THE RELATIVE PRIORITY OF THE FEDERAL GOVERNMENT:
THE PERNICIOUS CAREER OF THE INCHOATE AND
GENERAL LIEN

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EVERY person within the jurisdiction of the Federal Government has an enforceable obligation to make his appointed contribution to its support. But enforcement of the Government's claims is frequently complicated when there are other deserving creditors of the delinquent debtor, and the debtor's property is insufficient to satisfy all claims. Government claims are accorded preference¹ over claims of other creditors primarily by two statutory provisions.² Section 3466 of the Revised Statutes³ grants a first priority to the

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This article is a revision of a thesis submitted in 1953 in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Yale University Law School. The basic conclusions herein were reached before the writer participated in the presentation of the respondent's case in *United States v. New Britain*, 347 U.S. 81 (1954), which is discussed at several points in the article.

1. "The right of priority of payment of debts due to the Government, is a prerogative [sic] of the crown well known to the common law." *United States v. State Bank of North Carolina*, 6 Pet. 29, 35 (U.S. 1832). But, there being no federal common law and the Government of the United States being one of delegated powers, it was necessary for Congress to accord whatever priority the United States may claim by statute. *Ibid.* Although sovereign prerogatives were in disrepute when the federal priority statute was enacted, it is at least arguable that under recent Supreme Court interpretations, the United States today has a statutory right of priority which exceeds the crown prerogative recognized by the English common law of 1789. Compare *Rorke v. Dayrell*, 4 Durn. & E. 402, 100 Eng. Rep. 1087 (K.B. 1791) (sustaining priority of senior execution) with *United States v. New Britain*, 347 U.S. 81, 85 (1954) ("Congress has protected the federal revenues by imposing an absolute priority"). See also Seligson, *Bankruptcy*, 1950 ANNUAL SURVEY OF AMERICAN LAW 476-77 (1951). The common law prerogative right to priority has always been understood in this country to be subject to prior liens as well as transfers of title by the debtor before the priority attached. *Marshall v. New York*, 254 U.S. 380, 382, 384 (1920); *Montgomery v. State*, 228 Ala. 296, 298, 153 So. 394, 396 (1934).

2. The Government also is granted special liens for certain taxes. See statutes cited in note 93 *infra*.

3. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment

Government as a creditor; Internal Revenue Code Section 3670⁴ creates a lien on "all the property" of a delinquent taxpayer. The Section 3466 priority is not a lien;⁵ it covers all debts to the Government; it is available only in the case of an insolvent debtor whose property has passed to a third person⁶—other than a trustee in bankruptcy⁷—for the benefit of creditors; and it arises at the time of this transfer.⁸ The Section 3670 tax lien covers only tax debts;

thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1946).

4. "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, 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." INT. REV. CODE § 3670.

The tax lien statute appears in the proposed Internal Revenue Code of 1954 as §§ 6321-3, H.R. 8300, 83d Cong., 2d Sess. (1954).

5. See note 18 *infra*.

6. Section 3466 appears to contemplate a right of priority in any case where the debtor of the United States is insolvent. But the four cases particularly named—the decedent's estate, the voluntary assignment, the attachment of the estate of an absent debtor, and the commission of an act of bankruptcy—have been held to be exclusive of the situations in which § 3466 operates. *United States v. Hooe*, 3 Cranch 73, 91 (U.S. 1805); *United States v. Oklahoma*, 261 U.S. 253, 260 (1923). And, since the following section subjects "any executor, administrator, or assignees, or other person" to personal liability for failing to pay the claim of the United States first, the Supreme Court has inferred that the debtor's property must pass to some other person for the statute to apply. *Bramwell v. United States Fidelity & Guar. Co.*, 269 U.S. 483, 490 (1926). The estate does so pass at the death of an insolvent debtor or a general assignment for the benefit of creditors. The burden is on the Government to show that a partial assignment is in fact a voluntary assignment within the statute. *United States v. Langton*, 26 Fed. Cas. 862, 864, No. 15,560 (C.C.D. Mass. 1829). The provision for priority in the event of an attachment of "the estate . . . of an absconding, concealed or absent debtor" presented no anomaly, inasmuch as such an attachment under the contemporaneous statutes of important commercial states caused an administration for the benefit of all creditors. *United States v. Wilkinson*, 28 Fed. Cas. 605, No. 16,695 (C.C.W.D. Mo. 1878); *McLean v. Rankin*, 3 Johns. 369, 372 (N.Y. 1808).

7. Although the fourth ground for invoking § 3466 is the commission of an "act of bankruptcy," the section now has only limited application in bankruptcy proceedings because the Bankruptcy Act prescribes its own priorities. 3 COLLIER, BANKRUPTCY ¶ 64.502 (14th ed. 1941). But if an act of bankruptcy is committed without the eventuation of proceedings under the Bankruptcy Act, the section will apply. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 367-70 (1946). And the section may be applicable in reorganization proceedings under the Bankruptcy Act. See 5 COLLIER, BANKRUPTCY ¶ 77.21 (14th ed. 1943); 6 *id.* ¶ 9.13[2] (14th ed. 1947).

8. *Massachusetts v. United States*, 333 U.S. 611, 617 n.8, 626 *et seq.* (1948); *Engelman v. Commodity Credit Corp.*, 107 F. Supp. 930, 932 (S.D. Cal. 1952); *State v. Woodroof*, 253 Ala. 620, 627, 46 So.2d 553, 558 (1950). That divestment of possession and control without technical transfer of title is enough to bring the statute into operation was settled by *Bramwell v. United States Fid. & Guar. Co.*, 269 U.S. 483, 490 (1926).

It has been held that the requirement of insolvency must be satisfied as of the time of divestment, at least where the commission of an act of bankruptcy is relied on as a basis for invoking § 3466. *Hofmann v. United Welding & Mfg. Co.*, 102 A.2d 878 (Conn. 1954).

it arises regardless of the solvency of the taxpayer; and it attaches at the time the assessment list is received by the collector.⁹ Judicial interpretation of priority and lien legislation has been misguided, resulting in a lack of harmony between this legislation and the Bankruptcy Act.

SECTION 3466 PRIORITY

Section 3466 priority was apparently intended to apply only to unencumbered property of the insolvent debtor.¹⁰ If the priority is violated by the third party liquidator, he is personally liable for the debts due the United States.¹¹ In imposing personal liability on the liquidator, Congress could hardly have contemplated that priority payment should be made from property subject to a mortgage or other lien, which the liquidator has no right to use for the payment of unsecured debt claims.¹² And, ordinarily, a statutory priority prescribes only a preference among creditors having no specific claims against property of an insolvent estate;¹³ it does not apply to liens held by competing creditors unless this application is made explicit by the statute.¹⁴ Nothing in Section 3466 purports to change the traditional status

9. INT. REV. CODE § 3671. Under § 6322 of the Internal Revenue Code of 1954 the lien arises from the making of the assessment rather than from the receipt of the assessment list. H.R. 8300, 83d Cong., 2d Sess. (1954).

10. For early statements of this understanding see Daniel Webster's argument in *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 416-18 (U.S. 1823), and Mr. Justice Story's opinion, *id.* at 439, 444; *Case of Richardson*, 9 Ops. ATT'Y GEN. 28 (1857); *United States v. Lewis*, 26 Fed. Cas. 920, 924, No. 15,595 (C.C.E.D. Pa. 1875), *aff'd*, 92 U.S. 618 (1875).

11. "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." REV. STAT. § 3467 (1875), 31 U.S.C. § 192 (1946).

12. An executor or administrator takes a decedent's estate subject to liens against the property. *United States v. Cutts*, 25 Fed. Cas. 745, 750, No. 14,912 (C.C.D.N.H. 1832); *ATKINSON, WILLS* 712 (2d ed. 1953); *cf. SIMES & BASYE, PROBLEMS IN PROBATE LAW* 151 (1946). The assignee in a voluntary assignment takes subject to all existing liens. See *BURRILL, ASSIGNMENTS* § 349 (6th ed. 1894). A receiver takes subject to existing liens. *Marshall v. New York*, 254 U.S. 380, 385 (1920); *Regan v. Metropolitan Haulage Co., Inc.*, 127 N.J. Eq. 487, 490, 14 A.2d 257, 258-9 (Ch. 1940); 1 *CLARK, RECEIVERS* 932 (2d ed. 1929).

For other cases limiting the operation of § 3466 to assets subject to the liquidator's dispositive power to pay debts, see, *e.g.*, *Kennebec Box Co. v. O. S. Richards Corp.*, 5 F.2d 951 (2d Cir. 1925); *United States v. Eggleston*, 25 Fed. Cas. 979, No. 15,027 (C.C.D. Ore. 1877); *In re Holmes Mfg. Co.*, 19 F.2d 239 (D. Conn. 1927); *Postmaster General v. Robbins*, 19 Fed. Cas. 1126, No. 11,314 (D. Me. 1829); *Meyer Estate*, 159 Pa. Super. 296, 48 A.2d 210 (1946); *Estate of Jones*, 84 Pa. Super. 170 (1924).

13. *GLENN, LIQUIDATION* 726 (1935).

14. See *Marshall v. New York*, 254 U.S. 380, 384 (1920); *Fidelity & Deposit Co. v. Lovell*, 108 F. Supp. 360, 367 (S.D. Miss. 1952); *In re Cramond*, 145 Fed. 969, 978 (N.D.

of secured creditors by authorizing a liquidator to override a valid lien antedating the attachment of the federal priority.¹⁵

Relative Priority of Section 3466: The Early Cases

By the middle of the nineteenth century the Supreme Court had decided six times that the federal priority did not overcome an antecedent lien.¹⁶ The Court refused to interpret a secret and retroactive lien into the priority statute.¹⁷ Section 3466 did not create a lien,¹⁸ nor did it create a "preference in the nature of a lien" with power to avoid a deed of trust previously executed to secure a guarantor.¹⁹ Nevertheless, two early cases caused confusion as to the viability of a pre-existing lien against 3466 priority.

In *Thelusson v. Smith*,²⁰ the Supreme Court purported to rule that the priority statute defeated the "preference" of a judgment creditor holding a lien on the debtor's realty at the time of a voluntary assignment by the debtor. The Government obtained a judgment against the debtor on duty bonds falling due after the assignment, and had the debtor's real estate levied upon and sold. The judgment creditor, relying on his prior lien, brought suit to satisfy his judgment from the proceeds of the sale. Although the Court conceded that the 3466 priority would not defeat an antedating mortgage or *fiery facias* seizure, it held that the interest of a judgment lienor was overcome.

N.Y. 1906); *Regan v. Metropolitan Haulage Co., Inc.*, 127 N.J. Eq. 487, 490-1, 14 A.2d 257, 258-9 (Ch. 1940); GLENN, *LIQUIDATION* §§ 510, 518 (1935).

A statute which purports to create a lien in behalf of a particular creditor or class of creditors at the inception of liquidation proceedings is properly regarded as no more than priority legislation. *Id.* at 726. Accordingly a state-created lien which arises from the same circumstances as those generating a priority for the United States under § 3466 yields to the latter under the doctrine of federal supremacy. *United States v. Division of Labor Law Enforcement*, 201 F.2d 857 (9th Cir. 1953); *Leggett v. Southeastern People's College*, 234 N.C. 595, 68 S.E.2d 263 (1951); *cf. United States v. Knott*, 298 U.S. 544 (1936), discussed note 50 *infra*.

15. *See United States v. Eggleston*, 25 Fed. Cas. 979, 981, No. 15,027 (C.C.D. Ore. 1877).

16. *United States v. Hooe*, 3 Cranch 73 (U.S. 1805); *Conard v. Atlantic Ins. Co.*, 1 Pet. 386 (U.S. 1828); *Conard v. Nicoll*, 4 Pet. 291 (U.S. 1830); *Conard v. Pacific Ins. Co.*, 6 Pet. 262 (U.S. 1832); *United States v. Hack*, 8 Pet. 271 (U.S. 1834); *Brent v. Bank of Washington*, 10 Pet. 596 (U.S. 1836). *See also Prince v. Bartlett*, 8 Cranch 431 (U.S. 1814); *Field v. United States*, 9 Pet. 182 (U.S. 1835).

17. *United States v. Hooe*, 3 Cranch 73, 90 (U.S. 1805). The subversion of commercial transactions wrought by secret liens and liens which operate retroactively by relation back is recognized by the courts. *See, e.g., United States v. Western Union Tel. Co.*, 50 F.2d 102, 103 (2d Cir. 1931); *First Nat. Bank v. Southland Prod. Co.*, 189 Okla. 9, 17, 112 P.2d 1087, 1095 (1941).

18. *See United States v. Fisher*, 2 Cranch 358, 390, 394 (U.S. 1805). Recently, a court, taking cognizance of more recent views of the section, observed that "[t]his priority of payment accorded is not technically a 'lien' but is analogous and tantamount thereto" *Meyer Estate*, 159 Pa. Super. 296, 299, 48 A.2d 210, 212 (1946).

19. *United States v. Hooe*, 3 Cranch 73 (U.S. 1805).

20. 2 Wheat. 396 (U.S. 1817).

