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# IMPROVING THE LAW OF FEDERAL LIENS AND PRIORITIES

JAMES ANGELL MACLACHLAN\*

The reason for this comment may not be obvious. There is no need for scholarly research. Mr. Plumb has written articles constituting a model of exhaustive research marshalled with such candor and skill that the tortuous and ramified paths of the law do not obscure the shocking outline of the picture he paints.<sup>1</sup> Several years earlier Prof. Kennedy had ably exposed "the pernicious career of the inchoate and general lien,"<sup>2</sup> which had already led to serious forfeitures of private property, although the worst was yet to come. The area examined is not a dark corner of remote theory but a conspicuous feature of the law and business of credit in this country today.

The "final" report of the Committee on Federal Liens of the American Bar Association was presented to the House of Delegates at its mid-year meeting on February 23, 1959. This booklet of 139 pages gives a clear and realistic survey of the complex of problems produced by an overzealous court and an inattentive Congress. The bill evolved by this Committee and now sponsored by the Bar Association<sup>3</sup> represents a balanced approach and detailed provisions carefully tailored to afford a workable reconciliation of conflicting interests. The official print of this bill encompasses 66 pages averaging 24 lines each. Notwithstanding all this, a comment here may serve two purposes.

Patent as the facts and the law may be, they reek of liquidation and of taxation. These are both commonly regarded as esoteric specialities not intelligible to the ordinary lawyer or business man without an expenditure of time and energy that few have to spare. Consequently, far too few have stopped to observe how bad the situation is or what can be done to rectify it. They should be assured that you don't need to be an expert to know beans when the bag is open. This comment aims first to open somewhat wider the already gaping

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<sup>1</sup> *Federal Tax Collection and Lien Problems*, 13 *Tax L. Rev.* 247, 459 (1958).

<sup>2</sup> Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 *Yale L.J.* 905 (1954).

<sup>3</sup> H.R. 7915, 86th Cong., 1st Sess., introduced by Mr. Simpson of Pennsylvania on June 23, 1959, and referred to the Committee on Ways and Means. H.R. 7914, introduced by Mr. Mills of Arkansas, is said to be identical. All references here are to H.R. 7915, as the one that happens to be at hand.

bag. Another purpose is to record some reflections concerning the natural tendency of recent decisions to set up a chain reaction through our credit system subversive of the prime objective of the present law, *viz*: to protect the Federal Revenue.

These purposes necessarily involve a glance at the impact on business of the collection of government claims, and some statement of existing law and outstanding points of the leading present proposal to improve it.

#### THE IMPACT OF GOVERNMENT CLAIMS

It is common knowledge today that governmental activities have been expanding for three-quarters of a century and that this trend has been accelerated, virtually without interruption, during at least the last third of that period. The impact of government on business is extended in several dimensions. First, the rates of all taxes are increased. Second, new taxes are constantly being invented and introduced, frequently on a "temporary" basis, only to become indefinitely extended until they become, practically if not theoretically, permanent taxes, frequently at increased rates.<sup>4</sup> Occasionally an old tax is abandoned in form or in substance, but the death rate signally fails to keep up with the birth rate. Third, the increase of the volume of transactions through governmental agencies produces a corresponding enlargement of governmental claims against debtors in addition to tax claims. Thus government leans ever more heavily on business to the extent that it is granted priorities over citizens for its claims against insolvent debtors.

Conceding that business may derive some benefit as well as burdens from government, and that ready justification can be found for heavy burdens, the magnitude of both governmental and business operations accentuates the need for apportioning and applying the load in such a manner as to avoid knocking business off its stride. It is also always important to keep standards of elementary fairness in mind. Business can carry a bigger load farther if the load is well distributed and if the beasts of burden feel that they have a master with decent respect for their basic needs.

In spite of the elementary character of the foregoing discourse, far too few people seem aware of the most conspicuous failure of our present law even to move in the direction of the indicated objectives. The federal law of liens and priorities is bad and rapidly getting

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<sup>4</sup> The most glaring example that comes to mind happens to be a state tax. A Massachusetts income tax return requires a tax to be computed and set forth at certain rates and then increased by 23%. In depression days, a quarter century ago, a 3% increment was added "temporarily." This "temporary" increment has since been raised by two successive increments of 10% of the original tax.

worse. It has many evil facets, but most of them share a single characteristic. The government collects its revenue and other claims, to an increasing extent, not from its taxpayers and those who enter into direct business relations with it or its various agencies, but from those who enter into business relations with taxpayers or with those against whom the government has other claims.

