Fordham Law Review

Volume 25 | Issue 1 Article 7

1956

Priority as between the Federal Tax Lien and the Mechanics Lien

"interposition"[45] with or without a nullifying clause. As the national election campaign gets under way presidential candidates have been forced to recognize the problem of the South. While the situation still remains dangerous not only for the South but also for the entire nation, in the long run the experience gained by the non-Southern integrators, may prove very helpful to the nation. This experience thus far would seem to support the contention of those who advocate gradualism but true gradualism, not sham gradualism, in the transition from segregation to desegregation.

"The most important factor in integration of the public schools in the non-South, finally, is community attitudes. *It is axiomatic that separate schools can be merged only with great difficulty, if at all, when a great majority of the citizens who support them are actively opposed to the move.* No other public activity is so closely identified with local mores. Interest in the schools is universal, and it is an interest that directly involves not only the tax-payer but his family, and therefore his emotions."[46]

PRIORITY AS BETWEEN THE FEDERAL TAX LIEN AND THE MECHANIC'S LIEN

Introduction

Decisions rendered in the past few years throughout the federal judiciary have caused serious concern among those individuals and corporations engaged in the construction or building improvement trade. Tersely stated, these decisions have, in most instances, given priority to federal tax liens when they have conflicted with the lien accorded a builder or materialman by state statute. The frequency of litigation concerning these interests, when conflicting, bears ample evidence both to the uncertainty of the priority of such opposing claims and to the eminent dissatisfaction of those concerned with the apparent position of the courts.

Before more searchingly approaching the problem, it would perhaps, for sake of clarity, be wise to discuss generally the exact nature of the liens involved.

The Mechanic's Lien

A mechanic's lien has been defined as ". . . a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as to the building erected thereon."[1] In a narrow and restricted sense a mechanic's lien is a lien for labor, as distinguished from a materialman's lien, but in a broad sense it means a lien

45. The Legislature of Virginia has authorized "interposition" but unlike Georgia, without a nullifying clause. South Carolina is debating the issue. See Krock, N.Y. Times, Jan. 27, 1956, p. 22, col. 5; Feb. 12, 1956, sec. 4, p. 3, col. 1. See also Time, Jan. 30, 1956, p. 14.

46. Ashmore, The Negro and the Schools 81 (1954) (Emphasis added.)

1. Van Stone v. Stillwell & Bierce Manufacturing Co., 142 U.S. 128, 136 (1891).

for material as well as for labor and is frequently used as a general term to designate liens of contractors, sub-contractors, laborers and materialmen.[2] Mechanics' liens were not allowed at common law nor in equity, their existence being in strict derogation thereof.[3] Therefore, the existence and origin of such a lien depends purely on statute.[4] A mechanic's lien is not an interest in land, but is akin to the right given by the common law to artisans on materials in their possession for labor bestowed on them. The principle upon which the mechanic's lien rests is that of unjust enrichment; it is the equity arising from an assumed enhancement in value resulting from work or materials expended on the property for which payment has not been made.[5] Statutes creating mechanics' liens have been enacted in practically every jurisdiction. The statutes are generally of two classes, known as the "New York System" and the "Pennsylvania System." The chief distinction between the two concerns the lien of the sub-contractor or materialman; in the "New York System" the sub-contractor or materialman is limited to the rights of the contractor, their lien being considered derivative in nature, while under the "Pennsylvania System" the statute gives to such contractor or materialman a direct lien not dependent on any indebtedness due to the general contractor from the owner.[6] Statutes in many jurisdictions require notice of a mechanic's lien to be served on the owner, but this is generally required only from sub-contractors or materialmen whose services have been rendered as a result of an agreement with the general contractor, and not as the result of any direct negotiations with the owner.[7] The statutes relating to mechanics' liens generally declare that the statement or claim of lien must be filed within a certain time in order to preserve the lien, the most common provisions being that it shall be within a given time from the completion of the building or improvement,[8] from the time the materials or last items are furnished,[9] the last labor performed,[10] or within a given time after the debt becomes due.[11] The question of the time of the accrual or commencement of a mechanic's lien is one naturally dependent on the language of the various local statutes. Although in a few jurisdictions a mechanic's lien does not attach until the date it is actually filed or served,[12] in most states the right thereto attaches at the date of the contract for the improvement,[13]

2. Dilworth v. Steves, 107 Texas 73, 169 S.W. 630 (1914).

3. Van Stone v. Stillwell & Bierce Manufacturing Co., 142 U.S. 128 (1891); Canal Co. v. Gordon, 73 U.S. (6 Wall) 561 (1867).

