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## TAXATION-LIENS-NATURE OF FEDERAL ESTATE TAX LIEN

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TAXATION—LIENS—NATURE OF FEDERAL ESTATE TAX LIEN—At the time of his death, decedent owned certain land in fee simple. His executrix, authorized by an order of the probate court, sold the land to herself as an individual. Subsequently, the United States began condemnation proceedings against the land, paying an award into court. Before distribution of this award was ordered, the executrix in her individual capacity and as ostensible owner was permitted in

accordance with statute to withdraw a part of this award. The withdrawal was made without prejudice to her right to the remainder if it proved more than sufficient to satisfy the claims of other parties in interest, and without effect on her duty to refund if it proved inadequate.<sup>1</sup> The United States then filed a petition for distribution of the award, naming with the executrix, as possible parties in interest, the Commissioner and Collector of Internal Revenue, on the ground that a lien for unpaid federal estate taxes might have attached. In answering, the commissioner asserted such a lien<sup>2</sup> on an amount in excess of that part of the award remaining in court.<sup>3</sup> The district court concluded that the sale of the land to the executrix had not divested the lien and that she was therefore liable to refund an amount sufficient to satisfy the claim of the United States. On appeal by the executrix, *held*, affirmed. *Smythe v. United States*, (C.C.A. 1st, 1948) 169 F. (2d) 49.

Under its power to lay and collect taxes, Congress has imposed a lien to secure payment of the estate tax,<sup>4</sup> which is entirely distinct from the general tax lien of the United States.<sup>5</sup> For purposes of computing the estate tax, property may be includible in the gross estate even though not transferred by testacy or intestacy, when otherwise passing at death<sup>6</sup> or when transferred inter vivos.<sup>7</sup> The estate tax lien arises at the death of the owner without requirement of assessment or demand, and attaches to all property which is includible in the gross estate.<sup>8</sup> Since a lien, by nature, adheres, whatever disposition is made of the property to which it is incident, this lien is not divested except where Congress has so provided by statute.<sup>9</sup> Though it does not assume priority to liens validly attaching during the lifetime of the decedent, it precedes, though unrecorded, all encumbrances arising after his death.<sup>10</sup> When property includible in the gross estate has been transferred directly from the decedent to a subsequent taker, the lien continues to attach unless the transfer is for a full and adequate consideration.<sup>11</sup> Before October 21, 1942, if an inter vivos taker of property includible in the

<sup>1</sup> 46 Stat. L. 1421, § 1 (1931), 40 U.S.C. (1946) § 258(a).

<sup>2</sup> 53 Stat. L. 128, § 827(a) (1939), 26 U.S.C. (1946) § 827(a).

<sup>3</sup> When land is condemned, all the liens that were attached to it are obliterated and attach to the condemnation award in its place. *United States v. 25,936 Acres of Land*, (C.C.A. 3d, 1946) 153 F. (2d) 277 at 279.

<sup>4</sup> U.S. Const., Art. 1, § 8; I.R.C., § 827(a); see *Michigan v. United States*, 317 U.S. 338, 63 S.Ct. 302 (1943).

<sup>5</sup> I.R.C., § 3670; *United States v. McGuire*, (D.C. N.J. 1941) 42 F. Supp. 337. *United States v. McGuire*, (D.C. N.J. 1941) 42 F. Supp. 337.

<sup>6</sup> I.R.C., §§ 811(b), (e), (f), (g)(1).

<sup>7</sup> I.R.C., §§ 811(c), (d), (f), (g)(1).

<sup>8</sup> *Detroit Bank v. United States*, 317 U.S. 329, 63 S.Ct. 297 (1943).

<sup>9</sup> *Michigan v. United States*, 317 U.S. 338, 63 S.Ct. 302 (1943). The lien terminates at the end of ten years. I.R.C., § 827(a).

