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Liens -- Priority of Federal Claims Over Attachments

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expressly incorporated in the amended act,[32] thus includes the second exception to the equitable rule.

Since the instant case is not of the latter type, and as the criminal proceedings had already been instituted, the inference of the court that it could enjoin the proceedings violates the provisions of the "anti-injunction" statute as well as the long standing equitable doctrine.

Nevertheless, the court's action in *Cooper v. Hutchinson*, in refusing to grant injunction, and in remanding to the district court pending a ruling by the state court on the constitutional issues was not detrimental to either party. It did not delay the state's administration of criminal justice, and resulted in disposition of the case without necessity of appeal to the New Jersey Supreme Court.[33] This is not the first time such relief has been employed,[34] and it appears that it is to be preferred to dismissal or an order enjoining the court proceedings where the propriety of injunction is questionable.

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Liens—Priority of Federal Claims Over Attachments

A creditor brought an action on an unsecured promissory note and on the same day attached four parcels of real estate belonging to the debtor to secure payment of any judgment recovered in the action. After levy of the attachment, which was duly recorded, a federal tax lien[1] on all of the debtor's property, including the previously attached real estate, was recorded. Subsequently, the creditor recovered judgment in his action on the promissory note. In a suit to determine priority of liens on the real property, a California district appellate court found that the attachment was a *specific* and *perfected* lien, and following the general rule of "first in time of recordation, first in priority," the attachment was superior to the federal tax lien.[2] The California Supreme Court declined to hear the case and the United State Supreme Court granted certiorari. By a unanimous vote, the Supreme Court held that the federal tax lien was superior to the *contingent* or *inchoate* attach-

[32] ". . . except . . . where necessary in aid of its jurisdiction. . . ." 62 STAT. 968, 28 U. S. C. §2283 (1948).

[33] Following the decision of the instant case, the trial judge issued a rule to show cause to the parties involved. This was never heard, as the three New York attorneys voluntarily requested permission to withdraw from the case, which permission was granted.

[34] Railroad Comm. of Texas v. Pullman Co., 312 U. S. 496 (1941) (first case in which this type of relief used); A. F. of L. v. Watson, 327 U. S. 582 (1946); Specter Motor Service, Inc. v. McLaughlin, 323 U. S. 101 (1944).

[1] INT. REV. CODE §§3670-3672.

[2] Winther v. Morrison, 93 Cal. App. 2d 608, 209 P. 2d 657 (1949).

ment lien, reversing the judgment of the state court.[3]

It is generally stated that the law of attachment as it exists in the United States is in derogation of the common law, and there is no right of attachment unless provided by statute.[4] Although the precise details of attachment statutes vary among the states, the underlying purpose of attachment remains the same; ". . . the word 'attachment,' as ordinarily understood in American law, has reference to a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the event the debt shall be established. . . ."[5] The usual and practical theory is that an attachment creates a lien on the property attached,[6] which is a vested interest of the creditor.[7]

Inasmuch as the basic purpose of an attachment is to hold the property of the debtor to secure any judgment which may be recovered, the courts have under certain fact situations described the attachment lien as inchoate or contingent. For example, if the attachment was never followed by a judgment it would not prevail over an intervening recorded mortgage.[8] And makers of a note who pay installments to payee's attaching creditor, who thereafter does not pursue his right to execution of judgment, are still liable for such payments to payee's other lien creditor.[9] On the other hand, where the attachment lien is not permitted to lapse by failure to proceed to judgment in due time, the language of the decisions with reference to the type of lien created by attachment, before judgment, is quite different.[10] When the attachment

[3] United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111 (1950) (Justice Jackson has a concurring opinion, p. 114). The creditor had died and the Security Trust and Savings Bank as executor of his will was substituted.

[4] Harris v. Balk, 198 U. S. 215, 222 (1904); Mitchell v. St. Maxent's Lessee, 4 Wall. 237, 243 (U. S. 1823); Bethel v. Lee, 200 N. C. 755, 758, 158 S. E. 493, 494 (1931). For comments on attachment law in the colonies see Peck v. Jenness, 7 How. 612, 620 (U. S. 1848).