In dealing with large forces bearing upon human activities, well directed action frequently calls for a consideration of repercussions which often transcend in time and space both the acts and the parties most immediately involved. The head of one of the earliest of the large charitable foundations long ago explained the theory upon which the administrators of its funds selected the causes it chose to serve. They sought to foster activities that were "germinal." The foundation was to aid people that were working for the benefit of others and frequently setting an example which might be followed elsewhere. Education, for instance, at its best, can be germinal. The disciples of one three or four year college generation can be the apostles of the next, and if the educational institution is really a source of enlightenment, an investment in seed corn there may produce benefits disproportionately large. Unfortunately, not all things germinal are beneficial. Any legal system which injects unnecessary doubt and uncertainty into credit transactions tends to be germinal of a noxious growth. One man's creditor is the next man's debtor, and anything that tends to make credit transactions precarious can have widespread corrosive effects.

Indiscriminate extension of credit, secured or unsecured, is not to be encouraged. Business can be kept sound if secured credit is granted only on sound security worth a safe margin above the debt and only if unsecured credit is based upon reasonable investigation of moral risks and kept in line with prospective earning power. The application of such standards is facilitated by law which minimizes the intervention of avoidable disturbing factors. The present law of federal liens and priorities is well adapted to maximize the intervention of disturbing factors in amounts which are unpredictable. The increased risks of extending credit operate to make credit obtainable only upon more onerous terms.

The advantage that the government gets from its liens and priorities is assistance in collecting its claims and obligations from those who did not incur them. It thus collects more money in the short run. It probably collects less in the long run. In taking the biggest cut of the business pie (52% net income of corporations plus double taxation of dividends, for example), the government has produced a situation which can be roughly described by paraphrasing a notorious comment

to the effect that what is good for business (if not General Motors) is good for the United States and vice versa. This only begins to tell the story, however, because the increased costs of making credit risky are not measured by the increased out-of-pocket costs in cases of actual liquidation. Business has to absorb the increased cost of the credit work and the legal work of taking precautions in many cases for each case where the apprehended risks actually materialize. This money goes to reduce net taxable incomes from business. There is little basis for assuming that the government gains through increased incomes of credit men and lawyers. These people should do at least as well if they were more productively employed under a more efficient legal system.

§ 3466, REVISED STATUTES<sup>5</sup>

Section 3466 of the Revised Statutes, a relic of the ox cart days,<sup>6</sup> intrudes upon attention at this point because it afforded occasion for the introduction of the doctrine of the inchoate lien. In form this section creates a priority but no lien, providing merely that the claim to United States be first satisfied whenever any person indebted to the United States is insolvent or involved in any of several liquidation procedures. The insolvency referred to has long been held to be not mere inability to pay debts as they mature, but insolvency associated with some liquidation proceeding, as in probate, attachments, or assignments for the benefit of creditors.<sup>7</sup> A study of liens and priorities in the National Bankruptcy Conference led to the conclusion that even if a favored interest be designated by statute as a lien, it is mislabelled if it attaches only upon insolvency or upon liquidation proceedings. A true lien is a property right existing and entitled to recognition as soon as it is created by contract, by conveyance, by legal process, or otherwise. A mere direction of the order of distribution in cases of insolvency or liquidation is only a priority in substance. This concept has been embodied in a bill in relation to amendments of Section 67c of the Bankruptcy Act, which passed the House of Representatives on August 25, 1959.<sup>8</sup> Upon any such basis, Section 3466 creates merely a priority in substance, and this would be the case even if Congress had labelled it a lien. But Congress has not even given it any such label. Nevertheless, the rights of the United States under this section have been held to outrank a great variety of prior liens, for the unconvincing reason that these liens have been described as inchoate.

<sup>5</sup> (1874), 31 U.S.C. § 191 (1954).

<sup>6</sup> See Act of July 31, 1789, § 22, 1 Stat. 42; Act of March 3, 1797, 1 Stat. 512.

<sup>7</sup> See *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 490 (1926); *Plumb*, op. cit. supra note 1, at 481-483 (1958).

