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Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection

J. Harry Cross

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TABLE OF LEADING ARTICLES—TITLES

CURRENT TRENDS IN THE LAW OF CONDEMNATION. *Sidney Z. Searles and Sidney O. Raphael* 529
DETERMINATION OF APPROPRIATE BARGAINING UNIT BY THE NLRB: PRINCIPLES, RULES, AND POLICIES. *Walter L. Daykin* 218
FEDERAL SUPREMACY IN LABOR MANAGEMENT RELATIONS. *Robert C. Knee.* 373
FEDERAL TAX CLAIMS: NATURE AND EFFECT OF THE GOVERNMENT'S WEAPONS FOR COLLECTION. *J. Harry Cross.* 1
INTERNATIONAL LAW AND THE LAW OF HOSTILE MILITARY EXPEDITIONS. *Manuel R. Garcia-Mora* 309
MONETARY REMEDIES UNDER THE UNITED STATES COPYRIGHT CODE. *Robert Price* 555
MUNICIPAL CONFLICTS OF INTEREST: RIGHTS AND REMEDIES UNDER AN INVALID CONTRACT. *Richard B. Lillich* 31
NECESSARY ADMINISTRATIVE REFORMS IN THE IMMIGRATION AND NATIONALITY ACT OF 1952. *Harry N. Rosenfield* 145
NON-DOMICILIARY DECEDENTS' ESTATES: A PROBLEM FOR TITLE EXAMINERS IN NEW YORK. *Douglass G. Boshkoff* 513
POLICY AND THE FOURTEENTH AMENDMENT: A NEW SEMANTICS. *Oliver Morse* 187
STATE RESPONSIBILITY UNDER THE FOURTEENTH AMENDMENT: AN ADHERENCE TO TRADITION. *Leonard F. Manning* 201
SUA SPONTE CONSIDERATION IN APPELLATE REVIEW. *Allan D. Vestal* 477
THE INVESTIGATIVE PROCEDURE FOR CRIMINAL TAX EVASION. *Joseph H. Murphy* 48
THE PROFESSIONAL CORPORATION. *H. Bradley Jones* 353
THE SURETYSHIP STATUTE OF FRAUDS. *John D. Calamari* 332

TABLE OF LEADING ARTICLES—AUTHORS

BOSHKOFF, DOUGLASS G., *Non-Domiciliary Decedents' Estates: A Problem for Title Examiners in New York* 513
CALAMARI, JOHN D., *The Suretyship Statute of Frauds* 332
CROSS, J. HARRY, *Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection* 1
DAYKIN, WALTER L., *Determination of Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies* 218
GARCIA-MORA, MANUEL R., *International Law and the Law of Hostile Military Expeditions* 309
JONES, H. BRADLEY, *The Professional Corporation* 353
KNEE, ROBERT, C., *Federal Supremacy in Labor Management Relations* 373
LILLICH, RICHARD B., *Municipal Conflicts of Interest: Rights and Remedies Under an Invalid Contract* 31
MANNING, LEONARD F., *State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition* 201
MORSE, OLIVER, *Policy and the Fourteenth Amendment: A New Semantics* 187
MURPHY, JOSEPH H., *The Investigative Procedure for Criminal Tax Evasion* 48
PRICE, ROBERT, *Monetary Remedies Under the United States Copyright Code* 555
ROSENFIELD, HARRY N., *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952* 145
SEARLES, SIDNEY Z.; RAPHAEL, SIDNEY O., *Current Trends in the Law of Condemnation* 529
VESTAL, ALLAN D., *Sua Sponte Consideration in Appellate Review* 477

TABLE OF BOOK REVIEWS—AUTHORS

ADLER: THE IDEA OF FREEDOM. *Vincent C. Hopkins, S.J.* 661
DOUGLAS: THE RIGHT OF THE PEOPLE. *Leonard F. Manning* 141
FRANK: MARBLE PALACE. THE SUPREME COURT IN AMERICAN LIFE. *Leonard F. Manning* 658
GREEN: TRAFFIC VICTIMS. TORT LAW AND INSURANCE. *Eugene M. Wypyski* 473
HALL and GLUECK: CASES ON CRIMINAL LAW AND ITS ENFORCEMENT. *Raymond P. O'Keefe* 472
HAND: THE BILL OF RIGHTS. *Robert A. Kessler* 302
MASON: THE SUPREME COURT FROM TAFT TO WARREN. *Godfrey P. Schmidt* 468
PASTON: SUMMARY JUDGMENT IN NEW YORK. *Joseph N. Fournier* 660
RISK: THE LAW OF CATHOLIC MARRIAGE. *Joseph P. O'Brien* 143
STANLIS: EDMUND BURKE AND THE NATURAL LAW. *Warren L. Fleischauer* 303
WILLISTON: A TREATISE ON THE LAW OF CONTRACTS (3d ed. Walter H. E. Jaeger) *George P. Lamb and Carrington Shields* 307
WORMSER: WORMSER'S GUIDE TO ESTATE PLANNING. *Peter D. Murray* 663

COMMENTS

A SYMPOSIUM ON THE FAIR TRADE LAWS 68
ABOLITION OF THE EAVESDROPPING EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE 390
CONSTITUTIONAL ASPECTS OF RETRACTION STATUTES 254
CONTROL OF CORPORATE AND UNION POLITICAL EXPENDITURES: A CONSTITUTIONAL ANALYSIS 599
NEW YORK, LIBEL PER QUOD, AND SPECIAL DAMAGES: AN UNRESOLVED DILEMMA 405
THE EFFECT OF ESTATE TAXES UPON THE RIGHT OF ELECTION 236
THE EFFECT OF SPECIFIC ALLEGATIONS ON THE APPLICATION OF RES IPSA LOQUITUR 411
THE IMPACT OF JENCKS V. UNITED STATES AND SUBSEQUENT LEGISLATION ON THE SECRECY OF GRAND JURY MINUTES 244
THE LAW OF CONFESSIONS AS AFFECTED BY SUPREME COURT DECISIONS 396
THE NEW YORK LAW GOVERNING THE RELATIVE RIGHTS OF ASSIGNEES AND THIRD PARTY CLAIMANTS TO A FUTURE FUND 579
THIRD PARTY BENEFICIARIES ON A CONTRACTOR'S SURETY BOND 262

INDEX DIGEST

ADMINISTRATIVE LAW

Necessary Administrative Reforms in the Immigration and Nationality Act of 1952 145
—Reform No. 1: Consolidation of Conflicting and Overlapping Responsibility 146
—Reform No. 2: Right of Appeal from Denial of a Visa 151
—Reform No. 3: Statutory Status for Board of Immigration Appeals 154
—Reform No. 4: Hearings on the Record in Exclusion Proceedings 161
—Reform No. 5: Applicability of the Administrative Procedure Act 169
—Reform No. 6: Judicial Review of Deportation and Exclusion Orders 177
—Reform No. 7: Judicial Determination of Claim of Citizenship 179

ADMIRALTY LAW

Jones Act Three Year Statute of Limitations Applied to a Conjoined Count of Unseaworthiness 416
Shipowner's Liability Under Jones Act for Death or Injury of Seaman Resulting from Violation of Navigation Rule 112

ALIENS

See *Administrative Law*

APPEAL AND ERROR

Sua Sponte Consideration in Appellate Review 477
—Facts, Legal Issues, and Bases of Decision 478
—Reasons for Appellate Review 483
—Control by Litigants 487
—Correction of Errors 490
—Matters Considered Sua Sponte 493
—Rationale of Cases Decided on Matter Raised Sua Sponte 495
—Jurisdiction of the Appellate Court 499
—Contra Bonas Mores Matter 502
—Sua Sponte Treatment of Fundamental Errors 503
—Sua Sponte Consideration to Affirm 506
—Sua Sponte Interpretation of Instruments 507

ASSIGNMENTS

See *Taxation*
The New York Law Governing the Relative Rights of Assignees and Third Party Claimants to a Future Fund 579

ATTORNEY AND CLIENT

See *Negligence*
Abolition of the Eavesdropping Exception to the Attorney-Client Privilege 390

ATTORNEYS

See *Corporations*

BANKRUPTCY

See *Taxation*

CERTIORARI

See *Appeal and Error*

COLLECTIVE BARGAINING

See *Labor Relations*

CONFLICT OF LAWS

Foreign Torts — Effect of Subsequent Marriage of Litigants 422

CONSTITUTIONAL LAW

See *Jury*
Authority of Secretary of State to Determine Standards for Issuance of Passports 426
Constitutional Aspects of Retraction Statutes 254
Control of Corporate and Union Political Expenditures: A Constitutional Analysis 599
Due Process Requirements for Obtaining Limited In Personam Jurisdiction over a Foreign Corporation 116
Effect of Possible Federal Prosecution Upon State Grant of Immunity 429
Freedom of the Press not Affected by New York City's Gross Receipts Tax 615
Policy and the Fourteenth Amendment: A New Semantics 187
—Governmental Functions 188
—Positive Application of Fourteenth Amendment 198
—Private Acts Assuming Governmental Character 195
—Private Agency with Governmental Character 196
—Scope of Public Purpose 191
—State Interaction Interpreted as Action 199
State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition 201
—What Is State Action 203
—Ex parte Virginia 204
—The Civil Rights Cases 208
—Categories of State Action 210
—New or Old Meanings of State Action 215
State Taxation of the Private Beneficial Use of Federal Property 119
States' Power to Tax Imports 278
The Bill of Rights, A Book Review 302
The Law of Confessions as Affected by Supreme Court Decisions 396

The Right of the People, A Book Review 141
The Supreme Court from Taft to Warren, A Book Review 468

CONTRACTS

See *Negligence, Taxation*
An Advertisement as an Offer 123
A Treatise on the Law of Contracts, A Book Review 307
Reformation of a Written Instrument Because of Mutual Mistake or Unilateral Mistake Plus Fraud 125
Third Party Beneficiaries on a Contractor's Surety Bond 262

COPYRIGHTS

Monetary Remedies under the United States Copyright Code 555
—The Statutory Provisions 556
—Possible Defenses to a Suit for Recovery of Profits and/or Damages 558
—Jurisdiction 559
—Profits and Damages Defined 560
—Damages and/or Profits 562
—Profits 564
—Allowable Deductions from Profits 566
—Damages 568
—Actual Damages 568
—Statutory Damages 571
—Minimum and Maximum Awards 575
—Costs and Attorney Fees 576

CORPORATIONS

See *Constitutional Law*
The Professional Corporation 353
—Extent of Present Prohibitions 354
—Proposal for a Form of Professional Corporation 360
—Other Proposals for Tax Relief 362
—Kintner Associations and the Professional Corporation 364
—Taxes on Professional Corporations 366

CRIMINAL LAW

See *Constitutional Law, Grand Jury, Jury*
Cases on Criminal Law and Its Enforcement, A Book Review 472
Death of Co-Felon in Perpetration of Arson as Felony Murder 281
Issuance of Handbooks to Federal Jurors 618
The Investigative Procedure for Criminal Tax Evasion 48
—The Investigative Process 57
—The Taxpayer's Safeguards 54
—Applicable Statutes 50
—Elements of the Offense 51
—In the Courts 64
—Revelation of Evasion 49

DAMAGES

See *Constitutional Law, Libel and Slander*
Damages for Impairment of Plaintiff's Earning Capacity Awarded without Proof of Prior Employment 432
Recovery for Mental Anguish in Malpractice Suit 622

DEBTS

See *Taxation*

DECEDENTS ESTATES

The Effect of Estate Taxes upon the Right of Election 236

DEFAMATION

See *Constitutional Law*

DOMESTIC RELATIONS

See *Conflict of Laws*
Survival of Alimony Rights after a Valid Ex Parte Divorce 626
The Law of Catholic Marriage, A Book Review 143

EMINENT DOMAIN

Current Trends in the Law of Condemnation 529
—Recent Cases 531
—Revision of Condemnation Procedures 538
—Federal Acquisition of Land and Condemnation Practice 539
—Recommendations 553

EQUITY

See *Contracts*

ESTATE PLANNING

Wormser's Guide to Estate Planning, A Book Review 663

EVIDENCE

See *Attorney and Client, Constitutional Law, Grand Jury, Negligence*
Admissibility of Confession Obtained by Interrogation Subsequent to Indictment 435

FEDERAL TAXATION

Income Suit for Refund in the Federal Courts 438

GRAND JURY

Powers of an Extended Grand Jury 129
The Impact of Jencks v. United States and Subsequent Legislation on the Secrecy of Grand Jury Minutes 244

IMMIGRATION

See *Administrative Law*

INCOMPETENCY

Right of Unadjudicated Incompetent to Sue or to Hire Attorneys in His Own Right 629

INSOLVENCY

See *Taxation*

INSURANCE

See *Conflict of Laws, Constitutional Law, Torts*
Applicability of New York State Standard Fire Insurance Statute to "Jewelers' Block Policy" 633
The Meaning of the Word "Accident" in a Liability Insurance Policy 636

INTERNATIONAL LAW

Effect of a Senate Reservation upon a Treaty 132
International Law and the Law of Hostile Military Expeditions 309
—The Traditional Law 309
—The Law and the Practice of the United States 313
—The Law and the Practice of Other Countries 318
—Measures of Prevention 320
—Necessary Revisions 330

JURISDICTION

See *Conflict of Laws, Incompetency*

JURY

Right of Accused to Waive Jury Trial 650

LABOR LAW

Discovery Procedure Prior to Institution of Contempt Proceedings 286

LABOR RELATIONS

See *National Labor Relations Board*
Effect of Grievance Procedure and Arbitration Provisions of Collective Agreement on Individual Employee 640
Effect of Hot Cargo Clauses in Collective Bargaining Agreements 446
Federal Supremacy in Labor Management Relations 373
—Federal Pre-emption 374
—Jurisdictional Yardsticks of NLRB 377
—No-Man's Land 381
—Areas in which State Court Damage Awards are Sustained 384
—State Jurisdiction over Violent Union Conduct 385
State Courts' Jurisdiction where Tortious Conduct Constitutes an Unfair Labor Practice 450
Union's Liability for Wrongful Expulsion 453

LIBEL AND SLANDER

New York, Libel Per Quod, and Special Damages: An Unresolved Dilemma 405

LIENS

See *Taxation*

MORTGAGES

See *Taxation*

MOTIONS

Summary Judgment in New York, A Book Review 660

MUNICIPAL CORPORATIONS

Estoppel to Assert Failure of Notice as Condition Precedent to Suing Municipality where Actual Notice Present 289
Municipal Conflicts of Interest: Rights and Remedies under an Invalid Contract 31
—Common Law Background to Problem 31
—Action by the Interested Public Servant 32
—Action by the Municipality or by Taxpayers 39
—Actions by Third Parties 42
—State Aid 45
—Proposed Statutory Solution 46

