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Choateness, Consensual Liens and Section 6323 of the Internal Revenue Code

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CHOATENESS, CONSENSUAL LIENS AND SECTION 6323 OF THE INTERNAL REVENUE CODE

*[We] have prepared this opinion as an explanation . . . , not out of vanity, or a desire to show how a legal matador can pierce a charging bull.**

In a recent case from the United States District Court in New Hampshire, *United States v. Lebanon Woolen Mills Corp.*,[1] the court reached what would initially seem to be an unusual conclusion: a security interest which had not, at the time the federal lien was filed, met state requirements for perfection[2] took precedence over the federal tax lien which, though duly filed, was subsequent to the creation of the security interest.

The fact situation in *Lebanon* was not unique. In October 1961 defendant Lebanon Woolen Mills purchased a car from Miller Auto Co. under a conditional sales contract. Three months later, the Commissioner of Internal Revenue made assessments and gave notice and demand for income taxes, penalties and interest due from Lebanon Woolen Mills.[3] When this demand was refused, the Commissioner filed notices of the tax due in the proper state offices.[4] Two weeks thereafter, Lebanon Woolen Mills went into receivership. Miller Auto Co. did not file the financing statement required for perfection of its security interest[5] until Lebanon Woolen Mills had been in receivership for two weeks. The United States brought the present action to foreclose its tax lien and compel sale of the car. Miller Auto Co. intervened with a motion to have its security interest declared superior to the lien of the Government.

The district court judge held that "to the extent of this security interest, the automobile has been alienated from the assets of the taxpayer vendee and a lien for the unpaid taxes of the vendee cannot attach to it."[6] In rejecting the Government's argument that the security interest had not been perfected, the court examined the rationale underlying recording requirements. Since "recording statutes are a typical result of . . . efforts to protect reliance interests . . . ,"[7] and a lien for federal taxes is not a reliance interest, the court saw no reason to extend this policy to a non-reliance creditor.[8]

Thus, a federal court was once again faced with the seemingly perpetual and confused problem of the priority of the federal government's claims as a creditor.

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* Chief Judge Wyzanski in McLaughlin v. Venore Transp. Co., 244 F. Supp. 802, 804 (D. Mass. 1965)

1 241 F. Supp. 393 (D.N.H. 1964).

2 N.H. Commercial Code §§ 9-302(1)(d), -303.

3 Int. Rev. Code of 1954, § 6321, quoted in note 41 infra.

4 Int. Rev. Code of 1954, § 6323, quoted in note 41 infra.

5 N.H. Commercial Code §§ 9-302(1)(d), -303.

6 United States v. Lebanon Woolen Mills Corp., supra note 1, at 396.

7 Id. at 399

8 The court, in fact, considered the policy an "anomaly" as applied even to reliance creditors. Ibid.

I. Historical Development of Choateness

The general rule as to priority among creditors, at common law[9] as well as today,[10] has always been "first-in-time, first-in-right." Unwilling to rely solely on this formula to protect itself, the federal government enacted a series of statutes designed to implement the doctrine of federal superiority. The first of these, the general priority statute—Section 3466 of the Revised Statutes—provides for an absolute priority in favor of the federal government for any debt due it when the debtor is insolvent or dead.[11]

Though, by its terms, the statute does create an absolute priority, the courts have not interpreted it categorically.[12] They have engrafted certain qualifications into the statute. The result of this development was the doctrine of choateness.[13]

In positing one element in this development, the Supreme Court stated in *Thelusson v. Smith* that a private lienor, who had sufficiently separated the property in which he held a security interest from the debtor's remaining property, could prevail.[14] This requirement was reiterated more specifically in 1929, when it was held that in order for a private creditor to prevail over the Government in a claim for property, his lien had to be specific. Attainment of specificity in this case necessitated distraint of the property against which the private creditor had his claim.[15]

In 1936, another element was added to this development. The Supreme Court, in *United States v. Knott*,[16] refused priority to a number of private creditors because their identities had not been judicially established, and therefore the lien was not specific and perfected. The reason why these

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[9] Rankin v. Scott, 25 U.S. (12 Wheat.) 177, 179 (1827).

[10] United States v. Pioneer Am. Ins. Co., 374 U.S. 84, 87 (1963).