<sup>8</sup> H.R. 7242, 86th Cong., 1st Sess., § 5. It provides, inter alia, for treating spurious "liens" as mere priorities in bankruptcy.

According to general principles long recognized in bankruptcy, valid liens, choate or inchoate, outrank all priorities, but Section 3466 has developed a law of its own outside the bankruptcy domain. State and federal taxes were placed on a parity and ahead of other federal government claims by the Bankruptcy Act of 1898.<sup>9</sup> The Bar Association and some of the other groups that later promoted the National Bankruptcy Conference took an early interest in bankruptcy and achieved something in relation to priorities in bankruptcy in 1926. Wages were then put ahead of taxes for the first time.<sup>10</sup> The situation outside of bankruptcy received no comparable attention. The United States went to the head of the list of priorities on a general theory of federal supremacy, but the priority did not outrank competing liens until the doctrine of the inchoate lien was evolved. The remedy applied in H.R. 7915<sup>11</sup> is to apply the bankruptcy ranking in other liquidations and to abolish the doctrine of the inchoate lien.

#### THE DOCTRINE OF THE INCHOATE LIEN

A common course of growth of doctrine by case law occurred here. The first case has facts which may support it, but the opinion does not place weight on the facts. If the doctrine of a case is to grow, general language in the opinion is then applied to quite a different state of facts. If the court favors the direction in which the doctrine is moving, it can continue to expand it. This can all be done ostensibly in the exercise of the power to construe legislation.

By 1836 it was well established by United States Supreme Court cases that the federal priority did not overcome an antecedent lien,<sup>12</sup> unless one is precluded from so asserting by the fact that the Court, starting in 1941,<sup>13</sup> has four times denied that it has ever so decided.<sup>14</sup> The doctrine of the inchoate lien arose from a 1929 case where the state taxes were not effective liens by state law until assessed on specific property. The Supreme Court remarked that the liens were not specific and completed by distress.<sup>15</sup> The requirement that the lien be specific and perfected was then picked up as a requirement of federal law in cases where this contradicted the applicable state lien

<sup>9</sup> § 64, 30 Stat. 544, 563.

<sup>10</sup> Act of May 27, 1926, § 14, 44 Stat. 662, 667, amending Bankruptcy Act § 64.

<sup>11</sup> Title II, pp. 52-57.

<sup>12</sup> *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386 (1828); *Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596 (1836). See Kennedy, *op. cit.* note 2, 908-911.

<sup>13</sup> *United States v. Texas*, 314 U.S. 480, 484-486 (1941).

<sup>14</sup> *United States v. Texas*, *supra* note 13, at 484; *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355 (1945); *Ill. ex rel. Gordon v. Campbell*, 329 U.S. 362, 370 (1946); *United States v. Gilbert Associates*, 345 U.S. 361, 365 (1953). See Kennedy, *op. cit.* *supra* note 2, at 910, n. 27.

<sup>15</sup> *Spokane County v. United States*, 279 U.S. 80 (1929). The state law was controlled by *Pennington v. Yakima County*, 127 Wash. 538, 221 Pac. 326 (1923).

law,<sup>16</sup> and this movement has been carried forward<sup>17</sup> in complete disregard of the needs of business, in complete disregard of the policy of state law and of the reasonable expectancies of parties founded thereon.

Once it was established that liens competing with federal interests were to be disregarded unless choate, the same idea was used to promote the floating federal tax lien. This lien arises upon all the taxpayer's property whenever a tax deficiency is assessed<sup>18</sup> and remains upon all his property then or thereafter acquired until the deficiency is removed. Postponing the consideration of the secret nature of the lien while it remains secret,<sup>19</sup> immediate note may be taken of the patent fact that, with or without any potency to be added by notoriety, such a lien is at least as potent as a priority. If the federal interest loses nothing from its inchoate and floating character, while competing interests are held to a totally different standard, bizarre results may ensue.