NATIONAL LABOR RELATIONS BOARD

See *Labor Law*
Determination of Appropriate Bargaining Unit by the NLRB: Principles, Rules and Policies 218
—Statutory Provisions Regarding Determination of Appropriate Bargaining Unit 218
—Who Are Included in the Unit 219
—Determination of the Type and Scope of Appropriate Unit 220
—Certification of Separate Craft Units 222
—Single Plant Units 224
—Employer-Wide Units 225
—Multi-Employer Units 227
—Severance of Craft or Departmental Groups 228
—The American Potash Case 231
—Judicial Action 233

NEGLIGENCE

See *Admiralty Law, Death, Insurance, Sales*
Intervening Insanity of Third Person Unforeseeable by Defendant 457
Liability of Draftsman of Will to Beneficiary Thereof 290
The Effect of Specific Allegations on the Application of Res Ipsa Loquitur 411

NEGOTIABLE INSTRUMENTS
Validity of Endorsements on Checks Obtained by Use of Fictitious Name 135

PROPERTY
See *Taxation*

QUASI CONTRACTS
See *Municipal Corporations*

REAL PROPERTY
See *Wills*

RES IPSA LOQUITUR
See *Negligence*

REVIEW
See *Appeal and Error*

SALES
See *Trade Regulations*
Manufacturer's Liability to Ultimate User 293

STATUTE OF FRAUDS
See *Suretyship*

STATUTES
FEDERAL
Administrative Procedure Act
5 U.S.C. § 1001 168-71, 175, 182
Bankruptcy Act
11 U.S.C. § 104(4) (Supp. V) 26
11 U.S.C. § 107(b) 26
11 U.S.C. § 107(c)(1) 25
Bituminous Coal Conservation Act
49 Stat. 991 72
Boiler Inspection Act
45 U.S.C. § 22 (Supp. V) 113-14
Coast Guard Navigation Rule
33 U.S.C. § 157 (Supp. V) 114-15
Constitution
Art. I, § 4 602
Art. I, § 8 375
Art. I, § 8, cl. 3 280
Art. I, § 8, cl. 8 555
Art. I, § 10, cl. 2 278, 280
Amend. I 141-42, 302, 604-08, 610, 615
Amend. IV 56
Amend. V 54-56, 63-64, 302, 427, 429, 604, 611
Amend. VI 610-11
Amend. XIII 201
Amend. XIV 118, 201-04, 208-11, 213, 216, 302, 398-99, 402, 404, 605, 615-17
Amend. XV 206, 212-13
Amend. XVII 602
Copyright Act of 1909
35 Stat. 1075 556, 562, 575
Copyright Act
17 U.S.C. § 101(b) 556, 562, 575
17 U.S.C. § 116 576
Crimes and Criminal Procedure
18 U.S.C. § 3500 (Supp. V) 249
Federal Corrupt Practices Act of 1925
2 U.S.C. § 251 602-603
Federal Corrupt Practices Act
18 U.S.C. § 610 600, 604, 606, 608, 610-614
Federal Trade Commission Act
15 U.S.C. § 45 70
Foreign Relations Act
18 U.S.C. § 959(a) 327
18 U.S.C. § 960 314
Immigration and Nationality Act of 1952
8 U.S.C. § 1185 145, 427-28
Int. Rev. Code of 1939
Sec. 145(b) 51
Sec. 3616(a) 51
Sec. 3670 284-86
Sec. 3671 284, 286
Sec. 3672(a) 284-86
Int. Rev. Code of 1954
26 U.S.C. § 401 (Supp. V) 364
26 U.S.C. § 543 (Supp. V) 366
26 U.S.C. § 2056 (Supp. V) 238
26 U.S.C. § 5004 (Supp. V) 16
26 U.S.C. § 5177 (Supp. V) 16
26 U.S.C. § 6212 (Supp. V) 438
26 U.S.C. § 6321 (Supp. V) 9, 11, 14, 29
26 U.S.C. § 6322 (Supp. V) 11-12
26 U.S.C. § 6323 (Supp. V) 12, 17, 24
26 U.S.C. § 6323(a) (Supp. V) 28-29
26 U.S.C. § 6323(c)(2) (Supp. V) 12-13
26 U.S.C. § 6331 (Supp. V) 10
26 U.S.C. § 6531(2) (Supp. V) 60
26 U.S.C. § 7122 (Supp. V) 58
26 U.S.C. § 7201 (Supp. V) 50-51
26 U.S.C. § 7207 (Supp. V) 51
26 U.S.C. § 7263 (Supp. V) 49
26 U.S.C. § 7421 (Supp. V) 444
26 U.S.C. § 7422(a) (Supp. V) 439
26 U.S.C. § 7422(e) (Supp. V) 445
Internal Security Act of 1950
50 U.S.C. § 781 428
Interstate Commerce Act
24 Stat. 379 375
Jones Act
46 U.S.C. § 688 112, 114-15, 416-22
Judicial Code
28 U.S.C. § 1651 287
Labor Management Relations Act of 1947
2 U.S.C. § 251 603
McGuire Act
15 U.S.C. § 45 68, 70-71, 74, 79, 108, 110-11
15 U.S.C. § 45(a)(3) 108
Miller-Tydings Act
15 U.S.C. § 1 68, 70, 74, 79, 108

Money and Finance
31 U.S.C. § 191 1-9, 14-15, 19, 26-27, 30
National Labor Relations Act
29 U.S.C. § 141 447-49
29 U.S.C. § 141(b) 451
29 U.S.C. § 151 375-77, 383-87
29 U.S.C. § 152(7) 382
29 U.S.C. § 157 380
29 U.S.C. § 158(a)(3) 383
29 U.S.C. § 158(b) 450
29 U.S.C. § 158(b)(4) 446-49
29 U.S.C. § 159(b) 218
29 U.S.C. § 159(b)(1) 218-19
29 U.S.C. § 159(b)(2) 218, 229
29 U.S.C. § 159(b)(3) 218
29 U.S.C. § 159(c)(5) 218, 221
29 U.S.C. § 160(a) 376, 378, 382, 387-88, 450-51
29 U.S.C. § 160(c) 385, 451, 453
29 U.S.C. § 160(e) 278-88
29 U.S.C. § 185(a) 644
Nationality Act of 1940
8 U.S.C. § 903 179, 186
Norris-LaGuardia Act
29 U.S.C. § 101 447
Railway Labor Act
45 U.S.C. § 152 642
Robinson-Patman Act
15 U.S.C. § 2(e) 96
15 U.S.C. § 13(c) 81
Rules of Civil Procedure
28 U.S.C. § 12(h) 501
28 U.S.C. § 71A 539-40
Rules of Criminal Procedure 540-41
18 U.S.C. Rule 5(a) (Supp. V) 400, 403
18 U.S.C. Rule 6(e) 245-46
18 U.S.C. Rule 6(g) 131
18 U.S.C. Rule 52(b) 498
Sherman Act
15 U.S.C. § 1 (Supp. V) 272-76, 278
15 U.S.C. § 4 253
15 U.S.C. § 14 272-76, 278
United States Supreme Court Rules
Rule 27(b) 498
Rule 38 485, 488
War Labor Disputes Act of 1943
2 U.S.C. § 251 603

FOREIGN
East Germany
Law on Defense of Peace (1950) 327
El Salvador
Act of October 9, 1912 327
Art. 3 327
England
English Homicide Act of 1957 472
Fatal Accidents Act of 1846 296
Foreign Enlistment Act of 1819 318
Foreign Relations Act of 1870 318-19, 327
Sec. 11 318-19
France
Code Penal (1810) 319
Art. 84 320
Law of January 21, 1937 327
Art. 1, Sec. 1, par. (a) 327
Hague Convention No. V of 1907
Art. IV 316-17, 325, 328
Art. VI 316-17, 325, 328-30
Hague Convention No. XIII of 1907
Art. VIII 322
Statute of the International Court of Justice
Art. 38, para. (c) 320
United Nations Charter
Art. 2, para. 5 329

STATE
California
Cal. Civ. Code Sec. 48(a) 256-60
California Insurance Code
Sec. 1610 117
Connecticut
Conn. Gen. Stat. Sec. 6708 93
District of Columbia
D. C. Code Ann. Sec. 14-402 516-17
D. C. Code Ann. Sec. 14-404 517
Georgia
Ga. Code Ann. Sec. 113 (Supp. 1955) 516
Illinois
Ill. Rev. Stat. c. 16.5, Sec. 30 302
Ill. Ann. Stat. Sec. 32 516
Iowa
Iowa Rules of Civil Procedure
Sec. 344(a) 488
Kentucky
Ky. Rev. Stat. Sec. 386.190 646
Maryland
Md. Ann. Code
Art. 23, Sec. 119(d) 118
Art. 93, Sec. 388 516
Michigan
Mich. Stat. Ann. Sec. 18.990(1) 261
Missouri
Mo. Ann. Stat. Sec. 474.370 516
New Jersey
N. J. Stat. Ann.
Sec. 3A: 3-28 516-17
Sec. 37: 2-1-29 422
Sec. 37: 2-5 423
Sec. 27: 2-12 423
Sec. 37: 2-7 424
New York
Civil Practice Act
Art. 81 630-32
Sec. 112-F 138-40
Sec. 193-2 299-301
Sec. 207 631
Sec. 236 629
Sec. 349 395
Sec. 351 395
Sec. 352 395
Sec. 1170-b 626-29
Code of Civil Procedure
Sec. 2703 518, 525

Code of Criminal Procedure
Sec. 39 130
Sec. 40 130
Sec. 244 130
Sec. 245 130
Sec. 395 436-37
Constitution
Art. I, § 2 651
Art. I, § 6 131
Art. I, § 7 553
Art. I, § 7(b) 539
Decedent Estate Law
Sec. 18 236-38, 240-41, 243-44
Sec. 44 514-18, 521, 525, 527
Sec. 45 517, 519
Sec. 46 520-21
Sec. 83 236, 240-41
Sec. 124 238-42, 244
Sec. 160 526
Domestic Relations Law
Sec. 57 424
General Business Law
Sec. 369 98, 104
General City Law
Sec. 3 31, 40, 45
Insurance Law
Sec. 46(20)(c) 633
Sec. 167(3) 424
Sec. 168 633
Lien Law
Sec. 230 586
Mental Hygiene Law
Sec. 70 629
Penal Law
Sec. 1868 38, 40
Personal Property Law
Sec. 17-a 647-49
Sec. 31 126-29, 332, 335, 339-40, 342, 348, 350-51
Rules of Civil Practice
Rule 113 660
Sessions Laws 1958
c. 851 390, 392
Surrogate's Court Act
Sec. 234 527
Tax Law
Sec. 249-s 238
Sec. 350(8) 648
Vehicle and Traffic Law
Sec. 59 295, 298-99
North Carolina
N. C. Gen. Stat.
Sec. 8 516-17
Pennsylvania
Pa. Stat. Ann. tit. 18
Sec. 4701 282
Pa. Stat. Ann. tit. 43
Sec. 211.6 379
Pa. Stat. Ann. tit. 20
Sec. 3470.5 646-47
Pa. Stat. Ann. tit. 73
Sec. 7 106
Texas
Tex. Prob. Code Ann.
Sec. 96 516
Tex. Rev. Stat. Ann.
Art. 5526, Sec. 6 416
Virginia
Va. Code
Sec. 8-487 507
Wisconsin
Wis. Penal Code 472
Wis. Stat. Ann.
Sec. 251.09 498
Sec. 310.075(1) 516-17
UNIFORM LAWS
Uniform Sales Act
Sec. 12 295
Sec. 15 295

SURETYSHIP
The Suretyship Statute of Frauds 332
—Where There Is No Prior Obligation Owing from the Principal to the Creditor 333
—Where There Is A Prior Obligation Owing from the Principal to the Creditor 338
—The Main Purpose Rule 341

TAXATION
See *Corporations, Criminal Law, Estate Planning*
Federal Tax Claims: Nature and Effect of the Government's Weapons for Collection 1
—Priority of Federal Tax Claims 1
—Inchoate Lien and the Perfected Lien 4
—Insolvency within the Statute 7
—Detours in the First in Time Rule 13
—Question of Whose Property 19
—Previous Assignments 22
—Previous Mortgages 23
—Antecedent Contractual Rights 23
—Distinction Between Tax Lien and Tax Priority under the Bankruptcy Statute 25
—Federal Tax Liens Arising Before Bankruptcy 25
—Status of Federal Taxes which Are Not Liens before Bankruptcy 26
Priority of a Federal Tax Lien over a Prior Mortgage 284
Refund of Taxes Paid under Mistake of Law 137

TORTS
See *Conflict of Laws*
Traffic Victims. Tort Law and Insurance, A Book Review 473

TRADE REGULATION
A Symposium on the Fair Trade Laws 68
Tying Arrangement Per Se Violation of Sherman Act 272

TRUSTS
Allocation of Dividends Payable in Stock or Cash at Option of Trustee 645

UNIONS
See *Constitutional Law*

WILLS
See *Decedents Estates, Negligence*
Non-Domiciliary Decedents' Estates: A Problem for Title Examiners in New York 513
—Ancillary Proceedings and Section 44 514
—Examining a File 517
—Alteration of Proceedings in the Foreign Jurisdiction 519
—Administration Terminated by Subsequent Probate 519
—Revocation or Vacation of Original Probate 521
—Termination of Representative's Authority 524
—Power of Executor to Act 525
—Payment of Debts and Taxes 527
—Rights of Surviving Spouses and Afterborn Children 528

WORKMEN'S COMPENSATION
Award for Disability Caused by Cerebral Thrombosis Brought about by Mental and Emotional Strain 462

WRONGFUL DEATH
Contributory Negligence of a Statutory Beneficiary 295

ZONING
Termination of Prior Nonconforming Use 653

TABLE OF CASES

Case names prefixed with an asterisk are the subjects of Case Notes.

