party, as long as the proceeds of the mortgage are to be used to apply on the purchase.[124]

Judicial Foreclosure.—In order to sue the United States in a foreclosure suit, the mortgagee must bring himself within the provisions of a federal statute authorizing such suit. There are two such consent statutes, but one is so little used today[125] that it will not be discussed. The other consent statute[126] provides that the United States may be named a party defendant in any suit instituted in a federal or state court for the purpose of quieting title, or for the foreclosure of a mortgage or any other lien when the United States claims a lien upon the property. Briefly, the procedure is to serve the local United States Attorney with copies of the process and complaint, which also are sent by registered mail to the Attorney General of the United States. The statute grants the government sixty days from date of service to file an answer. Thereafter, a judicial sale of the property will discharge the junior federal lien in the same way as any junior lien would be discharged under the law of the state where the property is located. However, the statute does provide for a one-year right of redemption in favor of the government, which is rarely exercised and can be disposed of by submitting a nominal offer to the tax division of the Department of Justice.

Non-Judicial Foreclosure.[127]—There is no law requiring that the

122. United States v. New Orleans R.R., 79 U.S. (12 Wall.) 362 (1870); Troyer v. Mundy, 60 F.2d 818 (8th Cir. 1932). However, an equitable vendor's lien has been held subordinate to a later federal lien on the grounds that the former was enforceable only by suit and hence "inchoate" until judgment. It was also subject to defeat by a bona fide purchaser. United States v. Morrison, 247 F.2d 285 (5th Cir. 1957).

123. The Internal Revenue Service recently substantiated this approach in an opinion rendered to the Veterans Administration, which was contemplating taking back a purchase-money mortgage from a purchaser against whom notice of a federal lien existed. See Proceedings American Bar Association, Section of Real Property, Probate and Trust Law, at 80 (1961).

124. Wermes v. McCowan, 286 Ill. App. 381, 3 N.E.2d 720 (1936).

125. INT. REV. CODE OF 1954, § 7424. The reason for this lack of use is the slow and cumbersome procedure involved.

126. 28 U.S.C. § 2410 (1958).

127. It is relevant to mention at this point the possibility of obtaining an administrative release or discharge of a federal lien without the necessity of going through a suit, either judicially or nonjudicially. Section 6325(b) of the Code includes such a provision, if it can be shown that the interest of the United States in the property is valueless.

government be named as a party in a private mortgage foreclosure proceeding.[128] What then is the law concerning a foreclosure under *power of sale*, rather than judicial proceedings? Is the government's lien discharged or does it survive? There seemed to be considerable uncertainty until recently, because conflicting court of appeal decisions had never been resolved by the Supreme Court.[129] However, in June, 1960, the question was finally settled in *United States v. Brosnan*.[130] This case held that no notice need be given the United States as a junior lienor in a private mortgage foreclosure sale. [131] The decision was particularly significant, not only because it calmed fears that thousands of titles based upon state non-judicial foreclosure procedures might be upset, but also because it was grounded on the proposition that *state* determined property rights were conclusive on the government.[132] This latter fact gave rise to the belief that the Court was changing its position that federal law always controls federal lien property cases.[133] However, this thesis now seems doubtful, and the indications are that state law will be allowed to control in this limited area *only*.[134]

It should also be noted that a non-judicial sale will not eliminate the federal lien if the sale is a sham,[135] or if the federal lien is prior to the competing lien being enforced.[136]

The Circuity Problem.—A "circular" priority problem can arise when a state provides that local taxes are paramount, even over a prior mortgage. If the mortgage is first in time over a federal lien, which, in turn, is prior in time to the local tax lien, the "circle" is then complete. This unusual problem in priorities appears to be controlled by the Supreme Court's decision in *United States v. City of New Britain*.[137] Applying the principle, "first in time, first in right," the Court held that the mortgage, being first, was entitled to first priority, and that the federal lien, being second, should be paid next. If there were not enough of the proceeds left to pay the local tax lien, then the local lien could invade the mortgagee's share for satisfaction.[138] The rationale for

128. In Florida, however, the statutes provide that all mortgages, with certain exceptions, must be foreclosed judicially. FLA. STAT. ch. 702 (1961).