If *Thelusson* appeared to elevate 3466 priority over an antedating lien, this notion was soon corrected by the Court. In *Conard v. Atlantic Insurance Co.*,²¹ the Court insisted that since the judgment creditor in *Thelusson* had not "perfected his title, by an execution and levy," he acquired no title to the *proceeds* of the sale of the realty,²² and that *Thelusson* did not hold that "a specific and perfected lien can be displaced by the mere priority of the United States."²³

While clarifying *Thelusson*, however, the opinion in *Conard* laid the foundation for a new misconception of the status of a prior lien. *Conard* upheld an insurance company's claim against goods at sea which, under *respondentia* bonds,²⁴ were collateral security for a loan. The debtor made a general assign-

21. 1 Pet. 386 (U.S. 1828). Four pages of *Conard* are devoted to explaining what the Court understood the three page opinion of *Thelusson* to hold. The opinion in *Thelusson*, written by Mr. Justice Washington, was substantially the same as one he had originally delivered in the circuit court as a circuit justice. 23 Fed. Cas. 903, No. 13,873 (C.C.D. Pa. 1815). Washington thus appears not merely to have participated in the review of his own decision but to have written the opinion affirming it.

22. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386, 444 (U.S. 1828). The judgment creditor apparently had mistaken his remedy in seeking the proceeds of the execution sale rather than in pursuing the land. Cf. *United States v. Duncan*, 25 Fed. Cas. 927, 932-3, 935, No. 15,003 (C.C.D. Ill. 1850).

23. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386, 444 (U.S. 1828).

One of the justices concurring in *Thelusson* refused to accept the Court's explanation. Mr. Justice Johnson expressed his belief that the "report of the decision" had been overturned on the point supposed to be decided by it, "to wit, the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment." *Id.* at 451. Johnson explained his own concurrence on the ground that, while the sale of the assigned property on the Government's execution was a nullity, the plaintiff judgment creditor had no right against the defendant marshal, there being want of privity between the parties. *Id.* at 454.

Contrary to a suggestion in *United States v. Duncan*, 25 Fed. Cas. 927, 932, No. 15,003 (C.C.D. Ill. 1850), applicable state law at the time of *Thelusson* seems to have been quite clear that the assignee could not have sold the real estate free of the judgment lien without consent of the lienor. *Shunk's Appeal*, 2 Barr. 304 (Pa. 1845); *Estate of Gump*, 13 Phila. 495 (Pa. C.P. 1876). Unless the assignee could somehow have acquired an interest in the assignor's property superior to the judgment lien, it is not perceived how the federal priority could have defeated the lien.

The Court's explanation of *Thelusson* was accepted by lower courts. See *Cottrell v. Pierson*, 12 Fed. 805, 807 (C.C.D. Neb. 1831); *United States v. Duncan*, 25 Fed. Cas. 927, 935-6, No. 15,003 (C.C.D. Ill. 1850); *Postmaster General v. Robbins*, 19 Fed. Cas. 1126, 1127, No. 11,314 (D. Me. 1829); *Case of Richardson*, 9 OPS. ATT'Y GEN. 28, 29 (1857); 1 KENT, COMMENTARIES 246-7 (2d ed. 1832). *Willing v. Bleeker*, 2 S. & R. 221 (Pa. 1816), permitting the federal priority to supersede a prior garnishment, relied largely on the unexplained ruling in *Thelusson*. Cf. *Wilcocks v. Waln*, 10 S. & R. 380 (Pa. 1823).

24. A *respondentia* bond is an obligation to repay a loan of money, on maritime interest, on goods laden on board a ship, upon the condition that the goods not be lost in the course of the voyage by any of the perils enumerated in the contract. The money is generally lent on the personal responsibility of the borrower unless the parties contract, as they did in the *Conard* case, for security. See 3 BOUVIER, LAW DICTIONARY 2922 (Rawle's 3d rev. 1914).

ment for the benefit of creditors while the goods were at sea, and thereafter confessed judgment on a debt to the Government. The Government levied on the goods before the insurance company took possession, but the Court sustained the bond security as a kind of mortgage—a “transfer *in presenti*” of the “specific interest” in the goods at sea.²⁵ The opinion emphasized that a mortgage was more than a lien because it involved a transfer of property as security for a debt.²⁶ This rationale has led to the citing of *Conard* subsequently for the proposition that the Supreme Court has never decided whether the priority of the United States can be overcome by a specific and perfected lien.²⁷ This is a misconception of the decision in *Conard*: notwithstanding the Court’s mortgage rationale, the insurance company had nothing more than an equitable lien, resting on the debtor’s obligation to transfer the bills of lading and goods as collateral security for a contingent debt.²⁸

At first, the full import of *Conard* was appreciated by bench and bar. Six years after the decision the Attorney General conceded the holding of *Conard* to be that “the priority of the United States does not divest anterior liens.”²⁹ And in *United States v. Hack*³⁰ the Court held that assignees of partnership property for the benefit of creditors need not grant priority to a Government claim against one of the partners as an individual. At common law each partner has an equitable lien on partnership property to have it applied to firm debts, and firm creditors are subrogated to the equity of the partners.³¹

25. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386, 446 (U.S. 1828).

26. *Id.* at 441.

27. The first version of this disparagement of the *Conard* case appeared in *United States v. Texas*, 314 U.S. 480, 484 (1941). Three times since, the Court has reiterated the proposition that it has never decided the question thought to have been reserved in *Conard*: *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355 (1945); *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 370 (1946); *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 365 (1953).

28. The outward bills of lading designated the borrower as the shipper, specified that the shipments were for his account and risk, and named a third party or his assigns as consignee. *Conard v. Atlantic Insurance Co.*, 1 Pet. 386, 393 (U.S. 1828). On the outward bills of lading there were endorsed assignments, which purported to transfer to the insurance company the bills, the goods to be procured thereon, and any return cargo to be obtained by the outward cargo. But these assignments failed to effectuate a perfected transfer of legal title to the goods which were eventually attached by the Government: (1) the assignments were made explicitly for the purpose of furnishing collateral security for the contingent obligation of *respondentia* bonds; (2) the assignment was executed by the borrower-shipper, not the designated consignee; and (3) the goods attached were subject to homeward bills of lading disclosing no interest on the part of the insurance company. The Court acknowledged that the assignments were imperfect as against bona fide purchasers from the consignees for valuable consideration but insisted that they were good as against creditors of the assignor. *Id.* at 445.

29. *United States v. Hack*, 8 Pet. 271, 273 (U.S. 1834).

30. 8 Pet. 271 (U.S. 1834).

31. *Fitzpatrick v. Flannagan*, 106 U.S. 648, 654-5 (1882); *Case v. Beauregard*, 99 U.S. 119, 125 (1878); *Richardson, Creditors' Rights and the Partnership*, 40 Ky. L.J. 243, 254-5 (1952); Note, 27 COL. L. REV. 436, 437, 441 (1927).

Hack is thus another recognition of the superiority of an antedating equitable lien over the priority claim of the United States.

In *Brent v. Bank of Washington* ³² a unanimous Court squarely held that a prior lien is not defeated by the federal priority. The executors of an insolvent testator, in order to accord priority to a debt due to the United States, sought an equity decree freeing testator's bank stock from any lien held by the bank. The bank's lien arose from three notes endorsed by the testator. Two of the notes fell due and were protested before the testator's death; the Court treated "the legal lien of the bank for their payment complete."³³ Since the third note did not mature until after his death, a legal lien was not consummated before the 3466 priority attached.³⁴ Nevertheless, the Court had no difficulty in holding for the bank on all three notes.³⁵

Genesis and Growth of the Doctrine of the Inchoate and General Lien

Spokane County v. United States ³⁶ marked a departure from the settled interpretation of Section 3466,³⁷ and launched the doctrine of the inchoate and general lien: the federal priority defeats an antedating lien that is not specific and perfected. In *Spokane County* the Supreme Court affirmed the decision of the state supreme court ³⁸ that the federal priority was superior to a local tax lien. Two counties had assessed taxes against the debtor's personal property both before and after he went into receivership, at which time

32. 10 Pet. 596 (U.S. 1836).

33. *Brent v. Bank of Washington*, 10 Pet. 596, 615 (U.S. 1836).

34. The Court observed that the testator-stockholder's "signature to the note is an inchoate pledge of his stock for security." *Ibid*.

35. "[T]he bank, when called into a court of equity, may hold to any equitable lien, or other means in their hands, till it is discharged." *Id.* at 617. Cf. *United States v. Cutts*, 25 Fed. Cas. 745, No. 14,912 (C.C.D.N.H. 1832).

36. 279 U.S. 80 (1929).

37. The early Supreme Court cases cited note 16 *supra*, upholding antedating liens over the federal priority, were followed for over a century by federal and state courts. *United States v. Guaranty Trust Co.*, 33 F.2d 533, 537 (8th Cir. 1929), *aff'd on other grounds*, 280 U.S. 478 (1930) (mortgages and equitable liens preferred to § 3466 priority); *Cottrell v. Pierson*, 12 Fed. 805, 806-7 (C.C.D. Neb. 1881) (sustaining a judgment lien against federal priority); *United States v. Cutts*, 25 Fed. Cas. 745, No. 14,912 (C.C.D. N.H. 1832) (equitable assignment of stock as collateral security); *United States v. Crookshank*, 1 Edw. Ch. 232 (N.Y. 1831) (equitable lien on realty). Cf. *Piedmont Corp. v. Gainesville & N.W.R.R.*, 30 F.2d 525 (N.D. Ga. 1929); *In re C. J. Rowe & Bros., Inc.*, 18 F.2d 658 (W.D. Pa. 1927); *United States v. Wilkinson*, 28 Fed. Cas. 605, No. 16,695 (W.D. Mo. 1878) (sustaining title of attaching creditor who purchased at own sale all of property of absconding debtor of United States); *Postmaster General v. Robbins*, 19 Fed. Cas. 1126, No. 11,314 (D. Me. 1829) (sustaining widow's allowance notwithstanding uncertainty as to the amount). See *Brown v. American Gas Coal Co.*, 95 W. Va. 658, 665, 123 S.E. 412, 415 (1924); *Case of Richardson*, 9 OPS. ATT'Y GEN. 23 (1857). For further confirmation of the uniform understanding of the meaning of the early Supreme Court precedents, see 5 COLLIER, BANKRUPTCY 546 n.45 (14th ed. 1943); 65 C.J. 1369 nn. 37, 40 (1933); 39 Cyc. 751 n.1 (1912).

38. *Exchange Nat. Bank v. United States*, 147 Wash. 176, 265 Pac. 722 (1923).

the federal priority attached. The state supreme court had previously held that the personal property tax created a binding lien only on specific property against which it was assessed.³⁹ Chief Justice Taft assumed that no property in the hands of the receiver had been assessed by the counties until after the federal priority arose.⁴⁰ With this crucial assumption of fact made, the counties were merely unsecured creditors. In affirming the Government's priority over unsecured claims, *Spokane County* squared with existing law.⁴¹ Had the factual assumption and its significance, however, been made more explicit, the decision might have been better understood and productive of less mischief.⁴² But the Court's emphasis on the fact that the counties' liens were not "specific" and not "completed" by distraint,⁴³ inauspiciously originated the doctrine of the inchoate and general lien. The Court did not differentiate the *Conard*, *Hack*, and *Brent* cases. Indeed, Chief Justice Taft seemed to be oblivious of their existence.⁴⁴

Once born, the doctrine of the inchoate and general lien was nurtured in subsequent Court decisions. In *New York v. Maclay*,⁴⁵ the State of New York claimed a lien for franchise taxes on the property of a corporation in receivership. Although the lien, under New York law, bound the property in the hands of subsequent purchasers and took precedence over prior as well

39. *Pennington v. Yakima County*, 127 Wash. 538, 221 Pac. 326 (1923); *Raymond v. King County*, 117 Wash. 343, 201 Pac. 455 (1921).

40. *Spokane County v. United States*, 279 U.S. 80, 93 (1929). This assumption ignores the statement in the dissenting opinion in the court below that the proceeds of the sales of the taxpayer's assets by the receiver stood "in lieu of the specific property assessed, and the lien of the county tax . . . extended to it." *Exchange Nat. Bank v. United States*, 147 Wash. 176, 188, 265 Pac. 722, 726 (1928). The Court also ignored the county's contention that its lien on the property taxed was transferred from the specific items sold to the fund in the hands of the receiver. *Spokane County v. United States*, *supra* at 80.

41. The 3466 priority outranks a state's unsecured claims. *United States v. San Juan County*, 280 Fed. 120 (W.D. Wash. 1922); *In re Dickson's Estate*, 197 Wash. 145, 84 P.2d 661 (1938). In *Ernst v. Guarantee Millwork, Inc.*, 200 Wash. 195, 93 P.2d 404 (1939), the Washington court, appropriately distinguishing *Spokane County*, sustained a state personal property tax lien on the specific property assessed (actually the proceeds of its sale) as against the claim of the Government for priority.

42. See *Ernst v. Guarantee Millwork, Inc.*, *supra* note 41; *United States v. Waddill, Holland & Flinn, Inc.*, 182 Va. 351, 358, 364, 28 S.E.2d 741, 743, 746 (1944), *rev'd*, 323 U.S. 353 (1945).

43. *Spokane County v. United States*, 279 U.S. 80, 94-5 (1929). While Chief Justice Taft referred to the counties' liens as not specific and not perfected, he quoted from the concurring opinion of Judge Parker of the Washington Supreme Court, who rested his decision on the absence of any supporting lien right. 147 Wash. at 187, 265 Pac. at 725-6.