Adrico Realty Corp. v. City of New York 140
Alabama Claims 321
Allaire v. Allaire 522-23
Amalgamated Meat Cutters, AFL v. Fairlawn Meats, Inc. 373, 382-83, 386
American Potash & Chemical Corp. 231-34
*American Pub. Power Ass'n v. Power Authority 132
American Sur. Co. v. Rosenthal .. 634
Ampex Corp. v. Goody Audio Center, Inc. 94
Anstey v. Marden 339
*Appleby's Estate, In re 645
Armour & Co. 227
Atlantic Monthly Co. v. Post Pub. Co. 563
*Atlantic Nat'l Bank v. United States 135

Baltimore S.S. Co. v. Phillips .. 419-21
Bankers Title & Abstract Co. v. Ferber Co. 20
Barron v. Baltimore 430
Baskin v. Brown 212-13
Bassell v. Elmore 406
Bathasweet Corp. v. Weissbard ... 98
Baxter v. Ford Motor Co. 294
Beatty v. Mason 518
Belford v. Scribner 565
Bell v. Quin 43
Benedict v. Ratner 592-94
Berka v. Woodward 34
Berman v. Parker 532
Betts v. Easley 196
*Biakanja v. Irving 291
Bird v. St. Paul Fire & Marine Ins. Co. 640
Bissell Carpet Sweeper Co. v. Masters Mail Order Co. 108-11
Black, Matter of 597-98
Bowers v. Kerbaugh-Empire Co. .. 442
Brady v. Daly 571
Brady v. The Mayor 35
Bram v. United States 398
*Brandwein v. Provident Mut. Life Ins. Co. 125
Brewer v. Hoxie School District No. 46 188, 192, 197-99, 205, 215-17
Bristol-Myers Co. v. Picker ... 92, 102
Brown v. Board of Educ. ... 194, 197, 200, 202-03, 205, 215-17
Brown v. Maryland 278-79
Brown v. Mississippi 398
Brown v. Weber 342
Browne v. Hibbets 456
Brownell v. Tom We Shung .. 178, 185

Buckley v. Gray 292
Bulova Watch Co. v. Sattler's, Inc. 105
Bush v. Lathrop 584

Calihan v. State 434
Callaghan v. Myers 565
Campbell v. United States 548
Carroll v. Lanza 660
Carter v. Carter Coal Co. 72
Cassady v. Old Colony St. Ry. .. 415
Cassella v. Schenectady 36
Central Carolina Farmers Exchange, Inc. 226
Cheatham v. United States .. 441, 443, 446
City of New York v. Bedford Bar & Grill, Inc. 579, 596-97
City of New York v. Clouse 595
City of New York, Matter of ... 534
Civil Rights Cases 203, 208-12, 215
Clamp, Matter of 43
Clarke v. Town of Russia 43
Cloth v. Hyman 577
Commonwealth v. Almeida 282-83
*Commonwealth v. Bolish 281
Commonwealth v. Guida 283
Commonwealth v. Redline 472
Commonwealth v. Schultz 473
Commonwealth v. Thomas 282
Commonwealth v. Thompson 283
Commonwealth v. Wakelin 395
Commonwealth v. Webster 472
Commonwealth v. Wilson 130
Concordia v. Hagaman 34
Conrad v. Atlantic Ins. Co. 6, 7
Cook v. Tait 442
Cooper v. Douglass 597
Co-operative Law Co., Matter of .. 355
Cortes v. Baltimore Insular Line Inc. 115
Coster v. Coster 425
Council of Western Electric Technical Employees v. Western Electric Company 500
Crashley v. Press Publishing Co. 407-08
People ex rel. Crowe v. Peck 43
Curtis v. Wilcox 423

Damato v. Leone Constr. Co. .. 21, 22
Daniel-Morris Co. v. Glens Falls Indemnity Co. 268-71
Daniels v. New York, N.H. & H.R.R. 458-59
Derrington v. Plummer ... 188, 190-91, 215-17
Detroit v. Murray Corp. 120-21
Diven v. State 534
Donner v. Calvert Distillers Corp. 86-87
Dorsey v. Stuyvesant Town Corp. 195, 214

Doubleday, Doran & Co. v. R. H. Macy & Co. 69
Douglas v. Cunningham 575
Downes v. Bidwell 134

Eastman Kodak v. FTC 77
Eastman Kodak Co. v. Home Util. Co. 75
Eastman Kodak Co. v. Siegel .. 97, 98
Edward B. Marks Music Corp. v. Borst Music Pub. Co. 572
Edwards, Matter of 236-40, 243, 244
Elsis v. Evans 374
Engel v. Garner 40, 41
Erie Railroad v. Tompkins 511-12, 594
Estin v. Estin 626
Eubank v. Richmond 72

Fairbanks v. Sargent 588-89
Fashion Originators Guild v. FTC 276
Feldman v. United States ... 430, 431
*Ferrara v. Galluchio 623
Fidelity and Deposit Co. v. Housing Authority 10
Field v. Mayor of New York .. 581-83
Fikes v. Alabama 404
Finch v. Goldstein 631
Finelblatt v. Giant Laundry, Inc. 598
Fireman's Fund Ins. Co. v. Vermes Credit Jewelry 634, 636
*Firman v. Sacia 457
*Flora v. United States 438
Florsheim, In re 320
Foulke v. Zimmerman 522
Food and Grocery Bureau, Inc. v. Garfield 103
Fosmire v. National Surety Co. 264, 265, 267, 271
Frank, Matter of 631
Frank Fischer Merchandising Corp. v. Ritz Drug Co. 96-98

Garner v. Teamsters Union, AFL 378-81, 451-52
General Elec. Co. v. R. H. Macey & Co. 91, 94
General Elec. Co. v. Masters Mail Order Co. 93, 108-11
General Elec. Co. v. Wite Elec. Appliances Co. 106
General Management Corp. 367
Geofroy v. Riggs 132
Georgian Co. v. Bloom 124
Girard's Estate, In re 192, 194, 195, 216
Glanzer v. Shepard 291-92
Globe Mach. and Stamping Co. .. 235
Goesaert v. Cleary 260
Gordon v. United States 248
Gorin v. United States 612
*Grayson v. Irvmar Realty Corp. .. 432
Greey v. Dockendorff 597
Grosjean v. American Press Co. 615, 617
Gruner, In re 594-96

Guerlain, Inc. v. F. W. Woolworth Co. 80, 103
Guss v. Utah Labor Relations Bd. 373-74, 378, 381-83, 387

Haley v. Ohio 399
*Harbinson v. City of Buffalo 653
Harrison v. Sterry 7
Town of Hartley v. Floete Lumber Co. 38
Henneford v. Silas Mason Co. 120
Hooven & Allison Co. v. Evatt 278-79
*Horton v. United States 619
Hurd, Matter of 649

Illinois v. Campbell 14
*Insurance Dep't v. Dinsmore 462
International Ass'n of Machinists v. Gonzales 452
International Indem. Co. v. Duncan 635
International Salt Co. v. United States 273-77
International Shoe Co. v. Washington 116
Iowa Pharmaceutical Ass'n v. May's Drug Store Inc. 94

Jack v. Kansas 430
Jackson v. Baker 502
Jencks v. United States 66, 247-54
*Jenkins v. Wm. Schluderberg-T. J. Kurdle Co. 640
Jewell-La Salle Realty Co. v. Buck 575
Johns v. Bay State Abrasive Products Co. 118
Johnson v. Grand Rapids Bldg. & Constr. Trades Council, AFL-CIO 374
*Johnson Corp. v. Indemnity Ins. Co. 637
Johnson Serv. Co. v. E. H. Monin Co. 267

Keinz v. State 533
Kellogg v. Kellogg 648-49
Kennett v. Chambers 320
*Kent v. Dulles 426
*Kernan v. American Dredging Co. 112
*Knapp v. Schweitzer 429
Knauff v. Shaughnessy 165-66
Kohl v. United States 539
Konigsberg v. State Bar 141
*Koplik v. C. P. Trucking Corp. .. 422
Kuhn v. Veloz 409-10

Lanham, Matter of 632
Lanza v. New York Joint Legislative Comm. 393-95
Lawrence v. Fox 263
Leedom v. Kyne 218
*Lefkowitz v. Great Minneapolis Surplus Store Inc. 123
Leonard v. Vredenburgh 341-42
License Cases—Thurlow v. Massachusetts 279

Lindley v. O'Reilly 518
*Local 1976 United Brother of Carpenters v. NLRB 447
*Loeb v. Loeb 626
Lovett v. Frederick Loeser & Co. 124
Low v. Austin 278
Lundberg v. Welles 561
Lynch v. Fisher 458

*McAllister v. Magnolia Petroleum Co. 416
McAllister Transfer, Inc. 448, 450
McClare v. Massachusetts Bonding and Ins. Co. 264
McDonald v. The Mayor 36
*McGee v. International Life Ins. Co. 116
McGrath v. American Surety Co. 270
McKay v. Syracuse Rapid Transit Ry. 297-98, 301
McNabb v. United States .. 400, 403-05
McNamara v. Goldan 407-08
*Madden v. Atkins 454
Mallory v. Gillet 342
Mallory v. United States 404
Marbury v. Madison 468
*Markovich v. McKesson and Robbins, Inc. 293
Marks v. Leo Feist, Inc. 576
Marsh v. Alabama 208
Mease v. Wagner 334
*Mercury Mach. Importing Corp. v. City of New York 137
Merritt v. Merritt 631
Mertz v. Mertz 425
Michigan Furniture Co., In re ... 593
Mickel v. Murphy 292
Missouri ex rel. Gaines v. Canada 201
Modell, In re 595
Morey v. Doud 302
Morissette v. United States 473
Mueller Brass Co. v. NLRB 234
Muir v. Schenck 584
Munn v. Illinois 209

Nash, Matter of 518
Nathanson v. NLRB 288
Nebbia v. New York 71, 208-09
Newberry v. United States 602
New York v. United States 207
New York Indians v. United States 133
*NLRB v. Deena Artware, Inc. 287
NLRB v. Sunshine Mining Co. 288
*Northern Pac. Ry. v. United States 272
Northwestern Nat'l Ins. Co. v. Mortenson 636

O'Connell v. The Press Publishing Co. 406-10
Official Aviation Guide Co. v. American Aviation Associates 577
Old Dearborn Distributing Co. v. Seagram Distillers Corp. 69, 71, 72

Payne v. Arkansas 403
Pennoyer v. Neff 116
Pennsylvania v. Board of Directors 188, 194, 205, 215-17
People v. Ferlin 283
People v. La Barbera 283
People v. Leyra 403
People v. Maclay 7
People v. Miller 654-57
*People v. Spano 435
*People v. Stern 129
Pepper, Matter of 242-43
Perkins v. Elg 426
Pinesbridge Farm, Inc. v. Bloomingdale Bros., Inc. 104
Plessy v. Ferguson 201-03, 215
Plummer v. Casey 188, 190-91, 205, 215
Pollock v. Hooley 525
*Power Authority v. Federal Power Commission 132
Price v. United States 2, 3

Queensboro Farm Products v. State 535

R. M. Crummer & Co. v. Nuveen .. 124
Raabe v. Squier 346-47
Regina v. Davenport 473
Regina v. Sandoval 319
Reid v. Covert 134-35
Remington Arms, Inc. v. Harris Berger, Inc. 105
Revere Copper and Brass, Inc. v. The Economy Sales Co. 93
Rhinesmith v. Erie R.R. Co. 434
Rice v. Elmore 212-14, 217
*Rischer v. Owens 295
Robinson v. State 534
Rochester Distilling Co. v. Rasey 586-87
Rogers v. Toni Home Permanent Co. 294
Rosasco Creameries, Inc. v. Cohen 37
Rosenkrantz v. Schreiber Brewing Co. 343, 345-46
Rozewski v. Rozewski 298-99
Runberg v. Johnson 632
Ryan, Matter of 648-49
Ryszka v. Board of Education 41

Sammons v. Colonial Press 560, 566, 570
San Diego Bldg. Trades Council v. Garmon 373, 383-84
Sand's Estate, In re 522-23
People ex rel. Schenectady Illuminating Co. v. Board of Supervisors 32
Schware v. Board of Bar Examiners 141
Schwegmann Bros. v. Calvert Distillers Corp. 70
Schwegmann Bros., Giant Supermarket v. Eli Lilly & Co. 70, 71
*Scott v. McCaffrey 651
Scott v. Zion Evangelical Lutheran Church 20
Seattle Trust Co. v. Roberge 72
Seaver v. Ranson 264-65
Sebring v. Starner 40

Seif v. Long Beach 36
*Sengstack v. Sengstack 629
Shapiro v. United States 55
Shaughnessy v. Pedreiro 178
Sheldon v. Metro-Goldwyn Corp. 562, 565, 573
Shelly v. Kraemer 199, 211-12
Shenker v. Harr 130-31
Silver v. Silver 261
Smith v. Albany 33
Smith v. Allwright 212-13
Smith v. Smith 408-09
Solotaire v. Cowles Magazines, Inc. 409-10
Spies v. United States 53
St. Albans Claims 324
St. Paul-Mercury Indem. Co. v. Rutland 638-39
St. Petersburg v. Alsup 191
Stein v. New York 402
*Steinbeck v. Gerosa 615
Sterling Drug, Inc. v. Benatar 105
Stone v. Cooper 406-07
Strauder v. West Virginia ... 205, 210, 212
Sunbeam Corp. v. Civil Serv., Employees' Co-operative Ass'n 106
Sunbeam Corp. v. Richardson 70
Sunbeam Corp. v. Wentling 70
Sung v. McGrath 169, 175-76
Swift v. Tyson 512
Sydney v. MacFadden 408-09

Tamburri, Matter of 516
Terminiello v. Chicago 492
Terry v. Adams 212-13, 217
Textile Workers Union v. Lincoln Mills 641
Thomas v. Arizona 403
The Queen v. Jameson 319
The Three Friends 318
*Tillman v. Pompano Beach 289
Times-Picayune Publishing Co. v. United States 273-75, 278
Toksvig v. Bruce Pub. Co. 572
Tonkin v. Cal. Ins. Co. 640
Traveler's Health Ass'n v. Virginia 117
Truck Ins. Exch. v. Rohde 638-39
Turk v. Ridge 263
Twining v. New Jersey 430

Ultramares Corp. v. Touche 292
United Auto Workers v. Russell 384-86, 450
United Auto Workers v. Wisconsin Employment Relations Bd. ... 385-86
United Constr. Workers v. Laburnum Constr. Corp. 383-85, 451-53
United Pub. Workers v. Mitchell 607-09
United States v. Allegheny County 120-21
United States v. Allied Stevedoring Corp. 620
*United States v. R. F. Ball Constr. Co. 23, 27-30, 284
United States v. Cohen 252
United States v. Columbia Steel Co. 274
United States v. Consolidated Laundries Corp. 252
United States v. Continental-American Bank & Trust Co. 136
United States v. Cunningham 543
*United States v. Detroit 119
United States v. First National Bank 136
United States v. Fisher 2
United States v. Gilbert Associates, Inc. 10
United States v. Gordon 619-22
United States v. Hack 20
United States v. Hooe 3, 4, 8, 19
United States v. Kaufman 19
United States v. Kintner 357, 368
United States v. Knott 4, 5
United States v. Liverpool & London & Globe Ins. Co. 28
United States v. McKesson & Robbins 70
United States v. Mitchell 400
United States v. Township of Muskegon 119, 122
United States v. New Britain .. 15, 17, 18, 28
United States v. Petrillo 609
United States v. Procter & Gamble Co. 253
United States v. Rosenberg .. 249-50, 254
United States v. Security Trust and Sav. Bank 14, 17, 19, 21, 28, 285
United States v. Socony-Vacuum Oil Co. 253-54
United States v. Texas 7
United States v. H. J. K. Theatre Corp. 252
United States v. Theimer 542
United States v. United States Brewers Ass'n 607
United States v. Univis Lens Co. 75, 76
United States v. Wallace 543
United States v. Waymire 542
United States v. Wurzbach 608
*United States Plywood Corp. v. City of Algoma 278
United States ex rel. Lee Till Seem v. Shaughnessy 164
Universal Pictures Co. v. Harold Lloyd Corp. 562, 569
Upshaw v. United States 400

Vanderbilt v. Vanderbilt 627
Virginia v. Rives 210
Ex parte Virginia 201-02, 204, 207-08, 210-12, 216-17
Vrooman v. Turner 263

Ward v. Texas 399
Weber v. Anheuser-Busch, Inc. 379-81, 386
Wehrman v. Farmers' & Merchants' Savings Bank 488
Weisstein v. Freeman's Wines & Liquors' Inc. 94
Werner v. Southern Cal. Associated Newspapers 262
White v. Rintoul 341-44, 346, 348-49
White v. Texas 399
Wildwood Lumber Co. 226
Williams v. Ingersoll 579, 590
Williams v. Leper 341
Wilson v. United States 398
Witschard v. Brody & Sons, Inc. .. 347
Wolf, Matter of 238
Woodruff v. Parham 280
*Woods Patchogue Corp. v. Franklin Nat'l Ins. Co. 633
Woodworth v. Bennett 42
Woolworth Co. v. Contemporary Arts 563, 573

Yakus v. United States 93
Yonkers Bus Inc. v. Maltbie 43
Youngstown Co. v. Sawyer 27

Zartman v. First Nat'l Bank ... 596-97
Ziang Sung Wan v. United States .. 398
Ziegelheim v. Flohr 572

GEORGE W. BACON
Cameron Professor of Law

DEDICATION

With deep pride and an equal measure of sadness the Editors of the FORDHAM LAW REVIEW respectfully dedicate this issue to a great lawyer, teacher, and gentleman.

