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TRIUMPH OR TRAGEDY? THE BANKRUPTCY ACT AMENDMENTS OF 1966

HAROLD MARSH, JR.*

Professor Marsh analyzes in detail the 1966 amendments to the Bankruptcy Act. Addressing the question whether these amendments have accomplished anything, he concludes that they have done little but complicate an already intolerably complicated statute. Although he points out many drafting failures, he particularly condemns the failure of Congress to ask or answer the underlying questions of policy—whether tax liens and state statutory liens should be given priority. Professor Marsh concludes that whatever good the amendments may do "is not worth the mess they have made."

"[T]his is about the simplest piece of legislation, and as free from ambiguities as any bill that has been introduced in the Congress since I came to the Senate 11 years ago."[1]

Senator Sam J. Ervin

"In short, Mr. Chairman, it is our sincere belief, it is far from clear whether the bill has any effect whatsoever."[2]

Mr. Lawrence M. Stone
Tax Legislative Counsel,
Treasury Department

"I will admit if you start reading all of the sections of the bankruptcy law that you reach a state of great intellectual confusion."[3]

Senator Sam J. Ervin

After almost ten years of arduous work by the National Bankruptcy Conference, H.R. 136 and H.R. 3438 were enacted by the Congress

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[1] *Hearing on S. 976 (H.R. 3438) and S. 1912 (H.R. 136) Before the Senate Committee on Finance*, 89th Cong., 1st Sess, 21 (1965) [hereinafter cited as *Hearing*].

[2] *Hearing* 9.

[3] *Hearing* 23.

and approved by the President July 5, 1966.[4] These bills, containing the first major revisions of the Bankruptcy Act since 1950-1952, constitute the only significant bills which the Bankruptcy Conference has been able to persuade Congress to adopt in that period of time, albeit with various amendments made at the insistence of the Treasury Department. An analysis of these measures is not only intrinsically important in view of their possible impact upon bankruptcy law and administration, but also interesting as a gauge of the feasibility of obtaining major improvements in this area of the law.

These above mentioned bills amend sections 1, 2, 17a, 64a, 67b, 67c and 70c of the Bankruptcy Act. The amendments are primarily related to tax claims and tax liens in bankruptcy proceedings, although they importantly affect other matters. To a large extent they were sold to Congress on the basis that they would significantly reduce the enormous impact of tax claims, particularly federal tax claims, upon the distribution of a bankrupt's estate, thus benefiting the general unsecured creditors.[5] They were supported by various organizations of such creditors, including the National Association of Credit Management and the American Bankers Association,[6] and vigorously opposed by the Treasury Department.

The following analysis of these amendments is an attempt to determine whether in fact the hopes of their sponsors have been realized or whether the amendments will have "any effect whatsoever."

I. PRIORITY OF TAX CLAIMS

All unsecured tax claims, state and federal, have heretofore been granted an unlimited priority by section 64a of the Bankruptcy Act on the fourth rung of a five-rung ladder of priority. The first three rungs granted priority to administrative expenses, wage claims limited as provided in section 64a(2), and the expenses of a creditor in obtaining the refusal or revocation of a discharge or the conviction of the debtor of a bankruptcy crime (a relatively unimportant priority). Tax liens, not invalidated or subordinated by some provision of the Bankruptcy Act, were entitled to payment (along with other

[4] As 80 Stat. 268 (1966), 11 USC § 1 (Supp. 1966), and 80 Stat. 270 (1966), 11 USC § 11 (Supp. 1966).

[5] H.R. REP. No. 687, 89th Cong., 1st Sess. 4 (1965); S. REP. No. 114, 89th Cong., 1st Sess. 4, 16-17 (1965); *Hearing* 21, 27, 43-44, 46, 48, 56.

[6] *Hearing* 45, 56.

secured claims in the order of their priority)[7] before anything could be paid to the various section 64a priorities.

Section 64a as amended in 1966 grants priority only to those taxes "which are not released by a discharge," thus incorporating the amended provisions of section 17a purporting to discharge certain taxes in bankruptcy. Section 17a provides that a discharge in bankruptcy releases the bankrupt from all of his provable debts, except six categories of such debts, one of which has heretofore been all taxes. The new section 17a(1), however, excludes from the effect of discharge only:

> taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: *And provided further,* That a discharge in bankruptcy shall not release or affect any tax lien.

What tax claims are denied priority by these provisions? We are concerned at this point only with the effect of this language as incorporated in section 64a. Strangely enough, although the language is necessarily identical in sections 64a and 17a (since it is merely incorporated by reference from one to the other), its effect as it relates to discharge (considered later in this article) may be quite different from its effect as it relates to priority.

Since there are a myriad of taxes, state and federal, it is difficult to discuss these new provisions in the abstract. However, almost all *ad*

[7] See Federal Tax Lien Act of 1966, 80 Stat. 1125 (1966), U.S. CODE CONG. & AD. NEWS 4572 (1966).

valorem taxes are secured by liens on the property assessed, and the provisions do not purport to release any tax lien. It is conceivable that in some circumstances the amount of arrears in such a tax might exceed the amount realizable upon a sale of the property and be a personal liability of the owner, thus leaving an unsecured balance to claim priority. However, the Bankruptcy Act provides that "no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein. . . ."[8] Hence, the new provisions will presumably have no effect on *ad valorem* taxes.

The impact, if any, of the new provisions will relate primarily to various types of internal revenue taxes, such as income taxes, sales taxes, estate and gift taxes. It is of course impossible in the space available here to review the tax laws of the fifty states and federal government relating to each of these different types of taxes. However, there can be no doubt that the primary concern of the sponsors of the amendment, and of the Treasury Department in its consideration of it, was directed to the federal income and withholding taxes, which cause the major depletion of the assets of a bankrupt estate. Therefore, the application of the new provisions can be illustrated by considering their relationship to these federal taxes.

The amendment purports to exclude from priority status only those taxes which "became legally due and owing" three years or more prior to the date of bankruptcy. The date of bankruptcy is by specific definition the date of filing the petition.[9] When do income taxes "become due and owing" within the meaning of this provision? Section 6151 of the Internal Revenue Code [hereinafter called IRC] provides that a person required to file a return of tax "shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)." Therefore, it would seem at first glance that income taxes would become "due and owing"

[8] Bankruptcy Act § 64a(4), 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104 (1964). This provision has been said not to affect any valid tax lien. 3 COLLIER, BANKRUPTCY ¶ 64.403, 64.406, at 2179 (14th ed. 1966) [hereinafter cited as COLLIER]. In itself, no exception can be taken to this statement. However, it has recently been interpreted to mean that an *ad valorem* tax which by the filing of a certificate can be made a general lien on all the property of the taxpayer (not merely the property subject to the tax) is unaffected by this proviso. Poly Indus., Inc. v. Mozley, 362 F.2d 453 (9th Cir. 1966). This construction seems to be erroneous (although the result of the case is supportable on another ground also relied upon by the court) and to frustrate the policy of this provision. Even if correct, however, it does not alter the statement that the new § 64a(4) will have no effect on such taxes, since it also does not affect any lien.

[9] Bankruptcy Act § 1(13), 30 Stat. 544 (1898), as amended, 11 U.S.C. § 1 (1964).

at the date the return is due (normally March 15 for corporations and April 15 for individuals on a calendar year basis, of the year following the tax year).[10] However, the apparent simplicity of this answer is disturbed by three factors.

The first is the effect of the pay-as-you-go provisions applicable to certain individuals and corporations.[11] Such individuals and corporations are required to file declarations of estimated tax and to pay such tax in installments during the taxable year, with the final installment in the case of individuals payable on January 15 of the succeeding taxable year.[12] Suppose that an individual subject to these provisions filed a declaration of estimated tax for the calendar year 1963, but did not pay any of the tax on the due dates for the installments; on April 15, 1964, the person filed a tax return showing a total tax due equal to or less than the amount shown on the declaration of estimated tax, but also did not pay any of this amount. On February 15, 1967, the individual files a petition in bankruptcy, and the tax is still owing. Did it become "due and owing" more than or less than three years prior to the date of bankruptcy?

There is nothing in the legislative history which is helpful in answering this question. Probably the answer will turn upon whether the estimated tax is considered to be a separate tax which is credited on the income tax payable at the due date of the return for the taxable year, or is considered to be a required payment, at an earlier date, of what is essentially the same tax. It is believed that the basic income tax should be considered "due and owing" at the due date of the return, and the estimated tax a separate tax, under the provisions of the IRC.[13] However, the question is not free from doubt.

The second factor preventing a clear answer to the question when

[10] INT. REV. CODE OF 1954, § 6072 [hereinafter cited as IRC].

[11] IRC §§ 6015-16. In general, an individual is required to file a declaration of estimated tax if his gross income can reasonably be expected to exceed $5,000 (or $10,000 in the case of a married couple filing a joint return) or to include more than $200 from sources other than wages. A corporation is required to file such declaration if its income tax can reasonably be expected to exceed $100,000.

[12] IRC §§ 6153-54. For fiscal years beginning after 1966, corporations will be required to pay the full amount of such estimated tax in four equal installments during the year. (Previously, only 74% of the estimated tax was required to be paid.)

[13] IRC § 6315 provides that payment of the "estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by subtitle A for the taxable year." This seems to indicate that the estimated tax is a separate tax which is merely credited on the income tax. And while there are penalties for not paying the estimated tax (IRC §§ 6654-55), IRC § 6201(b) provides that "No unpaid amount of estimated tax under § 6153 or § 6154 shall be assessed" and under IRC § 6601(i) no interest is charged on underpayments. As a practical matter, of course, it has to be recognized that the estimated tax is merely a required prepayment of the income tax.

income taxes become due and owing is the existence of procedures for contesting an asserted deficiency in the tax reported and the prohibition upon the collection of a deficiency (other than by a jeopardy assessment) until these procedures have been exhausted. If the Internal Revenue Service asserts that there is a tax due in addition to that reported on the return as filed, it is normally prohibited from assessing or collecting the asserted deficiency until it has sent the ninety-day letter provided by IRC section 6212 and until the ninety-day period has elapsed without any petition being filed with the Tax Court, or if such a petition is filed until the decision of the Tax Court has become final.[14] IRC section 6151 provides as the "general rule" that "such tax" is payable at the time and place fixed for filing the return. On the other hand, IRC sections 6213 and 6215 provide that in the case of a deficiency determination which has become final by the elapse of the ninety days or by a decision of the Tax Court, the deficiency "shall be paid upon notice and demand from the Secretary or his delegate."

Will such a deficiency be treated as "due and owing" for the purposes of section 64a of the Bankruptcy Act at the due date of the original return or only upon a final determination of the amount of the deficiency under the above provisions? The fact that interest is payable upon the amount of the deficiency as finally determined from the due date of the original return[15] suggests that the amount was "due and owing" at that time. On the other hand, the fact that assessment and collection of the deficiency is normally prohibited pending the exhaustion of the administrative and judicial remedies and the fact that the amount of the deficiency actually payable in a contested case is not known until a compromise settlement or a final decision of the Tax Court argues that it is not "due and owing" until those processes are completed. The existence of the possibility of a jeopardy assessment which can shortcut these procedures, of course, weakens the latter argument. It would seem that the stronger argument supports treating such a deficiency as "due and owing" at the due date of the return, but doubtless extensive litigation will be required to obtain a final answer to this question.

The third factor which complicates the question when income taxes

[14] IRC § 6213. The ninety days is extended to 150 days in a case where the notice of deficiency is "addressed to a person outside the States of the Union and the District of Columbia." The jeopardy assessment authority is provided by IRC § 6861 in cases where the Secretary or his delegate believes that the assessment or collection of a deficiency "will be jeopardized by delay."

[15] IRC § 6601.

become "due and owing" is the existence of provisions for installment payments and extensions of time for payment. IRC section 6152 provides that a corporation may elect to pay its income tax in two equal installments, the first of which shall be paid at the time of the return and the second three months later. If a corporation makes such an election and then files a petition in bankruptcy three years and one month after the due date of the return, would the second installment have become "due and owing" more or less than three years prior to the date of bankruptcy? Also, the Secretary or his delegate may under various circumstances extend the time for the payment of a tax or of an amount determined as a deficiency for varying periods of time.[16] Where such an extension has been granted, did the tax become "due and owing" at the original due date or at the extended date agreed to by the Secretary or his delegate, for the purposes of section 64a?

If the extension of time for payment is granted before the date when the tax would otherwise become due, a plausible argument can be made that it never became "due and owing" on the earlier date but only at the extended date. Of course, in the case of a deficiency, this conclusion would depend in part upon how the earlier question in answered as to whether such deficiency ordinarily would become "due and owing" at the time the return is due or only when the amount of the deficiency becomes final. If the former is selected, then it is hard to see how an extension of time for payment granted after the determination could change that date, unless it is said that the tax became "due and owing" at two separate and distinct times. If the conclusion last suggested should be reached, the question would arise as to which of the events started the three-year period running, or whether a second three-year period started running when the tax became due and owing a second time.

As to an election of installment payments of the tax which is entirely within the choice of the taxpayer, the conclusion would seem clear that the deferred installment would only become "due and owing" at the time fixed for its payment.

[16] IRC § 6161 provides that the Secretary or his delegate may extend the time for payment of any tax for a reasonable period not to exceed six months (or longer in the case of a taxpayer who is abroad), and may extend the time for the payment of an amount determined as a deficiency in income tax for a period not to exceed eighteen months (and, "in exceptional cases," for a further period not to exceed twelve months). Other sections provide for extensions in special situations: § 6162 (payment of tax on gain attributable to liquidation of personal holding companies); § 6164 (payment of taxes by corporations expecting carrybacks); § 6167 (payment of tax attributable to recovery of foreign expropriation losses). There are also other sections relating to extension of time for payment of estate and gift taxes.

It can be seen that determining what income taxes became due and owing within three years prior to bankruptcy is far from simple. However, as we shall see, under the provisos in this section there are few taxes denied priority in any event, whether they are more or less than three years old, so that the ambiguity in this clause is not as serious as it might otherwise be.

If we are able to determine that a particular tax became due and owing more than three years prior to bankruptcy, under what circumstances will it be denied priority? There are logically only three circumstances in which an income tax[17] can be due the United States Government: (1) if a return is filed showing the correct tax, but all or part of the tax shown is not paid; (2) if no return is filed; or (3) if a return is filed not showing the correct tax, and an additional amount is due as a deficiency. There might also be some combination of these three sets of circumstances, as for example where part or all of the tax shown is not paid and there is an understatement of the tax on the return so that a deficiency is also due.

