Statutory Liens in Bankruptcy

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In general equality is equity. The principal raison d'être for bankruptcy is that it terminates the race for preference among creditors by substituting an orderly, equitable distribution of a debtor's assets among all his deserving creditors. Yet the principle of equality—or of ratable distribution, which is the intended connotation of equality in this context—is not carried nearly so far as the uninitiated may suppose.

The Plight of the General Creditor in Bankruptcy

English judges early acknowledged the conflict between the policy of bankruptcy legislation to insure equal distribution and that of the common law to accord liens to certain classes of persons in possession of chattels until their demands were satisfied. Generally the bankruptcy policy has yielded. Nor have mortgages or other kinds of consensual liens been leveled for the sake of achieving equality of distribution unless shown to be (1) fraudulent as to creditors, (2) preferential because obtained during insolvency and shortly before bankruptcy to secure antecedent indebtedness, or (3)...

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1. "...[T]he theme of the Bankruptcy Act is equality of distribution," Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941). The primacy of the purpose to achieve equitable distribution has been characteristic of all bankruptcy law, including the Roman prototype. See Levinthal, The Early History of Bankruptcy Law, 66 U. of Pa. L. Rev. 223, 225, 235 (1918). See also 3 Collier, Bankruptcy §§ 60.01 (14th ed. rev. 1950); 4 id. §§ 67.01 (14th ed. rev. 1954). The treatise referred to in this note will hereinafter be cited as Collier.

2. See, e.g., Ex parte Deeze, 1 Atkyns 228, 229, 26 Eng. Rep. 146, 147 (Ch. 1748) (packer's lien); Kruger v. Wilcox, Ambler 252, 253, 27 Eng. Rep. 168 (Ch. 1755) (factor's lien). Other instances are cited in Montagu, A Summary of the Law of Lien I-2 (1st Am. ed. 1824).

2a. In addition to the cases cited in the preceding note, see, e.g., Ex parte Bush, 7 Viner's Abr. 74, 2 Eq. Cases Abr. 169, 22 Eng. Rep. 93 (Ch. 1734) (attorney's lien); Austin v. O'Reilly, 2 Fed. Cas. 234, No. 665 (C.C.S.D. Miss. 1875) (attorney's lien); Hartman v. Swiger, 215 Fed. 986 (N.D. W.Va. 1914) (attorney's lien); cf. The Louie Dole, 14 Fed. 862 (C.C. N.D. Ill. 1885) (maritime lien for services rendered vessel).

3. Fraudulent liens are voidable by the trustee under §§ 67d, 70c, and 70e of the Bankruptcy Act, 11 U. S. C., §§ 107d, 110c, and 110e (1952). Further reference to the Bankruptcy Act will dispense with citations to 11 U. S. C., since the section numbering followed in the Statutes at Large is more familiar.

4. Voidable preferences are defined in § 60 of the Bankruptcy Act. The section reaches back four months before bankruptcy in striking down preferential transfers, including those creating or fixing a lien other than a statutory lien. The feature of permitting certain liens to be avoided if made within a short time before bankruptcy (usually four months under modern American bankruptcy legislation) has been traced to a principle adopted in early Italian

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[Note: The text continues with legal citations and discussions.]
voidable by creditors under nonbankruptcy law.4a After mischief-making careers as fronts for secret security,5 unperfected legal liens and equitable liens capable of becoming perfected legal liens were finally brought under control by legislation assimilating those not perfected over four months before bankruptcy to preferential liens.6 Equitable liens perfected in time or enforceable against buyers in the ordinary course of trade are preserved against the trustee.7 Liens acquired through judicial proceedings are likewise enforceable notwithstanding bankruptcy under modern legislation unless acquired during insolvency and shortly before bankruptcy of the debtor.8 Until 1938 statutory liens were generally regarded in American bankruptcy with a respect approximating that accorded common-law liens.9

But bankruptcy has not only permitted secured creditors to retain their preferred positions. It has indeed so far diverged from the ideal of pro rata distribution as to set up a schedule of priorities among unsecured claimants.10 Finally the courts themselves have recognized a judicial power to subordinate certain claims because of equitable considerations militating against pro rata distribution.11

A persistent problem in modern bankruptcy administration is its typically small dividend yield for general creditors, i.e., those without security or priority of any kind.12 A preponderant majority of
all bankruptcies are "no-asset" cases. When less than twenty per cent of the proceeds that are realized from bankrupt estates regularly goes to the large but lowly class of general creditors, it is not surprising that most creditors take no active part or interest in the administration of estates against which they have claims. The safeguards to insure efficient administration and prevent abuses supposed to be built into the Bankruptcy Act by the provisions for democratic creditor control do not work when apathy overcomes the constituency. This is such a serious problem that it has given rise to proposals for drastic overhauling of bankruptcy machinery. Although some of these proposals are no doubt ill-advised, let there be no misappreciation of the seriousness of the plight of the unsecured creditor in bankruptcy.

The most direct approach to the problem of improving the status of unsecured creditors in bankruptcy is to increase their share by reducing the portions that go to secured creditors and claimants to priority. Broadly speaking, American bankruptcy legislation ap-

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13. Less than a fifth of the cases concluded during each of the last two reported years were "asset cases." Rep. Director of Admin. Office of U. S. Courts 200 (1953); Rep. Director of Admin. Office of U. S. Courts 180 (1952).

14. See Table F5 in Rep. Director of Admin. Office of U. S. Courts 204-207 (1953); Rep. Director of Admin. Office of U. S. Courts 184-187 (1952). The tables in these two reports, the latest available at this writing, assign approximately a third of the proceeds to secured creditors, a fourth to administrative expenses, and a sixth to priority claimants. Exempt, abandoned, and wholly encumbered property which has not been administered in bankruptcy apparently is not reflected in these figures in any way.

15. Perhaps the most drastic proposals were contained in a series of four bills, numbered S. 2560—S. 2563, introduced August 1, 1953, by Senator Langer, then Chairman of the Senate Judiciary Committee. Briefly, the proposed amendments would provide for: (1) appointment of official salaried attorneys to represent receivers and trustees in bankruptcy; (2) selection of salaried receivers and trustees; (3) investor representation by United States attorneys in bankruptcy proceedings; (4) investor protection on complaint by any investor by United States attorneys and the judge. Two critical discussions, Gleick, The Langer Bills: A Discussion, 40 A. B. A. J. 382 (1954), and Horsky and McGiffert, The Langer Bills: A Challenge to Creditor Control, 27 Temp. L. Q. 261 (1953), reveal the objections to the proposed changes. Whatever the deficiencies of the system of creditor control with its reliance on creditor self-interest as affording the best hope for securing efficient bankruptcy administration, these critics with impressive practical wisdom challenge the premise that a paternalistic bureaucracy would achieve better results. See also McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act, 4 U. of Chi. L. Rev. 369, 374 (1937). The Langer bills were disapproved by the Judicial Conference of the United States. Report of Procdgs of Regular Ann. Mtg. of Jud. Conf. of U. S. 14 (1954).

A more modest proposal for official examiners, professional trustees, and supervisory administrators was advanced in the Thacher-Garrison report of 1932, Sen. Doc. No. 65, 72d Cong., 1st Sess. 93-96, 104-111 (1932). For a proposal to free bankruptcy estates of the burden of the fees required to support referees' salary and expense funds see Wagner, The Commercial Lawyer in the Bankruptcy Court, 57 Com. L. J. 309, 310 (1952).
pears to have moved in this direction. Three notable steps were taken in the Chandler Act of 1938: (1) Consensual securities theretofore impregnable in bankruptcy were brought within the condemnation of the preference provision; (2) the schedule of priorities was substantially trimmed by the elimination of all state-created priorities but one, v.s., a limited priority for landlords; (3) statutory liens on personalty unaccompanied by possession and liens of distress for rent were postponed to the priorities accorded administrative-expense and wage claims, and wage and rent liens were restricted except as against other liens. It was later determined

16. The Bankruptcy Acts of 1800 and 1841, the first two federal bankruptcy statutes, explicitly saved all existing liens from impairment. 2 Stat. 36 (1800); 5 Stat. 442 (1841). Nevertheless fraudulent liens were surely invalid under both Acts. 2 Stat. 26 (1800); 5 Stat. 442 (1841). And to a limited extent preferential securities were subject to invalidation under the 1841 legislation. 5 Stat. 442, discussed in 3 Collier § 60.05. The Bankruptcy Act of 1867 for the first time authorized invalidation of attachment liens acquired within four months of bankruptcy. 14 Stat. 522. All varieties of liens acquired through judicial proceedings became vulnerable to attack under the Act of 1898. See 4 Collier §§ 67.02[2]. The Act of 1867 and the Act of 1898 extended, each in its turn, the powers of the statutory liquidator to avoid preferential and fraudulent liens. 3 Collier § 60.05; 4 Collier §§ 67.01, 67.02[4], 70.02. "The history of the Bankruptcy Act of 1898, in broad outline, has been one of repeated amendments ever strengthening the law of preference to protect the general creditor." McLaughlin, Defining a Preference in Bankruptcy, 60 Harv. L. Rev. 233, 235-236 (1946). In 1910 the trustee acquired the strong arm of a levying creditor as of the date of bankruptcy to use against tenuous liens on property in the debtor's possession. 36 Stat. 840, discussed in 4 Collier § 70.47. His powers have been strengthened by recent amendments of § 70c. Katcher, Powers of Trustee Under Amended Section 70c—Weakened or Strengthened?, 58 Com. L. J. 60 (1953). But see Moore and Tone, Proposed Bankruptcy Amendments: Improvement or Retrogression?, 57 Yale L. J. 683, 692 n. 33 (1948).

For a summary description of the process of degradation to which tax priorities have been subjected see Wurzel, Taxation During Bankruptcy Liquidation, 55 Harv. L. Rev. 1141, 1145-1146 (1942).

17. Section 60, the preference provision of the Bankruptcy Act, was extensively revised in 1938. Notable was the adoption of the "bona fide purchaser" test: A transfer was deemed to have been made for the purpose of applying the section when it had become so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter acquire any rights in the property superior to those of the transferee. Certain security devices, such as trust receipts in some states, could never meet the test. 3 Collier §§ 60.38.

18. The purpose of this reform to maximize the residual fund for distribution among the general creditors was recognized in the Analysis of H. R. 12889, 74th Cong., 2d Sess. 201 (1936). See also Weinstein, Amendments to the Bankruptcy Act as Proposed and Pending Before the Congress, 24 J. N. A. Ref. Bankr. 28, 32 (1950). Under § 64a(5), state-created rent priorities are on the fifth (lowest) rung of the ladder of priority claimants. Rent priorities are limited to "rent which is legally due and owing for actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

19. Debts for certain administrative expenses and wages are the first two classes of claims entitled to priority of payment under § 64a(1) and (2).

20. The amount of payment of wage and rent liens was restricted to the same extent as are wage and rent priorities under § 64a(2) and (5) of the
that, at least in the light of its judicial construction, the preference provision was too sweeping, and Congress restricted its apparent reach somewhat. But the elimination of state-created priorities has stood, and the trustee has been given additional powers with respect to statutory liens: by the amendment of 1952 the trustee may invalidate state statutory liens on personalty unaccompanied by possession, levy, distraint, or sequestration or, when advisable, he may preserve such liens for the benefit of the estate. Moreover, the wage-and-rent-lien restrictions stand in every case but if such restriction would redound to the benefit of other lienors, the trustee is empowered to preserve the wage or rent lien to the extent of the excess for the benefit of the estate.

In view of the obvious considerations supporting legislation leveling securities and priorities for the purposes of bankruptcy liquidation, it may be wondered why the evolutionary process referred to has not proceeded further and faster. The explanation of course is that there are weighty interests against which the advantages of achieving equality in bankruptcy distribution must be balanced. In the drafting of early legislation it was not conceived that bankruptcy could properly affect completed transactions creating liens against the bankrupt's property except for fraud. It has taken many years of historical development of nonbankruptcy law to bring the "title" of the mortgagee and the conditional vendor to the status of a lien, and indeed the development has not yet been fully consummated. While a lien is a less refractory interest for

Act. Wages under § 64a(2) cannot exceed $600 for each claimant and must be earned within three months before bankruptcy. As to rent priority restrictions see note 18 supra.

21. Congress elaborately amended § 60 in 1950. 64 Stat. 25. The "bona fide purchaser" test, referred to in note 17 supra, was changed to a "lien creditor test" so far as transfers of property other than real property are concerned: generally a transfer is made for the purpose of the section when perfected to the extent that "no subsequent lien . . . obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." The bona fide purchaser test was retained for real property transfers, and a special test was fashioned for equitable liens. See 3 Coller §§ 60.38 et seq.