4. Springer Land Ass'n. v. Ford, 168 U.S. 513 (1897); In re Louisville Daily News & Enquirer, 20 F. Supp. 465 (W.D. Ky. 1937).

5. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920).

6. 36 Am. Jur., Mechanics' Liens § 6 (1941).

7. Cohoon v. Levy, 6 Cal. 295 (1856).

8. Green v. Green, 16 Ind. 253 (1861); Derrickson v. Edwards, 29 N.J.L. 468 (1861).

9. Mitchell v. Schulte, 142 Ark. 446, 222 S.W. 365 (1920); Smith v. Newbaur, 144 Ind. 95, 42 N.E. 40 (1895).

10. Cain v. Rea, 159 Va. 446, 166 S.E. 478 (1932).

11. Tallapoosa Lumber Co. v. Copeland, 223 Ala. 41, 134 So. 658 (1931).

12. Spengler v. Stiles-Tull Lumber Co., 94 Miss. 780, 48 So. 966 (1909).

13. Boyer v. Keller, 258 Ill. 105, 101 N.E. 237 (1913).

while in others it attaches at the commencement of work or the improvement,[14] or at the time when labor is begun and the first materials furnished.[15] Until the lien is fixed by the filing or giving of notice, there is merely a right to a lien, or as is sometimes said, an inchoate lien; when the notice of lien is filed, or given, as required by the statute, the lien as a whole relates back to, and dates from the time the right accrued under such statute.

Thus, in summary, it has been seen that a mechanic's lien derives its existence and validity purely from statute; that its construction and interpretation is a matter purely of individual state control; that its whole purpose is to secure the builders or materialmen in their claims against the owner, and that the lien attaches at the very latest when the notice of lien is filed. Since mechanic's lien statutes have at least as many variances and nuances as there are jurisdictions, resort must be made to the statutory law of the pertinent state upon the occasion of a problem, so that the information obtained shall be precise and specific. Nevertheless, that which has been set forth above should afford the reader at least a precursory and general knowledge of the nature of the mechanic's lien, one properly sufficient to adequately comprehend the problem herein presented.[16]

The Federal Tax Lien

The federal tax lien is a statutory lien imposed by Congress in section 6321 of the Internal Revenue Code.[17] It provides, in substance, that if any person liable to pay any tax refuses to pay the same after demand, the amount of said tax shall be a lien in favor of the United States upon all property, or property rights, real or personal, belonging to such person. Section 6322 of the Internal Revenue Code[18] states that, unless otherwise specified by law, the lien arises at the time of the assessment. Section 6323 of the Internal Revenue Code[19] deprives the lien of validity (except as to securities, as later provided and not here pertinent) as against mortgagees, pledgees, purchasers or judgment creditors until notice has been filed in the office designated by the law of the state or territory in which the property subject to the lien is located, and if no such office be designated then with the clerk of the district court in that district in which the property subject to the lien is located.

Thus, three essential points are to be noted concerning the federal tax lien. The lien is imposed by the federal government on the property of delinquent taxpayers; it arises when the assessment rolls are received by the District Director from the Commissioner of Internal Revenue;[20] and it is not valid as against mortgagees, pledgees, purchasers or judgment creditors who attain such

14. Glass v. Freeburg, 50 Minn. 386, 52 N.W. 900 (1892).

15. Van Stone v. Stillwell & Bierce Manufacturing Co., 142 U.S. 128 (1891).

16. See 36 Am. Jur., Mechanics' Liens, §§ 1-292 (1941) and 57 C.J.S., Mechanics Liens, §§ 1-354 (1948) for comprehensive treatment of mechanics' liens.