129. *No discharge*—Metropolitan Life Ins. Co. v. United States, 107 F.2d 311 (6th Cir. 1939). *Discharged*—United States v. Boyd, 246 F.2d 477 (5th Cir.), *cert. denied*, 355 U.S. 889 (1957).

130. 363 U.S. 237 (1960).

131. The Court affirmed the Third Circuit's decision in 264 F.2d 762 (3d Cir. 1959) and in the same opinion reversed United States v. Bank of America, 265 F.2d 862 (9th Cir. 1959) which had held the opposite of *Brosnan*.

132. The Pennsylvania statute did not require notice to be given to either the mortgagor or the government.

133. See note 100 *supra*.

134. See note 186 *infra* and text following.

135. Decker v. Brereton, 62-1 U.S. Tax Cas. ¶ 9455 (D. Utah 1962).

136. United States v. Peterson, 204 F. Supp. 683 (E.D. Pa. 1962).

137. 347 U.S. 81 (1954).

138. For example, suppose a property sells for $12,000. The mortgage is $10,000, the

this solution was that the priority of local taxes over a prior mortgage was a matter of local law and no concern of the federal government. The federal statutes, the Court said, permit only the priority of the mortgage over the federal lien and therefore *any* amount obtained upon sale over the mortgage amount must go to satisfy the federal lien.

This decision has been criticized because the mortgagee suffers a loss, when the proceeds are insufficient, despite the priority the law gives him. It seems to this writer, however, that the solution is as reasonable as could be under the circumstances. Actually the mortgagee's rights are being sacrificed to the demands of the state rather than the federal government. The mortgagee receives all the protection the statute provides, but it is the overriding priority of the state tax lien which creates the problem. The mortgagee's proceeds would be invaded by the local tax lien even if no federal lien were present, if the proceeds covered only the mortgage amount. Thus, if the state law conferred no priority on the local lien, then the mortgagee's interest would not be impaired.[139]

Mortgage Foreclosure Expenses.—While a mortgage lender may search for federal liens against a prospective mortgagor in order to protect himself, he cannot refrain from making advances once a defaulted mortgage must be foreclosed and attorney's fees and court costs are incurred. Furthermore, accrued interest may have accumulated or advances may have to be made for state taxes, insurance and repairs —all necessary items to protect the mortgagee's security. What is their status if the payments are made after the federal tax lien attaches? The trend of decisions against "inchoate" liens indicates that the mortgagee will have a difficult time collecting these expenses. *United States v. Bond*[140] is a prime example. Under state law and the instrument itself, the attorney's fees and advances for real estate taxes were to become part of the original indebtedness. The Fourth Circuit held, however, that these advances were not "choate" before the lien was recorded and furthermore, that the doctrine of relation back would not preclude the federal lien from priority.

Even if the state statute provides that local taxes be made a prior part of the "expenses of sale," they still are not prior to the sales proceeds due the federal lien. This is the latest holding of the Supreme

federal lien $5,000, and state taxes $1,000. The mortgagee would get his $10,000 first with the federal lien receiving the $2,000 balance. The local taxes would then have to be paid from the mortgagee's share, reducing it to $9,000. Prior to this decision, the results would have been: local taxes first for $1,000, mortgagee second for $10,000 and the federal government sustaining the $1,000 reduction.

139. See Jefferson Standard Life Ins. Co. v. United States, 247 F.2d 777 (9th Cir. 1957).

140. 279 F.2d 837 (4th Cir.), *cert. denied*, 364 U.S. 895 (1960). See also United States v. Pioneer Am. Ins. Co., 83 Sup. Ct. 1651 (1963).