[5] Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239, 245 (1908). See also CAL. CODE CIV. PROC. §537 (1949) and N. C. GEN. STAT. §1-440.1(a) (1949 Supp.).

[6] Peck v. Jenness, 7 How. 612 (U. S. 1848).

[7] McGaffey Canning Co. v. Bank of America, 109 Cal. App. 415, 294 Pac. 45 (1930) (creditor has tort action against one wrongfully interfering with his attachment lien).

[8] Pratt v. Law, 9 Cranch 456, 497 (U. S. 1815).

[9] "The attaching creditor obtains only a potential right or a contingent lien and in order to discharge their liability, defendants should have made all payments to the sheriff in accordance with . . . the Code . . ." (instead of to attaching creditor). Puissegur v. Yarbrough, 29 Cal. 2d 409, 412, 175 P. 2d 830, 831 (1946).

[10] Horan v. Varian, 204 Cal. 391, 268 Pac. 637 (1928) (attachment has priority over a secret existing but unrecorded deed); Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352 (1889) (attaching creditor has priority over existing unrecorded deed although he received notice of deed prior to judgment); Sanborn, McDuffee Co. v. Keefe, 88 N. H. 236, 187 Atl. 97 (1936) (attachment is good as against encumbrances intervening between attachment and execution); United States v. Yates, 204 S. W. 2d 399 (1947) (Texas Court of Civil Appeals held an attachment lien was specific and perfected and superior to a federal tax lien though not reduced to judgment).

is followed by a judgment, the rationale of the decisions is that the attachment lien merges in the lien of judgment to preserve the priority,[11] or the judgment lien relates back to the date of the attachment lien and is effective from that date.[12] A study of the cases emphasizes the necessity of viewing expositions concerning the *general* nature of the attachment lien with considerable caution. The descriptive excerpts, as such, are irreconcilable and are made meaningful only when interpreted in the light of the fact setting involved. For example, the California courts have, in separate decisions, what purport to be general descriptions of an attachment lien in precisely contradictory terms.[13] While the courts have justifiably held an attachment lien inferior to another lien under one set of facts, and superior in another fact setting, there unfortunately and unnecessarily have been too many attempts to describe the general nature and effect of an attachment lien in terms of the immediate set of facts then confronting the court.[14] The consequence of this has been an accumulation of inconsistent reasoning more than inconsistent results. So long as the trite but still pertinent exhortation, "Interpret the language of the case in terms of the facts therein," is obeyed, the lack of clear and consistent explanations is not as likely to be a substantial impediment in reaching desirable and correct results. Courts, however, sometimes fail to heed the admonition. And in the principal case, this indiscriminate use of descriptive language by Cali-

[11] Balzano v. Traeger, 93 Cal. App. 640, 270 Pac. 249 (1928); Brun v. Evans, 197 Cal. 439, 241 Pac. 86 (1925); *cf.* Hambley Co. v. White Co., 192 N. C. 31, 133 S. E. 399 (1926); Cook v. N. Y. Corundrum Mining Co., 114 N. C. 617, 19 S. E. 664 (1894).

[12] Martinovich v. Marsicano, 150 Cal. 597, 89 Pac. 333 (1907); Board of Supervisors v. Hart, 210 La. 78, 26 So. 2d 361 (1946); Campbell v. Keys, 130 Mich. 127, 89 N. W. 720 (1902); Smart v. Burgess, 35 R. I. 149, 85 Atl. 742 (1913). The relation back idea has been used in various lien situations to establish a priority over a federal tax lien: *In re* Taylorcraft Aviation Corp., 168 F. 2d 808 (6th Cir. 1948) (mechanic's lien relates back to time of performance of work); United States v. Winnett, 165 F. 2d 149 (9th Cir. 1947) (right to set-off related back to date of agreement and set-off right was superior to intervening tax lien); New York Casualty Co. v. Zwerner, 58 F. Supp. 473 (N. D. Ill. 1944) (surety company's equitable lien relates back to date of suretyship contract). *Contra:* Miller v. Bank of America, 166 F. 2d 415 (9th Cir. 1948); Seaboard Surety Co. v. United States, 67 F. Supp. 969 (Ct. Cl. 1946).