17. 26 U.S.C.A. § 6321.

18. 26 U.S.C.A. § 6322.

19. 26 U.S.C.A. § 6323.

20. See note 18 supra; note 31 infra at 83; note 24 infra at 50-51.

status prior to the filing of the lien.[21] It is important to emphasize, at this point, two vital factors: (1) failure to file the lien can only effect its validity as to those classes of individuals categorized in section 6323 of the Internal Revenue Code;[22] and (2) during the interval between the birth of the federal tax lien and its subsequent filing there is absolutely no authority in the Code for the release of information on a taxpayer's indebtedness.[23]

At this juncture, an examination of those decisions whose direct findings or whose philosophy has dealt with the issue of priority between federal tax liens and mechanics' liens, or those of a similar nature, would perhaps best lend to an adequate development of the presentation of the problem. Since the Supreme Court of the United States has held that it is a well settled principle that the final arbiter in any controversy concerning the priority of federal tax liens should be the federal judiciary,[24] the examination of cases here presented shall for the most part be restricted to the decisions and positions of the federal courts. Several leading cases have made their way to the Supreme Court of the United States within the past several years, and together with other important decisions in the circuit and district courts they manifest a current position which has caused no little concern among those intimately affected.

Priority Between Liens

In *United States v. Security Trust and Savings Bank*[25] the issue involved the priority between a federal tax lien, which had arisen and been filed subsequent to the date of an attachment lien, but prior to the date the attachment creditor obtained judgment. The events occurred in the State of California and, under the law of that state, the attachment lien was merely contingent or inchoate—a right to perfect a lien which did not become consummate until reduced to judgment. In ruling in favor of the federal tax lien the Supreme Court, by way of dictum, said, "the effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive'."[26] The Court also enunciated, "Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation."[27]

In *United States v. Gilbert Associates, Inc.*[28] the Court made law the dictum

21. United States v. Phillips, 198 F. 2d 634 (5th Cir. 1952).

22. See notes 24, 28, 31, 36, 39 infra.

23. Provision is made for release of information only after notice of lien has been filed. 26 U.S.C.A. § 6323.

24. United States v. Security Trust & Savings Bank, 340 U.S. 47 (1950).

25. Ibid.

26. Id. at 49-50, citing Illinois ex rel. Gordon v. Campbell, 329 U.S. 362, 371 (1946).

27. Id. at 50.

28. 345 U.S. 361 (1953).

of the *Security Trust* case when it overruled the finding of the Supreme Court of New Hampshire[29] which had held that a municipal tax assessment is in the nature of a judgment, and that consequently the town was a judgment creditor within the meaning of section 3672 of the Internal Revenue Code.[30]

In *United States v. City of New Britain*[31] the Court crystallized and made concrete various points upon which there had existed considerable doubt. In a suit involving priority between federal tax liens and municipal liens, the Court pronounced its now famous doctrine of "first in time is first in right," in according priority to the lien of the federal government. The Supreme Court of Errors of Connecticut had held the municipal liens to have been perfected or choate liens,[32] and the Supreme Court, while affirming the rule of the *Securities Trust* case in that such characterization was subject to federal review, found themselves in accord with the state interpretation. In so holding, the Court stated, ". . . we accept the holding as to the specificity of the city's liens since they attached to specific pieces of real property for the taxes assessed and water rent due. The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established."[33] However, in reaching its decision, the Court found that the federal tax assessment lists had been received in the office of the Collector of Internal Revenue for Connecticut prior to the arising of the municipal liens, and since the municipality could not qualify as a member of a class protected by section 3672 of the Internal Revenue Code,[34] another principle of law must apply, namely "the first in time is the first in right." Thus, the Court was heard to announce that ". . . the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."[35]

In *United States v. Acri*[36] assessment lists for unpaid income taxes were received by the District Collector of Internal Revenue and notices of tax liens were properly filed subsequent to the date of an attachment lien for wrongful death, but prior to the date the attachment creditor obtained judgment. Under the law of Ohio, which was the pertinent jurisdiction, the attachment lien was considered an "execution in advance" and was treated as a perfected or choate lien at the time of attachment. The District Court[37] and the Circuit Court of Appeals[38] gave credence to the Ohio characterization, but the Supreme Court

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

30. 26 U.S.C.A. § 3672. The case was decided in the light of the Internal Revenue Code of 1939 as amended. The present sections as described in notes 17, 18 and 19 supra, became law effective January 1, 1955. There was no substantial change in the new sections as affecting the problem under consideration.

