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## Federal Tax Lien—Forced Sale of the Homestead Interest of a Non-Delinquent Spouse

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FEDERAL TAX LIEN—FORCED SALE OF THE HOMESTEAD INTEREST OF A NON-DELINQUENT SPOUSE. *United States v. Rodgers*, 103 S. Ct. 2132 (1983).

In 1955, Lucille and Phillip Bosco acquired residential property in Dallas, Texas, which they occupied as their homestead under Texas law.<sup>1</sup> In 1971 and 1972, the federal government issued tax assessments against Phillip S. Bosco for federal wagering taxes. Phillip died in 1974 with the delinquent taxes unpaid. Lucille remarried and continued to occupy the property as her homestead.

In 1977, the federal government filed suit against Lucille (now Mrs. Rodgers) in the United States District Court for the Northern District of Texas under sections 7402 and 7403 of the Internal Revenue Code.<sup>2</sup> The Government sought to reduce to judgment the tax assessments made against Phillip Bosco and to enforce the federal liens against all property that belonged to Phillip, including his interest in Mrs. Rodgers' homestead. The district court held that the government's federal tax lien was subordinate to Mrs. Rodgers' state created right to

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1. See TEX. CONST. art. XVI, §§ 50-52. (Vernon 1955); Section 50 provides:

[T]he homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid . . . (other exceptions not relevant).

See also TEX. FAM. CODE ANN. § 5.81 (Vernon 1975).

2. I.R.C. § 7402(a) (1982) provides in part:

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws.

I.R.C. § 7403 (1982) provides in part:

(a) Filing: In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

possession of her homestead.<sup>3</sup> The fifth Circuit Court of Appeals affirmed in *United States v. Rogers*.<sup>4</sup>

Joerene and Donald Ingram acquired as community property a residence located in Dallas, Texas, which they occupied as their homestead under Texas law.<sup>5</sup> In 1972 and 1973, the government issued assessments against Donald Ingram relating to unpaid employee social security and withholding taxes. In addition, an assessment for unpaid income tax was issued against both Donald Ingram and Joerene Ingram for the taxable year 1971.

The Ingram's house was destroyed by fire in March 1975. Pursuant to a divorce entered later that year, the Ingrams divided the proceeds of an insurance policy on the house and Donald conveyed his interest in the house to Joerene. Joerene filed suit in Texas state court to quiet title to the property and to remove federal tax liens that arose when the taxes were assessed. The Government removed the suit to federal district court and counterclaimed seeking, among other things, a judicial sale of the property to enforce the tax lien.<sup>6</sup> The district court granted summary judgment on the Government's counterclaims.<sup>7</sup>

On appeal in *Ingram v. City of Dallas Department of Housing & Urban Rehabilitation*,<sup>8</sup> the Fifth Circuit Court of Appeals agreed that the Government could foreclose its lien on the proceeds of the sale of the property to collect the unpaid income taxes owed by Joerene and Donald Ingram jointly. But the court, relying on *Rogers*, which was decided the same day, held that the Government could not reach the proceeds of the sale of the property to collect the individual tax liability of Donald, assuming Joerene had not abandoned her homestead interest. The court remanded for determination of the abandonment issue.<sup>9</sup>

The United States Supreme Court granted certiorari for both *Rogers* and *Ingram*, consolidated the cases, and reversed the decisions of the court of appeals. The Court held that a district court was authorized to order the sale of homestead property to satisfy a federal tax lien and to compensate the non-delinquent spouse out of the proceeds

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3. The district court's opinion was not published.

4. 649 F.2d 1117 (5th Cir. 1981). Mrs. Rodgers name was misspelled in the caption of the case.

5. See TEX. CONST. art. XVI, §§ 50-52 (Vernon 1955); TEX. FAM. CODE ANN. § 5.81 (Vernon 1975), *supra* note 1.

6. While the suit was pending, the property was sold unencumbered. The parties agreed that their rights in the proceeds would be determined as if the sale had not taken place.

7. The district court's opinion was not published.

8. 649 F.2d 1128 (5th Cir. 1981).

9. *Id.*

of the sale. *United States v. Rodgers*, 103 S. Ct. 2132 (1983).