[13] "The attaching creditor obtains only a potential right or a contingent lien. . . ." Puissegur v. Yarbrough, 29 Cal. 2d 409, 412, 175 P. 2d 830, 831 (1946). "Since . . . the attachment herein was properly . . . levied . . . it is evident that Morrison *perfected* a lien thereon. . . ." Winther v. Morrison, 93 Cal. App. 2d 608, 209 P. 2d 657, 659 (1949) (italics added). The contradictory descriptions of the nature of the attachment lien are found elsewhere. Compare 5 AM. JUR. ATTACHMENT §815 with §827 of the same reference. See 7 C. J. S. ATTACHMENT §256.

[14] Although criticism at this juncture may seem "hindsight more omniscient than foresight" it appears to this writer that the language ("contingent lien") was unnecessary to the decision in Puissegur v. Yarbrough, *supra* note 13. It would have been sufficient to have asserted against the defendants that they had failed to observe the requirements of the California statutes.

fornia courts concerning the nature of an attachment lien (contingent and inchoate on one occasion, and specific and perfected on another) acted somewhat as a boomerang on a decision by courts of that state.[15]

Nevertheless, when the issue is the relative priority of a recorded attachment lien and a subsequently recorded *private*[16] creditor's lien, the courts will usually apply the rule of "first in time of recordation, first in priority."[17]

Section 3466 of the Revised Statutes,[18] the basic provisions of which were enacted in 1797,[19] provides for a priority of payment of federal debts under specified circumstances but does not create any lien.[20] The interpretation of Section 3466 has had a long and tortuous history.[21] Although the language of the statute appeared to give the federal claim priority over all other creditors without exception, a dictum in the early case of *Thelusson v. Smith*[22] indicated that a "specific and perfected"

[15] The United States Supreme Court used this language in reversing the California court: ". . . if the state court itself describes the lien as inchoate, this classification is 'practically conclusive. . . .' The Supreme Court of California has so described its attachment lien in the case of Puissegur v. Yarbrough. . . ." United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111, 113 (1950). The Court clearly did not interpret the language of the California court "in the light of the facts of the case" and it ignored the effect of other California decisions concerning the nature of an attachment lien, including the state decision it overruled.

[16] As developed in this comment *infra*, if the competing claim is held by the federal government, the result will be different under the rule of the principal case, United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111 (1950).

[17] See notes 10, 11 and 12 *supra*.

[18] 31 U. S. C. §191 (1946): "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 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."

[19] 1 STAT. 515 (1797). Under the English common law the priority of payment of debts due to the government was a prerogative of the crown, but in the United States this right of priority has been held to be entirely dependent upon the acts of Congress. Mellon v. Michigan Trust Co., 271 U. S. 236, 239 (1926); United States v. State Bank, 6 Pet. 29, 35 (U. S. 1832). *But cf.* the language of United States v. Snyder, 149 U. S. 210, 214 (1892).

[20] "Under this act these rules have been clearly established: First, no lien is created; second, the priority established can never attach while the debtor continues the owner and in possession of the property, though he may be unable to pay all his debts; third, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated; and fourth, whenever the debtor is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States. . . ." Beaston v. Farmers' Bank, 12 Pet. 102, 132 (U. S. 1838).

[21] See Rogge, *The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships*, 43 HARV. L. REV. 251 (1929); Note, 56 YALE L. J. 1258 (1947).