44. After discussing *United States v. Fisher*, 2 Cranch 358 (U.S. 1805), and *United States v. Nicholls*, 4 Yeates 251 (Pa. 1805), *writ of error dism'd*, 4 Wheat. 311 (U.S. 1819), Taft wrote: "No question of the construction of § 3466 seems to have come before this Court again until . . . *Field v. United States*, 9 Pet. 182 [(1835)] . . ." *Spokane County v. United States*, 279 U.S. 80, 89 (1929). This ignores, *inter alia*, the *Conard* cases decided in 1828-32. See note 16 *supra*. Neither they nor the *Brent* case, decided the year after *Field*, was cited by the Court despite their obvious relevance.

45. 288 U.S. 290 (1933).

as subsequent mortgages,⁴⁶ the state taxes had not been assessed or liquidated until after the receivers were appointed and the federal priority attached. Therefore, invoking *Spokane County*, the Supreme Court held that New York's lien was not specific and perfected⁴⁷ and that the federal claim must be accorded priority.

To his conclusions in *New York v. Maclay*, Mr. Justice Cardozo appended a mischief-making paragraph, containing the gratuitous suggestion that the result might have been the same even if the state tax lien had become specific and perfected by liquidation before the priority attached.⁴⁸ In support of this suggestion he raised the ghost of *Thelusson*: federal priority will prevail over a lien which has not resulted in a "change of title or possession."⁴⁹ To Cardozo, the federal priority "must prevail against the [New York] lien of a tax not presently enforceable, but serving merely as a *caveat* of a more perfect lien to come."⁵⁰

In *United States v. Texas*⁵¹ the doctrine of the general and inchoate lien was extended to embrace a tax lien which, under state law, was "first and

46. See *New York Terminal Co. v. Gaus*, 204 N.Y. 512, 98 N.E. 11 (1912).

47. *New York v. Maclay*, 288 U.S. 290, 292-3 (1933).

48. *Id.* at 293. The suggestion was heeded in *Gerson, Beesley & Hampton, Inc. v. Shubert Theatre Corp.*, 7 F. Supp. 399, 400 (S.D.N.Y. 1934), and *Matter of Lincoln Chair & Novelty Co.*, 274 N.Y. 353, 9 N.E.2d 7 (1937).

49. *New York v. Maclay*, 288 U.S. 290, 293-4 (1933). Circuit Judge Augustus Hand had raised the ghost in the opinion below. *New York v. Maclay*, 59 F.2d 979, 981 (2d Cir. 1932). Cardozo's analysis followed closely that of Hand.

50. *New York v. Maclay*, 288 U.S. 290, 294 (1933).

Although the doctrine of the inchoate lien also received recognition in *United States v. Knott*, 298 U.S. 544 (1936), the decision can stand without it. The case involved the right of the United States to assert priority in the proceeds of a deposit made by a New Jersey surety company as security for the payment of judgments on its bonds in Florida. The proceeds of the deposit were being administered in a state receivership proceeding for the benefit of unsecured creditors including some whose claims had no connection with surety bonds. When the federal priority attached, no Florida claimant had a judgment, a claim of lien, or any specific interest in the deposit. The Government had obtained judgment against the surety company on bonds given in Florida, and had filed a claim for the aggregate amount in a state receivership proceeding. The Florida Supreme Court subordinated the Government to Florida claimants. *Kelly v. Knott*, 120 Fla. 589, 163 So. 64 (1935). In view of the fact that the securities deposited remained subject to process within the state, at least prior to insolvency, and that the deposit was subject to administration for the benefit of unsecured creditors when insolvency occurred, the decision of the United States Supreme Court sustaining the Government's claim to priority over the other creditors is difficult to criticize. *But cf. Conway v. Imperial Life Insurance Co.*, 207 La. 285, 21 So.2d 151 (1945). Mr. Justice Brandeis' conclusion in *Knott* that the Florida creditors' interest lacked "the characteristics of a specific perfected lien which alone bars the priority of the United States" was found ten years later to concede too much. By then the federal priority had waxed in stature and the Court explained away the concession in order to keep open the question whether a specific and perfected lien would bar the priority. "The statement . . . was not intended to settle the problem and may be taken to have been made with reference to the early mortgage lien cases . . ." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 370 n.10 (1946).

51. 314 U.S. 480 (1941).

prior to any and all other existing liens."⁵² The Texas court held that such a lien for state gasoline taxes, on all the property used in the business of a gasoline distributor, outranked both a prior mortgage and a priority claim for federal gasoline taxes.⁵³ The Supreme Court reversed because the state's lien was not sufficiently specific and perfected to prevail against the federal priority: the property subject to the lien was "neither specific nor constant";⁵⁴ the amount of the claim secured by the lien was "unliquidated and uncertain";⁵⁵ and some judicial procedure was essential to enforce the lien.⁵⁶

52. TEX. STAT., REV. CIV., art. 7065a-7 (1936).

53. *State v. Nix*, 138 S.W.2d 924 (Tex. Civ. App. 1940), entering judgment in conformity with answers to questions certified to the Supreme Court of Texas, 134 Tex. 476, 133 S.W.2d 963 (1939); see also *State v. Wynne*, 134 Tex. 455, 133 S.W.2d 951 (1939), *app. dismissed*, 310 U.S. 610 (1940).

54. *United States v. Texas*, 314 U.S. 480, 487 (1941). It is not unusual for a mortgage to cover accessions, after-acquired property, or even a shifting stock of goods. 3 GLENN, MORTGAGES c. 33 (1943). Such mortgages apparently would not satisfy the *Texas* test.

55. The Court thought the amount uncertain because a statute made tax reports by the distributor only prima facie evidence of the amount of the tax and authorized admission of evidence of incorrectness of the report. *United States v. Texas*, 314 U.S. 480, 487 (1941). Is any lien so certain that neither party can show in a judicial proceeding the incorrectness of the amount secured? In *First Nat. Bank v. Southland Production Co.*, 189 Okla. 9, 112 P.2d 1087 (1941), the Government attacked a ruling conferring priority on a state tax lien on the ground that the lien was not perfect and specific when the federal priority attached. Levy had been made under a warrant to enforce the state lien prior to the institution of the insolvency proceedings against the taxpayer, but the state later discovered that \$656.72 was due from the taxpayer in addition to that previously reported by him. The court sustained the priority of the state tax lien even as to the latter sum.

The amount secured is frequently unliquidated and uncertain, as when the mortgage is one for future advances or contains a dragnet clause. See, e.g., the deed of trust sustained as against the federal claim to priority in *United States v. Hooe*, 3 Cranch 73 (U.S. 1805). And of course there is always the possibility of disagreement as to the amount or application of payments. 2 WILTSIE, MORTGAGE FORECLOSURE c. 33 (5th ed. 1939).

56. "[The lien] . . . did not of its own force divest the taxpayer of either title or possession." *United States v. Texas*, 314 U.S. 480, 488 (1941). In states where a mortgage may be foreclosed only by judicial proceedings the modern mortgage often has the characteristics of the "inchoate and general" lien held by the state in *Texas*; it does not of its own force divest title or possession. See *Bank of Wrangell v. Alaska Asiatic Lumber Mills, Inc.*, 84 F. Supp. 1, 4-5 (D. Alaska 1949); *Meyer Estate*, 159 Pa. Super. 296, 302, 48 A.2d 210, 214 (1946). Real estate mortgages in particular are apt to be subject to a requirement that enforcement shall be accomplished by judicial foreclosure. OSBORNE, MORTGAGES 921 (1951).

"Incredible as it may seem, the question whether a mortgage lien is entitled to priority over the United States under this statute has not yet been decided by the Supreme Court." *Bank of Wrangell v. Alaska Asiatic Lumber Mills, Inc.*, *supra* at 2. Presented with the question, the Alaska court acknowledged that recent Supreme Court decisions cast doubt on the ability of a mortgage to defeat the federal priority, but it sustained the mortgage. See *United States v. Guaranty Trust Co.*, 33 F.2d 533, 537 (8th Cir. 1929), *aff'd on other grounds*, 280 U.S. 478 (1930). The latest expression of the Supreme Court on the nature of a mortgage recognizes its specific character but does not advert to its state of perfection. *United States v. New Britain*, 347 U.S. 81, 84 (1954).

The opinion in *Texas* undermines the interpretation of 3466 established by the early cases. After observing that 3466 mentions no exception to its requirement of first satisfaction of debts due to the Government, the opinion noted that in *Thelusson*, *Conard*, and *Brent* the Court had created an exception for previously executed mortgages.⁵⁷ The Court then remarked that these so-called "mortgage cases" had reserved the question of whether the federal priority would be defeated by a specific and perfected lien.⁵⁸ This statement ignores the actual decisions in *Conard* and *Brent*, and rests on an apparent acceptance of Cardozo's analysis of *Thelusson*. These "mortgage cases" were then disposed of with an observation that, "whatever [their] current vitality, [they did not] require the subordination of unsecured claims of the United States to a specific and perfected lien."⁵⁹ An impressive body of authority requiring such subordination was thus reduced to a trio of misunderstood cases shadowed by a cloud of doubt.

In order to continue the expansion of the doctrine of the inchoate and general lien, the Supreme Court soon found it necessary to rule that specificity and perfection is a federal question. In *United States v. Waddill, Holland & Flinn, Inc.*,⁶⁰ Virginia's highest court had held that a statutory landlord's lien was "fixed and specific and not . . . merely . . . inchoate."⁶¹ The Supreme Court could not deny this as an authoritative construction of state law; and it had said in *Spokane County* that "[t]his is really a state question."⁶² The Court, however, restated the role of state law in the determination of the relative priority of the competing claims:

"... [I]t is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress."⁶³

57. *United States v. Texas*, 314 U.S. 480, 484 (1941). Cf. *Bank of Wrangell v. Alaska Asiatic Lumber Mills, Inc.*, 84 F. Supp. 1, 2 (D. Alaska 1949).

58. It is the argument of this article that the security interest involved in *Conard* was certainly no more than a specific lien. Mr. Justice Baldwin in the *Brent* case said that the *Conard* security transaction "approximates to one which merely gives a lien." *Brent v. Bank of Washington*, 10 Pet. 596, 611 (U.S. 1836). Since the *Brent* case did recognize that legal and equitable liens were superior to the federal priority, see note 35 *supra*, it is inconceivable that Baldwin thought that the question of whether the federal priority would be defeated by "a specific and perfected lien" was reserved in either *Conard* or *Brent*. His words were that "it has never been decided that it [i.e., the federal priority] affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority." *Id.* at 611. In the context of the *Conard* and *Brent* decisions, Baldwin's words must mean not that the question had been reserved but that the court had never decided for the Government.

59. *United States v. Texas*, 314 U.S. 480, 486 (1941).

60. 323 U.S. 353 (1945).

61. *United States v. Waddill, Holland & Flinn, Inc.*, 182 Va. 351, 363, 28 S.E.2d 741, 746 (1944).

62. *Spokane County v. United States*, 279 U.S. 80, 94 (1929); accord, *United States v. Reese*, 131 F.2d 466, 468 (7th Cir. 1942).

63. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 356-7 (1945).

Scrutinized under federal law the landlord's lien failed to meet federal standards of specificity and perfection.⁶⁴ The Court said it was not known on the day the federal priority attached whether the landlord would assert his lien.⁶⁵ The amount of the rent claim secured by the lien was deemed uncertain in view of the possibility of prior payment or mistake or a right of setoff in the tenant.⁶⁶ The property subject to the lien was said to be indefinite because the landlord's lien could not be enforced against more property than necessary to satisfy the rent claim,⁶⁷ and could not be asserted against property removed from the rented premises for more than thirty days.⁶⁸ In addition to setting standards of specificity that few if any liens could satisfy, the Court confused "perfection" with processes of enforcement and collection.⁶⁹ The statutory lien was held not perfected because the landlord had not levied on the property, and because the tenant retained both title and possession.⁷⁰

The doctrine of the inchoate lien received its fullest elaboration in *Illinois ex rel. Gordon v. Campbell*,⁷¹ where constructive notice to the world provided by recording a statutory lien was held not to affect a Section 3466 priority claim. Under state law, the state's lien for unemployment contributions attached to all of the employer's personal property used in his business.⁷²

64. Although the City of Danville, Virginia, was not represented in the Supreme Court, its tax lien on personalty of the debtor was also subordinated to the federal priority. The state courts had accorded the city priority over the landlord as well as the Government but the Supreme Court found the city's lien not sufficiently "explicit and perfected." The Court relied strongly on an inadvertent clause in a dictum of an inferior Virginia court for substantiation of its conclusion that the city's lien was contingent. *Id.* at 359-60. The Virginia Supreme Court's clear analysis, 182 Va. at 363, 28 S.E.2d at 746, was disregarded.

65. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 357 (1945). Of course, up to the instant any lien is terminated by payment, there can be no absolute certainty that the lienor will insist on his full rights under the lien. This observation is a dramatic illustration of the length to which the Court has been willing to go to sustain its view that a particular lien is inchoate.

66. *Id.* at 357-8. Is ever a lien free of this kind of uncertainty? The Court apparently thought it unnecessary to inquire if there was in fact any dispute or uncertainty as to the amount of the lien.

67. *Id.* at 358.

68. *Ibid.* See VA. CODE ANN. § 5523 (1942).