23. See note 16 supra.


legislatures and courts than title, the economic, social, and political justifications for secured credit cannot be ignored in the making of bankruptcy policy, and the considerations underlying the priorities that have been recognized in bankruptcy have such a manifest appeal that efforts to break them down will always encounter strong legislative reluctance. Bankruptcy must serve the legitimate ends of commercial intercourse and of society generally. If the bankruptcy policy makers go too far in their zeal for improving the lot of the unsecured creditors, those adversely affected by the change are likely to find ways of overcoming it or at least protecting themselves. The result may be less desirable than the status quo ante.

A statute creating a lien reflects a legislative judgment that the class of persons made lienors thereby needs to be protected against the hazards to which unsecured creditors are subject. One of the hazards, of course, is insolvency. Invalidation of a statutory lien in bankruptcy goes far to frustrate the legislative purpose in enacting the lien statute in the first place.

There can be no serious question as to the power of Congress to enact bankruptcy legislation overriding state statutory liens, subject, perhaps, to the vague limitations imposed by the due process clause. The nullification of state-created liens has an obvious relation to the primary bankruptcy objective of equitable distribution. But what is the rational justification for the complex and confusing provisions of Section 67c subjecting certain statutory liens in particular circumstances, and a single nonstatutory variety in every circumstance, to differing degrees of impairment?

owner rather than lienor under § 77B); In re Pointer Brewing Co., 105 F. 2d 478 (8th Cir. 1939), criticized in 24 Minn. L. Rev. 101 (1939) (unrecorded conditional sale erroneously upheld as against trustee in bankruptcy); Griffin and Curtis, Chattel Mortgages and Conditional Sales 2-3 (5th ed. 1931) (chattel mortgage "more than a mere lien"). But see id. at 282 (interest of conditional vendor said to be reduced by statutes "to a lien similar to that created by a chattel mortgage").

26. Cf. McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act, 4 U. of Chi. L. Rev. 399, 390 (1937), discussing a proposal to make a preferential lien more easily voidable than a preferential transfer intended to be absolute.

27. See 3 Collier §§ 64.02, 64.201, 64.301; Wurzel, supra note 16.


29. The court in Ginsberg v. Lindel, 107 F. 2d 721 (8th Cir. 1939), indicating that retrospective application of the three-month limitation imposed by §§ 67c and 64a of the Bankruptcy Act of 1938 on a "vested" statutory landlord's lien would be unconstitutional, declined to accede to such an application in order to avoid the constitutional difficulty. But see the excellent analysis of the constitutional issues in Martin, Substantive Regulation of Security Devices Under the Bankruptcy Power, 48 Col. L. Rev. 62 (1948).

Section 67c of the Chandler Act of 1938

Let us first examine the language of subdivisions b and c of Section 67 as enacted by the Chandler Act of 1938:31

"b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

"c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act."

The legislative record accompanying these provisions, like the subdivisions themselves, emphasizes two contradictory objectives. On the one hand the draftsmen wanted to put beyond question the validity of statutory liens in bankruptcy even when otherwise preferential under Section 60 and even when perfected after bankruptcy.32 On the other hand the draftsmen were concerned about liens for taxes and for rent, presumably inter alia, which often were allowed to accumulate over a number of years and to become so large as to consume most or all of a bankrupt's estate, even to the exclusion of administrative expense and wage claimants.33 These inharmonious objectives were sought to be reconciled in the two convoluted subdivisions of Section 67 that deal with statutory liens.

31. 52 Stat. 876 (1938).
Section 67c had to be read, of course, as qualifying Section 67b's sweeping validation of statutory liens notwithstanding the absence in the latter subdivision of any intimation that its language was subject to exception or limitation. The tentativeness of the attack on statutory liens in subdivision c is suggested by the fact that no statutory lien was invalidated, that certain liens only were postponed or restricted, and that the following kinds of statutory liens were not affected at all:

1. statutory liens on real property;
2. statutory liens on personalty (except those of distress for rent) accompanied by possession of the property by the lienor;
3. statutory liens enforced by sale prior to bankruptcy.

Wage and rent liens on personalty unaccompanied by possession and liens, whether statutory or not, of distress for rent were postponed and liens for wages or rent were restricted.

34. Insofar as § 67b validated statutory liens, including those perfected after bankruptcy, it pretty much codified pre-existing law. 4 Collier ¶¶ 67.02[3], 67.26. But cf. Note, 3 Stan. L. Rev. 711, 717 (1951), making the point that pre-existing law did not distinguish statutory liens from other kinds of liens. While § 67b expressly immunizes statutory liens from avoidance as preferences under § 60, there is no reason for saving statutory liens from application of § 70c. Those not effective at bankruptcy as against levy ing creditors under applicable nonbankruptcy law are therefore invalid as against the trustee. 4 Collier ¶ 67.26.

35. Statutory liens on personal property not accompanied by possession and liens, whether statutory or not, of distress for rent were postponed and liens for wages or rent were restricted.

36. All liens of distress for rent, whether statutory or common-law, were postponed and restricted regardless of possession. 4 Collier ¶¶ 67.23, 67.27[2], 67.28. The reason for striking out at the lien of distress with such vigor is suggested by the following quotation from the House Committee Report explaining the restriction of the landlord's priority in § 64a(5):

"The statistics gathered by the Attorney General indicate that rent claims consume a very substantial portion of an estate, and in smaller estates not infrequently use up all of the funds." H. R. Rep. No. 1409, 75th Cong., 1st Sess. 16 (1937). Distress for rent, a mode of self-help recognized at common law but rejected in some states and modified by statute in others, is a remedy peculiarly susceptible of frustrating the objective of equitable distribution in bankruptcy. See 4 Collier ¶ 67.23. Although the Bankruptcy Act speaks of liens of distress, it has been doubted that distress gives rise to more than a priority. See Goodman, Rent as a Priority Claim in Bankruptcy in Virginia, 3 Va. L. Rev. 366 (1916) (discussing both common-law and statutory distress). Cf. United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945) (statutory lien of distress held inchoate and general and therefore inferior to federal priority under Rev. Stat. § 3466 (1875), 31 U. S. C. § 191 (1952)). Modern English law regards a landlord as neither a secured nor a preferential creditor but as one having "a preferential right of distress if there are goods of the debtor upon which he can levy." Roper, Practical Guide for Trustees in Bankruptcy 296 (1929).

Nonstatutory liens of distress for rent under § 67c are not likely to include contractual liens. Ginsberg v. Lindel, 107 F. 2d 721 (8th Cir. 1939).

37. The priority for wages under § 64a(2) cannot exceed $600 for each claimant nor attach to earnings for any period over three months before bankruptcy. Rent claims entitled to priority under § 64a(5) are restricted to those which accrue within three months before the date of bankruptcy.
but the restriction was taken off when it would redound to the benefit of other lienors rather than unsecured creditors.38

The experiment drew less fire from those whose interests were aligned with the statutory lienors affected39 than from those primarily interested in improving bankruptcy law and administration, including the National Bankruptcy Conference whence emanated the subordination and restriction provisions of the Chandler Act.40 Assuming the soundness of some measure relieving bankrupt estates against the burden of statutory liens, the effectiveness of Section 67c of the Chandler Act was impaired by the imposition of arbitrary limitations. Assuming the soundness of preserving some preferential rights for statutory lienors in bankruptcy, Section 67c of the Chandler Act drew arbitrary distinctions in classifying the interests to be protected.

Immunity for Liens on Realty

The saving intact of statutory liens on realty by subdivision c has been explained as a concession to “historical development, and the inherent differences in the incidents attaching to real and personal property.”41 The weight attached to historical considerations in connection with statutory liens on realty seems almost wholly gratuitous. It is doubted that statutory liens on realty are any more steeped in history than statutory liens on personalty. Indeed, in view of the fact that the common law does not recognize any lien on realty other than such as are created consensually or by the court as an instrument for affording equitable relief,42 it can be argued with force that statutory liens on personalty have a stronger historical

38. This by the phrase, “except as against other liens.” Weinstein, op. cit. supra note 32, at 145.
39. H. R. 5796, introduced in the 83d Congress, is believed to be the only proposal to amend § 67c not presented at the instance of the National Bankruptcy Conference. This bill, which passed the House on July 19, 1954, would have made clear that state and local tax liens and federal tax liens are on a parity for the purposes of § 67c as amended in 1952. See notes 92 and 99 infra. The bill was pushed by spokesman for state and local taxing authorities. Hearing Before Subcommittee No. 2 of the House Committee on the Judiciary on H. R. 5796, 83d Cong., 2d Sess. (1954).
41. Committee Report Analysis, supra note 32, at 212. See also Hanna and MacLachlan, op. cit. supra note 40, at 98; Weinstein, op. cit. supra note 32, at 145.
42. Holdsworth, History of English Law 511-513 (1926); 1 Jones Liens 2 (3d ed. 1914). Lands, being subject to seigniorial and family claims, were not an asset available to creditors at common law. 2 Pollock and Maitland, History of English Law 596 (2d ed. 1899). Accordingly no lien on realty
sanction. Certainly that appears to be true with respect to statutory liens that are counterparts or refinements of common-law liens. The federal tax lien, one of the most conspicuous of statutory liens, has always been made to attach without discrimination between real and personal property. Historical considerations have not been thought relevant in respect to the avoidance of liens on realty when acquired through judicial proceedings or when preferential or fraudulent or when voidable for any reason under state law. Indeed, the "six months rule" applied in equity could arise from a judgment or from judicial proceedings seeking enforcement of a judgment. 2 Freeman, Judgments 1927 (5th ed. 1925); 1 Freeman, Executions 572 (2d ed. 1888).

43. Many statutory liens are improved versions of common-law liens recognized at common law. 1 Jones, Liens 93 (3d ed. 1914). The law may not be clear as to whether a statute regulating a particular kind of lien is exclusive. In such a jurisdiction the question may arise whether there is a right of election to pursue the common-law or the statutory remedy. If the creditor may choose his type of lien, there may nevertheless be a question as to what choice he has made between well-nigh indistinguishable liens. See, e.g., Henderson v. Mayer, 225 U. S. 631, 638 (1912) (statutory landlord's lien regarded as "full equivalent of a common law distress"); Goggin v. Bank of America Nat. Trust & Sav. Ass'n. 183 F. 2d 322 (9th Cir.), cert. denied, 340 U. S. 877 (1950) (statutory banker's lien regarded as having same scope as common-law lien). If the lien is statutory, it is by virtue of § 67b entitled to be perfected after bankruptcy and excepted from application of § 60, but it may be subject to postponement, restriction, invalidation, or preservation for the benefit of the estate under § 67c. 4 Collier § 67.20[2]-[5], 67.23; Note, 3 Stan. L. Rev. 711, 722, 725-726 (1951).

44. Int. Rev. Code of 1954, § 6321: "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."


46. Judgment liens, which attach almost exclusively to realty, as well as other types of liens acquired through judicial proceedings are avoidable by the trustee within the limitations prescribed by § 67a. The nature of the property subject to the lien is a matter of indifference in the application of the subdivision.

47. Section 60, the preference section, does distinguish between transfers of personality in this respect: A preferential transfer of realty is not deemed to have been made for the purposes of the section until it has become perfected as against subsequent bona fide purchasers; a transfer of personality on the other hand is deemed to have been made when perfected as against an ordinary levying creditor. § 60a(2). There is thus at least a formal discrimination against preferential liens on realty in that a greater degree of perfection is required with respect to such liens to start the four-month period of limitations running. See 3 Collier §§ 60.41.

48. No distinction is made with respect to the nature of the property involved in either §§ 67d or 70e, the provisions authorizing avoidance of fraudulent transfers.

49. Subdivisions c and e of § 70, which enable the trustee to invoke creditors' remedies afforded by state law in avoiding transfers of property of the bankrupt, treat liens against real property with neither more nor less respect than that accorded them by state law.
receiverships of railroads, whereby certain expenses were accorded priority even over real estate mortgages, affords a precedent for subordinating liens on realty to unsecured claims.\textsuperscript{49a}

There are of course practical differences between realty and personalty which may justify differing legislative approaches in dealing with liens on the two kinds of property.\textsuperscript{50} Real property is less subject to being moved, destroyed, or otherwise converted than personal property.\textsuperscript{50a} The volume of secured credit that is extended every day, however, on so mobile and destructible an item of personalty as the automobile raises doubts as to the wisdom or realism of a statute that treats liens on realty as sacrosanct and liens on personalty as vulnerable because of the differences in the nature of the property.\textsuperscript{64} Indeed, notwithstanding the fixity of realty and the greater ease of its identification, it is at least arguable that the problem of providing a satisfactory method for perfecting liens has been more successfully solved with respect to automobiles than as to land.\textsuperscript{62} Frequently of course the differences between realty and personalty tend to disappear: every first-year law student is familiar with the shadowy area lying between real property and personal property which is so productive of litigation.\textsuperscript{53} The reasons

\textsuperscript{49a} Hanna and MacLachlan, \textit{op. cit. supra.} note 40, at 98.