Court concerning this problem handed down in *United States v. Buffalo Sav. Bank*.[141] The opinion stated particularly that "the state may not avoid the priority rules of the federal tax lien by the formalistic device of characterizing subsequent accruing local liens as expenses of sale."[142]

Thus, it is evident that the mortgagee can no longer be secure with his statutory protection. The inchoate doctrine has definitely made serious inroads into the mortgage lien area. Cases like *United States v. Chapman*[143] make one wonder just how far this intrusion will go. In this case a finance company lent money to a contractor who assigned the proceeds of the construction to the finance company as security. Thereafter, federal liens arose. The Tenth Circuit held the assignment was inchoate, stating that "not only had no action been taken to perfect the lien but, also, the amount of the debt to be collected from the security had not been determined."[144] The implications of this statement are profound, for the amount of the debt to be collected from any type of security is not precisely determined until foreclosure. Thus, the logical conclusion would be that *all* types of security interest are "inchoate" until sale.

b. Purchasers

Because purchasers are included in the four classes protected by the statute, priorities are generally governed by the same rules applicable to mortgagees. Therefore, if a person is adjudged a "purchaser," his claim is choate and superior to the federal lien if the purchase was made before the notice was filed. The question then is, what exactly does the term purchaser mean? The Supreme Court has said, "[A] purchaser within the meaning of § 3672 [now § 6323] usually means one who acquires title for a valuable consideration in the manner of vendor and vendee."[145] If the Court's definition means that the requirements of a purchaser are not met until title passes, then installment land contract vendees may be susceptible to the infirmities of the "choateness" test. A district court case seems to confirm this conclusion. In *Leipert v. R. C. Williams & Co.*,[146] the buyers had contracted to purchase homes under long term contracts which prohibited recordation. The purchasers took possession and began making periodic payments when a federal lien was recorded against the vendor. The court held that the liens of the purchasers were inchoate and inferior to the federal lien because title had not been conveyed. In effect, the decision says that the purchaser had no rights (*i.e.*, only "inchoate" rights), when in fact, those same

141. 371 U.S. 228 (1963). See also United States v. Christensen, 269 F.2d 624 (9th Cir. 1959).
142. 371 U.S. 228 (1963).
143. 281 F.2d 862 (10th Cir. 1960).
144. *Id.* at 869.
145. United States v. Scovil, 348 U.S. 218, 221 (1954).
146. 161 F. Supp. 355 (S.D.N.Y. 1957).

rights were sufficient to be enforceable in a court of equity. This fact was noted in another more recent district court decision. In *United States v. Boston & Berlin Transp. Co.*,[147] the court held the contrary—that the purchaser had an interest in property even in the absence of legal title, and thus the lien was choate and superior to the federal lien. The court based its decision on the Treasury's own regulations, which define a purchaser as one who for valuable consideration acquires property or an *interest in property*.[148] Furthermore, the court intimated *Leipert* was in error by this comment on the earlier case: "The Court held that those receiving deeds after the recording date were not 'purchasers,' overlooking the fact that they, even without title, had an 'interest in property' within the meaning of the Treasury Regulation . . . ."[149]

It seems to this writer that any extension of the "choate" doctrine into this area would flagrantly disregard the original purposes of the statute. Those purposes were the alleviation of the harsh conditions which previously had existed for bona fide purchasers under the secret lien.[150] The denial of protection to contract land purchasers certainly is not in keeping with these aims. Further, adoption of the policy expressed in *Leipert* would present an intolerable situation for the practitioner representing a contract purchaser. In order to avoid liability in his title opinion, he would either have to expressly exempt federal liens and let his client assume the risk, or insist that the seller prove *all* his taxes were currently paid, which even then would not solve the problem as to future taxes.

c. Judgment Creditors

Although creditors are also presumably protected by section 6323, the question again arises: Who qualifies as a judgment creditor within the meaning of the section? The Supreme Court has said, "We think Congress used the word 'judgment creditor' . . . in the usual conventional sense of a judgment of a court of record."[151] The regulations issued under the 1954 Code take a different view, however. "Judgment creditor" is defined there as one "who has a *perfected lien under such a judgment* on the property involved."[152] Once again, the government seems to have injected the choate test into another area by apparently requiring a recording[153] or levy *after* judgment. Thus, in some states the judgment

147. 188 F. Supp. 304 (D.N.H. 1960).