#### MECHANICS' LIENS

Mechanics' lien laws are designed to shield unpaid contractors, laborers and materialmen from the consequences of the law of realty and of fixtures which would make the improvements the unencumbered property of the landowner, and such laws are designed to encourage these classes of people to collaborate in the improvement of real property without getting pay in advance or exacting collateral security. The mechanics' lien laws recognize that bookkeeping for work and material must practically follow the facts. Under statutory law the seniority of the lien may date from the time the work is done, provided a statement of the amount secured is filed within a specified statutory time after the completion of the work.<sup>20</sup> This protection is destroyed when the government, under *United States v. White Bear Brewing Co.*,<sup>21</sup> is permitted to place a secret tax lien against the landowner ahead of a mechanics' lien valid under state law. The less sophisticated members of the construction industry are greatly shocked to find their accustomed security taken by the United States to meet secret claims against the landowner. The more sophisticated must arrange in advance to get other security or to increase the allowances for contingencies that enter into their prices and their bids.

<sup>16</sup> *New York v. Maclay*, 288 U.S. 290 (1933); *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353 (1945).

<sup>17</sup> *United States v. Texas*, 314 U.S. 480 (1941); *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362 (1946). And see *infra*.

<sup>18</sup> IRC § 6321.

<sup>19</sup> See *infra*.

<sup>20</sup> *New York-Brooklyn Fuel Corp. v. Fuller*, 11 F.2d 802 (2d Cir. 1926); *Wickes Boiler Co. v. Godfrey-Keeler Co.*, 116 F.2d 842 (2d Cir. 1926).

<sup>21</sup> 350 U.S. 1010 (1956).

The doctrine that no lien competing with that of the United States can be recognized as choate until the amount secured has been determined and until all other conditions precedent to its enforcement have matured was widely developed with reference to liens imposed by statute or arising through legal proceedings without regard to the volition of the debtors. This has now been extended to liens by voluntary contract in a decision satisfying a government claim against a principal debtor at the expense of his surety and in disregard of the security assigned to the surety.<sup>22</sup>

#### LIENS OF SURETIES

Surety companies have long been accustomed to reduce their losses upon construction bonds by taking contractual security upon the funds to arise in the work. They lend their credit to a contractor and greatly reduce the risk that those who furnish work or materials will suffer loss through his failure. He is required to procure a bond for that express purpose. It is entirely reasonable and in accordance with long established practice that the surety companies be encouraged to do this by arrangements which secure them against losses due to the intervention of third parties not involved in the job. The government now lurks in the background as a potential intervening claimant for sums which may exceed the remaining resources of a struggling contractor. Withholding and social security taxes are a particular source of trouble. A contractor has to pay his help or abandon the job, but the government does not press him. It lies back and lets him pile up arrears he can never meet and then collects what he has left at the expense of his creditors through the federal law of government liens and priorities.<sup>23</sup> Most surety companies can close out their activities in the construction bond field. Unless they are to do so, rates must be adjusted before long to cover the costs attributable to this new risk. Such companies are not presently organized actively to police a contractor's books and bank accounts, and the costs of setting up such organizations might exceed even the large sums the government is now in line to collect at their expense. The risks of substantial damage from the government are high, but there is no way of determining in advance the cases in which it may materialize, so the only choice is between following the usual insurance procedure of spreading the risk over the entire line of activity, and following the probably more

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<sup>22</sup> *United States v. Ball Construction Co.*, 355 U.S. 587 (1957).

<sup>23</sup> A case can be made for this, to the extent that the liability was incurred on the job bonded, but the government's rights are presently not so limited.

Some small relief would come in bankruptcy cases by the passage of H.R. 2236, 86th Cong., 1st Sess., which passed the House of Representatives on August 25, 1959, limiting tax priority in bankruptcy to the taxes which become due within 3 years preceding bankruptcy.

expensive course of policing the books and the bank accounts of all contractors. In either case, not even the Supreme Court can mulct the surety companies for long, because there is no way of keeping them long in a line of business unless they can recover their costs.