The most important provision in the amendment in relation to the first situation posed is the last proviso which states that it shall not "release or affect any tax lien." Under IRC sections 6321 and 6322, if any person liable for any tax neglects or refuses to pay the same after demand, a tax lien arises upon all his property and rights to property as of the time of the assessment.[18] Under IRC section 6201 an assessment is made automatically and immediately of all taxes

[17] We are considering here the basic income tax only. For a complete treatment, it would also be necessary to deal with additions to tax, penalties, interest, transferee liability, and possibly other liabilities of a taxpayer. For example, would a penalty or an addition to tax become "due and owing" only at the time it is assessed or prior thereto when the facts occurred giving rise to the liability for the penalty or addition? With respect to priority, the question regarding penalties is not important since penalties are not allowable. Simonson v. Granquist, 369 U.S. 38 (1962). However, in the course of these bills winding their way through Congress for ten years, a provision that penalties are non-dischargeable was for some reason dropped. Therefore, a question may arise as to whether a penalty which has been due and owing for more than three years may be discharged, if it is treated as a part of the "tax" under Bankruptcy Act § 17a(1). (There is some authority that all penalties are discharged, because they are provable but not allowable, United States v. Mighell, 273 F.2d 682 (10th Cir. 1959), but this position is based upon the argument that "They are not taxes and their assimilation with taxes for lien purposes does not make them taxes." *Id.* at 685. *But cf.* Bruning v. United States, 376 U.S. 358 (1964)).

However, we probably have enough difficulty for present purposes in deciding when the basic income tax becomes "due and owing," without going into these peripheral matters.

[18] Although the lien does not arise until a demand is made, it relates back to the time of the assessment. IRC §§ 6321-22. And the demand may be made even after the date of bankruptcy. *In re* Fidelity Tube Corp., 278 F.2d 776 (3rd. Cir.), *cert. denied sub nom.* Borough of East Newark v. United States, 364 U.S. 828 (1960); Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956). Therefore, we may treat the lien for practical

shown on a return filed. Therefore, subject to the qualification in the next paragraph, all income taxes which have been correctly reported on a return, no matter how old, are still entitled to priority if they are still collectible by the government. Of course, under the previous law if the tax was no longer collectible by the Government, it was not allowable (much less entitled to priority).

Under the Supreme Court's *Speers*[19] decision (and the recent amendment to section 70c confirming it, discussed below), a tax lien as to which a notice has not been filed under IRC section 6323 is invalid against a trustee in bankruptcy, who has the status of a "judgment creditor." Formerly, the only consequence of such invalidation was to demote the tax claim from the super priority of a secured debt to the fourth rung of section 64a's priority ladder, still ahead of all general unsecured creditors. Under the amendment to section 64a if (a) a tax became due and owing more than three years prior to bankruptcy, and (b) the tax has been assessed so that a lien arises, and (c) no notice has been filed under IRC section 6323, the lien will be invalid, and the tax claim will fall into the general unsecured category, since it is now denied priority status under section 64a(4).

Where the bankrupt failed to make a return required by law, proviso (a) to the amendment excludes from the three-year cut-off and grants priority to taxes which have not been assessed at the date of bankruptcy; proviso (b) similarly excludes any taxes "which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law." These provisions seem to deny priority to any tax claim (1) which became due and owing more than three years prior to bankruptcy, (2) as to which no return was filed, and (3) which was assessed more than one year prior to bankruptcy. However, this is erroneous. If the tax has been assessed (whether more or less than one year prior to bankrupty) a lien arises, which is not released or affected by the amendment. Thus, a fourth condition must be added: (4) as to which no notice has been filed under IRC section 6323.

The deficiency arising where a return is filed but the full tax is not reported may result either from a good faith error[20] or from "fraud"

purposes as arising at the date of assessment. (Note, however, that these cases have been overruled with respect to the effect in bankruptcy of the non-filing of the notice under IRC § 6323. See note 19 *infra.*)

[19] United States v. Speers, 382 U.S. 266 (1965).

[20] A good faith error for this purpose may involve negligence or even an intentional disregard of the rules and regulations (but without intent to defraud). While

(in the words of IRC section 6501(c) a "false or fraudulent return with intent to evade tax" or "a willful attempt in any manner to defeat or evade tax").

In the former case there is normally a three-year limitation upon assessment of the deficiency computed from the time "the return was filed,"[21] but running of the period is suspended from the issuance of the ninety-day letter until a final decision by the Tax Court, and for sixty days thereafter.[22] In the case of a fraudulent return there is no period of limitation upon assessment.[23]

If the deficiency arose from a fraudulent return, the tax claim is not in any event denied priority, regardless of its age, under the provisions of the amendment. Proviso (d) of the amendment excludes from the three-year cut-off any tax "with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat." This provision applies regardless of whether the tax has been assessed and regardless of whether any resulting lien is vulnerable under section 70c.

If the deficiency arose from a non-fraudulent return, and the Government has taken no steps to assess or collect it, or to secure a waiver of the statute of limitations, a tax claim which has been due for more than three years is generally not collectible and would not have been provable in bankruptcy even before the amendment. IRC section 6501 imposes a three-year limitation upon the assessment of any such income tax (which in practical effect means upon the issuance of the ninety-day letter, since that tolls the running of the statute). There are two exceptions to this general statement.

The first arises from the fact that the three-year period in IRC section 6501 runs from the date of the actual filing of the return, whether or not on the normal due date. Therefore, if an extension of time was obtained in which to file the return, and if bankruptcy occurs more than three years after the due date of the return but less than three years after its actual filing, such a tax claim would still be provable in bankruptcy. The second exception arises from the fact that under IRC section 6501(e) a six-year statute of limitations

there is a penalty for such negligence or intentional disregard under IRC § 6653(a), they do not affect the statute of limitations and are not distinguished from other errors by the new provisions of Bankruptcy Act §§ 17a(1) and 64a(4).

[21] IRC § 6501(a).

[22] IRC § 6503(a).

[23] IRC § 6501(c). There is also no statute of limitations in the case of failure to file a return, but that situation is specifically dealt with in the new § 64a(4) of the Bankruptcy Act.

(rather than a three-year statute) is provided in a case where the taxpayer omits in excess of twenty-five per cent of his gross income from the return. Therefore, a deficiency claim in that case would still be provable so long as the date of filing of the return was not more than six years prior to the date of bankruptcy.

The more important situations involving open years extending back more than three years prior to bankruptcy are those where the Government has obtained waivers of the statute of limitations and possibly taken some steps to determine and assess a deficiency. Such action may involve any, or frequently all, of the following, in chronological order:

(a) obtaining waivers of the statute of limitations from the taxpayer to permit the audit to be made or completed and the other procedures to be pursued after the expiration of the three-year period;[24]

(b) audit of the return;

(c) informal conferences of the taxpayer with the agent and his group chief;

(d) issuance of the thirty-day letter;[25]

(e) the district conference procedure with a conferee in the District Director's office other than the group chief;[26]

(f) a proceeding before the Appellate Division in the Regional Office;[27]

(g) issuance of the ninety-day letter;[28]

(h) a petition to the Tax Court;[29]

(i) final decision of the Tax Court which is not appealed or the final decision on appeal;

(j) assessment of the tax deficiency as finally determined.

Of course, these procedures may be short-circuited at any time by either a compromise settlement and resulting consent to assessment of the figure agreed upon or by making a jeopardy assessment.

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[24] IRC § 6501(c)(4).

[25] Treas. Reg. § 601.105(d)(1). Formerly, the conference procedure in the District Director's office, if requested by the taxpayer, normally preceded the issuance of the 30-day letter and the written Protest in response thereto. However, this was changed by Rev. Proc. 64-38, 1964-2 CUM BULL. 965. Under the present procedure, the 30-day letter is issued and generally a written Protest must be filed in order to obtain a district conference.

[26] Treas. Reg. § 601.105(c).

[27] Treas. Reg. § 601.106.

[28] IRC § 6212.

[29] IRC § 6213.

What tax deficiency claims involved in some stage of this process will be denied priority under the provisions of amended section 64a? The answer seems to be none, or almost none. Proviso (c) excludes from the three-year cut-off taxes "which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt." This language obviously refers to IRC section 6213 (a) which generally prohibits assessment (other than a jeopardy assessment) "until such notice [the ninety-day letter] has been mailed to the taxpayer.... [and] until the expiration of such ninety-day period... [and], if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final."[30] Therefore, assessment is presumably prohibited within the meaning of section 64a at all stages of these proceedings.[31]

It could be argued that the language of the proviso, "pending the exhaustion of administrative... remedies," means that such remedies must be "pending" at the date of bankruptcy for the proviso to apply, and therefore the thirty-day letter, or perhaps the ninety-day letter, must have been issued before the petition in bankruptcy was filed. However, it should be noted that the proviso does not refer to "pending administrative remedies"; it says "pending the exhaustion of administrative remedies." These remedies are as available to a taxpayer who has merely signed a waiver permitting later audit and determination of a deficiency as to one who has received a thirty-day letter.[32] And IRC section 6213 equally prohibits assessment at any time *prior to* the issuance of the ninety-day letter, as well as thereafter while further remedies are being pursued. Furthermore, this interpretation would suggest that income tax claims for periods eight, nine or ten years in the past would still be entitled to priority if the thirty-day letter or the

[30] The period for filing the petition with the Tax Court is 150 days if the notice of deficiency "is addressed to a person outside the States of the Union and the District of Columbia." IRC § 6213(a).

[31] The reference to a prohibition on assessment cannot, of course, mean a total prohibition, since the possibility of a jeopardy assessment under IRC § 6861 always exists; such a construction would make the proviso meaningless.

[32] While the 30-day letter is not a statutory requirement, it does mark a point at which some additional formality is introduced into the administrative proceedings; and it could be argued that administrative "remedies" were not "pending" before its issuance. On the other hand, if the 90-day letter should be selected as the dividing line, this would exclude not only the district conference but also the "appeal" to the Appellate Division as being "administrative remedies," leaving only the appeal to the Tax Court. While the Tax Court may be an administrative court, it is a court; and the proceedings before it would seem to be more in the nature of "judicial" than administrative remedies.

ninety-day letter had gone out the day before the filing of the petition in bankruptcy; but a claim for the same years would be denied priority if the audit had been completed and informal conferences held, but the thirty-day letter (or the ninety-day letter) did not issue until the day after the bankruptcy petition was filed.

It similarly would be possible to argue that any given point in this process (obtaining waivers of the statute of limitations, beginning the audit, completion of the audit, the agent's preliminary report, conferences with the group chief, the district conference procedure, etc.) was the point at which administrative proceedings became "pending" within the meaning of section 64a. The fact that there is no obvious reason to select any one of these over the others, and the fact that IRC section 6213 indiscriminately prohibits assessment whether any or none or these steps have been taken (so long as the taxable year is still open), argues very strongly for the conclusion that proviso (c) grants priority to any tax deficiency claim which has not been finally determined, if it is still assessable.

There is one situation in which the amendment does seem to deny priority to a deficiency claim more than three years old. That is where the prohibition on assessment has lifted but no assessment has been made and the statute of limitations has not run. The government is given sixty days after the expiration of the ninety-day period or after the final decision of the Tax Court in which to make an assessment.[33] However, until the assessment it has no lien. Therefore, if the petition in bankruptcy is filed three days after a final decision of the Tax Court but the assessment is not made until six days after the decision, the government would not have any lien recognizable in bankruptcy and its claim would be denied priority, if the claim became "due and owing" more than three years before bankruptcy, because at the date of bankruptcy there was no longer any prohibition on assessment. While this result may seem irrational, there appears to be no escape from it under the terms of the amendment.[34]

Another situation in which the Government's claim for a deficiency would be denied priority is where an assessment is made after the conclusion of all these procedures, but no notice is filed prior to the date of bankruptcy. In that case the lien would be invalidated under section 70c and the claim would not be entitled to priority if it became "due and owing" more than three years prior to bankruptcy.

[33] IRC § 6503(a).
[34] See S. REP. No. 999, 89th Cong., 2d Sess. 3 (1966).

The result of these irrationalities may be that a court will say that a deficiency does not in any case become "due and owing" until it is assessed or at least finally determined.[35] That this interpretation would make proviso (c) meaningless may perhaps be thought the lesser of two evils.

Finally, the amendment in proviso (e) makes the three-year cut-off inapplicable and grants priority to all taxes "which the bankrupt has collected or withheld from others as required by the laws of the United States or any state or political subdivision thereof, but has not paid over." It is a common phenomenon of business failure that even an "honest" businessman, in attempting to salvage a business which appears headed for insolvency, will frequently "borrow" money of other people without their consent if he can get his hands on it. The one fund which he is almost always able to lay his hands on is the taxes he has withheld and is currently withholding from his employees for the Government. In those cases where the Government has been able to trace such funds, they have been treated as a trust fund held for the Government to which it has the sole claim.[36] In the more usual case where the funds have been dissipated and are not traceable, the Government has either the super priority of a secured debt where the tax has been assessed or, in any event, the fourth priority of a tax claim.[37] Since the Government's claim comes in all cases before all general unsecured creditors, it has been in many cases the major cause of the depletion of a bankrupt estate, which results in general creditors receiving little or nothing.

This situation will remain completely unchanged under the amendment to section 64a. It is doubtful if the proviso really means anything in this connection, since it is hardly conceivable that the Government would permit an employer to continue failing to remit his withholding taxes for more than three years before it takes some steps against him which precipitate bankruptcy. But even in the highly unusual case where this might happen, the priority of the Government is still preserved.

To return to our original question, what federal income tax claims

[35] The Senate Finance Committee proposed that the term "date of assessment" be substituted for "legally due and owing" in the bill. It stated that "while perhaps the courts would interpret the term 'legally due and owing' as meaning the 'date of assessment' a question of this importance should not be left in doubt." S. REP. No. 999, 89th Cong., 2d Sess. 3 (1966). However, Congress rejected this amendment; and it seems doubtful if a court will itself make the substitution, except perhaps out of frustration.

[36] IRC § 7501; 4 COLLIER 259, 273-74.

[37] IRC §§ 3403, 7501; 3 COLLIER 2163-74.

will be denied priority under this "simple" amendment to section 64a? While as indicated above the interpretation of a number of its provisions is highly uncertain, based upon our conclusions as to the most reasonable interpretations the following claims would seem to be denied priority:

I. Deficiency claims:

A. Arising out of a "fraudulent" return: none.

B. Arising out of a non-fraudulent return:

If a deficiency claim is considered to become due and owing at the due date for the return and a prohibition on assessment "pending the exhaustion of administrative remedies" within the meaning of section 64a is considered to exist at all times prior to the issuance of the ninety-day letter—only those claims with respect to which (a) the due date of the return was more than three years prior to bankruptcy, (b) the ninety-day letter was issued and the ninety days elapsed without petition to the Tax Court or the decision of such court became final prior to bankruptcy, and (c) either (i) the bankruptcy petition was filed within sixty days after the elapse of the ninety days or after a final decision but prior to the assessment or (ii) the assessment was made but no notice was filed under IRC section 6323 prior to bankruptcy.

II. Claims where no return was filed:

Those claims with respect to which (a) the return was due more than three years prior to bankruptcy, (b) the assessment was made more than one year prior to bankruptcy and (c) no notice was filed prior to bankruptcy under IRC section 6323.

III. Claims where a return was filed reporting the correct tax which was not paid in whole or in part:

A. If no extension of time for payment was granted and installment payments were not elected or were not permissible, those claims with respect to which (a) the due date of the return was more than three years prior to bankruptcy, and (b) no notice was filed prior to bankruptcy under IRC section 6323.

B. If extension of time for payment was granted or installment payments were validly elected:

If such extended or installment payments are considered to

> become due and owing only at the extended or deferred date—those claims with respect to which (a) such extended or deferred date was more than three years prior to bankruptcy, and (b) no notice was filed prior to bankruptcy under IRC section 6323.