During the past thirty-two years many lawyers, judges and civic officials have sat before his teaching desk. Now that he is reducing his teaching schedule it is only fitting that on behalf of the legion of students who have been inspired by this man that FORDHAM LAW REVIEW proudly dedicate this issue to Professor George W. Bacon.

George W. Bacon, Cameron Professor of Law, has been a member of the faculty of the Fordham University School of Law since 1926 and was its Acting Dean in 1953-54. This issue of the Law Review is dedicated to him because he has given of his skill and his spirit without stint to this School for most of his life and for most of the life of this School. He is cutting down his teaching load to half time but his devotion to Fordham will remain undiminished.

George Bacon's scholarly writing and conscientious teaching ability have made him a recognized authority in Contract and Sales law. His staunch New England character, his tireless guidance and counsel to student and teacher alike have endeared him to Fordham men and women who first learned in his classes the intricacies of offer and acceptance, consideration, stoppage in transitu and trust receipts. He has trained future judges, lawyers, law teachers, civic officials, corporate counsel and officers without pretense or fanfare and without ever losing either his humility or his New Hampshire accent.

His interests have been wide; he is as familiar with the Civil War as he is with the Sales Act. Although his mountain climbing has slackened, his horticultural, bee-keeping, and book reading activities continue. His devotion to Fordham has never flagged and we know he will continue to inspire its law students in the days ahead. The Dean and Faculty of the Law School salute with affection and respect our teacher and colleague George W. Bacon, Cameron Professor of Law.

WILLIAM HUGHES MULLIGAN

Dean

FEDERAL TAX CLAIMS: NATURE AND EFFECT OF THE GOVERNMENT'S WEAPONS FOR COLLECTION

*J. HARRY CROSS**

A TAX debtor's property is the principal object of weapons for enforcing collection of his delinquent taxes. If just two parties were involved, the Government and the tax debtor, relatively few collection problems of a legal nature would result. Thus, if a tax debtor owned all his property in the same exclusiveness of ownership that he owns his shoes, for instance, the absence of third party interests would mean no competition from that source with remedies for collection of his tax. Competition arises, however, where third parties have diverse interests in the property. Should their antecedent interests be taken for the federal taxes of another party? Resolution of the competition has varied from time to time. Currently, the federal resolution is startling, because of judicial decisions which have produced a veritable revolution in tax collection impacts. On third parties, there are federal impacts that are latent and dangerous. The development of these impacts will appear in the course of tracing the statutory and decision law.

A claim for taxes does not *ex proprio vigore* give any special remedy for collection.[1] Without the aid of statute, the tax creditor would be but a general creditor.[2]

The federal government has various statutory remedies for collection of taxes, principally[3] by three types of statutes: (1) the priority statute, (2) the general tax lien statute and (3) the bankruptcy statute. The nature and effect of these three weapons will be considered.

I. The Priority Statute

History and Interpretation of the Statute

This is the earliest of the three statutes, dating from 1790[4], the days of the First Congress. The statute was broadened in 1797, and since then

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1. Bull v. United States, 295 U.S. 247, 259-60 (1935); 27 A. & E.2d 735, 782; 61 C.J., Taxation §§ 1155, 1359 (1933); Peppin, Priority of Tax and Special Assessment Liens, 23 Calif. L. Rev. 264, 265-67 (1935).

2. To escape this result, one court sought to work out a sovereign prerogative in the payment of federal taxes, notwithstanding the United States does not possess the common-law prerogative of the sovereign to be first paid. Liberty Mut. Ins. Co. v. Johnson Shipyards Corp., 6 F.2d 752 (2d Cir. 1925), aff'd sub nom. Stripe v. United States, 269 U.S. 503 (1926).

3. Miscellaneous special statutes include: Int. Rev. Code of 1954, §§ 6324 (lien for estate and gift taxes), 5004, 5177 (lien on distilled spirits), 7202-03 (making crimes of certain wilful failures to pay certain taxes), 7501 (withholding taxes special fund in trust for the United States).

4. This first enactment on the subject was limited to "bonds" for the payment of

has not undergone significant amendment.[5] It is commonly known as section 3466 and the essence of the statute is that: "debts due to the United States shall be first satisfied"[6] in four cases: (1) death of the debtor without sufficient assets; (2) commission of an act of bankruptcy; (3) voluntary assignment by the insolvent of all his property to pay his debts; (4) an absconding, concealed, or absent debtor whose estate and effects are attached by process of law.

Constitutionality of the statute was early upheld by the Supreme Court in the *Fisher* case,[7] decided in 1804. The principle was there settled that the United States is entitled to secure to itself the exclusive privilege of being preferred to private citizens, and even to the state authorities, in all cases of the insolvency or bankruptcy of the debtor.

The statute is to be liberally construed in favor of the Government. This kind of construction was early,[8] as well as recently,[9] declared by the Supreme Court. It is based on the purpose of the statute "to secure an adequate public revenue to sustain the public burdens and discharge the public debts."[10] It is perhaps worthy of note that so eminent an authority as Chancellor Kent expressed the view that ". . . it is proper that this prerogative right of the United States should be strictly construed and precisely defined, for it is in derogation of the general rights of creditors."[11]

For well over a century the liberal construction was applied with judicial restraint, and therefore did not produce expanding effects; but at the end of that period and commencing with the second quarter of the present century, a fork in the road appeared, and as a result the same statutory language has been given broader interpretation. Certain developments will now be considered.

The word "person" was early held to include a corporate debtor of the United States.[12]

The word "debts" was long regarded as not including taxes. As one court said: "They are two very distinct matters. A debt is not a tax, and a tax is not a debt."[13] But in the *Price* case,[14] decided in 1926, the Supreme

revenue duties. Further legislative history through 1799 is recited in Annot., 1913 L.R.A. 226-27.

5. Price v. United States, 269 U.S. 492 (1926).

6. 31 U.S.C.A. § 191 (1954).

7. United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805). See Spokane County v. United States, 279 U.S. 80 (1929).

8. Beaston v. Farmers' Bank, 37 U.S. (12 Pet.) 102, 134 (1838).

9. United States v. Emory, 314 U.S. 423, 426 (1941).

10. United States v. State Bank, 31 U.S. (6 Pet.) 29, 35 (1832).

11. 1 Kent, Commentaries 247 (1896).

12. Beaston v. Farmers' Bank, 37 U.S. (12 Pet.) 102 (1838).

13. Liberty Mut. Ins. Co. v. Johnson Shipyards Corp., 6 F.2d. 752, 755 (2d Cir. 1925).

14. See note 5 supra.

Court rejected any distinction and held that the word "debts" in the statute included taxes. Thus, for the first time, a century and a quarter later, the statute became applicable to the Government's claims for taxes.

Nature of the Priority

In the course of upholding the constitutionality of the statute, Chief Justice Marshall took the occasion to describe the nature and effect of the priority, stating:

"On this subject it is to be remarked, that no lien is created by this law. No bona fide transfer of property, in the ordinary course of business, is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living; though it takes effect generally if he be dead."[15]

In *United States v. Hooe*,[16] decided by the Supreme Court in 1805, Chief Justice Marshall emphasized the no-lien aspect in this vigorous language:

"In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected."[17]

Deep appreciation of this distinction, "always to be recollected," was the antithesis of the statute affecting any lien, general or specific. For over a century the Supreme Court recognized as much.[18] In short, the statute did not cut off, or interfere with, antecedent liens of other parties. And this remained the law until a series of decisions commencing in 1929.

This protection of antecedent liens of all kinds, it should be noted, was upheld against the extraordinary contention of the Government that:

". . . the priority, thus created by law, if it be not of itself a lien, is still superior to any lien, and even to an actual mortgage, on the personal property of the debtor."[19]

The rejection of this extraordinary contention was further supported by holding that the preference is in the appropriation of the debtor's estate,[20] namely, his general funds.[21] This clearly meant that the debtor's estate is what is left after satisfying all antecedent interests of others.[22] Still

15. United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805).

16. 7 U.S. (3 Cranch) 73 (1805).

17. Id. at 89.

18. Brent v. Bank, 35 U.S. (10 Pet.) 596, 611-12 (1836). Chancellor Kent so understood the cases. 1 Kent, Commentaries 247 n. a (1896). See also United States v. Guaranty Trust Co., 33 F.2d 533, 536-37 (8th Cir. 1929); 9 Ops. Att'y Gen. 28, 29 (1857).

19. Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386, 440-41 (1828).

20. Brent v. Bank, 35 U.S. (10 Pet.) 596, 611 (1836).

21. United States v. Hack, 33 U.S. (8 Pet.) 271, 275 (1834).

22. United States v. Lewis, 26 Fed. Cas. No. 15595, at 924 (C.C.E.D. Pa.), aff'd, 92 U.S. 618 (1875).

further, the priority operates only where, by law, or by act of the debtor, his property is sequestered for the use of his creditors.[23] Until such sequestration, the priority does not arise or apply.

A consideration reinforcing this limitation was pointed out in the *Hooe* case, Chief Justice Marshall stating that if the Government's priority statute claim existed from the time the debt was contracted, and the debtor continued to transact business with the world, the inconvenience of that priority would certainly be very great, and if the priority were to apply from the instant the debtor became indebted to the United States, it would be in the nature of a lien, which it is not.

The Inchoate Lien and the Perfected Lien

In a series of cases commencing in 1929 the Supreme Court launched in a new and different direction—inchoate lien versus specific perfected lien.[24] Shortly, the Court displaced an inchoate general lien in *United States v. Knott.*[25] There, a foreign surety company deposited securities with the State Treasurer of Florida in order to qualify to do business and for the protection of Florida creditors. It entered into many surety obligations in Florida. Upon its insolvency, the United States filed a claim for priority for judgments recovered against the company in Florida on bail bonds given there. The Florida officials insisted that the claim of the United States must be postponed to those of Florida creditors. In construing the state statutes, the Supreme Court of Florida declared that the deposit constituted a "trust fund" for the benefit of those whom the state had the power and duty to protect, and the United States was not such a beneficiary. The Supreme Court of the United States approached the matter from the standpoint of what would bar the priority of the United States, holding:

> "Unless the law of Florida effected, at least as early as the date of insolvency, either a transfer of title from the company, or a specific perfected lien in favor of the Florida creditors, the United States is entitled to priority."[26]

On the point of title, the Court held that the deposit did not divest the company's title to the securities. On the point of specific perfected lien, the Court held:

> "While in the case at bar the Supreme Court [of Florida] declared that the deposit created 'a trust fund,' the term appears to have been used to connote an inchoate general

23. Bramwell v. United States Fidelity Co., 269 U.S. 483, 490 (1926); 1 Kent, Commentaries 247 (1896).

24. See e.g., Spokane County v. United States, 279 U.S. 80 (1929); Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905, 911-12 (1954).

25. United States v. Knott, 298 U.S. 544 (1936).

26. Id. at 549-50.

lien for the benefit of those persons who may become entitled to be paid from the proceeds, either as unsatisfied judgment creditors, or as Florida creditors at the time when insolvency supervenes. Such an interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States."[27]

Next, the Court dealt with a specific perfected lien. Does it bar the priority of the United States? Although the *Knott* case squarely answered the point by saying that such lien "bars the priority of the United States,"[28] the Court later said that that statement:

". . . was not intended to settle the problem and may be taken to have been made with reference to the early mortgage lien cases . . . ."[29]

The Court further asserted that "the Court has never decided"[30] whether the priority is overcome by a fully perfected and specific lien; a question which, the Court thought, had been reserved in the early cases. Although a later case in the Supreme Court makes a similar assertion,[31] the question was met head on and decided against the Government in 1954 by the United States Court of Appeals for the Fifth Circuit[32] which said:

"This statute applies only as against unsecured debts, that is, debts not secured by a specific and perfected lien. It has never been, we think it will never be, applied as it is sought to be applied here, to accord payment to a debt due the United States in preference to a claim secured by a lien which is prior in time and superior in law to the lien of the United States securing the debt for which preferential payment is sought."[33]

The Approach of the Supreme Court

The Court's approach, in the latest series of cases, has been to analyze the characteristics of the particular competing lien, and then to hold that it "does not raise the question."[34] A further question therefore arises: what characteristics of a competing lien will raise the main question? It would be futile to try to rationalize.[35]

On the one hand, the main elements have been simply stated: (1) identity of the lienor; (2) the amount of the lien; and (3) the property to which it attaches.[36] These elements, as of the crucial time (arising of the federal priority right), must be definite and not merely ascertainable in the future by taking further steps.[37] On the other hand, the Court has

27. Id. at 550-51.
28. Id. at 551.
29. People ex rel. Gordon v. Campbell, 329 U.S. 362, 370 n. 10 (1946).
30. Id. at 370.
31. United States v. Gilbert Associates Inc., 345 U.S. 361, 365 (1953).
32. United States v. Atlantic Municipal Corp., 212 F.2d 709 (5th Cir. 1954).
33. Id. at 711.
34. United States v. Gilbert Associates Inc., 345 U.S. 361, 365 (1953).
35. Exchange Bank & Trust Co. v. Tubbs Mfg. Co., 246 F.2d 141, 143 (5th Cir. 1957).
36. People ex rel. Gordon v. Campbell, 329 U.S. 362, 375 (1946).
37. Ibid.

indulged in a veritable maze of refinements in regard to these elements.[38] If there is any single direction, it may possibly be described as towards an inordinate quest for certainty as of the crucial time regarding fulfillment of the stated elements.

On the problem of whether a competing state statutory lien is specific and perfected, a question arises whether the decision of a state supreme court which construes its own statute to create a specific and perfected lien is binding on the United States Supreme Court. This question has arisen various times, and in the latest series of cases every lien has been a state statutory lien. Although hemmed in by the state court's construction, the Supreme Court has been unwilling to accept it, and so has proceeded in another direction by simply making the lien's actual legal effect a "federal" question.[39] So denominating the question enables the Supreme Court to re-examine other courts' decisions, including their construction of their own statutes, and to render final decision. Significantly, the Supreme Court in modern cases has not yet found a single lien to be sufficiently specific and perfected, in its judgment, to defeat, or even to raise the question of defeating the priority of the United States.

