Comstock and other like decisions make it even more difficult to accept the absoluteness of his conclusion in the present case. It seems difficult to justify a statutory interpretation which would allow a parent to place its subsidiary in involuntary bankruptcy, and recover its full claim, where the parent had not abused its dominant position, and which, at the same time, would not allow a parent and its subsidiary to be counted as separate petitioning creditors, in spite of the fact that there had been a strict honoring of the corporate form. It is more important, however, to note the approach taken by the *Comstock* Court. That Court did not find itself compelled to lay down a strict prohibition. Its decision is illustrative of the many which recognize the true nature of bankruptcy proceedings, and establish a standard in keeping therewith. In *Comstock*, the Court refused to apply the rule established in *Taylor v. Standard Gas and Electric Co.*[21] because it found that the parent had acted in good faith and with due regard for its obligations to the subsidiary.

Both the majority and the dissent would arrive at a like finding with regard to Wurlitzer's conduct in the present case, and both would also agree that there was no attempted subversion of the Bankruptcy Act.[22] In view of such a finding, which we may assume would withstand even the closest scrutiny, recognition of parent and subsidiary as separate petitioning creditors under section 59(b) would not seem to violate the policy of the Bankruptcy Act. It is difficult to speculate concerning the reaction of Congress to judicial recognition of a corporate form relatively unknown at that time. Nevertheless, behind the clenched fists and the ringing oratory lay one evident purpose, protection of the insolvent debtor! Adherence to the principles outlined above has afforded the debtor more than adequate protection under other circumstances,[23] while preserving the true character of bankruptcy proceedings. There is no reason to believe that adherence to these same principles would afford the debtor any less protection under the circumstances of the present case.

RICHARD T. COLMAN

Bankruptcy—Mortgages—Priority of Federal Tax Liens.—*Wethered v. Alban Tractor Company.*[1]—In October of 1954, Gaither Inc., the apellant—trustee's bankrupt, purchased certain goods from the appellee, Alban Tractor Co., on a conditional sale contract. In December of 1954 Gaither gave the Plaza Corp. a mortgage on some of the goods covered by Alban's

[21] 306 U.S. 307 (1938). The Court reformulated a general equity principle for application to reorganization cases. Known as the "Deep Rock Doctrine," this rule provided that a claim against a debtor subsidiary would be disallowed or subordinated where the parent corporation had dominated and controlled the subsidiary, and had breached its fiduciary duty in the transactions creating the debt, by acting for its own benefit, to the detriment of the subsidiary.

[22] Supra note 16

[23] Supra note 17.

[1] Wethered v. Alban Tractor Company, 168 A.2d 358 (Md. 1961).

conditional contract as well as other chattels and real estate. The chattel mortgage was not properly recorded in Baltimore County. In May of 1955 Gaither made another purchase from Alban. Alban had assigned the conditional sales contract to a bank which it paid at the time of the second sale. Alban then took a mortgage from Gaither on the goods involved in both transactions. The mortgage was recorded in Baltimore City. Gaither's legal residence is in Baltimore County and not Baltimore City.[2] Applicable local law also determined that Plaza's mortgage prevails over Alban's as neither were properly recorded in the jurisdiction of Gaither's residence; the result being that the respective rights are governed by priority of execution.[3] In August 1956 a tax lien was assessed on Gaither by the federal government.[4] Gaither defaulted on his 1955 mortgage to Alban and Alban filed a petition in Baltimore City on November 5 to foreclose. The goods were repossessed, advertised and sold at auction on December 1, 1956. On December 27, the federal government filed notice of its tax lien in Baltimore City and in Baltimore County the next day. On June 6, 1957, the foreclosure sale was ratified by Circuit Court No. 2 of Baltimore City. In May of 1958, Gaither was adjudicated an involuntary bankrupt. The instant case is an appeal from a decree of the Circuit Court No. 2 of Baltimore City rejecting the trustee's claim for the recovery for the bankrupt's estate of the proceeds of the foreclosure sale. The trustee asserted that he stands in the shoes of the government as a lien creditor, and that since the government could set aside the unrecorded mortgages by virtue of its lien priority, the foreclosure is also ineffective to him. HELD: The United States government did not have a lien on any chattel covered by the mortgage before it was sold to a bona fide purchaser, and the date of the sales marked the close of the period in which any creditor could acquire a lien upon the property in question.

This case presents a situation of mutually antagonistic federal policies which must be resolved with reference both to Congressional intent and those safeguards imposed by statute upon the government's revenue collecting arms. The conflict is embodied in the Bankruptcy Act with its provisions increasing the size of a bankrupt's estate available to unsecured creditors;

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[2] O'Toole Tire Company v. John B. Gaither, Jr., Inc., 216 Md. 54, 139 A.2d 252 (1958).