\textsuperscript{50} Differing provisions are made in the Act with respect to the validity of post-bankruptcy transfers of the bankrupt's real and personal property. The pendency of the bankruptcy proceeding must be made a matter of record in every county where real property of the bankrupt is situated in order to put subsequent purchasers, including lienors, on constructive notice. § 21g. Adjudication or the taking of possession by a bankruptcy receiver cuts off the possibility of the acquisition of any indefeasible interest in the bankrupt's personalty other than currency and negotiable instruments. § 70d. Section 21g is a concession to the policy of protecting persons who rely on local records in acquiring interests in real estate. The limitations placed on the protection accorded persons acquiring interests in personalty perhaps constitute another reflection of the view of the draftsmen of the 1938 Act that such interests are somehow more tenuous than interests in reality and therefore more easily disregarded in the interest of maximizing the estate available for distribution. Section 21g, however, does prescribe a procedure whereby the reality of the bankrupt may be put beyond the power of any interest to attach after bankruptcy, whereas it may be somewhat more difficult to put even the non-negotiable personalty of the bankrupt immediately beyond the reach of a subsequent transferee by virtue of the delay that may intervene before adjudication or the satisfaction of the statutory condition requisite to the appointment of a receiver. 4 Collier \textsuperscript{f1} 70.68, at 1334.

\textsuperscript{50a} It may also be suggested that real property is not so amenable to rapid transfer, that real estate transactions are generally more formal and less numerous than transactions involving personal property. All this may be true, but it does not necessarily follow that statutory liens on reality are endowed with a higher degree of legal integrity than statutory liens on personalty.

\textsuperscript{51} See Leary, \textit{Horse and Buggy Lien Law and Migratory Automobiles}, 96 U. of Pa. L. Rev. 455, 469 n. 36 (1948).

\textsuperscript{52} See Comment, 48 Yale L. J. 1238 (1939); \textit{cf.} McDougal and Brubner-Smith, \textit{Land Title Transfer: A Regression}, 48 Yale L. J. 1125, 1126, 1150 (1939).

\textsuperscript{53} See, e.g., 1 Thompson, Real Property § 56 (Perm. ed. 1939).
for the drastically different treatment of statutory liens on personalty as compared with such liens on realty do not appear to be substantial enough to warrant the necessity of drawing the troublesome distinction in bankruptcy.\textsuperscript{54}

\textit{Immunity for Possessory Liens}

It is true that liens on personalty are also excepted from impairment by Section 67c to the extent that they are accompanied by possession. The talismanic power of possession in the law is familiar enough to the layman. Does the deference accorded possession here have a rational foundation? All liens were once possessory: the original lien was no more than a personal right of one in possession of personalty to detain the property until satisfaction of a debt or demand arising in connection with the property.\textsuperscript{56} The development of the lien concept may not have been logical,\textsuperscript{56} but the term today has no such miserly meaning as that suggested by its origin.\textsuperscript{57} The necessities of modern economy could not be adequately served by a legal view that would require the lienor to have possession of chattel security.\textsuperscript{58} If recognition of the validity of common law liens in bankruptcy continues to be sound as a matter of general policy,\textsuperscript{59} then possessory liens created by statute are surely entitled to no less respect.\textsuperscript{60} The refusal, however, to accord comparable

\textsuperscript{54} The necessity of drawing the distinction is likely to arise whenever a statutory lien unaccompanied by possession purports to attach to all property of the debtor of whatever kind. See, e.g., In re Ann Arbor Brewing Co., 110 F. Supp. 111 (E.D. Mich. 1951). A state statutory lien securing an ad valorem tax on personalty is thus valid against the trustee in bankruptcy to the extent the lien attaches to realty but, unless accompanied by possession, is subject to postponement under \$ 67c insofar as it attaches to the personal property taxed. It would not appear to matter that under state law the lien against the personalty is accorded preferential treatment. Cf. Wilberg v. Yakima County, 132 Wash. 219, 231 Pac. 931 (1925).

\textsuperscript{55} Whitaker, The Law of Lien and Stoppage in Transitu 2 (1816); Montagu, A Summary of the Law of Lien 3 (1824).

\textsuperscript{56} Gavit, \textit{Under the Lien Theory of Mortgages Is the Mortgage Only a Power of Sale?}, 15 Minn. L. Rev. 147, 149 (1931).

\textsuperscript{57} Jones, \textit{Liens} \$ 3 (3d ed. 1914); cf. Restatement, Security 157-159 (1941). The term "lien" is used in this article, as it is used in the Bankruptcy Act, to refer to the interest of a secured creditor. Note, 17 Minn. L. Rev. 47 (1932).


\textsuperscript{59} See note 2a supra. Common-law liens may conceivably fall within the condemnation of \$ 60, the preference section. See Note, 3 Stan. L. Rev. 711, 722 (1951); 4 Collier \$ 67.20[2], at 183.

\textsuperscript{60} Since, unlike common-law liens, statutory liens accompanied by possession are expressly exempted from application of \$ 60, there is actually a discrimination against possessory common-law liens in bankruptcy. Cf. Goggin v. Bank of America Nat. Trust & Sav. Ass'n, 183 F. 2d 322, 327 (9th Cir.), cert. den. 340 U. S. 877 (1950). The contributor of the Stanford Law Review Note cited in the previous footnote observes that a particular
treatment to statutory liens on personalty which have been perfected under state law as against subsequent bona fide purchasers and levying creditors by compliance with notice-filing or recordation requirements is anachronistic.61

Is any legitimate bankruptcy purpose served when one statutory lien is saved because accompanied by possession and another, equally effective under state and federal nonbankruptcy law, is impaired? Traditionally of course the taking of possession by a lienor has given effective legal notice to the owner's creditors of the specific claim of the lienor. The development of chattel mortgages, conditional sales, and trust receipts, as well as of nonpossessory statutory liens, has proceeded too far, however, for creditors today to expect to be apprised of encumbrances against their debtors' property by transfers of possession. Effective means of affording notice which save to the debtor-owner the economic advantage of possession and at the same time are less equivocal62 in signifying an encumbrance than possession in the lienor have been evolved and are accorded full recognition elsewhere in the Bankruptcy Act.63

That subdivision c cannot be justified as a measure designed to protect unsecured creditors against the deceptive appearances of re-

61. The incongruity of the distinction based on possession vel non is demonstrated by considering its impact on statutory liens which can be perfected either by recordation or by possession. Examples of such liens may be found in Kan. Gen. Stat. § 58-201 (1949) (artisan's lien); Ore. Rev. Stat. §§ 87.085-87.120 (1953) (artisan's lien); Ore. Rev. Stat. §§ 87.325, 87.505 of seq. (1953) (agister's lien). If the lienor chooses the right method of perfection, his lien will withstand attack by the trustee in bankruptcy. Although it is a matter of indifference to creditors under state law, if the lienor chooses to record rather than to possess, he will suffer the penalties of § 67c.


63. Secret liens may be attacked by the trustee in bankruptcy under §§ 60, 67d, 70c, and 70e. The statute of limitations does not run against the trustee under the first two of the cited provisions until the lien has been perfected as against subsequent bona fide purchasers or ordinary levying creditors. The test is one requiring reference to nonbankruptcy law. The two subdivisions of § 70 accept the validity of liens if perfected under nonbankruptcy law as against creditors. No special consideration is accorded liens perfected by possession except as nonbankruptcy law may require. Section 70c formerly distinguished between property of the bankrupt in his possession at the date of bankruptcy and property not so held. The trustee in bankruptcy was given the lien of a levying creditor only as to the property in possession. By virtue of amendments in 1950 and 1952 the trustee's lien extends to all property of the bankrupt, whether or not in his possession at bankruptcy. 64 Stat. 20 (1950); 66 Stat. 430 (1952).
tention of possession by the debtor is apparent from the fact that possession taken of personalty by a statutory lienor on the eve of bankruptcy is effective to immunize the lien as against the trustee under the subdivision.64

It may be suggested that a lien accompanied by possession can be differentiated from other liens in that it has somehow reached a stage closer to absolute and complete transfer, that it is a more drastic measure to disturb the lien of one in possession than a non-possessor lien.65 The suggestion is hardly based on better than metaphysical considerations and involves a disregard of the criteria established by nonbankruptcy law for determining perfection of liens and an indifference to the economic advantages of permitting the debtor to retain the possession and use of encumbered property. Testimony recently given at a Congressional hearing emphasized the tendency of a rule which puts a premium on seizure of a debtor's property to precipitate bankruptcy in situations where forebearance by the lienor would have permitted the debtor to extricate himself from financial difficulty.66 A rule which increases bankruptcies requires a strong justification.

Congressional committee reports disclose that liens securing indebtedness, accumulated as a result of long indulgence by tax

64. Mr. Justice Burton suggested in Goggin v. Division of Labor Law Enforcement of Cal., 336 U. S. 118, 127-129 (1949), that public warning of the existence of the lien was the purpose of the possession requirement of § 67c. The opinion contained an implication that notice filing serves this purpose of the subdivision but discloses no awareness that this mode of perfection is ineffectual to protect a lienor under the subdivision. The suggestion of a purpose to require public notoriety has been criticized as incompatible with the primary objective of § 67c to implement the policy of § 64. Note, 62 Yale L. J. 1131, 1135 (1953).

65. Section 67c "speaks as of the time of the filing of the petition in bankruptcy." Goggin v. Division of Labor Law Enforcement, 336 U. S. 118 (1949). Compare the suggestion of Judge Frank in City of New York v. Hall, 139 F. 2d 935, 936 (2d Cir. 1944), that the lienor to prevail under § 67c "must adequately warn potential petitioning creditors of the existence of the lien." The point of warning them is not entirely clear. Should they not be warned in like manner of the existence of liens on realty?

66. Possession of property at bankruptcy by a lienor or by any person other than the bankrupt has been regarded of sufficient moment to entitle him generally to insist on a plenary tria. of issues arising out of his claims against the property. 2 Collier ¶ 23.04. This deference to persons in possession has become considerably diminished as a result of recent amendments of the Act. Summary jurisdiction of actions to avoid liens of judicial proceedings under § 67a was granted by the Chandler Act without respect to who has possession. See 4 Collier ¶ 67.18. The amendment of 1952 requires the lienor in possession to interpose timely objection to the exercise of summary jurisdiction. 66 Stat. 421, amending § 2a(7). See also the reference to recent changes of § 70c in note 63 supra. It is one thing, however, to afford certain procedural safeguards to lienors in possession and quite another to immunize their liens from challenge by the trustee in any kind of proceeding.

authorities and landlords, loomed as a serious evil in the minds of the draftsmen of the Chandler Act of 1938. The taking of possession by a statutory lienor is frequently a first and may be the final step in the enforcement of the lien. It may be suggested, therefore, that subdivision c discourages dilatoriness in the enforcement of statutory liens by putting a premium on the acquisition of possession before bankruptcy. The suggestion can hardly be more than a makeweight or afterthought. If accumulations are the problem, they can and should be attacked directly, as they are in respect to wage and rent liens. In any event the tax liens and other kinds of statutory liens that secure accumulating liabilities are most likely to agglomerate against land, buildings, fixtures, and such real assets. Such liens are of course not touched by Section 67c.

