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Notes

Applicability of the “General and Unperfected Lien” Doctrine to Contractual Liens

The United States Supreme Court in its 1958 per curiam decision in United States v. R. F. Ball Constr. Co. subordinated a prior unrecorded contractual lien to a subsequently filed federal tax lien, characterizing the former “inchoate and unperfected.” The author of this Note analyzes statutory and case law, the facts of Ball, and the congressional policy on federal priority in order to determine what the Court meant by using those words. He concludes that Ball should be interpreted as holding only that a contractual lien will be subordinated to the federal tax lien where the contractual lien has not met the ordinary standards of commercial perfection.

I. INTRODUCTION

A TAXPAYER’S creditors may simultaneously include the federal government, state and local governments, and secured as well as unsecured commercial creditors. When the taxpayer lacks sufficient funds to satisfy the maturing claims of all of his creditors, the age-old problem of priority arises. At common law, priority among similar, competing interests is guided by the cardinal principle “the first in time is the first in right.”

However, the claims of the Government for debts and taxes are given preference over most competing creditors by two statutory provisions: section 3466 of the Revised Statutes of 1875 and section 6321 of the Internal Revenue Code of 1954. Section 3466 provides:

Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall first be satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment there-of, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

2. Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1952). Section 3466 affords the Government a priority, not a lien. Meyer Estate, 159 Pa. Super. 296, 299, 48 A.2d 210, 212 (1946). It covers all debts owing to the Government. However, it is applicable only in the case of an insolvent debtor whose property has passed to some third person, and arises as of the time of the transfer. Massachusetts v. United
And section 6321 states:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . 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.3

Neither section 3466 nor section 6321 indicates a congressional intent to depart from the common law principle “the first in time is the first in right” in order to defeat the rights of prior lienors. But in County of Spokane v. United States,4 the Supreme Court held that the section 3466 priority could defeat an antedating statutory lien, because the latter was not “specific” or “complete.” Two decades later, in United States v. Security Trust & Sav. Bank,5 in an obvious attempt to create harmony between the treatment of a section 3466 priority and a federal tax lien, the Court applied the same standards of specificity and perfection to defeat a prior statutory lien competing with a federal tax lien.

Until 1958, the tests of specificity and perfection had been applied solely to defeat competing statutory liens. However, in United States v. R. F. Ball Constr. Co.,6 the Court summarily reversed a holding that a prior contractual lien outranked a subsequently filed federal tax lien, by characterizing the former “inchoate and unperfected.”7 The principal question raised by the Ball decision is whether or not prior contract rights must meet the same tests of specificity and perfection required of statutory liens in order to defeat a subsequently filed federal tax lien. The impact on secured creditors and legitimate and recognized security transactions may be latent and dangerous if an affirmative answer be reached.

States, 333 U.S. 611, 617 & n.8 (1948). It is unnecessary, for the applicability of section 3466, that actual title to the property have passed; it is sufficient that the debtor has been divested of possession of and control over the property transferred. Bramwell v. United States Fid. & Guar. Co., 269 U.S. 483, 490 (1926).

3. Inr. Rev. Code of 1954, § 6321. Section 6321 creates a lien for tax debts, and is applicable regardless of the taxpayer’s solvency. See, e.g., United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950). Quaere whether the tax lien arises at the time of demand, or at the time of assessment? Inr. Rev. Code of 1954, § 6322. But in United States v. Lias, 103 F. Supp. 341 (N.D.W. Va.), aff’d, 196 F.2d 90 (4th Cir. 1952), it was concluded that the lien arises only after both requirements have been satisfied. 103 F. Supp. at 342. However, the tax lien is invalidated against mortgagees, pledgees, purchasers, and judgment creditors unless notice of the tax lien has been filed. Inr. Rev. Code of 1954, § 6323.

4. 279 U.S. 80 (1929).
7. Ibid. The Court’s use of words such as “specific,” “general,” “inchoate,” and “unperfected” frequently obscures the actual meaning of a decision. Clearly, “specific” and “general” are antonyms, and “inchoate” and “unperfected,” referring to something incomplete, are synonymous. However, the Court has confused at least one
Thus, it will be the purpose of this Note to resolve the above question by tracing and analyzing statutory and case law involving questions of relative federal priority; by analyzing the facts of the Ball case; and by determining and analyzing congressional intent underlying sections 3466 and 6321, and the pertinent provisions of the Bankruptcy Act.