The recent emphasis on the matter of inchoate lien versus specific and perfected lien is completely at variance with the Court's approach for the last century. Although the Court has not rejected the great deliberation of the early cases that the priority neither is a lien nor partakes of the character of a lien, nevertheless the question arises as to what has happened to Chief Justice Marshall's vigorous admonition. The language of the priority statute has not changed. No broader will of Congress is involved. Contemporaneous construction of a statute sheds valuable light upon statutory meaning,[40] and ample light was afforded by the early cases. No reason for departure is discernible. Yet, in the last quarter century, without the aid of Congress, the Supreme Court has built a detour road around the priority statute.

The Question of Title

It would be misleading to think that defeat of the priority statute has to involve the difficult matter of specific and perfected lien, despite the prominence given this matter in the latest series of cases. Potent matters are devestment of (1) title to, or (2) possession of, the property involved.

Long ago, in the famous *Conard* case,[41] decided by the Supreme Court in 1828, it was pointed out that there is a loose and general sense in which the term "lien" is used, even in the case of a mortgage. This loose and general sense has not disappeared with the passage of time.[42] Today,

38. Kennedy, supra note 24, at 911-19.

39. United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353, 356-57 (1945).

40. Sutherland, Statutory Construction § 5101 (3d ed. 1943).

41. Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386, 441 (1828).

42. See Danais v. M. DeMatteo Constr. Co., 102 F. Supp. 874, 877 (D.C.N.H. 1952).

therefore, just as then, a right, styled a lien, may actually include title.

On the potency of title, *Harrison v. Sterry*[43] is instructive. There, the competing interest was represented by the assignee of a chose in action, as collateral security. Chief Justice Marshall said:

"The priority of the United States is to be maintained in this case, unless some of the creditors can show a *title* to the property *anterior* to the time when this priority attaches.

"The assignment made to Richard Harrison is, it is contended, such a title. To this assignment several objections have been made.

". . .

"2. It is the assignment of a *chose in action;* and is, therefore, to be considered rather as a contract than an actual transfer, and could be of no validity against the several claimants in this case. The authorities cited at bar, especially those from 1 Atkins, and William's Law Cases, are conclusive on this point, to prove that equity will support an equitable assignment."[44]

That an antecedent assignment of a chose in action, as collateral security, will be protected against a subsequent claim of federal priority, was again decided in the *Conard* case.[45] The potent effect of devestment of title or possession has not been disturbed in the recent series of cases.[46]

On the point of title, however, a matter of great importance concerns the effect of subsequent federal priority on previous mortgages. For a long time, the Court held that such mortgages were not affected.[47] However, commencing in 1933 with a mischief-making paragraph in the *Maclay* case,[48] the Court itself raised the question whether the holding of the old mortgage cases is to be applied in jurisdictions where a mortgage upon real estate is a lien and nothing more. The Court again raised that question in *United States v. Texas,*[49] but once again supplied no answer, that is, after raising it in 1933. Apparently, the repose created by the older cases is still undisturbed as to mortgages in title theory states.[50]

Insolvency Within the Statute

The effect of the statute involves insolvency of the debtor, but it is important to note that not every insolvency is within the statute.

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43. 9 U.S. (5 Cranch) 289 (1809).

44. Id. at 300 (emphasis added).

45. See Brent v. Bank, 35 U.S. (10 Pet.) 596, 612 (1836). The same result was also reached at common law under the king's prerogative right of priority. Marshall v. People, 254 U.S. 380, 382 (1920); State v. Bank, 6 G. & J. 205 (Md. 1834).

46. United States v. Gilbert Associates, Inc., 345 U.S. 361, 366 (1953); People ex rel. Gordon v. Campbell, 329 U.S. 362, 376 (1946).

47. See cases collected in United States v. Guaranty Trust Co., 33 F.2d 533, 536-37 (8th Cir. 1929).

48. People v. Maclay, 288 U.S. 290, 294 (1933).

49. 314 U.S. 480, 485-86 (1941).

50. Earlier, any distinction between the lien and title theories was clearly disregarded. Savings and Loan Soc'y v. Multnomah County, 169 U.S. 421 (1898). For classification of the lien and title theory states, see 5 Tiffany, Real Property 1380 (3d ed. 1939).

Insolvency within the statute must be of a particular kind and manifested in a particular way. With reference to the *kind* of insolvency, the statute applies only in cases where the debtor does not have sufficient property to pay all his debts. This has always been construed not to apply to mere inability of the debtor to pay all his debts in the ordinary course of business. Thus, where pursuant to state law a bank was found to be insolvent and unable to pay its debts and to continue as a going concern, and was taken over by the bank commissioner, but such insolvency under the state law was not necessarily with reference to insufficiency of assets, the priority statute was held not to apply.[51] With reference to the manifestation of insolvency, it must be in one of the modes pointed out in the statute:[52] (1) death of the insolvent; (2) commission of an act of bankruptcy; (3) voluntary assignment by the insolvent of all[53] his property to pay his debts; or (4) in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law. These modes, in view of their manifesting insolvency that is both actual and notorious, have been said to give ". . . to the world some reasonable and definite test by which to ascertain the existence of the latent and dangerous preference given by law to the United States."[54]

The lack of both kind and manifestation of insolvency is illustrated by the *Hooe*[54a] case where a collector of the revenue had mortgaged part of his property to his surety in his official bond, to indemnify him from his responsibility as surety, and to secure him from his existing and future endorsements for the mortgagor at the bank. The Government contended that the priority claim intervened and avoided the mortgage. This contention was rejected, and the mortgage upheld on the grounds that: (1) as to the kind of insolvency, the Government had failed to show insufficiency of assets although the collector was, in point of fact, unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew, when he took the mortgage, that the mortgagor was largely indebted to the United States; (2) as to the manifestation of insolvency, a voluntary assignment within the purview of the priority statute, must be of all, and not part, of the debtor's property, and hence a mortgage of part only of the debtor's property was not within the statute. The case pointed out that the burden of proof is upon the Government to show the requisite insolvency, both kind and manifestation.

51. United States v. Oklahoma, 261 U.S. 253 (1923). See also United States v. Crosland Constr. Co., 120 F. Supp. 792 (E.D.S.C. 1954); Maryland Cas. Co. v. United States, 53 F. Supp. 436 (Ct. Cl. 1944); Kohlman v. Alexander, 1 A.D.2d 334, 150 N.Y.S.2d 134 (1st Dep't 1956).

52. United States v. Oklahoma, supra note 51.

53. United States v. Hooe, 7 U.S. (3 Cranch) 73 (1805).

54. 1 Kent, Commentaries 246 (1896).

54a. See note 53 supra.

Finally, application of the priority statute depends on the nature of the proceeding in which it is asserted.[55] Although the statute covers an act of bankruptcy, the cases hold that, as to estates in bankruptcy, the Bankruptcy Act supersedes the priority statute, and that the latter statute does not apply in cases of bankruptcy. Hence, in cases of bankruptcy, the priority of federal tax claims is to be determined not by the priority statute, but by the Bankruptcy Act.[56]

II. General Tax Lien Statute

This statute, now commonly known as section 3670,[57] dates from 1866[58] and has undergone amendments.[59] Although contemporaneous construction may shed valuable light upon statutory meaning,[60] it will be noted that this is not available in the Supreme Court, for the first construction by that Court did not occur until 27 years later, in 1893.[61]

The essence of the statute is that, for any unpaid tax, there is imposed:

". . . a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to [the tax debtor] . . . ."[62]

The statute goes no further, and furnishes no criteria in regard to the crucial words "lien" and "property."

The Terms "Property" and "Lien" Under the Statute

The broad outlines of the term "property" have been established as embracing tangible property, intangible property such as a debt,[63] and after-acquired property[64] situated anywhere in the United States.[65] Since

55. The curious differences are discussed in Rogge, The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships, 43 Harv. L. Rev. 251 (1929).

56. Adams v. O'Malley, 182 F.2d 925 (8th Cir. 1950); In Re Van Winkle, 49 F. Supp. 711 (W.D. Ky. 1943).

57. Int. Rev. Code of 1954, § 6321.

58. Act of July 13, 1866, c. 184, § 9, 14 Stat. 107.

59. Detroit Bank v. United States, 317 U.S. 329 (1943); concurring opinion of Justice Jackson in United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950).

60. Sutherland, op. cit. supra note 40, § 5101.

61. United States v. Snyder, 149 U.S. 210 (1893). The Court said: "The single question thus presented for our consideration is whether the tax system of the United States is subject to the recording laws of the States." Id. at 213. The decision was "No." Although the decision was thus limited, the case impliedly decided also that a secret federal tax lien was good against a subsequent purchaser for value without notice of the lien. See United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953), and United States v. Curry, 201 Fed. 371 (D.C. Md. 1912).

62. See note 57 supra.

63. United States v. Eiland, 223 F.2d 118 (4th Cir. 1955); Citizens State Bank v. Vidal, 114 F.2d 380 (10th Cir. 1940).

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

65. See concurring opinion of Justice Jackson, United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950).

Congress has not set up a system of property law, and there is no federal common law,[66] it must necessarily be that Congress intended all aspects of "property" to be determined in accordance with the only existing system of property law, state law. Some courts have expressly applied state law.[67] Thus, in an important case, *Fidelity and Deposit Co. v. Housing Authority*,[68] it was held that whether or not property exists in the form of a contractual right is a matter of state law only.

It appears to one court,[69] however, that the Supreme Court has looked both to, and also away from state law, and that the better view is represented by the line of Supreme Court cases applying state law.

Akin to applicable law is the problem of uniformity. In *United States v. Gilbert Associates, Inc.*,[70] the Court sought the goal of uniformity, declaring that:

> "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be."[71]

But it was previously determined by the same Court that differences of state law may not be read into the Federal Revenue Act to spell out a lack of uniformity.[72] If uniformity is to be accomplished, in determining the meaning of property, it would seem necessary for Congress to provide a separate, complete and continually up to date system of property law, blanketing the nation. Until such time, the absence of federal common law means that the state law of property must be resorted to and applied in determining the meaning of property in the federal tax lien statute.

The other crucial term, "lien," is the name given to a right, exercisable over the property of another. The right is usually defined as:

> "A hold or claim which one person has upon the property of another as a security for some debt or charge."[73]

This security claim upon the property of another involves matters of effect and enforcement. These matters are governed by statute in the case of a statutory lien, and into this category falls the federal tax lien. The federal statutes provide for enforcement by authorizing levy upon the property of the tax debtor, and levy is defined to include the power of distraint and seizure by any means, and the power to sell.[74] As to the effect of the lien, a leading feature is the order of time in which certain

66. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
67. United States v. Winnett, 165 F.2d 149 (9th Cir. 1947); Jones v. Kemp, 144 F.2d 478 (10th Cir. 1944); Metropolitan Life Ins. Co. v. United States, 107 F.2d 311 (6th Cir. 1939).
68. 241 F.2d 142 (2d Cir. 1957).
69. United States v. E. Regensburg & Sons, 124 F. Supp. 687 (S.D.N.Y. 1954).
70. 345 U.S. 361 (1953).
71. Id. at 364.
72. Poe v. Seaborn, 282 U.S. 101 (1930).
73. Bouvier, Law Dictionary (3d rev. 1914).
74. Int. Rev. Code of 1954, § 6331.

events happen. Detour roads are also encountered which will be discussed.

The federal tax lien being entirely statutory,[75] the rule is that the lien is not to be enlarged by construction.[76] We will also see how this rule has fared in the Supreme Court.

Priority of the Federal Tax Lien

The statute does not in terms confer priority upon the federal tax lien.[77] On this account, the Supreme Court, in 1954,[78] thought that Congress, when it enacted section 3670, had in mind the cardinal rule, enunciated by Chief Justice Marshall in 1827, that:

". . . The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds . . . ."[79]

This is the order of time rule, familiarly expressed "first in time, first in right."

When Does the Lien Arise?

The order of time rule makes it important to determine when the federal tax lien arises. There is some ambiguity in this respect. The section imposing the lien does so "if any person liable to pay any tax neglects or refuses to pay the same after demand. . . ."[80] This language indicates that demand and refusal to pay are conditions precedent to existence of the lien. The next section provides that "unless another date is specifically fixed by law, the lien shall arise at the time the assessment is made."[81] Since demand is not made until after the assessment, the question has been raised as to whether the two provisions may be inconsistent.[82] The court which raised this question of inconsistency did not decide the effect of it, and the point seems not to have been pursued. At any rate, the cases hold that demand is a condition precedent to the existence of a lien,[83] and, moreover, that the burden of

75. MacKenzie v. United States, 109 F.2d 540 (9th Cir. 1940). See also United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950), to the effect that the lien "stems from" the statute.

76. Libby, McNeill & Libby v. Yakutat, 206 F.2d 612 (9th Cir. 1953); De Laney v. Denver, 185 F.2d 246, 253 (10th Cir. 1950). Although the cited cases involved a non-federal statutory tax lien, the same rule would seem applicable to the federal tax lien within the doctrine of Gould v. Gould, 245 U.S. 151 (1917).

77. United States v. New Britain, 347 U.S. 81, 84-85 (1954).

78. United States v. New Britain, 347 U.S. 81 (1954).

79. Rankin v. Scott, 25 U.S. (12 Wheat.) 177 (1827).

80. Int. Rev. Code of 1954, § 6321.

81. Id. § 6322.

82. MacKenzie v. United States, 109 F.2d 540 (9th Cir. 1940).

83. Detroit Bank v. United States, 317 U.S. 329, 335 (1943); Ruth, Inc. v. O.S.V. The Marie & Winifred, 150 F. Supp. 630 (D.C. Mass. 1957); United States v. Commonwealth, 288 S.W.2d 664 (Ky. 1956). See also 26 U.S.C.A. §§ 6303, 6659 (1955).

proving the demand rests on the Government.[84] It has been further held that a time difference in the assessment and demand has the effect of postponing the lien arising until both requirements have been satisfied.[85]

The time when the lien arises was made earlier in the Internal Revenue Code of 1954, with that lien arising "at the time the assessment is made."[86] In contrast, in the preceding Code of 1939 the lien shall arise "at the time the assessment list is received by the Collector."[87] The significance of the change made by the 1954 Code concerning the commencement of the lien is especially important to competing lienors who are not clearly within the protection of a mortgagee, pledgee, purchaser or judgment creditor under section 3672,[88] because the lien seems to arise from a mere administrative assessment[89] of a tax by an office whose records are not open to public scrutiny. It is truly a secret lien.[90] As to others than the tax debtor, it remains secret from "the time the assessment is made" until a local district collector removes the veil of secrecy by causing a notice of lien to be recorded.