69. Cf. Glenn, *Creditors' Rights—A Review of Recent Developments*, 32 VA. L. REV. 235, 289 (1946); 31 VA. L. REV. 678, 680-81 (1945). When Congress has used the word "perfected" with reference to liens in the Bankruptcy Act, its reference has been to the conventional meaning rather than the esoteric meanings found in the Supreme Court opinions construing § 3466. See 3 COLLIER, BANKRUPTCY §§ 60.36-60.51 (14th ed. 1941); 4 *id.* §§ 67.24, 67.26 (14th ed. rev. 1954); WEINSTEIN, THE BANKRUPTCY LAW OF 1938 120, 144 (1938). For further evidence of conventional usage see comment 2 accompanying § 9-303 of the Uniform Commercial Code (Official Draft, Text and Comments ed. 1952).

70. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 358 (1945). The Virginia court, however, had insisted that the landlord had the same kind of possessory lien as an innkeeper. 182 Va. at 362, 28 S.E.2d at 745.

71. 329 U.S. 362 (1946).

72. ILL. REV. STAT., c. 48, § 243(a) (1943).

Notice of the lien had been filed in the office of the county recorder, validating it even against innocent purchasers for value.⁷³ In order to protect itself against dissipation of its security, the state sued in a state court to enforce the lien, and obtained both an injunction against creditors' interference with the property, and the appointment of a receiver. The state supreme court, however, accorded priority to a federal claim,⁷⁴ and the United States Supreme Court affirmed.

The lien was found not "sufficiently specific or perfected" for federal purposes. Although the lienor was identified,⁷⁵ and the amount of the lien was certain,⁷⁶ the property to which the lien attached was not definite.⁷⁷ The statutory language—"all the personal property . . . used . . . in business"—was too vague and comprehensive; the property affected could not be ascertained until the debtor submitted a schedule in the lien foreclosure proceedings.⁷⁸ In addition to this three-part test of identity, certainty, and definiteness the Court suggested that specificity and perfection required a transfer of title or possession.⁷⁹ The Court repudiated the view that recordation perfected the state lien,⁸⁰ because such a view "in substance" would overrule the

73. ILL. REV. STAT., c. 48, § 243(b) (I) (1943).

74. *People for use of Murphy v. Chicago Waste & Textile Co.*, 391 Ill. 29, 62 N.E.2d 537 (1945).

75. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 375 (1946). *Cf.* *United States v. Knott*, 298 U.S. 544 (1936), discussed in note 50 *supra*.

76. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 375 (1946). The Court acknowledged that the notices of lien "fixed the amounts of the liens, though miscalculated." *Ibid.* Uncertainty as to the amount secured by the lien was nevertheless fatal in *New York v. MacLay*, 288 U.S. 290 (1933), *United States v. Texas*, 314 U.S. 480 (1941), and *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353 (1945).

77. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 375 (1946). This indefiniteness was also found in the *MacLay*, *Texas*, and *Waddill* cases, *supra* note 76.

78. The filing of a complete schedule of personal property subject to the lien was a duty of the debtor. ILL. REV. STAT., c. 48, § 243(e) (1943). Since the state would not know the amount of property subject to the lien until the debtor had filed the required schedule, the earlier appointment of the receiver was said to be "only an initial step in the perfection of the lien, [not a final attachment,] as is, for example, the enforcement of a judgment by execution and levy." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 374 (1946). *Cf.* *State v. Woodroof*, 253 Ala. 620, 630, 46 So.2d 553, 561 (1950), where the state court ventured its own version of the Supreme Court "formula or standard" for a "specific and perfected" lien: "if the amount of it has been fixed by a proceeding which is binding and conclusive at the date of receivership, and not open for change in any sort of proceeding which might arise thereafter; and that the lien upon the property which was received by the receiver was not dependent upon any contingency, nor subject to selection, shift, or change, and nothing remained to be done then or thereafter to make such lien complete, specific or perfect, or to liquidate the debt, and nothing could be done thereafter to discharge the debt or subordinate such lien but full payment of the debt."

79. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 376 (1946).

80. Justices Reed and Jackson dissented on the ground that recordation of notice perfected the state lien. *See id.* at 376-8. The same justices also dissented in *United States v. Carroll Construction Co.*, 346 U.S. 802 (1953). Since *Carroll Construction Co.* involved a state tax lien of which notice had been filed under state law, it may be surmised that the *Carroll* dissenters were adhering to the position they took in *Campbell*.

numerous decisions in which liens no less "specific and perfected" had been held impotent against Section 3466.⁸¹

The most recent case under Section 3466 produced the defeat of a state lien perfected by foreclosure sale. In *Petition of Gilbert Associates, Inc.*,⁸² New Hampshire's highest court thought that there could be "no question" that the lien of a town property tax on machinery which had been foreclosed by advertisement and sale before the federal priority arose complied with the Supreme Court's requirements.⁸³ The state court was satisfied that the town's tax lien was sufficiently perfected and specific even before advertisement and sale.⁸⁴ The Government took the case to the Supreme Court,⁸⁵ where the town did not continue the battle. Without questioning that the lienor was identified, that the amount of the lien was certain, or that the property subject to the lien was definite, the Court simply pointed out that "[t]he taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien."⁸⁶ What made the lien "general" is not clear.

The remarkable progeny of *Spokane County* subordinated statutory liens⁸⁷ to the federal claim, even though the Government had no lien. The condemned category of the inchoate and general lien, created by the Court and continually enlarged to include each new lien coming before it, has come to embrace practically every lien to be found in modern American law.⁸⁸ And in order to avoid facing the supposedly unresolved question whether a specific and perfected lien is superior to the federal priority, the Court has always been

If recordation perfects a lien on a debtor's property as against every subsequently accruing interest under state law, these justices are apparently unable to find anything in the federal priority statute to justify a judicial ruling that the lien is still not perfected. Cf. *Goggin v. Division of Labor Law Enforcement of Cal.*, 336 U.S. 118 (1949), implying throughout that a federal tax lien had been "perfected" for the purposes of § 67b of the Bankruptcy Act by virtue of a filing of notice of the lien.

81. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 374, 376 (1946). Only *Waddill* was cited, and that case did not involve a recorded lien.

82. 97 N.H. 411, 90 A.2d 499 (1952).

83. *Petition of Gilbert Associates, Inc.*, 97 N.H. 411, 416, 90 A.2d 499, 503 (1952).

84. *Ibid.*

85. *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953).

86. *Id.* at 366.

87. All these cases involved state statutory liens. But "[a] statutory lien is as binding as a mortgage, and has the same capacity to hold the land as long as the statute preserves it in force." *United States v. New Britain*, 347 U.S. 81, 84 (1954), quoting *Rankin v. Scott*, 12 Wheat. 177, 179 (U.S. 1827).

88. Repeated references in the Court's opinions to lack of title or possession suggest that pledges, common-law liens, and even statutory possessory liens may meet the Court's standards. But *both* title and possession may be required despite the use of the disjunctive in the Court's references to these two features. In *Gilbert Associates* acquisition of a tax title without possession was insufficient to perfect the lien. To speak of a lienor with title is of course to utter a legal solecism; but the incongruities of the doctrine of

successful in finding one feature suggestive of inchoateness.⁸⁹ In 1954 the Court finally acknowledged that a lien was specific and perfected.⁹⁰ But the competing federal interest in this case was the federal tax lien, not the federal priority. To the tax lien it is now necessary to turn.

SECTION 3670 TAX LIEN

Evolution of Federal Tax Lien Legislation

The need for a lien to secure the Government's tax claims, irrespective of the taxpayer's solvency, became apparent as federal fiscal requirements ex-

the inchoate and general lien have never been a handicap to its development. In any event, even a possessory lienor probably does not hold free of all the contingencies enumerated in *Waddill*. See text at notes 65-8 *supra*.

There is occasional intimation that an actual levy may create a specific and perfected lien. See, e.g., *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 374 (1946). The suggestion apparently goes back to a dictum, that seizure under a *fiery facias* places property beyond the federal priority, in *Thelussan v. Smith*, 2 Wheat. 396, 426 (U.S. 1817). A levy of execution, however, need not deprive the debtor of possession. See 2 FREEMAN, EXECUTIONS § 263 (3d ed. 1900) (personalty); DRAKE, ATTACHMENT § 236 (7th ed. 1891) (realty); 2 FREEMAN, EXECUTIONS § 280a (3d ed. 1900) (same). Even when possession is taken by a levying officer, the lien may be defeated by intervention of bankruptcy under § 67a of the Bankruptcy Act or by other circumstances before final enforcement. 2 *id.* §§ 271-271a. Finally, the possession taken under a levy would seem to be like that of the receiver in *Campbell*—possession "of the court" rather than of the lienor. And that kind of possession apparently does not constitute perfection. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 376 (1946).

The six cases cited in note 16 *supra*, sustaining consensual liens, have not been explicitly overruled; and no consensual lien has yet been subordinated by the Supreme Court on the ground that it was inchoate and general. The Court has, however, intimated that the old "mortgage cases" may now require re-examination. *New York v. Maclay*, 288 U.S. 290, 294 (1933); *United States v. Texas*, 314 U.S. 480, 484, 486 (1941); *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 370 (1946). But cf. *United States v. New Britain*, 347 U.S. 81, 86-7 (1954). As pointed out in notes 54-6 *supra*, the modern mortgage has some or all of the characteristics of the inchoate and general lien. No other variety of consensual lien appears to be completely free of such characteristics. Thus, while the landlord's lien urged unsuccessfully in *Waddill* was statutory, a contractual landlord's lien is ordinarily vulnerable to the same infirmities.

Although nothing in the cases states that the nature of the property subject to a lien has aught to do with the issue of whether the lien is specific and perfected, it has sometimes been thought that a difference should be recognized between a lien on realty and a lien on personalty. Cf. BANKRUPTCY ACT § 67c, discussed in 4 COLLIER, BANKRUPTCY ¶ 67.20[3] (14th ed. rev. 1954). The statutory liens involved in *Maclay* and *Texas* apparently applied to real property as well as to personalty, and the Court made no effort to limit the scope of its ruling to personalty in either case. The only hint that the nature of the property may be relevant is found in *United States v. New Britain*, *supra* at 87, where *Gilbert Associates* was distinguished partly on the ground that it involved personal property instead of realty. But see text at note 137 *infra*. For a recent application of the doctrine to a statutory lien on real estate see *In re Lane's Estate*, 59 N.W.2d 593 (Iowa 1953), 39 IOWA L. REV. 189.

89. See, e.g., *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953), where lack of title or possession doomed an apparently otherwise choate lien.

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

panded during the Civil War and tax collections were increasingly defeated by a transfer of the taxpayer's assets before institution of enforcement proceedings.⁹¹ Section 3670 of the Internal Revenue Code provides that if, after demand for payment, any person should neglect or refuse to pay a federal tax,⁹² the amount of the tax should be a lien in favor of the United States.⁹³ The lien attaches to "all property and rights to property . . . belonging to such person."⁹⁴

United States v. Snyder,⁹⁵ the first Supreme Court case involving the federal tax lien, demonstrated how drastic a statute had been drawn. In 1879 a federal lien for delinquent tobacco taxes attached to certain realty owned by Charles Snyder. Snyder transferred the realty in 1881 to a good faith purchaser for value. Four years later, the Government sued Snyder and his transferee to enforce the lien. The circuit court dismissed the purchaser pursuant to a Louisiana constitutional provision which imposed a three-year statute of limitations on any "privilege on immovable property" not recorded in the parish where the realty was located.⁹⁶ The Government appealed. "The single question thus presented for [the Supreme Court's] consideration [was] whether the tax system of the United States is subject to the recording laws of the States."⁹⁷ So stated, the question was not difficult to answer: the federal lien was held valid against the transferee.

Since *Snyder* imposed individual hardships and impaired alienation of

91. Derivation of the tax lien statute is commonly traced to 14 STAT. 107 (1866). See *Detroit Bank v. United States*, 317 U.S. 329, 334 (1943). Also see Hist. note, 26 U.S.C.A. § 3670 (1940). But substantially the same statute appeared earlier in 13 STAT. 470-1 (1865).

92. A neglect or refusal to pay after demand is a condition precedent to the inception of the lien. An ambiguity exists in the provisions for the commencement of the lien found in §§ 3670 (time of demand) and 3671 (time of receipt of assessment list). See, e.g., *MacKenzie v. United States*, 109 F.2d 540, 541-2 (9th Cir. 1940); Kohlmeier, *Federal Tax Liens Under Revised Statutes—Section 3186*, 13 TAX MAG. 191, 192 (1935). The result has been uniformly reached, however, that the lien arises only after both requirements have been satisfied. *United States v. Lias*, 103 F. Supp. 341, 342 (N.D.W.Va.), *aff'd*, 196 F.2d 90 (4th Cir. 1952); *Johnson v. Western Union Telegraph Co.*, 184 Misc. 728, 53 N.Y.S.2d 867 (Sup. Ct. 1945). It seems clear that there should be no relation back to cut off rights vesting in the period intervening between the first and second steps requisite to the attachment of the tax lien. Cf. Sarner, *Correlation of Priority and Lien Rights in the Collection of Federal Taxes*, 95 U. OF PA. L. REV. 739, 745 (1947).