Although in Saxon England a judgment creditor often encountered difficulties in collection,<sup>10</sup> after the Norman Conquest procedures were developed that gave a judgment creditor remedies against a debtor. A creditor had the right to obtain portions of the debtor's personal property and to receive rents and profits from the debtor's land to satisfy the debt.<sup>11</sup> With the passage of the statute authorizing the writ of *elegit* in 1285, a debtor's land could be taken from him to satisfy his debts.<sup>12</sup> Apparently, a provision in the Magna Carta<sup>13</sup> extended to the king a similar right at common law. The king could take possession of the debtor's land until the debt to the king was paid, if the debtor's goods could not satisfy the judgment.<sup>14</sup> Thus, the sovereign had the authority and the means to collect debts owed to it by its citizens.

One procedure the United States government may utilize to enforce collection of unpaid taxes is the exercise of the rights afforded any judgment creditor. These rights are provided in the Internal Revenue Code.<sup>15</sup>

Another option available to the government is the administrative levy. Section 6331 of the Internal Revenue Code provides that:

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.<sup>16</sup>

10. See Pollock, *English Law Before the Norman Conquest*, 14 LAW Q. REV. 291 (1898). Under Anglo-Saxon law, the parties came to court if they agreed to do so. A court lacked the power to compel attendance. One practical means used by the complaining party to ensure the appearance of the other party was to take some article as security so the adversary would show. The primary form of security was cattle.

Final judgment also had its problems. Once obtained, the judgment could not be directly enforced. The complaining party was left to gather the "fruits of judgment" for himself.

11. See generally 3 W. BLACKSTONE, COMMENTARIES \*416-19; 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 230-31 (2d ed. 1937).

12. See 3 W. BLACKSTONE, COMMENTARIES \*418. A writ of *elegit* was authorized by statute either on a judgment for debt or damages. Westm. 2 13 Edw. I. c. 18, cited in BLACKSTONE, at \*418. Under the writ of *elegit*, the defendant's goods and chattels were appraised and all of them (excepting oxen and beasts of the plough) were delivered to the plaintiff in satisfaction of his debt. If the goods were not sufficient to meet the debt, then the moiety, or one half of the debtor's freehold lands, was delivered to the plaintiff. The plaintiff held the land until the rent and profits paid the debt or the defendant's interest in the land expired.

13. MAGNA CARTA cl. 9, reprinted in L. WRIGHT, MAGNA CARTA AND THE TRADITION OF LIBERTY at 55 (1976).

14. 3 W. BLACKSTONE, COMMENTARIES \*418.

15. See I.R.C. §§ 6502(a), 7401, and 7402(a) (1982).

16. I.R.C. § 6331 (1982).

Administrative levy requires no judicial intervention.

A third alternative the government may utilize is the federal tax lien. Section 6321 of the Internal Revenue Code states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."<sup>17</sup> The tax lien is created automatically at the time the assessment is made and continues until the amount of the liability is paid.<sup>18</sup> Enforcement of the federal tax lien requires judicial intervention which is provided for in section 7403 of the Internal Revenue Code.<sup>19</sup> Section 7403 allows a district court to decree a sale of property and apply the proceeds to satisfy the unpaid taxes. Although a federal statute establishes the lien, the "property or rights of property" referred to in the statute<sup>20</sup> are determined under state law.<sup>21</sup> However, state laws that attempt to exempt "property" or "rights to property" are not binding with respect to the collection of federal taxes.<sup>22</sup> Only those exemptions provided for by federal law are valid and "state law is inoperative to prevent the attachment of liens created by Federal statutes."<sup>23</sup> Specifically, treasury regulations provide that homestead exemption laws do not exempt property from subjection to a federal levy.<sup>24</sup>

A "homestead" is a state created statutory exemption of real property from attachment and execution.<sup>25</sup> The principal consequences of characterizing property as a homestead include:

- (1) the property is exempt from execution for certain kinds of debts;

17. I.R.C. § 6321 (1982).

18. Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

I.R.C. § 6322 (1982).

19. I.R.C. § 7402(a) (1982), *supra* note 2.

20. *Id.*

21. *See, e.g., Aquilino v. United States*, 363 U.S. 509 (1960).