Under the 1954 Code, as contrasted with the 1939 Code, there necessarily will be a longer period of time during which many federal tax liens remain secret after the tax is assessed and prior to the time the first warning of their existence appears in the public records. That period of secrecy is of great importance to the attorney who must act and advise his clients with regard to property rights which are subject to federal tax liens which he cannot find out about but which may be a threat to his client under many different circumstances.

The Notice Filing Provision

In addition to the matter of when the federal tax lien arises, we must also note the "shall not be valid until" concept, expressed in the amendments of 1913 and 1939, constituting section 3672,[91] whereby as against any mortgagee, pledgee, purchaser or judgment creditor, the federal tax lien shall not be valid until notice thereof has been filed of public record. The 1939 amendment made further provision with respect

84. Cattani v. Korsan, 29 N.J. Super. 581, 103 A.2d 51, aff'd, 32 N.J. Super. 210, 108 A.2d 110 (1954).

85. Detroit Bank v. United States, 317 U.S. 329, 335 (1943); Ersa, Inc. v. Dudley, 234 F.2d 178 (3d Cir. 1956); United States v. Eiland, 223 F.2d 118 (4th Cir. 1955).

86. Int. Rev. Code of 1954, § 6322.

87. Int. Rev. Code of 1939, § 3671, 53 Stat. 449 (now Int. Rev. Code of 1954, § 6322).

88. Id. § 3672, as amended, 56 Stat. 957 (1942) (now Int. Rev. Code of 1954, § 6323).

89. See Int. Rev. Code of 1954, § 6203; Bull v. United States, 205 U.S. 247, 259 (1935).

90. See Id. §§ 6103, 7213; Grand Prairie State Bank v. United States, 206 F.2d 217 (5th Cir. 1953), holding that a federal tax lien recorded at taxpayer's domicile is effective as to personal property located elsewhere.

91. See note 88 supra.

to a security, as defined in the statute,[92] whereby the federal tax lien shall not be valid against any mortgagee, pledgee or purchaser for value, without notice or knowledge of the tax lien, regardless of the filing of notice of lien. These amendments, known as the notice filing provision, operate to defeat the precedence of the tax lien resulting from the order of time, as more fully discussed hereinafter.

First Lien Should Be Superior

Since the statute, as has been seen, does not confer any priority upon the federal tax lien, a fair and reasonable construction would, in general, end the question of priority between competing liens by the rule that, lien for lien, the first is superior.[93] Thus, the statute would not interfere with or override antecedent interests in the same property which later becomes subject to a federal tax lien. A person can create a lien on property only to the extent of his interest in it;[94] no greater right should be created by a federal tax lien which is not given primacy by Congress. This was the view prior to 1950 with respect to federal tax liens;[95] it accords with the construction of the federal priority statute by the Supreme Court prior to 1929.[96]

Supreme Court Detour to the First in Time Rule

Since 1950, the question of relative priority has not been limited to the first in time rule, alone. The Supreme Court has annexed one detour, and the Government contends for another.

Inchoate Lien

The detour annexed by the Supreme Court is the matter of inchoate lien; a familiar matter, as we have seen, under the priority statute. The

92. Int. Rev. Code of 1954, § 6323 (c)(2), which gives this statutory definition: ". . . the term 'security' means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money."

93. This nearly became the law recently. In United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953), the original opinion pronounced the rule that: "Without more, priority would depend upon the dates the liens arose." Later, this statement was deleted by authority of the court. Revealed in United States v. Albert Holman Lumber Co., 208 F.2d 113-14 (5th Cir. 1953).

94. 1 Jones, Liens § 9 (3d ed. 1914).

95. See Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905, 924-25 (1954). A good illustration is United States v. Sampsell, 153 F.2d 731 (9th Cir. 1946).

96. See note 18 supra.

background is that the Government had argued before various courts to the effect that federal tax liens are analogous to the priority right established by the latest series of Supreme Court decisions under the priority statute.[97] The first court to adopt this argument was the Supreme Court in *United States v. Security Trust and Sav. Bank.*[98] In explaining the analogy and its adoption, all that the Court said was:

"In cases involving a kindred matter, i.e., the federal priority under R.S. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois v. Campbell,* supra 374. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment lien of Morrison, and the judgment of the District Court of Appeal for the Fourth Appellate District is reversed."[99]

The result was to annex a detour road around the statute: a federal tax lien is superior to a state statutory lien where the latter, although prior in time and binding against the tax debtor, is "inchoate" at the time the federal tax lien arises. Briefly stated, first in time became first "perfected" in time.

As under the priority statute,[100] the Supreme Court reinforced the annexed detour of inchoate lien by making its application a "federal" question.[101] Needless to say, the Supreme Court's approach to the matter of inchoateness was not from the standpoint of the federal tax lien, but only from the standpoint of the competing state statutory lien. Lower courts have confirmed that the federal tax lien is not inchoate.[102]

It is interesting to observe the state of the law prior to the *Security Trust* case. One commentator has given this vivid portrayal:

". . . Thirty cases in the lower courts had denied the supremacy of the 3670 tax lien over antedating rival liens without investigating inchoateness. In applying the rule 'first in time, first in right,' these courts had treated the federal tax lien the same as any other legal lien having no special priority. Since none of these cases was brought to the Court's attention in any brief, or mentioned in the opinion, the Court may not have realized how far Security Bank departed from the traditional interpretation of section 3670."[103]

Looking to the later judicial history, the *Security Trust* case has shown strong vitality in subsequent cases in the Supreme Court. In every

97. See Board of Supervisors v. Hart, 210 La. App. 78, 84-85, 26 So. 2d 361, 363 (1946); Kennedy, supra note 95 at 922-23.

98. 340 U.S. 47 (1950).

99. Id. at 51.

100. See note 39 supra.

101. See note 98 supra.

102. Ersa, Inc. v. Dudley, 234 F.2d 178 (3d Cir. 1956); United States v. Kings County Iron Works Inc., 224 F.2d 232 (2d Cir. 1955).

103. Kennedy, supra note 95, at 924-25.

instance, save one,[104] it has been applied by the Court to the end of finding a variety of competing state statutory liens, prior in time, to be inchoate at the time the federal tax lien arises.

However, contrary to the situation under the priority statute,[105] the Supreme Court has not questioned whether a specific and perfected lien will bar the federal tax lien. On the contrary, the Court has indicated that a bar does exist, stating in *United States v. New Britain:*[106]

> "Thus, the priority of each statutory lien contested here must depend upon the time it attached to the property in question and became choate."[107]

It will be noted that the Court described the priority of lien by the new terminology—"choate." Since this rare term means "complete,"[108] presumably it is similar to "perfected," and if thus fulfilled it may not require the element of "specific"[109] as included by the Supreme Court under the priority statute.

The Will of Congress

Similar to the detour road around the priority statute, the detour road around the tax lien statute was built by the Supreme Court without the aid of Congress. Indeed, unlike the judicial support the Court drew from its own opinions in launching in new directions under the priority statute, the Court offered no judicial support whatever in launching its inchoate lien doctrine under the tax lien statute. In the matter of the will of Congress, no more here than in the priority statute is there any indication that Congress intended the federal right to supersede a pre-existing lien of any kind.

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104. United States v. New Britain, 347 U.S. 81 (1954), involving city real estate taxes and water rent. Here the Supreme Court was not too sure. Although the state supreme court had construed its statute to create a lien that was specific and perfected, the United States Supreme Court spoke guardedly, saying: "In the instant case, certain of the City's tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens." Id. at 86-87.

105. See note 30 supra.

106. 347 U.S. 81 (1954).

107. Id. at 86.

108. The rare term "choate" is amusingly discussed in 42 A.B.A.J. 608 (1956). It does not appear in all unabridged dictionaries. Webster's 1957 and 1934 editors state: "Complete. Rare."

109. However lower courts continue to use the term. United States v. Kings County Iron Works, Inc., 224 F.2d 232, 234 (2d Cir. 1955). The term was given another twist in United States v. Gilbert Associates, Inc., 345 U.S. 361, 366 (1953), where the court said: "In claims of this type 'specificity' requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. Until such possession, it remains a general lien." On the point of possession, contrast the following from Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386, 441 (1828): "But it has never yet been decided by this court that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possession or not."

From another point of view, the will of Congress—this all important matter—is not silent. In another field, Congress has conferred primacy on a federal lien. Thus, in regard to the tax on distilled spirits, Congress has long provided for a "first" lien.[110] Further, in regard to a distiller's bond, Congress has long required a stipulation of prior lienors that the lien of the United States for taxes and penalties "shall have priority" of a mortgage, judgment or other encumbrances.[111]

Congress, therefore, is aware both of its power[112] to create primacy and the language[113] to confer primacy. With this background, when Congress fails to use language of primacy, as in the general tax lien statute, does it intend no primacy? Or does it intend some primacy, as in the case of inchoate prior liens of others? The mere statement of these questions points to the answers. "First" lien means just that, and "lien" means only that with nothing in between. Congress, in these pieces of tax lien legislation, has created two kinds of liens,[114] one with primacy and the other with no mention of primacy, but it has not created a lien with intermediate primacy. This contrasting situation reflects a conspicuous intent of Congress that the general tax "lien" attach only through the owner in accordance with his property rights at the time the lien arises, and thus not affect prior rights of others.[115]

According to the general tax lien a preference over inchoate prior state statutory liens works out badly in practice[116] and results in frequent examples of injustice.[117] Furthermore, if respecting prior state statutory

110. Int. Rev. Code of 1954, § 5004, dating back to 1868 (§ 1, 15 Stat. 125).

111. Id. § 5177, dating back to 1868 (§ 8, 15 Stat. 125).

112. Brown v. General Laundry Serv. Inc., 139 Conn. 363, 94 A.2d 10 (1952).

113. Cases are collected in Peppin, supra note 1, at n. 38. A recent example is N.Y. Tax Law § 501(2), providing "such liens shall be paramount to all prior liens or encumbrances of any character," upheld in International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956), the statute being set forth in 284 App. Div. 604, 132 N.Y.S.2d 511 (3d Dep't 1954).

114. The Supreme Court seems aware of the distinction, but regards it as irrelevant. United States v. New Britain, 347 U.S. 81, 85 and n. 8 (1954). Contra, Central Trust Co. v. Third Avenue. R.R., 186 Fed. 291, 293-94 (2d Cir.), cert. denied, 223 U.S. 721 (1911).

115. Accord, under New York statutes, Central Trust Co. v. Third Ave. R.R., supra note 114.

116. Consider the unfortunate clash between two supreme courts—federal and state—over the construction of a state statute. Perhaps the best example is United States v. Security Trust and Sav. Bank, 340 U.S. 47 (1950), where the United States Supreme Court disregarded the state court's construction in the very case under review and applied another construction by the state court but in a different case. Another clash occurred in United States v. Vorreiter, 134 Colo. 543, 307 P.2d 475 (1957), where the Colorado Supreme Court considered that to agree with the Government's position would mean pulling down the structure of property law of the state, which the court refused to do. However, the United States Supreme Court summarily reversed, merely citing the Security Trust Case. United States v. Vorreiter, 355 U.S. 15 (1957).

117. Consider a prior mechanic's lien being cut off by a subsequent federal tax lien. The story has been recounted by the writer in the 1957 Proceedings of the American Bar Association Section of Insurance, Negligence and Compensation Law 57, 67-71.

liens will have the effect of hampering the federal government in the "prompt and certain collection" of its revenues, it is the peculiar province of Congress to say so by expressly making federal taxes a preferred lien. Its failure to say so, in contrast with its saying so in another instance, is strong evidence that no such hampering effect is deemed by Congress to exist in the area of the general tax lien. For courts to undertake to say that it does exist, when Congress has not, is a bald example of judicial legislation.

Government Detour to First in Time Rule

The Government contends for another detour, springing from the notice filing provision of the 1913 and 1939 amendments, mentioned above.[118] The Government seeks to have the courts read this notice filing provision as having the effect of subordinating, to the federal tax lien, every kind of interest not specifically protected, regardless of the time of its attachment to the tax debtor's property.[119]

In the *Security Trust* case, Justice Jackson, in a concurring opinion, gave support to this argument:

"My conclusion from this history is that the statute excludes from the provisions of this secret lien those types of interests which it specifically included in the statute and no others."[120]

This concept of "and no others" was uttered in a setting where the federal tax lien was the subsequent lien, in relation to a prior inchoate lien, and so viewed its application presents difficulty. The concept has been recognized by a unanimous Court in two cases[121] where its application presented no difficulty in the particular case, the federal tax lien being the antecedent lien and therefore first in time.

Thus, in one, the *New Britain* case, the Court said:

"There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression."[122]

The Court's position was clearly limited to the effect of an antecedent federal tax lien and, therefore, does not bear on the reverse, a subsequent federal tax lien.

The Supreme Court has not decided the effect of Justice Jackson's concept, in the setting of a federal tax lien which is subsequent and not antecedent. It is submitted that the concept is not applicable to this set-

118. See note 88 supra.

119. Kennedy, supra note 95 at n. 99.

120. 340 U.S. at 53.

121. United States v. Scovil, 348 U.S. 218 (1955); United States v. New Britain, 347 U.S. 81 (1954). The broad statement in this case must be read in the context of the fact that the federal tax lien was the antecedent lien.

122. 347 U.S. at 88.

ting, and specifically that a subsequent federal tax lien is ranked by all antecedent interests.

In the first place, when Justice Jackson expressed his concept, he did not have the benefit of two important points, decided by the Supreme Court, because they were subsequently decided by that Court. These points, announced in the *New Britain* case are: (1) Congress conferred no priority upon the federal tax lien, and (2) Congress, when it enacted the federal tax lien statute, had in mind the cardinal rule, first in time, first in right. These two qualifications upon the federal tax lien clearly do not affect, but actually protect, antecedent interests.

In the second place, when Congress enacted the amendments of 1913 and 1939, the evil it was seeking to remedy consisted of two decisions,[123] in both of which the federal tax lien was the antecedent interest. In subordinating the subsequent interest to the antecedent federal tax lien, these decisions, it should be noted, accorded with the first in time rule. This history, therefore, did not deal with a subsequent federal tax lien.

In the third place, the remedy that Congress applied did not deal with a subsequent federal tax lien. The amendments of 1913 and 1939 did not affect the arising of the tax lien—Congress left the arising undisturbed. What Congress did was to say that, even when a tax lien arises, it nevertheless "shall not be valid until" notice thereof has been filed of public record, as to the specified types of interests, and an even longer period of "shall not be valid" can be applicable in the instance of a security as defined in the statute.

These three considerations disclose no purpose to affect or displace the interests of others existing antecedent to the arising of a federal tax lien. This area was simply not involved; only the reverse area was involved. This type of notice filing protection does not operate retrospectively[124] —it does not act as a notice backward in time.[125] In this light, the true effect of the notice filing protection is, not the concept of "and no others," but it is to defeat the precedence of a federal tax lien resulting from the order of time, when any of the types of interests specified in the amendments arise in the periods that Congress has allowed;[126] for one purpose, the period between the time the tax lien arises and the time it is filed of public record. When those interests arise other than in that period, or

123. United States v. Snyder, 149 U.S. 210 (1893); United States v. Rosenfield, 26 F. Supp. 433 (E.D. Mich. 1938). See also United States v. Gilbert Associates, Inc., 345 U.S. 361, 363-64 (1953).