An examination of this outline will reveal that, if a prohibition on assessment within the meaning of section 64a is considered to exist at all times prior to the issuance of the ninety-day letter and until final determination of a deficiency (which is the most probable interpretation, since that is specifically what IRC section 6213 says), no federal income tax claims whatever will be denied priority under the amended section 64a except (1) those which have been assessed prior to bankruptcy but with respect to which no notice has been filed, under various circumstances; and (2) those with respect to which a prohibition on assessment has expired upon the elapse of ninety days after the issuance of the ninety-day letter without petition to the Tax Court or upon final decision of the Tax Court, and the bankruptcy petition is filed within sixty days thereafter, before the actual assessment is made. If the Internal Revenue Service should adopt a policy of sending a demand and filing a notice of tax lien simultaneously with the assessment in every case where the assessment relates to a taxable year which ended more than three years before the assessment, the first group could be eliminated.[38] If it adopts a policy of speeding up its assessment procedures after the termination of a prohibition on assessment and of utilizing to a greater extent the jeopardy assessment during the ninety-day period and during the course of a Tax Court case, the second group may be reduced to insignificance.

[38] This would not be as great an administrative problem as the Treasury attempted to convince the Senate it would. The Senate Finance Committee Report stated that there were 2.4 million delinquent Federal tax accounts for the fiscal year ended June 30, 1965, and only 220,000 notices of lien filed. S. REP. No. 999, 89th Cong., 2d Sess. 4 (1966). It might of course be impossible to file 2.4 million notices of lien. However, undoubtedly the vast majority of these delinquencies were current delinquencies, and not deficiency assessments relating to years more than three years in the past; and the same report points out that four-fifths of them were collected in the first year after assessment. So long as the tax did not become "due and owing" more than three years in the past, the only result in bankruptcy of a failure to file the notice would be to push the Government down to priority 4, and it would in any event be pushed down to priority 2½ by § 67c with respect to all personal property not accompanied by possession. Therefore, while the result may be unpalatable to the Treasury, this is not as serious a problem as the Treasury tried to make it out. On the other hand, it would be a more serious detriment to the Treasury if it were to lose its priority entirely as a result of the invalidation of the lien; and it seems reasonable to assume that the number of such cases would be entirely manageable if the Treasury wants to take steps to avoid this result.

It thus appears probable that this amendment may result in causing harrassment and financial embarrassment to taxpayers in many cases in which they might otherwise arrange an accommodation with the government.[39] Filing notice of a tax lien, and certainly making a jeopardy assessment, are actions which frequently precipitate bankruptcy where otherwise the delinquent taxpayer might be able to work his way out of a difficult situation.[40] As the end result, general unsecured creditors will not receive any more in bankruptcy liquidations, since, if the Government does in fact adopt these policies, it will preserve its priority in virtually all cases.[41]

II. Invalidation of Tax Liens

A. Section 70c

Section 70c of the Bankruptcy Act has provided that the trustee in bankruptcy has the rights of a creditor holding a "lien by legal or equitable proceedings" as of the date of bankruptcy upon all property upon which a creditor of the bankrupt could have obtained such a lien, whether or not such a creditor exists. This section has been one of the major weapons in the arsenal of the trustee for the purpose of invalidating imperfect liens and transfers which are vulnerable to a lien creditor under state law. IRC section 6323 has provided that a federal tax lien as to which no notice has been filed as prescribed "shall not be valid" as against, among others, a "judgment creditor." The majority of the court of appeals decisions considering the problem had held that the trustee in bankruptcy was not a "judgment creditor"

[39] See H.R. Rep. No. 686, 89th Cong., 1st Sess. 17 (1965) (Letter From Stanley S. Surrey, Assistant Secretary of the Treasury); S. Rep. No. 999, 89th Cong., 2d Sess. 5 (1966) (Letter From Henry H. Fowler, Secretary of the Treasury); *Hearing* 8 (Testimony of Lawrence M. Stone, Tax Legislative Counsel, Treasury Department).

[40] See S. Rep. No. 999, 89th Cong., 2d Sess. 5 (1966).

[41] It may be suggested that the Government will not adopt policies which may be harmful to many taxpayers, but will stoically accept its relegation to an unsecured, non-priority position in some situations. Anyone who has observed the conduct of the Internal Revenue Service in connection with tax claims in insolvency liquidations will not view this as a very likely occurence. Furthermore, the irrationality of the few instances where a tax claim is denied priority is a persuasive argument that the Government should not accept subordination in those cases if it can be avoided. For example, an income tax claim relating to a taxable year 10 years prior to bankruptcy will be entitled to priority if a Tax Court case is still pending regarding it at the date of bankruptcy or if the Tax Court case has been concluded and the assessment has been made and notice filed; but the same claim relating to the same year will be denied priority if the Tax Court case has been concluded but the assessment not yet made or if such case has been concluded and the assessment made but no notice filed—without regard in any case to how dilatory the Government may have been in making the audit.

under IRC section 6323 on the ground that that section required an actual, not merely a "hypothetical," judgment creditor.[42]

Section 70c as amended in 1966 now provides that the trustee in bankruptcy has the rights of "a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists," as well as the rights of a creditor holding a lien by legal or equitable proceedings.[43] This amendment was intended to overrule those decisions holding that an unfiled federal tax lien was nevertheless valid against the trustee. It should be noted, however, that literally the amendment does nothing. No one denied that the trustee had the "rights" of a judgment creditor holding a lien on property of the bankrupt under the previous language. What those decisions had said was that it was not enough for a person to have the rights of a judgment creditor in order to qualify under IRC section 6323; he had to *be* a judgment creditor. Also, the Federal Tax Lien Act of 1966,[44] enacted later in the same session of Congress, changed the phrase "judgment creditor" in IRC section 6323 to "judgment lien creditor," thus frustrating even the effort to have the same phrase in the two statutes.[45]

However, while the bill containing this amendment was pending in

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[42] *In re* Fidelity Tube Corp., 278 F.2d 776 (3rd Cir.) *cert. denied*, 364 U.S. 828 (1960); Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956); United States v. England, 226 F.2d 205 (9th Cir. 1955); see *In re* Taylorcraft Aviation Corp., 168 F.2d 808, 810 (6th Cir. 1948).

[43] The amendment also restored and revised a provision which was in § 70c prior to 1950; and the section now gives the trustee the additional status of "a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists."

There may be obligations enforceable by creditors which are not enforceable by the debtor himself, and which therefore do not pass to the trustee under § 70a. For example, the liability of the holders of watered stock of a corporation is in this category in many states. BALLANTINE, CORPORATIONS § 353 (rev. ed. 1946). And since it is merely an obligation, there is nothing to which a "lien" can attach. Even prior to 1950 it had been held that the trustee could not enforce such an obligation, because the provision as it then read gave him the status of a judgment creditor with execution returned *n.b.* only as to "all other *property*" [*i.e.*, other than that in the possession or control of the bankrupt]. In this situation there is no "property" involved.

Under the revised language in the 1966 amendment restoring this provision all reference to property has been eliminated, and the trustee will succeed directly to the rights of the creditors as well as the rights of the bankrupt. This effect of this amendment is more important than that pointed out in the Congressional reports, namely, that the trustee will also be able to use discovery procedures in State courts where these are available only to a judgment creditor with execution returned *n.b.* H.R. REP. No. 686, 89th Cong., 1st Sess. 10 (1965).

[44] 80 Stat. 1125 (1966). 1966 U.S. CODE CONG. & AD. NEWS. 4572 (1966).

[45] Of course, no amount of language in the Bankruptcy Act can *make* the trustee a judgment creditor (or judgment lien creditor). If the question were still in doubt, it would have been preferable simply to insert the phrase "trustee in bankruptcy" in IRC § 6323 as one of those persons against whom an unfiled federal tax lien is invalid.

Congress the Supreme Court made it unnecessary by the decision in *United States v. Speers*,[46] which held that the trustee in bankruptcy was a "judgment creditor" within the meaning of IRC section 6323 under the previous language. Therefore, the only effect of this amendment is to reinforce that decision.

The arguments over this amendment and in the *Speers* case seemed to assume that it made some significant difference under the previous law how this question was decided and, furthermore, that it was of vital concern to general unsecured creditors. In fact, the difference was of little importance; the decision did not affect general unsecured creditors one iota. Under former section 67c(1) of the Bankruptcy Act (now section 67c(3) under the amendment discussed below) all tax liens on personal property not accompanied by possession were subordinated to the first two priorities in section 64a (those for administrative expenses and wage claims). All tax claims were entitled to fourth priority under section 64a even though unliened or even though a lien was invalidated under some other provision of the Act.

The only effect of the *Speers* decision with respect to an unfiled federal tax lien on personal property not accompanied by possession was to push the claim down to a fourth priority. In any event it would have been pushed down to a two and one-half priority by section 67c, after administrative expenses and wage claims, but before the third priority (expenses of obtaining a denial of discharge or conviction of a crime, which is economically unimportant) and the fourth priority for unliened taxes. With respect to such liens the only significant effect of the decision was to require the federal government to share on a parity with unliened state tax claims rather than to come before the state tax claims in position two and one-half. The benefit to general unsecured creditors was not discernable.

With respect to real property, and with respect to three situations stated below involving personal property, the decision demoted the federal tax claim from the super priority of a secured debt to the fourth priority, in cases where otherwise it would not have been subject to subordination under 67c: (1) where possession of the property had been taken by the Government prior to bankruptcy but no notice of the tax lien had been filed—a rather unlikely occurrence since there is no reason to withhold the filing of the notice after a seizure of the property; (2) where the lien had been enforced by sale prior to bank-

[46] 382 U.S. 266 (1965).

ruptcy but no notice of the lien had been filed—a highly unlikely occurrence; and (3) where the estate of the bankrupt was solvent—in which case priorities become meaningless since everyone gets paid in full.[47]

In these instances where the lien was demoted by the decision from the super priority of a secured debt to fourth priority, the beneficiaries were the claimants for administrative expenses, wage claimants, and state tax claims for unliened taxes (which were permitted to share equally with the federal tax claim thus demoted). General unsecured creditors would not receive any more as a result of the decision. Thus, this was primarily an argument between trustees in bankruptcy and their counsel, on the one hand, and the Treasury Department, on the other, with the incidental beneficiaries (who strangely enough do not seem to have participated in the argument) being state tax collectors and wage claimants.

However, the major effect of this decision and the amendment confirming it (which for some reason was not remarked upon by the witnesses at the hearing on the bills, but which may have been in the back of their minds) arises when this rule is applied in conjunction with the new provisions of section 64a(4) discussed above. As we have seen, in some instances a tax lien with respect to which a notice has not been filed will be pushed down all the way to the general unsecured category, rather than merely to priority four. This situation is probably most likely to arise where a deficiency is finally determined by compromise or litigation, a process which in many cases will take more than three years after the due date of the return, and the assessment is made. Frequently the taxpayer is unable in the case of a large deficiency to pay the full amount immediately, and the Government is usually willing to arrange in an appropriate case for its payment over an extended period in installments.[48] If a notice is not filed, the Govern-

[47] This statement is not entirely true, since exempt property is counted under the Bankruptcy Act in determining solvency. § 1(19). As Collier points out, the estate might be solvent and still everyone not be paid in full if exempt property makes the difference between solvency and insolvency. 4 COLLIER 190, 289. However, for this to make any difference in the case we are considering (the question of invalidity vs. subordination of a tax lien under the prior law), the amount of the exempt property would have to exceed *all* of the general, non-priority claims *plus* priority (5) claims. Therefore, for practical purposes this possibility can be ignored. This provision might conceivably have applied with some practical effect in connection with the restriction of wage and rent liens by former § 67c(1), although Collier does not cite any case where this actually happened; and the provision has been eliminated by the 1966 amendments.

[48] H.R. REP. No. 686, 89th Cong., 1st Sess. 16-17, (1965) (Letter From Stanley S. Surrey, Assistant Secretary of the Treasury); S. REP. No. 999, 89th Cong., 2d Sess. 3 (1966) (Letter From Henry H. Fowler, Secretary of the Treasury).

ment in any subsequent bankruptcy will probably lose its priority entirely.[49]

It is possible therefore that in the future the Government may refuse to agree to such deferred payments without filing a notice of the tax lien, which may precipitate action by other creditors forcing the taxpayer into bankruptcy in cases where otherwise he would have had some hope of working his way out of the situation. This may be of benefit to general creditors in some situations where the sooner the debtor goes into bankruptcy the better off they are, since he is thus prevented from getting further into debt to them. On the other hand, they will obviously be prejudiced in cases where absent the filing of the notice he would in fact have succeeded in working out the problem and paying everyone in full. I do not know of any statistics which would throw any light on the question of which of these results will be more frequent than the other. In any event, it is doubtful that the general unsecured creditors will receive a greater distribution in many actual bankruptcy liquidations under the amendments to sections 70c and 64a than they would have absent those amendments.

B. Section 67c(1)

The provisions of section 67c(1) of the Bankruptcy Act as amended (corresponding to the former section 67c(2)), discussed in greater detail below, invalidate in bankruptcy any statutory lien (1) which first becomes effective "upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor," or (2) which is invalid as against a bona fide purchaser at the date of bankruptcy, provided that if such a lien can be perfected against a bona fide purchaser under applicable lien law it may be so perfected after the date of bankruptcy and will then be valid against the trustee.

These provisions can have no application to the federal tax lien. In the first place, a lien in favor of the United States is not specifically covered, and there is a presumption that the sovereign is not included in such a provision unless it is mentioned.[50] Secondly, the federal tax lien does not arise upon insolvency or any of the other events mentioned, and while it may be invalid as against a bona fide purchaser if notice is not filed, it can generally be perfected against such a pur-

[49] Assuming that the deficiency claim will be held to have become "due and owing" at the due date of the return, rather than upon its final determination.

[50] Davis v. Pringle, 268 U.S. 315 (1925); Lewis v. United States, 92 U.S. 618 (1875); United States v. Herron, 87 U.S. (20 Wall.) 251 (1873).

chaser at any time by filing the notice, so long as it is still collectible. It is true that with respect to some types of property and some types of purchasers, the mere filing of the notice does not perfect the federal tax lien,[51] and the number of these special situations has been expanded by the Federal Tax Lien Act of 1966.[52] However, a levy can also be made on such property[53] and there can be no doubt that the Government's taking possession would perfect the lien against any bona fide purchaser. Thirdly, an unfiled federal tax lien is already invalidated by the provisions of section 70c.