148. Treas. Reg. § 301.6323-1(a)(2)(i)(a) (1954).

149. 188 F. Supp. 304, 307 (D.N.H. 1960). The *Leipert* decision could also be distinguished by the unusual contract employed, which provived that the relation between the parties was to be like that of landlord and tenant and that on default the seller might enter the premises and remove property as for non-payment of rent.

150. See note 51 *supra*.

151. United States v. Gilbert Associates, 345 U.S. 361, 364 (1953).

152. Treas. Reg. § 301.6323-1(a)(2)(i)(c) (1954).

153. It is to be noted that a judgment in Florida does not become a lien on real

creditor would be forced to seize and hold property to protect his lien where the government does not. This seems a complete distortion of what Congress intended when it included judgment creditors in the recording statute. The Supreme Court has not yet been asked to decide the precise question.[154]

3. PARTIES NOT MENTIONED IN THE STATUTES

a. Generally

It thus appears that the position of mortgagees, purchasers, and judgment creditors is not as secure as might be expected of a class under statutory protection. However, the position of lienors not covered by the statute is downright precarious. Their claims had always been subject to the risk of subordination to an unfiled secret lien, but recently they have been displaced by federal liens attaching *subsequently*. This new development has been almost exclusively the result of applying the "choateness test" to the competing lien. Thus, nowhere else in the priority field is the controversy and criticism greater than in this area.

b. Mechanic's Lienors

A mechanic's lien is solely a creature of statute designed to secure the compensation of those who expend their labor and materials toward enhancing the value of the property of others. For this reason, state property law generally has preferred it to other liens, mortgages and encumbrances which subsequently arise, and to prior but unrecorded liens. In some states the statutes provide for relation back of the lien to the date of commencement of improvement in order to render it superior to all intervening liens.[155] This was the type of statute involved in *United States v. Vorreiter*,[156] in which mechanic's lien statements had been filed, but not reduced to judgment. The federal lien had been assessed prior to the making of the contract, but notice was not filed until after the mechanic's lienor had finished the work and filed his lien. The Colorado Supreme Court held that by the law of that state the mechanic's lienor had a property interest in the taxpayer's property to the extent that the value of the property was increased by the work performed. To give priority to the United States, the court said, would unjustly enrich it. The United States Supreme Court reversed in a one sentence per curiam opinion, citing the *Security Trust*[157] case as authority.

estate until a certified copy thereof is recorded in the judgment lien record. FLA. STAT. § 55.10 (1961).

154. *But see* Miller v. Bank of America, N.T. & S.A., 166 F.2d 415 (9th Cir. 1948), which held that the mere entry of judgment is insufficient to compete with a federal tax lien. The judgment must be a lien upon the property involved. See also note 172 *infra*.

155. The Florida mechanic's lien statute has a like provision. FLA. STAT. §§ 84.01-84.35 (1961).

156. 355 U.S. 15, *reversing* 134 Colo. 543, 307 P.2d 475 (1957).