Immunity of Liens Enforced by Sale

The least objectionable of the saving clauses in Section 67c of the Chandler Act is that pertaining to liens enforced by sale before bankruptcy. Ordinarily, of course, a lien enforced by sale is no longer a lien, since the purchaser takes the property discharged of the lien. The Supreme Court, however, recently recognized that a tax lien foreclosed by sale was nevertheless too inchoate and general to prevail as against the federal priority under Section 3466 of the Revised Statutes. Such a lien would seem to be one preserved against the trustee by the language of Section 67c, whether real or personal property is involved and irrespective of who had possession at bankruptcy. Whatever the propriety of the Supreme Court's view of the effect of the federal priority statute, no reason appears why a statutory lienor who has proceeded so far as to

69. "Notwithstanding the admonition of Section 67, sub. c, the City chose to slumber on its rights. Congress intended to penalize such somnolence." City of New York v. Hall, 139 F. 2d 935, 936 (2d Cir. 1944).
70. See note 20 supra. The National Bankruptcy Conference and other groups have been long engaged in an effort to limit the take of taxing authorities from bankrupt estates. See Moore and Tone, supra note 16, at 699-703; Special Report of Harry S. Gleick, Chairman of the Committee on Bankruptcy of the A. B. A. Section of Corporation, Banking and Business Law, The Business Lawyer, Nov. 1954, p. 82.
71. Most tax liens and many other statutory liens attach exclusively to realty or to both realty and personalty. 1 Jones, Liens § 97 et seq. (3d ed. 1914). The relatively greater permanence of realty contributes to the result described in the text.
72. Cf. Brown, Personal Property §§ 119, 125 (1936). If the effect of a sale enforcing a lien were no more than an assignment of the lien to the purchaser, then the property would remain indefinitely subject to redemption. The utility of chattel security would be seriously impaired by such a condition.
enforce his lien by sale should submit to postponement or other
impairment of his interest for the sake of paying any unsecured
claim in a subsequent bankruptcy proceeding.

Circuit of Priority

Every piece of legislation enacted to take care of old difficulties
creates new difficulties of its own. One largely unanticipated diffi-
culty attributable to the new Section 67c of the Chandler Act was
that it inflicted on the courts the task of dealing with the judicially
insoluble problem of circuity of priority. The normal rule74 for
determining the relative priority of valid liens, in bankruptcy as well
as out, is that “first in time is first in right.”75 Except when govern-
ing legislation provides otherwise, the rule applies to statutory liens,
including those created by federal as well as state law.76 Section 67c
explicitly provided for a special order of priority for certain statu-

tory liens vis-d-vis two classes of unsecured claims77 but said nothing
about their relation to other valid liens. Such other liens might be
second in time yet valid as against the trustee in bankruptcy; or they
might be first in time and valid against the trustee yet be inferior
in right under nonbankruptcy law, which frequently accords special
priority to statutory liens.78 The perplexities that arise may best
be appreciated by a consideration of a series of situations.

Let it be supposed that the bankrupt owns personalty valued
at $5,000. It is subject to a federal tax lien unaccompanied by posses-

74. This rule is recognized in the Roman law, Radin, Roman Law 207
(1927); in continental civil law, Brissaud, A History of French Private Law
617 (1912); and in Anglo-American common law and equity, 4 American
75. “The principle is believed to be universal, that a prior lien gives
a prior claim, which is entitled to prior satisfaction, out of the subject it
binds, unless the lien be intrinsically defective, or be displaced by some act of
the party holding it, which shall postpone him in a Court of law or equity
to a subsequent claimant.” Chief Justice Marshall in Rankin & Schatzell v.
Scott, 12 Wheat. 177, 179 (U.S. 1827). The rule is an inarticulate assumption
in almost every case involving priority of encumbrances.

For application of the rule in bankruptcy see, e.g., In re Caswell Const.
Co., 13 F. 2d 667 (N.D. N.Y. 1926). The same rule has prevailed since 1938
insofar as the Chandler Act has not changed the law. In re Taylorcraft Avia-
tion Corp., 168 F. 2d 808 (6th Cir. 1948), 35 Iowa L. Rev. 490, 24 J. N. A.
1943). But cf. United States v. Reese, 131 F. 2d 466 (7th Cir. 1942), where
the court failed to distinguish (1) priorities from liens and (2) bankruptcy
legislation from the law applicable to nonbankruptcy liquidation.

77. I.e., those for costs of administration and wages under § 64a(1)
and (2).
and cornhusker's lien “preferred to that of any prior chattel mortgage or en-
cumbrance”); Fla. Stat. Ann. § 85.17 (1943) (lien for race track supplies
“superior to any and all claims, liens and mortgages, whether recorded” or
not); Mich. Stat. Ann. § 12.560 (1951) (lien for breeding service prior to
“all other liens and encumbrances upon the offspring”).
sion and an indefeasible attachment lien, each securing a $4,000 claim. The federal tax lien is apparently superior in its entirety to the attachment lien, irrespective of the chronology of the commencement of the liens. If claimants entitled to priority under clauses (1) and (2) of Section 64a have claims totaling $4,000, any of the following results is plausible in bankruptcy:

(1) Since the Bankruptcy Act nowhere in terms permits impairment of the attachment lien, it is inferable that it is entitled to be a first charge against the fund derived from the property. With respect to the remainder, the Bankruptcy Act clearly postpones the Government to the claims entitled to priority. The attachment lienor, who may be designated as $A$, would thus receive $4,000; the priority claimants, identified collectively as $P$, would take the balance of $1,000; and the Government ($G$) would take nothing.

(2) Another solution assumes that subordination of a superior lien also subordinates an inferior lien. In the case supposed, $P$, i.e., the group of claimants coming within Section 64a (1) and (2), may be ranked first. The Government ($G$) would then take the $1,000 remainder, leaving the attachment creditor ($A$) nothing.

(3) A third solution is to reason that $P$ is entitled to no more than $1,000 of the proceeds of the property since the Bankruptcy Act does not postpone the $4,000 attachment lien to priority claims. As between $G$ and $A$, nevertheless, $G$ is entitled to

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79. I.e., under § 67a. Section 67c does not, of course, purport to deal with any other than statutory liens and liens for distress of rent whether statutory or not.


81. This result, believed to be the only sound one possible under the statute, was reached in New Orleans v. Harrell, 134 F. 2d 399 (5th Cir. 1943), sustaining priority of a chattel mortgage in bankruptcy as against a city tax lien which fell within the subordinating language of § 67c. The concurring opinion is particularly pertinent: "Nor may the City be heard to say that though subordinated by the statute to the two priorities, nothing in the statute purports to subordinate it to the mortgage lien which but for the bankruptcy it would have primed. Such claim is completely answered by the consideration that since the mortgage lien is not, and City's lien is, subordinated to these two priorities, the City's claim must be subordinate to the mortgage." Id. at 402.

82. This solution, like the first, avoids circuity of priority and the attendant uncertainties which are the concomitant of circuity. It is the rule generally supposed to be followed in circuity situations by the Pennsylvania courts. 4 American Law of Property 625 (1952); Osborne, Mortgages 533 (1951). It is subject to the criticism here that it accords the priorities superiority over the attachment lien without authority derivable from the language or context of the Act and without justification from its purpose. Moreover, it is capable of particularly unfortunate results. Suppose in our example the Government tax lien was for only $100 and the priority claims under § 64a (1) and (2) totaled $4,900. Although the attachment lienor's claim is superior to all save the $100 lien, he would, nevertheless, be completely cut out by this solution.
priority to the full extent of its $4,000 lien. A is again squeezed out, but G this time gets the lion's share of $4,000.83

(4) A and P may get together on the argument, however, that since outside of bankruptcy the attachment lienor could expect to receive $1,000, he should receive that much in bankruptcy. G on the other hand is not entitled to retain the $4,000 remainder as against P, whose claims will absorb the entire remainder to the complete exclusion of G.84

(5) A court may, however, find neither of the proffered solutions satisfactory and come up with this Solomonic judgment: Outside of bankruptcy A would be entitled to $1,000 of the proceeds of the property, and nothing in the Act can be said to improve or derogate from his position in respect to that part of his claim. On the other hand, if the attachment lien were to be fully enforced, as it might be against unsecured creditors, in allowing G to be subrogated to the position of A, this solution accords priority to G over P as well as A, thereby defeating the objective of § 67c to subordinate statutory liens on personality to the first and second priorities. At the same time, without statutory authorization, it postpones A to both G and P, protecting P against indirect attack by G at the expense of A. See Campbell, Protection Against Indirect Attack, in Harvard Legal Essays 3, 17-19 (1934); Osborne, Mortgages 534-535 (1951).

83. This adjustment conforms to a rule frequently applied, and still more frequently urged, for resolving conflicts of priority. See 4 American Law of Property 625-626. (1952); Comment, 36 Yale L. J. 129, 135 (1926); 43 Harv. L. Rev. 186 (1930); cf. Blair, The Priority of the United States in Equity Receivership, 39 Harv. L. Rev. 1, 29, 33 (1925).

In allowing G to be subrogated to the position of A, this solution accords priority to G over P as well as A, thereby defeating the objective of § 67c to subordinate statutory liens on personality to the first and second priorities. At the same time, without statutory authorization, it postpones A to both G and P, protecting P against indirect attack by G at the expense of A. See Campbell, Protection Against Indirect Attack, in Harvard Legal Essays 3, 17-19 (1934); Osborne, Mortgages 534-535 (1951).

84. This method of disposition, following the same principle as that employed in the third solution, nevertheless appears to effectuate more closely the objective of § 67c. Yet, in allowing P to be subrogated to the position of G, it nullifies the priority of G over the attachment lien. This pattern of distribution was employed in In re Empire Granite Co., 42 F. Supp. 450, 458-459 (M.D. Ga. 1942), involving state tax liens subordinated under § 67c and a chattel mortgage inferior to the tax liens by state law. The method is approved in Feigenbaum, Tax Problems, 25 J. N. A. Ref. Bankr. 107, 111 (1951), reprinted under the title, The Bankruptcy Triangle: Creditor-Debtor-Commissioner, 30 Taxes 448, 456 (1952). Although Empire Granite was impliedly overruled by New Orleans v. Harrell, 134 F. 2d 399 (5th Cir. 1943), discussed in note 81 supra, the same method of distribution was employed in California State Dept' of Employment v. United States, 210 F. 2d 242 (9th Cir. 1954), and approved in Seligson, Recent Developments in the Field of Federal Tax Claims, 29 J. N. A. Ref. Bankr. 7 (1955). Cf. United States v. New Britain, 347 U. S. 81, 88 (1954).

The effect of application of the formula here under consideration is the same as if the trustee were empowered to preserve the postponable lien of the Government for the benefit of the claimants entitled to first and second priority. While it is arguable as a matter of policy that the trustee should have power to preserve the lien, the lack of such power would seem to be the irresistible inference from the absence of any express grant of it when considered against the fact that Congress has in five places in the Bankruptcy Act explicitly authorized preservation of other kinds of voidable transfers, including liens. See §§ 60b (preferential lien or security title), 67a(3) (lien acquired through judicial proceedings), 67c (excess of restricted lien for wages or rent and lien invalid under clause (2), 67d(6) (fraudulent transfer or obligation), and 70e(3) (transfer or obligation voidable under nonbankruptcy law). For an argument that a trustee under the Act of 1938 had no general power of subrogation to voidable liens see Sachs, Trustee's Rights of Subrogation to Creditor's Liens, 15 J. N. A. Ref. Bankr. 105 (1941).
there would be but $1,000 for distribution to \( P \). Giving \( A \) and \( P \)
the $1,000, which is all that each can expect in view of other
superior claims to the property, $3,000 would remain for dis-
tribution to \( G \).\(^{85}\)

(6) But why should \( G \) end up with $2,000 more than \( P \)?
That certainly fails to regard the objective of Section 67c. Would
not a superior solution limit \( G \)'s original share to what it would
take as a junior lienholder after \( P \), i.e., $1,000? The remaining
$2,000 could then be divided equally among the three classes of
claimants.\(^{86}\)

Six solutions thus produce six differing nets for the parties in a
fairly simple situation presenting circuity. But if the problem of cir-
cuity of priority is imported into the Act, there is no demonstrably
correct solution—none beyond criticism.\(^{87}\)

Another novel feature introduced into bankruptcy by the Chan-
der Act's Section 67c was the provision in its second clause for re-

\(^{85}\) Just as much logic of course supports the following disposition: \( A \) is
etitled to $1,000 in bankruptcy as before, i.e., to the remainder after deducting
from the whole fund the amount of the paramount Government lien of $4,000.
By the same token \( G \) is entitled to the $1,000 remaining after deduction of
$4,000 in priority claims of first and second rank. By thus paying over $2,000
to \( A \) and \( G \) in fulfillment of their expectations in bankruptcy as junior lien
claimants, the court has $3,000 left for application to the priority claims of
\( P \). But \( G \) and \( P \) may likewise be regarded as junior encumbrancers entitled to
$1,000 each, leaving $3,000 for \( A \), the attachment creditor.