<sup>10</sup> *Michigan v. United States*, *ibid.*; *In re Decker's Estate*, 355 Pa. 331, 49 A. (2d) 714 (1946), cert. den., 331 U.S. 807, 67 S.Ct. 1190 (1947); *United States v. Bank of Los Angeles*, (D.C. Cal. 1939) 30 F. Supp. 113, appeal dismissed, (C.C.A. 9th, 1940) 113 F. (2d) 491.

<sup>11</sup> *Hughes v. Sun Life Assur. Co.*, (C.C.A. 7th, 1946) 159 F. (2d) 110; but see *John Hancock Mut. Life Ins. Co. v. Helvering*, (App. D.C. 1942) 128 F. (2d) 745. By the terms of the Revenue Act of 1926, 44 Stat. L. 80, § 315 (b) (1926), the lien was

gross estate conveyed to a bona fide purchaser,<sup>12</sup> the lien was divested and attached to all of the property of the seller. However, the lien was not removed by sale to a bona fide purchaser from one taking gross estate property at the death of the decedent.<sup>13</sup> The basis of this distinction lay in the fact that the notoriety of the proceedings surrounding transfer at death diminished the need to give additional protection to purchasers from one taking at death. But the Revenue Act of 1942 changed the line of distinction by providing that whenever property is includible in the gross estate otherwise than as probate property, a bona fide purchaser from the immediate taker shall be protected by divestment of the lien.<sup>14</sup> The lien then attaches to all the property of the seller. Only where it actually passes by testacy or intestacy is the property in the hands of such a bona fide purchaser still subject to the burden of the lien.<sup>15</sup> If, during the period before distribution, the executor disposes of property pursuant to a court order in settlement of claims against the estate or expenses of administration, that property is divested of the lien.<sup>16</sup> The present case indicates that, at least where the transferee is not a bona fide purchaser, a transfer by the executor for any other purpose, even though pursuant to court order, will not divest the lien. It is intimated that the result will be the same where the purchaser is bona fide. If, however, the proceeds from such sale can be traced into an approved payment of claims against the estate or costs of administration, then the lien is divested from the transferred property.<sup>17</sup> Payment of tax as ascertained by the commissioner, though discharging the executor from personal liability,<sup>18</sup> does not divest the lien as to any portion of the tax later found to remain unpaid.<sup>19</sup> However, conveyance of property to a bona fide purchaser subsequent to such payment will serve to direct the lien from the property to the proceeds of the sale.<sup>20</sup>

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expressly divested, if full and adequate consideration was given. Since the Revenue Act of 1942, 56 Stat. L. 950, § 411(a) (1942), incorporates by reference the applicable subdivisions of 53 Stat. L. 120, § 811 (1939), 26 U.S.C. (1946) § 811, each of which is itself subject to such a limitation, it is no longer expressed in the former provision of the 1942 Act.

<sup>12</sup> "Bona fide purchaser," as used herein, will be understood to mean "bona fide purchaser for full and adequate consideration."

<sup>13</sup> 44 Stat. L. 80, § 315(b) (1926) as amended by 47 Stat. L. 280, § 803(c) (1932); *Detroit Bank v. United States*, 317 U.S. 329, 63 S.Ct. 297 (1943).

<sup>14</sup> 56 Stat. L. 950, § 411(b) (1942), I.R.C., § 827(b).

<sup>15</sup> *Id.*; TREAS. REG. 105, § 81.85(e).

<sup>16</sup> 53 Stat. L. 128, § 827(a) (1939), 26 U.S.C. (1946) § 827(a); TREAS. REG. 105, § 81.85(b).

<sup>17</sup> See *United States v. Bank of Los Angeles*, (D.C. Cal. 1939) 30 F. Supp. 113, appeal dismissed, (C.C.A. 9th, 1940) 113 F. (2d) 491.

<sup>18</sup> I.R.C., § 825.

<sup>19</sup> I.R.C., § 827(c); *Paul v. United States*, (C.C.A. 6th, 1942) 127 F. (2d) 64.

<sup>20</sup> I.R.C., § 827(c); *Detroit Bank v. United States*, 317 U.S. 329, 63 S.Ct. 297 (1943); TREAS. REG. 105, § 81.85(c).