31. 347 U.S. 81 (1954).

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

33. 347 U.S. at 84.

34. See note 30 supra.

35. 347 U.S. at 86.

36. 348 U.S. 211 (1955).

37. 109 F. Supp. 943 (N.D. Ohio 1952).

38. 209 F. 2d 258 (6th Cir. 1953).

of the United States reversed, holding the case not distinguishable from the *Securities Trust* case, and that for federal tax purposes the attachment lien was inchoate, since it was contingent upon the outcome of the suit for damages, and thus was not perfected until judgment.

Similarly, in *United States v. Liverpool & London & Globe Insurance Co. Ltd.*,[39] the Supreme Court reversed both the District Court[40] and the Circuit Court,[41] and held that the lien of a garnishor was subservient to that of the government. On the facts, the writ of garnishment was obtained prior to both the accrual of the federal tax lien and the subsequent filing of the notice of lien, yet the Court with little or no discussion accorded priority to the government, holding the case to be exactly analogous to the *Securities Trust* and *Acri* decisions. So once again the Supreme Court refused recognition to a lien classified by a state as perfected, maintaining that the lien was inchoate until reduced to judgment.

During and shortly prior to the period within which the foregoing cases were decided by the Supreme Court, several important cases dealing with similar issues were presented in the lower federal courts, some of them dealing specifically with the subject of mechanics' liens. A discussion of these cases in the light of the juridic philosophy manifested in the above discussed decisions, should reveal the precise position of the federal judiciary on the issue as here presented.

Prominent among these decisions is *In re Taylor-craft Aviation Corporation*.[42] The suit involved the priority to be accorded between a federal tax lien and a mechanic's lien in a bankruptcy proceeding. In this case the builder had supplied labor and materials commencing on August 6, 1946, and had completed his work on September 22, 1946. He duly filed his lien on November 20, 1946. The government's tax lien arose on November 8, 1946. Under Ohio statutes, the controversy occurring in that state, a mechanic's lien after due filing relates back to the time of first performance of first labor and first delivery of material and is effective as of that date against subsequent liens.[43] The Circuit Court so characterized the mechanic's lien in this instance, in according it priority. Seemingly basing its decision on broad equitable grounds as well as its interpretation of the statutory law, the Circuit Court was heard to say: "Certain well established legal considerations favor the sustaining of the priority of the mechanic's lien even as against the lien for federal taxes. . . . Moreover mechanics' liens are in a favored class because of the benefit which has been received by the property improved, due to the work expended thereon. The mechanic's lien has been created by statute in every state because of the legislative realization of the equity in favor of the mechanic resulting from an enhancement in value due to the expenditure of work or the employment of materials upon

39. 348 U.S. 215 (1955).

40. Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe Ins. Co., 107 F. Supp. 405 (N.D. Tex. 1952).

41. 209 F. 2d 684 (5th Cir. 1953).

42. 168 F. 2d 808 (6th Cir. 1948).