This pattern for distribution follows the "Dixon formula." The formula
has been widely approved. 4 American Law of Property 627-629 (1952);
Campbell, op. cit. supra note 83, at 17-18 (1934); Osborne, Mortgages 534,
539 (1951); cf. A. K[ocourek], A First-Rate Legal Puzzle—A Problem in
Priorities, 29 Ill. L. Rev. 952, 957 (1935). When no party is at fault, however,
as in the supposed case in the text, it furnishes no starting point, and the re-
sults vary arbitrarily as different starting points are used. Note, 38 Col. L.
Rev. 1267, 1269 (1938).

Another criticism that may be noted in respect to the formula is that the
proportion each person takes varies as the fund increases or decreases. Thus,
if the fund should be $4,000, \( G \), \( P \), or \( A \), depending on the starting point,
would take the entire sum and the other claimants would go without any-
thing. If the sum involved should be $6,000, each would take $2,000, wherever
the circle is started. A larger sum would increase the share of two of the
claimants and reduce that of the third party. See Osborne, Mortgages 535
(1951); White, A Problem in Priorities, 25 Ohio L. Bull. and Rep. 116,
119-121 (1926).

\(^{86}\) This distribution follows the proposal made by Professor Benson in
Circuity of Lien—A Problem in Priorities, 19 Minn. L. Rev. 139 (1935). The
same result would be reached by other routes proposed in A. K[ocourek],
supra note 85, and a Note, 38 Col. L. Rev. 1267 (1938). In other situations, how-
ever, the method proposed in the Note last cited avoids the result common to
both the Dixon and Benson formulae of yielding less to one claimant as the
fund increases.

\(^{87}\) Seven methods of solution of circuity problems are discussed in
Osborne, Mortgages 532-539 (1951). Nor does his list purport to be exhaus-
tive. See also 4 American Law of Property § 17.33 (1952); A. K[ocourek],
supra note 85.

The desirability of avoiding the legal tangles of circular priority where
possible was acknowledged in H. R. Rep. No. 2320, 82d Cong., 2d Sess. 14
(1952), discussing a proposed amendment of § 67c. Cf. Kennedy and Brooks,
Ten Years of Creditors' Rights in Iowa, 38 Iowa L. Rev. 410, 434-437 (1953).
striction on the amount of payment of certain liens. The liens so restricted were "such liens for wages or for rent," i.e., statutory liens for wages or rent which were on personal property, unaccompanied by possession and not enforced by sale, and liens of distress for rent. Inasmuch as this restriction was intended to benefit unsecured creditors rather than lienors, however, the subsection provided that "as against other liens" the restriction should not apply. Now, curiously, only this provision seems to have excited concern about the importation of the problem of circuity of priority into bankruptcy administration.

**The 1952 Amendment of Section 67c**

*The Thrust at Circuity*

The Report of the House Committee on the Judiciary which accompanied the bill that became the 1952 amendment observed that the exception "as against other liens" made it difficult to avoid a construction "which would introduce a self-created circuity of lien." The committee's explanation of how this particular phrase, rather than the postponement provision, generates a self-created circuity is difficult to follow.

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9. See *Hanna and MacLachlan, The Bankruptcy Act of 1898 as Amended with Annotations* 96 (4th ed. 1951). The editors here appeared to be concerned about the circuity problem only to the extent that it may arise in connection with the provision for restriction "except as against other liens." They assumed that an amendment deleting the exception "would meet this difficulty."
11. The report undertakes to illustrate: "Since junior liens [junior to what?] are senior to the rights of general creditors, the subdivision would seem to provide that the trustee in bankruptcy could prevail over the specific lien claimant [meaning wage or rent lien claimant?] with reference to the restrictable excess, but the junior lien claimant [junior to whom?], outranking the trustee as the representative of general creditors with reference to this property, could thus claim it, only to lose it back to the specific lien claimant, whose lien is unrestricted as against other liens." *Ibid.*

"Junior liens" could be liens which are subordinated by the first part of § 67c and are inferior because subsequent in time to a wage or rent lien that is both subordinated and restricted by the subsection. For even as to the liens subordinated by § 67c, the bankruptcy court must depend on nonbankruptcy law for the rules on marshalling such liens. 4 Collier ¶ 67.27[3], at 296; *Note, 62 Yale L. J. 1131, 1132 n. 11 (1953). The exception "as against other liens" could thus be applied to such liens without incurring any contact with the problem of circuity. The passage must, therefore, use "junior liens" in a different sense, i.e., liens inferior under applicable lien law which are not, however, subordinated in terms by the first part of Section 67c. No problem of circuity arises with respect to such liens either, if they are regarded as not postponed by this subsection of the Act. In order for a problem of circuity to be created, §67c must be viewed as subordinating not only the liens particularly described therein but also, to some extent at least, those liens junior under nonbankruptcy lien law to the subordinated liens. This is the circuity discussed in the text. Even so, however, the quoted passage remains unin-
In any event Congress on July 7, 1952, undertook to remove the "self-created" difficulty by amending the subdivision. As thus amended, Section 67c now reads:

"c. Where not enforced by sale before the filing of a petition initiating a proceeding under this Act, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act; and (2) the provisions of subdivision b of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, shall not be valid against the trustee: Provided, however, That so much of clause (1) of this subdivision c as restricts liens for wages and rent and clause (2) of this subdivision c shall not apply in proceedings under chapter X of this Act, unless an order shall be entered therein directing that bankruptcy be proceeded with, or in proceedings under section 77 of this Act. The court may on due notice order so much of any lien in excess of the restricted amount under clause (1) and any lien invalid under clause (2) of this subdivision c to be preserved for the benefit of the estate and, in any such event, such lien for the excess and such invalid lien, as the case may be, shall pass to the trustee."

The legislative purpose was thought to be achieved by eliminating the phrase, "except as against other liens," and providing for preservation of the wage or rent lien for any excess over the restricted amount, such preservation to be for the benefit of the estate. The wage-and-rent-lien restriction is no longer affected by the presence or absence of other liens. Where, however, the restriction would redound to the benefit of some other lienor—the United States as a tax lienor, for example, the bankruptcy court may on due notice

telligible as an interpretation of the "except" phrase, since there was under the statute that included the phrase no restriction or restrictable excess so long as there were other liens which would benefit from the restriction. How then, when the exception applied, could the trustee be said to prevail, or the junior lienor to have or lose a claim, as to the restrictable excess?

order the excess of the restricted lien to be preserved so that it may pass to the estate.\textsuperscript{94}

With deference it is suggested that while the amendment effects a desirable change, it did not accomplish the elimination of the "legal tangle" of circular priority. The most serious problem of circuitry which can arise and has arisen under Section 67c\textsuperscript{95} was not touched. It did overrule In re Eakin Lumber Co.,\textsuperscript{96} decided in 1941, where a wage lien was held to be unrestricted because the restriction would redound to the Reconstruction Finance Corporation, holding a junior lien as a pledgee. The unsecured creditors were thus cut out because of the presence of the junior lien. The House Report accompanying the bill which became the 1952 amendment pointed out that such a result not only meant that the policy of Section 67c was being "inadequately implemented," but it presented to a trustee the unseemly question of whether the latter's lien would be extinguished at a discount in order that the wage (or rent) lien might be subject to restriction.\textsuperscript{97} By deleting the exception the draftsmen of the 1952 amendment eliminated the question.

\textit{Priorities Labelled as "Liens" and "Floating Liens"}

The most noteworthy change effected by the 1952 amendment to Section 67c, however, was the invalidation against the trustee, by a new clause (2), of statutory liens created\textsuperscript{98} by state law for debts on personal property unaccompanied by possession, levy, sequestration, or distraint of the property. Since liens for \textit{taxes} or debts are referred to in clause (1) of the new subdivision which provides for postponement, it may be inferred that tax liens are not invalidated by clause (2), although liens for \textit{debts} owing any state or subdivision thereof are explicitly nullified.\textsuperscript{99} At all events federal tax liens

\textsuperscript{95} See notes 81-86 supra.
\textsuperscript{98} The statute invalidates liens of the kind described if "created or recognized" by state law. The use of the word "recognized" here is confusing and probably unnecessary. 4 Collier \textsection 67.231, at 311-312. Federal statutory liens are necessarily recognized by state law but they are surely not intended to be invalidated by such circumlocution. A helpful interpretation is suggested by Hanna, \textit{Preferences as Affected by Section 60c and 67b of the Bankruptcy Law}, 25 Wash. L. Rev. 1, 12, 24 J. N. A. Ref. Bankr. 115, 118 (1950) (liens "recognized" by state law deemed to be those arising by implication from legislation rather than "created" by explicit terms).
\textsuperscript{99} It is to be noted, however, that by \textsection 1(14) of the Act, "unless the same be inconsistent with the context," "\textit{debt} shall include any debt, demand, or claim provable in bankruptcy." Tax claims are provable in bankruptcy. 3 Collier \textsection 63.26, Section 64, which confers priority on taxes, purports to deal only with debts. Moreover, "\textit{debts}" as used in Rev. Stat.
clearly are not invalidated by the new clause.¹⁰⁰

The avowed legislative purpose of the invalidation provision was “more fully to implement the policy of the Chandler Act.”¹⁰¹ The Chandler Act sought to improve the position of unsecured creditors. Pursuant to this purpose, Section 64 was amended by that Act by deleting the priority theretofore given to a multiplicity of priorities created or recognized by state laws. If a state could fasten the label of “lien” on what had been called a priority, however, it could frustrate the objective of the Chandler Act’s amendment of Section 64, and it has been suggested that there is a trend in state statutes to label as “liens” what are “essentially priorities.”¹⁰² The new amendment views a state-created statutory lien on personalty unaccompanied by possession, levy, sequestration, or distraint as not significantly different from a priority by striking down the lien as the Chandler Act did the priority. Indeed, a state statutory lien for rent is treated more harshly than a state priority, which is recognized under Section 64a(5) to the extent of rent accrued within three months of bankruptcy.¹⁰³

Whether or not the new invalidation provision is desirable, the identification of state legal provisions for priority with state statutory provisions for liens on personalty unaccompanied by possession, levy, sequestration, or distraint does not appear to be well taken. On the one hand statutory liens on realty and liens on personalty per-


Apparently the only ruling on the point to date is that of Referee Katcher in Matter of Gordon, 27 J. N. A. Ref. Bankr. 85 (E.D. Mich. 1952), invalidating as against the trustee city, county, and state tax liens on personalty unaccompanied by possession or process. The ruling is reported to have been subsequently vacated, and the case presumably has since been settled without the necessity for final determination of the matter. Hearing, supra note 39, at 6. The ruling nevertheless prodded representatives of state and local taxing authorities to seek an amendment of § 67c(2) which would eliminate any doubt as to the inapplicability of the invalidation provision to tax liens. A bill, H. R. 5796, would have inserted the following language parenthetically and immediately following the word “debts” in § 67c(2): “as distinguished from statutory liens for taxes.” The bill passed the House but died in the Senate. Although the National Bankruptcy Conference took the position that the amendment was unnecessary in view of the context, the phraseology of the bill that passed the House followed the recommendation of the Conference. Id. at 26.

¹⁰⁰. The sweeping statement in Sen. Rep. No. 1395, 82d Cong., 2d Sess. 8 (1952), that “the bill strengthens the provisions of Section 67c by rendering a statutory lien invalid as against the trustee” plainly disregards the limitations in the invalidation clause itself.


¹⁰³. 4 Collier ¶ 67.23, at 234.
fected in particular ways are invulnerable. On the other hand liens on personalty not so perfected are utterly annulled. It has been said by way of explanation for the difference:

“A lien upon real estate is commonly dealt with adequately by recording acts and there is no confusion caused by fluctuation of the subject matter to which it relates. Liens on personal property unaccompanied by possession, however, are of the nature of ‘floating liens,’ which attach to all a debtor’s personalty, although the property he owns is commonly changing from day to day.”

The statement’s description is accurate as to certain personal property liens, e.g., the federal tax lien under Section 6321 of the Internal Revenue Code. Without explanation, however, this particular brand of tax lien on personalty unaccompanied by possession or any other designated mode of perfection is not subject to the invalidation treatment. One is left to the inference that opposition from the gentlemen of the Treasury Department was effective. However, there are liens that come within the invalidating provision that cannot be called floating liens at all and should not be analogized to mere priorities. They are as specific as a lien can be; they encumber the property and follow it into the hand of third persons quite independently of any insolvency or liquidation proceedings; and they can be independently foreclosed or enforced.

