Volume 33 | Issue 3 Article 3

April 1927

Federal Liens

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FEDERAL LIENS*

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It is the purpose of this paper to discuss the various liens, arising under United States laws or statutes, that may affect the title to real estate. Since the writer discussed the subject of bankruptcy at the 1922 meeting of this association no discusison of that subject is included in this paper.

JUDGMENT LIENS

We will first take up the subject of the lien of judgments rendered in federal courts. And since the local law in many of our states, in the matter of judgments in state courts, is such that no advantage can be taken of the provisions of the federal law of 1888 on the subject of judgment liens, it will be necessary first to discuss the law as it was prior to the Act of August 1, 1888.

Prior to 1888 there was no federal statute specifically dealing with the subject of judgment liens. Revised Statutes §721,[1] originally passed in 1789, provides that

> "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

Revised Statutes §916[2] passed in 1872 is as follows:

> "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules adopt such state laws as may

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* An address delivered at the Twentieth Annual Convention of The American Title Association, Atlantic City, New Jersey, September 7, 8, 9, 10, 1926. Reprinted by permission of the American Title Association.

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[1] U. S. Comp. St. 1538.

[2] U. S. Comp. St. 1540.

hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Revised Statutes §967[3] passed in 1840 is that

"Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon."

Under the above statutes there is a long line of decisions to the effect that the lien of a judgment in a federal court has the same effect throughout the territorial jurisdiction of the court as the lien of a state court has throughout its territorial jurisdiction.

As authority for the above statement we quote *Massingil* v. *Downs*[4] as follows:

"In those states where the judgment on the execution of a state court creates a lien only within the county in which the judgment is rendered, it has not been doubted that a similar proceeding in the circuit court of the United States, would create a lien to the extent of its jurisdiction."

In *Barth* v. *McKeever*,[5] it was decided that a federal judgment, rendered in a state where the judgments of a state court attach to after-acquired land, will in such state attach to after-acquired land.

In *United States* v. *Humphreys*,[6] it was decided that a federal judgment need not be recorded to be valid, even in a state (Virginia) which required judgments in state courts to be recorded. This case was decided prior to the passage of the present federal statute of 1888.

In *Bank* v. *Bates*,[7] it was said that

"Prior to 1888 the lien of judgments in the federal courts was co-extensive with their territorial jurisdiction."

The only opinion that we have been able to find to the effect that the lien of a federal court judgment may extend

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[3] U. S. Comp. St. 1608.

[4] 7 How. (U. S.) 760 (1849). To the same effect see the following cases: Shrew *v.* Jones, Fed. Case No. 12818 (1840); Lombard *v.* Bayard, Fed. Case No. 8469 (1848); Cropsey *v.* Crandall, Fed. Case No. 3418 (1851); Ward *v.* Chamberlain, 17 U. S. (L. ed.) 319 (1862); Barth *v.* McKeever, Fed. Case No. 1069 (1868); Carroll *v.* Watkin, Fed. Case No. 2457 (1870); U. S. *v.* Scott, Fed. Case No. 16242 (1878).

[5] *Supra*, n. 4.

[6] Fed. Case No. 15422 (1879).

[7] 44 Fed. 546 (1890).

beyond the territorial jurisdiction of the court rendering the judgment is *Prevost* v. *Gorrell*,[8] decided by a federal court sitting in Pennsylvania as follows:

> "In the United States courts, when a state is divided into several districts, a judgment obtained in one district is a lien upon defendant's real estate in all parts of the state."

This opinion, which seems to stand alone, and which seems not to have been followed by federal courts in states other than Pennsylvania, was based upon Revised Statutes §985[9] which reads as follows:

> "All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts may run and be executed in any part of the state; but it shall be issued from and be made returnable to the court wherein the judgment was obtained."

The court says that

> "The right of lien depends upon the right of execution and by Revised Statutes 985 all writs of execution may run and be executed in all parts of the state."

Even prior to 1888 the above decision seems never to have been followed elsewhere than in Pennsylvania, and the statute of 1888 now regulates the lien and the territorial extent thereof.

We come now to the Act of August 1, 1888, Ch. 729[10] which, as originally enacted, read as follows:

> "*Sec.* 1. That judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgment had been rendered by a court of general jurisdiction of such state. *Provided*, That whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and

[8] Fed. Case No. 11400 (1877).
[9] U. S. Comp. St. 1631.
[10] 25 Stat. L. 357, U. S. Comp. St. 1606.

only whenever the laws of such state shall authorize the judgment and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"*Sec.* 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county, or parish in the State of Louisiana, in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

By the Act of March 2, 1895, Section 3 of the above act was amended to read as follows:

"*Sec.* 3. That nothing herein contained shall be construed to require the docketing of a judgment or decree of a United States Court, or the filing of a transcript thereof, in any state office within the same county, or the same parish in the State of Louisiana, in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the Clerk of the United States Court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish."

On January 1, 1913, the original Section 3, which seems not to have been specifically repealed by the Act of 1895 was repealed.

On January 1, 1917, the amended Section 3 was repealed.[11]

Since January 1, 1917, therefore, the judgment lien law has consisted of Section 1 of the original Act of August 1, 1888 as quoted above. From August 1, 1888 until January 1, 1917 it was not necessary to docket a federal judgment in accordance with the state law in those cases where the judgment was rendered by a federal court sitting in the county where the land was situated. For instance a judgment rendered in a federal court sitting in Cook County, Illinois, would be a lien on all land in Cook County whether or not the federal judgment was docketed or recorded in accordance with any law providing for docketing or record-

[11] Act of August 23, 1916, Ch. 1397, 39 Stat. L. 531.

ing a judgment of a state court. This has not been the law since January 1, 1917 and all federal judgments, whether rendered in the county where the land lies, or whether rendered in another county, must comply with Section 1 of the Act of August 1, 1888.

In those states whose judgment lien law is such that no advantage can be taken of the proviso in Section 1 of the Act of August 1, 1888, and in those states whose judgment lien law is such that advantage may be taken of the proviso, but advantage of which has not been taken by proper legislation, the law as to the lien of federal judgments seems to be exactly what it was prior to 1888, since that part of Section 1 preceding the proviso would seem to be merely declaratory of the law as laid down in the numerous decisions cited above. The declaratory part of the law is as follows:

> "That judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgment had been rendered by a court of general jurisdiction of such state."

An example of a state, whose judgment lien law is such that no advantage can be taken of the proviso in the Act of August 1, 1888, is Ohio. In Ohio a judgment is a general lien from the date of rendition (and in the case of judgments coming over from a previous term of court from the first day of the term) and no provision is made for "registering, recording, docketing or indexing" the same in order to make it a valid lien. In Ohio, therefore, and in other states whose judgment lien laws are substantially similar, judgments in federal courts are liens on all lands throughout the district from the date of rendition (and in some cases from the 1st day of the term), and no provision can be made for any sort of docketing or recording in any state office.