22. *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974).

23. *United States v. Bess*, 357 U.S. 51, 57 (1958).

24. Treas. Reg. § 301.6334-1(c) (1983).

25. 1 AMERICAN LAW OF PROPERTY § 5.75 (1952). *See also* 3 C. VERNIER, AMERICAN FAMILY LAWS 629 (1935). A homestead did not exist at common law. *Id.* The Republic of Texas originated the homestead exemption in 1839. Act of Jan. 26, 1839, LAWS OF THE REPUBLIC OF TEXAS, at 125. Georgia and Mississippi followed shortly with similar legislation. 1841 GA. LAWS at 134, 1841 MISS. LAWS, ch. 15 at 113. The majority of states now have homestead exemption provisions. *See* 3 C. VERNIER, *supra*, at 631; Comment, *Debtor Exemption Laws and the Farmer: Suggestions for Judicial Reform*, 11 U.C.D. L. REV. 573, 589 (1978).

(2) the owner's freedom of disposition is limited, since the consent of the spouse is required for a conveyance or encumbrance of property; and (3) the use and disposition of the homestead, after the owner's death, is regulated for the benefit of his family.<sup>26</sup>

While the general purpose of a homestead law is to provide security for the family,<sup>27</sup> other purposes have been mentioned. These include encouraging home ownership and attracting settlers to an area.<sup>28</sup>

In an early federal decision,<sup>29</sup> the United States obtained a judgment against the defendants on a warehouse bond and attempted to levy on the goods and real estate of the defendants.<sup>30</sup> The district court held that the state homestead exemption did not apply because the North Carolina legislature had not intended to exempt debts owed to the United States and federal law was supreme when conflicting with state exemption laws.<sup>31</sup>

In *Fink v. O'Neil*,<sup>32</sup> the United States Supreme Court addressed the issue of whether the United States could levy on a homestead interest. The Court held that the government could not levy upon the homestead interest of the plaintiff.<sup>33</sup> Congress had authorized the district courts to rely on state law when affording remedies to a judgment creditor and the United States, like any judgment creditor, was subject to the state's exemption law.<sup>34</sup> The Court pointed out that without the congressional recognition of the state law, the exemption would not have applied and the government would have been able to levy on the homestead interest.<sup>35</sup>

While it was settled that homestead interests were not exempt from federal tax liens,<sup>36</sup> conflicts began to arise among the lower federal district courts when the government attempted to foreclose its tax lien on the homestead interest of a non-delinquent spouse. The Eighth and Ninth Circuits held that the property of the non-delinquent spouse was not exempt from foreclosure of a federal tax lien and a forced sale if the delinquent spouse had an interest in the homestead when the tax

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26. 1 AMERICAN LAW OF PROPERTY § 5.75 (1952).

27. *Id.*

28. *Id.*

29. *United States v. Howell*, 9 F. 674 (W.D.N.C. 1881).

30. *Id.*

31. *Id.* at 667.

32. 106 U.S. 272 (1882).

33. *Id.*

34. *Id.* at 279.

35. *Id.* at 280.

36. *E.g.*, *Shambaugh v. Scofield*, 132 F.2d 345 (5th Cir. 1942).

liability was assessed.<sup>37</sup> The underlying reasons given for these holdings were that (1) treasury regulations stated that state exemption statutes have no validity in relation to the federal levying statute;<sup>38</sup> (2) the federal levying statute should be considered the "supreme law of the land" in relation to state exemption statutes; and (3) the Internal Revenue Code has provided for certain categories of exempt properties which are exclusive and do not include a homestead exemption.<sup>39</sup>

The Tenth Circuit in *United States v. Hershberger*,<sup>40</sup> held that the emphasis which a particular state placed in its homestead exemption determined whether the non-delinquent spouse's interest would be subject to a forced sale. If the state treated the homestead merely as an exemption from creditors, then the homestead was not exempt from foreclosure of a federal tax lien and a forced sale. However, if the state treated the homestead as an estate or present property right,<sup>41</sup> then the homestead property was exempt from foreclosure of a federal tax lien and a judicial sale, provided that the non-delinquent spouse retained an interest in the property.<sup>42</sup> The Fifth Circuit had relied upon the same distinction in holding that the Florida homestead law was merely an exemption, rather than a property right, and allowed the government to enforce a federal tax lien through foreclosure on the homestead interest

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37. *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974); *United States v. Heasley*, 283 F.2d 422 (8th Cir. 1960); *United States v. Heffron*, 158 F.2d 657 (9th Cir. 1947).