As a matter of fact the nature of a priority, as distinguished from a lien, seems to have been misapprehended in the explanation given for the 1952 amendment to Section 67c. A priority is no more than a right to preference in the distribution of the assets of an estate undergoing liquidation and can have no effect independently of such a distribution. The House Report accompanying the proposed law stated that “If any provisions for priority were relabeled a ‘lien,’ such a lien would be indistinguishable from floating liens on

106. There is a conflict as to whether a federal tax lien not perfected by notice filing pursuant to Int. Rev. Code § 6323 can prevail against the trustee under § 70c. The crux of the controversy is whether a trustee can be said to be such a ‘judgment creditor’ as is protected by notice-filing of the federal tax lien. 4 Collier §§ 67.24[1] n. 6a, § 67.26 n. 21; Seligson, supra note 84, at 11. See also note 159 infra.
107. Examples of such liens may be found in Iowa Code c. 571 (1954) (thresherman’s or cornsheller’s lien); Minn. Stat. § 514.35 (1953) (garage keeper’s lien); N. J. Rev. Stat. § 2:60-21 (1937) (garage keeper’s lien); Wash. Rev. Code § 84.60.030 (1951) (personal property tax lien). The Minnesota lien was enforced as against a subsequent bona fide purchaser in Pratt v. Armstrong, 192 Minn. 14, 255 N. W. 91, 100 A. L. R. 77 (1934), criticized in 19 Minn. L. Rev. 469 (1935). The Washington tax lien, similarly enforceable, is discussed in a Note, 2 Wash. L. Rev. 186 (1927).
108. Strom v. Peikes, 123 F. 2d 1003 (2d Cir. 1941), noted in 51 Yale L. J. 863 (1942); 4 Collier § 67.20[9]; Glenn, Liquidation 726 (1935).
The accuracy of the observation, of course, depends on what one means by "floating lien." The "floating charge" of English law comes close indeed to being no more than a priority, but it is not clear from the context of the House Report whether the "floating lien" is limited to the kind permitting the debtor-owner to consume the property or to sell items free of the lien, or may embrace every lien attaching to after-acquired property. In any event the invalidation provision goes far beyond protecting the unsecured creditors against "floating liens," howsoever defined, let alone liens that are no more than priorities in disguise. If state policy as embodied in state lien statutes is to be frustrated by federal legislation, more care in drafting the federal statute and explaining the federal policy seems desirable.

Selective Preservation of Liens

By the last sentence of the new subdivision the court may on due notice order "any lien invalid under clause (2) of this subdivision to be preserved for the benefit of the estate." Coupled with the provision in the same sentence, earlier alluded to, whereby the excess amount secured by a restricted wage or rent lien can likewise be brought into the general estate, the authorization for the exercise of a preserving power by the bankruptcy court in Section 67c permits the policy of protecting unsecured creditors to be more adequately realized and enables the court to avoid the troublesome problem of circuity of priority insofar as restricted and invalidated liens are concerned. As previously noted, however, the situation discussed earlier for which six solutions were ventured as legally tenable under the Chandler Act appears in the same light under the amendment of 1952, notwithstanding the legislative concern about circuity of priority. As an original matter it would seem that, in the light of the language used and in the absence of any evidence of Congressional intent or supposition to the contrary, only those liens deliberately described in the subdivision are subordinated.

To subject to postponement other liens would extend a novel and

110. See 3 Glenn, Mortgages § 426 (1943).
111. Statutory liens which do not become effective until the property has come into the custody of a court or a liquidator for sale and distribution of proceeds are indeed nothing but glorified priorities. Cf. United States v. Knott, 298 U. S. 544 (1936); United States v. Oklahoma, 261 U. S. 253, 260 (1923); Leggett v. Southeastern People's College, 234 N. C. 595, 600, 68 S. E. 2d 263, 268 (1951).
112. See the text accompanying notes 93-94, supra.
113. See text accompanying note 95 supra.
114. See note 81 supra.
drastic remedy to achieve results not within the objectives or the language of the legislation. To illustrate:

(1) Let it be supposed that an indefeasible attachment lien is for $4,000 and the Government's tax lien is for $500.\textsuperscript{115} If the personal property involved is worth only $4,000, it is using Section 67c(1) with a vengeance to permit the priority claimants to cut out the attachment lienor to any greater extent than the $500 representing the amount of the subordinated tax lien.\textsuperscript{119}

(2) Suppose that personal property, subject to an indefeasible $4,000 attachment lien and a tax lien in the same amount, is valued at $10,000. If priority claims totalling $4,000 are first paid out of the proceeds of the property and the Government takes the balance of $4,000 as the second claimant, then is Section 67c(1) employed to subordinate, not the tax lien within its terms, but the attachment lien, which outside of bankruptcy would have been invulnerable to invasion by the Government's lien.

Even should the trustee be given the power to preserve subordinated liens for the benefit of the estate or any part of it, the attachment lien in this situation would be left intact by Section 67c. It may be doubted, however, that the Act affords any basis for finding in the statute as now drawn authority for subrogation to or preservation of a postponed lien postponed by Section 67c(1).\textsuperscript{117} While Congress has by the last sentence of Section 67c carefully extended the power to preserve for the benefit of the estate certain liens and portions of liens affected by the subdivision, it has not extended such power with respect to the liens subordinated by clause (1) of Section 67c. If the subordination of liens by contract, judicial proceedings, common law, and statute (when accompanied by possession) had been intended when they are junior by nonbankruptcy law to liens that are postponed by Section 67c(1), the argument is persuasive that Congress would have provided for the preservation of any lien postponed by clause (1) for the benefit of the claimants entitled to priority under Section 64a.

**The National Bankruptcy Conference Proposal**

It thus appears that notwithstanding the improvements effected by the 1952 amendment of Section 67c, the amendment did not take

\textsuperscript{115} Assuming as before that the Government tax lien is superior, under applicable lien law, to the attachment lien but is of the type postponed under § 67c(1). See note 80 supra and the accompanying text.

\textsuperscript{116} If the priority claims of § 64a(1) and (2) should total $3,500 or more, the attachment lien would be cut out completely despite its superiority to all save a $500 tax lien. See note 82 supra.

\textsuperscript{117} But cf. In re Cofax Corp., 96 F. Supp. 420 (S.D. N.Y. 1951). See also Seligson, supra note 84, at 11. Professor Seligson suggests the possible availability of § 70e to the trustee as authority for avoiding an otherwise indefeasible attachment lien which is inferior to a statutory lien invalid under § 70c. If the suggestion is sound, the five lien preservation provisions incorporated in the Act would seem unnecessary. See note 84 supra.
care of some of the difficulties arising under the original version of the subdivision and, on the other hand, imported into the Act some new problems of its own. The National Bankruptcy Conference has been aware of inadequacies in the treatment of statutory liens by the Bankruptcy Act and since March of 1953 has had a committee assigned to study and bring in a proposal for revision. At its November, 1954, meeting the Conference approved in principle the following draft:

“(1) This subdivision c does not apply to liens enforced by a sale before the petition, does not apply to solvent bankrupt estates, does not apply to property which cannot be sold in bankruptcy for more than the amount of the liens upon it which are indefeasible in bankruptcy, does not apply in proceedings under Chapter X of the Act, unless an order has been entered therein directing that bankruptcy be proceeded with, and does not apply to proceedings under section 77 of the Act.

“(2) This second clause of this subdivision c does not apply to tax liens created by statutes of the United States and does not apply to liens for taxes owing to any state or subdivision thereof. All statutory liens (not hereinabove excluded) which first become effective upon the insolvency of the debtor or upon execution upon or distribution or liquidation of the property of the debtor, and all statutory general liens not hereinabove excluded, as distinguished from statutory liens upon specified items of property, shall be invalid against the trustee, even though valid under subdivision b of this section; provided, however, that the court may, on due notice, order any such lien to be preserved for the benefit of the estate and in such event such invalid lien

120. The Summary of Conference Proceedings records a resolution making a somewhat confusing change in the second sentence of clause (2) "so that the words, 'All statutory liens' will read 'All statutory as distinguished from consensual liens and statutory liens.'"

It has been suggested that § 67b may be resorted to as a means of putting trust receipts and perhaps other forms of consensual security beyond the condemnation of § 60, the preference section. Hanna, Preferences as Affected by Section 60c and Section 67b of the Bankruptcy Law, 25 Wash. L. Rev. 1, 24 J. N. A. Ref. Bankr. 115 (1950); Note, 3 Stan. L. Rev. 711 (1951); cf. MacLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act, 4 U. of Chi. L. Rev. 369, 394-395 (1937). The context would not seem to require the exclusion of consensual liens from the scope of § 67b and c any more than it would require the exclusion of liens acquired through judicial proceedings. Security for which a creditor has contracted does not fall within the protection of § 67b or the condemnation of § 67c, whatever may be the form or language of the agreement and whatever may be the effect of a statute in regulating its validity, perfection, and enforcement. While vagrant dicta may be found tending to lend support to the position taken in the first two of the law review referees cited supra, no actual application of the relevant provisions has been found to be inconsistent with the position taken here. See 4 Collier ¶ 67.20(2), at 184-185.
shall pass to the trustee. A lien not preserved but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy. Claims for wages or rent secured by liens hereby invalidated or preserved shall be respectively admitted and restricted as prior claims under clauses (2) and (5) of section 64 subdivision a.

“(3) Although valid against a trustee under subdivision b of this section, statutory liens for taxes or debts owing to the United States, and for taxes owing to any state or subdivision thereof, of such a nature that they would be invalid under clause (1)\textsuperscript{121} of this subdivision c, were they not excluded therefrom, and liens of rent or distress for rent, of such a nature that they are valid under such clause, shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a, section 64 of this Act. Claims of rent or distress for rent secured by liens valid apart from this subdivision c shall be restricted as in section 64a(5), but may enjoy the highest priority here provided. Liens not preserved but postponed under this subdivision (2)\textsuperscript{122} shall be also postponed to all liens upon the same property which are indefeasible in bankruptcy.”

“General Liens”

If the objections to present Section 67c that have been set forth herein are well taken, the proposed amendment would accomplish a change much to be desired. Enactment of the proposal would effect three notable improvements over the subdivision as it now reads:

(1) it would eliminate the distinction between liens on realty and those on personalty;
(2) it would eliminate the discrimination against statutory liens on personalty not accompanied by possession, levy, sequestration, or distraint;
(3) it would eliminate the confusion engendered in situations of circuity of priority by dealing explicitly with the problem.

Its attack on priorities labelled as liens is aimed with considerably improved accuracy when it strikes at “[a]ll statutory liens ... which first become effective upon the insolvency of the debtor or upon execution upon or distribution or liquidation of the property of the debtor.” The invalidation of “all statutory general liens ... as distinguished from statutory liens upon specified items of property” is a less easily defended effort to reach the so-called “floating lien.” The terms “general lien” and “specific lien” are still encountered with considerable frequency in judicial opinions, but whatever their

\textsuperscript{121} The reference intended here must be to clause (2), since clause (1) does not invalidate any lien.

\textsuperscript{122} This must be “(3)” instead of “(2)” since postponement is effected only by the third part. A more accurate reference, however, would be “clause (3).”
original meanings, they have been subjected to such corruption that it may be doubted whether they retain the capacity to serve any purpose for the legislative draftsman.

In a series of opinions stretching over the past twenty-five years the Supreme Court has sustained the priority of the Federal Government under Section 3466 of the Revised Statutes as against a variety of liens, all of which were found to be general and inchoate. The apex was reached perhaps in *United States v. Gilbert Associates*, involving the relative priority of the Government and a tax lien of the town of Walpole, New Hampshire. The property subject to the lien was certain machinery which was subject to an *ad valorem* tax as real estate under New Hampshire law. The town had not only assessed the tax involved; it had proceeded to foreclosure of its lien by sale and had bid in the property at its own sale. The town was nevertheless defeated by the subsequently attaching priority of the United States because the town had only a general lien. Since the Court said that the town’s lien was “general” four times, it is hardly possible to dismiss the description as a mere inadvertence; moreover, the same kind of usage characterizes the

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123. The distinction of early common law between “general” and “specific” liens was clear enough: A specific lien, or a particular lien, was “a right to retain the property of another on account of labour employed, or money expended on that same property.” A general lien was “a right to retain the property of another on account of a general balance due from the owner.” Whitaker, *op. cit. supra* note 55, at 8-9. Both types of liens were possessory and applied only to personal property. Brown, *Personal Property* §§ 108, 109 (1936); Restatement, *Security* § 60 (1941). The common law illogically denied either kind of lien, however, to agisters, private carriers, and certain others who are now generally protected by statute. Note, 17 *Cornell L. Q.* 279 (1932). While the specific lien was conferred by the common law itself or by general custom, a general lien existed only when established by special custom or usage of a particular trade or calling, by contract of the parties, or by statute. Montagu, *op. cit. supra* note 55, at 26-39; Brown, *Personal Property* 475 (1936).