With respect to state tax liens, the effect of these provisions cannot be determined with certainty without making an investigation of the tax lien statutes of each of the fifty states. Of course, the provisions may not apply at all to state tax liens, since a lien in favor of a state is not specifically mentioned. Former section 67c(1), subordinating certain statutory liens, specifically referred to "liens for taxes or debts owing to the United States or to any State or any subdivision thereof" and former section 67c(2), invalidating certain statutory liens, specifically referred to liens for "debts owing to any person, including any State or any subdivision thereof." However, the new Section 67c(2) does refer to "claims for . . . taxes . . . secured by liens hereby invalidated [*i.e.* by section 67c(1)]" and states that they shall be given the priority accorded them in section 64a. The need for such a provision is not apparent since section 67c has never been thought to affect section 64a; but it does indicate that Congress thought it was covering *some* tax liens in section 67c(1).[54] If state as well as federal

[51] IRC § 6323 has for many years excluded securities from the effect of the filed notice, so that a bona fide purchaser of such securities without actual notice or knowledge of the tax lien takes free of it even though the statutory notice has been filed. In 1964 a similar exception was also made for motor vehicles. IRC § 6323(b)(1), (2).

[52] 80 Stat. 1125 (1966), U.S. CODE CONG. & AD. NEWS 4572 (1966). The exceptions, giving priority to a bona fide purchaser without actual notice or knowledge even though the statutory notice has been filed, have now been expanded to include a purchaser of tangible personal property at retail sold in the ordinary course of the seller's trade or business, and a purchaser of household goods and personal effects in a "casual sale" for less than $250. IRC § 6323(b)(3) and (4) (as amended). There is also an exception for a forty-five day period with respect to a purchaser of accounts receivable or chattel paper or real estate mortgages under a "commercial transactions financing agreement." IRC § 6323(c)(2) (as amended). However, this exception requires that there must have been "a written agreement entered into before tax lien filing" to purchase such collateral acquired by the taxpayer in the ordinary course of his trade or business.

[53] IRC § 6331.

[54] The congressional reports also indicate that Congress intended to cover at least some tax liens by § 67c(1):

> In respect to the relation between new sections 67c(1) and 67c(3), it is the intention of the committee that a statutory tax lien on personal property not accompanied by possession should first be tested by the standards of section 67c(1).

tax liens were held to be excluded by failure to mention them, this statement in section 67c(2) would become even more nonsensical than it already is.

Furthermore, although the Supreme Court has assumed in several cases that the rule that the sovereign is presumed not to be included in a statutory provision may apply to the question whether a state government is subject to a federal statute,[55] it has understandably given it much less force in that situation than where the question involved the United States.[56] Since this is merely a rule of construction in any event,[57] a state tax lien should be held to be covered by section 67c(1).

The question is probably not too important since state tax liens do not normally arise upon insolvency or any of the other events mentioned. While they may for some reason be unperfected as against a bona fide purchaser, they can normally be perfected by some action as long as they are still enforceable. In fact, any type of lien, statutory or otherwise, which is not valid as against a bona fide purchaser and cannot be made so by any action of the lienor, but which is still enforceable, is a very strange creature indeed, if not entirely mythological.[58]

Section 67c(3) is then to be applied to those liens which have not been invalidated by section 67c(1).

H.R. REP. No. 686, 89th Cong., 1st Sess. 8-9 (1965).

[55] Before the United States and the states were specifically included in § 57n of the Bankruptcy Act requiring the filing of proofs of claims, it was generally assumed that the states were not covered; and it was customary to secure a bar order against both state and federal claims. The Supreme Court recognized this practice in New York v. Irving Trust Co., 288 U.S. 329 (1933), and stated in dictum: "It is admitted here, that as the United States *and the States* are not mentioned in the limitation of § 57, they are not bound thereby." *Id.* at 331. [Emphasis added.] However, there does not seem to have been any square holding on this point by an appellate court.

[56] Plumbers Local 298, AFL v. County of Door, 359 U.S. 354 (1959); Gardner v. New Jersey, 329 U.S. 565 (1947) (no mention of the presumption); California v. United States, 320 U.S. 577, 585 (1944) ("We need not waste time on useless generalities about statutory construction...."); United States v. California, 297 U.S. 175 (1936); United States v. California, 328 F.2d 729 (9th Cir. 1964). *Compare,* as to the United States, United States v. United Mine Workers of America, 330 U.S. 258 (1947), and the cases cited note 50, *supra.*

[57] Cook County Nat'l Bank v. United States, 107 U.S. 445 (1882).

[58] A reasonably intensive search of the laws of sixteen States, in which according to the latest figures more than 71% of all straight bankruptcy asset cases were filed involving more than 77% of all of the assets collected in such cases, has failed to reveal a single tax lien which would clearly be invalidated by the provisions of § 67c(1) (assuming them to be covered by it).

There are a number of tax liens on personal property which are stated not to be good against a bona fide purchaser. For example, CAL. REV. & TAX. CODE §§ 2191.3, 2191.4 (1956) (personal property tax); CAL. REV. & TAX. CODE §§ 6738, 6757 (1956) (sales tax); CAL. REV. & TAX. CODE §§ 14301, 14303 (1956) (inheritance tax); CAL. REV. & TAX. CODE §§ 16061, 16062 (1956) (gift tax); CAL. UNEMP. INS. CODE § 1703 (1956) (unemployment insurance contributions); ILL. ANN. STAT. ch. 48, §§ 720, 721 (1966) (unemployment insurance contributions); ILL. ANN. STAT. ch. 120, § 444a (1966) (sales tax); FLA. STAT. § 198.22 (1965) (estate tax); MASS. ANN. LAWS ch. 60, § 37 (Supp. 1964) (real property tax); MICH. STAT. ANN. § 7.81 (1960) (personal property tax); N.Y. TAX LAW § 1092(j) (1954) (corporation tax, franchise tax, and

III. SUBORDINATION OF TAX LIENS

Former section 67c(1) of the Bankruptcy Act subordinated to the first two priorities under section 64a all "statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property," unless enforced by sale before bankruptcy and except where the estate was solvent. The new section 67c(3), the corresponding provision in the new act, provides:

> Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for

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state and national bank tax); PA. STAT. ANN. tit. 72, §§ 2485-801, 2485-806 (1964) (inheritance tax); VA. CODE ANN. § 58-838.4 (1950) (tax on forest products); VA. CODE ANN. § 58-180 (1950) (inheritance tax); VA. CODE ANN. § 58-227 (1950) (gift tax). However, in every one of these cases, the government may also take possession of the personal property (usually by a distraint), and in that event the lien would undoubtedly become good against a bona fide purchaser. CAL. REV. & TAX. CODE §§ 2914 (1956) (personal property tax); 6776 (sales tax); 14321 (inheritance tax); 16071 (gift tax); CAL. UNEMP. INS. CODE § 1785 (1956) (unemployment insurance contributions); ILL. ANN. STAT. ch. 48, § 723 (1966) (unemployment insurance contributions), and ch. 120, § 444f (sales tax); FLA. STAT. § 198.20 (1965) (estate tax); MASS. ANN. LAWS ch. 60, § 53 (1964) (real property tax); MICH. STAT. ANN. § 7.83 (1960) (personal property tax); N.Y. TAX LAW § 1092(j) (1954) (lien becomes good against a bona fide purchaser upon the issuance of a "notice of deficiency"); PA. STAT. ANN., tit. 72, § 2485-825 (1964) (inheritance tax); VA. CODE §§ 58-41, 58-42, 58-43 (1950) (tax on forest products); § 58-181 (inheritance tax); § 58-228 (gift tax). It may be argued, of course, that these provisions for distraint warrants provide methods of "enforcing" rather than "perfecting" the tax liens; and, therefore, such liens cannot be "perfected" against a bona fide purchaser and would be invalid under § 67c(1)(B). All such a ruling would force a state to do is to provide for a separate warrant expressly labelled a method of "perfecting" the tax lien and, even though never used, its mere availability would validate the tax lien under § 67c(1)(B). It is difficult to believe that any court would engage in such pointless semantics at the present day.

There remains a handful of tax lien statutes which provide that the lien is not good as against a bona fide purchaser, and which contain no statutory method of perfection of the lien except by a court action to foreclose it. ARIZ. REV. STAT. ANN. § 23-745 (1956) (unemployment insurance contributions); ARIZ. REV. STAT. ANN. § 42-1526 (1956) (estate tax); ILL. ANN. STAT. ch. 120, § 397 (1966) (inheritance tax, after it has been due for five years); N.Y. TAX LAW § 249-bb (1954) (estate tax: distraint warrant can only issue six months after the tax is due; during this six months period there is no statutory method of perfection except by judicial foreclosure). It is of course more difficult to argue in these few cases that such a method of perfection would be available after bankruptcy under § 67c(1)(B), since an action to foreclose the lien would no longer be possible. However, again all that the State need do in these instances is to provide for a statutory method of seizure, even if it never contemplates using it, and this would take the lien out of § 67c(1)(B).

> prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien.

Clause (5) of new section 67c provides that the entire subdivision c shall not apply "to liens enforced by sale before the filing of the petition."

The first sentence of this provision, while it eliminates the subordination of *non-tax* statutory liens, was clearly intended to cover exactly the same tax liens as those covered by the previous provision.[59] However, a question can be raised as to whether a federal tax lien is in fact subordinated by the new section 67c(3). Since the former provision specifically referred to a lien in favor of the United States, and this statement has been eliminated from the new one, an argument can be made that such a lien is not covered, under the rule that the sovereign is presumed not to be included in a statute unless specifically mentioned.[60] It is true that a tax lien necessarily arises in favor of some sovereign; but it can be argued that the new provision applies only to state tax liens, since the presumption in question, if applicable at all to a state government in connection with a federal statute, has much less force as so applied than when applied to the federal government.[61]

There is no doubt that there was no intention of making any such change in the law, and the proponents of the bill, the Treasury Department and the various congressional committees considering it all assumed that a federal tax lien was still covered. The overwhelming evidence of this legislative history should be sufficient to cause a court to hold that federal tax liens are still subject to subordination under the new section. At the same time, it is regrettable (and inexplicable) that this point should have been left unresolved by the statutory language, particularly when the draftsmen had the example of the careful coverage of it in the former section 67c(1) before them.

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[59] The reference to a situation where the estate is solvent has been eliminated, but that was largely irrelevant anyway since in that case priorities generally become meaningless because everyone is paid in full. *But see* note 47 *supra.*

The provision has also been modified by the addition of a statement in § 67c(5) that the subdivision does not apply to liens on exempt property or property abandoned by the trustee. Since neither of these types of property are available for the payment of administrative expenses and wage claims, subordination of a lien upon such property to those claims would be meaningless. This statement assumes significance only in connection with the invalidation of statutory liens by new § 67c(1).

[60] Note 50 *supra.*

[61] Note 56 *supra.*

The remaining provisions of the new section 67c(3) are intended to deal with the problem arising from the decision in *In re Quaker City Uniform Co.*[62] in the Court of Appeals for the Third Circuit. The problem arises when a statutory lien subordinated in bankruptcy is superior to another lien not subordinated. In that case a landlord's lien was subordinated which was superior by state law to a chattel mortgage, not subordinated. However, the problem arose more often in connection with tax liens, simply because they were more numerous; and it will hereafter arise only in connection with tax liens because they are now the only ones subordinated.

The question that arises is how the apparent circular priority thus created should be resolved. For example, if a tax lien exists as to which notice has been filed prior to the grant of a chattel mortgage (now a security interest under the UCC), it is prior to the chattel mortgage. However, if the tax lien is not accompanied by possession at the date of bankruptcy, it is subordinated by this provision to the administrative expenses and wage claims. On the other hand, the chattel mortgage if properly recorded or filed, and not otherwise invalidated by some provision of the Bankruptcy Act, is indefeasible in bankruptcy and is not subordinated (at least explicitly) to the administrative expenses and wage claims. Therefore, the apparent order of priority is: the tax lien is prior to the chattel mortgage, which is prior to the administrative expenses and wage claims, which are prior to the tax lien. The same situation might arise with respect to another statutory lien which is not subordinated to administrative expenses and wage claims (because it is accompanied by possession, or is enforced by sale prior to the filing of the petition, or is a non-tax lien not invalidated by section 67c (1)), but which itself is subordinate to a tax lien subordinated to those two priorities.

The Court of Appeals for the Third Circuit in the *Quaker City* case solved this problem by saying that the subordinated lien carried down with it all liens subordinate to it. Thus, in the illustration of the chattel mortgage, the order of distribution would be: (1) administrative expenses; (2) wage claims; (3) tax lien; (4) chattel mortgage. The chattel mortgage ends up at the bottom, and the fortuitous existence of a subordinated lien, no matter how small, under this decision resulted in subordinating and perhaps as a practical matter destroying any lien subordinate to it. For example, assume in the illustration above

[62] 238 F.2d 155 (3d. Cir. 1956), *cert. denied*, 352 U.S. 1030 (1957).

that the administrative expenses and wage claims amounted to 5,000 dollars; the tax lien was for one dollar; the chattel mortgage secured a debt of 5,000 dollars; and 5,000 dollars was realized upon a sale of the property. According to this decision, the order of distribution would be: administrative expenses and wage claims—5,000 dollars; tax lien —nothing; chattel mortgage—nothing, even though Congress did not subordinate the chattel mortgage to the administrative expenses and wage claims.[63]

It is not surprising that almost all commentators disagreed with this approach[64] or that the decision found no favor outside the Third Circuit.[65] That circuit refused to abandon it,[66] probably more out of pride than conviction; but it seems likely that the Supreme Court, if and when it got around to it, would have overruled the *Quaker City* case. In any event, that decision has now been abrogated by the new provisions of section 67c(3).

These provisions adopt the solution to this problem suggested by the Court of Appeals for the Ninth Circuit in *California State Department of Employment v. United States:*[67] the ordinary priority of liens under section 67b is to be applied first in the distribution of the assets, and then a sufficient amount taken away from the subordinated lien (if there is sufficient) to satisfy the administrative expenses and wage claims. For example, to take a slightly more realistic illustration than that discussed above, suppose that the tax lien was 2,000 dollars, the administrative expenses and wage claims were 3,000 dollars, the chattel mortgage was 5,000 dollars, and the property brought only 5,000 dollars upon sale. The tax lien would first be given 2,000 dollars and the chattel mortgage 3,000 dollars in the order of their priority; the

[63] The statement in several places in the congressional committee reports and at the hearing on these bills, that the *Quaker City* doctrine would even result in subordinating a chattel mortgage which was *prior to* the subordinated statutory lien, is wholly erroneous. H.R. REP. No. 686, 89th Cong., 1st Sess. 8 (1965); S. REP. No. 227, 89th Cong., 1st Sess. 9 (1965). *Hearing* 23. How much this misconception contributed to the passage of the bill it is difficult to say.

[64] See Kupfer, *A "Puzzlement": The Quaker City Uniform Case, Its Impacts and Aftermaths,* 12 BUS. LAW. 280 (1957); Wolfe & Forman, *Circuity of Liens and Priorities,* 38 REF. J. 36 (1964); Note, 70 HARV. L. REV. 1296 (1957).

[65] Jordan v. Hamlett, 312 F.2d 121 (5th Cir. 1963); California State Dep't. of Employment v. United States, 210 F.2d 242 (9th Cir. 1954); City of New Orleans v. Harrell, 134 F.2d 399 (5th Cir. 1943); *In re* American Zyloptic Co., Inc., 181 F. Supp. 77 (E.D.N.Y. 1960). *But cf.* Brod v. Third Realty Co., 340 F.2d 591 (5th Cir. 1965), where the court apparently misunderstood the case of *Jordon v. Hamlett* upon which it relied; however, since one of the two chattel mortgagees in the *Brod* case did not appeal, it would seem that the result of the case is correct on that basis alone.