States whose judgment lien laws are such that advantage can be taken of the proviso in the 1888 law are in the same situation as Ohio unless and until laws shall have been passed permitting the docketing or recording of federal judgments in exactly the same manner as local judg-

ments are docketed or recorded. The word "exactly" is used advisedly, for it was decided in *Lineker* v. *Dillon*,[12] that a California law, which attempted to take advantage of the proviso in the Act of August 1, 1888, but which in part placed federal judgments in a less favorable position than judgments in state courts, was inoperative. In other words, any law passed by a state legislature, for the purpose of taking advantage of the privilege permitted by the 1888 statute, must put federal judgments exactly on a par with judgments rendered in state courts.

It has been decided that a judgment that has become a lien in any state, prior to the passage of a state law taking advantage of the privilege provided by the judgment lien law of August 1, 1888, is unaffected by the passage of such state law, and does not have to be docketed in accordance with the state law, to be a lien.

At page 733 of *Bank* v. *Bank*,[13] the court says:

> "In this language (quoting the Act of August 1, 1888) there is evidenced no intention to make the operation of the law retrospective, neither is there any provision giving time to register federal judgments already in existence with a view to preserving the liens thereof.
>
> "A court will not give retrospective effect to a statute, unless it is clear from the language used that the legislature intended to give it that effect."

To the same effect as the Nebraska decision see *Bank* v. *Thompson*.[14] In this case there is a very complete history of the whole question of the lien of federal judgments.

In *United States* v. *Kendall*,[15] a question arose as to certain judgments that had become liens in Louisiana, prior to 1913, under the original Section 3 of the Judgment Lien Act of August 1, 1888. It was held that the repeal of said Section 3 did not affect the lien of a judgment (in favor of the United States) which had already attached, the court saying at page 129 that "repealing statutes are not to be construed as affecting vested rights."

The law as to the lien of federal judgments may be sum-

[12] 275 Fed. 460 (1921).
[13] 51 Neb. 766, 71 N. W. 1024 (1897).
[14] 173 Ill. 593, 50 N. E. 1089 (1898).
[15] 263 Fed. 126 (1920).

marized as follows:

> "In those states whose local laws provide for the docketing, recording, registering, or indexing of judgments rendered in state courts, with certain formalities, federal judgments stand on the same footing 'if, as and when' a law is passed permitting the docketing, recording, registering, or indexing of federal judgments in the same manner as judgments of state courts. And this applies to those counties in which United States courts sit, as well as to counties where there is no United States court. In all other states the judgment of a federal court throughout its territorial jurisdiction has the same lien as the judgment of a state court throughout its territorial jurisdiction. In other words if the judgment of a common pleas court in Ohio is a lien on all the lands within a county, the judgment of a United States district court is a lien throughout the district in Ohio in which it is rendered, without any docketing or transcribing in any state court, or in any state recording office."

The question is often raised as to whether or not a judgment in favor of the United States stands upon the same footing as a judgment in favor of a private individual.

In *United States* v. *Houston*,[16] it was held that the statutes of limitations do not run against a judgment in favor of the United States.

In *United States* v. *Minor*,[17] it was said that "the United States may take the benefit of any state or federal statute, though it is not bound by its limitations."

At page 380 of *United States* v. *Noojin*,[18] the court says:

> "Under and by virtue of that statute (R. S. 916 above) it is claimed that, when the United States voluntarily appears in a court of justice, it at the same time submits to the law and places itself on an equality with other litigants. This, indeed, may be true; but the courts have universally held that such condition is always qualified by the rule that neither the statute of limitations, nor laches, will bar the government of the United States as to any claim for relief in a purely governmental matter."

And again in *United States* v. *Ingate*,[19] it was said:

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[16] 48 Fed. 291 (1891).
[17] 235 Fed. 101 (1916).
[18] 155 Fed. 377 (1907).
[19] 48 Fed. 251 (1891).
In the following cases it was held that "the party recovering a judgment," as used in Revised Statutes 916 above, includes the United States: Green v. U. S., 9 Wall. (U. S.) 655 (1869); Fink v. O'Neill, 106 U. S. 272 (1882); Clark v. Allen, 114 Fed. 874 (1902); Allen v. Clark, 126 Fed. 788 (1903).

"It is well settled, that when the United States voluntarily appears in a court of justice, they at the same time voluntarily submit to the law and place themselves on an equality with other litigants. But this does not mean that the United States is bound by the statute of limitations."

In *Clark* v. *Allen*,[20] it was held that the United States had no right, in connection with a judgment for a fine under Revised Statutes §1041 (quoted below), to reach the homestead of a Virginia debtor, even though the homestead in Virginia is subject to levy under a judgment for a fine in a state court.

It would seem, therefore, that a judgment in favor of the United States stands on the same footing as a judgment in favor of a private person except that the United States is not bound by the limitation provided by Revised Statutes §967.

LIS PENDENS

Intimately connected with the subject of judgment liens is the subject of lis pendens. Most states have a lis pendens statute providing substantially, that no one shall be deemed to have notice of a suit affecting land until there shall have been filed in the office where deeds are recorded a memorandum of the suit with a description of the land affected thereby. Let us suppose, that in a state having a statutory lis pendens law there is filed in the United States district court sitting in Johnson County, a partition of lands situated in Bolivar County, or any sort of equitable action based on diverse citizenship. Is a purchaser of the land in Bolivar County charged with notice of the suit in the United States court without any notice thereof being filed as a lis pendens in said Bolivar County?

The cases on this subject are delightfully contradictory.

In *Majors* v. *Cowell*,[21] it was decided that a state lis pendens law does not apply to suits in federal courts, unless the statute has been incorporated into the rules of court.

The Indiana Supreme Court in *Wilson* v. *Heflin*,[22] decided

[20] 114 Fed. 374 (1902).
[21] 31 Cal. 478 (1876).
[22] 81 Ind. 35 (1881).

that a state lis pendens statute has no application to suits in federal courts.

In *Jones* v. *Smith*,[23] it was intimated, but not decided, by a federal court sitting in New York, that state lis pendens statutes are binding on federal courts.

In *McCloskey* v. *Barr*,[24] it was decided that the Ohio lis pendens statute (which is not really a lis pendens statute at all, but merely a statutory declaration of the general doctrine of lis pendens) is a rule of procedure and not a rule of property and is therefore not binding on federal courts.