93. See note 4 *supra*. Special liens secure liability for unpaid taxes on distilled spirits, INT. REV. CODE § 2800(e)(1); the head tax on aliens entering the United States, 22 STAT. 214 (1882), as amended, 8 U.S.C. § 132 (Supp. 1952); the federal estate tax, INT. REV. CODE § 827; and the gift tax, INT. REV. CODE § 1009. The statutory provisions for special tax liens are not restricted by the provisions for the general tax lien. See *Detroit Bank v. United States*, 317 U.S. 329 (1943) (notice-filing not required for federal estate tax lien).

94. See note 4 *supra*.

95. 149 U.S. 210 (1893).

96. LA. CONST. Art. 176 (1879).

97. *United States v. Snyder*, 149 U.S. 210, 213 (1893).

property,⁹⁸ a 1913 amendment invalidated the federal tax lien as against purchasers, mortgagees, and judgment creditors prior to the filing of notice of the lien.⁹⁹ Still the statute proved inadequate for commercial necessities. Pledges were added to the class protected by notice-filing.¹⁰⁰ In *United States v. Rosenfield*,¹⁰¹ the collector was allowed to foreclose a tax lien on shares of stock which had been acquired by a broker without actual notice of the previously filed lien. The decision negated the provisions and policy of the Uniform Stock Transfer Act, then adopted in half the States, insofar as that law sought to promote negotiability of stock certificates by freeing them of liens not indicated on the certificate.¹⁰² Immediately after the *Rosenfield* case a new exception was engrafted on the lien statute to protect any mortgagee, pledgee, or purchaser of a security, who did not have actual notice

98. Five years after *Snyder* the American Bar Association appointed a committee to call Congress' attention to the implications of *Snyder*, and to urge remedial legislation. 21 A.B.A. REP. 108, 261 (1898); 22 A.B.A. REP. 53-8, 488 (1899). Although approval of the efforts of the committee was obtained from the Secretary of the Treasury in 1902, 25 A.B.A. REP. 496 (1902), it was another eleven years before they were to bear fruit. When the American Bar Association first interested itself in the problem, the principal taxes which would give rise to a troublesome lien appeared to be those for spirits and tobacco. 22 A.B.A. REP. 55 (1899). By 1913, concern was developing over the impact of a corporate excise tax levied by the Revenue Act of 1909, 36 STAT. 12. The Attorney General had ruled that unpaid taxes imposed by that Act would constitute a lien. 23 ORS. ATT'Y GEN. 241 (1910). Also see 37 A.B.A. REP. 41 (1912); H.R. REP. No. 1018, 62d Cong., 2d Sess. 2 (1912).

99. 37 STAT. 1016 (1913). The Government has sought to have the courts read the notice-filing statute as having the effect of subordinating to the federal tax lien every kind of lien not specifically protected, regardless of the time of its attachment to the debtor's property. Brief for Petitioner, pp. 19-24, *United States v. New Britain*, 347 U.S. 81 (1954); Brief for Petitioner, pp. 27-9, *United States v. Gilbert Associates*, 345 U.S. 361 (1953). In subordinating liens attaching prior to the tax lien, this reading of the statute involves a misapprehension of the purpose of notice-filing legislation. See H.R. REP. No. 1018, 62d Cong., 1st Sess. (1912). But the reading found support in the concurring opinion of Mr. Justice Jackson in *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950).

For the persons covered by the notice-filing provision, actual notice or knowledge of a federal tax lien has been regarded as immaterial on the question of the validity of the tax lien. *United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1938). But, under § 6323(c) (1) of the Internal Revenue Code of 1954, actual notice will be equated to constructive notice for mortgagees, pledgees, and purchasers. H.R. 8300, 83d Cong., 2d Sess. (1954). No reference is made, however, to the effect of a judgment creditor's actual knowledge.

100. 53 STAT. 882-3 (1939). This amendment apparently was declaratory of existing law. H.R. REP. No. 855, 76th Cong., 1st Sess. 25 (1939); cf. *In re Decker's Estate*, 355 Pa. 331, 340-1, 49 A.2d 714, 719 (1946), cert. denied sub nom. *Decker v. Kann*, 331 U.S. 807 (1947); *Exchange Nat. Bank v. Davy*, 13 F. Supp. 226 (N.D. Okla. 1936). *Contra*: *Investment & Securities Co. v. Robbins*, 49 F. Supp. 620, 622 (E.D. Wash. 1943), aff'd, 140 F.2d 894 (9th Cir. 1944).

101. 26 F. Supp. 433 (E.D. Mich. 1938).

102. UNIFORM STOCK TRANSFER ACT §§ 1, 5, 6, 15.

of the federal tax lien, whether or not recorded.¹⁰³ Thus, in a series of amendments during the last ninety years, Congress has exhibited a constant purpose to protect third persons against harsh application of the federal tax lien.¹⁰⁴ No more here than in Section 3466 is there any indication that Congress intended the federal right to supersede an antecedent lien.

A Trio of Troublesome Precedents

The Government lawyers who, equipped with no more than a priority statute, were winning jousts with lien claimants in the lists of the Supreme Court in the 1930's and early 1940's, found harder going in lower courts when armed instead with a federal tax lien.¹⁰⁵ In the late 1940's the Government forged

103. INT. REV. CODE § 3672(b), 53 STAT. 882-3 (1939). Section 6324 of the Internal Revenue Code of 1954 would incorporate a similar provision into the federal estate and gift tax lien legislation. H.R. 8300, 83d Cong., 2d Sess. § 6324 (1954).

104. In at least five of the nine amendments which have brought §§ 3670-2 to their present form, Congress has concerned itself with making the statute operate more equitably toward third parties: 20 STAT. 331 (1879), eliminating relation-back of the lien to the date the tax became due; 43 STAT. 994 (1925), providing for notice-filing in records of towns and cities in New England; 45 STAT. 875 (1928), placing a limitation on duration of the tax lien; and see notes 99, 100, and 103 *supra*. The other four amendments, 48 STAT. 757 (1934), 49 STAT. 1921 (1936), 53 STAT. 448 (1939), and 56 STAT. 957 (1942), have involved formal or procedural changes.

The Internal Revenue Code of 1954, H.R. 8300, 83d Cong., 2d Sess. (1954), overrules several interpretations of the present lien law but marks no departure from the policy of protecting third parties. Section 6321 subjects a taxpayer's interest in an estate by the entirety to the lien, overruling such cases as *Bigley v. Jones*, 64 F. Supp. 389 (W.D. Okla. 1946), and *United States v. Nathanson*, 60 F. Supp. 193 (E.D. Mich. 1945). Section 6322 starts the lien from the time the assessment is made rather than the time the collector receives the assessment list. Section 6323(b) nullifies state notice-filing statutes which prescribe the form or content of the federal lien notice, *e.g.*, MICH. STAT. ANN. § 7.751 (1950), held applicable in *United States v. Maniaci*, 116 F.2d 935 (6th Cir. 1940). An amendment of 1942 apparently having the same purpose proved to be abortive. *Youngblood v. United States*, 141 F.2d 912 (6th Cir. 1944). See *Wright, Title Examinations in Michigan as Affected by the General Federal Tax Lien*, 51 MICH. L. REV. 183 (1952). Section 6323(c) (1) validates the lien against purchasers, mortgagees, and pledgees taking property (except securities) with actual notice of the lien. This provision overrules such literal interpretations of the notice-filing law as that in *United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1938). Section 6323(c) (2) limits the protection afforded a judgment creditor to persons with a conventional judgment, codifying *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953). Section 6323(c) (3) further limits the class of judgment creditors to those with perfected liens. Unless the word "perfected" takes on the exotic coloration of the doctrine of the inchoate lien, see *United States v. Security Trust & Sav. Bank*, 340 U.S. 47 (1950), § 6323(c) (3) will be in accord with the interpretation of the present statute, INT. REV. CODE § 3672. See, *e.g.*, *Miller v. Bank of America*, 166 F.2d 415 (9th Cir. 1948).

105. See, *e.g.*, *New York Casualty Co. v. Zwerner*, 58 F. Supp. 473 (N.D. Ill. 1944); *Meyer Estate*, 159 Pa. Super. 296, 48 A.2d 210 (1946). In addition to arguing for a 3670 tax lien, the Government sometimes proposed the application of § 3466 in situations in which it was obviously inapplicable. See, *e.g.*, *American Surety Co. v. Louisville Mun. Housing Comm'n*, 63 F. Supp. 486, 487 (W.D. Ky. 1945), *aff'd sub nom. Glenn v. American Surety Co.*, 160 F.2d 977, 982 (6th Cir. 1947); *In re Van Winkle*, 49 F. Supp.

an argument which it began to test in the lower courts: "the rationale of cases under [Section 3466] . . . should be followed in determining priorities of liens under [Section] 3670."¹⁰⁶ This argument by analogy made no impression until the Government carried its contest with an attaching creditor to the Supreme Court in *United States v. Security Trust & Savings Bank*.¹⁰⁷

In *Security Bank* the creditor's attachment and subsequent judgment straddled the date of the federal tax lien. The Stylianos owned realty in California. Morrison sued them on a note and had the realty attached. Thereafter, but before Morrison obtained judgment against the Stylianos, a federal tax lien arose against the realty, and notice was duly filed. Under California law, the creditor's attachment gave rise to a lien on the realty effective when recorded.¹⁰⁸ And the California courts had held that a subsequent judgment lien merged with the attachment lien and related back to the time when the attachment was recorded.¹⁰⁹ Since the federal tax lien came after the attachment lien, the state court relegated the Government to the funds remaining after discharge of Morrison's judgment.¹¹⁰

The Government appealed, and the United States Supreme Court reversed. The federal tax lien had become affixed before Morrison's judgment. A state court had once, in a different context, characterized an attachment lien as contingent:¹¹¹ if judgment is rendered for the defendant or if the attachment

711, 714 (W.D. Ky. 1943); *Brenner v. Patrician Restaurant, Inc.*, 92 N.Y.S.2d 246, 248 (N.Y. City Ct. 1949). But occasionally the additional argument was accepted by courts that were confused by Supreme Court interpretation of 3466. See, e.g., *United States v. Barndollar & Crosbie, Inc.*, 166 F.2d 793, 796 (10th Cir. 1948); *United States v. Reese*, 131 F.2d 466 (7th Cir. 1942); *Ratner-Stanhope Corp. v. Rosen*, 49 N.Y.S.2d 750, 752 (Sup. Ct. 1944); cf. *In re Capital Foundry Corp.*, 64 F. Supp. 885 (E.D.N.Y. 1946).

106. See quotation from the Government's brief in *Adams v. O'Malley*, 182 F.2d 925, 928 (8th Cir. 1950). For earlier references to less refined versions of the argument, see, e.g., *In re Taylorcraft Aviation Corp.*, 168 F.2d 808, 809-10 (6th Cir. 1948); *United States v. Sampson*, 153 F.2d 731, 734 (9th Cir. 1946); *Board of Supervisors v. Hart*, 210 La. 78, 86, 26 So.2d 361, 363 (1946); *Manufacturers Trust Co. v. Sobel*, 175 Misc. 1067, 1069, 26 N.Y.S.2d 145, 146-7 (N.Y. City Ct. 1940); *United States v. Yates*, 204 S.W.2d 399, 405 (Tex. Civ. App. 1947); see *Martin, C.J.*, dissenting in *Glenn v. American Surety Co.*, 160 F.2d 977, 982-3 (6th Cir. 1947). The Government lost in all of these cases.

107. 340 U.S. 47 (1950).

108. CAL. CODE CIV. PROC. § 542a (Deering 1949). Such a lien is found in many states. *DRAKE, ATTACHMENT* § 239 (7th ed. 1891); *MOORE & COUNTRYMAN, DEBTORS' AND CREDITORS' RIGHTS-CASES AND MATERIALS* 47 n.6 (1951).

109. See, e.g., *Balzano v. Traeger*, 93 Cal. App. 640, 643, 270 Pac. 249, 250 (1928).

110. *Winther v. Morrison*, 93 Cal. App.2d 608, 209 P.2d 657 (1949), *petition for hearing before Cal. Sup. Ct. denied*, 93 Cal. App. 2d 615, 209 P.2d 657 (1949). Under state law no subsequent purchaser or encumbrancer could have defeated the attaching creditor's right. *Martinovich v. Marsicano*, 150 Cal. 597, 89 Pac. 333 (1907); *Woodward v. Brown*, 119 Cal. 283, 306, 51 Pac. 2, 9 (1897); *Porter v. Pico*, 55 Cal. 165 (1889); *Ritter v. Scannell*, 11 Cal. 238 (1858).

111. *Puissegur v. Yarbrough*, 29 Cal.2d 409, 412, 175 P.2d 830, 831 (1946). The Court disregarded the lower California court's determination in the very case under review that the attachment lien was "perfected." *Winther v. Morrison*, 93 Cal. App.2d 608, 611, 209 P.2d 657, 659 (1949).

lien is allowed to lapse by the passage of time, the attachment lien is dissolved.¹¹² In that sense, Morrison's attachment lien was inchoate.¹¹³ Consequently, the Government argued that since the priority of the United States under Section 3466 would not be defeated by a lien like Morrison's, the tax lien should fare no worse. And, although the tax lien statute does not subordinate or even mention inchoate liens, the Court accepted the Government's analogy to 3466.¹¹⁴

Since the Supreme Court had not yet found any antedating lien sufficiently specific and perfected to defeat the federal priority, the *Security Bank* case appeared to be a significant victory for the Government. Thirty cases in the lower courts had denied the supremacy of the 3670 tax lien over antedating rival liens without investigating inchoateness.¹¹⁵ In applying the rule "first

112. CAL. CODE CIV. PROC. § 542b (Deering 1949). Since the three-year period had passed without any enforcement of the lien in *Puissegur v. Yarbrough*, *supra* note 111, the rights of the attaching creditor were terminated by operation of law. Few liens are not subject to the same kind of contingency.