43. Id. at 809, citing Ohio Saving's Ass'n. v. Bell, 25 Ohio App. 84, 158 N.E. 548 (1926).

property, without payment therefor. Since the security has been enhanced in value, the creditors are not prejudiced by existence of the lien."[44] Clearly it is difficult to take exception to this equitable reasoning, but sincere doubt may be expressed as to the court's enunciation of the law as it is now expressed by the Supreme Court. It should here be emphasized that this case preceded the Supreme Court cases discussed above, this being at least explanatory of the apparent diversity of judicial approach. The *Securities Trust* and *Acri* cases clearly contravene the doctrine of relation back,[45] and the entire tenor of the Supreme Court's decisions, as above discussed, points to only one result—that in most instances the lien must be reduced to judgment before it will be recognized as choate. This position is pointedly emphasized in the *Liverpool and London* case where the Court, for all intents and purposes, gave summary judgment for the government even though the Circuit Court[46] found the lien choate and perfected by applying the same rules as proposed by the *New Britain* case to test such status. It would seem apparent that the *Taylorcraft* case, unfortunately, no longer represents the law.

The *Taylorcraft* case was cited with approval in *United States v. Albert Holman Lumber Co.*,[47] a case decided in the Fifth Circuit. The facts are somewhat analogous but differ in one major aspect. Under Alabama law, the pertinent jurisdiction in this case, the mechanics' liens involved had become perfected and choate prior to the accrual of the federal tax lien, but had not been developed to the status of judgment until subsequent to both the assessment and the filing. The Circuit Court reviewed the character of the mechanics' liens, and by applying the same rules as propounded in the *New Britain* case concluded that, although not reduced to judgment, the liens were perfected and choate prior to the occurrence of the federal lien, and thus under the doctrine of "first in time is first in right" would prevail. The decision appears sound and not in necessary contravention of any direct holding of the Supreme Court. However, the Supreme Court has cast serious doubt on such an inclination to view a lien as choate and perfected prior to judgment, even though so classified by both the district and circuit courts. Such was the exact situation in the *Liverpool and London* case where the Circuit Court held the lien choate and perfected under the *New Britain* rules,[48] but was summarily reversed by the Supreme Court. It is of particular interest to note that the Circuit Court cited as one of its prime authorities the *Holman* case[49] in this instance and yet was promptly reversed.[50] This, of course, casts direct doubt on the proposition that the *Holman* case represents the law as the Supreme Court would see it.

By way of dicta the United States District Court for the Western District of Louisiana presented an interesting discussion on the elements of choate and

44. Id. at 811.
45. United States v. Security Trust & Savings Bank, 340 U.S. 47, 50 (1950).
46. 209 F. 2d 684 (5th Cir. 1953).
47. 206 F. 2d 685, 690 (5th Cir. 1953).
48. 209 F. 2d 684 (5th Cir. 1953).
49. 209 F. 2d 684, 689 (5th Cir. 1953).
50. 348 U.S. 215 (1955).

inchoate liens.[51] In discussing the nature of a Louisiana mechanic's lien, which had been filed prior to the accrual of a federal tax lien but had not been reduced to judgment, the court stated, "the Supreme Court, in the New Britain case, distinguished the two cases by saying that the Security Trust case involved an 'inchoate' lien. They defined an 'inchoate' as one that 'may become certain as to the amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach.' In the Security Trust case, the Supreme Court defines an 'inchoate' lien as one where 'numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded.' The Louisiana lien seems to fit the definition of an inchoate lien in the Security Trust case. But, the New Britain case definition also fits and is appropriate. . . . The Louisiana liens here were 'certain as to amount, identity of the lienor, or the property subject thereto,' and under the definition of the New Britain case were 'choate'."[52] Thus, the court, although realizing the apparent ambiguity in the Supreme Court decisions, held the mechanic's lien perfected, choate and superior. Seemingly the court did not anticipate the remarkable decision in the *Liverpool & London* case decided by the Supreme Court the following year, but that it received startled and dubious acceptance can hardly be doubted.