[11] Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1964) (formerly Act of March 3, 1797, ch. 20, § 5, 1 Stat. 515; Act of March 2, 1799, ch. 22, § 65, 1 Stat. 676) provides:

> 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 shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment 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.

Hereinafter, this section and its predecessors will be cited as § 3466.

It should be noted that § 3466 refers to "an act of bankruptcy." If the debtor is actually bankrupt, the priority of § 3466 yields to the priority established by the Bankruptcy Act. See, e.g., United States v. Sampsell, 153 F.2d 731, 734 (9th Cir. 1946).

[12] United States v. Hack, 33 U.S. (8 Pet.) 271 (1834) (federal priority does not go to partnership property to pay a separate debt); Conrad v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 386, 441 (1828) (federal priority will not divest "a specific lien, attached to a thing, whether it be accompanied by possession or not"); United States v. Hooe, 7 U.S. (3 Cranch) 73 (1805) (a mortgagee prevails over United States even if mortgagee knew mortgagor was indebted to United States).

[13] For a complete discussion of the doctrine of choateness, see generally Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905 (1954).

[14] 15 U.S. (2 Wheat.) 396 (1817).

[15] County of Spokane v. United States, 279 U.S. 80, 94 (1929).

[16] 298 U.S. 544 (1936).

identities could not be established was that the debtor's assets had been placed in a fund, pursuant to state law, and could not be distributed to any creditor until judgment was rendered.[17]

Finally, in 1945, the Court took a last big step in this evolution. A landlord's lien was refused priority because the landlord had not asserted his rights and thus, by federal standards, the amount of the lien was not specific.[18]

To a great extent, these cases formed the nucleus of the concept of "specificity and perfection." If a lienor hoped to prevail over the Government, his lien had to meet the nebulous standards of this concept.

In *Gordon v. Campbell*,[19] in an apparent attempt to synthesize the many elements which had been confusing the application of section 3466, the Court enumerated certain requirements. The lien of a private creditor, in order to avoid falling into the category now denominated "inchoate,"[20] must conform to the following standards: (1) The identity of the lienor must be definite; (2) the amount of the lien must be definite; and (3) the property to which the lien attaches must be identifiable.[21] The Court further ruled that only the federal courts could make the final determination as to whether the standards had been met:

> [A] state court's characterization of a lien as specific and perfected is not conclusive. . . . The state characterization, though entitled to weight, is always subject to reexamination by this Court.
>
> On the other hand, if the state court itself characterizes the lien as inchoate, this characterization is practically conclusive.[22]

The first case in which the Court found that the *Gordon* standards had been met was *United States v. City of New Britain*.[23] There, the proceeds of a mortgage foreclosure sale were insufficient to satisfy the claims of a mortgagee, a judgment creditor, the city of New Britain and the federal government. The state court ordered that the city's liens, the mortgages and the judgment (in that order) should all be paid prior to the federal tax lien.[24] The United States appealed only the city tax lien,[25] tacitly admitting that the mortgage and the judgment were superior to the federal tax lien.

The Supreme Court held that the city's liens had attached to specific pieces of property and that nothing remained to be done to make them choate.[26] The Court added, however, that choateness in itself was not a sufficient basis on which to grant the city priority. Congress, by section 3466, and the courts, by decisions like *Thelusson* and *Gordon*, had added the requirement of choateness to the traditional requirement of priority in

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17 Id. at 550.

18 United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945).

19 329 U.S. 362 (1946).

20 Id. at 371.

21 Id. at 375.

22 Id. at 371.

23 347 U.S. 81 (1954).

24 Brown v. General Laundry Serv., Inc., 139 Conn. 363, 94 A.2d 10 (1952).

25 United States v. City of New Britain, supra note 23, at 83.

26 Id. at 84. The Court also relied heavily on the fact that the lien attached only to land. Ibid.

time. Thus, in *New Britain*, where the competing lien was choate, the Court looked to the "first-in-time, first-in-right" rule[27] and remanded for a determination of chronology.[28]

After indicating in *New Britain* what appeared to be a liberalization in its attitude toward choateness, the Supreme Court handed down two decisions which reflected a return to its earlier, stricter position.[29] In each of these decisions the Court refused priority to a private lienor because no formal judgment had been entered and, as a result, the amounts of the liens were uncertain and therefore inchoate. In one of these, *United States v. Acri*, the Supreme Court refused the private lienor priority despite the fact that he had met state standards of perfection.[30]

Even these two cases, however, gave no warning of *United States v. White Bear Brewing Co.*[31] In a two line per curiam decision, the Supreme Court reversed a lower court's finding that a mechanic's lien was entitled to priority over a federal tax lien.[32] The mechanic's lien was for a specific amount, had been recorded and suit to enforce it had been instituted—all prior to the assessment of the federal tax.[33] The lower court had held that the tax lien statute[34] does not grant priority to the federal government and there is no such priority by right alone.[35] In the Supreme Court's per curiam reversal, no reason was given and no cases were cited.

