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Taxation—Attachment Lien Not Entitled to Priority Over Subsequent Federal Tax Lien.—*Manchester Federal Savings and Loan Association v. Emery Waterhouse Co.*[1]—Following a foreclosure sale of a parcel of property subject to a real estate mortgage, a bill of interpleader was filed to determine the rights of a number of claimants to the proceeds of the sale in excess of the amount paid to the mortgagee. Following the execution of the first mortgage certain creditors made attachments, a second mortgage was executed, and a federal tax lien was imposed. The proceedings involved an application of the Int. Rev. Code of 1954 § 6323 which provides that the lien of the United States for taxes "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor whose liens . . . " antedate the tax lien.[2] On record questions the Supreme Court of New Hampshire held, inter alia, that the federal tax lien did not have priority over the second mortgage but did have priority over the attachments of the creditors who had not taken judgment and subsequently had not perfected their inchoate attachment liens.[3]

The question frequently arises as to whether liens which have attached prior to the filings of a federal tax lien are entitled to priority over it. The Supreme Court of the United States has taken the position that only liens that are perfected and choate are entitled to priority.[4] For a lien to meet these requirements: (1) the property subject to the lien must be definite, (2) the identity of the lienor must be established, (3) the amount of the lien must be in an exact amount and be fixed and determined with finality.[5] Congress, however, has specifically given protection to prior liens of mortgagees, pledgees, purchasers, and judgment creditors.[6] As the court in the instant case points out, an attachment lien is neither a perfected lien because it is contingent upon the creditor getting judgment, nor does it fall within the class of judgment creditors specifically protected by the Int. Rev. Code of 1954.[7] The creditors in this case in order to protect their rights would have had to get judgment before the federal tax lien was filed. Moreover, if this were a case involving personal property, it would seem that the mere entry of judgment would not be sufficient for the creditors to preserve their rights. Security would only be obtained by the creditors reducing the property to their constructive possession by delivery of a writ of execution to the sheriff prior to the time that the federal tax lien was filed.[8]

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[1] 153 A.2d 918 (N.H. Sup. Ct. 1959).

[2] Int. Rev. Code of 1959, § 6323.

[3] Two creditors received judgment but had failed to levy execution within thirty days of judgment as required by N.H. Rev. Stat. ch. 511-55 and therefore had lost their security rights; Murphy v. Hill, 68 N.H. 544, 44 Atl. 703 (1896). Other creditors had attached the property, but the actions had been continued for judgment at the time the federal tax lien was filed. Therefore, they were not judgment creditors; United States v. Security Trust & Savings Bank, 340 U.S. 47 (1950).

[4] United States v. Security Trust & Savings Bank, supra note 3.

[5] Illinois ex rel. Gordon v. Campbell, 329 U.S. 362 (1946).

[6] Int. Rev. Code of 1954, § 6323.

[7] United States v. Security Trust & Savings Bank, supra note 3.

[8] United States v. Levin, 128 F. Supp. 465 (D. Md. 1955). See Mosner, Federal Tax Liens, 17 Md. L. Rev. 1, 10 (1957).

Whether a lien fulfills the requirements of specificity stated above is a matter of federal law.[9] A state court's characterization of a lien as specific and choate, while entitled to consideration, is not binding on the federal courts.[10] On the other hand, if the state court decides that the lien is inchoate, as was done in the instant case, this classification is practically conclusive.[11]

The doctrine of the inchoate lien has been the subject of severe criticism.[12] One critic has pointed out that the concept of the inchoate lien as created by the Supreme Court has subsequently been enlarged to include practically every lien to be found in American law.[13] The most valid criticism seems to be that it does not apply to federal tax liens. The federal tax lien is not regarded as an inchoate general lien, but a specific and perfected lien which without the aid of any subsequent court action attaches to the property of the tax debtor.[14]

The problem of the inchoate lien probably would not have arisen had the Supreme Court adhered to a holding that the priority of liens be based upon a "first in time, first in right theory" which they seemed to follow in an earlier case.[15] However, since the Court did not subsequently follow the rule it has become, in this regard, purely academic.[16] It is felt that Congress could ameliorate the situation presented in the instant case by providing that when an attachment lien is followed by judgment, the judgment should relate back to the date of the attachment and thereby the priority of the lien be preserved. There seems to be no indication, however, of any Congressional action in this respect within the immediate future.[17]

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Taxation—Federal Income—Statutory Interpretation—Useful Life-Salvage Value.—*Hertz Corporation v. United States.*[1]—The corporate taxpayer was engaged in the business of renting automobiles and trucks, the former of which had a useful life to it of less than three years but a physical life of four. In preparing the federal income tax returns for the years 1954, 1955, and 1956, the taxpayer claimed depreciation on the automobiles on the basis of the four year physical life using the declining balance method at a rate of fifty per cent per year on the undepreciated

9 United States v. Gilbert Associates, 345 U.S. 361 (1953).

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

11 Illinois ex rel. Gordon v. Campbell, supra note 5, at 371.

12 MacLachlan, Improving the Laws of Federal Liens and Priority, 1 B. C. Ind. & Com. L. Rev. 73 (1959).

13 Kennedy, The Pernicious Career of the Inchoate and General Liens, 63 Yale L.J. 905 (1954).

14 Note, 22 Geo. Wash. L. Rev. 583, 588 (1954).

15 United States v. City of New Britian, 347 U.S. 81 (1954).

16 Comment, 54 Mich. L. Rev. 829 (1956).

17 MacLachlan, supra note 12, at 82.

1 268 F.2d 604 (3d Cir. 1959).