[66] *In re* Einhorn Bros., Inc., 272 F.2d 434 (3rd Cir. 1959); *In re* Lehigh Valley Mills, Inc., 225 F. Supp. 494 (E.D. Pa. 1964).

[67] 210 F.2d 242 (9th Cir. 1954).

entire 2,000 dollars would then be taken from the tax lien and given to the administrative expenses and wage claims, leaving the tax lien with nothing. The final distribution would thus be:

Claim	*Amt. of Claim*	*Amt. Paid*
Tax lien	$2,000	-0-
Adm. expenses	$1,000	$1,000
Wage claims	$2,000	$1,000
Chattel mtge.	$5,000	$3,000

On the other hand, if the subordinated tax lien were in excess of the total of the administrative expenses and wage claims, it would retain that excess. Thus, if the tax lien were for 4,000 dollars (rather than 2,000 dollars) in the above case the final distribution would be:

Claim	*Amt. of Claim*	*Amt. Paid*
Tax lien	$4,000	$1,000
Adm. expenses & wage claims	$3,000	$3,000
Chattel mtge.	$5,000	$1,000

An argument can be made that the chattel mortgage should get 2,000 dollars here and the tax lien nothing, which would give the chattel mortgage more than the amount of its priority absent the provisions of Section 67c(3). This argument would be based on the language, "after allowing for prior indefeasible liens," in the sentence which states that the excess of the proceeds over the amount of the administrative expenses and wage claims, up to the difference between the amount of such expenses and claims and the amount of the tax lien, shall be paid to the tax lien. However, the "prior" indefeasible liens referred to here are those *prior to the tax lien,* since all indefeasible liens (other than tax liens subject to this provision) are prior to the administrative expenses and wage claims. In other words, this qualification was merely intended to avoid any implication that liens prior to the tax lien, which are not involved in this circle at all, are affected by this provision.[68]

[68] See H.R. REP. No. 686, 89th Cong., 1st Sess. 8 (1965):
This solution thus avoids the situation where the fortuitous intercession of a subsequent tax lien may result in little or nothing being left for the secured creditor as occurred in *Quaker City.* At the same time, it prevents a lienor who

This provision is a desirable correction of the situation existing in the Third Circuit, which if permitted to continue might eventually have infected other areas of the country before its final resolution by the Supreme Court. And, on the whole, it seems as equitable a solution as can be found. Congress desired and continues to desire to levy contribution upon certain liens, but not others, for the purpose of paying administrative expenses and wage claims. In accomplishing this purpose, there is no reason to disturb the ordinary priority of these liens among themselves. To say, as the Third Circuit did, that the superior lien may end up with nothing is irrelevant; Congress must have contemplated that it would always end up with less, and perhaps with nothing, when it said that it was to be subordinated to some other claim. The ironic result in the *Quaker City* case, which has frequently been commented upon, was that both the superior lien and the inferior lien ended up with nothing; the administrative expenses and wage claims took the entire proceeds, primarily from the lien which Congress had said was not to be subordinated to them.

There is, however, one situation which the language of the new section fails to take into account, namely, where the proceeds of the sale of the property exceed the amount of the tax lien plus the amount of the chattel mortgage (or other non-subordinated lien which is inferior to the tax lien). For example, in the case last considered, assume that the proceeds of the property are 10,000 dollars (rather than 5,000 dollars). The statute provides that the administrative expenses and wage claims (3,000 dollars) are to be paid first, but not exceeding the tax lien (4,000 dollars). Then the excess of the proceeds over the administrative expenses and wage claims are to be paid to the tax lien, but only "up to the amount of the difference between the total paid to the [administrative expenses and wage claims] . . . and the amount of the tax lien" (1,000 dollars). It is contemplated that the balance of such excess will go to the chattel mortgage; but in this case the amount of the chattel mortgage is less than that balance. Therefore, so far as section 67c(3) goes the distribution would be:

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has a lien subsequent to a tax lien from receiving more than he would get if bankruptcy had not occurred.

The illustrations on the same page of this report make it clear that this clause was intended to save liens prior to the tax lien, but not to give a subordinate lien anything until the administrative expenses and wage claims and the tax lien between them had been given the full amount of the tax lien. The provision was probably inserted because of the erroneous notion of Congress that the *Quaker City* case subordinated liens prior to the tax lien. See note 63 *supra*. See also, S. REP. No. 972, 89th Cong., 2d Sess. 11 (1966).

Claim	*Amt. of Claim*	*Amt. Paid*
Tax lien	$4,000	$1,000
Adm. expenses & wage claims	$3,000	$3,000
Chattel mtge.	$5,000	$5,000

But this leaves 1,000 dollars unaccounted for. Obviously, it should go to the tax lien, since it still has a deficit of 3,000 dollars and the other two claimants have been paid in full. An argument could be made from the literal language of section 67c(3) that this 1,000 dollars should go into the general pot to be distributed through the remaining section 64a priorities. However, this would be an unwarranted negative implication from the statute; it simply does not say what is to be done with this 1,000 dollars. Therefore, the general rule apart from section 67c(3) that a valid lien has priority over all section 64a priorities should be applied.

IV. DISCHARGE OF TAX CLAIMS

Heretofore, all tax claims have been non-dischargeable in bankruptcy. Section 17a(1) listed "taxes" as among those debts which were not released by a discharge in bankruptcy. This result was not of any practical consequence in the case of a corporation, since a corporation which went into straight bankruptcy (as distinguished from a Chapter proceeding) was almost always abandoned; its theoretical continued liability for unpaid taxes was meaningless. However, in the case of an individual or partnership, the fact that no taxes could ever be discharged was a frequent source of difficulty to a person attempting to rehabilitate himself after a financial failure.

Out of solicitude for such individuals, Congress enacted the provisions of the new section 17a(1), which have been set out above. The previous discussion of those provisions in connection with the priority of tax claims is directly pertinent here. However, there are two vital points which may make their effect with respect to discharge entirely different.

The first point is concerned with the meaning of the statement that "a discharge in bankruptcy shall not release or affect any tax lien." A tax lien is a general, floating lien which automatically attaches to all after-acquired property of the taxpayer at the moment of its ac-

quisition. The tax lien is effective as of the time of assessment.[69] If the statement that the discharge does not "affect" any tax lien means that such a lien still attaches to property of the bankrupt acquired after the discharge, this proviso nullifies the purported grant of a discharge with respect to all income taxes assessed prior to the filing of the petition, or perhaps prior to the granting of the discharge. Nor would it make any difference that the lien might be invalid (because unfiled) as against the trustee in bankruptcy under section 70c. It has never been suggested that the invalidation of a tax lien as against the trustee in bankruptcy would affect in any way its validity as against the taxpayer himself, any more than would a similar subordination of an unfiled tax lien to an actual judgment creditor.[70]

The discussion above concerning the various provisions of the new section 17a(1) reveals that in every instance where a federal income tax debt is purported to be discharged, with one minor exception, it is a tax which has been assessed (and therefore with respect to which a lien has arisen), assuming that our conclusions as to the most probable interpretations of these provisions are valid. The one exception is the case where a prohibition on assessment has lifted upon the expiration of ninety days after the ninety-day letter or upon a decision of the Tax Court becoming final, and the filing of a petition in bankruptcy precedes the assessment within the sixty day assessment period. If the provision that a discharge does not affect any tax lien refers not only to a tax lien in existence at the date of filing the petition but also to one in existence at the time of granting the discharge, even this minor exception would largely disappear, since presumably the assessment would always be made upon receipt by the Government of the notice of the first meeting of creditors, if not made previously.

The fact that this interpretation would virtually nullify section 17a (1) insofar as it purports to grant a discharge of any federal income taxes should create a strong presumption that it is not a correct interpretation of the intention of Congress. On the other hand, if it is said that the provision only means that the discharge does not affect any

[69] Note 18 *supra.*

[70] It may be argued that, even though the discharge does not prevent the tax lien from attaching to after-acquired property, it does destroy the debt in some instances; and therefore since the lien has no debt to support it, it fails too. The minor premise of this argument would seem to be erroneous, since it has been consistently held that a discharge in bankruptcy does not affect a valid lien, for example on exempt property. 1 COLLIER ¶ 17.29; 4 COLLIER 272. In any event, this would merely be another way of saying that the discharge *does* in fact "affect" the tax lien, to the extent of preventing it from attaching to after-acquired property.

tax lien with respect to property owned by the bankrupt at the date of filing the petition, the proviso becomes meaningless insofar as it relates to section 17a(1). A discharge operates only prospectively; it does not relieve any of the existing property of the bankrupt from liability to be taken to pay his obligations. The whole purpose of the bankruptcy proceeding is to take existing property and apply it to those obligations, while releasing after-acquired property if the bankrupt obtains a discharge. To say that a discharge does not release or affect a lien as it applies to existing property is a nonsensical statement, except with respect to exempt property which is not involved here.[71]

The true explanation of this proviso seems to be that it was not intended to have anything to do with section 17a(1), although that is where it appears, but rather with section 64a into which it is incorporated by reference. In other words, it was intended to negative any inference that by denying priority to certain tax claims there was an intent to include liened taxes as well as unliened taxes. It was simply a blunder in drafting caused by the dubious attempt to deal with two different problems by language in one section which is to be incorporated by reference into another. If this explanation is accepted, then a court should hold that this proviso has no effect so far as the question of discharge is concerned.

The second point mentioned above is that the filing or nonfiling of a notice under IRC section 6323 is irrelevant in connection with discharge, since our conclusion must be (if this section is to have any application) that a tax lien becomes invalid as against the taxpayer after discharge where the tax debt is purported to be discharged by these provisions. It is of no importance whether the lien was valid or invalid as against the trustee. With modification for this factor, the outline above indicating what taxes will be denied priority is also applicable to determine what taxes will be discharged.

Based upon our conclusions as to the most reasonable interpretations of these provisions, a bankrupt probably will be discharged from the following federal income taxes:

1. A deficiency claim which has been finally determined (whether or not assessed) prior to bankruptcy, arising out of a nonfraudulent return which was due more than three years prior to bankruptcy.
2. A claim for taxes with respect to which (a) no return was filed,

[71] Exempt property is specifically covered by another provision in the new § 17a(1).

(b) the due date of the return was more than three years prior to bankruptcy, and (c) the tax was assessed more than one year prior to bankruptcy.

3. A claim for taxes correctly reported on a return due more than three years prior to bankruptcy, or if an extension of time for payment was obtained prior to the due date of the return or installment payments were elected, where such extended or deferred dates were more than three years prior to bankruptcy.

It can thus be seen that the discharge provisions, assuming that their apparent nullification by the final proviso regarding tax liens can be overcome, may have some substantial effect in relieving a bankrupt of ancient tax debts, as contrasted with the almost total ineffectiveness of such provisions in denying priority to tax claims, despite the fact that the language is identical. On the other hand, this possible result may cause the Internal Revenue Service to be less lenient in arranging for deferred payments of tax liabilities where the liabilities relate to a tax year already more than three years in the past or where the proposed schedule of payments will extend to a time more than three years after the due date of the return.[72] Whether taxpayers in general will be benefited or harmed by these new provisions remains to be seen.

V. Invalidation of Other Statutory Liens

Section 67c(2) of the Bankruptcy Act has heretofore invalidated all state statutory liens, other than tax liens, "on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property," except where enforced by sale prior to the filing of the petition or where the estate was solvent. So far as such liens were concerned, this provision, enacted in 1952, largely superseded that of former section 67c(1), enacted in 1938, which subordinated to the first two priorities in section 64a statutory liens "on personal property not accompanied by possession of such property." However, former section 67c(1) also subordinated liens "of distress for rent," whether statutory or not and whether or not accompanied by possession. Therefore, former section 67c(1) subordinated the following non-tax liens which were untouched by section 67c(2): (1) statutory liens accompanied by levy, sequestration or distraint, but not

[72] H.R. Rep.No. 687, 89th Cong., 1st Sess. 6 (1965) (Letter From Stanley S. Surrey, Assistant Secretary of the Treasury); S. Rep. No. 999, 89th Cong., 2d Sess. (1966), U.S. Code Cong. & Ad. News 2019 (Letter From Henry H. Fowler, Secretary of the Treasury).

by possession; (2) non-statutory landlords' liens; (3) statutory landlords' liens of "distress for rent" which were accompanied by possession.[73]

The new provisions restrict subordination to tax liens, and deal with the invalidation of other statutory liens in the new section 67c(1), which provides:

> The following liens shall be invalid against the trustee:
>
> (A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;
>
> (B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided,* That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law; *And provided further,* That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court;
>
> (C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c.

Statutory lien is defined for the purpose of these provisions in the new section 1(29a), as follows:

> "Statutory lien" shall mean a lien arising solely by force of statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute.

The purpose of this definition of statutory lien, as explained in the Committee reports,[74] is to negative the suggestion in the first opinion

[73] A *statutory* landlord's lien *accompanied* by possession which was *not* a lien of "distress for rent" was apparently untouched by either former § 67c(1) or former § 67c(2). See 4 COLLIER 228.

[74] H.R. REP. No. 686, 89th Cong., 1st Sess. 5 (1965); S. REP. No. 277, 89th Cong., 1st Sess. 21 (1965).

in the *Quaker City* case,[75] subsequently withdrawn, that a chattel mortgage was a "statutory lien" within the meaning of section 67c, subject to its subordination and invalidation provisions. While the Court of Appeals for the Third Circuit upon rehearing withdrew that statement, it stated in its second opinion that it was "not necessary to decide" whether a chattel mortgage was a statutory lien,[76] since the same result followed from its decision that the subordinated lien carried down with it the chattel mortgage to which it was superior. However, the Third Circuit has shown no disposition to revive this egregious error,[77] and the Second Circuit has expressly repudiated it.[78] Thus, Congress in enacting this definition was apparently merely beating a dead snake with a stick.

However, the definition may have two collateral effects which there is no evidence were considered by Congress. The first relates to a statutory lien given to a secured party upon property in addition to that covered by his security agreement, which arises upon the institution of insolvency proceedings. The most important example of such a lien is contained in section 9-306(4)(d) of the Uniform Commercial Code, [hereinafter called UCC] which grants to the secured party "in insolvency proceedings" a lien upon all cash and bank accounts of the debtor equal in amount to the proceeds received by the debtor from the sale of collateral within ten days prior to the institution of such proceedings and not paid over to the secured party.[79] Heretofore, there has been a substantial question whether such lien was not a

[75] *In re* Quaker City Uniform Co., CCH FED. BANKING L. REP. ¶ 58,778 (rd Cir. 1956).

[76] *In re* Quaker City Uniform Co., 238 F.2d 155, 158 (3d Cir. 1956).

[77] When it was pointed out to the Third Circuit upon rehearing in the *Quaker City* case that its interpretation would invalidate all chattel mortgages in bankruptcy since the addition of § 67c(2) in 1952, it escaped from this embarrassment by stating that the chattel mortgage involved had been created prior to 1952. Yet when confronted with a security interest under the Uniform Commercial Code created after 1952 in *In re* Einhorn Bros., Inc., 272 F.2d 434 (3d Cir. 1959), the Third Circuit exhibited a deafening silence on this point.