There was a vigorous dissent by Mr. Justice Douglas, in which Mr. Justice Harlan joined, which asserted that the competing lien should receive priority because it was as specific and choate as state law could make it.[36] Judgment was required only to order sale of the property for the lienors to secure the already specific amount of the lien. The dissent concluded:

> The Court apparently holds that under . . . [section 6321] a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment. That is new doctrine, not warranted by our decisions, and supportable only if the *New Britain* case were overruled.[37]

II. Section 6323 and Consensual Liens

Section 3466 had, in a sense, a parallel development. While limitations were growing into the concept of choateness, other case law was giving rise to a separate statute. In *United States v. Snyder*,[38] the Court ruled that

27 347 U.S. at 85.
28 Id. at 88.
29 United States v. Acri, 348 U.S. 211 (1955); United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 (1955)
30 348 U.S. at 213.
31 350 U.S. 1010 (1956).
32 United States v. White Bear Brewing Co., 227 F.2d 359 (7th Cir. 1955).
33 Id. at 368.
34 Int. Rev. Code of 1954, § 6321
35 227 F.2d at 366.
36 350 U.S. at 1010-11.
37 Id. at 1011
38 149 U.S. 210 (1893).

a federal tax lien, to be effective, need not comply with state recording statutes; it attached from the time of the assessment.[39] By means of this "secret lien," it was possible for the Government to pursue property of the debtor into the hands of a good faith purchaser for value.[40]

As a result of the *Snyder* case, Congress amended the tax lien laws to require that the federal lien be filed to be effective against a mortgagee, purchaser or judgment creditor. Through a series of subsequent amendments, this provision became a part of Section 6323 of the Internal Revenue Code of 1954.[41]

Section 6323 provides that a government lien for taxes, unless filed, is ineffective against a mortgagee, pledgee,[42] purchaser or judgment creditor. As a result, three possible situations might arise: (1) The mortgagee obtains his security interest prior to the time the tax lien originates; (2) the mortgagee obtains his security interest subsequent to the filing of the federal claim; and (3) the mortgagee obtains his security interest subsequent to the creation of the government lien, but prior to its filing. In the first case, since the lienor has attained his status prior to the assessment by the Government, the rule of "first-in-time, first-in-right" controls and the Government is thus denied priority.[43] In the second case, the Government is obviously the victor, for the same reason.[44] In the third case, however, the private lienor secures his interest in the time gap between the assessment and filing of the federal tax lien. It is this transaction that section 6323 is intended to protect.[45]

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[39] Id. at 212-14.

[40] See United States v. Snyder, supra note 38.

[41] The tax lien statutes, Int. Rev. Code of 1954, §§ 6321-23, all developed from a single statute, Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107. This Act became Rev. Stat. § 3186 (1875) and was amended several times to develop into §§ 6321-23. It was the amendment of March 4, 1913, ch. 166, 37 Stat. 1016 which eliminated the "secret lien" problem created by *Snyder*.

Int. Rev. Code of 1954, § 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Int. Rev. Code of 1954, § 6322 provides:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

Int. Rev. Code of 1954, § 6323 provides:

> (a) Invalidity of lien without notice.-Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate.
>
> (1) Under state or territorial laws.-In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice. . .

[42] The term "pledgee" was inserted in 1939. Int. Rev. Code of 1939, § 3672, as amended, ch. 247, § 401, 53 Stat. 882 (1939).

[43] See United States v. Pioneer Am. Ins. Co., supra note 10.

[44] See United States v. Creamer Indus., Inc., 349 F.2d 625 (5th Cir. 1965).

[45] See United States v. Lebanon Woolen Mills Corp., supra note 1; 5 P-H 1965 Fed.