The recent case of *United States v. Colotta*[53] is also worthy of note. The contest essentially involved conflicting claims as to priority between mechanics' liens and federal tax liens. Under Mississippi law the mechanics' liens had attached prior to the accrual of the federal tax lien, but had not been reduced to judgment prior to the filing of the federal tax lien. The court therefore applied the rules of the *New Britain* case to ascertain the degree of perfection the mechanics' liens had attained prior to the occurrence of the tax lien. The court found the identity of the lienor, the property subject to the lien and the amount of the lien to be established and definite prior to the event of the federal tax lien, and thus being prior in time was prior in right. This conclusion seems entirely warranted by the facts. The court discussed another pertinent issue dealing with the state statute which provided that any person entitled to and desiring the benefit of the lien shall commence his suit within twelve months after the time the money became due and payable, and if he shall so fail to act he shall be barred from enforcing his lien. This, the court held, and it would appear validly so, was merely a statute of limitations, and has no effect on the valid subsisting lien during the preceding twelve month period. The importance of this case, however, might be termed more negative than affirmative, since the Supreme Court in a truly disturbing per curiam decision reversed the Mississippi court without comment.[54] Although it does not appear that the Supreme Court had ever before considered directly the specific problem of conflict between mechanics' liens and federal tax liens,[55] no opinion was furnished

51. Great American Indemnity Co. v. United States, 120 F. Supp. 445 (W.D. La. 1954).
52. Id. at 450.
53. 79 So. 2d 474 (Miss.), reversed, 350 U.S. 808 (1955).
54. United States v. Colotta, 350 U.S. 808 (1955).
55. United States v. Colotta, 79 So. 2d at 477.

by which one might fathom the Court's reasoning. It does seem significant, however, if not a bit startling, that the Attorney General, before the Mississippi court, had cited the Supreme Court cases above discussed as holding that a federal tax lien, although unfiled, has priority over all other liens, regardless of their temporal position, until such liens are reduced to judgment.[56] Those cases clearly do not stand for such a general proposition, but one cannot help but wonder, in view of the decisions, especially the *Colotta* case, if the Court is not actually lending credence to such a proposition in its practical application of the law to the facts as they arise.

Equipped with the apparent position of the Supreme Court of the United States, an examination of fact situations, in which a builder may find himself enmeshed, will perhaps emphasize the problem, and in turn create some appreciation for the very real plight of the builders.

First: On February 1 the District Director of Internal Revenue receives an assessment against a delinquent taxpayer and therefore the federal tax lien arises. The notice of the federal lien is not filed. On March 1 the taxpayer and a building contractor enter into an agreement calling for the construction of a building on a piece of land owned by the taxpayer. The substantial part of the agreed price is to be paid upon completion. On the day set for payment the taxpayer states that he cannot pay his contractor, and so the contractor commences suit to foreclose his lien. At this point the federal tax lien is filed and the government proceeds to foreclose. Who prevails? Clearly on the holding of the *New Britain* case with its doctrine of "first in time is first in right" the government would prevail, and this is true even though on March 1, when the contract was entered into, there was no manner or means by which the contractor could ascertain the existence of the federal lien.[57] Without fully developing the scheme and its ramifications, it would seem obvious that, in addition to being highly inequitable, such a situation affords excellent opportunity and basis for a nefarious scheme on the part of the taxpayer to achieve first a discharge of his federal tax liability, and then a discharge in bankruptcy as to his other debts including those of the contractor—the element of fraud being here discounted and made a matter and problem of proof in the bankruptcy proceedings.

Second: On April 1 a contract is entered into between taxpayer and builder and the construction commences on that day. On April 15 the federal tax lien arises. On April 30 the work under the contract is completed and the builder being unpaid files a mechanic's lien in contemplation of foreclosure. According to the law of the state the mechanic's lien dates back and is effective as of the date of the first supply of labor or materials. Who prevails? Clearly, under the doctrine of the *Securities Trust* and *Acri* cases, the proposition of relation back will not be countenanced by the court when it interferes with the priority of a federal tax lien. Once again, for all intents and purposes, the builder loses his secured claim.

56. Id. at 476.

57. See note 23 supra.

Third: On April 1 a contract is entered into between a taxpayer and a builder. On April 15 said contractor had completely performed and being unpaid files a mechanic's lien. According to state law the lien would arise no later than April 15, as has been previously shown.[58] On April 20, the contractor commences his action to foreclose his lien and reduce it to judgment. On April 25 a federal tax lien arises, is immediately filed and a foreclosure action is commenced by the government. Once again it would appear, on the basis of the *Colotta* case, the *Acri* case and the *Liverpool and London* case, that the government would prevail. The entire philosophy, which would appear to have permeated the court's reasoning on cases of this nature, is that unless the lien has been reduced to judgment it shall only be regarded as an inchoate lien, and in turn subsequent to any federal tax lien which arises and is filed at any time prior to judgment. Seemingly, the *Colotta* case might stand for that exact proposition.