#### CONTRACTUAL LIENS IN GENERAL

The devastation of this decision is not limited to the surety business. The same principle of making the innocent party pay can be applied with equal logic to all contractual securities for contingent obligations. One harsh application, if more widely known, should arouse popular indignation. Purchasers of houses on the installment plan have lost both their houses and their part payments made. Their equities in the houses were held not to make them purchasers entitled to protection against unfiled liens and their equitable liens for reimbursement upon the failure of the builder to deliver clear titles were "inchoate."<sup>24</sup> Landlords, parties to negotiable instruments, lawyers<sup>25</sup> and creditors in general may be warned to raise their charges and to revise their ideas of trusting people, because the United States can be trusted to raise havoc at every opportunity. It is no comfort that the United States may spend more money than it takes in by such conduct on Small Business Administrations and other bureaucratic schemes to mitigate the damages through extending government credit, or underwriting, in whole or in part, extensions of private credit. The creditors who are damaged now have no discernible relation to the creditors who may receive governmental largess in the future as a by-product of the attempt to aid debtors through stimulating loans by private creditors who have, with good cause, become wary. Nor is the situation saved by the fact that some securities are protected against unfiled tax liens under U.S. Code § 6123. By the time the lien is filed the creditor who has previously extended the secured credit is usually too much involved to extricate himself. The entire purpose of giving him security, choate or inchoate, is to give him protection from the date of the initiation of his security. A security which is ineffectual until it is all but foreclosed is illusory, and only a trap for the unwary.

Conservative advice to creditors is not new. Over a decade ago, creditors were advised not to extend credit to debtors without establishing that they maintained adequate tax reserves and were free of non-tax liabilities to the government, because "Uncle Sam will take

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<sup>24</sup> *Leipert v. R. C. Williams & Co.*, 161 F. Supp. 355 (S.D.N.Y. 1957).

<sup>25</sup> An attorney on a contingent fee basis has been deprived of his interest in the fund he produced upon the ground that his interest was only inchoate. *Pay-O-Matic Corp. v. Goldstein & Sons*, 1 A.F.T.R.2d 1684 (1957), *aff'd per curiam*, 257 F.2d 48 (2d Cir. 1958).

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the assets if there is a failure.<sup>26</sup> Now the situation has become worse and the extension of secured credit may be as disastrous as the extension of unsecured credit.

### STRICT CONSTRUCTION OF FILING PROVISIONS

Congress long indicated an intention to protect valid liens under state law, both voluntary and involuntary, from the secret character of the federal tax lien by providing protection for judgment creditors, mortgagees and pledgees against liens not filed in an office made available for that purpose,<sup>27</sup> but the classes of liens to be so protected have been narrowly and literally construed in defiance of the patent purpose of the statute. Thus, when New Hampshire declared that a tax assessment was equivalent to a judgment, a majority of the United States Supreme Court held that there was no power in the state to define what would be a judgment within the meaning of the federal law, setting up a supposed standard of uniformity.<sup>28</sup> Again, a trustee in bankruptcy is clearly supposed to have the rights of a judgment creditor who takes such further steps as may be necessary to obtain a lien to enforce it,<sup>29</sup> but since he is not called a judgment creditor in so many words, the Supreme Court's attitude is causing him to lose his standing against the tax lien in the opinion of lower courts.<sup>30</sup> A bill to correct this and other more or less related situations in bankruptcy has passed the House of Representatives and is pending before the Judiciary Committee of the Senate,<sup>31</sup> but it will have small impact in the broader business world where the Treasury stalks its unsuspecting and innocent prey.

### THE REMEDY REQUIRED

The United States Supreme Court is not only preoccupied with humanities, and short of businessmen's lawyers, it is impressed with the need for federal government supremacy, while heedless of the impairment of business health without which the government cannot be sustained in the style to which it has become accustomed. Some of those in the Treasury Department are more aware of such fundamentals, as evidenced by restraint in enforcing government claims at the expense of innocent third parties in adjustments under administrative processes, but the litigating arm of the Treasury seems determined fully to exploit the judicial trend to destroy the basis of private credit.

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<sup>26</sup> Boston, *Uncle Sam Has First Call* . . . 23 *J.N.A. Ref. Bankr.* 17, 18 (1948), quoted in *MacLachlan, Bankruptcy*, 154 (1956).

<sup>27</sup> *Int. Rev. Code of 1954* § 6123.

<sup>28</sup> *United States v. Gilbert Associates*, 345 U.S. 361 (1953).

<sup>29</sup> See *MacLachlan, Bankruptcy*, 192 (1956).

<sup>30</sup> The cases are collected in *Annotation*, 2 *L. Ed.* 2d 1823, 1867 (1958).

<sup>31</sup> H.R. 7242, 86th Cong., 1st Sess.