King v. *Davis*,[25] affirmed by the Circuit Court of Appeals,[26] was a case involving the Virginia lis pendens statute. The court says:

> "If the Virginia legislature were to enact a statute making it the duty of the state court clerks to record memoranda of pending suits and attachments in the federal courts, there might possibly be no further difficulty. But until that is done, the situation in respect to federal pending suits and attachments is the same as that which existed in respect to the lien of federal judgments prior to the Congressional Statute of 1888 (Act of Aug. 1, 1888, C. 729, 25 Stat. 357)."

It was decided in *United States* v. *C. M. & St. P. Ry. Co.*,[27] that the Minnesota lis pendens statute providing that the pendency of an action relating to real estate is notice to purchasers or incumbrancers only from the time of the filing of notice thereof in the office of the registrar of deeds in the county in which the land is situated, is a rule of property of the state relating to real estate, and applies to a suit in equity pending in a federal court. It is interesting to note that the Minnesota lis pendens statute does not specifically mention judgments in federal courts.

In *United States* v. *Calcasieu Timber Co.*,[28] decided by the Circuit Court of Appeals, Fifth Circuit, it was decided that a lis pendens statute of Louisiana, specifically including federal judgments within its purview, is binding on federal

[23] 40 Fed. 314 (1889).
[24] 48 Fed. 130 (1891).
[25] 137 Fed. 222, 240 (1905).
[26] 157 Fed. 676 (1906).
[27] 172 Fed. 271 (1909).
[28] 236 Fed. 196 (1916).

courts. The court mentions *King* v. *Davis*,[29] and notes that the Louisiana statute meets the requirement laid down in that case as a necessary prerequisite to making a state lis pendens statute binding on federal courts. The Court of Appeals in *Tennis Coal Co.* v. *Sacker*,[30] has this to say about the Kentucky lis pendens statute:

> "We do not concur in the view urged by counsel for the appellee, that a lis pendens notice, as provided by that statute, is unnecessary in order that the proceeding, sale or judgment may affect the title or interest of a subsequent purchaser, lessee or encumbrancer, for value, without notice, of real estate involved in a suit in a federal court where the real estate is situated in this state. It is a rule pertaining to property in this state and it is to be assumed, that the federal courts will give force and effect to it, as the courts of the state will do."

It might be added that the Kentucky opinion is a dictum only.

In *United States* v. *Olzak*,[31] a United States district court sitting in New Jersey decided that the state lis pendens law had no application to a suit in equity to abate a nuisance under the Volstead Act. In this case an alleged innocent lessee was denied relief.

The only statute in Ohio having the characteristics of a statutory lis pendens is G. C. 11301 providing that an action affecting land brought in one county shall not be effective in another county until notice thereof is filed in the recorder's office of such other county. It was decided by the Ohio Supreme Court in *Stewart* v. *Railway Co.*,[32] that this statute is not applicable to suits in federal courts.

In view of this conflict of authority, what are the title men to do about this matter of lis pendens? It would seem that unless they live in one of the jurisdictions in which it has been decided by a United States Court that their lis pendens statute applies to suits in federal courts, they had better assume that their lis pendens statute does not apply to such suits. In the meantime it would seem advisable for

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[29] *Supra*, n. 25.
[30] Am. Ann. Cas. 1917E 529, 640 (1916).
[31] 6 F. (2d) 1014 (1925).
[32] 53 Oh. St. 151 (1895).

the American Title Association to get behind a federal act, placing suits in federal courts within the purview of the state lis pendens statutes, just as the Act of August 1, 1888, placed federal judgments to some extent within the purview of state judgment lien statutes.

EXECUTION LIENS

Aside from judgment liens there are certain liens that may be created by the levy of execution, the existence of which can be safely discovered only by a search of the United States Marshal's execution docket.

The general law on the subject of execution liens is discussed in Volume 23 of Corpus Juris and is epitomized in the following quotations:

> "When the judgment is a lien upon real estate it has been generally recognized by the courts that an execution and levy thereunder upon such real estate creates no new or separate lien from lien of the judgment.
>
> "Where, however, land is levied on under an execution issued on a judgment which is not a lien on such land, the execution creates a lien on it.
>
> "It is generally held, in the absence of a statute to the contrary, that an execution is not a lien upon real estate, independent of the judgment lien, without a levy.
>
> "The general rule is that the writ is co-extensive with the jurisdiction of the officer to whom it is delivered."[33]

Federal execution liens are provided for by (§§ 916, 985 and 986) the United States Revised Statutes as follows:

> "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court, and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon the judgments as aforesaid, by execution or otherwise.
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> "All writs of execution upon judgments or decrees ob-

[33] 23 C. J. §§490, 492 and 494.

tained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from and made returnable to, the court wherein the judgment was obtained.

"All writs of execution upon judgments obtained for the use of the United States in any court thereof, in one state, may run and be executed in any other state, or in any territory, but shall be issued from and made returnable to, the court wherein the judgment was obtained."[34]

Just a word as to the application of these statutes. Suppose that John Smith gets a judgment against John Jones in the United States district court in a jurisdiction where judgments are not a lien on after acquired property. If Smith desires to make his judgment a lien on lands that are acquired by Jones after the effective date of his judgment he may under Revised Statutes § 916, have execution issued and levied upon the after acquired lands.

Suppose that John Smith gets a judgment against John Jones in the southern district of Ohio. In and of itself this judgment is a lien on all of John Jones' land situated in any county within the southern district. If Smith wants to attach the judgment as a lien upon land owned by Jones in a county of the northern district of Ohio, he may under Revised Statutes §985 have execution issued and levied by the marshal of the northern district on any lands within the northern district.

Suppose that the United States gets a judgment against John Jones in a United States district court in California. By Revised Statutes §986 his judgment may be made to attach as a lien in any other state in the union by having execution issued and levied by the United States Marshal of any district in which Jones may own land.

The only safe method by which the existence of the liens created by execution and levy under the above sections (Revised Statutes §§916, 985 and 986) of the United States Revised Statutes can be discovered, is a search of the marshal's execution docket. It is true that Revised Statutes §916 adopts the state laws as to execution in existence in 1872, and provides that state execution laws passed after 1872 may be adopted by general rules and the federal

[34] 1016 U. S. Comp. Stat. §§1540, 1631 and 1632.

courts. But it was held in *Brown* v. *Fletcher*,[35] that Revised Statutes §916 applies only to common law causes; in *Steam Stone Cutter Company* v. *Jones*,[36] and in *Hudson* v. *Wood*,[37] that it does not apply to equity cases; and in *The Blanche Page Company*,[38] and in *Steam Stone Cutter Company* v. *Sears*,[39] that it does not apply to executions in admiralty.