157. See note 107 *supra*.

A year later, *United States v. Hulley*,[158] a Florida case with similar facts, was decided in the same manner. Thus it appears, under these federal decisions which are controlling, that a mechanic's lien cannot relate back to defeat a prior but unrecorded federal lien, although under state law competing unrecorded private liens would be subordinate. Obviously, this results in a difficult situation for the lienor because he has no way of determining whether a federal lien has attached prior to the commencement of his work. This, however, has always been a hazard to the mechanic's lienor since he is not protected by statute from the secret lien. But consider this plight: A contractor makes improvements to the property and upon failure to be paid files his lien and commences suit. Prior to all these events *no* federal lien has been assessed. Then, while the foreclosure suit is pending, the federal lien is filed. These were the facts in *United States v. White Bear Brewing Co.*,[159] and the Supreme Court held, without opinion, that the prior mechanic's lien was subordinated to the subsequent federal lien.[160] There was a dissenting opinion, from which one can gather the rationale of the Court:

> The Court apparently holds . . . a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent tax lien, short of reducing the [state] lien to final judgment.[161]

This position has been severely criticized by many authorities. One writer describes the government as, in effect, "robbing Peter to pay Paul's taxes."[162] The inequities of this situation certainly are gross. The government can remain silent while the mechanic increases the value of the taxpayer's property. Then the federal lien can be assessed anytime thereafter, take priority over the mechanic's lien if it has not been reduced to judgment, and receive the benefits of the enhanced value of the property. Throughout these proceedings the mechanic's lienor lacks any method of protecting himself. The arguments made in favor of these decisions seems very weak by comparison. One proposition is that there is no actual distinction between the "mechanic" who works on the construction of a building and one who works on the construction of furniture. Thus, there should be no lien in the first place. This, of course, is highly unrealistic. One or two weeks pay of the craftsman does not approach the value a contractor contributes to the real property. Then, there is the assertion that federal tax revenues would be impaired. Again, this ignores the practical economics involved. The very property the

158. 358 U.S. 66, *reversing* 102 So.2d 599 (Fla. 1958).

159. 350 U.S. 1010 (1956).

160. See also United States v. Colotta, 350 U.S. 808, *reversing* 224 Miss. 33, 79 So.2d 474 (1955). This also was a per curiam reversal without opinion.

161. 350 U.S. 1010, 1011 (1956), by Justices Harlan and Douglas.

162. Plumb, *Federal Tax Collection and Lien Problems*, 13 TAX. L. REV. 247, 459 (1958).

government's lien attaches to in the first place would not be available if the mechanic's lienor had not created it.

The foregoing discussion applies mainly to the situation in which the mechanic's lien and the federal tax lien are both filed against the owner of the property. However, the more common situation is when the federal lien is asserted, not against the owner of the property, but against the general contractor who has a contract with the owner. In this situation, it is the sub-contractor who then is competing with the federal lien for the proceeds of the contract due the general contractor. Depending upon the state's mechanic's lien law, these circumstances can produce results contrary to the situation first discussed. In *Aquilino v. United States*,[163] New York property law made the general contractor's right of recovery a trust fund, to be applied first for the benefit of sub-contractors. The New York Court of Appeals, relying on *White Bear* and other prior decisions of the Supreme Court, held the sub-contractor's rights inchoate by federal standards. Surprisingly, the Supreme Court reversed, holding that the contractor never had any "property" or "property rights" as defined by state law, so the federal lien never had anything to which it could attach. A companion case, *United States v. Durham Lumber Co.*,[164] was disposed of similarly, the Court stating:

> [S]ince under North Carolina law the taxpayers [*i.e.*, the contractor] possessed merely a right to the residue of the fund and since the Government's tax lien attached to the property interests of the taxpayers as defined by state law, the Government can recover only "so much of the construction price as will remain unpaid after the owners have deducted a sum sufficient to pay the subcontractors.[165]

There has been speculation that these decisions indicate a change in the Court's position in regard to its "choate" test. However, it seems to this writer that the decisions only illustrate the Court's meticulous regard for the principles discussed at the outset of this section.[166] In these two cases, the priority question was never reached because the first principle, "the property of the taxpayer," was decisive. What these decisions *do* have to offer is an invitation to state legislatures to change their mechanic's lien laws so that at least sub-contractors will have some protection against the federal lien.

c. Lis Pendens

When the mechanic's lien case of *White Bear* was first decided it raised the fear that the common-law principles of lis pendens did not