Though section 6323 helped to alleviate the problem illustrated in the *Snyder* decision, it gave rise to a new problem. It now became necessary to determine whether the choateness standards enumerated in *Gordon* should be applied to mortgagees, pledgees, purchasers and judgment creditors under section 6323.

This question remained unanswered until 1950, when the Supreme Court, in *United States v. Security Trust & Savings Bank*,[46] applied the choateness doctrine of the cases decided under section 3466 to a tax lien case prosecuted under section 6323 and involving neither death nor insolvency. The federal tax lien was recorded in the interim between the attachment of the debtor's property by the lienor and the rendering of judgment on his claim. Under state law this lien became specific and perfected at the time of judgment and then related back to the time of attachment. The Court, however, rejected the doctrine of relation back and ruled that until judgment was entered, the rights of the private lienor were contingent and thus inchoate.[47] The Court further stated that under section 3466 "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."[48]

Thus, by using the language previously reserved for cases arising under section 3466, wherein the Government had a nearly absolute priority, the Court had now made it as difficult for competing lienors to prevail under section 6323. Consequently, a competing judgment lienor, in order to prevail under section 6323, had to meet three requirements: (1) He had to have a choate interest; (2) the lienor had to fit within that section; and (3) he had to be prior in time.

It is to be noted, however, that *Security Trust* involved a judgment lien under section 6323. There had still been no decision from the Supreme Court regarding either of the two consensual liens enumerated in that section.[49]

In 1958 the Court decided *United States v. R. F. Ball Constr. Co.*[50] In a four sentence per curiam decision, citing *New Britain* and *Security Trust* as authority, the Court held that a lien arising out of a contract between a sub-contractor and his surety was inchoate, and the surety, therefore, was not within the protection of section 6323. No explanation was given for its decision.[51]

Tax Serv. ¶ 35,781. Note that the "secret lien" is still valid against lienors not enumerated in § 6323. Ibid. But see Gauvey v. United States, 291 F.2d 42 (8th Cir. 1961), which indicates that there is uncertainty as to whether § 6323(a) still applies only to the third hypothetical or to both the first and third hypotheticals.

[46] 340 U.S. 47 (1950).

[47] Id. at 50.

[48] Id. at 51.

[49] There have been lower court decisions concerning mortgagees and pledgees under § 6323. See, e.g., United States v. Anders Contracting Co., 111 F. Supp. 700 (W.D.S.C. 1953). Note that the category of purchaser is omitted from this discussion of § 6323 because a purchaser is the beneficiary of a consummated contractual agreement and holds no lien.

[50] 355 U.S. 587 (1958).

[51] For an explanation of this decision, see United States v. Pioneer Am. Ins. Co., supra note 10, at 88-90.

This necessitates an analysis of the propriety of applying choateness standards to section 6323, thereby making it possible for a valid mortgage to be termed inchoate. This analysis reveals that precedential and conceptual thinking require that choateness standards cannot be applied to consensual liens.

This appears to be the argument used by the dissenters in *Ball* when they argued that *Security Trust* was inapposite because it did not involve a contractual lien.[52] The dissenters would thus have the Court create a dichotomy within section 6323 by treating judgment liens one way and the two contractual liens somehow differently. While they might be willing to concede that the standards of choateness of section 3466 could apply to a judgment creditor, in that a final judgment would be necessary to become such a creditor,[53] they would not be willing to apply these rigorous standards to contractual lienors.

What standards, then, would the dissenters apply?

> The fact that the assignment was of property to be afterwards acquired did not affect its validity as a "mortgage," . . . nor did uncertainty in the amount (not exceeding the fixed maximum) of the generally identified obligation, so secured, do so. . . . Neither does the fact that the instrument was not recorded under the State's fraudulent conveyance statutes—thus to impart constructive notice to subsequent purchasers, mortgagees and the like—make any difference here, for the instrument was valid between the parties to it . . . .[54]

Thus, the only requirement of choateness which would be retained as to contractual lienors would be the identity of the lienor.

It is submitted that the rationale for establishing a different standard for choateness for contractual liens than has been used for statutory and judgment liens[55] has two possible bases. First, a lien which arises out of a contract is, by its very nature, mutual and voluntary. Both parties have agreed that the relationship should be established. This is not true of a statutory lien, which arises after purely unilateral action. The second distinction refers to the time when the creditor's property interest is created. In a statutory lien, the interest arises only after some statutory prerequisite, such as filing, assessment or formal judgment has occurred.[56] In a contractual lien, the interest which the creditor has in the debtor's property arises immediately upon execution of the agreement.