If a state statute in existence in 1872 provided for the recording of execution levies in the recorder's office; or if in any particular state a law has been passed since 1872 providing for such recording, and if in that same state the federal courts have by general rules adopted such state statute; then in such state one could rely, for execution in common law causes, upon a search in the recorder's office for federal executions. But because of the exceptions to the operation of the statute noted above, it is unsafe to rely upon anything but a search in the marshal's execution docket for a federal execution. In my own state of Ohio, the local law is such that a search of the marshal's execution docket is absolutely essential. And I presume that this is true for many other states.

In connection with this matter we quote from *Lamaster* v. *Keeler*:[40]

> "The provisions of Revised Statutes §914 do not apply to remedies upon judgment; but those remedies, being governed by the provisions of Revised Statutes §916, are confined to such remedies as were provided by the laws of the state in force when Revised Statutes §916 was passed, or re-enacted, or by subsequent laws of the state adopted by the federal court in the manner provided for in that section."

FINES AND PENALTIES

The discussion of execution liens leads naturally to the subject of judgments for fines and penalties concerning which there are, in the opinion of the writer, some mistaken ideas current in the title world.

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[35] 239 Fed. 360 (1917).
[36] 13 Fed. 567 (1882).
[37] 119 Fed. 764 (1903).
[38] Fed. Case No. 1524 (1879).
[39] 9 Fed. 8 (1881).
[40] 123 U. S. 376 (1887).

As to the general effect of a judgment for a fine, we quote from Corpus Juris:

> "After a fine has been imposed by the sentence of the court, it is regarded as in the nature of a debt of record due the state, and ordinarily it may be enforced by execution against the defendant's property both at common law and under statutes in many jurisdictions.
> "Some statutes provide that a judgment imposing a fine shall constitute a lien on defendant's property."[41]

The only provision of the United States statutes with reference to judgments for fines and penalties is Revised Statutes §1041[42] which is as follows:

> "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided,* that where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

It was held in *Fink* v. *O'Neill,*[43] that the United States as a plaintiff in a civil action stands on the same footing as an individual under Revised Statutes §916 above, but in *Clark* v. *Allen,*[44] it was held that said Revised Statutes §916 does not apply to criminal cases. In the latter case it was held that:

> "Revised Statutes §1041, providing that judgments in criminal or penal causes as to the fine or penalty may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced, means only that the government in enforcing judgments for fines and penalties is not restricted to mere imprisonment of the defendant, but may proceed also by execution against his property."

It was also held in *Clark* v. *Allen*[45] that "execution on judgments under Revised Statutes §1041 can be levied to the same

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[41] 25 C. J. §§1155 and 1164.
[42] U. S. Comp. St. 1705 (1916).
[43] 106 U. S. 272 (1882).
[44] 114 Fed. 374 (1902).
[45] *Supra,* n. 44.

extent, and only to the same extent, as judgments in civil cases." The decision in that case was affirmed by the Circuit Court of Appeals.[46]

In *In re Teuscher*,[47] the court says that Revised Statutes §1041 for the first time gave the United States the right of execution on fines and penalties.

It would seem, therefore, that a judgment for a fine or penalty in a federal court is not a lien on the property of the defendant, and can be made a lien only by the levy of execution. That a judgment for a fine stands on a different footing from the ordinary judgment is further shown by a line of cases which hold that such judgments can not be collected against the estate of the defendant. It was said in *United States* v. *Mitchell*,[48] affirmed by the Circuit Court of Appeals,[49] that "the purpose of a fine imposed in a criminal case is the punishment of the defendant personally, and while Revised Statutes §1041 provides that fines may be collected by execution as in civil judgments, there is no provision making it a debt, and the fine can not be collected against defendant's estate."

Under §1 of the Judgment Lien Act of August 1, 1888, which provides that judgments and decrees rendered in a federal court shall be liens to the same extent as judgments in state courts, it might be argued that in those states where judgments for fines and penalties in state courts are liens, judgments for fines and penalties in federal courts should also be liens. But there seems to be no more reason for applying this act to federal judgments than for applying Revised Statutes §916, and we have shown above[50] that Revised Statutes §916 has been held inapplicable to judgments in criminal proceedings. It would of course apply to a civil judgment acquired by the United States.[51]

The liens created by levy of execution under judgments for fines and penalties in criminal cases, like the other exe-

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[46] 126 Fed. 738 (1903).
[47] Fed. Case No. 13846 (1877).
[48] 163 Fed. 1014 (1908).
[49] 173 Fed. 254 (1909). To the same effect see U. S. *v.* Pomeroy, 152 Fed. 279 (1907) and Dyar *v.* U. S., 186 Fed. 614 (1911).
[50] Clark *v.* Allen, 114 Fed. 374 (1902).
[51] See Fink *v.* O'Neill, supra, n. 43.

cution liens discussed above, can be safely discovered only by searching the United States Marshal's Execution Docket.

BONDS AND RECOGNIZANCES

Another subject on which there are, in the opinion of the writer, many misconceptions in some parts of the title world, is the matter of criminal bonds and recognizances in federal courts.

A recognizance has been defined as "an obligation entered into by a person with a court of record, whereby he binds himself under a penalty to do or not to do a particular thing required of him by the court, and which is made a part of the record." In the ordinary criminal recognizance the principal and sureties "acknowledge themselves to owe to the United States of America the sum of $....., to be levied of their goods and chattels, lands and tenements, to and for the use of the United States, in case default be made in the condition of this recognizance, which is that if the said (principal) shall personally appear in court to answer to (a certain indictment) and *shall then and there abide the order and judgment of the court,* this recognizance shall be void; otherwise to remain in full force and effect."

If the defendant does not appear in court (or perform whatever other act the bond is given to secure) the bond is thereby forfeited and the government may proceed to enforce the obligation against the principal and sureties, either by the common law writ of *scire facias* or by a separate suit.

Whether the government shall proceed by *scire facias* or by a separate suit is a matter of choice with the district attorney. He will usually follow the same method of procedure as is followed in the courts of the state in which his district is situated, although it has been decided[52] that it is not necessary that the local procedure be followed.

But whatever the procedure, whether by *scire facias* or by independent action it is submitted that there is no suit pending, in so far as the bond or recognizance is concerned, until a forfeiture has been declared, and the writ of *scire facias*

[52] U. S. *v.* Insley, 54 Fed. 221 (1893); Insley *v.* U. S., 150 U. S. 512 (1893).

has been issued, or a separate suit has been started thereon; and there is no judgment until the writ has been returned and the conditional judgment has thereby been made absolute, or until a judgment has been rendered in the independent action.[53]

In *Kirk* v. *United States*,[54] affirmed by the Circuit Court of Appeals,[55] it was decided that *scire facias* is a proper procedure on a forfeited recognizance, and that, being in the nature of an original action, the safety must be personally served.[56]

It has been contended in my own jurisdiction that that part of the ordinary criminal recognizance, which reads *"and shall then and there abide the order and judgment of the court"* binds the sureties to pay the fine imposed by the court. But it was decided by Judge Westenhaver in the case of *United States* v. *Rudner*,[57] that this is true only of *supersedeas* bonds, and not of the ordinary bail bond or recognizance.