124. United States v. Peoples Bank, 197 F.2d 898, 899 (5th Cir. 1952); United States v. Sampsell, 153 F.2d 731, 735-36 (9th Cir. 1946); Gower v. State Tax Comm., 207 Ore. 288, 295 P.2d 162 (1956).

125. Pomeroy, Equity Jurisprudence § 657 (3d ed. 1941).

126. See Comment, 54 Mich. L. Rev. 829, 839 (1956).

whenever any other interests arise, the first in time rule governs as a general rule.

In the practical area, the Government's contention is refuted by Chief Justice Marshall in the *Hooe* case. He pointed out that if the Government's priority statute claim existed from the time the debt was contracted, and the debtor continued to transact business with the world, the inconvenience of that priority would certainly be very great. The Chief Justice was shocked at the inconvenience that would operate in the future. How much more shock where the inconvenience would operate not only forward but also backward! The consideration of inconvenience puts far in front the immensity of inconvenience to the business world that would result from a subsequent federal tax lien reaching backward and destroying antecedent interests in the property. To produce this dimension of havoc, Congress would have to put a time bomb into antecedent interests—to explode when a federal tax lien subsequently arises. Such a congressional time bomb, as we have seen, does not exist in the federal general tax lien statute.

The Question of Property Under the Statute

As under the priority statute, it would be misleading to think that defeat of a federal tax lien has to involve the difficult matter of inchoate versus perfected lien, despite the prominence given that matter since 1950. The basic matter is the mandate of the general tax lien statute that the property involved "belong" to the tax debtor. This mandate often presents the question of property versus no property, for, of course, if the tax debtor is held to have no interest in the property involved, then he has "no property" in this respect for the federal tax lien to attach to.

In the *Security Trust* case and the line of Supreme Court cases applying it, there was no question whether the property involved belonged to the tax debtor; it did belong to him, even though encumbered by a state statutory lien.[127] But the question of no property has arisen in other situations, and several offer instruction to the basic approach.

In the *Kaufman* case,[128] decided by the Supreme Court in 1925, the Government claimed that taxes owing by individual partners should be paid out of partnership assets prior to the payment of partnership debts. The Court rejected this claim, saying:

". . . under its very terms the lien includes only the property of the person owing the tax; and in the case of a partner owing an individual tax, it extends only to his interest in the surplus of the partnership property."[129]

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127. Great Am. Indemnity Co. v. United States, 120 F. Supp. 445, 451 (W.D. La. 1954).

128. United States v. Kaufman, 267 U.S. 408 (1925).

129. Id. at 414.

The Court pointed out the same result had been reached by it, under the priority statute, *United States v. Hack* [130] decided in 1834.

In the *Ferber* case,[131] decided by the Supreme Court of New Jersey in 1954, the federal tax liens against the contractor were filed before the construction contract was entered into, and a levy upon the owner was made during the construction period and before the suppliers filed a stop notice with the owner pursuant to the New Jersey mechanics' lien law. In relation to the time the contract funds were payable by the owner, several suppliers filed their stop notices prior thereto, and one supplier filed his stop notice subsequent thereto. The court construed the effect of the stop notices as requiring the owner to withhold payments to the contractor until the stop notice claimant is satisfied up to the amount due, or to grow due, on the contract. This was held to result in the contractor's property right under his contract being "inchoate," and although the federal tax lien attaches to that inchoate right, it is not sufficient to enlarge[132] it for the lien of the Government can rise no higher than the right of the contractor—tax debtor. The Court applied this result to the several stop notice claimants who had filed their stop notices prior to the time the contract funds were payable by the owner; and as to the supplier who filed his stop notice after that time, the Court held that the contractor's property right in the balance of contract funds matured at that time, so the federal tax lien could and did attach to such funds to the exclusion of the late stop notice claimant. All the judges concurred, including Justice Brennan, now Associate Justice of the United States Supreme Court.

In *Scott v. Zion Evangelical Lutheran Church*[133] decided by the Supreme Court of South Dakota in 1955, the federal tax liens against the contractor were filed after the construction contract was entered into, but before the supplier had filed a statement and notice of claim for mechanic's lien pursuant to state law. The pivotal matter was a clause in the construction contract whereby the owner reserved the right to withhold certain payments until the contractor, if required, shall deliver to the owner a complete release of all liens arising out of the contract.[134] Because this clause covered suppliers' liens, and such lien had been filed, the court held that the contractor had no property right in so much of the contract funds in the hands of the owner as was necessary for the pay-

130. 33 U.S. (8 Pet.) 271 (1834).

131. Bankers Title & Abstract Co. v. Ferber Co., 15 N.J. 433, 105 A.2d 408 (1954).

132. In United States v. Metropolitan Life Ins. Co., 130 F.2d 149, 151 (2d Cir. 1942), the court stated: "Yet certainly the section gives no evidence of any purpose to allow the United States to mend in the district court all infirmities of title in the taxpayer's property."

133. Scott v. Zion Evangelical Lutheran Church, 75 S.D. 559, 70 N.W.2d 326 (1955).

134. This type of clause is widely used; and it is identical with that in the Standard Form of the American Institute of Architects, Art. 32 of the General Conditions of the Contract for the Construction of Buildings.

ment of the claims of suppliers, who were therefore entitled to those funds.[135] A number of decisions, federal and state, were cited for the proposition that the rights of the United States do not extend beyond those of the taxpayer whose property is sought to be subjected to its liens. Also, the court distinguished the *Security Trust* case which the Government consistently relies upon for overriding those interests which stand in the way of collection under a federal tax lien. Pointing out the distinction, and cogently describing the decisive question, the court said:

"The cases cited by appellant are distinguishable. In United States v. Security Trust & Sav. Bank, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53, upon which appellant principally relies, the federal tax lien and an attachment under a state statute were applicable to the same property. The Government had in fact acquired a lien on the property of the taxpayer and the court was concerned with the question of the priority of liens. The question in the instant case is not one of priority and perfection of liens. The decisive question is what amount under the contract was due to Nemmers. The contractor had no property right in so much of the fund in the hands of the church as was necessary for the payment of claims of materialmen and the government cannot claim more than the tax debtor Nemmers was entitled to."[136]

The no property concept finds application in the general law of contracts.[137] Illustrative is the *Damato* case,[138] decided by the Superior Court of New Jersey, Appellate Division, in 1956. There, the federal tax liens against the contractor were filed before the construction contract was entered into. The contractor apparently abandoned the work, and in any event the work left unfinished cost approximately $3800, in comparison with a total contract price of approximately $28,000. The court upheld the contention of the unpaid suppliers that the contractor had failed to substantially perform the construction contract and consequently had no right to the contract funds.[139] With the defaulting contractor

135. Accord, Transmix Concrete v. United States, 142 F. Supp. 306 (W.D. Tex. 1956) which involved a clause similar to Art. 26 of the American Institute of Architects General Conditions of the Contract for the Construction of Buildings. See also Berkal v. M. DeMatteo Constr. Co., 327 Mass 329, 334-35, 98 N.E.2d 617, 621 (1951).

136. 75 S.D. at 562-63, 70 N.W.2d at 328; accord: Fidelity & Deposit Co. v. Housing Authority, 241 F.2d 142 (2d Cir. 1957); Colusa-Glenn Production Ass'n v. Phoenix Ins. Co., 145 F. Supp. 844 (N.D. Cal. 1956) and authorities therein cited.

137. "According to the better view, in the case of an entire executory contract, which the plaintiff without legal excuse has failed to fulfill on his part, he can recover nothing, either on the contract itself or on a quantum meruit." 2 Sedgwick, Damages § 659 (9th ed. 1912); see also the life insurance policy cases where there was no debt because the insurer's contractual liability had not accrued. United States v. Mass. Mut. Life Ins. Co., 127 F.2d 880 (1st Cir. 1942); United States v. Metropolitan Life Ins. Co., 130 F.2d 149 (2d Cir. 1942); United States v. Penn. Mut. Life Ins. Co., 130 F.2d 495 (3d Cir. 1942).

138. Damato v. Leone Constr. Co., 41 N.J. Super. 366, 125 A.2d 302 (1956).

139. Accord, Colusa-Glenn Production Ass'n v. Phoenix Ins. Co., 145 F. Supp. 844 (N.D. Cal. 1956); Vincent v. P. R. Matthews Co., 126 F. Supp. 102 (N.D.N.Y. 1954). See also where the work was completed but some suppliers were unpaid, United States

having no right to the contract funds, and the tax lien of the Government rising no higher than the right of the contractor, the money was awarded to the unpaid suppliers. While there was some aspect of mechanic's lien in the case, it was eliminated and the primary question stated, as follows:

"The question of the legal efficacy of the liens of the subcontractors is of no moment if, as respondents contend, Leone had no right to any of the monies here involved. The primary question is—are there any monies due Leone?—rather than—to whom are the monies due, if not to Leone, under the contract?"[140]

Previous Assignments

Illustrative of both no property and also the notice filing protection,[141] is an assignment of a chose in action, where the assignment antedates a federal tax lien against the assignor. The courts protect such assignment, although on various grounds, and sometimes the Government does not dispute.[142] Some cases[143] apply the no property concept on the ground that, after assignment, there is no interest left in the assignor.[144] The same result has also been reached under the priority statute.[145] Doubtless the courts will always be influenced by the traditional attitude toward protecting assignments of choses in action, expressed long ago by Blackstone, who said:

". . . and our courts of equity, considering that in a commercial country all personal property must necessarily lie in contract, will protect an assignment of a chose in action, as much as the law will that of a chose in possession."[146]

Cases where the federal tax lien is filed antecedent to the assignment, are clearly distinguishable[147] for they are an application of the first in time rule.

Fidelity & Guaranty Co. v. Miller, 143 F. Supp. 941 (W.D.N.C. 1956); Steelcraft Mfg. Co. v. Hewkin, 148 F. Supp. 872 (E.D. Ill. 1956).

140. 41 N.J. Super. at 371, 125 A.2d at 305.

141 See note 88 supra.

142. Steelcraft Mfg. Co. v. Hewkin, 148 F. Supp. 872 (E.D. Ill. 1956).

143. United States v. Long Island Drug Co., 115 F.2d 983 (2d Cir. 1940); Royal Indemnity Co. v. Board of Educ., 137 F. Supp. 890 (M.D.N.C. 1956); Alabama Tenn. Natural Gas Co. v. Lehman-Hoge & Scott, 122 F. Supp. 314 (N.D. Ala. 1954); United States v. Crosland Constr. Co., 120 F. Supp. 792 (E.D.S.C.), aff'd on the only ground raised by the Govt. on appeal, 217 F.2d 275 (4th Cir. 1954); National Iron Bank v. Manning, 76 F. Supp. 841 (D.C.N.J. 1948); Seaboard Surety Co. v. United States, 67 F. Supp. 969 (Ct. Cl. 1946), cert. denied, 330 U.S. 826 (1946).

144. Salem Co. v. Manufacturers' Finance Co., 264 U.S. 182 (1924).

145. Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386 (1828); Harrison v. Sterry, 9 U.S. (5 Cranch) 289 (1809); see also Brent v. Bank, 35 U.S. (10 Pet.) 596, 612-15 (1836). The same result was also reached at common law under the king's prerogative right of priority. Maryland v. Bank, 6 G. & J. 205 (Md. 1834); Marshall v. People, 254 U.S. 380, 382 (1920).

146. 2 Blackstone, Commentaries *442.

147. Geitz v. Gray, 280 S.W.2d 859, 864, (Mo. App. 1955).

Previous Mortgages

Related to the situation of previous assignments is the situation of previous mortgages. The question has arisen as to whether a mortgage, antedating the filing of a federal tax lien against the mortgagor, must have been recorded, in order to enjoy the interest of "any mortgagee" as protected under the notice-filing provision. The cases are in conflict,[148] and yet the statute says nothing about recording of the mortgage. "Any mortgagee"—simply the holder of a mortgage—is precisely that, wholly apart from recording of the instrument.[149] Furthermore, the no property concept should be applicable to the mortgagor, at least in title theory jurisdictions.[150]

It has been asserted to be the opinion of the Internal Revenue Service that purchase money mortgages take priority over federal tax liens, even where the tax lien is of record prior to the purchase money mortgage.[151] A similar result has been applied to a conditional sales contract which was subsequent to a recorded federal tax lien against the purchaser.[152]

An Antecedent Contractual Right

As discussed above, the Supreme Court has considered the effect of a federal tax lien upon the interests of others. However, in every instance since the 1950 line of decisions, the interests of others consisted of state statutory liens. There, the Court seemed concerned with the proposition that the state cannot by statute impair the standing of federal liens without the consent of Congress.[153] The Supreme Court, having granted the Government's petition for certiorari in the *Ball* case,[154] will now, for the first time, be confronted with the interest of another consisting of an antecedent contractual right. The commercial world will await the outcome with extraordinary interest because the Government's position, if successful, might subordinate a widely used credit arrangement—an assignment of money, due or to become due under an existing contract, as collateral security—such subordination being to a federal tax lien against the assignor, which tax lien was not in existence when the assignment was made, but arose subsequently.

148. Mason City & Clear Lake R.R. v. Imperial Seed Co., 152 F. Supp. 145, 157 (N.D. Iowa 1957) and cases cited therein; Winther v. Morrison, 93 Cal. App. 2d 608, 613, 209 P.2d 657, 661 (1949), rev'd on another ground sub nom. United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950).

149. Rogge, The Tax Lien of the United States, 13 A.B.A.J. 576, 580-81 (1927).

150. See note 50 supra.

151. Mosner, The Nature and Scope of Federal Tax Liens, 17 Md. L. Rev. 1 n. 25 (1957).

152. United States v. Anders Contracting Co., 111 F. Supp. 700 (W.D.S.C. 1953).

153. United States v. New Britain, 347 U.S. 81, 84 (1954).

154. United States v. R. F. Ball Constr. Co., 239 F.2d 384 (5th Cir. 1956), cert. granted, 353 U.S. 956 (1957). See discussion of case at pp. 27-30 infra.