163. 363 U.S. 509 (1960).
164. 363 U.S. 522 (1960).
165. *Id.* at 525-26.
166. See text accompanying note 88 *supra*.

apply to the government. Under this doctrine, any person who acquires rights to real property affected by pending litigation takes with notice of such litigation and must appear in the action and assert his rights or he will be estopped by the judgment and cannot thereafter question its validity.[167] Otherwise, a real estate lawyer foreclosing on a mortgage, for example, would have to search for revenue liens every day until the sale, in order to join the United States. In *White Bear*, the Court did not squarely decide this question, but the fact was that the tax lien did arise in the midst of the suit and was enforced against the purchaser *after* the sale.[168]

The decision in the *Brosnan*[169] case seems to have had a settling effect on this situation. In a letter to the ABA in 1961, the acting chief counsel of the IRS said:

> In view of the Court's decision [*Brosnan*] it would seem that you need only look to state statutes and decisions to determine whether the junior liens are discharged under the fact situation [lis pendens] outlined in your letter.[170]

d. Attachment and Garnishment Liens

In Florida, as in other jurisdictions, a suit begun by attachment or garnishment generally gives the attaching creditor prior rights to the property against subsequent creditors, although actual judgment is obtained at a later date.[171] However, when competing with the federal lien, attachment or garnishment liens give no protection whatsoever. The case which introduced the "choate doctrine" to the general lien field settled this question as early as 1950. In *United States v. Security Trust & Sav. Bank*,[172] an attachment lien was filed against four parcels of real estate, and thereafter a federal lien arose. Although final judgment was rendered in the suit, the Court held the federal lien was still superior because the attachment lien was "contingent or inchoate—merely a lis pendens notice that a right to perfect a lien exists."[173]

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167. 54 C.J.S. *Lis Pendens* § 1 (1948).

168. See note 159 *supra*.

169. See note 130 *supra*.

170. Proceedings American Bar Association, Section of Real Property, Probate and Trust Law, at 81 (1961). This opinion is in conformity with the case of Ward v. Congress Constr. Co., 99 Fed. 598 (7th Cir. 1900), which held that the doctrine of lis pendens applied to the United States the same as any other subsequent claimant and that sovereign immunity from suit did not require a different result. See also Puritan Dairy Prods. Co. v. Christoffers, 54 N.J. Super. 102, 148 A.2d 223 (1959).

171. FLA. STAT. chs. 76 (attachment), 77 (garnishment) (1961).

172. 340 U.S. 47 (1950).

173. *Id.* at 50. See also United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 (1955) (involving a garnishment of personal property); United States v. Acri, 348 U.S. 211 (1955) (attachment involving personal property).

e. Landlords' Liens

A similar situation exists in regard to landlord liens. In *United States v. Scovil*[174] the Supreme Court decided that a landlord's distress lien was not perfected in the federal sense at the time the federal lien arose. Under South Carolina law, the tenant had five days to post a bond to free the property from the lien. As this period had not elapsed, the lien was considered "inchoate."[175]

f. Municipal Liens

Local tax liens have fared no better against the federal lien than the previously discussed private liens. Municipal assessments, not actually fixed before the federal lien arises, are considered inchoate and subordinate to the federal lien.[176] To attain the required choateness, the taxing unit must reduce the claim to judgment (not a statutory judgment)[177] and do whatever else is required to make the judgment a lien.[178]

Real estate taxes seem to be an exception to this rule. In *United States v. City of New Britain*,[179] a lien for in rem property taxes was deemed to be *choate* by the Supreme Court. This, incidentally, was the one occasion on which the Supreme Court has ever found a private lien choate. Apparently the lien met the test because it had attached to specific property and was enforceable without a suit. Unfortunately, it seems that this is virtually the only type of lien that will satisfy the choate test.

The fact that after a federal lien arises all subsequent local taxes are subordinate presents a grim prospect for local tax collectors. As long as the lien remains unpaid, it is very unlikely that anyone would buy the property at a local tax sale knowing the federal lien is senior. The net effect is to all but take the property off the tax rolls, in most cases.