It seems clear that the National Bankruptcy Conference draft is not intended to codify the common-law distinction. The context of the draft evidences an exclusive concern with the scope or extent of the property covered by the lien; “general” is apparently used here in the sense Lord Coke used it in *Twyne’s Case*, 3 Coke 80b, 81a, 76 Eng. Rep. 809, 812 (Star Chamber 1601), to condemn a transfer “without exception of his apparel or anything of necessity.”


126. 345 U. S. 361 (1953).

127. *Id.* at 365-366.
other recent opinions of the Court construing the same statute.\textsuperscript{128} In view of the vagueness of the terms under discussion and the confusion bound to be engendered by their use it is to be hoped that if they are incorporated in a newly enacted subdivision the accompanying legislative reports will illuminate the draftsmen’s meaning by including some illustrative examples of the two kinds of liens.

Voidable Liens on Property Subject to Indefeasible Liens

Notwithstanding the elimination of the immunity for statutory liens on realty it is suggested that the proposed Section 67c would leave more liens intact in bankruptcy than does the present statute. Since Section 67c now condemns many liens not infected with the evil which the draftsmen undertook to remedy, the proposed constriction of the trustee’s power to invalidate is an understandable departure from the general course of bankruptcy legislation. One limitation newly introduced into the statute seems capable of producing somewhat arbitrary results, however, and its wisdom may be questioned. The new subdivision “does not apply to property which cannot be sold in bankruptcy for more than the amount of the liens upon it which are infeasible in bankruptcy.” The provision thus requires the trustee to reach the conclusion on the basis of a tentative appraisal that there is such an “equity” in the property for the bankrupt estate as can be realized on a judicial sale. Consideration of a pair of hypothetical cases will make clear the basis for the suggested criticism:

(1) Let it be supposed that property of the bankrupt is subject to a $10,000 mortgage that is indefeasible\textsuperscript{129} in bankruptcy and six $1,000 wage liens falling within the invalidating language of the proposed second clause.\textsuperscript{130} If the property can be sold for no

\textsuperscript{128} Kennedy, supra note 125. In United States v. Waddill, Holland & Flinn Inc., 323 U. S. 353, 356-357 (1945), the Court was confronted with a Virginia Supreme Court of Appeals holding that the landlord’s lien before it was “fixed and specific,” but this binding declaration of state law was not allowed to control the application of the federal priority statute. But cf. United States v. New Britain, 347 U. S. 81, 86-87 (1954), where the Court recognized that “the City’s tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens.”

\textsuperscript{129} “Indefeasible” is a new term for the Bankruptcy Act and may not always be clear in its application. See note 133 infra. Although the mortgage is subject to being defeated by virtue of the exercise of the power to preserve a senior lien that is itself voidable, it is assumed that “indefeasible” as used in clause (1) must disregard this possibility.

\textsuperscript{130} Such wage liens may be created by Cal. Code Civ. Proc. §§ 1204, 1206 (1953). The wage liens were sustained against the trustee in bankruptcy in In re West Beverly Corp., 166 F. 2d 429 (9th Cir. 1948), but subordinated to the federal priority under Rev. Stat. § 3466 in United States v. Division of Labor Law Enforcement, 201 F. 2d 857 (9th Cir. 1953). Their relative priority vis-à-vis mortgages and other liens does not seem to have been made clear.
more than $9,500, it is clear that the subdivision affects none of the liens, and their relative priority will be determined by reference to nonbankruptcy lien law. Although the wage liens are no more than priorities in disguise and the lienholders would be entitled to priority for their wage claims insofar as they come within Section 64a(2), the wage liens if prior under nonbankruptcy law may prevail to the full extent of their value ($6,000) and the mortgage would then absorb the balance ($3,500) to the exclusion of the unsecured creditors of the bankrupt estate.

(2) Let it be supposed that the property in the above situation can be sold for $10,500. It is understood that the wage liens can now be avoided or preserved. If superior under nonbankruptcy law the wage liens can be preserved for the benefit of the estate and the wage claimants accorded priority to the extent permitted by Section 64a(4). The mortgage would again be protected to the extent of the balance (here $4,500).

The difference in the treatment of the wage lienors in the two situations does not appear to be justified. It is apparent that in the first situation the trustee might be well advised to procure a bid in excess of the sale value of the property in order to be able to avail himself of the advantages that accrue to the estate when clauses (2) and (3) of the proposed subdivision apply. The statute thus creates an artificial situation and the bankruptcy or nonbankruptcy objective it serves is not self-evident.

Preservation of Postponable Liens

The forthright treatment of the problem of circuity in the new draft has been remarked. Parallel provisions in clauses (2) and (3) assure that any lien invalidated or postponed thereunder shall be invalidated or postponed as against all liens indefeasible in bankruptcy. The court may, however, authorize preservation of any lien voidable under the second clause in order that the general creditors rather than inferior lienors shall benefit from application of the clause. Strangely, there is no comparable preservation provision in clause (3) dealing with postponement. The resulting incongruity is easily demonstrated:

(1) Let it be supposed that property of the bankrupt is subject to a $5,000 mortgage that is indefeasible in bankruptcy and don't overlook a $3,000 tax lien prior to the mortgage under nonbankruptcy law but subject to postponement under clause (3). The statute thus creates an artificial situation and the bankruptcy or nonbankruptcy objective it serves is not self-evident.

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Preservation of Postponable Liens

The forthright treatment of the problem of circuity in the new draft has been remarked. Parallel provisions in clauses (2) and (3) assure that any lien invalidated or postponed thereunder shall be invalidated or postponed as against all liens indefeasible in bankruptcy. The court may, however, authorize preservation of any lien voidable under the second clause in order that the general creditors rather than inferior lienors shall benefit from application of the clause. Strangely, there is no comparable preservation provision in clause (3) dealing with postponement. The resulting incongruity is easily demonstrated:

(1) Let it be supposed that property of the bankrupt is subject to a $5,000 mortgage that is indefeasible in bankruptcy and don't overlook a $3,000 tax lien prior to the mortgage under nonbankruptcy law but subject to postponement under clause (3). The statute thus creates an artificial situation and the bankruptcy or nonbankruptcy objective it serves is not self-evident.
If the property can be sold for $8,500, the third clause applies and dictates that the tax lien "shall be postponed" to the debts entitled to priority under Section 64a(1) and (2). But what of the mortgage? There is no authority for preserving the $3,000 lien, and, "liens not preserved but postponed under this subdivision [(2) [(3) ?] shall be also postponed to all liens upon the same property which are indefeasible in bankruptcy." The mortgage then is manifestly to be paid in full, and the balance of $3,000 must be used first to defray administrative costs and to pay wage claims entitled to priority under Section 64a.

(2) If on the other hand the property brings only $7,500,133 the tax lien would be enforced in full and the mortgage could be enforced only against the balance ($2,500).

Although these strangely contrasting results seem to be required by the language used, it is doubted that they conform to what the draftsmen want or intended. The reference in the last sentence of clause (3) to "liens not preserved but postponed" contains an implication that postponed liens may be preserved. The explicit provision for preservation of voidable liens in clause (2), however, argues convincingly against the existence of the implied power in clause (3). The absence of any power to preserve liens subject to postponement under present Section 67c reinforces the argument.134 There is on the other hand no apparent reason why a preserving power should not be included in clause (3). An additional complication not presented in any of the preservation clauses now included in the Bankruptcy Act needs to be noted here, however: Since the postponement provision is operative for the benefit of only the claimants entitled to priority under Section 64a(1) and (2), a logical limitation on preservation under clause (3) would confine the beneficiaries to such claimants and the extent of the preservation to the total required to satisfy such claimants. If the total required to pay the two priorities should exceed the amount of the preserved lien, there should be no invasion by the priority claimants of the security of the otherwise indefeasible lien. On the other hand, if the postponable lien should contain an excess after discharge of the

133. This assumes that the tax lien which is merely postponed is indefeasible within the meaning of the third exclusionary provision in clause (1). Cf. In re Hardy Plastics & Chem. Corp., 112 F. Supp. 878 (E.D. N.Y. 1953), treating the United States, holding a postponed tax lien, as a secured creditor for the purpose of computing statutory fees under § 40c(2) in a Chapter XI proceeding. The term may be construed, however, not to apply to a lien which is subject to the impairment of demotion. If only the mortgage is indefeasible in the examples given, anomalous results nevertheless can be shown to follow when the salable value varies but little above or a little below the amount secured by the mortgage. The mortgage comes out intact if the value is less but the tax lien is fully enforced if the value is greater than the amount of the mortgage.

134. See notes 84 and 117 supra.
claims entitled to priority under (1) and (2), there is no reason why the lienholder should not retain the excess as against not only inferior lienors but other unsecured creditors.

Correlation of Liens and Priorities

It does the Conference draft no credit but is perhaps politically imperative that tax liens should not be subjected to invalidation in the same way as other kinds of statutory liens. Accumulated tax liens were the bane primarily responsible for the inclusion of a measure diminishing the strength of statutory liens in the Chandler Act of 1938.\(^\text{135}\) It is to be observed, however, that they are subjected by the Conference draft to postponement under the circumstances which would require invalidation of other statutory liens. Since taxes are in any event entitled to priority pursuant to Section 64a(4), the only creditors directly benefiting from invalidation, as opposed to postponement, of tax liens would be the small group who are entitled to priority under Section 64a(3) and tax claimants entitled to priority under Section 64a(4) but not to liens. Elevation of the third class of priority claims would involve no significant interference with revenue since such claims arise only in the relatively few cases where expenses are incurred in preventing or upsetting a discharge or confirmation or arrangement or plan or in obtaining a conviction of a criminal bankrupt.\(^\text{136}\) Insofar as tax liens are accorded preference in bankruptcy over unsecured tax claims, the result is deemed to be without sufficient justification. The policy of Section 64a(4) to treat all tax claims as on a parity without respect to the chronology of their accrual or the nature of the taxing authority is believed to be sound.\(^\text{137}\) The existence of a lien securing a particular tax is, so far as concerns competing tax authorities \textit{inter se}, a circumstance which should not determine relative priority.\(^\text{138}\) Invalidation of tax liens would afford an additional advantage under the measure proposed in that the trustee would be enabled to preserve those liens superior to otherwise indefeasible liens and thereby

\(^{135}\) Committee Report Analysis, \textit{supra} note 32, at 212; Weinstein, \textit{op. cit. supra} note 32, at 144.

\(^{136}\) See Statement on Behalf of the National Bankruptcy Conference in \textit{Hearing, supra} note 39, at 26. In order for claims for expenses to be allowed under § 64a(3), it must be shown that they were incurred by a creditor or creditors whose services were successful. 3 Collier \textit{supra} note 32, at 2058; \textit{id. supra} note 32, at 2108-2109.

\(^{137}\) 3 Collier \textit{supra} note 32, at 2058; \textit{id. supra} note 32, at 2108-2109.

\(^{138}\) A tax liability secured by lien tends to differ from a tax not so secured only by virtue of having become delinquent earlier and perhaps made a matter of constructive notice by compliance with certain procedural formalities. 3 Collier \textit{supra} note 32, at 2058. Whether these formalities have been complied with are not likely to be a matter of concern to other taxing authorities, since taxes are ordinarily assessed and liens therefore caused to attach without reference to what the records may show regarding other encumbrances against the debtor's property.
to benefit all unsecured creditors including those with priority under Section 64a. Regret is accordingly expressed over the special treatment of tax liens which entails complications of language and of administration without adequate justification in principle or policy.

The Chandler Act of 1938 took a modest step toward correlating liens and priorities, even while it was complicating the schedule of distribution in bankruptcy by inserting for the first time a category of liens below certain classes of unsecured claims and above others.\textsuperscript{135} The correlation was most successful with respect to wage liens, which under certain circumstances were postponed to the priority for wages and then restricted in the amount of their payment to the same extent as provided for wage claims entitled to priority. The result was that, except for wage liens escaping the reach of Section 67c altogether and those not restricted as against other liens, wage liens were absorbed by wage priorities.\textsuperscript{140} Tax liens on personality unaccompanied by possession were assimilated to tax priorities, but an advantage was preserved: Even when there were no creditors entitled to priority under Section 64a(3), a tax authority asserting a lien under Section 67c was one step ahead of those with priority under Section 64a(4).\textsuperscript{141} While rent lienors and landlords entitled to priority under Section 64a(5) were ordinarily subjected to the same restriction on the amount payable on their claims under the Chandler Act, the position of rent lienors was substantially better than that of landlords entitled to no more than a priority because of the right of tax authorities to assert priority for their unsecured claims over the latter but not the former.\textsuperscript{142}

The amendment of 1952 carried the correlation project somewhat further. It has already been noted that its invalidation of state-created liens not perfected by possession or levy of some kind was viewed as an implementation of the policy recognized in the abolition by the Chandler Act of state-created priorities except for

\textsuperscript{139} For more complete discussion of this matter see Wolfe, \textit{supra} note 62; Note, 62 Yale L. J. 1131 (1953).