It would thus appear that the initial point of time at which the builder is protected from these "secret" federal tax liens is when he attains the status of a judgment creditor, and at no time prior can he be assured of his supposed secured interest. The worth and validity of a mechanic's lien thus seems visibly shaken.

This situation would appear both highly unnecessary and extremely inequitable. Some of the lower courts in questionable decisions have gone to great extremes to escape the harsh application of the law as announced by the Supreme Court; some of them finding lien holders to be purchasers and thus protected under section 6323 of the Internal Revenue Code,[59] others introducing concepts of trust law in an attempt to protect a mechanic's lien.[60] It cannot be doubted that the Court's position, as has been presented above, has met with general disfavor among those most immediately affected, and its soundness questioned in many judicial proceedings. It was stated in the *Taylorcraft* case that "the essential principle upon which the mechanic's lien rests is that of unjust enrichment. It is uncontradicted in this record that the giving of a priority to the United States over the mechanic's lien also gives the United States the enhancement of the value of the property which resulted from the work performed and the material supplied by the appellee."[61] In a New Jersey Superior Court case in which the finding favored the federal tax lien in a controversy with the lien of a plaintiff builder, the court concluded its opinion by saying, "while the equities are all in favor of plaintiff—for the material furnished by it and unpaid for by Macchio actually created the fund upon which the government has levied—I am reluctantly forced to the conclusion that plaintiff's motion must be denied."[62]

58. See notes 12, 13, 14, 15 supra.

59. Hawkins v. Savage, 110 F. Supp. 615 (U.S.D.C. Alaska, 3d Div. Anchorage 1953).

60. United States v. Preferred Contractors, Inc., 122 F. Supp. 219 (E.D. N.Y. 1954).

61. 168 F. 2d at 811.

62. Union Building & Investment Co. v. Forest Hills Apartments, Inc., 30 N.J. Super. 130, 135 (1954).

Conclusion

The present situation and status of the law is an unhappy one, and one which equitably appeals for some immediate remedial action. It is painfully obvious that the law as it now stands and its application have completely obviated the preferred and secured position which state legislatures have endeavored to obtain for builders and materialmen in order to encourage their venture into sorely needed construction efforts. It cannot be doubted that a more conscious realization by construction men as to their uncertain position might generate a sweeping deleterious effect in the building industry, especially in those instances where credit must be granted by the builder in order to fulfill the building plan.

The remedies are twofold and at this point must seem obvious. A more realistic position is required both by the legislative and judicial arms of the government in considering this problem.

The Supreme Court's tendency at general classification of all liens, conflicting with tax liens, as inchoate until reduced to judgment has apparently reached an extreme and ultimate point, and should be more tempered with the equitable characteristics more familiar in that Court's pronouncements of the law. A greater sympathy is needed, in that quarter, for the characterization of each state of its own liens as to their imperfection or perfection as the case may be. This, of course, does not suggest that such characterizations should not be subject to federal review, but rather, simply begs a more realistic and equitable approach by the Court.

The more important and essential reform remains the task of the Congress. Section 6323 of the Internal Revenue Code should be amended to include in its protective embrace the mechanic's lien. This lien should be accorded such a preferred position because of its peculiar and equitable nature, and further since such a position would be more conducive to satisfying a great national and social need in construction. Such an amendment to the code would give priority to any mechanic's lien which had arisen prior to the filing of the federal tax lien, and would to a great degree extricate the "mechanic" from this difficult and serious situation. No great burden or hindrance would be placed on the federal taxing power in compelling prompt filing of a lien by its agents in order to protect its interest, and combined with a more sympathetic approach by the Court, the equitable priority previously enjoyed by materialmen and builders would be justly restored.