[78] *In re* New Haven Clock & Watch Co., 253 F.2d 577 (2d Cir. 1958).

[79] Section 9-306(4)(d) provides:

> In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest...
>
> (d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is
>
> (i) subject to any right of set-off; and
>
> (ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period.

"statutory lien" invalidated by section 67c.[80] Under the new definition it can be plausibly argued that this lien of UCC section 9-306(4)(d) is not a statutory lien since, although it is not "provided by" the security agreement but by the statute, it is nevertheless one that is "dependent upon" the agreement to give security. If so, it would no longer be vulnerable under section 67c.

Even if this interpretation is adopted, it probably would not change the result in this particular case since the lien of UCC section 9-306(4)(d) would also appear to be vulnerable under section 70c of the Bankruptcy Act. The lien of UCC section 9-306(4)(d) would normally come into existence at the time the petition in bankruptcy is filed, and as of that time the trustee in bankruptcy has the rights of a creditor obtaining a lien by legal proceedings upon all the property of the bankrupt. The rights of the trustee under section 70c should take priority over any such lien created by state law as of the instant of bankruptcy.[81] However, this would not be true in the case where a bankruptcy is preceeded by an assignment for the benefit of creditors or other state insolvency proceeding, since in that case the lien under UCC section 9-306(4)(d) would arise at the time the assignment is made and would no longer be vulnerable to a lien creditor at the date of bankruptcy.

In the last situation mentioned, however, the lien of UCC section 9-306(4)(d) would probably be a voidable preference. Under section 60 of the Bankruptcy Act any transfer, "voluntary or involuntary," of the debtor's property to or for the benefit of a creditor on account of an antecedent debt, made within four months prior to bankruptcy while the debtor is insolvent and which would enable the creditor to receive a greater percentage of his debt than other creditors of the same class is voidable if the creditor had reasonable cause to believe the debtor was insolvent. A transfer would occur at the time of the making of the assignment, even though involuntarily by force of this statute, and to the extent that the creditor is otherwise unsecured would enable him to receive a greater percentage of his debt than other creditors of the same class. If the secured party is fully secured without the additional lien of UCC section 9-306(4)(d) the argument will not arise. If the debtor was insolvent and the creditor had reasonable cause to believe that he was, both of which circumstances are highly likely to exist at

[80] See Marsh, Book Review, 13 U.C.L.A.L. REV. 898, 907-08 (1966).

[81] N.W. Day Supply Co. v. Valenti, 343 F.2d 756 (1st Cir. 1965). *But cf.* Hertzberg v. Associates Discount Corp., 272 F.2d 6 (6th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).

the very moment the debtor makes an assignment for the benefit of his creditors, then the conclusion seems fairly clear that the lien is voidable as a preference.[82] The transfer would necessarily occur within four months of bankruptcy, since the petition must be filed within that time after the making of an assignment.[83]

Therefore, this new definition of statutory lien, while interesting, is probably not significant in connection with such liens as that of UCC section 9-306(4)(d).

The second aspect of this definition which was apparently not considered is its possible impact upon judicial liens. The definition apparently proceeds upon the assumption that there are only two kinds of liens, "statutory" and consensual (*i.e.* provided by an "agreement to give security"). In fact, the Bankruptcy Act has always accorded quite different treatment to three categories of liens—statutory, consensual and judicial. The latter are not defined (nor were any of the others prior to this amendment), but are referred to in several places in the act as liens "obtained by legal or equitable process or proceedings." Section 67a invalidates such liens if obtained within four months of bankruptcy while the debtor is insolvent.

However, many, if not all, such judicial liens will literally fit the new definition of "statutory lien." The judgment lien, for example, arises "solely by force of statute" (since the judgment lien is purely a creature of statute) "upon specified circumstances or conditions" (namely, the docketing or recordation of the judgment). The attachment lien and the execution lien may be slightly more difficult to fit into this definition, since normally some action of the creditor and of the sheriff are necessary to obtain them, but they are nevertheless created by statute, they arise upon specified circumstances or conditions, and they are not provided by or dependent upon any agreement to give security.

While it is to be hoped that the courts will recognize that this definition was not intended to have any relationship to this third category of liens, the matter is not free from doubt. The only practical result of a decision including such judicial liens within the definition would be in connection with landlords' claims for rent. It would appear that the first two invalidating clauses of the new section 67c(1) would almost never be applicable to such judicial liens. They do not arise

[82] The arguments of Professor Gilmore to the contrary do not seem to me to be persuasive. 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1344 (1965).
[83] Bankruptcy Act § 3b.

upon insolvency or any of the other events mentioned. While they may be invalid as against a bona fide purchaser, it would seem that they can normally be made valid against such a purchaser by some action.[84]

The most important effect of including judicial liens within this definition, however, would be in connection with clause (C) of section 67c(1) invalidating "every statutory lien for rent." This interpretation would result in invalidating every attachment, judgment or execution lien obtained upon a tenant's property based upon a claim for rent, even though obtained more than four months before bankruptcy or while the debtor was solvent. Any such "Henry Georgian animosity" towards landlords, as Judge Frank once said,[85] should not be attributed to Congress. But the contrary argument can be made that this entire clause (C) exhibits exactly such an animosity towards landlords, since it invalidates their liens without any regard to the infirmities required in the case of liens in favor of other persons; therefore, to extend it to an attachment lien obtained by a landlord is merely further carrying out this intent. Nevertheless, I believe the more weighty arguments support the view that judicial liens were not intended to be included within the new definition of "statutory lien" in the absence of a clearer expression of that intent.

Assuming that we can determine what a statutory lien *is* under the new definition, which ones will be invalidated under the new provisions? It should first be pointed out that if a statutory lien is not valid at the time of bankruptcy against an attaching, execution or judgment creditor, it is already invalid against the trustee in bankruptcy under the provisions of section 70c. While section 67b generally validates statutory liens in bankruptcy "notwithstanding the provisions of section 60," it does not say "notwithstanding the provisions of

[84] For example, suppose that an execution lien arises upon delivery of the writ to the sheriff, which is valid as against other creditors but not valid against a bona fide purchaser until actual levy. See. *e.g.*, New York CIV. PRAC. §§ 5202 (a), 5234(b) (1963); 2 FREEMAN, EXECUTIONS § 200 (3d ed. 1900). The levy is delayed for more than four months for reasons which do not defeat or impair the lien of the judgment creditor under local law. A bankruptcy petition is filed four months and one day after the delivery of the writ. Such a lien might be invulnerable under § 67a. Would it be invalid under the new § 67c(1)(B), if it is held to be a "statutory lien"? It would appear not, because, although it is invalid as against a bona fide purchaser at the date of bankruptcy, it can be made so valid by the sheiff making the actual levy (*i.e.*, seizing the property). Section 67c(1)(B) provides that in that case it can be made valid by filing notice with the bankruptcy court. (But see note 94 *infra.*) However, if there were only a limited time left in which to make the levy under local law, and the notice was not filed within that time, then the lien might be invalidated under § 67c(1)(B) if it is held to be a statutory lien.

[85] Oldden v. Tonto Realty Corp., 143 F.2d 916, 922 (2d Cir. 1944) (dissenting opinion).

section 70." And it has been held that a statutory lien may be vulnerable under section 70c despite the provisions of section 67b.[86] Furthermore, the new provisions of section 67c(1)(B) expressly recognize this overriding effect of section 70c. Therefore we are only talking about statutory liens which are valid against an attaching, execution or judgment creditor at the date of bankruptcy. With this in mind, we will examine the three clauses of the new section 67c(1).

A. Liens Arising Upon Insolvency

The first clause purports to invalidate any lien "which first becomes effective" upon (1) insolvency of the debtor; or (2) distribution or liquidation of his property; or (3) execution against his property levied at the instance of one other than the lienor. This clause was apparently aimed primarily at certain wage liens which have been provided by state law in assignment or insolvency proceedings.[87] The statutes typically do not specify in so many words when such liens "first become effective"; but since they are applicable only in the assignment or insolvency proceeding and are clearly not intended to have any effect prior thereto, the most reasonable interpretation is that they "become effective" when the assignment is made or the insolvency proceeding is commenced. Strangely enough, this event is not specified in this clause. Certainly, such liens do not become effective upon "insolvency" *simpliciter*.[88] Nor is it a reasonable interpre-

[86] United States v. Speers, 382 U.S. 266 (1965); Aviation Investments, Inc. v. Cameron, 350 F.2d 959 (5th Cir. 1965); Rochelle v. McLendon, 208 F.2d 442 (5th Cir. 1953); see 4 COLLIER 283-86.

[87] CAL. CIV. PRO. CODE § 1204 (1955) (see *In re* West Beverly Corp., 166 F.2d 429 (9th Cir.), *cert. denied*, 335 U.S. 820 (1948); DEL. CODE ANN., tit. 8, § 300 (1953), tit. 10, § 4935 (1953); MASS. ANN. LAWS ch. 254, § 31 (1965); MONT. REV. CODE §§ 45-601, -607 (semble) (1947); N.M. STAT. ANN. §§ 51-8-20, -21 (1953); OKLA. STAT. ANN., tit. 42, § 40 (Supp. 1966), § 41 (1954); PA. STAT. ANN. tit. 43, § 223 (1964).

[88] Even though some of the statutes cited *supra* note 87 are phrased merely in terms of "insolvency," for example, the Delaware statute, they are interpreted to apply only in insolvency *proceedings*. Lupton v. Hughes, 2 Penne. [Del.] 515, 47 Atl. 624 (1900). Compare the similar interpretation given to the federal priority statute, REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1954). See Blair, *The Priority of the United States in Equity Receiverships*, 39 HARV. L. REV. 1, 3-4 (1925).

There are certain rights given to a buyer or seller under Article 2 of the Uniform Commercial Code which arise upon insolvency. For example, under UCC § 2-502 a buyer may under certain conditions recover goods which have been identified to the contract "if the seller becomes insolvent within ten days after receipt of the first installment on their price"; under UCC § 2-702 a seller may under certain conditions recover goods sold on credit which are received by a buyer "while insolvent"; and under UCC § 2-705 an unpaid seller may stop goods in transit when "he discovers the buyer to be insolvent." These rights, however, would not seem to be "liens" within the meaning of Bankruptcy Act § 67c(1). Although the point may be arguable, since there is no definition of "lien" in the new Section 1 (29a) of the Bankruptcy Act but only of "statutory", it is very doubtful that the draftsmen intended to void these rights under Article 2 of the UCC in bankruptcy. (They may, of course, be otherwise

tation of these lien statutes to say that the lien becomes effective only upon liquidation of the property. Rather, since the assignee or receiver must as a practical matter have at least the implied authority to sell the property free of the lien, the lien is terminated at that point, as to the original property, and attaches only to the proceeds. And the distribution of such proceeds discharges the lien; it certainly does not create it. However, a court should reach the reasonable conclusion that these inept expressions are intended to refer to a lien which is only effective *in* insolvency proceedings and not prior to their institution.

Even if a state statute purported to make such a lien effective upon the institution of bankruptcy proceedings, it seems quite clear that it would be invalid against the trustee under section 70c.[89] Therefore, this provision assumes importance only where there is a state insolvency proceeding later superseded by bankruptcy.

The reference to a lien which first becomes effective "upon execution against . . . [the debtor's] property levied at the instance of one other than the lienor" is also apparently directed at certain statutory wage liens which might be called "piggy-back" liens. These statutes provide that where an execution is levied upon the property of a debtor by a creditor, an unpaid employee by filing a notice in the execution proceedings can obtain a prior right to the payment of a certain portion of the proceeds of the sale of the property levied upon.[90] While these liens probably do not become effective upon the levy of execution by the third party, but only upon the filing of notice by the wage claimant, a liberal interpretation of this clause might include them, particularly since it is difficult to see what else it could be talking about.[91]

vulnerable under §§ 70c and 60. See *In re* Kravitz, 278 F.2d 820 (3d Cir. 1960); Note, 79 HARV. L. REV. 598 (1966)).

[89] Note 81 *supra.*

[90] COLO. REV. STAT. §§ 80-16-1 to -3 (1963); CAL. CIV. PRO. CODE § 1206 (1955); IDAHO CODE ANN. § 45-603 (1947); IND. ANN. STAT. § 40-111 (1965); IOWA CODE ANN. §§ 626.69 - .73 (1950); MINN. STAT. ANN. §§ 514.59-.60 (1947); MO. ANN. STAT. § 513.055 (1952); MONT. REV. CODE §§ 45-604 to -608 (1947); NEV. REV. STAT. § 100.020 (1957); ORE. REV. STAT. §§ 652.510-.560 (1953); PA. STAT. ANN. tit. 43. §§ 221, 222 (1964); UTAH CODE ANN. §§ 34-8-1 to -3 (1953); WASH. REV. CODE § 49.56.030 (1962). Most of these statutes are not phrased in terms of a "lien", although a few of them are, but rather in terms of a prior right to payment out of the property levied upon by the other creditor. However, if it is said that they establish only a "priority," it is a "priority over a lien" and therefore seemingly partakes of the character of a lien (or at least is *sui generis*). Compare, however, the interpretation of the statute of 8 Anne referred to in note 91 *infra.*

[91] The statute of 8 Anne c. 14, § 1 (1709), which is in force in some states (see, *e.g.*, N.J. STAT. ANN., § 2A :42-1 (1952)), gives a landlord a prior right to be paid his accrued rent, not to exceed one year's rent, before another creditor may remove goods of the tenant upon the demised premises seized upon execution. However, "That statute has been generally interpreted to give merely a priority to the landlord, as distinguished from a lien...." 4 COLLIER 230-31. Even if this right were inter-

Presumably, if the execution lien, to which the "piggy-back" lien fastens, is itself vulnerable under section 67a (because obtained within four months of bankruptcy while the debtor is insolvent), the "piggy-back" lien would fall also, either on the theory that it is dependent upon the validity of the execution lien or that it is itself a "lien obtained by legal or equitable process or proceedings." If this is true, then only where the execution lien is invulnerable will this new provision of section 67c(1)(A) have any significance. Were it not for the preservation provisions of section 67c(2),[92] the only result of invalidating the "piggy-back" lien would be to benefit the holder of the execution lien; however, under those provisions the trustee can preserve the wage lien for the benefit of the bankrupt's estate. He may thereby be able to pick up some small amounts for the estate in a few cases, where he would have gotten nothing if the wage lien had never been asserted in the execution proceeding.

B. Liens Invalid Against a Bona Fide Purchaser

Clause (B) of section 67c(1) purports to invalidate every statutory lien which is not valid as against a bona fide purchaser at the date of bankruptcy; but it then provides that any such lien which can be perfected against such a purchaser under applicable lien law may be perfected *after bankruptcy* and then becomes valid as against the trustee. Therefore, this clause contemplates a statutory lien which: (a) is valid as against an attaching, execution or judgment creditor at the date of bankruptcy (since otherwise section 70c invalidates it and section 67c is irrelevant); (b) is not valid as against a bona fide purchaser at the date of bankruptcy; (c) cannot be made valid as against

preted to be a lien, it would be covered by the new 67c(1)(C) invalidating all landlords' liens, and it would be unnecessary to invoke § 67c(1)(A).