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[53] As authority for the above conclusion we cite the following authorities: Winder *v.* Caldwell, 14 How. (U. S.) 434 (1852) "A *scire facias* is a judicial writ used to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ."

U. S. *v.* Winsted, 12 Fed. 50 (1882) "A recognizance duly entered is a debt of record, and the object of a *scire facias* is to notify the cognizer to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. The recognizance is in the nature of a conditional judgment, and the recorded default makes it absolute, subject only to such matters of legal avoidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture."

[54] 131 Fed. 331 (1904).

[55] 137 Fed. 753 (1905).

[56] Hollister *v.* U. S., 145 Fed. 773 (1906). "A *scire facias* on a forfeited recognizance takes the place of the declaration in an original suit, and its sufficiency must be determined by its averments, apart from the record on which the writ issued."

U. S. *v.* Taylor, 157 Fed. 718 (1907). "A recognizance in a criminal case is in the nature of a judgment confessed of record, and a proceeding thereon by *scire facias* after forfeiture is merely to confirm such judgment."

Ewing *v.* U. S., 240 Fed. 241 (1917). "1. A recognizance or bail bond may be enforced by *scire facias* or civil action; debt lying on the recognizance. 2. A writ of *scire facias* is considered both as process and as a declaration, and informalities which may be taken advantage of by demurrer, can be cured by amendment. 3. The United States may adopt the remedy of *scire facias* to recover on bail bond, and have judgment entered after return of process if no sufficient cause is shown for setting aside the conditional judgment."

U. S. *v.* Davenport, 226 Fed. 425 (1920). "1. A bail bond is a contract and an action to enforce it is a civil action. 2. A recognizance in a criminal case is a judgment confessed of record and a proceeding by *scire facias* after forfeiture is merely to confirm such judgment."

We refer also to Volume 122 of American State Reports as follows:

"In cases of this class (criminal recognizances), however, the court generally enters some order or declaration which is equivalent in effect to a judgment *nisi*, and the subsequent proceeding by *scire facias* may well be regarded as resting on judgment rather than upon the recognizance or other writing. So far as the courts have spoken on the subject, they seem to regard the remedy by *scire facias* as cumulative rather than as exclusive, and therefore, allow it to be brought by action at law upon the bond against the sureties thereon." (Note 122 Am. St. Rep. 75.)

"The writ of *scire facias* answered the double purpose of a writ and a declaration." (Note 122 Am. St. Rep. 92.)

"No petition or complaint is necessary to obtain a *scire facias*, or perhaps it would be more correct to say that *scire facias* is a complaint as well as a writ." Note 122 Am. St. Rep. 92.)

[57] U. S. 1923.

It will appear in our discussion of the Volstead Act below that the bond given in a padlock case binds the principal and sureties to pay all fines and penalties for violating the injunction against the illegal sale of liquor on the padlocked premises.

REVENUE LIENS

The lien of internal revenue taxes (except the estates tax) is governed by Revised Statutes §3186[58] which reads as follows:

> "If any person liable to pay any tax neglects or refuses to pay same after demand, the amount shall be a lien in favor of the United States, from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: *Provided,* however, that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property, subject to such lien, is situated: *Provided further,* Whenever any state by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that state, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that state as against any mortgagee, purchaser, or judgment creditor until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated."

The law prior to 1913 was substantially that part of the above quoted act which preceded "provided." The two provisos were added by the Act of March 4, 1913.

The questions naturally arising as to the lien created by Revised Statutes §3186 are:

1. When does the lien attach?
2. To what property does it attach?
3. What is its relative priority?
4. How long does it continue as a lien?
5. By what legal proceedings may it be removed?

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[58] 1916 U. S. Comp. St. §5908.

When does the lien attach? Prior to 1913 as to all persons, both lienee and third parties, the lien attached at the time the assessment list was received by the collector. This is still the law as to the lienee, but as to purchasers, mortgagees, or judgment creditors the lien attaches since 1913, either (a) upon filing notice of lien with clerk of the district court, in those states which have not provided for filing the same in the office in which deeds are recorded, or (b) upon filing of notice in the office of the recorder of deeds, in those states which have taken advantage of the permission granted by the 1913 amendment.

To what property does it attach? The best answer to this question is found in *United States* v. *Pacific Railroad Company*,[59] in which the court says that "the lien created by Revised Statutes §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 payment was made."

No cases have been found discussing the question as to whether or not the lien attaches to after acquired property. We must, therefore, be guided in this matter by the general law as to liens, which according to 17 C. J. 324 is that "in the absence of provision showing an intention to extend the lien to after-acquired property, a lien attaches only to property on hand at the time it is created."[60]

What is the relative priority of the lien? It is sometimes argued that, since the revenue tax is a debt due the government, the lien of the tax is paramount and will override prior liens. The so-called "priority" statute relative to debts due the United States is Revised Statutes §3466,[61] which reads as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment

[59] 1 Fed. 97 (1880).
[60] Citing Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793 (1889), and Thornsberry *v.* Thornsberry, 68 S. W. 129 (Ky. 1902).
[61] 1916 U. S. Comp. St., §6372.

thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The general rule as to the priority of statutory liens is stated as follows in 17 C. J. 329:

"The priorities of statutory liens are generally regulated by the statutes creating them. But although it is within the power of a legislature to give a statutory lien priority over other liens, as a general rule a statutory lien does not take precedence over a prior contractual lien, unless the statute clearly shows or declares an intention to cause the statutory lien to override the prior lien."

As to priority of tax liens generally we find the following statement in 37 Cyc. 1143:

"It is competent for the legislature to make taxes a paramount lien on the property of the tax payer, and this has been done in many states, the consequence being that the lien for taxes takes precedence of every other lien or claim upon the property of whatsoever kind, however created, and whether attaching before or after the assessment of the taxes. But this preference does not belong to the tax lien unless it is so declared by statute and a law, for example, which merely enacts that taxes shall be a lien on real property does not make them a first lien."

The overwhelming weight of authority is to the effect that Revised Statutes §3466 has to do only with the distribution of an estate and has nothing to do with the question of priority of liens.

In *United States* v. *Sheriff*,[62] the United States had a judgment under the revenue laws. A private individual had a prior judgment in a state court. It was held that the law giving priority to claims due the United States must not be construed so as to destroy a prior lien.