Since the federal government has signally failed to serve even its own long term interest in the field of federal liens and priorities, it would be a natural reaction of the Bar to urge restoring the subject matter to the states, and indeed, there is a substantial segment of opinion in the American Bar Association that such a step would be both appropriate and beneficial. However, if the emotions accompanying a sense of outrage can be assuaged or kept within bounds, the businessmen's bar, which is the most concerned, should bear in mind the commercial advantages in having a law both national and rational to govern business transactions. To start competition among states to benefit their citizens against the citizens of other states by putting the greatest possible obstacles in the path of collection of federal claims suggests new evils to supplant the present ones.

It seems better to start afresh with a federal law designed to protect the legitimate interests of the United States, while specifically serving the rights of several classes of lien claimants who clearly ought not to be outranked by subsequent governmental claims against the debtor. The extent to which security interests are to be protected is dealt with in broad terms in H.R. 7915 and, as in the Uniform Commercial Code,<sup>32</sup> a security interest is defined broadly with reference to its function and not with reference to the various forms that have so long dominated the general law in this field.

#### THE PROPOSED LAW OF FEDERAL TAX LIENS

The proposed law first makes a general declaration subjecting the federal tax lien to a security interest which becomes effective before the lien is filed. Some exceptions to this rule are later stated. After the federal lien is filed, the competing lienor can build up his priority for further advances or performance only if he is obliged to do so under his contract or is under a contingent liability depending upon an event beyond his control, or if he is involved in a continuous operation such as marketing or farm production, except that a security interest for a single public issue of securities is also protected. In other cases, the holder of a security interest is protected for new credits after the tax lien is filed only if he serves written notice of his security upon the Secretary of the Treasury more than 15 days<sup>33</sup> but not less than 1 year before his new credits are made. If he does, he gets a priority, unless the Secretary promptly notifies him that a tax lien has been

<sup>32</sup> UCC §§ 1-201 (37), 9-102.

<sup>33</sup> A proposal is pending to give protection to the secured creditor retroactively to the commencement of the 15 day period, if word of the unfiled lien does not come back from the Secretary during that period. The text of the bill as it stands is the result of a mechanical error in transcribing the results of a revision by the draftsmen in the pre-Congressional stage.

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filed, or unless he has actual notice to that effect.<sup>34</sup> This recognizes that the Treasury cannot make a routine of searching records for security transactions with taxpayers, nor can a secured creditor check for tax liens every time he makes an additional advance. The change puts dealings with the government on a practical business basis. The Bureau of Internal Revenue gets the information it needs fed right into its office, and is required to take the simple step of serving notice of its tax lien upon the creditor who initiates the correspondence.

Property coming in under after-acquired property clauses after notice of tax lien has been filed augments the lien of an old security only if it was financed by the security interest, physically integrated into existing security, or substituted for other property and necessary to maintain the value of a security interest. A secured creditor may be protected upon new security if it is only proportional to additional advances he is obliged to make.<sup>35</sup>

Bona fide purchasers (before and after obtaining legal title), optionees and lessees are protected against unfiled tax liens.<sup>36</sup>

Mechanics' liens are expressly given priority over the tax lien,<sup>37</sup> except as against a lien for withholding taxes "under subtitle C" of the Internal Revenue Code<sup>38</sup> and certain derivative rights of third persons which may arise thereunder, but holders of unrecorded interests have the burden of showing value and good faith.<sup>39</sup> In cases of circuity of lien, mechanics' liens were originally to be subject to a special provision drafted on sound principles to cut such Gordian knots. Unfortunately, this last special provision was dropped at a late stage of the Bar Committee's labors. The difficulties of exposition to Congress and the public may have been deemed disproportionate to its net worth. The bill retains a more general provision for cases of circuity which should reduce litigation or make more predictable the result of any litigation that may take place.

Judgment liens are also specifically protected.<sup>40</sup> Landlords' liens are restricted to rent and obligations accruing before or within three months after the filing of the tax lien, except in case of possessory security interests.<sup>41</sup> Special consideration has been given to estate and gift tax liens. The pending bill conforms their relative priorities to those prescribed for the general tax lien, while making clear that such liens expire when the assessment or collection of the underlying

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<sup>34</sup> Proposed IRC § 6323(a)(2), H.R. 7915, pp. 2-6.