113. The Government suggested additional respects in which the attachment lien should be regarded as contingent or inchoate: (1) the attaching creditor has no possessory rights in the property; (2) he has no title; (3) he has no priority over an antedating unrecorded mortgage; (4) his lien terminates if the debtor dies before levy of execution on a judgment; (5) his lien right may be displaced by the debtor's declaration of homestead before judgment; (6) the attachment lien may be discharged on the debtor's giving security. Brief for Petitioner, pp. 37-8, *United States v. Security Trust & Sav. Bank*, 340 U.S. 47 (1950). A comparable catalogue of contingencies can be drawn up for most liens. Cf. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 356-7 (1945).

114. "In cases involving a kindred matter [the § 3466 priority] . . . , it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. . . . If the purpose of the . . . collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here." *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950). Mr. Justice Jackson concurred separately. *Id.* at 51-3. He read the history of the federal tax lien to give the lien priority over every adverse interest except those protected by notice-filing, and stated that since an attachment lienor was not "a judgment creditor in the conventional sense," he was not entitled to protection. *Id.* at 52. Jackson's history left out significant events, *e.g.*, the special efforts of Congress, 15 STAT. 125, 128 (1868), to create a lien for the distilled spirits tax with a first priority identical with that which any tax would have under Jackson's view of the general tax lien.

115. *Adams v. O'Malley*, 182 F.2d 925 (8th Cir. 1950) (county tax liens); *In re Taylorcraft Aviation Corp.*, 168 F.2d 808 (6th Cir. 1948) (mechanic's lien); *United States v. Winnett*, 165 F.2d 149 (9th Cir. 1947) (contingent right of setoff); *United States v. Sampsell*, 153 F.2d 731 (9th Cir. 1946) (corporate franchise tax lien); *American Surety Co. v. City of Louisville Mun. Housing Comm'n*, 63 F. Supp. 486, 487 (W.D. Ky. 1945), *aff'd sub nom. Glenn v. American Surety Co.*, 160 F.2d 977, 982 (6th Cir. 1947) (equitable lien of surety); *United States v. Bank of Shelby*, 68 F.2d 538 (5th Cir. 1934) (banker's equitable lien or right of setoff); *In re Fisher Plastics Corp.*, 89 F. Supp. 446 (D. Mass. 1950) (lien of trustee in bankruptcy); *United States v. 52.11 Acres of Land*, 73 F. Supp. 820 (E.D. Mo. 1947) (garnishment lien); *United States v. O'Dell*, 61 F. Supp. 966, 968 (E.D. Mich. 1945, *aff'd on other grounds*, 160 F.2d 304, 306-7 (6th Cir. 1947) (city, county, and state tax liens); *New York Casualty Co. v. Zwerner*, 58 F. Supp. 473 (N.D. Ill. 1944) (equitable lien of surety); *In re Van Winkle*, 49 F. Supp. 711 (W.D. Ky. 1943)

in time, first in right," these courts had treated the federal tax lien the same as any other legal lien having no special priority.¹¹⁶ Since none of these cases was brought to the Court's attention in any brief, or mentioned in the opinion, the Court may not have realized how far *Security Bank* departed from the traditional interpretation of 3670.¹¹⁷

In any event, the Government encountered obdurate resistance in its efforts to exploit the implications of *Security Bank*.¹¹⁸ In spite of the seemingly un-

(same); *Equitable Life Assur. Soc'y v. Moore*, 29 F. Supp. 179 (E.D. Ill. 1939) (assignment of shares of stock to secure loan); *Exchange Nat. Bank of Tulsa v. Davy*, 13 F. Supp. 226 (N.D. Okla. 1936) (assignment creating lien on equitable estate); *In re Mt. Jessup Coal Co., Ltd.*, 7 F. Supp. 603, 606 (M.D. Pa. 1934) (local tax lien); *Winston-Salem v. Powell Paving Co.*, 7 F. Supp. 424 (M.D.N.C. 1934) (same); *In re Holmes Mfg. Co.*, 19 F.2d 239 (D. Conn. 1927) (liens of receiver's certificates); *In re Caswell Const. Co.*, 13 F.2d 667 (N.D.N.Y. 1926) (mechanics' liens); *The River Queen*, 8 F.2d 426 (E.D. Va. 1925) (liens for seamen and materialmen); *In re Wyley Co.*, 292 Fed. 900 (N.D. Ga. 1923) (state tax liens); *Muhleman & Kayhoe, Inc. v. Brown*, 43 Del. 207, 45 A.2d 521 (Super. Ct. 1945) (equitable pledge); *Ferris v. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 Atl. 577 (1924) (local tax liens); *Schmitz v. Stockman*, 151 Kan. 891, 101 P.2d 962 (1940) (statutory lien of landlord); *Board of Supervisors v. Hart*, 210 La. 78, 26 So.2d 361 (1946) (attachment lien); *Regan v. Metropolitan Haulage Co.*, 127 N.J. Eq. 487, 14 A.2d 257 (Ch. 1940) (garagekeeper's lien); *United States Fid. & Guar. Co. v. Triborough Bridge Auth.*, 297 N.Y. 31, 74 N.E.2d 226 (1947) (equitable lien of surety); *Knight v. Knight*, 272 App. Div. 499, 71 N.Y.S.2d 357 (1st Dep't 1947), *aff'd*, 297 N.Y. 945, 80 N.E.2d 344 (1948) (assignment of percentage of wages); *Cranford Co. v. L. Leopold & Co.*, 189 Misc. 388, 70 N.Y.S.2d 183 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 754, 75 N.Y.S.2d 512 (1st Dep't 1947), *aff'd*, 298 N.Y. 676, 82 N.E.2d 580 (1948) (mechanic's lien); *First National Bank v. Southland Production Co.*, 189 Okla. 9, 17-18, 112 P.2d 1087, 1095-6 (1941) (state tax lien securing unascertained amount); *State v. Wynne*, 134 Tex. 455, 133 S.W.2d 951 (1939) (state tax liens); *United States v. Yates*, 204 S.W.2d 399, 405 (Tex. Civ. App. 1947) (attachment lien and recorded mechanics' liens).

116. The federal tax lien prevailed over a nonfederal lien when the federal lien was prior in time. See, e.g., *Cobb v. United States*, 172 F.2d 277, 278-9 (D.C. Cir. 1949); *United States v. City of Greenville*, 118 F.2d 963, 966 (4th Cir. 1941); *Littlestown Nat. Bank v. Penn Tile Works Co.*, 352 Pa. 238, 42 A.2d 606 (1945). When the federal lien was not prior in time, it failed to prevail over a nonfederal lien. See cases cited note 115 *supra*.

For holders of interests specifically protected by notice-filing provisions, the federal tax lien has been treated as not arising until duly perfected under § 3672 by the filing of notice. See, e.g., *United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1933); *In re F. MacKinnon Mfg. Co.*, 24 F.2d 156 (7th Cir. 1928).

The rule of "first in time, first in right" has been applied to the federal estate tax lien. *INT. REV. CODE* § 827(a); *Paul v. United States*, 127 F.2d 64, 66 (6th Cir. 1942), *aff'd sub nom.* *Detroit Bank v. United States*, 317 U.S. 329, and *Michigan v. United States*, 317 U.S. 338 (1943); *United States v. Security-First Nat. Bank*, 30 F. Supp. 113 (S.D. Cal. 1939), *appeal dismissed*, 113 F.2d 491 (9th Cir. 1940); *In re Decker's Estate*, 355 Pa. 331, 49 A.2d 714 (1946), *cert. denied sub nom.* *Decker v. Kann*, 331 U.S. 897 (1947).

117. The law reviews generally caught the latent significance of the decision. 35 *MINN. L. REV.* 580 (1951); 26 *N.Y.U.L.Q. REV.* 373 (1951); Note, 29 *N. C. L. REV.* 293 (1951); 39 *Geo. L.J.* 496 (1951).

118. See, e.g., *United States Fid. & Guar. Co. v. United States*, 201 F.2d 118 (10th Cir. 1952), sustaining priority of a surety's equitable lien over the Government's lien, notwithstanding a contingency as to the surety's obligation when the tax lien attached;

attainable standards for the specific and perfected lien erected by Supreme Court opinions construing Section 3466, lower courts had little difficulty in finding these standards satisfied by liens competing with a federal tax lien.¹¹⁹ They also avoided *Security Bank* by characterizing state-created interests in such a way as to bring their owners within the protection of the notice-filing provision.¹²⁰ In *Petition of Gilbert Associates, Inc.*,¹²¹ the New Hampshire Supreme Court used both devices to sustain the superiority of town property tax liens over subsequent 3670 tax liens: (1) the town's tax liens were held specific and perfected; (2) the town, by virtue of the assessment of taxes, was a judgment creditor under previous state decisions and, as such, was entitled to the protection of notice-filing. The United States Supreme Court, however, disagreed on both points.¹²² The first ground failed because the town lacked possession or title.¹²³ The second ground failed because only a judg-

United States v. Anders Contracting Co., Inc., 111 F. Supp. 700 (W.D. S.C. 1953), sustaining an unrecorded conditional sale as against the Government's tax lien; *In re Ann Arbor Brewing Co.*, 110 F. Supp. 111 (E.D. Mich. 1951), resolving conflicts among local, state, and federal tax liens without reference to the *Security Bank* case; *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953), sustaining superiority of prior-in-time materialman's lien. In *Gulf Coast Marine Ways, Inc. v. The J. R. Hardee*, 107 F. Supp. 379, 385 (S.D. Tex. 1952), the asserted priority of a federal tax lien was denied on the ground that another federal statute extended priority to "preferred maritime liens." 41 STAT. 1004 (1920), 46 U.S.C. § 953(a) (1946) (Ship Mortgage Act). Maritime liens have traditionally been accorded superiority over nonmaritime liens without reference to the chronology of their accrual. ROBINSON, ADMIRALTY § 60 (1939); Note, 35 YALE L.J. 876 (1926).

119. See, e.g., *United States v. Liverpool & L. & G. Ins. Co.*, 209 F.2d 684 (5th Cir. 1953), cert. granted, 22 U.S.L. WEEK 3307 (U.S. 1954) (garnishment lien); *United States v. Albert Holman Lumber Co.*, 206 F.2d 685 (5th Cir.), rehearing denied, 208 F.2d 113 (1953) (materialmen's liens); *United States v. Acri*, 109 F. Supp. 943 (N.D. Ohio 1952), aff'd, 209 F.2d 258 (6th Cir. 1953), cert. granted, 22 U.S.L. WEEK 3307 (U.S. 1954) (attachment lien); *Great American Indemnity Co. v. United States*, 120 F. Supp. 445 (W.D. La. 1954) (statutory liens for laborers and materialmen); *American Fidelity Co. v. Delaney*, 114 F. Supp. 702 (D. Vt. 1953) (equitable lien of surety against sum held by obligee of construction bond); *Fidelity & Deposit Co. v. Lovell*, 108 F. Supp. 360, 368 (S.D. Miss. 1952) (lien of creditor's bill); *United States v. Canadian American Co.*, 108 F. Supp. 206, 207 (E.D.N.Y. 1952) (local tax lien); *Levy v. Tubby's Wine & Liquor Shop Inc.*, 110 N.Y.S.2d 653 (N.Y. City Ct. 1951), rev'd on other grounds, 116 N.Y.S.2d 207 (1st Dep't 1952) (local tax liens; *Security Bank* ignored). In none of these cases did the lienor competing with the Government appear to have "perfected" his lien by divesting the debtor of possession or title.

120. *Hawkins v. Savage*, 110 F. Supp. 615 (D. Alaska 1953) (treating attachment creditor as a bona fide purchaser); *Exeter Banking Co. v. Sleeper*, 97 N.H. 321, 87 A.2d 151 (1952) (sustaining equitable interest as a mortgage); *United States v. Scovil*, 78 S.E.2d 277 (S.C. 1953), cert. granted, 22 U.S.L. WEEK 3307 (U.S. 1954) (treating landlord's lien perfected by distraint as entitled to protection against unfiled tax lien). The amendments to § 3672 in the Internal Revenue Code of 1954 restrict this method of avoiding *Security Bank*. See note 104 *supra*.

121. 97 N.H. 411, 90 A.2d 499 (1952).

122. *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953).

123. The loose usage that has characterized the Court's employment of the terms "specific," "general," "inchoate," and "perfected" appears with glaring clarity in *Gilbert*

ment creditor "in the usual, conventional sense" is comprehended within the restricted list of beneficiaries of notice-filing.¹²⁴

Despite the Government's victory, *Gilbert Associates* casts doubt on *Security Bank's* application of the doctrine of the general and inchoate lien to Section 3670 cases. Since the debtor was in receivership, the Government asserted both a 3670 tax lien and a 3466 priority.¹²⁵ If, as *Security Bank* indicated, the doctrine is engrafted on 3670, the Court could have held for the Government on both grounds. But the Court based its decision solely on the Government's 3466 priority,¹²⁶ revealing perhaps a sense of insecurity about *Security Bank*. In any event, the lethal effects of the doctrine were mitigated in *United States v. New Britain*,¹²⁷ where the Supreme Court found a specific and perfected lien for the first time.