[3] Plaza Corporation v. Alban Tractor Co., Inc., 219 Md. 570, 151 A.2d 170 (1959).

[4] The government claim was for taxes withheld from income and Federal Insurance Contribution Act taxes. Gaither owed $5,705.32 which was due on July 31st. On August 14th he submitted that sum. Nevertheless, the assessment for that amount was entered against him on August 22, plus a penalty of $285.27 for late filing and interest from July 31st to August 22nd totaling $19.79. The assessment was sent to Gaither on Form 17 "Statement of Tax Due on Employer's Quarterly Federal Tax Return" (income tax withheld for wages and FICA taxes). There was an assessment of $8,978.05, a penalty of $285.27 which totals $9,263.32. Also shown was a credit of $3,272.73 which was paid on June 15th. This left a balance due of $5,990.59. Increasing the credit by the amount paid August 14th, the remaining balance would be $285.27, the amount of the penalty. The form stated: "According to our records the tax was not paid in full. You will be saved inconvenience and further expense by making payment of the 'balance due' within 10 days of the date of this notice."

and in the Internal Revenue Code with its lien laws affording the government maximum assistance while collecting taxes.

Section 70(e)(1) of the Bankruptcy Act[5] provides that the trustee of the bankrupt may step into the shoes of any creditor having a claim provable in bankruptcy and recover for the estate such property or its value that may have been transferred in violation of any applicable state or federal law. This section equips the trustee with the necessary tools with which he may assert any creditor's rights who may have avoided the transfer. The basis, however, for this assertion must be found in another area of applicable state or federal law. It is from this point that the Internal Revenue Code of 1954 must be considered.

The Federal Tax Lien Statute in sections 6321, 6322 and 6323[6] provides that a person liable to pay any tax who neglects or refuses to do so after a demand, becomes subject to a lien upon all his property and rights to property for the amount owed including interest, penalty and cost. The lien arises from the time of assessment unless otherwise fixed by law, but is not valid against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed. The effect of section 6321 is to give rise to an inchoate lien at the time the assessment is made. Section 6322 provides for the perfection of that lien upon demand. Yet section 6323 makes clear that

[5] Bankruptcy Act § 70(e), 11 U.S.C. § 110(e)(1) and (2) (1958). Section 70(e)(1) "A transfer made or suffered for obligation incurred by a debtor adjudged a bankrupt under this Title which, under any federal or state law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Title, shall be null and void as against trustee of such debtor.

(2) "All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by the trustee for the benefit of the estate. . . . The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable federal or state laws."

[6] Internal Revenue Code of 1954, §§ 6321, 6322, 6323.

§ 6321. "Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) 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.

§ 6322. "Period of Lien.

Unless any 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 liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

§ 6323. "Validity Against Mortgagees, Pledgees, Purchasers and Judgement Creditors.

(a) Invalidity of liens without notice except as otherwise provided in subsection (c).

The lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws in the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice . . . ."

until filed even the perfected lien may be defeated by a class of prior lien holders. Before any lien may attach, however, there are certain statutory prerequisites with which there must be explicit compliance. The statute applies the lien to "property and all right to property" which assumes a previous definition of the taxpayers property and rights. As the court pointed out in the *Fidelity & Deposit Co.*[7] case:

> "Section 3670 imposes a tax lien on 'all property and rights to property' of a defaulting taxpayer. In adopting this legislation the Congress did not create property interest on which a lien might be imposed; there is no suggestion that it authorize the federal courts to do so. On the contrary, it took for granted here, as it normally does in the tax law, the vital existence of state laws creating and maintaining various interests. The statute was fashioned to require the courts to determine for federal purposes whether those state created interests are 'property' or 'rights to property.' That classification of interest is a federal question; the existence of the interests to be federally classified, however, is solely a question of state law."

The distinction urged above between the function of the state and the federal courts in this respect is well established.[8] Also essential to the creation of a perfected lien as well as the state defined right in property is a "demand" on the part of the government and the taxpayer's neglect or refusal to pay.[9] The New Jersey court in *Cattani v. Korsan*[10] stated:

> "The mere statement contained in a notice of federal tax lien . . . is not sufficient for the present purpose. It is a mandatory requirement both under the exact language of the statute and the adjudication in the above referred to cases[11] as a condition precedent to establish its lien and priority, it was necessary that the United States of America make proof of such demands. Absent such proof the United States of America has failed in a vital respect."

The resolution of the instant case, *Wethered v. Alban Tractor*, rests heavily on the government's proper satisfaction of these prerequisites.