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174. 348 U.S. 218 (1955), *reversing* 224 S.C. 233, 78 S.E.2d 277 (1953).

175. See also *In re* Uni-Lab, Inc., 282 F.2d 123 (3d Cir. 1960); United States v. Weissman, 135 So.2d 235 (Fla. 2d Dist. 1961).

176. United States v. City of New Britain, 347 U.S. 81 (1954).

177. United States v. Gilbert Associates, 345 U.S. 361 (1953). The tax lien here was designated by the state to have the effect of a judgment, but the Court said that it was not a judgment in the *conventional* sense, and hence that it was inferior to the federal lien. It seems incongruous to force the state to get a court judgment which would stand the choate test when the statute creating the judgment lien was passed specifically to expedite the proceedings.

178. Ersa, Inc. v. Dudley, 234 F.2d 178 (3d Cir. 1956). In *Gilbert, supra* note 177, the property in question had been sold to the locality for taxes, and yet the lien was still held inchoate on the grounds that the "taxpayer had not been divested by the Town of either title or possession." *Id.* at 366. Thus, it seems that in § 3466 cases, of which this is one, a fourth requirement has been added to the choate test.

179. Note 176 *supra*.

g. Attorneys' Liens

This discussion would not be complete, nor appropriate, until the priority of the attorney's lien was examined. Here again, the choateness test has had its effects. It now appears that fees incurred in *any* connection with a mortgage foreclosure prior to the sale[180] will be subordinated to the federal lien. However, when the attorney creates the property or fund to which the federal lien attaches, the law is not yet settled. In *United States v. Goldstein*,[181] the attorney was retained by the taxpayer corporation to represent it on a twenty-five per cent retainer agreement in a condemnation proceeding. After an award in its favor was made, a federal lien was filed against the taxpayer corporation. The attorney claimed his twenty-five per cent on the basis that he created the fund, but the district court held the lien inchoate and subordinate to the federal lien. In *United States v. Coblentz*,[182] on similar facts, the New York Appellate Division ruled in favor of the attorney, holding that an attorney's lien was a property right to which the federal lien did not attach. There was no discussion at all of the choateness of the lien. The government's petition for certiorari surprisingly was denied. This state of affairs creates a dilemma for the attorney who undertakes litigation on a contingent fee basis for a client against whom a lien is already filed. The best solution would seem to be for the attorney to extract an agreement from the government before the litigation begins, by pointedly reminding the government attorneys that unless he is paid, there will be no money at all from which the lien can be paid.

4. SUMMARY

From *Security Trust*[183] to *Ball*,[184] the decisions leave little doubt as to the government's supremacy as a creditor. The rule that federal law controls the issue of priorities and a strict application of the choateness test have combined to swing the pendulum from government subordination to state created liens, to complete subordination of almost

180. United States v. Bond, 279 F.2d 837 (4th Cir.), *cert. denied*, 364 U.S. 895 (1960); American Sur. Co. v. Sundberg, 58 Wash. 2d 337, 363 P.2d 99 (1961), *cert. denied*, 368 U.S. 989 (1962).

United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 (1955), involved insurance proceeds for which the United States was a competing claimant. The Supreme Court disallowed a $500 attorney fee to the insurance company that *interpleaded* the fund. *Cf.* United States v. Pioneer Am. Ins. Co., 357 S.W.2d 653 (Ark. 1962), *rev'd*, 83 Sup. Ct. 1651 (1963). The Arkansas court had held that the mortgagee's right to an allowance became choate at the same date when default was made in a mortgage payment—which was before the federal lien was filed against the owner. The court added, "while attorneys love their work, they do not work entirely for love."

181. United States v. Pay-O-Matic Corp., 162 F. Supp. 154 (S.D.N.Y.), *aff'd sub nom.* United States v. Goldstein, 256 F.2d 581 (2d Cir.), *cert. denied*, 358 U.S. 830 (1958), *rehearing denied*, 359 U.S. 985 (1959).