In *United States* v. *Insurance Company*,[63] it was decided that the priority of the United States cannot be asserted as against a prior bona fide conveyance or mortgage.

In *United States* v. *Cutts*,[64] it was held that the United States had no right of priority over a prior pledge of stock.

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[62] Fed. Case No. 16276 (1803).
[63] Fed. Case No. 14942 (1823).
[64] Fed. Case No. 14912 (1832).

In *Brent* v. *Bank*,[65] we find the following:

> "The preference provided by Revised Statutes §3466 does not prevent the transmission of the property, but gives the United States a preference in payment out of the proceeds. This preference is in the appropriation of the debtor's estate; so that if, before it has attached, the debtor has contracted or mortgaged his property, or it has been transferred in the ordinary course of business, neither are over-reached by the statutes; it has never been decided that it affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority."

Also *United States* v. *Duncan*,[66]

> "It has been uniformly held, in all the cases, that the priority of the United States does not disturb any specific lien, nor the forfeited lien of a judgment, that is, it does not supersede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on real estate. But in case of a general lien it is not so clear."

The case of *In Re Wiley*[67] decided that under §64a of the Bankruptcy Act taxes due the United States will pro-rate with state taxes and have no priority under Revised Statutes §3466. The court says:

> "A tax has such lien and priority, and only such, as is given it by statute. 37 Cyc. 1138, 1143. The common law preference of the sovereign is said not to exist in favor of the United States, save as continued by statute. *United States* v. *Bank of North Carolina*, 6 Pet. (U. S.) 29. A lien is provided for federal taxes by Revised Statutes §3186, but no special priority is stated. Debts due the United States are given a first priority, apparently extending to cases of bankruptcy, by Revised Statutes §3466: but taxes are hardly to be considered debts. (*United States* v. *Anderson*, 203 U. S. 483)."

It was also held in *In Re A. E. Fountain, Incorporated*,[68] that taxes due the United States have no priority over state taxes in bankruptcy.

There is one decision *contra* to the last two cases. In *United States* v. *San Juan County*,[69] it was held that United States

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[65] 10 Pet. (U. S.) 596 (1836).
[66] Fed. Case No. 15003 (1850).
[67] 292 Fed. 900 (1923).
[68] 295 Fed. 873 (1924).
[69] 280 Fed. 120 (1922).

taxes have priority over state taxes.

It was held in *In Re Baltimore Pearl Hominy Company,*[70] that there is no lien under Revised Statutes §3186 until demand, and that the United States has no priority under §64a of the Bankruptcy Act until the demand establishes the lien. The court says that no lien is created by the priority statute[71] and that the priority of debts due the United States is not established so long as the debtor continues in possession of the property.

Ferris v. *Chic-Mint Company,*[72] is a New Jersey equity case involving the priority of revenue liens. In this case it was held, (1) that a mortgage is prior to a subsequently assessed revenue lien. (2) That a mortgage is prior to a prior assessed, but subsequently filed (under Revised Statutes §3186) lien. (3) The revenue lien is also subsequent to a judgment lien.

The only case squarely holding a revenue lien paramount to a prior mortgage is *The Melissa Trask.*[73] In this case the government had a lien for "head taxes" on immigrants under the Immigration Act and it was decided that this lien was prior to a mortgage that had previously been placed on the ship under the Ship Mortgage Act of 1920. This case might be distinguished from the case of a general lien in that the lien is a lien on a specific piece of property, to-wit, the ship.

A very interesting, and to our way of thinking, a very proper criticism of this case is found in 38 Harvard Law Review 1060.

It seems to the writer that Revised Statutes §3186 very clearly indicates that no priority is intended. It says that the tax "shall be a lien * * * upon all property and rights to property" of the person against whom the tax is assessed. If the tax delinquent has made a prior mortgage his property is to that extent diminished and the lien attaches only to the equity. That this is the proper construction of this statute is shown by the 1924 revision of Revised Statutes §3207, giving a prior lien claimant the right to initiate pro-

[70] 294 Fed. 921 (1923).
[71] Rev. Stat. §3466.
[72] 124 Atl. 577 (1924).
[73] 295 Fed. 781 (1923).

ceedings to remove the lien. This statute will be discussed later.

How long does the lien continue? Revised Statutes §3186 says the taxes shall be a lien until paid. While it is true that the recent revenue acts have placed certain limitations on the time for assessment of the tax, and upon the time in which suit must be brought to collect the same, it is probable that these limitations have nothing to do with the lien provided by Revised Statutes §3186. The general law on this subject, as laid down in 17 C. J. 700, is as follows:

> "The rule sustained by the weight of authority * * * is that where the security for a debt is a lien on the property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred."

By what legal proceeding may the lien be removed? The only method is that laid down by Revised Statutes §3207 (as amended by §1030 of the Revenue Act of 1924). This section as amended reads as follows:

> "Section 3207. (a) In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell real estate to satisfy the same, the Commissioner of Internal Revenue may direct a bill in chancery to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title or interest, to the payment of such tax. All persons having liens upon or claiming any interest in the real estate sought to be subjected as aforesaid, shall be made parties to such proceedings, and be brought into court as provided in other suits in chancery therein. And the said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein, and finally determine the merits of all claims to and liens upon the real estate in question, and, in all cases where a claim or interest of the United States therein is established, shall decree a sale of such real estate, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.
>
> "(b) Any person having a lien upon or any interest in such real estate, notice of which has been duly filed of record in the jurisdiction in which the real estate is located,

prior to the filing of notice of the lien of the United States as provided by §3186 of the Revised Statutes as amended, or any person purchasing the real estate at a sale to satisfy such prior lien or interest, may make written request to the Commissioner of Internal Revenue to direct the filing of a bill of chancery as provided in subdivision (a), and if the Commissioner fails to direct the filing of such bill within six months after receipt of such written request, such person or purchaser may, after giving notice to the Commissioner, file a petition in the district court of the United States, for the district in which the real estate is located, praying leave to file a bill for a final determination of all claims to or liens upon the real estate in question. After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such bill, in which the United States and all persons having liens upon or claiming any interest in the real estate shall be made parties. Service on the United States shall be had in the manner provided by §§5 and 6 of the act of March 3, 1887, entitled 'An Act to provide for the bringing of suits against the Government of the United States.' Upon the filing of such bill the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of bills filed under subdivision (a) of this section. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid, and all costs of the proceedings on the petition and the bill shall be borne by the person filing the bill."

As many of this association know, Mr. H. R. Chittick of The Lawyers Title & Trust Co., New York, was instrumental in having introduced in Congress a law permitting the United States to be made a party to foreclosure proceedings involving revenue liens, but the most that could be accomplished was the above revision of Revised Statutes §3207. It is an extremely unsatisfactory procedure and it is unfortunate that the bill permitting the foreclosure of these liens in state courts did not pass.