38. Treas. Reg. § 301.6334-1(c) (1983).

No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

39. I.R.C. § 6334(c) (1982). "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." *Id.* Subsection (a) does not include homestead.

40. 475 F.2d 677 (10th Cir. 1973).

41. Nine states consider the homestead to be more than a "mere exemption" or somewhat in the nature of an "estate," or "absolute right." *See, e.g., Jones v. Kemp*, 144 F.2d 478 (10th Cir. 1944); *Rash v. Bogart*, 226 Ala. 284, 146 So. 814, 816 (1933); *Wiegand v. Wiegand*, 410 Ill. 533, 103 N.E.2d 137 (1951); *Sayers v. Childers*, 112 Iowa 677, 84 N.W. 938 (1901); *Helm v. Helm*, 11 Kan. 19 (1873); *Riggs v. Sterling*, 60 Mich. 643, 27 N.W. 705 (1886); *Wyatt v. Bauer*, 332 S.W.2d 301 (Mo. Ct. App. 1960); *Williams v. Williams*, 106 Neb. 584, 184 N.W. 114 (1921); *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929); *Closson v. Closson*, 30 Wyo. 1, 215 P. 485 (1923).

42. The court in *Hershberger* held that on the basis of Kansas law, which regarded the homestead as a "present property interest," the federal government could not foreclose its federal tax lien and force the sale of the property while the non-delinquent spouse still lived there. 475 F.2d at 682. *See also Jones v. Kemp*, 144 F.2d 478, 481 (10th Cir. 1944), where the non-delinquent spouse lost because the marriage was illegal and therefore the homestead and accompanying exemption from the federal lien never existed.

of the non-delinquent spouse.<sup>43</sup>

Thus, the United States Supreme Court was left to resolve the differences that existed among the courts of appeals when the government was seeking a forced sale of the homestead interest of a non-delinquent spouse for taxes that were assessed against the delinquent spouse while the delinquent spouse had an interest in the property. The issue was squarely presented to the Court in *United States v. Rodgers*.<sup>44</sup> Justice Brennan, writing for the majority in a five to four decision, held that a district court was authorized to order the sale of homestead property to satisfy a federal tax lien and to compensate the non-delinquent spouse out of the proceeds of the sale.<sup>45</sup> Justice Brennan stated that the government's lien could not extend beyond the delinquent taxpayer's interest in the property and that the government could not collect more than the value of the property interest that was liable for the debt.<sup>46</sup> "[T]he Government may 'enforce [its] lien,' . . . [and] may seek to subject any property, [of] whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. . . ." <sup>47</sup> The entire property of the delinquent taxpayer is subject to sale as long as the United States has a "claim or interest" in it.<sup>48</sup>

Even though the entire property of the delinquent taxpayer was subject to sale, the Court emphasized that section 7403(b) authorized all parties having an interest in the property to be made a party in the action.<sup>49</sup> The Court noted that this joinder provision would be unnecessary if the third party's interest could not be sold.<sup>50</sup> In addition, section 7403 provided for the sale and distribution of the proceeds according to the respective rights of the parties.<sup>51</sup>

The Court relied upon several factors in its interpretation of the

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43. *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963). For a background to the earlier federal district and Texas state court decisions, see *Morgan v. Moynahan*, 86 F. Supp. 522 (S.D. Tex. 1949). The court there held that homestead rights are indivisible and extend to all parts of the property. The non-delinquent spouse's interest is exempt. *Contra United States v. Stone*, 572 U.S. Tax Cas. (CCH) ¶ 9864 (E.D. Tex. 1957). In *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949), the court held that the wife's homestead interest was exempt from a federal tax lien. *But see Staley v. Vaughn*, 50 S.W.2d 907 (Tex. Civ. App. 1932).

44. 103 S. Ct. 2132 (1983).

45. *Id.* at 2136.

46. *Id.* at 2141.