Where the Tax Lien is Inchoate

Although it was said earlier[155] that the tax lien is not inchoate, and this is the general rule, there is one situation where the lien is inchoate. This situation is where a third party is in possession of, or obligated with respect to, property or rights to property belonging to the delinquent taxpayer. A common illustration is an indebtedness owing by the third party to the delinquent taxpayer. This indebtedness is property, to which the tax lien attaches.[156] After the lien arises, although it be secret,[157] can the debtor pay the indebtedness to the creditor-taxpayer without being subject to the hazard of having to pay the same over again to the Government? In a recent case, the hazard was visualized as follows:

"Where there is a tax lien outstanding against a taxpayer, it would seem that if the Government chose to enforce that lien against intangibles to the fullest extent, then any bank paying a check of such taxpayer, any insurance company making payments of cash surrender values, disability payments or annuity payments, any party making payment to such taxpayer for services, or any party settling either a contract or tort claim with such taxpayer would be subject to the hazard of paying the same over again to the Government. Except as to such parties that come within the protection of Section 6323, the tax lien would for all practical purposes be a secret lien since it would come into existence and continue from the time the taxes were assessed in Washington, D. C. It would appear that the Government as a matter of policy has been sparing in its enforcement of tax liens against intangibles of the kind noted. See Note, Effect of a Federal Tax Lien on a Bank Deposit, 42 Iowa L. Rev. 412-420 (1957)."[158]

It is believed, however, that hazard does not exist where the debtor, at the time of making payment, has not received a demand from the Government for payment of the indebtedness, as in the illustration mentioned above.[159] Until such demand,[160] the tax lien, so far as it affects the debtor, is inchoate.[161]

III. BANKRUPTCY STATUTE

This is the third statutory aid of the federal government in the collection of taxes. As under the order of time rule,[162] here again it is important

155. See note 102 supra.

156. See note 63 supra.

157. See note 90 supra.

158. Beeghly v. Wilson, 152 F. Supp. 726, 730 (N.D. Iowa 1957).

159. United States v. Eiland, 223 F.2d 118, 122 (4th Cir. 1955). The statute relied upon by the court is now Int. Rev. Code of 1954, § 6333(b).

160. Prior to the Internal Revenue Code of 1954 there was apparently conflict as to whether distraint was necessary in addition to levy. See United States v. Eiland, 223 F.2d 118 (4th Cir. 1955), and United States v. O'Dell, 160 F.2d 304 (6th Cir. 1947). The basis of this conflict has apparently been eliminated by the Internal Revenue Code of 1954, § 6331 (b) (1955), so that now a demand in the form of a levy may be sufficient. In any event, it would be hazardous for the debtor, after he receives any form of demand from the Government, to proceed at variance therewith.

161. United States v. Eiland, 223 F.2d 118, 123 (4th Cir. 1955).

162. See note 78 supra.

to consider the relative situation of the federal tax lien according to the time it arises, whether before or after bankruptcy of the tax debtor.

Distinction Between Tax Lien and Tax Priority

In bankruptcy, a careful distinction must be made between a tax lien and a tax priority,[163] the former arising independently of bankruptcy, and the latter being a creature of the Bankruptcy Act. Quite different consequences in bankruptcy are appended to each.[164] A valid lien, whether for a tax or otherwise, is, in general, a charge against assets which must be met before distribution to claims, whether for a tax or otherwise, entitled to priority under the Bankruptcy Act. A right to priority accords a federal tax without a lien before bankruptcy, a particular precedence over other claims but only in the distribution of the bankrupt's remaining assets, that is, unencumbered assets after valid pre-bankruptcy liens are paid.[165]

Federal Tax Liens Arising Before Bankruptcy

Federal tax liens which arise before bankruptcy of the taxpayer are, with one exception, safeguarded by the Bankruptcy Act just as any other valid lien so arising.[166] They may be asserted against the property of the bankrupt taxpayer to the same extent as if the bankruptcy had not intervened.[167] The mentioned exception includes federal tax liens "on personal property not accompanied by possession of such property," where the lien is not enforced by sale before bankruptcy.[168] In this situation, such lien is subject to a limited subordination[169] by being postponed to the payment of claims specified in clauses (1) and (2) of subdivision (a) of section 64 of the Bankruptcy Act; clause (1) relating to certain administrative expenses, and clause (2), to certain wages. A federal tax lien, attaching as it often does to personalty without any taking of possession, may easily fall within this subordination.

Federal tax liens arising before bankruptcy, are, as in the nonbankruptcy situation, subject to the order of time rule as respects relative priority with other liens so arising.[170] In the non-bankruptcy situation,

163. Dallas v. Crippen, 171 F.2d 526, 529 (5th Cir. 1949).

164. Collier, Bankruptcy Manual § 64.00 at 788 (2d ed. 1954) (hereinafter cited as Collier).

165. Id. § 64.402 at 803.

166. Goggin v. Division of Labor Law Enforcement, 336 U.S. 118, 126-27 (1949); United States v. England, 226 F.2d 205 (9th Cir. 1955); California State Dep't of Employment v. United States, 210 F.2d 242 (9th Cir. 1954); 6 Am. Jur., Bankruptcy § 949 (1950).

167. 6 Am. Jur., Bankruptcy § 949 (1950).

168. 11 U.S.C.A. § 107 (c)(1) (1953).

169. Goggin v. Division of Labor Law Enforcement, 336 U.S. 118, 127 (1949).

170. California State Dep't of Employment v. United States, 210 F.2d 242 (9th Cir. 1954); In Re Freeze-In-Mfg. Corp., 128 F. Supp. 259 (E.D. Mich. 1955).

as discussed previously,[171] the first in time rule was changed to first "perfected" in time. Is this change applicable where bankruptcy of the tax debtor intervenes? The Supreme Court has not decided the question, and possible answers run deep.[172]

Federal Taxes Which Are Not Liens

As to federal taxes which are not liens before bankruptcy,[173] they are placed on the fourth of a five rung ladder of priority,[174] payable out of unencumbered assets. They are placed on an equal footing with other tax claims which are not liens before bankruptcy, and no preference may be given to federal over other taxes; if the estate is insufficient to pay all such taxes in full, a pro rata distribution is contemplated.[175]

Taxes incurred during bankruptcy are a cost of administration, and entitled to a first priority,[176] applicable to unencumbered assets.

In bankruptcy, the 3466 priority claim of the Government arising before bankruptcy is assigned the fifth and last rung of priority,[177] applicable to unencumbered assets.

The Will of Congress

The Bankruptcy Act affords a remarkable contrast in the matter of the will of Congress. Under the priority and general tax lien statutes, where Congress expressed its will in only the most general and abbreviated form, the Supreme Court broadened, step by step, the authority of the federal government to collect unpaid taxes.

In contrast, under the bankruptcy statute, where Congress expressed its will specifically and in detail, there are policies that look in the opposite direction from those asserted by the Supreme Court under the priority and tax lien statutes. Thus, as shown above, federal taxes which are not a lien before bankruptcy are inferior to three classes of claims, and are payable only out of unencumbered assets; the 3466 priority is inferior to four classes of claims and is payable only out of unencumbered assets. Inchoate statutory liens are dealt with by Congress[178] much more solicitously than by the Supreme Court. Granting that the courts must carry out the will of Congress "in order to secure an adequate

171. See note 108 supra.

172. Discussed at length in 3 Collier, Bankruptcy § 67.24 at 264-67 (14th ed. 1942). See also Collier § 67.21 at 856.

173. In Re Lambertville Rubber Co., 111 F.2d 45, 48 (3d Cir. 1940); see also notes 83-85 supra.

174. 11 U.S.C.A. § 104 (4) (1953).

175. Collier § 64.401 at 802.

176. Ibid.

177. 11 U.S.C.A. § 104(4) (1953); Collier § 64.501 at 812.

178. 11 U.S.C.A. § 107(b) (1953); Collier § 67.23 at 861.

revenue to sustain the public burdens and discharge the public debts," this purpose is nevertheless the primary business of Congress. When Congress has clearly expressed its will as in the bankruptcy statute, such clearly expressed will should govern the judicial construction of its more generally expressed will in the priority and tax lien statutes, instead of the latter will being regarded as proceeding in a direction sharply at variance with the former will.

CONCLUSION

In the collection of federal taxes, Congress has, in brief, provided ordinary weapons—a mere right of priority, and an ordinary lien. Although Congress has not elevated these federal rights, the Supreme Court has done so by cutting off competing state statutory liens which are antecedent to the federal right. The cutting-off has resulted from a right of priority without a lien, and a lien without primacy. The judicial process is the court's introduction of the doctrine of inchoate lien. Thus, a time bomb has been put into the antecedent interests of others in the property of the tax debtor, and in this way the Government has an interest in the tax debtor's property greater than the tax debtor himself has.

The inchoate lien doctrine represents a detour road built by the Supreme Court, without the aid of Congress, around both the priority statute and the general tax lien statute. In the obscurity of the application of the court's doctrine, there lurks an ambush for third parties.

If, as believed, the Supreme Court has failed to discern the true will of Congress as to the scope of the priority statute and the general tax lien statute, it is possibly too late for that Court to reopen the subject. Possibly too late, because of the line of decisions under the priority statute commencing in 1929 and the line of decisions under the general tax lien statute commencing in 1950. The Supreme Court could, of course, retreat in the future application of its doctrine of inchoate lien. Failing this, the only other avenue for reopening is Congress. The outset of the question can be briefly stated: Should any antecedent property rights of third parties be taken for the federal taxes of another party?

ADDENDUM

The important *Ball* case[179] since the writing of this article, has been decided by the United States Supreme Court[180] In the first case of its kind, a bare majority of the Court cut off antecedent assignment of money, as collateral security, in favor of a subsequent federal tax lien against the assignor.

The opinions of the Supreme Court are even more important than the decisions. Justice Jackson forcefully so reminded counsel upon the occasion of oral argument of the famous steel seizure case, Youngstown Co. v. Sawyer.[181]

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179. See p. 23 and note 154 supra.

180. —— U.S. —— (1958).

181. 343 U.S. 579 (1952).

In relation to this view, the majority opinion in the *Ball* case is extremely disappointing, for it reads in full:

"Per Curiam. The judgment is reversed. The instrument involved being inchoate and unperfected, the provisions of § 3672(a), Revenue Act of 1939, 53 Stat. 449, as amended, 53 Stat. 882, 56 Stat. 957, 26 U.S.C.A. § 3672(a), do not apply. See United States v. Security Trust & Savings Bank, 340 U.S. 47 . . . ; United States v. City of New Britain, 347 U.S. 81, 86-87 . . . . The claim of the interpleader for its costs is controlled by United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 . . . ."

Four Justices dissented, on extended opinion by Justice Whittaker.

Although the majority did not say so, their action in reversing the judgment below necessarily meant that the subesquent federal tax lien was superior to the antecedent assignment. The latter, therefore, was cut off in favor of the former. What were the grounds?

The majority reveal very little about their grounds. So little, indeed, that it is risky to try to state the grounds. On this account, and at this risk, it may be more helpful to attempt to consider the majortiy opinion in the framework of some questions which seem fundamental.

The provisions of section 3672(a), do not apply, the Court said. What are those "provisions," and to what do they "not apply"?

The provisions are only of two types, namely, the effect of the tax lien not being filed of public record, and the place of such filing. The latter did not figure in the case. Therefore, the former must have been the "provisions" referred to by the Court. These provisions read:

"Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector . . . ."

This provision sets out categories of interests.[182] The Court, however, referred to the "instrument involved." Presumably, the Court intended its reference to apply to the interest created by the instrument involved. This interest was that of assignee, as collateral security.

Was the interest of assignee within the categories of interests set out in the statute? If it was not, then this basic ground would seem to make the statute inapplicable. Such non-application, in turn, could have raised the correctness of Justice Jackson's limited concept of "and no others."[183] But the Court seems not to have proceeded on the mentioned basic ground, for, in saying that the provisions of the statute "do not apply," the subject is not the interest, per se. The subject seems to be certain qualities of the interest, the qualities being described as "inchoate and unperfected." These qualities seem to be the key to why the majority thought the statute did not apply. In this light, the majority seem to give the implication that, but for these qualities, the interest was otherwise within the categories of interests set out in the statute. It would seem, therefore, that the Court treated the interest of assignee, per se, as within the categories of interests set out in the statute, but held the statute inapplicable because the interest had the qualities of being "inchoate and unperfected."

182. See p. 12 supra.

183. See p. 17 supra.

What interest set out in the statute was the assignee interest within? The latter was not so classfied by the Court. It would seem safe to eliminate the interest of "judgment creditor," for this did not figure in the case. This leaves the three other interests—"mortgagee, pledgee, purchaser." The courts below principally invoked the interest of "mortgagee," and the minority invoked that interest alone, both being on the basis of state law. Since the majority apparently invoked some interest specified in the statute, in order to give the implication mentioned above, it could be that they did not disagree with the courts below or with the minority in contemplating the "mortgagee" interest. This view is not inconsistent with the Court's own general characterization of a similar assignment: "But here the transfer was as collateral security. It was therefore a *mortgage* of the goods and the returns."[184]

Why did the qualities of "inchoate and unperfected" make the statute not apply? There are no such words in the statute. Moreover, never before had the Court applied such words to this particular statute. The answer may be that the Court was extending its "inchoate" lien doctrine.[185] If this be true, the extension was an extraordinary step. The inchoate lien doctrine was developed, in the tax lien area, under the statute imposing the tax lien section 3670. The *Ball* case, however, did not involve this statute; it involved section 3672(a), whereby Congress created filing protection as to specified interests of third parties. It is one thing, and going far, to elevate the federal lien by cutting off inchoate interests. It is quite another and different thing, and going much further, to use the inchoate concept to cut off interests which Congress has expressly protected in language that makes no reference to the matter of inchoateness. If, as may be, the Court did take this extraordinary step, then we have another instance of the court, without the aid of Congress, building a detour road—this time and for the first time, around the congressional filing protection.

What made the assignee interest "inchoate and unperfected"? There is nothing more than the majority's statement that this was so—a bare conclusion, without explanation except for the citation of two cases. The citation of the two cases suggests enlightenment to be found therein. The expected enlightenment, however, was nonexistent to four Justices. They analyzed the same two cases and vigorously assert "they are not in point nor in any way controlling," and "they do not in any way support the Court's decision here." So, whatever enlightenment in the two cases appeared to five Justices, in no way whatever appeared to four Justices.

The minority did not leave in the dark the matter of "inchoate and unperfected." They discuss various points, from which they conclude:

> "In these circumstances, I think it is clear that the assignment was in legal effect a mortgage, completely perfected on its date, in all respects choate, and valid between the parties; and inasmuch as it antedated the filing of the federal tax liens it was expressly made superior to those liens by the terms of § 3672(a)."[186]

184. Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386, 447 (1828). (Emphasis added.)
185. See p. 4 supra.
186. —— U.S. —— at —— (1958).

In summary: Congress has protected certain interests including "any mortgagee" against federal tax liens subsequently filed of public record; in the *Ball* case, the Supreme Court seems to have read into congressional protection a requirement that a mortgage be not "inchoate and unperfected"; what renders a mortgage "inchoate and unperfected," and in turn, vice versa, is undisclosed.

In the congressional protection there lurks a judicial ambush—a potential time bomb in the antecedent interests of third parties. Whether the judical ambush will apply beyond the interest of mortgagee, and incdude the other protected interests of "pledgee, purchaser or judgment creditor," is unknown. That any ambush should exist for these important interests, which have been congressionally protected, is incredible. Equally incredible is the threatened judicial ambush of certain mortgagees, in connection with the federal right under the priority statute.[187] Congressional action has become imperative.

The American Bar Association, through the House of Delegates, has created a Special Committee of the Association, designated "The Committee on Federal Liens," to study the subject and to report to the House of Delegates at its annual meeting in Los Angeles.[188]

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187. See notes 48-50 supra.

188. 44 A.B.A.J. 384-85 (1958).