[92] "The court may, on due notice, order any of the aforesaid liens invalidated against the trustee to be preserved for the benefit of the estate and in that event the lien shall pass to the trustee. A lien not preserved for the benefit of the estate but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy, so as to have the effect of promoting liens indefeasible in bankruptcy which would otherwise be subordinate to such invalidated lien. Claims for wages, taxes, and rent secured by liens hereby invalidated or preserved shall be respectively allowable with priority and restricted as are debts therefor entitled to priority under clauses (2), (4), and (5) of subdivision a of section 64 of this Act, even though not otherwise granted priority."

What circumstance the second sentence of this clause contemplates is mysterious, since it would always be to the advantage of the estate to preserve the invalidated lien if it were prior to some other lien indefeasible in bankruptcy; and it would seem that the trustee could be surcharged if he failed to take action to do this.

See text at note 54 *supra*, for comment on the third sentence of this provision as it relates to wage and tax claims. (The third sentence does serve some function insofar as it relates to *rent* claims, since they are not given priority by § 64a itself but by state law incorporated into § 64a(5). See text following note 96 *infra*.)

a bona fide purchaser by any action of the lienor; and (d) is still enforceable under state law.

It might also apply in some cases where the lien could be made valid against a bona fide purchaser after bankruptcy, but under state law the lienor has only a limited time in which to do this and he fails to take action within that time; however, this situation would normally only arise through negligence of the lienor in failing to take action to protect his rights.

What actual statutory liens are described by section 67c(1)(B)? There are, of course, many liens which are valid as against an attaching creditor but not a bona fide purchaser. An unrecorded real property mortgage, while not a statutory lien, is in this category in many states.[93] However, a lien which cannot by any means be perfected as against a bona fide purchaser, not even by seizure of the property subject to the lien, is virtually inconceivable.[94]

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[93] OSBORNE, MORTGAGES §§ 196, 210 (1951).

[94] Under N.Y. CIV. PRAC. § 5202(a) (1963) the lien of a writ of execution, even after levy, is not good as against a bona fide purchaser in the case of debts and personal property "not capable of delivery." Apparently such a lien in the case of debts could never be perfected as against a bona fide purchaser, except by collection of the debt, which would extinguish the debt and the lien on it. The same situation apparently exists in Virginia, where the lien of a fi. fa. attaches not only to the property levied upon, but also to all other personal estate of the judgment debtor "not capable of being levied on," but such lien is not valid as against an "assignee... for valuable consideration... unless he has notice thereof." VA. CODE ANN. § 8-431 (1950). A "suggestion" of garnishment may be made, which eventually may result in a judgment against the obligor on the debt; but apparently the service upon the garnishee creates no additional lien upon the debt. Nor is there any indication that such service upon the garnishee would perfect the lien of the fi. fa. as against a bona fide assignee. VA. CODE ANN. § 8-441 (1950). However, these are "judicial," not "statutory," liens. See text following note 83 *supra*.

In Florida there is a repairer's lien (FLA. STAT. § 85.25 (1963)) and in Oregon a landlord's lien (ORE. REV. STAT. § 87.535 (1953)) which are not valid against either a bona fide purchaser or a lien creditor, but these liens are invalidated anyway by § 70c (Aviation Investments, Inc. v. Cameron, 350 F.2d 959 (5th Cir. 1965)), and the Oregon landlord's lien in addition by § 67c(1)(C). Furthermore, they can be perfected against a bona fide purchaser by the lienor taking possession.

In Georgia there is a laborer's lien and in New Jersey a garage keeper's lien which are not valid against a bona fide purchaser so long as non-possessory, GA. CODE ANN. § 67-1803 (1933); N.J. STAT. ANN., §§ 2A:44-21 (Supp. 1966), 2A:44-22 (1952); Lanterman v. Luby, 96 N.J.L. 255, 114 Atl. 325 (1921), but in both cases they can be perfected by the lienor taking possession.

In Illinois there is a thresherman's lien upon the crops threshed which is not valid as against a purchaser unless the lienor serves a written notice of the existence of the lien upon such purchaser "previous to or at the time of making final settlement for such crops." ILL. STAT. ANN., ch. 82, § 59a (1966). Query as to whether the service of such a notice upon the trustee after bankruptcy would perfect the lien under § 67c(1)(B)?

In Pennsylvania a mechanic's lien on an improvement on real property continues on the improvement if it is unlawfully removed, but is not valid against a "purchaser for value." PA. STAT. ANN., tit. 49, § 1307 (1965). In Colorado the lien on the "get" of "bulls, rams and boars" is not valid against a bona fide purchaser, COLO. REV. STAT. ANN. §§ 8-9-8 to -9 (1963) (although the lien on the get of stallions and jacks is, COLO. REV. STAT. ANN. § 8-9-7 (1963)). In neither case is there any express statutory

How did this strange provision get into the amendment? It clearly resulted from transposing a proviso formerly in a *validating* provision to a new *invalidating* provision, with the result that the proviso validates substantially the same liens that the basic provision purports to invalidate. Former section 67b generally validated statutory liens in bankruptcy, and it contained a sentence in the nature of a proviso stating:

> Where by such laws [creating the statutory lien] such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of the property, they shall instead be perfected by filing notice thereof with the court.

Former section 67c(1), which was also added in the Chandler Act, cut across this provision by subordinating certain statutory liens on personal property not accompanied by possession; section 67c(2), added in 1952, further modified it by invalidating certain statutory liens on personal property not accompanied by possession, levy, sequestration or distraint. These former provisions of section 67c, while they modified the basic validating provision, were nevertheless perfectly consistent with it since the invalidating cause had nothing to do with perfection or lack thereof.

In the new statute, the proviso was removed from the validating provision, section 67b, and was instead inserted (with some minor modifications of language) into section 67c(1)(B) adopting an entirely new invalidating principle, *i.e.*, lack of perfection as against a bona fide purchaser.[95] The result is that the proviso appears to negative the basic provision; the new section 67c(1)(B) means, for all practical purposes, nothing.

C. Landlords' Liens

If the first clause of section 67c(1) is of minor importance and the second clause is self-stultifying, the third clause strikes with a vengeance at one particular category of liens—landlords' liens. These

method of perfection available. Is it possible that the Congress of the United States drew itself up in all its majesty and legislated only against liens on ambulatory houses in Pennsylvania and the get of bulls, rams and boars in Colorado?

(This note is based upon a survey of the law of the same sixteen states referred to in note 58 *supra*.)

[95] H.R. REP. No. 686, 89th Cong., 1st Sess. 12 (1965). "In the interest of clarity the substance of the last sentence of subdivision b has been deleted and instead inserted as a proviso in Section 67c(1)(B)." In the interest of clarity!?

liens were already treated with peculiar discrimination in the former provisions of section 67c. They were not, it is true, invalidated under clause (2) of that section unless they were statutory liens and unless they were not accompanied by possession, levy, sequestration or distraint; or, in other words, they were treated in that clause like all other statutory liens. However, under clause (1) of that section all liens of "distress for rent" were subordinated to the first two priorities of section 64a, whether statutory or not, and whether or not accompanied by possession, and furthermore were restricted in amount to the rent allowed priority under section 64a(5).

Under the new provisions of section 67c(1)(C) every "statutory lien for rent" and every "lien of distress for rent, whether statutory or not" are invalidated. This differs from the previous provisions primarily in that: (a) a statutory lien for rent is invalidated even though accompanied by possession, levy, sequestration or distraint; and (b) a common-law "lien of distress for rent," whether or not accompanied by possession, is invalidated, rather than merely subordinated to the first two priorities in section 64a and restricted in amount.[96]

However, new section 67c(2) provides that where a lien for rent is invalidated under section 67c(1) (or preserved for the benefit of the estate), the claim secured by the invalidated lien shall be "allowable with priority and restricted as are debts therefor entitled to priority under . . . [clause] (5) of subdivision a of section 64 of this Act, even though not otherwise granted priority." Section 64a(5) recognizes a state priority in favor of a landlord (on the fifth rung of the five-rung ladder of priority), but restricted to rent due for the actual use and occupancy of the premises accrued during the three months preceding bankruptcy. Therefore, if state law should purport to grant a lien to a landlord under certain circumstances, but not any "priority," the lien, although invalidated by section 67c(1)(C), will be treated as though it granted a priority and will be recognized as such to the extent permitted by section 64a(5).

The second sentence of the new section 67c(1)(C) provides that a "right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c." What did the authors of this curious sentence have in mind? The use of the phrase "security interest" suggests that perhaps it was intended to

[96] See note 73 *supra*, for one situation where a landlord's lien apparently escaped through the interstices of former §§ 67c(1) & 67c(2).

invalidate in bankruptcy any chattel mortgage or other security given by a tenant to his landlord to secure the payment of rent. Aside from the startling nature of such a proposition, this thought could certainly have been expressed more clearly if that was what was intended. A security interest under the Uniform Commercial Code may give to the secured party a right of self-help similar to a "right of distress" in that the secured party may peaceably take possession of the collateral to enforce his security interest.[97] But this right does not create the security interest; the security interest creates the right. The security interest is created by an agreement of the parties.[98]

On the other hand, if we reject this interpretation, what *does* the sentence mean? If it is suggested that it refers to something like the common-law "right of distress" for rent, then the reply can be made that such a right does not create any "security interest," certainly not in the sense used in the Uniform Commercial Code since that deals only with liens created by an agreement of the parties. Furthermore, any such common-law right of distress for rent is invalidated already by the first sentence of section 67c(1)(C); the second sentence would seem to be superfluous under this interpretation. However, there may have been some thought that the phrase in the first sentence, "lien of distress," would imply that the landlord must actually have made a distraint in order for the lien to be invalidated under that provision; whereas, the lien might arise prior to such action by virtue of the right of distress.[99] In other words, the intent was to invalidate any "lien of distress for rent, whether arising before or upon exercise of the right of distress, and whether common law or statutory." Why this wasn't said if it was meant is a small mystery. And why the misleading phrase "security interest" was introduced into the second sentence is a greater one. Perhaps the draftsmen were afraid that, if the second sentence said that a right of distress which creates a lien or is a lien shall be "deemed" a lien, it would sound like Gertrude Stein.

[97] UCC § 9-503.

[98] Aside from the fact that if Congress meant to invalidate any security interest securing the payment of rent it could easily have said so, such a singling out of landlords as the only creditors of a bankrupt who are prohibited from taking security for their claims would be outrageous. It is true that claims for *future* rent present a peculiar problem and have been restricted by § 64a(9) to an amount not exceeding the rent reserved for one year, without acceleration. The second circuit has suggested that this provision would invalidate any security obtained by the landlord in excess of the allowable amount. Oldden v. Tonto Realty Corp., 143 F.2d 916 (2d Cir. 1944) (This is the decision which provoked Jerome Frank's remark about "Henry Georgian animosity" towards landlords, quoted at note 85 *supra.*) But the provision we are considering is not limited to future rent; it applies to all rent, including that accrued and unpaid at the date of bankruptcy.

[99] 4 COLLIER 230.

There is another interpretation of this sentence which (although the most ridiculous) seems upon reflection the most probable explanation of the intent of the draftsmen. Collier argued that a right of distress given to a landlord *by contract* in the lease, even though properly perfected as a contractual lien under local law, would be subordinated by the old section 67c(1).[100] The cases cited by Collier did not support this argument;[101] it rested merely upon a mechanistic interpretation of the phrase "statutory *or otherwise*." It may be that the sentence under consideration is now intended to prescribe this result. This would mean that the landlord who got two pieces of paper, one labelled "lease" and the other "chattel mortgage," and who properly filed a financing statement under the UCC, would have a valid lien on the personal property of his tenant; whereas, if another landlord got one piece of paper containing both the lease and a security agreement, even though he also properly filed, his lien would be invalidated by section 67c(1)(C), at least if he used that distressful word "distress." Under this interpretation, if the lease contained a separate paragraph labelled "mortgage of chattels" and the word "distress" was avoided, the court would be presented with a nice problem.

At any rate, this sentence should stand as one more warning, probably useless in view of the volumes of such warnings in the past which have gone unheeded, that a statutory draftsman should never—repeat, never—use the technique of saying that one thing shall be "deemed" something else.

In the light of this discussion, what are the major differences between the provisions of the new section 67c(1) and the provisions of the old section 67c so far as non-tax statutory liens and landlords' common-law liens are concerned? They appear to be the following:

(a) The new provisions cover liens on real as well as personal property.

(b) The new provisions cover liens created by federal as well as state law.[102]

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[100] *Id.* at 293.

[101] In the footnote to this statement in COLLIER all of the decided cases are either distinguished, or it is explained that they would "go the other way" under the Chandler Act. No affirmative authority whatever is cited for the statement.

In re King Furniture City, Inc., 240 F. Supp. 453, 457 (E.D. Ark. 1965), while invalidating such a lien for lack of proper filing under the Uniform Commercial Code, denied that it was subject to former § 67c. Strangely enough, however, it was the landlord, not the trustee, who was invoking § 67c, asserting that it gave him "priority." Where he got this notion, it is impossible to imagine.

[102] The subordination provisions of former § 67c(1) covered federal statutory liens,

(c) The subordination of such liens has been eliminated; they are now invalidated or wholly valid.

(d) The new provisions clearly are intended to invalidate all landlords' liens, whether statutory or common law and whether or not accompanied by possession, levy, sequestration or distraint; whereas, previously some such liens were merely subordinated to the first two priorities. However, such subordinated landlords' liens were formerly restricted to the amount of rent granted priority under section 64a(5) (*i.e.*, an amount equal to three months' rent); and under the new provisions an invalidated lien is to be treated as though it were a priority. Therefore, the only effect of this change is to demote such claims from position two and one-half to position five on the ladder of priorities.[103]

(e) The basis for invalidating statutory liens, other than landlords' liens, is no longer lack of possession, but rather the two tests of section 67c(1)(A) and (B) which have been discussed at length above.

The most important of these changes is the last one which shifts the basis of invalidation from the relatively simple test of possession of personal property (or levy, sequestration or distraint) to the more difficult and much less widely applicable tests of whether the lien "first becomes effective" upon insolvency, etc., or whether it is invalid as against a bona fide purchaser and cannot be made valid against one. It is safe to predict that the new provisions will invalidate many fewer statutory liens than the previous provisions; but where they do invalidate a general statutory lien, they will strike it down with respect to real property as well as personal property.

VI. Conclusions

When one has worked his way through this labyrinth of language, which is truly one of the labors of Hercules, what is the general picture, if any, which emerges as to the effect of the 1966 amendments to the Bankruptcy Act? The reader may have observed that little has been said as to the policy considerations bearing upon the various problems discussed. Indeed, it seems almost ill-mannered to mention such things in the presence of these delightfully complicated provisions, which curl upon themselves like a crocodile swallowing its own tail. Nevertheless, it is useful to isolate a few relatively simple questions with which these amendments purportedly deal.

but not the invalidation provisions of former § 67c(2). There would seem to be few federal statutory liens of economic importance, other than tax liens. Federal tax liens will not be invalidated by the new § 67c(1), whether they are covered by it or not. See text at notes 51-53 *supra*.