An interesting case in connection with revenue liens is *Bosset* v. *Miller.*[74] In this case it was decided that the amount made on an execution sale by another creditor, cannot be paid to the Collector of Internal Revenue on a revenue lien. The syllabus in this case is as follows:

[74] 2 Woodw. Dec. (Pa.) 40 (1871).

"While Revised Statutes §3186 gives the government a lien, and provides a method of enforcing the lien by levy and sale, it does not make the the amount of the arrears payable out of the proceeds of sale under an execution upon a judgment in the Common Pleas Court in favor of another."

It would seem, therefore, that even if the Collector of Internal Revenue voluntarily appears in an action in a state court, the lien of a revenue tax can not be properly adjudicated therein. The lien created by Revised Statutes §3186 can not be foreclosed in a state court. The only method of removing the lien by judicial process is that laid down by Revised Statutes §3207 as amended by §1030 of the Revenue Act of 1924.

It is well to remember, in those states where no provision is made for filing revenue liens in the recorder's office, that no provision is made by the statute for indexing the liens by the district court clerk. In Cleveland it was always the custom to index the liens in the civil court index and we presume this custom is general. But in this matter the title man must govern himself in his search by the local custom.

It is also well to remember that the filing of the lien in the office of the district court clerk and in the county recorder's office in those states which have provided for filing the same, is only for the protection of the purchaser, mortgagee, or judgment creditor. As to the tax delinquent himself and as to all persons not coming within the three classes mentioned, the tax is a lien as soon as the assessment list is received by the collector.

In case of payment of the tax the Collector of Internal Revenue issues a certificate of discharge (Form 669) which reads as follows:

"I hereby certify that the taxes enumerated below, heretofore assessed against the following named person, firm or company, have been paid in full, together with all penalties, costs, and interest; and that the lien for such taxes, penalties, etc., created by §3186 of the Revised Statutes of the United States, as amended by Act March 4, 1913 (37 Stat. 1016), has thereby been discharged in full."

This certificate is filed with the district court clerk in those states having no statute permitting the recording of

revenue liens, and with the county recorder, or other recording officer, in those states having a law permitting the recording of revenue liens.

The question has been raised as to whether a lien which had attached prior to the 1913 revision of Revised Statutes §3186, must be re-filed in the county recorder's office of any state which has passed a law providing for the recording of these liens, in order that it may be a lien in such state.

There are no decisions on this question, but it seems to the writer that the cases cited above, with reference to the analogous situation arising out of the judgment lien law, are decisive of this question, and that liens which had attached prior to the passage of a state statute, remain liens without re-filing under the state statute.

There are certain methods of collecting revenue taxes that may be the source of trouble to the title searcher. Revised Statutes §3190 *et seq.* provide for collection of the tax by distraint and sale of chattels and Revised Statutes §3196 provides that "when goods, chattels or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector, or deputy collector, he is authorized to collect the same by seizure and sale of real estate." Revised Statutes §3197 provides for notice to the delinquent, publishing in a newspaper and by posting notices, and a sale at public auction. Revised Statutes §3198 provides for the issuance of a certificate of purchase. If the land is not redeemed within one year, the collector or deputy collector makes a deed for the same to the purchaser, which deed is *prima facie* evidence of the facts therein recited. Revised Statutes §3200 provides that lands anywhere in the state may be seized and sold under the above provisions. It was decided in *Sheridan* v. *Allen*,[75] a case involving personal property, that only the rights of the person against whom the tax is claimed is affected by the sale, and that it does not cut off the rights of other parties.

The only possible method of discovering distraint sales by the collector is a search in the office of the collector of internal revenue, as there is no provision for filing the collector's levy and sale, either in the clerk's or marshal's office. In twenty years' experience the writer has never run

[75] 153 Fed. 568 (1907).

across a sale of real estate by the collector under the provisions of the above statute.

Revised Statutes §3217 provides for similar proceedings by the United States Marshal against a delinquent revenue collector.

Revised Statutes §3627 provides for the issuance of a warrant of distress against any absconding officer and a sale of the real estate of such person by the United States Marshal.

Revised Statutes §3628 provides the same remedy against the sureties of an absconding officer.

Revised Statutes §3629 provides the following lien:

> "The amount due by any delinquent officer is declared to be a lien upon the lands, tenements and hereditaments of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them, and a record thereof made in the office of the clerk of the district court of the proper district, until the same is discharged according to law."

ESTATES TAX

There has been a Federal Estate Tax since September 8, 1916. The law has been amended a half dozen times and for its provisions it is always necessary to consult the latest revenue law. The provision that chiefly affects the title man is the lien of the tax which has been the same in all laws. It has always been provided that "unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent." In the case of residents of the United States there was a $50,000 exemption to all the laws prior to 1926, which exemption was increased to $100,000 by the 1926 Revenue Act, but there is no such exemption as to non-residents of the United States. As was said in *Page* v. *Skinner*,[76] "the imposition took effect at the time of death, and the tax became at once a lien on the property of the estate, enforceable by sale if not paid, on proceedings in court."

The estates tax is not subject to the provisions of Revised Statutes §3186 and becomes a lien immediately on the death

[76] 298 Fed. 731 (1924).

of the decedent and there is no provision for filing notice of the lien.

The statute provides for the execution by the commissioner of internal revenue of releases of the lien, but there is no provision made for the recording of said releases. In the matter of the Estates Tax the title man must govern himself in accordance with the information as the estate derived from the administration proceedings on the decedent's estate.

VOLSTEAD ACT

A perusal of the National Prohibition Act, popularly known as the Volstead Law, discloses various liens that are of vital interest to the title man. We will take up the less important matter first. Section 5 of Title 3 reads as follows:

> "Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol, and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereunto belonging or in any wise appertaining."

The above section has to do only with industrial alcohol plants, and is similar in scope to the provisions relating to distilleries under Revised Statutes §3251, which provided as to distilleries that "the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid."

It is well to note that the liens provided by the two laws quoted above are the first liens.

But the main troubles of the title man arising out of the Volstead Law are caused by Sections 21 and 22 of Title Number 2. Section 21 reads as follows:

> "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold,

kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provisions of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the persons guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction."

This section of the act is an example of the exasperating habit of passing a law creating a federal lien without stating just when and how the lien attaches. Section 3 of the Volstead Act provided a lien for certain violations of the War Prohibition Act and provided that "said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept." Had such a provision been inserted in Section 21, our troubles as title men would have been lessened.