[22] 2 Wheat. 396, 426 (U. S. 1817) (a judgment not yet levied was not a sufficiently perfected lien). See the surprising reference to this case in Conard v. Atlantic Insurance Co., 1 Pet. 386, 451 (U. S. 1828), concurring opinion by

lien would prevail over Section 3466 priority. Though repeated with varying degrees of assurance in later cases,[23] and urged upon the Court many times,[24] the Court has assiduously avoided a direct answer by finding that the lien competing with the federal priority was not sufficiently "specific and perfected."[25] Again, this was true in the recent case of *Illinois v. Campbell*.[26] In this case the Court stated that a lien must be definite in "at least three respects"[27] in order to overcome the priority of Section 3466: (1) the identity of the lienor;[28] (2) the amount of the lien;[29] (3) the property to which the lien attaches.[30]

A general statutory lien is provided for in Section 3670 of the Internal Revenue Code,[31] which arises at the time the assessment list is received by the internal revenue collector,[32] and which attaches to after-acquired property as well as present property rights of the debtor.[33] Originally Congress made no provision for recordation of federal tax liens arising under Section 3670. Perhaps influenced by the decision of the Court in *United States v. Snyder*,[34] which brought out the menace of this secret, unrecorded lien to the security of land titles and to all lien creditors' rights, Congress in 1913 provided that the tax lien

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Justice Johnson: ". . . I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelusson v. Smith*. I have never acknowledged its authority in my circuit . . . the question there supposed to be decided really never was raised. . . . The reporter has omitted one very material fact . . . which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of . . . the bankrupt."

[23] *See* Savings and Loan Society v. Multnomah County, 169 U. S. 421, 428 (1898): "This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States. . . ." See Illinois v. Campbell, 329 U. S. 362, 378 (1946) (dissenting opinion).

[24] Illinois v. Campbell, 329 U. S. 362 (1946); United States v. Waddill, 323 U. S. 353 (1945); United States v. Texas, 314 U. S. 480 (1941); United States v. Knott, 298 U. S. 544 (1936); New York v. Maclay, 288 U. S. 290 (1933); Spokone County v. United States, 279 U. S. 80 (1921); Thelusson v. Smith, 2 Wheat. 396 (U. S. 1817).

[25] See 33 VA. L. REV. 353 (1947); cases cited note 24 *supra*.

[26] 329 U. S. 362 (1946) (Illinois had recorded notice of unemployment compensation taxes due and asserted a lien upon *all* the personal property owned and used by lienee in connection with its business. The court ruled that the Illinois claim was not definite and certain as to the property).

[27] Illinois v. Campbell, 329 U. S. 362, 375 (1946).

[28] Lien on securities deposited with state official for benefit of possible future creditors of surety company was inchoate for lack of ascertained lien creditor. United States v. Knott, 298 U. S. 544, 550 (1936).

[29] Landlord's lien for rents accruing in the future not certain in amount when federal priority arose. United States v. Waddill, 323 U. S. 353 (1945).

[30] See note 26 *supra*.

[31] 26 U. S. C. §3670 (1946).

[32] INT. REV. CODE §§3670 and 3671. See *In re* Victor Brewing Co., 54 F. Supp. 11 (W. D. Pa. 1944), *aff'd*, 146 F. 2d 831 (3d Cir.).

[33] Glass City Bank v. United States, 326 U. S. 265 (1945). See Clark, *Federal Tax Liens and Their Enforcement*, 33 VA. L. REV. 13 (1947).

[34] 149 U. S. 210 (1892). See Note 33 *supra*.