[103] One exception to this statement is pointed out in note 73 *supra*.

Should tax liens (other than liens for *ad valorem* taxes) be recognized in bankruptcy? It may be assumed that tax liens are necessary outside of bankruptcy for the efficient collection of the revenue and for the purpose of protecting the Government against subsequent purchasers and secured parties (after appropriate notice of the tax lien is given). Also, the Government's position vis-à-vis other unsecured creditors must be established in the race of diligence which characterizes ordinary collection remedies, and a convenient point at which to do this is when the tax lien attaches. Whether the unsecured creditors should also be entitled to notice is a separate question. On the other hand, in insolvency proceedings none of this is relevant. Priorities are established by the statute; the Government no longer needs any collection procedure or any protection against subsequent parties. To say that an income tax claim should be entitled to the super priority of a secured debt simply because it has been assessed the day before bankruptcy, but that the same tax claim should be demoted to a fourth priority if it is assessed the day after bankruptcy, is irrational. This factor has nothing to do either with the equities of the situation or with the needs of the fisc.

Should the filing or non-filing of a notice determine the recognition of tax liens in bankruptcy? A federal tax lien as to which notice has been filed is recognized in bankruptcy, but with respect to personal property is subordinated by section 67c to the first two priorities if not accompanied by possession. Under the *Speers* case and the amendment to section 70c, however, a federal tax lien with respect to which no notice has been filed is not recognized in bankruptcy, whether or not accompanied by possession, and is granted only a fourth priority with respect to both real and personal property (except in a few instances under amended section 64a where it is granted no priority). Putting aside for the moment the question whether some tax claims should be denied any priority, why should the filing of the notice have this effect?

The effect of this decision and amendment is that such an unperfected tax lien is subordinated to administrative expenses and wage claims and required to share equally with other tax claims not secured by a lien; whereas, if the notice had been filed it would have been superior to such other tax claims and, in the case of personal property accompanied by possession or real property, superior to the administrative expenses and wage claims. Which of these people are going

to check the files for federal tax liens? The claimants of administrative expenses only come into existence after the filing of the petition, so that it is literally impossible for the filing or non-filing of the notice prior thereto to have any meaning so far as they are concerned. Wage claimants could, but it is safe to say never do, check the files for notices of federal tax liens before contributing their services to the enterprise. While state tax collectors might for some reason check the notices of federal tax liens, they are certainly not going to abstain from assessing their own taxes simply because the taxpayer also owes money to the federal government. Therefore, the priority of these claimants is made to turn upon a factor which is wholly irrelevant to them. And to the extent that the rule puts pressure upon the Internal Revenue Service to file many more notices of tax liens it may have undesirable collateral consequences.

Should tax claims be granted priority in bankruptcy? Does the traditional rule which has granted priority to all tax claims, at least over all general, non-priority creditors, rest upon anything more than a naked assertion of power based upon the fact that this particular creditor happens to be writing the rules of distribution? It is possible that in a simpler day the priority given to tax claims in insolvency proceedings was of some real consequence in gathering together enough funds to keep the government running. There can be no doubt today that whatever amount the government is able to collect as a result of such a priority over what it would receive without it is insignificant;[104] its sacrifice would go completely unnoticed in the vast federal bureaucracy. It is difficult to see how the government, absent a plea of necessity, has any equities superior to the other creditors of an insolvent.

It may be argued, since general, non-priority creditors already receive so little in a bankruptcy liquidation, and would receive such a

[104] In the fiscal year ended June 30, 1966, the total amount paid on priority tax claims (*both* state and federal) in all bankruptcy proceedings was $11,224,590 and the total amount paid to all secured creditors who filed proofs of claims was $32,427,785. *Tables of Bankruptcy Statistics for the Fiscal Year ended June 30, 1966,* Table F 5 (Adm. Off. U.S. Courts 1967). Of course, most secured creditors realize on their collateral outside of the bankruptcy administration; but a tax lien which is a general, floating lien on all of the property of the bankrupt usually is liquidated in the bankruptcy proceedings and ad valorem taxes are also usually paid in such proceedings unless the trustee abandons the property. Therefore, this $32,427,785 probably includes the amount realized on almost all tax liens, as well as a substantial amount paid on other secured debts. Hence, all tax claims, liened and unliened, probably received substantially less than $43,000,000 in that year in bankruptcy liquidations, despite their liens and priorities. In the days of $100 billion budgets, this is an insignificant amount.

small amount more if the priority of tax claims were denied, that the question is of no real economic importance to them either. Therefore, the priority should be maintained so that a substantial amount of money, even though admittedly small in relation to the over-all budget, will go to the government where it may be used for the benefit of all citizens, rather than be scattered about in insignificant amounts among a large number of unsecured creditors. However, it is important not only that the Government be fair in its dealings with its citizens, but that it appear to be fair, in this area as well as others. If there is no equitable basis for the Government's claiming such a priority, its assertion is viewed merely as an exercise of arbitrary power; to say that any one of the victims is really hurt very little is irrelevant. Even the ineffectual legislation represented by these amendments could never have been enacted in the absence of a widespread and deep-seated resentment in the business community at the government's claiming the lion's share of every bankrupt estate.[105]

If some tax claims are to be granted priority, but not others, upon what basis should the selection be made? The answer that the tax claims to be denied priority should be selected on the basis of age is at first sight appealing, and it was adopted in the amended section 64a (before its stultification by the various provisos). However, a little closer analysis would have revealed that this answer is not very satisfactory. There are two major reasons why a tax claim may go uncollected for a long period of time. One is simply the delay, negligence or procrastination of the tax collector. The other is a consideration for the taxpayer and the withholding of drastic measures because of a recognition that his default is not willful and that he is in good faith attempting to remedy it. Any rule denying priority to tax claims purely upon the basis of age tends to put pressure on the Internal Revenue Service to "crack down" on delinquent taxpayers, regardless of their degree of fault. Surely, any humanity which may have insinuated itself into the heartless process of tax collection is not something to be discouraged. Nor should the mere fact of delay necessarily be viewed as indicating any lack of diligence on the part of the Internal Revenue Service, or as indicating any lack of "virtue" in the claim itself as compared with one more recent. Under present

[105] See H.R. REP. No. 687, 89th Cong., 1st Sess. 4 (1965) ("The committee has received hundreds of letters from business firms all over the country complaining about this situation."); *Hearing* 43-44, 46, 48, 56.

conditions, with the millions of returns that must be handled, it is frequently impossible for the Internal Revenue Service (absent a vast increase in personnel) to audit a return and determine a deficiency, giving the taxpayer every opportunity to present his case, in less than four or five years.

It is difficult, if not impossible, to formulate a rule which segregates those tax claims that are not "deserving" of priority on the basis of age, unless a determination is made in each case whether the government was somehow at fault in not proceeding sooner (which is not a feasible administrative task). If it is necessary in this connection to make a Solomonic decision because of political considerations, it would be preferable to limit the priority of tax claims to a certain percentage of the assets available for distribution at that level of priority, and to require them to share with general creditors as to the balance. While this is not exactly a rational solution, it is certainly more so than what is now embodied in section 64a(4), and it has the advantage of not purporting to be anything other than a political compromise.

Should any tax claims be discharged in bankruptcy, and, if so, which ones? The proponents of the amendments argued that a business conducted through a corporation can go under without any surviving liability of its shareholders for unpaid taxes; and that individuals and partnerships who do not or cannot incorporate their businesses should not be denied the same right as the owner of a corporation to a fresh start.[100] This argument applies only to the individual or partnership in a business or profession, not to the wage earner; however, because of the withholding provisions it is doubtful if unpaid taxes are of any real significance in connection with personal bankruptcies. They would be involved in only a few cases as a result of under-withholding. This argument, based only upon the alleged inconsistency of treatment, does not really address itself to the basic question whether taxes should or should not be discharged.

A more forceful argument is that the government should be at least as generous towards those who have experienced a financial failure as it requires others to be. Acceptance of this argument would not mean that certain tax claims could not be excepted from the effect of the discharge where the taxpayer is guilty of some fault under the revenue laws putting him in a special category; *e.g.*, where he files no return, or where he files a fraudulent return, or where he omits from the

[100] H.R. REP. No. 687, 89th Cong., 1st Sess. 2 (1965); S. REP. No. 114, 89th Cong., 1st Sess. 12 (1965).

return more than twenty-five per cent of his gross income. Such treatment of tax claims would be consistent with the treatment of the claims of other creditors, since other claims based upon fraud or misrepresentation or upon willful injury to person or property are excluded from the effect of a discharge.[107]

On the other hand, granting a discharge to any tax claims may tend to influence the Internal Revenue Service to be less lenient with taxpayers in permitting installment payments of taxes or deficiencies. If the taxpayer can at any time discharge the unpaid installments by going into bankruptcy, and if there exist substantial assets, the government may prefer to take what it can get now rather than gamble upon those assets being dissipated and later ending up with nothing.[108] However, is this not precisely the judgment that the Internal Revenue Service must and should make in any case where it agrees to such an arrangement, even under the previous law? The Service might be slightly more willing to go along if a subsequent bankruptcy would not wipe out the tax claim; but a subsequent bankruptcy is going to make the claim very difficult to collect in any event. The fact that the Service previously has made such arrangements with corporations as well as individuals shows that a possible future discharge is not the sole determining factor.

Should statutory liens be invalidated in bankruptcy? The Bankruptcy Act has for some time exhibited a highly ambivalent attitude towards statutory liens. This attitude arises out of the inherent contradiction in the Chandler Act's treatment of state laws favoring certain groups of creditors over others. That act eliminated recognition in bankruptcy of state-created priorities in section 64a, except for a limited recognition of a state priority in favor of a landlord in clause (5).[109] At the same time, that act in section 67b generally validated all state "statutory liens" in favor of "classes of persons."[110] Since the only function of such a lien in bankruptcy is to give priority to the person in whose favor it is created, it is impossible to reconcile the

[107] Bankruptcy Act, § 17a(2).

[108] "If the payment period extends beyond the three-year limitation proposed in H.R. 4473 [a precedessor bill to H.R. 3438] it would require the Service to take a risk as to whether the Government would ever receive payment. Therefore, if a taxpayer is in possession of a home or other valuable asset, the Service would in all probability be required, in order to protect the revenue, to make immediate seizure of the home or other assets rather than enter into any extended payment plan." Letter From Stanley S. Surrey, Assistant Secretary of the Treasury, H.R. REP. No. 687, 89 Cong., 1st Sess. 6 (1965).

[109] 3 COLLIER 2053-54.

[110] 4 COLLIER 178-88.

policy of section 64a with that of section 67b. All that a state had to do to grant special treatment to favored creditors in bankruptcy was to create a "lien" rather than a "priority." The differences between a general floating lien on all the property of a debtor and a priority are practically undetectable, at least as far as bankruptcy administration is concerned.

This basic inconsistency was recognized from the outset, since the Chandler Act, after generally validating state statutory liens in section 67b, then in section 67c subordinated such liens to the first two priorities in section 64a, but only with respect to personal property and only if the liens were not accompanied by possession. This was followed by the addition of section 67c(2) in 1952 and by the entire re-writing of section 67c in 1966, still without solving this inherent contradiction. It would be perfectly easy to write a state statute granting a general "lien" to wage earners, for example, which would neatly sidestep all of the little traps laid in the new section 67c(1) and which would be payable first as a secured debt, since it is no longer subordinated by section 67c(3) in any event.

Since someone will probably challenge me to make good this boast, I will do so:

> All unpaid wages shall constitute a lien upon all of the property of the employer, real and personal, then owned or thereafter acquired, arising at the date such wages are due. Such lien shall be valid against subsequent attaching, execution and judgment creditors; but it shall terminate upon any sale on execution or other judicial process, unless the lienor has previously recorded a notice of the lien and in the case of personal property has made a third party claim in the execution proceedings. Such lien shall be invalid as against any subsequent purchaser, encumbrancer or secured party, unless prior to such purchase, encumbrance or secured transaction the lienor has recorded a notice of the lien. The notice of lien referred to in this paragraph must state the name of the claimant, the amount of his claim, the name of the employer, and must describe the property upon which the lien is claimed with particularity, in the case of real property by metes and bounds or other legal description and in the case of personal property specifically item by item with the serial numbers or other identifying marks to the extent that the property is reasonably capable of such description.

The exact place of filing or recording the notice and other details would of course have to be worked out in each state. However, it is safe to predict that almost no employee would ever record such a notice prior to insolvency proceedings; but in insolvency proceedings it could easily

be filed on behalf of all wage claimants. And it would not be subject to any of the infirmities presently denounced in section 67c(1).

The only way to solve this problem of statutory liens is by frankly recognizing that this contradiction exists and insisting that the Bankruptcy Act control priorities, except where Congress is willing to surrender this right to the states; or, in other words, by providing that all state statutory liens are invalid in bankruptcy, with specific exceptions.

Such exceptions should relate to statutory liens which are universal or virtually so among the states and for which Congress would have to provide some substitute if they were invalidated. I am thinking in particular of mechanics' liens given to contractors, subcontractors, workmen and materialmen in connection with a work of improvement on real property. Whatever one may think of such liens, there can be no doubt that the construction industry has developed in such reliance upon them that it would be unthinkable to propose that they be abolished in bankruptcy. And I do not believe that Congress is prepared to enact a national mechanics' lien law in the Bankruptcy Act; I would certainly not advise it to try.[111] Probably artisans' liens and warehousemen's and carriers' liens fall in the same category. These might be described in general terms as liens upon specific personal property based upon services rendered upon or with respect to such property. Whether possession by the lienor should be required at the date of bankruptcy is a question which would have to be considered, since some such liens may continue despite the surrender of possession;[112] and also whether any general lien in favor of such persons (*e.g.*, in favor of a warehouseman for storage charges on other property)[113] should be preserved or not. Whichever ones are selected as deserving of preservation, they could be specifically excepted from the general invalidation provision.

The faithful reader may inquire what these "conclusions" (or any similar basic policy considerations) have to do with the 1966 amendments to the Bankruptcy Act. He will have taken my point. These amendments represent a very undesirable form of tinkering with the

[111] This is not simply a generalized observation, but a *cri du coeur* arising from the author's recent experience in trying unsuccessfully for almost two years to rewrite the California mechanics' lien law in such a way as to satisfy all of the divergent interests represented on a Citizens' Committee to Study the Mechanics' Lien Law appointed by the California Legislature.

[112] BROWN, PERSONAL PROPERTY § 121 (2d ed. 1955); 1 JONES, LIENS §§ 22, 749 (3d ed. 1914).

[113] See UCC § 7-209(1).

language of the Bankruptcy Act, with nobody being willing to ask the gut questions, or at least able to answer them. The amendments have corrected an undesirable situation existing in one circuit, which probably would have resolved itself in time anyway; they have confirmed a Supreme Court decision which was probably ill-advised; they have perhaps granted a discharge with respect to some tax claims; and otherwise they have further complicated an already intolerably complicated statute. The final conclusion must be that whatever good they may do is not worth the mess they have made.[114]

[114] Back to the old drawing board!