Section 22 of the Volstead Act provides the method of abating the nuisance declared by Section 21. This is the so-called "padlock" law and under its provisions the United States may proceed by a suit in equity to enjoin the nuisance and prohibit the use of the property for one year. The last paragraph of Section 22 is as follows:

"And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or

thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property."

In connection with this matter of "padlocking" premises under Section 22 we quote the concluding paragraph of the prayer in a "padlock" case brought by the district attorney of the Northern District of Ohio, Eastern Division, against the violating tenant and the owner of the premises upon which the alleged violations of the law occurred. This prayer is as follows:

"The complainant further prays that this Honorable Court shall enter a decree directing that no intoxicating liquor as defined in Title II of said National Prohibition Act shall be manufactured, sold, kept, possessed, or stored in said premises, or any part thereof, and that said building shall not be occupied or used for one year after date of said decree, and in the event that it appears that the owner of said premises had knowledge or reason to believe that the same was occupied or used in violation of the provisions of Section 21 of Title II of said National Prohibition Act and suffered the same to be so occupied or used, that this Honorable Court shall enter a decree impressing a lien upon said premises, directing that the same be sold to pay all costs and fines that may be assessed or imposed against the person or persons found guilty of maintaining such nuisance."

Although the decisions under the Volstead Act are legion there are surprisingly few which throw any light on the lien created by Section 21, and these few are, as usual, conflicting.

In *United States* v. *Schwartz*,[77] Judge Anderson sitting in the Massachusetts District Court decided that the owner of the premises is a necessary party to a padlock case under Section 22. On page 720 the court quotes the provisions of Section 21 creating a lien and then says:

"It follows, that, if the owner of premises, made a nuisance by his tenant, has neither knowledge nor reason to believe that the premises are being so illegally used, no lien would lie against the property for fines and costs assessed against the nuisance-maintaining tenant."

On the other hand it was held in *United States* v. *Boynton*,[78]

[77] 1 F. (2d) 718 (1924).
[78] 297 Fed. 261 (1924).

and in *Denapolis* v. *United States*,[79] that the owner of the premises is a necessary party to an abatement suit under Section 22, commonly known as a "padlock" proceeding.

Also in *United States* v. *Olzak*,[80] it was held that a lessee who acquired his interest after decree in a padlock case, had no right to have the decree lifted. It was also held in this case that the New Jersey lis pendens law has no application to a padlock case.

Also it was held in *United States* v. *Lents*,[81] that since the owner of premises is not a necessary part to a padlock case, opening the case to permit infant owners to intervene will not be permitted. The court makes this very significant statement:

> "So long as the National Prohibition Law has not been repealed, those who deal in real property must inform themselves where any injunction proceeding is pending when they contemplate purchasing any premises."

It is submitted that the court which wrote the above opinion had more enthusiasm for the enforcement of the Volstead Act than consideration for the rights of innocent purchasers. This decision seems to put the burden on a purchaser or mortgagee of finding out who the tenant is, which under tenancies from month to month or at will is not always easy, and the further burden of searching the United States court records to find out whether or not there is a padlock case pending against the tenant. Since the weight of authority is that the owner is not a necessary party to a padlock case, the purchaser or mortgagee can not rely upon a United States court search in the name of owners only.

It would seem that there may arise out of Sections 21 and 22, Title II, of the Volstead Act, four situations that are of interest to the title man.

CASE A: A criminal prosecution for violation of the act by the tenant and a fine imposed for such violation.

CASE B: A criminal prosecution for violation of the act by the owner and a fine imposed for such violation.

CASE C: A padlock case against the tenant-violator to

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[79] 3 F. (2d) 722 (1925).
[80] 6 F. (2d) 1014 (1925).
[81] 8 F. (2d) 432 (1925).

which the owner is not made a party.

CASE D: A padlock case against the owner-violator, or against the tenant-violator and the owner.

The fine imposed in CASE A is not, in and of itself, a lien, but is a lien only if the owner "has knowledge or reason to believe" that the law has been violated on the premises. Just what is necessary to bring home to an innocent purchaser or mortgagee the fact that the owner may have been cognizant of the violation by his tenant is one of the puzzles of the Volstead Act. Whether or not he has no notice thereof until a lien has been impressed on the premises by decree in a padlock case following the sort of prayer that is quoted above, is, in view of some of the decisions quoted above, an open question. If the purchaser or mortgagee cannot rely upon the existence of a suit to impress a lien, the burden is upon him to discover, outside the records, who have been tenants of the property and then search the criminal docket of the United States court in the name of the tenants for cases involving violations of the Volstead Act.

The only real "safety first" policy for title companies to pursue is to locate, from the addresses given, all criminal cases arising under the Volstead Act, in the title plant, in the same way that all other instruments affecting the land are located. This is the method pursued by the title companies in Cleveland. This enables the title company to place upon the owner, where it belongs, the burden of proving that he had no knowledge of the violation of the act.

CASE B presents no difficulty from the standpoint of the title man. A fine against the owner-violator is necessarily a lien, this being an exception to the general rule that a fine is not a lien, until execution and levy. The ordinary United States court search in the name of the owner will disclose the existence of this lien.

CASE C presents the same difficulties as CASE A, as it necessitates the same sort of investigation outside the records. Aside from investigation outside the records, the title company's only protection is some system of locating these cases in plant from the address given. Actual inspection of the premises may show that the premises have been padlocked, and then again it may not, as the bond

required by Section 22 may have been given so as to permit the premises to be used. Attention is called to the fact that this bond, unlike other bonds and recognizances except supersedeas bonds, is conditioned for the payment of all fines, costs and damages that may be assessed for any violation of the act upon the premises.

CASE D presents no particular difficulties to the title man, since its existence may be discovered from the ordinary United States court search in the name of the owner.

Enough has been said to show that the Volstead Act is needlessly burdensome to the innocent purchaser or mortgagee, and to the title man searching titles for the purchaser and mortgagee. This needless burden could be eliminated by providing in Section 21, Title II of the Volstead Act, that the lien shall be operative against third parties only upon the bringing of an action to impress a lien upon the filing of a lis pendens notice as was required by Section 3, Title I, of the Volstead Act, being that part of the act known as "The War Prohibition Act."

This paper has grown to an unconscionable length, and for the sin of undue prolixity the writer prays the indulgence of this association. His excuse is that the subject assigned is a bigger one than he realized when he accepted the assignment.

In his "Life and Letters of Thomas Jefferson" Mr. Francis W. Hirst, in commenting on some of Jefferson's literary activities, makes the remark that one way thoroughly to learn a subject is to write a book about it. The writer can truthfully say that he has learned more about "Federal Liens," by writing this article, than he ever knew before, and he has simply tried to pass along to this association the things that he has learned about this exceedingly important and interesting subject.