should not be valid against a purchaser, mortgagee, or judgment creditor until the lien was recorded.[35] In 1939 this protection was extended to a pledgee, and another amendment provided that the lien, even if recorded, should not be valid as against a mortgagee, pledgee, or purchaser of *securities* who gave full consideration for such securities without actual knowledge of the tax lien.[36] As the present law requires recordation of the of the tax lien as against *subsequent* purchasers, judgment creditors, mortgagees and pledgees, it logically follows that a lien under Section 3670 would not be superior to *prior* recorded claims of a purchaser, judgment creditor, mortgagee or pledgee.[37] But the standing of the claimant who does not fall into one of these categories,[38] and who has recorded his claim *prior* to the time the tax lien arose, is not expressly dealt with by statute. Prior to the principal case the decisions on this point were in conflict. For example, in *Board of Supervisors v. Hart*,[39] the federal tax lien was recorded subsequent to an attachment but prior to judgment. The tax lien was held subordinate on the theory that the judgment related back to the date of attachment and was superior to any intervening liens.[40] On the other hand, in the similar case of *Miller v. Bank of America*,[41] it was held that a tax lien was superior to an attachment pursued to judgment on the ground that, under the California law, no lien was acquired on personalty by a judgment until levy of execution.[42]

In the principal case, the Supreme Court did not find the relation-back theory acceptable.[43] Neither did it think that the attachment lien was specific and perfected. The Court relied on language from a previous California decision,[44] and saw an analogy in cases arising under

[35] INT. REV. CODE §3672(a).
[36] INT. REV. CODE §3672(b).
[37] In the principal case, the Government did not contest the priority of a mortgage recorded prior to the time the tax lien arose.
[38] For example, an attachment creditor.
[39] 210 La. 78, 26 So. 2d 361 (1946). This case was not appealed.
[40] *Accord*, United States v. Winnett, 165 F. 2d 149 (9th Cir. 1947) (right of set-off related back to date of contract, taking priority over intervening tax lien); United States v. Sampsell, 153 F. 2d 731 (9th Cir. 1946); New York Casualty Co. v. Zwerner, 58 F. Supp. 473 (N. D. Ill. 1944); *In re* Van Winkle, 49 F. Supp. 711 (W. D. Ky. 1943); United States v. 52.11 Acres of Land, 73 F. Supp. 820 (E. D. Mo. 1947); United States v. Yates, 204 S. W. 2d 399 (1947). *But cf.* MacKenzie v. United States, 109 F. 2d 450 (9th Cir. 1940) (tax lien arose before attachment but was not recorded and tax lien held superior).
[41] 166 F. 2d 415 (9th Cir. 1948) (no discussion of the effect of the attachment).
[42] But see Balzano v. Traeger, 93 Cal. App. 640, 270 Pac. 249 (1928) (lien of attachment on personalty continues after judgment to preserve the lien and its priority); Bank of America v. United States, 73 F. Supp. 303 (N. D. Cal. 1946); United States v. Record Pub. Co., 60 F. Supp. 194 (N. D. Cal. 1945).
[43] "Nor can the doctrine of relation back . . . operate to destroy the realities of the situation." United States v. Security Trust & Savings Bank, 71 Sup. Ct. 111, 113 (1950).
[44] See note 15 *supra*.

Section 3466.[45] The refusal of the Court to adopt the relation-back doctrine could be justified under a strict reading of the statute.[46] However, the persistence of the Court in finding as inchoate and contingent any lien which is competing against a federal tax lien or priority under Section 3466 seems less justifiable.[47] Such language with respect to an attachment lien seems to ignore the fundamental purpose of an attachment. Although it is quite true that the *right* to realize upon the attached property is contingent upon a subsequent judgment,[48] if the attachment is to be effective as a lien, it must fill the office of a valid lien prior to any judgment in the action.[49] Otherwise, the creditor would just as well save his efforts and abide his time until he has a judgment to record.[50]

[45] See notes 24 and 28-30 *supra*.

[46] INT. REV. CODE §3672(a): "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed. . . ." It could be reasoned that to adopt the relation-back doctrine would in substance be inserting into the statute the additional words, "attachment creditor."

[47] Mr. Justice Jackson in a concurring opinion thought that the history of the statute required giving the tax lien priority over the attachment lien, as more in keeping with the intention of Congress. What seems to be a significant sentence in H. R. REP. No. 1018, 62d Cong., 2d Sess. (1912), which Justice Jackson cited, was not quoted: *"There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual"* (italics added). While this sentence could not, of course, be interpreted as an express statement of the Committee concerning an *attachment lien*, it does perhaps argue for more lenient treatment of private creditor's liens on an occasion when the statute is silent.