It is for precisely these reasons that the application of choateness standards to consensual liens is unnecessary. When a contractually created property interest arises, it is as specific and complete as it can be. For a court to say

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[52] United States v. R. F. Ball Constr. Co., supra note 50, at 588-94.

[53] See Fore v. United States, 339 F.2d 70, 72 (5th Cir. 1964) where the reasoning behind such a distinction is suggested.

[54] 355 U.S. at 593-94. For cases adopting the same rationale, see Gauvey v. United States, supra note 45; United States v. Lebanon Woolen Mills Corp., 241 F. Supp. 393 (D.N.H. 1964).

[55] The terms statutory lien and judgment lien are being used here synonymously.

[56] See Fore v. United States, supra note 53.

that such a lien is inchoate is a contradiction in terms, since it argues, in effect, that a lien which is specific and complete is not specific and complete.[57]

It is to be noted that both the dissent in *Ball* and the court in *Lebanon* reached the same result through identical reasoning. In both cases the competing interest was a contractual lien. The only distinction between the two was this: the dissent in *Ball* used section 6323 as the basis of its argument; *Lebanon* was decided using section 3466.

The combination of these decisions clearly implies that contractual liens —as a class—are entitled to consideration apart from any reference to the *Gordon* concept of choateness. This is so regardless of whether the case is decided under section 3466 or section 6323.

The impropriety of applying choateness standards to consensual liens is exemplified in another context. The initial question in any choateness problem involves the nature and extent of the interest to which choateness standards are to be applied.

It has been stated that determination of the "nature and extent" of the interest is a matter of state law and determination of priority is a matter of federal law.[58] Initially sensible and realistic, this view becomes, on closer examination, somewhat illusory.

Determination of the "nature and extent" of the interest should simply be a matter of referring to the applicable state law to see if there is a valid security interest, and the extent to which this interest manifests ownership.[59] As was stated in *Campbell v. Bagley*,[60] "whether a claimant has a valid mortgage or has acquired a valid title by purchase are questions to be determined by the law of the state."[61] If this is so, the proper question to ask in any given case would be whether, under state law, the lienor had a valid mortgage or pledge.

Even if the lienor did hold such a valid interest "the Supreme Court has made it abundantly clear that federal law determines which creditors are pledgees, mortgagees, purchasers and judgment creditors for purposes of protection under § 6323."[62] A classification by the state that a given interest is a valid mortgage is thus meaningless if such a classification gives the mortgagee no protection under section 6323.

Since federal practice determines whether a private lienor is entitled to the protection of section 6323, the next question must necessarily ask how a court determines if that statute is applicable. This brings the problem full circle, because the question asks, in effect: What are the standards of choateness which will be applied to contractual liens?[63]

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[57] Contra, United States v. Pioneer Am. Ins. Co., supra note 10, at 89.

[58] E.g., United States v. Lebanon Woolen Mills Corp., supra note 54, at 395.

[59] See Poe v. Seaborn, 282 U.S. 101, 110 (1930).

[60] 276 F.2d 28 (5th Cir. 1960).

[61] Id. at 33.

[62] Stevan v. Union Trust Co., 316 F.2d 687, 692-93 (D.C. Cir. 1963), citing United States v. Scovil, 348 U.S. 218 (1955) and United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953).

[63] The term "choateness" is used here merely to mean those standards which a contractual lienor has to meet to prevail over the federal competitor. It has no reference to the standards of choateness developed under § 3466 and discussed earlier.

A possible solution would be the application to the Government of the standards applied to all third party creditors. If this criterion were applied, choateness would be coextensive with perfection against third parties. The crux of the court's position in *Lebanon*, however, very convincingly argues that this would be improper. Briefly the court reasons as follows:

(1) As of the date of execution of the conditional sales agreement, it is complete as between the mortgagor and mortgagee.
(2) Filing requirements as prescribed in the Uniform Commercial Code are designed to protect third party reliance creditors.
(3) The Government is not a third party reliance creditor because its lien will attach in precisely the same way to precisely the same items whether or not, at the time it is filed, there is a previously executed mortgage on record.[64]

Thus, the premise of the argument is that the Government is not the third party envisioned by the Code's recording provisions; that the Government is something different, perhaps impliedly something less than such a creditor.