182. 5 N.Y.2d 300, 157 N.E.2d 587, *cert. denied*, 363 U.S. 841 (1960).

183. See note 107 *supra*.

184. See note 114 *supra*.

all security interests competing with the federal lien. The question now is, what lies ahead?

There is little reason to believe the Court is going to change its basic approach to the priorities question. As late as 1960, the Court said in *Aquilino v. United States*:

> The application of state law in ascertaining the taxpayer's property rights and of federal law in reconciling the claims of competing lienors is based both upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes.[185]

It is clearly discernible that the Court is still satisfied that this policy is the best approach to the conflicting state and federal interests involved. However, the recent cases also show some indications that the Court realizes the serious impact this policy is having on the commercial world, and is searching for a way to compromise its harsh effects, without overruling all that it has done in the past years.

The *Brosnan* decision, which refused to extend the priority approach to the mortgage foreclosure field, and held state law effective, may be one of these indications. The language of the opinion was especially significant:

> It must be recognized that the factors supporting a federal rule of uniformity in this field, and those militating against the dislocation of long-standing state procedures are full of competing considerations. They involve many imponderables which this Court is ill-equipped to assess, on which Congress has not yet spoken, and which we think are best left to that body to deal with in light of their full illumination. A wise solution of such a far-reaching problem cannot be achieved within the confines of a lawsuit.[186]

For the first time, the Court seemed to recognize the hazards of judicial legislation. Certainly, the same conflict the Court mentions in the mortgage foreclosure area, *i.e.*, federal uniformity versus "dislocation of long-standing state procedure," existed thirteen years ago in the priority field. Perhaps the hesitance of the Court to extend federal control to the foreclosure field indicates its remorse in acting in the priority area where Congress should have spoken first.

Other indications that the Court is attempting to mitigate the force

185. Aquilino v. United States, 363 U.S. 509, 514 (1960).
186. United States v. Brosnan, 363 U.S. 237, 251-52 (1960).

of its earlier decisions are seen in the *Aquilino* and *Durham* cases.[187] Technically, these decisions did not violate the Court's long-standing formula for deciding priority questions. However, by distinguishing the cases on the "property of the taxpayer" principle, the court impliedly upheld the state's right to confer a lesser interest in the taxpayer, thereby limiting the federal lien in the same way as a competing choate lien would reduce a larger property interest initially conferred. Certainly, the net effect of these cases conflicts directly with the Court's previously stated intention to enforce uniform standards of tax collection. The dissent in *Aquilino* noted this fact in its argument that state property concepts should not be permitted "to control the extent of a Federal lien's application in situations indistinguishable from those where the Court has in fact, rightly or wrongly, enforced a uniform Federal Rule."[188] There is no doubt that if the Court continues to try to remedy the situation by resorting to judicial circuity, the priority picture will undoubtedly become more confused and difficult than it already is. In the words of Justice Harlan:

> If the standard of choateness is thought to be an undesirable restriction on the States' freedom to regulate property relationships, the cases establishing that standard should be expressly overruled and not emasculated by dubious distinctions.[189]

CONCLUSION

Clearly, the *whole* area of federal tax lien law needs remedial action immediately. There is no legitimate reason, for example, why the federal lien should be kept secret. On the contrary, the fear of a secret lien may stifle lending and limit the growth of the economy—a result which could be avoided by enactment of a general notice statute.

The priority situation also has long been in need of congressional guidance. It is an area pregnant with public policy questions that can only be settled by legislative action.[190]

187. See notes 163 and 164 *supra*.

188. Aquilino v. United States, 363 U.S. 509, 516 (1960).

189. *Id.* at 521.

190. The American Bar Association has proposed legislation in this area. See S. 1193, H.R. 4319, H.R. 4320, 87th Cong., 1st Sess. (1961). See note 100 *supra*.