\textsuperscript{140} 4 Collier \textit{\$ 67.21}, at 207; \textit{\$ 67.28}\textsuperscript{1}, at 307.

\textsuperscript{141} Two other minor advantages may be noted: A tax lien may be enforced even though it secures a penalty which can not be allowed as a claim under \textit{\$ 57j}. Kentucky v. Farmers Bank & Trust Co., 139 F. 2d 266 (6th Cir. 1943), criticized in Note, 3 Stan. L. Rev. 711, 723 (1951). It is also pointed out in a Note, 62 Yale L. J. 1131, 1133 (1953), that a tax lien, even though postponed under \textit{\$ 67c}\textsuperscript{(1)}, may not be subject to the limitation placed on a tax priority by \textit{\$ 64} under which payment of a property tax cannot exceed the value of the interest of the bankrupt estate in the property. Both advantages should be eliminated.

\textsuperscript{142} See Note, 62 Yale L. J. 1131, 1133 (1953). An implication in Weinstein, \textit{op. cit. supra} note 32 at 145, that the order of priority for landlords is the same under \textit{\$ 64a} and \textit{\$ 67c} is due to an over simplification in statement of the effect of the amendment of 1938.
landlords. With reference to rent liens the amendment of 1952 appears to have overshot the mark. If a state-created rent lien is of the kind invalidated by Section 67c(2), it can be accorded no recognition whatsoever in bankruptcy although, of course, the debt once secured thereby is a general claim against the estate, whereas a state-created priority is still honored to the extent of rent accrued within three months before bankruptcy. If the rent lien is accompanied by possession, levy, sequestration, or distraint, it is restricted in the amount of payment to the same extent as is a state-created priority, but it overrides all but the first two priorities. It is apparent that if correlation is a desideratum, the Chandler Act and the amendment of 1952 fell considerably short of realizing the full possibilities of articulating the statutory lien and priority provisions.

The National Bankruptcy Conference draft, like the two enacted versions of the subdivision it would amend, treats the problem of correlation as of secondary importance. It does correct the inequity visited by present Section 67c(2) on a landlord holding an invalidated lien by saving to him the same rights as are accorded a landlord with a priority under Section 64a(5). By a provision which seems to comprehend contractual and common-law liens for rent as well as those created by statute, landlords holding liens which are not invalidated by clause (2) are nevertheless forced to accept subordination of their securities to the first and second priorities and restriction to the same extent as landlords with no more than a state-created priority under Section 64a(5). The proposal thus would achieve uniformity with respect to the amounts payable on rent liens and rent priorities, but it would still recognize two ranks for landlords.

A Further Proposal

The authors of the present piece have been troubled by the complexity and the convolutions of the National Bankruptcy Conference draft even while they approve its objectives and accomplishments. They have wondered whether the following draft does not attain substantially the same objectives in more economical and

143. See notes 101-102 supra and text thereto.
143a. Of course a court might be so impressed by the anomaly produced by recognition in bankruptcy of a state-created priority for a landlord as against a complete denial of any preference to a state-created lien for the same kind of creditor that a rationale would be found for the conclusion that the lien statute gave a priority for the purposes of § 64.
145. Cf. references cited in note 139 supra.
146. In the last sentence of clause (2).
147. This by the next to the last sentence of clause (3).
direct language and whether, once its implications are properly understood, it may not command as ready acceptance as the NBC draft:

c. Every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor; every statutory lien which is not perfected or enforceable as against subsequent bona fide purchasers from the debtor; and every lien for rent shall be invalid as against the trustee: Provided, however, that the court may, on due notice, order any such lien to be preserved for the benefit of the estate and in that event the invalid lien shall pass to the trustee. A lien not preserved but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy. Claims for wages, taxes, and rent secured by liens hereby invalidated or preserved shall be respectively admitted and restricted as are debts therefore entitled to priority under clauses (2), (4), and (5) of section 64, subdivision a. This subdivision shall not apply to liens enforced by sale before the petition, nor to proceedings under section 77 of this Act, nor

148. The phrase, "levied at the instance of one other than the lienor," has been added to make clear the distinction between priorities in partial or total liquidations and statutory liens enforced by judicial proceedings, including execution, at the instance of the lienor. It is argued by Professor Wolfe, supra note 62, that a statutory lien on personalty unaccompanied by possession, levy, or distraint is a "floating lien" and that if there is an effort to enforce such a lien by levy or distraint within four months of bankruptcy, it should be voidable to the same extent as are liens by judicial proceedings under § 67a. Section 67a, however, does not affect liens by judicial proceedings that enforce liens acquired over four months before bankruptcy. 4 Collier 67.04[1]. Nor does it matter that the lien thus being enforced is inchoate. See Mussman and Riesenfeld, Garnishment and Bankruptcy, 27 Minn. L. Rev. 1 (1942). It may be that if a lien of the type invalidated by the first sentence of the proposal made in the text is sought to be enforced by judicial proceedings or by distraint within four months of bankruptcy, it should be subjected to avoidance under § 67a when the other conditions of that provision are satisfied. That would tend to correlate § 67a more closely with § 3a(3) as it now reads. Cf. 4 Collier 67.03[4].

149. Like the National Bankruptcy Conference draft this proposal purports to deal with all rent liens: contractual, statutory, and common-law, and whether arising by distress or otherwise. It may be esthetically objectionable to deal with contractual liens here but if it is sound policy to assimilate rent liens of whatever kind to the priority for rent, this seems an efficient way to do it. The authors are dubious here: There is a serious question whether contractual liens of landlords ought to be subjected to treatment different from that given other kinds of contractual liens, even though landlords are specially favored under § 64a(5). The problem is complicated by the fact that a landlord's contractual lien is likely to cover exempt property, and it is at least doubtful that bankruptcy ought to interfere with this kind of bargain. Cf. Lockwood v. Exchange Bank, 190 U. S. 294 (1903). It may be safer to stick with the language of present 67c: every lien, "whether statutory or not, of distress for rent."

150. No consideration seems to have been given anywhere to the impact of §§ 67b and 67c on exempt property. It is doubted that statutory liens, particularly tax liens, ought to be invalidated insofar as they attach to exempt property. It may therefore be advisable at this juncture to add "liens against exempt property" to the list of exclusions in the last sentence.
to proceedings under chapter X of this Act unless an order has been entered therein directing that bankruptcy be proceeded with.\textsuperscript{151}

Even a cursory examination of this proposal discloses that it adheres closely to the National Bankruptcy Conference draft. It abandons the techniques of postponement and restriction of liens. It abandons the attempt to differentiate between general liens and those upon specified items of property in favor of a test which is familiar under both bankruptcy and nonbankruptcy law and can be easily applied.\textsuperscript{162}

The new test is predicated on the assumption that if a particular lien has sufficient integrity under nonbankruptcy law to bind property even as against bona fide purchasers, it ought to be recognized as effective against the trustee.\textsuperscript{155} If the debtor can scrape off the lien by disposing of the property to a subsequent bona fide purchaser, then the lien is a tenuous one and so like a statutory priority established for settling conflicting claims of competing creditors in a partial or total liquidation that it ought to be treated like one in bankruptcy. If a statutory lien is not perfected as against a levying creditor, it is of course now vulnerable to attack by the trustee under Section 70c.\textsuperscript{164} Unless they have liens valid as against subsequent purchasers, it relegates wage, tax, and rent lienors to their priorities, thereby achieving a closer correlation of the lien provisions with

\begin{footnotes}
\item[151] The saving provisions in the NBC draft, "does not apply to property which cannot be sold in bankruptcy for more than the amount of the liens upon it which are indefeasible in bankruptcy" and "does not apply to solvent bankrupt estates," have not been included here. The reasons for omitting the first are discussed in the text accompanying notes 129-131, \textit{supra}. The second is a rephrasing of an exception now appearing in § 67c. It was first introduced into the section by the amendment of 1952 without any reason being given for its inclusion. In view of the fact that an estate may be solvent only because of the inclusion of substantial exempt assets, the desirability of such a limitation is questionable, and it has accordingly been deleted. See 4 Collier § 67.02[3], at 40.

The exclusionary provisions referring to reorganization proceedings under § 77 and Chapter X are broader than corresponding provisions in present § 67c, but the reason for the limitation on these exclusionary provisions is not clear. See 4 Collier § 67.20[8], at 203. It may be wondered whether application to proceedings under Chapter XII should not also be denied.

\item[152] See Bankruptcy Act §§ 3b, 21g, 60a(2), 67a(3), 67d(6), and 70d. With reference to the development and utility of the concept outside of bankruptcy see Gilmore, \textit{The Commercial Doctrine of Good Faith Purchase}, 63 Yale L. J. 1057 (1954).

\item[153] Certainly such an attribute negatives any suggestion that the lien is no more than a priority or that it is merely a "floating lien" on fluctuating assets of the debtor.

\item[154] 4 Collier § 67.26, at 283-286. It is possible for circuitry of priority to develop under § 70c: if, e.g., an attachment lien indefeasible under § 67a and a federal tax lien not perfected under Int. Rev. Code of 1954 § 6323 cover the same property, the tax lien may be invalid against the trustee under § 70c (see note 159 \textit{infra}) yet superior to the attachment lien (see note 80 \textit{supra}). It seems desirable, therefore, for a preservation clause to be included in § 70c. The justification for such an amendment exists whether or not the proposed draft of § 67c is adopted. \textit{Cf.} note 117 \textit{supra}.
\end{footnotes}
those for priority.\textsuperscript{158}

The opposition of the representatives of the United States Treasury,\textsuperscript{159} not to mention those of the state and local taxing authorities,\textsuperscript{157} must of course be anticipated with respect to any proposal that alters without substantially improving the position of the Government. It is to be noted that the position of the United States is improved by the proposal with respect to liens on personalty perfected by notice-filing;\textsuperscript{158} and so far as its liens on both realty and personalty which have not been so perfected are concerned, the proposed statute goes no further than to codify the view already taken in several cases.\textsuperscript{159} No discrimination is made against state or local authorities in respect to any statutory liens given them by state statute. The holder of an invalidated tax lien is treated worse than the postponed tax lienor in only two situations: (1) when there are claims entitled to priority under Section 64a(3)—a comparatively rare situation; (2) when the result of invalidation is to compel the tax lienor to share \textit{pro rata} with a tax claimant under Section 64a(4) whereas postponement would permit realization on the lien in advance of any distribution to priority claimants below the first two classes. The latter result may of course work sometimes to the advantage and sometimes the disadvantage of any particular tax claimant. The proposal to enforce \textit{pro rata} distribution in payment of all tax claims is at any rate sound and can stand on its own.

If the prolonged efforts to obtain a restriction in the amounts payable on tax claims accorded priority under section 64a(4) ever attain success,\textsuperscript{160} the adoption of the proposed draft would make the limitation effective with respect to taxes secured by liens unless perfected in the manner prescribed. But that problem gets us into another story.

\textsuperscript{155} In this the draft proceeds along lines suggested elsewhere. See in addition to references cited in note 139, 4 Collier \textsuperscript{\textcopyright} 67.20 (3); Statement in Behalf of the Nat. Bankruptcy Conf., \textit{Hearing, supra} note 39, at 25.

\textsuperscript{156} Cf. H. R. Rep. No. 2320, 82d Cong., 2d Sess. 12-13, 21 (1952), noting that the Treasury Department objected to provisions in the 1952 amendment of the Bankruptcy Act even though the Government was adequately protected and, indeed, its position was actually bettered somewhat.

\textsuperscript{157} Cf. \textit{Hearing, supra} note 139.

\textsuperscript{158} Federal tax liens perfected by notice filing under Int. Rev. Code of 1954 \textsection 6323 are valid against subsequent bona fide purchasers. Schmitz v. Stockman, 151 Kan. 891, 101 P. 2d 962 (1940) (tax lien on wheat grown by farmer-debtor enforced against innocent purchasers of wheat.)


\textsuperscript{160} See note 70 \textit{supra}.