47. *Id.* at 2142, quoting 26 U.S.C. § 7403(a) (1982).

48. *Id.* at 2143.

49. *Id.* at 2142.

50. *Id.*

51. *Id.*

federal tax lien statute. First, the interpretation "is consistent with the policy . . . in favor of prompt and certain collection of delinquent taxes."<sup>52</sup> Next, the Court found historical support for the interpretation based on an analogy to the states' *ad valorem* taxation of real property.<sup>53</sup> A state's sale of property due to non-payment of taxes is an *in rem* proceeding that cuts off the dower and homestead rights of the non-delinquent spouse. The Court noted that, like a state's process, the federal tax lien proceeding is essentially *in rem*. Both cut off all dower and homestead interests.<sup>54</sup>

Another factor in the interpretation was a comparison of the language of the tax lien statute with the language of the administrative levy provision.<sup>55</sup> The administrative levy remedy allows the government to sell only the property or rights to property that belong to the delinquent taxpayer.<sup>56</sup> Since the federal tax lien statute does not contain such a limitation, the purpose of the federal tax lien statute was to enable the government to reach the interests of third parties.<sup>57</sup>

Although the statute allowed the government to reach the interests of third parties, those interests were protected by the statute. The Court pointed out that the federal tax lien proceeding only used the third party interest to facilitate the extraction of value from the concurrent property interests that were properly liable for the debt.<sup>58</sup> Compensation was provided for the "taking" of the property.<sup>59</sup>

In the second part of the opinion, the Court dealt with the Texas homestead law. First, the Texas homestead law did not provide an exemption from federal tax liens because a federal tax lien was intended to reach any property in which the delinquent taxpayer had an interest.<sup>60</sup> Second, since the federal statute could reach any property of the delinquent taxpayer, a state provisions could neither exempt the property nor an interest in that property.<sup>61</sup>

In addition, the Court found that the supremacy clause<sup>62</sup> provided the federal government with the authority to overrule state created ex-

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52. *Id.* at 2143.

53. *Id.*

54. *Id.*

55. *Id.* at 2143-44.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 2145.

60. *Id.* at 2146.

61. *Id.*

62. U.S. CONST. art. VI, cl. 2.

emptions and that the clause was just as applicable to innocent bystanders as it was to delinquent debtors.<sup>63</sup> No constitutional requirements were violated by the statute because even though the Texas homestead law created a property right, the right was compensated for by payment to the non-delinquent spouse.<sup>64</sup>

The last part of the opinion was devoted to the requirement of compensation for the non-delinquent spouse. The Court pointed out that financial compensation might not always be an adequate substitute for the non-delinquent spouse's home<sup>65</sup> and a district court should use "reasoned discretion" in authorizing a judicial sale of non-delinquent spouse's interest.<sup>66</sup> Several factors were suggested by the Court to assist the district courts in their use of reasoned discretion.<sup>67</sup> These factors include the possible prejudice to the government's financial interests, the third party's legally recognized expectation that the property would not be subjected to forced sale, any likely prejudice to the third party in the form of personal dislocation costs and practical undercompensation, and the relative character and value of the liable and non-liable interests in the property.<sup>68</sup> The Court pointed out that this list was not exhaustive.<sup>69</sup>

Justice Blackmun, writing the dissent, argued that section 7403 of the Internal Revenue Code gave the government the power to sell or force the sale of jointly owned property only if the tax debtor himself could have forced the sale of the property.<sup>70</sup> Since a delinquent spouse could not have forced the sale under the Texas homestead law, neither could the government.<sup>71</sup> The dissent relied upon the common-law rule that a creditor's rights rise no higher than those of the debtor himself.<sup>72</sup> While in some forms of co-ownership such as joint tenancies or tenancies in common, the individual tenant may seek partition, in other types such as tenancies by the entirety and certain homestead interests, a joint owner cannot force partition or destroy the survivorship rights of the other owner.<sup>73</sup> Justice Blackmun stated that in those situations in

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63. 103 S. Ct. at 2147.

64. *Id.*

65. *Id.* at 2148.

66. *Id.* at 2149.

67. *Id.* at 2151.

68. *Id.* at 2151-52.

69. *Id.* at 2152.