Gaither paid the tax, thus if a lien could have been created it must have been with reference to either the penalty or the interest thereby creating the basis for the operation of section 70(e) of the Bankruptcy Act. A penalty

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7 Fidelity & Deposit Co. v. New York City Housing Authority, 241 F.2d 142, 144 (2d Cir. 1957).

8 The first expression of it is found in Morgan v. Commissioner, 309 U.S. 78, 80 (1939): "State law creates legal interests and rights. The federal revenue acts designate what interest or rights, so created, shall be taxed."

9 In re Crockett, 150 F. Supp. 352 (N.D. Cal., 1957); Sherman B. Ruth, Inc. v. O. S. V. The Marie and Winifred, 150 F. Supp. 630 (D. Mass. 1957); In re Holdsworth, 113 F. Supp. 874 (D. N.J. 1953); 9 Mertens, Law of Federal Income Taxation § 54.40.

10 Cattani v. Korsan, 29 N.J. Super. 581, 103 A.2d 51 (1959).

11 United States v. Allen, 14 F. 263 (C.C.M.D. Tenn. 1882); In re Baltimore Pearl Hominy Co., 5 F.2d 553 (4th Cir. 1925).

is not, however, a claim provable in bankruptcy,[12] thus section 70(e) does not apply to that aspect of Gaither's debt to the government. It was conceded by both parties that interest does give rise to a lien. It is submitted though that the interest too must be demanded.[13] It was argued by the trustee that assuming that the interest must be demanded, the demand may be made subsequent to the assessment and when it is made such demand relates back and perfects the lien from that date.[14] While the inherent logic of the *Fidelity & Deposit Co.* case compels agreement, in the present case no effective demand seems ever to have been made. No interest was shown or demanded on the forms sent to Gaither, the form recited that further expense would be saved by payment of the balance due. The chief of the special procedure section of the Internal Revenue Service of the United States at Baltimore testified that interest was not assessed or collected if the amount demanded was paid in ten days. No lien could arise for the interest owed by Gaither since the balance due demanded of him included the penalty only, and no interest. It is this contention that lies at the heart of the court's opinion. Its rejection of the basic prerequisite of the trustee's claim for a lien would seem to put an end to the case leaving nothing for section 70(e) to work upon.

The law of the State of Maryland[15] provides that the unrecorded mortgage given by Gaither to Alban prevails over all but a subsequent purchaser, mortgagee, encumbrancer, landlord with a lien, pledgee, and receiver of a creditor with a lien acquired by judicial proceeding. The government by assessment without perfection of the lien by demand fits none of these categories, nor does the trustee. Even the perfected lien is invalid until recorded against a mortgagee according to section 6323 of Internal Revenue Code of 1954. The court does, however, seem to concede that the filing of notice of a lien on December 27th, twenty-one days after the completed sale, may have given rise to a lien if there were property or property right to which it may have attached.

The existence of a property right is clearly a question of state law.[16] In this situation Maryland treats the day of sale, here December 1st, as the last day on which a lien may be acquired, analogizing the government to a judgment creditor with a lien on the real property of his debtor.[17] An equity court's inherent right to foreclose a mortgage is undoubted. In Maryland the mortgagor's right to redeem ended with the fully advertised sale to a bona fide purchaser who paid cash in full.[18] Title vested in the vendee

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[12] Bankruptcy Act § 57(j), 11 U.S.C. § 93(j) (1958); United States v. Harrington, 269 F.2d 719 (4th Cir. 1959).

[13] Supra note 10.

[14] Supra note 8.

[15] Maryland Code Art. 21, § 41 (1957).

[16] United States v. Durham Lumber Co., 363 U.S. 522 (1960); Aquilino v. United States, 363 U.S. 509 (1960); United States v. Bess, 357 U.S. 51 (1958).

[17] Union Trust Co. v. Biggs, 153 Md. 50, 137 Atl. 509 (1927).

[18] Dungan v. Mutual Benefit Life Ins. Co., 46 Md. 469 (1877).

leaving no right to the property in Gaither upon which notice could attach a lien.

The Maryland court in the *Wethered* opinion consciously avoided the very important question raised in section 6323. The section states that notice is necessary to make valid a lien against "any mortgagee." It is not clear whether the term "any mortgagee" includes the holder of an unrecorded mortgage or whether that lien holder must choate and perfect his lien to prevail. The much discussed *Ball*[19] case is not explicit, and the lower federal courts have no unanimity of view as to the meaning of *Ball*.[20] It was argued by the trustee that a lien was created under sections 6321 and 6322 of the Internal Revenue Code of 1954 and that *Ball* extends the requirement of recordation to mortgages for such to prevail over a federal lien. But when a court rejects, as it has done in *Wethered*, that a lien was ever created, speculation as to *Ball's* meaning (as the court did in its opinion) becomes idle, irrespective of the desirability of certainty in that area. A Supreme Court clarification of its four line per curiam decision in *Ball* is anxiously awaited, but it should not come in the wake of *Wethered*.