New Britain presented the logically insoluble puzzle of liens caught in a circuitry of priority.¹²⁸ Federal tax liens were inferior to two mortgages and a judgment lien, which had attached before notice of the federal liens was filed; but the federal tax liens were superior to subsequent city liens, for taxes and water charges. The Connecticut Supreme Court of Errors saw nothing

Associates. No defect in the town's lien was suggested other than its failure to reduce the property to possession. This single deficiency, however, sufficed to render the lien both "general" and "imperfected." *Id.* at 366.

124. *Id.* at 364. And see note 104 *supra*.

125. After lower courts and commentators had expressed considerable doubt about the applicability of Section 3466 to tax claims, the Supreme Court settled the question in the affirmative. *Price v. United States*, 269 U.S. 492 (1926).

126. The Court inadvertently included a dictum in its originally filed opinion that if only the federal lien statute were involved, "priority would depend upon the dates the liens arose." *United States v. Gilbert Associates*, 73 Sup. Ct. 704 (adv. op., 1953). The dictum was deleted in the official report. But the dictum was relied on in *United States v. Albert Holman Lumber Co.*, 206 F.2d 685, 689 (5th Cir. 1953). When the deletion was called to the attention of the Fifth Circuit in a petition for rehearing, it amended its opinion but adhered to its original decision. 208 F.2d 113.

127. 347 U.S. 81 (1954).

128. The circuitry problem was also present in *United States v. Texas*, 314 U.S. 480 (1941). The proceeds of the sale of the debtor's property in the hands of the receiver were insufficient to pay any one of the rival claimants—United States, state, or mortgagee—in full. The Supreme Court of Texas ruled that the provision of the Texas statute making the occupation tax on gasoline "a preferred lien, first and prior to any and all other existing liens . . . regardless of the time such liens originated," was constitutional and must be given effect. *State v. Nix*, 134 Tex. 476, 133 S.W.2d 963 (1939). Accordingly the mortgages were subordinated to the state's lien. And since the federal priority could not be ranked above the state's lien without nullifying the state statute, nor above the mortgage without violating federal law, the Government was relegated to the third rung. 138 S.W.2d 924 (Tex. Civ. App. 1940). Since only the Government sought United States Supreme Court review of the state court determination in favor of the Texas tax lien, the Court declined to decide the relative rights of the mortgagee as against the Government. On remand, the Texas court saw no alternative to turning over the entire proceeds to the United States, thus freezing out the prior mortgage. *State v. Nix*, 159 S.W.2d 214, 215 (Tex. Civ. App. 1942). The court, however, could have followed federal policy, finding the mortgage superior to the federal priority, but appropriating the funds set aside for the mortgage to the payment of the state tax lien.

in the *Security Bank* case requiring disregard of the "principle ordinarily applicable to the determination of priority of incumbrances, namely, first in order of time, first in right."¹²⁹ But it found it impossible to apply the ordinary rule in the circuitry situation presented, because under Connecticut law the mortgages and the judgment lien were inferior to the city's liens. A disposition which would prefer the federal tax liens to those of the city would violate state law if the order of distribution were (1) mortgages and judgment lien, (2) federal liens, (3) city liens; or would violate federal law if the order were (1) federal liens, (2) city liens, (3) mortgages and judgment lien. The solution of the Connecticut court was to find a congressional intent to subordinate federal liens not only to mortgages and judgment liens but also to other encumbrances superior to mortgages and judgment liens.¹³⁰ Accordingly, it approved distribution of the proceeds in the following order: (1) city liens, (2) mortgages and judgment lien, (3) federal liens.

The Government appealed, challenging the rule of "first in time, first in right." The Supreme Court rejected the challenge, but vacated the Connecticut judgment because the rule had not been applied.¹³¹ The Court suggested that the United States was not concerned with the relative priority among the city, the mortgagee, and the judgment creditor, provided that the Government's claim was subordinated only to an amount equal to the claims of the mortgagee and judgment creditor.¹³² Impliedly, on remand the state court may follow state policy and appropriate the funds set aside by the Supreme Court for the mortgagee and judgment creditor to the payment of the city liens.¹³³ Such an allocation, however, would violate the federal policy of protecting the mortgagee and judgment creditor from the impact of 3670.

Although the Government did not defeat the city liens, the doctrine of the inchoate and general lien still survives. The Government relied on *Security Bank* and *Gilbert Associates* to defeat all the city liens. The Court accepted *Security Bank's* application of the doctrine to 3670 litigation.¹³⁴ But it dis-

129. *Brown v. General Laundry Service, Inc.*, 139 Conn. 363, 372, 94 A.2d 10, 14 (1952).

130. *Id.* at 374, 94 A.2d at 15, citing *Ferris v. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 Atl. 577 (1924).

131. 347 U.S. 81, 85-6 (1954).

132. *United States v. New Britain*, 347 U.S. 81, 88 (1954).

133. The Government suggested that the problem of circuitry could be solved by setting aside enough of the proceeds of the foreclosure sale to pay the mortgage liens and the judgment before satisfying the Government. The priority of the city could then be preserved by paying its liens from the sum so set apart. See Brief for Petitioner, p. 17, *United States v. New Britain*, 347 U.S. 81 (1954). The resulting disposition would compel the mortgagee and judgment creditor, who are explicitly protected as against the United States by § 3672, to submit to a compression of their liens between those of the city and the United States. To the extent of the city's liens denied priority over the federal liens, the mortgagee and the judgment creditor would thus be postponed to both the federal liens and the city's liens. The Government obliquely acknowledged the incongruity but blamed it on the state law.

134. *United States v. New Britain*, 347 U.S. 81, 86 (1954).

tinguished the result in that case on the ground that *Security Bank* involved an inchoate lien, while in *New Britain* "certain of the city's tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens."¹³⁵ The Court's distinction between *Gilbert Associates* and *New Britain*, however, is an uneasy one. New Britain's liens were not accompanied by possession or title, and that had been fatal to the town's claim to a specific and perfected lien in *Gilbert Associates*. Nevertheless, *Gilbert Associates* was distinguished because it involved "personal property" and an insolvent taxpayer, and because the town's lien was general while New Britain's was specific.¹³⁶ However, the property subject to the lien in *Gilbert Associates* was real property under state law,¹³⁷ and the New Hampshire court, with as much justification as the Connecticut court, had held the town's lien to be specific.

The road from *Spokane County* to *New Britain* was built without the aid of Congress. Originally the Government had a 3466 priority among unsecured creditors and an ordinary lien for tax claims under 3670. Both the federal priority and the tax lien were construed to respect the integrity of pre-existing liens. The detour in *Spokane County* destroyed this harmony by introducing the doctrine of the inchoate and general lien into 3466, giving the Government the extraordinary status of an unsecured creditor capable of superseding prior liens that are not specific and perfected.¹³⁸ Parallel construction was restored when *Security Bank* applied the doctrine to the 3670 tax lien and thereby gave the tax lien superiority over antedating inchoate and general liens.¹³⁹ But the two cases following *Security Bank* have put a new fork in the road: the criteria for determining specificity and perfection of a rival lien may not be the same under 3466 and 3670. The Supreme Court's election to rest its decision in *Gilbert Associates* on the 3466 priority and not on a 3670 lien suggests that the less specific claim created by Section 3466 is once again more efficacious than Section 3670 in competition with other liens.¹⁴⁰ And the Court's failure to note the lack of title or possession in New Britain's lien, when this shortcoming was fatal to the town's lien in *Gilbert Associates*, confirms the impression that standards of specificity and perfection are more easily met by a competing lien under 3670 than under 3466. Moreover, the

135. *Id.* at 86-7.

136. *Id.* at 87.

137. Petition of Gilbert Associates, Inc., 97 N.H. 411, 414, 90 A.2d 499, 501 (1952).

138. And because the Court has not yet found a specific and perfected lien in a 3466 case, it has said that it has not answered the question whether even a specific and perfected lien would prevail over the federal priority. See notes 27, 58 *supra*.

139. Except the three which Congress expressly saved by the notice-filing provision: the mortgage, pledge, and judgment lien. INT. REV. CODE § 3672.

140. The Court's contrast of the "absolute priority" when the debtor is insolvent with the failure of Congress "to expressly provide for federal priority" in the absence of insolvency also suggests that the Court thinks of 3466 as the more powerful preference. *United States v. New Britain*, 347 U.S. 81, 87 (1954).

three interests expressly protected from a 3670 lien—the mortgage, judgment lien, and pledge—may be unable to withstand the 3466 priority.¹⁴¹

THE BANKRUPTCY ACT: CONGRESSIONAL SIGNPOST ON THE PRIORITY ROAD

The disparity between the treatment of federal claims in bankruptcy and nonbankruptcy liquidations¹⁴² reveals how far the doctrine of the inchoate lien has led the courts astray. The Bankruptcy Act is equipped with its own system of priorities among unsecured creditors.¹⁴³ Federal, state, and local tax

141. While Government counsel have sometimes conceded the validity of mortgages antedating the attachment of the 3466 priority, these concessions have generally been *arguendo*; the record is replete with their efforts, ancient and recent, to subvert mortgage liens under 3466. See *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 421 *et seq.* (U.S. 1828); *United States v. Hooe*, 3 Cranch 73, 82-3 (U.S. 1805); *United States v. Guaranty Trust Co.*, 33 F.2d 533, 536-7 (8th Cir. 1929), *aff'd*, 280 U.S. 478 (1930).

In *Meyer Estate*, 159 Pa. Super. 296, 48 A.2d 210 (1946), the Government, having a tax lien, sought to prevail over a prior judgment lien by invoking the 3466 priority as elaborated by the inchoate lien doctrine. By a process of reasoning which comes close to reversing the rationale of *Gilbert Associates*, the court ruled that § 3672 limits § 3466, thereby saving the judgment lien. *Accord: In re Decker Estate*, 355 Pa. 331, 49 A.2d 714 (1946), *cert. denied sub nom. Decker v. Kann*, 331 U.S. 807 (1947).

Since the Supreme Court in *United States v. Gilbert Associates* went to the trouble of denying that the town was a judgment creditor under § 3672, it has been suggested that the Court is ready to hold that a judgment creditor along with the other persons listed in § 3672 is entitled to prevail against the § 3466 priority. See Note, 22 GEO. WASH. L. REV. 583, 590 (1954).

142. See Rogge, *The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships*, 43 HARV. L. REV. 251, 276 (1929).

143. BANKRUPTCY ACT § 64a. See 3 COLLIER, BANKRUPTCY ¶ 64.502 (14th ed. 1941) for a discussion of the limited role of § 3466 in bankruptcy proceedings. Section 3466 may apply, however, in reorganization proceedings under § 77 and Chapter X. See 5 *id.* ¶ 77.21 (14th ed. 1943); 6 *id.* ¶ 9.13[2] (14th ed. 1947).

In situations where the question is whether a particular debtor enterprise should be permitted to continue rather than be liquidated, Congress has taken into account the peculiar position of the Government as an inevitable future creditor. In railroad reorganizations, corporate reorganizations generally, and real property arrangements, the debtor's property shall be free and clear of all claims, including liens, of creditors except such as may otherwise be provided for in the plan or appropriate judicial order. See BANKRUPTCY ACT §§ 77(f), 226, and 474. But to protect the interests of the United States as a tax and customs-duty collector, Congress has prohibited confirmation of any plan of reorganization or arrangement not providing for full payment of any claims the Government holds in such a capacity, unless a designated official or agency of the United States accepts a lesser amount. See *id.* §§ 77(e), 199, and 455.

Likewise, by § 337(2), the debtor in a Chapter XI proceeding for an arrangement is required to deposit enough money to pay debts having priority under Section 64a, including taxes and debts owing the United States, unless the United States shall waive such deposit. Chapter XIII, authorizing wage earners' plans for composition or extension, requires full payment of debts entitled to priority under § 64a of the Bankruptcy Act, including federal tax claims. BANKRUPTCY ACT § 659.

Cf. In re Rider, 40 F. Supp. 882 (S.D. Iowa 1941), subordinating federal priority to a mortgage lien on rents and profits in a proceeding under § 75s of the Bankruptcy Act.

claims are on the fourth of a five-rung ladder of priority.¹⁴⁴ Section 3466, a priority created by a law of the United States, is on the fifth rung.¹⁴⁵ In bankruptcy proceedings, the Government can assert no priority over state or local bodies for unsecured tax claims,¹⁴⁶ and all such claims are ranked below the three rungs of administrative costs and expenses, wages, and certain creditors' expenses. And Government nontax claims on the fifth rung are further subordinated to state and local tax claims on the fourth rung. Moreover, the bankruptcy priorities among unsecured creditors are not honored until lien creditors have been satisfied.¹⁴⁷

And the Bankruptcy Act is more solicitous toward inchoate and general liens than the Supreme Court has been in nonbankruptcy proceedings. The Chandler Act of 1938 favored the inchoate and general statutory lien: these liens may be perfected after the filing of the bankruptcy petition, and when perfected, they must be paid in full before all unsecured claims, including those of the Government.¹⁴⁸ In the situations in which statutory liens may not be perfected, or their holders are limited in the amount of preferred recovery,¹⁴⁹ the Government is an incidental rather than an intended beneficiary. These restrictions were intended primarily to protect all general creditors from state-created liens thought to bear similarity to the state-created priorities that had been nullified for bankruptcy purposes by the Chandler Act.¹⁵⁰

If the policy of the Bankruptcy Act is sound, it should be followed in other

144. BANKRUPTCY ACT § 64a(4).

145. BANKRUPTCY ACT § 64a(5); *In re Weil*, 39 F. Supp. 618 (M.D. Pa. 1941); 3 COLLIER, BANKRUPTCY ¶ 64.502 (14th ed. 1941). In asserting priority under § 64a(5) the Government must of course establish that all of the requirements for the applicability of 3466 have been met.