70. *Id.* at 2153.

71. *Id.*

72. 1 L. JONES, LIENS § 9 at 9-10 (1914).

73. 103 S. Ct. at 2153.

which the joint owner could not force a partition or sale, the government should not be able to exact more as a lienholder than could the debtor himself.<sup>74</sup> Congress did not intend to abrogate the common-law rule that a creditor's rights rise no higher than those of the debtor himself when it passed section 7403.<sup>75</sup> The statute should be read in the light of the common-law rule.<sup>76</sup>

*Rodgers* settled the specific issue of whether the government could force the sale of a non-delinquent spouse's homestead interest for the delinquent spouse's unpaid taxes. The decision reconciles the conflict among the circuits and prevents inconsistent results based on a state's characterization of its homestead interest.

It should be noted that *Rodgers* will have its major impact in areas in which only one spouse is typically liable. Wagering taxes (*Rogers*) and withholding taxes (*Ingram*) are two examples of those areas. The wide spread use of the joint income tax return will prevent *Rodgers* from having a major impact in the area of the income tax since the spouses are jointly and severally liable.

Other property interests may also be affected by the decision.<sup>77</sup> Although the holding does not specifically apply to property held as tenants by the entirety, the Court implies that it might extend the application of the holding to those interests.<sup>78</sup> In a footnote,<sup>79</sup> the Court

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74. *Id.* at 2154.

75. *Id.*

76. *Id.*

77. In *United States v. Trilling*, 328 F.2d 699 (7th Cir. 1964), the court held that the government may foreclose its federal tax lien on property held under joint tenancy, force the sale of the entire property and divide the proceeds among the non-indebted owners. See also *United States v. Eaves*, 499 F.2d 869 (10th Cir. 1974).

Community property had also been subject to a federal tax lien. In *Broday v. United States*, 455 F.2d 1097 (5th Cir. 1972), the court held that a wife, previously assessed for unpaid taxes, upon remarriage obtained a vested interest in the husband's community income, a bank account. The wife's half share of the bank account was "property" or "rights to property" to which a federal tax lien could attach. See also *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964).

78. Earlier cases had held that a federal tax lien could not attach to property held as tenancy by the entirety. In *United States v. Am. Nat'l Bank of Jacksonville*, 255 F.2d 504 (5th Cir. 1958), *cert. denied*, 358 U.S. 835 (1958), the government attempted to attach a lien based on tax assessments against the husband alone to property held by husband and wife as tenants by the entirety. Because the property was held by both spouses as an estate by the entireties, the Fifth Circuit held that during the lifetime of the wife, the husband had no interest in the property in which a tax lien could attach. But upon the wife's death, the tax lien would attach to the husband's interest. The court adopted the rationale given in an earlier case, *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951). In *Hutcherson*, the court held that the federal tax lien could not attach to property held as an estate by the entirety when only one spouse was liable for the taxes. The rationale was that an estate by the entirety is a legal fiction in which each spouse owns an entire estate and not a separable interest to which tax lien could attach.

79. 103 S. Ct. at 2148 n.31.

states that "if the tenancy by the entirety cases are correct, they do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place."<sup>80</sup> The "if" suggests that the Court might be willing at some time to find that the tenancy by the entirety interest is property or right to property to which a federal tax lien may attach.

Although the dissent asserts that the decision would allow the government to force a judicial sale of a farm should the holder of an easement become delinquent or to force the judicial sale of a building should the tenant become delinquent,<sup>81</sup> those results are unlikely. Easements and leaseholds are property interests that have a determinable value. Since *Rodgers* only allows the government to extract from the property or rights to property the interest that the delinquent taxpayer owned, there would be no advantage in forcing the sale of an entire building or farm just to get to a lesser interest. The lesser interest has a value that would be the same, regardless of whether the government sold an entire interest and extracted the lesser interest or sole the lesser interest itself. In addition, district courts have at their disposal the authority to use reasoned discretion in ordering the forced sale of any property. The use of reasoned discretion should alleviate the dissent's concern that the government may overreach in its attempts to force a judicial sale of property to recover unpaid taxes.

*Allen C. Dobson*

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80. *Id.*

81. *Id.* at 2158.