<sup>35</sup> Proposed IRC § 6323(a)(3), H.R. 7915, pp. 6-7.

<sup>36</sup> Proposed IRC § 6323(b), H.R. 7915, p. 7.

<sup>37</sup> Proposed IRC § 6323(c), H.R. 7915, pp. 7-8.

<sup>38</sup> Proposed IRC § 6323(i), H.R. 7915, p. 11.

<sup>39</sup> Proposed IRC § 6323(h), H.R. 7915, p. 10.

<sup>40</sup> Proposed IRC § 6323(d), H.R. 7915, p. 8.

<sup>41</sup> Proposed IRC § 6323(e), H.R. 7915, pp. 8-9.

taxes is barred by a statute of limitations.<sup>42</sup> The Committee Report recommends for future consideration the possibility of further restriction of these liens, which may unduly cloud titles without corresponding benefit to the Government. Other methods of collection may suffice.<sup>43</sup>

#### CIRCUITY OF LIEN

The bill has general provisions for circuity of lien. The United States is first to be paid its expected sum, and the amount payable with respect to other liens and interests shall be determined under "applicable law," which is usually state law. The expected sum is defined as the amount that the United States would receive on the basis of the priority of its lien (as defined by federal law) disregarding the relative priorities of the other liens inter se. Thus, if there is a \$10,000 mortgage antedating the filing of a federal tax lien, such a tax lien for \$15,000, and a \$5,000 landlord's lien, ineffectual against the federal tax lien by federal law, but superior to the mortgage by state law, a liquidation of property for \$15,000 will produce the following distribution: The United States will be paid its expected sum, the \$5,000 it would receive if the mortgagee were given the \$10,000 to which he is entitled under federal law; the \$10,000 remaining would then be distributed, \$5,000 to the landlord and \$5,000 to the mortgagee. The net effect of this is to permit the federal tax lien to be collected in substantial part at the expense of the mortgagee, thus contradicting the original expressed general intent of Congress. Nevertheless, it is appropriate for Congress to alter its original and general intention to dispose of the special vicissitudes of circular priority. A consensus on a broad solution for such problems is not readily reached, and it is better to have the process for solving such problems prescribed by legislation than to leave such questions at large to be disposed of by usually expensive and difficult litigation in the considerable number of cases that may arise in the indefinite future. The solution now put forward follows that of the Supreme Court in *United States v. City of New Britain*.<sup>44</sup> Enough Supreme Court law will have to be overturned to make the present reform effective without bearing the added burden of reversing one of the few guideposts in this confusing field. So much may be conceded even by those who would have been inclined to disagree with the New Britain case as an original question.

#### CONSENT OF THE UNITED STATES TO BE SUED

Title III of the bill<sup>45</sup> is significant, but does not call for extended

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<sup>42</sup> Proposed IRC § 6324, H.R. 7915, pp. 31-34.

<sup>43</sup> See Final Report for February 1959 Meeting, p. 42.

<sup>44</sup> 347 U.S. 81 (1954).

<sup>45</sup> H.R. 7915, pp. 58-66, to amend 28 U.S.C. § 2410.

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treatment here. It spells out the conditions on which the United States consents to be sued in actions affecting property in which it has a lien or interest. The increasing impact of these federal claims, which has already been discussed, accentuates the need for procedures to enable people to get timely determination of where they stand with reference to actual or possible claims of the government. This would seem so obvious that Title III should ride along easily in the same vehicle that carries the Titles that may have more dramatic appeal.

CONCLUSION

Examination of the foregoing footnotes will indicate that the bulk of the details in the bill have not been noticed and some important parts have been entirely ignored. The remedy of the unsatisfied reader is to obtain the Committee Report from the Bar Association at 1155 East 60th St., Chicago.

One who has long wrestled with the problems of getting lawyers to agree upon a formulation of proposed legislation designed to improve the law in a technical field can only marvel at the quality of the work embodied in the bill and its supporting report. They manifest a balance and an awareness of many factors suggestive of committee work at its best. They also show a mastery of detail to be achieved only by the application of intense individual scholarship to the hard facts of practice best known to those on the actual firing line. The country is very fortunate to be served with such a rare combination of realism, industry and professional skill. It only remains for the Bar to put its united strength behind this meritorious product.