The trustee also argued in terms of section 70(c), section 70(a) and section 60 of the Bankruptcy Act. Whereas the operation of section 70(e) requires an actual lien holder, section 70(c)[21] creates a hypothetical lien holder and gives to the trustee so called "strong-armed" procedures to rights in property that the bankrupt had at the "date of bankruptcy." The critical date for the application of this section is that of bankruptcy, here, May, 1958. The property in question was sold in December, 1956, and that sale was ratified in June, 1957. In *Lewis v. Manufacturer's National Bank*[22] the Supreme Court said in reference to section 70(c):

> "The rights of creditors—whether they are existing or hypothetical —to which the trustee succeeds are to be ascertained as of 'the date of bankruptcy' not at an anterior point of time. That is to say the trustee acquires the status of a creditor when the petition of bankruptcy is filed."

The critical date for section 70(a) is the date of the filing of the petition of bankruptcy.[23] As the opinion in *Wethered* declared; to attempt the ap-

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[19] United States v. R. F. Ball Construction Co., 355 U.S. 587 (1957).

[20] United States v. Bond, 279 F.2d 837 (4th Cir. 1960), and compare Gauvey v. Basin Rig and Trucking Inc., 158 F. Supp. 374 (D.N.D. 1960).

[21] Bankruptcy Act, § 70(c), 11 U.S.C. § 110(c) (1958). ". . . the trustees, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

[22] 364 U.S. 603 (1960).

[23] Bankruptcy Act, § 70(a), 11 U.S.C. § 110(a)(5) (1958). "(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy . . . to all (5) property,

plication of these sections is to ignore the reality that the property was sold. Gaither had nothing. Section 60 of the Bankruptcy Act[24] avails the trustee nothing also. It concerns preferential treatment of creditors while insolvent, and its pivotal date is four months before bankruptcy. This section further stipulates that a proof of insolvency or reason to believe it must be shown. In the *Wethered* case the equity court below held that there was no proof of Gaither's apparent insolvency before bankruptcy and this finding was affirmed.[25]

It is submitted that while the opinion skillfully and accurately treats the legal questions involved the broad scope of the opinion is unnecessary and tends to obfuscate the central holding.

PAUL T. O'GRADY

Constitutional Law—State Registration Statutes—Sales Promotion as Intrastate Business.—*Eli Lilly and Company v. Sav-On-Drugs, Inc.*[1] —Eli Lilly and Company, an Indiana pharmaceutical corporation which sold to wholesalers in New Jersey, maintained an office in Newark. Out of this office eighteen detailmen were engaged in acquainting retailers, hospitals, and physicians with the company's products, examining and making recommendations with respect to retailers' stock inventories, and giving advertising and promotional materials to retailers. Occasionally, they would receive an order for transmittal to a wholesaler.

In a suit by Lilly to enforce its Fair Trade prices against a nonsigning druggist,[2] the defendant contended that Lilly had not complied with a New Jersey statute denying access to its courts to any foreign corporation doing business in the state which had not filed with the Secretary of State.[3] The Supreme Court of New Jersey affirmed the action of the trial court in granting the motion to dismiss, finding that Lilly was doing business in the state and, therefore, subject to the statute. On appeal, the Supreme Court of the United States affirmed. HELD: 1) a manufacturer that sells only interstate to wholesalers, but promotes sales from wholesalers to retailers within a foreign state is engaged in intrastate business in that state and can be licensed by it; 2) a license which prevents a foreign corporation, engaged

including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him or otherwise seized, impounded, or sequestered. . . ."

[24] Bankruptcy Act, § 60, 11 U.S.C. § 96 (1958). While the critical date for this section is four months prior to bankruptcy, Corn Exchange National Bank v. Klauder, 318 U.S. 434 (1943) and In re Vardaman Shoe Co., 52 F. Supp. 562 (D. Mo. 1943) both held that when security instruments were never recorded they are to be construed as if they had been filed on the date of bankruptcy.

[25] Wethered v. Alban Tractor Co., 168 A.2d at 369.

[1] Eli Lilly and Company v. Sav-On-Drugs, Inc., 81 Sup. Ct. 1316 (1961).

[2] Lilly had contracts with other druggists to sell at prices established by Lilly, which prices were obligatory on the defendant under the nonsigner provision of the New Jersey Act.

[3] N.J. Stat. Ann. § 14:15-4 (1937).