146. See *Missouri v. Ross*, 299 U.S. 72, 74 (1936).

147. *City of Richmond v. Bird*, 249 U.S. 174 (1919); *United States v. Sampsell*, 153 F.2d 731, 734 (9th Cir. 1946); *In re Auto Electric Repair & Parts Co.*, 41 F. Supp. 3, 4 (W.D. Ky. 1941); 3 COLLIER, BANKRUPTCY ¶ 64.02 (14th ed. 1941); 4 *id.* ¶ 67.20 (14th ed. rev. 1954).

The Government thus has been unable to exploit the *Spokane* line of cases in bankruptcy proceedings. It tried without success in *United States v. Sampsell*, 153 F.2d 731, 734 (9th Cir. 1946); *In re Knox-Powell-Stockton Co.*, 100 F.2d 979, 982 (9th Cir. 1939); *In re Van Winkle*, 49 F. Supp. 711, 714 (W.D. Ky. 1943). It succeeded in *United States v. Reese*, 131 F.2d 466 (7th Cir. 1942), where the court displayed an amazing disregard of statutory limitations. Cf. *In re Capital Foundry Corp.*, 64 F. Supp. 885 (E.D.N.Y. 1946).

148. BANKRUPTCY ACT § 67(b). This section was designed to codify preexisting law. 4 COLLIER, BANKRUPTCY ¶ 67.20[2] (14th ed. rev. 1954); HANNA & MACLACHLAN, THE BANKRUPTCY ACT OF 1898 WITH ANNOTATIONS 96 (5th ed. 1953); cf. *In re Knox-Powell-Stockton Co.*, 100 F.2d 979, 983 (9th Cir. 1939) (applying pre-Chandler Act bankruptcy law to sustain inchoate state tax liens as against a federal priority claim); *New Orleans v. Harrell*, 134 F.2d 399, 400-2 (5th Cir. 1943) (discussing the extent to which § 67b codified prior law).

149. Bankruptcy Act § 67c limits recovery on wage and rent liens to the same extent that § 64a limits wage and rent priorities, and invalidates against the trustee state statutory liens on an insolvent debtor's personality unless accompanied by possession or levy.

150. See H.R. REP. No. 2320, 82d Cong., 2d Sess. 13 (1952).

liquidations involving federal claims.¹⁵¹ The argument for elimination of the disparity between bankruptcy and nonbankruptcy distributions involves more than an academic concern for theoretical consistency.¹⁵² Bankruptcy legislation reflects a deliberate congressional choice not to accord the federal priority the kind of treatment which the Supreme Court has said is necessary to insure prompt and certain collection of debts due to the United States.¹⁵³ Judicial legislation is not only arbitrary in this sense, but it also tends to increase the number of bankruptcy petitions at the instance of creditors who fare better under the bankruptcy rules of distribution. And when bankruptcy is not available,¹⁵⁴ the spectacle of liquidations proceeding side by side—one affording the Government priority over liens as well as unsecured claims, and the other denying such priority—defies rational justification for the discrimination.

CONCLUSION

There is little reason to hope that the Supreme Court will retreat from the position it has taken in respect to the Section 3466 priority or, indeed, that it will not continue to extend the doctrine of the inchoate and general lien to envelop all liens in nonbankruptcy liquidations of insolvent estates. The 3466 priority must be amended¹⁵⁵ to remove the excrescence of the inchoate and general lien and to restore the original legislative intent, except insofar as congressional policy has been modified by relevant provisions of the Bankruptcy Act. A statute which would effectuate these objectives follows:

FEDERAL PRIORITY

Section I. *Priority established:* When an insolvent debtor of the United States is divested of the title, possession, or both title and possession of

151. See Rogge, *supra* note 142, at 276.

152. See *Glenn v. American Surety Co.*, 160 F.2d 977, 983 (6th Cir. 1947) (dissenting opinion); *Regan v. Metropolitan Haulage Co., Inc.*, 127 N.J. Eq. 487, 489-90, 14 A.2d 257, 258 (Ch. 1940).

153. For a description of the process of degradation of the tax priority in bankruptcy as federal tax claims have assumed increasing size and significance, see Wurzel, *Taxation During Bankruptcy Liquidation*, 55 HARV. L. REV. 1141, 1145-7 (1942). See also 3 COLLIER, BANKRUPTCY ¶ 64.402 (14th ed. 1941); Notes, 56 YALE L.J. 1258, 1263-4 (1947) and 36 YALE L.J. 138 (1926). Cf. Lord Atkinson in *Food Controller v. Cork*, [1923] A. C. 647, 659.

154. *E.g.*, in the case of an insolvent decedent's estate. 1 COLLIER, BANKRUPTCY ¶ 4.07 (14th ed. 1940).

155. Two identical bills to amend § 3466 have been introduced in the 83d Congress, 1st Session. H.R. 77 and H.R. 3699. These bills have the limited purpose "to subordinate tax claims of the United States to wage claims in state insolvency proceedings," and draw to some extent on the language of the wage priority provision of the Bankruptcy Act, § 64a(2).

As a result of recent hearings conducted on the so-called Langer Bills, S. 2560, S. 2561, S. 2562, and S. 2563, 82d Cong., 1st Sess. (1951), Jacob I. Weinstein, Esq., of the Philadelphia bar and former chairman of the National Bankruptcy Conference, was requested to draft a measure limiting tax claims so as to assure priority to wage claims. 28 J.N.A. REF. BANKR. 42 (1954).

all, or substantially all, of his property for the purpose of effecting general administration for the benefit of creditors otherwise than in bankruptcy,¹⁵⁶ the claims of the United States shall be entitled to priority of payment, subject to the following qualifications:

(1) *Certain Liens Preserved*: Except as provided in Section II, nothing herein shall impair any valid lien acquired before such divestment.

(2) *Administrative Expenses*: Expenses of collecting, preserving, and distributing the debtor's property shall be a first charge against the property administered.¹⁵⁷

(3) *Wage Claims*: Claims against the debtor for wages due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the debtor, shall be paid before the claims of the United States; but in no event shall such priority extend to earnings for any period over three months before divestment of the debtor's property in the manner provided in this Section, nor to any amount in excess of \$600 for each wage claimant.¹⁵⁸

(4) *State and Local Taxes*: Taxes legally due and owing by the debtor to any state or subdivision shall be accorded equal priority with taxes legally due and owing to the United States and shall be paid before any claims of the United States for other than taxes.¹⁵⁹

(5) *Claims for Rent*: Claims for rent to the extent of that legally due for actual use and occupancy during the three months before divestment of the debtor's property in the manner provided in this section shall, if entitled to priority under state law, be accorded equal priority with claims of the United States for other than taxes.¹⁶⁰

(6) *Rule in Bankruptcy*: This section is a law of the United States entitling the United States to priority within the meaning of the Bankruptcy Act, and in proceedings under that Act the claims of the United States shall have the degree of priority therein specified.

Section II. *Certain Liens Postponed*: Any statutory lien on personal property unaccompanied by possession, sequestration, or distraint of, or levy upon, such property, and any lien of distress for rent for an amount in excess of that legally due and owing for actual use and occupancy during the three months before divestment of the debtor's property in

156. This clause describes the cases to which the federal priority statute has previously been held to apply.

157. This subsection finds a parallel in § 64a(1) of the Bankruptcy Act. Authoritative interpretation of the priority statute now recognizes the priority of such expenses. See, e.g., *Kennebec Box Co. v. O. S. Richards Corp.*, 5 F.2d 951 (2d Cir. 1925); *In re Holmes Mfg. Co.*, 19 F.2d 239 (D. Conn. 1927).

158. This provision of course departs completely from § 3466. It follows closely the language as well as policy of § 64a(2) of the Bankruptcy Act. See also, H.R. 77 and H.R. 3699, *supra* note 155, and the proposed revision of § 3466 in Rogge, *supra* note 142, at 277.

159. This subsection conforms to the policy of § 64a(4) of the Bankruptcy Act. See also, Rogge, *supra* note 142, at 276. It gives no priority to state taxes except in a case to which the section applies, i.e., when an insolvent debtor of the United States is divested of his property.

160. This provision brings § 3466 in harmony with § 64a(5) of the Bankruptcy Act.

the manner provided by this section shall be postponed to claims entitled to priority under Section I.¹⁶¹

Section III. *Liability of the Liquidator:* Every executor, administrator, assignee, or other person who knowingly¹⁶² pays, in whole or in part, any claim against the debtor for whom he acts before he pays the claims of the United States having priority thereto under the preceding sections shall be answerable in his own person and estate to the extent of such payments for the claims so owing the United States, or for so much thereof as may remain due and unpaid.¹⁶³

Section IV. *Definitions:*

(1) *Decedent's Estate:* A decedent's estate shall be deemed to be the property of a debtor who has been divested of all his property for the purpose of general administration at the moment of his death.¹⁶⁴

(2) *Insolvent Debtor:* A debtor shall be deemed insolvent whenever the property of which he has been divested in the manner provided in Section I is insufficient to pay all his debts.¹⁶⁵

(3) *Claims:* "Claims" shall be those found to be legally due and owing by the debtor as of the date of the divestment of his property in the manner prescribed in Section I.¹⁶⁶

161. This provision adopts the policy of § 67c of the Bankruptcy Act—invalidating floating liens—but extends it somewhat in respect to federal and perhaps state tax liens on personalty. If, as the legislative explanation indicates, H.R. REP. NO. 2320, 82d Cong., 2d Sess. 13 (1952), the target of the 1952 change in § 67c was "'floating liens,' which attach to all a debtor's personalty, although the property he owns is commonly changing from day to day," no more perfect example can be found than the federal tax lien. The failure to include the federal lien in § 67c may be explained by the fact that the 1952 amendment was intended to include only "non-controversial" measures. Duberstein, *Highlights of Bankruptcy Amendments (1952)*, 27 J.N.A. REF. BANKR. 21 (1953). Even so, the Treasury Department objected to certain changes because of their possible impact on revenue collection. After noting the objections, the House Report accompanying the bill to amend pointed out that the Government was adequately protected and that its position was actually bettered. H.R. REP. NO. 2320, 82d Cong., 2d Sess. 12-13, 21 (1952).

In adopting the policy of § 67c, Section II is subject to the criticism that may be levelled at that bankruptcy provision. Cf. 62 YALE L.J. 1131, 1134-36 (1953). However, as long as the policy of subordinating so-called "floating liens" remains a part of the law governing distribution in bankruptcy, a discrepancy in distribution under § 3466 is unwarranted. While the result of application of the proposal here may conform to that reached in some of the Supreme Court precedents criticized in this article, the amorphous doctrine of the inchoate and general lien is replaced by a much more restricted and manageable concept. Doubts that now surround many forms of security are removed.

162. The requirement of knowledge is added as a safeguard against harsh application of the statute. Cf. *United States v. Eyges*, 286 Fed. 683 (D. Mass. 1923).

163. This provision is substantially the same as that found in S. 685, 82d Cong., 1st Sess. (1951). It does not attempt to impose liability on the liquidator for failing to pay other claimants in the order of their priority.

164. This provision is intended to make it clear that the comprehensive language of Section I includes the administration of a decedent's estate.

165. This definition of insolvency conforms to that recognized under § 3466. *United States v. Oklahoma*, 261 U.S. 253 (1923). Cf. BANKRUPTCY ACT §§ 1(19), 67d(1)(d).

166. This fixes a cutoff date consistent with that recognized in the adjudicated cases. Cf. *United States v. Marxen*, 307 U.S. 200 (1939).

The federal tax lien statute should also be amended. As the Supreme Court recognized in *New Britain*, congressional policy permits the preference of the 3670 lien to be determined by the principle that "the first in time is the first in right." However, the decision and rationale in *Security Bank* constitute a constant threat to application of this principle. The mischief of the doctrine of the inchoate and general lien should be removed by adopting a test of perfection¹⁶⁷ similar to that which has worked so well in bankruptcy.¹⁶⁸ The Government would then be treated like other lienors. This is the traditional philosophy of Section 3670.¹⁶⁹

167. *E.g.*, "*Prior Liens Preserved*: Nothing herein shall be construed to invalidate or postpone the rights of any third person, including a State or a subdivision thereof, which have attached to property before the lien provided in Section 3670 arises, and which are recognized by the law of the State or Territory where the property is situated as being effective against any subsequent lien thereon obtainable through judicial proceedings by a creditor of the tax delinquent."

168. See H.R. REP. No. 1293, 81st Cong., 1st Sess. 4, 7 (1949); 4 COLLIER, BANKRUPTCY ¶¶ 70.45, 70.47, 70.49, 70.52 (14th ed. 1942).

169. See H.R. REP. No. 1018, 62d Cong., 2d Sess. 2 (1912).

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