Not all courts have accepted this position. In *In re Moody*,[65] there was a contest for priority between the federal government for taxes and a bank for a chattel mortgage. Pennsylvania law provided that a chattel mortgage was not valid for more than five years as to third parties, unless re-recorded.[66] Since the chattel mortgage in question was not re-recorded after five years, it was held invalid against the Government.[67] The application of the statute implied that the Government was a third party. Similarly, in *Hart v. United States*,[68] the court stated: " . . . if the mortgage was made under such circumstances that, although it might be good between the parties . . . it still was ineffectual to constitute a senior lien against other creditors, it was not such a mortgage as the statute [section 6323] gives priority to."[69]

III. Conclusion

This quandary (what standards will be applied to contractual liens) demands a commitment from the courts. Will the rigid standards of section 3466 be applied to contractual liens, as was apparently done in *Ball*, or will a new, more liberal concept of choateness be developed as *Lebanon* and the dissenters in *Ball* would prefer? Equally important is the question of whether such different standards will prove beneficial.

On the basis of the several cases discussed, it seems the courts have adopted three approaches to the problem. At one end of the spectrum is the approach taken by the majority in *Ball*. The most cogent reason for application of this strict standard is the principle behind the federal priority: to keep a constant flow of funds coming into the federal treasury. In providing for this, Congress has decreed that "debts due to the United

[64] United States v. Lebanon Woolen Mills Corp., supra note 54, at 399.
[65] 132 F. Supp. 855 (E.D. Pa. 1955).
[66] Pa. Laws 1945, Act 1358, § 1.
[67] 132 F. Supp. at 856.
[68] 207 F.2d 813 (8th Cir. 1953).
[69] Id. at 819.

States shall be first satisfied."[70] The lien statutes are simply a method of implementing this priority. If the Government is to maintain this superiority, it is necessary that it be in a position to subordinate competing liens.

Though the reasoning may be sound, its application is still confused. The federal courts have adopted no definition of mortgagee or pledgee. The Internal Revenue Service Regulations provide:

> . . . determination of whether a person is a mortgagee, pledgee, purchaser, or judgment creditor, entitled to the protection of section 6323(a), shall be made by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Thus, a person who is in fact and in law a mortgagee, pledgee, or purchaser will be entitled as such to the protection of section 6323(a) even though such person is otherwise designated under the law of a State, such as the Uniform Commercial Code.[71]

Granted that the federal government must be permitted to defeat "inchoate" interests, it still seems to be a better policy to define the terms of the statute more clearly. A mortgagee, pledgee or purchaser should be able to refer to a definition and conclude that he has or has not met the standard. If this were accomplished, private creditors might be more favorably disposed to tolerate the concept of federal priority.

At the other end of the spectrum, however, are those cases which seem to rely entirely upon state-established standards.[72] These have the advantage of providing the private creditor with a single, defined standard as to all third parties, including the federal government. He need only follow whatever practice has been established in his local jurisdiction and, having complied with this, he is assured of also having met the federal requirements. This reaches the unsatisfactory result of denying to the Government that priority which it both has and needs.

The third approach is that taken by the dissent in *Ball* and the court in *Lebanon*. Using this approach, the mortgage, pledge or purchase is valid against the Government when it is valid between the parties. This seems to take into consideration the differences, enumerated above,[73] between contractual and statutory liens. This, however, undermines the importance of state filing requirements and in so doing reaches the conclusion that if the competing lienor can prevail against the Government where he cannot prevail against a third party, the Government is something less than a third party.

In deciding which of the three approaches is the most appropriate, two factors must control: (1) Generally speaking, federal priority is a well-established and important principle which should not be abrogated; and (2) state courts cannot be permitted to interpose their interpretations of a federal statute.

This necessarily dispenses with the second and third possibilities. It does

[70] Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1964).
[71] Treas. Reg. § 301.6323-1 (1960), 5 P-H 1965 Fed. Tax Serv. ¶ 35,784.
[72] See, e.g., Hart v. United States, supra note 68.
[73] Supra at p. 372.

not, however, prevent Congress or the courts from defining, in concrete terms, what constitutes a mortgagee or pledgee. If this step were taken, the problem would admittedly not be solved. It would, however, mitigate the confusion while retaining the necessary federal control.

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