[48] It should be remembered that short of payment, something usually remains to be done with any lien. A mortgage, whether in a lien or title jurisdiction, must be foreclosed. See Meyer's Estate, 159 Pa. Super. 296, 48 A. 2d 210 (1946).

[49] It might be argued that the attaching creditor does not lose anything if his attachment is overreached by other lien creditors, as he did not have any security to begin with, and did not expect any. But this would be an argument to do away with the whole body of attachment law. Furthermore, the attachment lien does protect the creditor against a fruitless suit and the expense of litigation, and the peril of having a judgment with nothing to levy upon. The reasons for giving the attaching creditor a lien on the debtor's property are indeed quite similar to those applicable for the judgment creditor's lien.

[50] The statutory provisions on attachments in North Carolina are set out in N. C. GEN. STAT. §§1-440.1 through 1-440.57 (1949 Supp.). The North Carolina statute is less extensive than the California statute, CAL. CODE CIV. PROC. ANN. §537 (1946), in that in North Carolina an attachment may be issued against a resident only when he (the debtor) with intent to defraud his creditors, is about to or has removed, assigned or otherwise disposed of his property. N. C. GEN. STAT. §1-440.3(5) (1949 Supp.). It would therefore seem that the situation which permits the creditor to attach the resident debtor's property is the situation which invokes the priority statute, R. S. §3466. See note 18 *supra*. But this assumes that the debtor is not thrown into bankruptcy. Since acts which call R. S. §3466 into play may also justify an involuntary petition in bankruptcy, if this results, the order of distribution under Sec. 64(a) of the Bankruptcy Act, 11 U. S. C. §104 (1946) gives the United States a fifth priority. Furthermore, under the Bankruptcy Act, Sec. 67, inchoate liens are specifically protected so that if an attachment lien is so denominated, it would have priority over the federal tax claim. See Sarner, *Correlation of Priority and Lien Rights in the Collection of Federal Taxes*, 95 UNIV. PA. L. REV. 739, 743 (1947). Where the attachment

The fact that a federal tax lien is in the race for priority should not serve to change the fundamental nature and purpose of competing liens.[51] The desirability as well as the Constitutional requirement[52] of a uniform tax policy throughout the country need not be argued, nor the necessity that the federal government secure needed revenue for the public benefit. What may be doubted is the contention of some that the public benefit is or would be served by subordinating all lien holders to the tax claims of the United States.[53] When this would not result in an appreciable amount of revenue in the aggregate,[54] and would often operate quite unjustly by imposing relatively heavy losses upon individual private creditors, the public benefit involved would seem highly dubious.

Congress has by successive amendments since 1913[55] greatly restricted the scope of the original secret, unrecorded federal tax lien. This fact plus a House Committee declaration that "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual"[56] would seem to make out a good case why the federal courts should not give effect to a secret, unrecorded tax lien by the judicial process of defining a competing lien as "contingent and inchoate."[57] Yet, the reluctance of the Supreme

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is on property of a nonresident (N. C. GEN. STAT. §1-440.3(1) (1949 Supp.) or a foreign corporation (N. C. GEN. STAT. §1-440.3(2) (1949 Supp.) without regard to any attempt to defraud creditors, R. S. §3466 would not necessarily be invoked. In this case, the North Carolina attachment creditor would likely still find his attachment lien inferior to a federal tax lien under INT. REV. CODE §3670 which intervened between attachment and judgment, under the rule of the principal case.

[51] *E.g.*, see Doe v. Childress, 24 Wall. 642 (U. S. 1874) as to the effect of an attachment where no tax lien was involved.

[52] U. S. CONST. Art. I §8.

[53] "In insolvency proceedings some claimants are certain to suffer. There is no reason why lien holders should be preferred over the United States. Since the priority accorded claims of the United States is for the purpose of securing revenue for the public benefit, the United States has a stronger argument for prior payment of its claims against an insolvent estate than does a lien holder whose interest is purely private." Sarner *supra* note 51, at 746-747. This author assumes without discussion what seems to be a debatable proposition: Would the public welfare *in fact* be served by giving the United States preference over *all* lien holders?

[54] See H. R. REP. No. 1018, 62d Cong., 2d Sess. 1912 and H. R. REP. No. 855, 76th Cong., 1st Sess. 1939.

[55] INT. REV. CODE §3672.

[56] H. R. REP. No. 1018, 62d Cong., 2d Sess. 1912.

[57] From the view of strict statutory construction, the interpretations of the Supreme Court are probably unassailable. But the Court has not limited itself to such construction through the years, inasmuch as it has kept alive, by dicta, the idea that a "specific and perfected" lien would not be overreached by federal priority under R. S. §3466. See notes 23 and 24 *supra*. The number of cases heard on the point is evidence of the reliance which litigants have put on the often repeated dicta, as well as of great differences of opinion as to what constitutes a "specific and perfected" lien. In an area of the law where certainty is an unusually desirable factor, the Supreme Court has often contributed to uncer-

Court to find a sufficiently "specific and perfected" lien under Revised Statutes, Section 3466, and now under Section 3670 of the Internal Revenue Code, indicates that amendments to these two sections are highly desirable. Such amendments should bring these sections into conformity with the federal priority philosophy Congress has expressed elsewhere,[58] thereby eliminating the remaining vestiges of the secret, unrecorded federal claim and achieving a greater degree of certainty as to creditors' rights. These goals appear impossible of attainment under the present state of the law.

ROBERT E. GILES.

Negligence—Contributory—Obstructions of View at Railroad Crossings

The failure of a traveler crossing a railroad to obtain a clear view of the track from any point, when he may do so in safety, renders him contributorily negligent as a matter of law in North Carolina, and his case will not be allowed to go to the jury.[1] This rule was recently illustrated by the case of *Parker v. Atlantic Coast Line R.R.*[2] Plaintiff stopped at a farm crossing with the front of his truck eight or ten feet from the near rail, at a point where an embankment prevented his seeing more than seventy-five to eighty yards up the track. He then entered the crossing and collided with a train. The court held motion for nonsuit should have been granted since plaintiff's evidence disclosed that he could have stopped in safety at a point which afforded him clear vision. This rule has had sustained approval since *Harrison v. North Carolina R.R.*,[3] but its application has not always been certain.

The general principles of the duty of a traveler in crossing a railroad track have been many times repeated.[4] It is generally held that

tainty. For an excellent example of the effect on lower federal courts, see Bank of Wrangell v. Alaska Lumber Mills, 84 F. Supp. 1 (D. C. Alaska 1949) (admitting the impossibility of reconciling the decisions, and the dicta, the court held that a mortgage, in a lien jurisdiction, was superior to federal priority under Section 3466).

[58] The Bankruptcy Act §§64 and 67, 30 STAT. 563 (1898), as amended, 11 U. S. C. §104 (1946) and 30 STAT. 564 (1898), as amended, 11 U. S. C. §107 (1946).

[1] This rule, of course, assumes the existence of some negligence on the part of the defendant railroad, which will generally be a failure to give proper warning. This note does not attempt to deal with the problem of what constitutes negligence on the part of the railroad. For a general discussion of the problem of crossing accidents see Blair, *Automobile Accidents at Railroad Crossings in North Carolina*, 23 N. C. L. REV. 223 (1945).

[2] 232 N. C. 472, 61 S. E. 2d 370 (1950).

[3] 194 N. C. 656, 140 S. E. 598 (1927).

[4] The basic North Carolina cases on duties of both parties at a railroad crossing are probably Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913); Coleman v. A. C. L. R.R., 153 N. C. 322, 69 S. E. 251 (1910); Cooper v. N. C. R.R., 140 N. C. 209, 52 S. E. 932 (1905).