II. THE "GENERAL AND UNPERFECTED LIEN" DOCTRINE AS APPLIED TO STATUTORY LIENS

A. THE SECTION 3466 PRIORITY

The Court early declared that section 3466 was to be liberally construed in favor of the Government, but interpreted the provision merely to create a priority over other unsecured creditors. Thus, from 1805 until 1929, it was the settled view that the section 3466 priority could not defeat antedating liens. However, in 1929, the Court applied a new, broader construction to section 3466.11 In decision by attributing the tests of perfection to the requirement of specificity. The tests of specificity are the following: the lienor must be identified, the amount of the lien must be certain, and the property subject to the lien must be definite. In addition, "perfection" has been said to require the lienor to divest the taxpayer-debtor of title and possession. Thus, it would appear that the tests for specificity and perfection are separable. However, in United States v. Gilbert Associates, 345 U.S. 361 (1953), the Court declared that "specificity" requires that the lien be attached to certain property by reducing it to possession." Id. at 366. The question is whether the Court implied that the tests for perfection include specificity, and that specificity includes perfection. If so, then the words are redundant and the tests for specificity and perfection are inseparable, and before a lien may be either "specific" or "perfected," all of the tests must be met: the lienor must be identified, the amount of the lien must be certain, the property subject to the lien must be definite, and the lien must be reduced to title and possession. In its later decisions, the Court has neither expressly adopted nor expressly rejected the language employed in Gilbert. Thus, the question remains whether the tests of specificity and perfection are separable. If not, then an "inchoate and unperfected" lien has met neither the tests of specificity nor those of perfection. The above analysis becomes crucial in the discussion and interpretation of the Ball decision, infra.

9. See United States v. Hooe, 7 U.S. (3 Cranch) 73 (1805). In Conard v. Atlantic Ins. Co., 26 U.S. (1 Pet.) 366 (1828), the Court made it clear that the federal priority was subordinated to an antedating, "specific and perfected lien." Id. at 444. Although it is not indicated in any of the Court's subsequent opinions, this language may have been the source of the "general and unperfected lien" doctrine. In Brent v. Bank of Washington, 95 U.S. (10 Pet.) 596 (1879), the Court stated that a prior lienor was not defeated by a federal priority. In this case, the Bank was the holder of notes indorsed to it by Brent; when the Bank protested the notes for nonpayment after maturity, its "legal lien . . . for their payment was complete." Id. at 615.
10. See cases cited note 9 supra.
County of Spokane v. United States, the Court held that liens for county corporation taxes, which were assessed against the debtor's personalty before he went into receivership and before the section 3466 claim attached, were neither "specific" nor "completed," and thus were subordinate to the federal priority. The counties' liens were neither "specific" nor "completed" because the counties had not followed the necessary statutory procedure—distraining the property subject to their liens—that would have "completed" them.

This approach was clearly at variance with the Court's earlier settled position. No reason for this departure was apparent. The language of section 3466 had not changed, and there was no indication that Congress disagreed with the Court's original construction of the provision. The extent of the Court's departure became clear only after subsequent decisions.

In 1941, in United States v. Texas, a federal claim under section 3466 was challenged by a state lien for gasoline taxes. Under state law, the state's lien was "first and prior to any and all other existing liens" on all property used by a gasoline distributor in his business. And the state court held that the state's lien subordinated the subsequent federal tax claim. However, the Court reversed, concluding that the state's lien was not sufficiently specific or perfected when the federal claim arose. The property subject to the state's lien was not "specific" or "constant," and the amount of the lien was "unliquidated and uncertain." Furthermore, the state's lien was "inchoate and general" because some judicial process was still required to enforce the lien when the federal claim at-
tached, since the lien “did not of its own force divest the taxpayer of either title or possession.”

In United States v. Waddill, Holland & Flinn, Inc., the Court held that a state court holding that a statutory landlord’s lien was “fixed and specific, and not . . . merely inchoate,” although authoritative of state law, was not controlling on the question of relative priority of competing liens, since this determination is “a matter of federal law.”

The Court then ruled that the landlord’s lien was not specific and perfected, because (1) it was not known on the day the federal claim attached whether the landlord would assert and insist upon his rights under his lien; (2) the amount of the lien was uncertain; (3) the property subject to the lien was indefinite, because the landlord could not enforce his lien against more property than necessary to satisfy the claim for rent; and could not in any event assert his lien against property removed from the premises for more than thirty days; and (4) the landlord had not levied on the property, so that the taxpayer remained in possession and retained title to the property in question.

In Illinois ex rel. Gordon v. Campbell, the state had filed a lien for unemployment contributions, thereby giving constructive notice to all prior or subsequent parties, including bona fide purchasers for value. The state sued to enforce its lien, and had a receiver appointed. Thereafter, a section 3466 priority arose. The Court affirmed a state court holding that the state’s lien was subordinated to the Government’s claim. Although the lienor was identified, and the amount of the lien was certain, the property subject to the lien was indefinite. Furthermore, the Court stated

NOTES

19. Id. at 488.
22. 323 U.S. at 356–57. Compare “This is really a state question.” County of Spokane v. United States, 279 U.S. 80, 94 (1929).
23. 323 U.S. at 357.
24. Id. at 357–58. “[I]t was . . . uncertain whether the landlord would ever assert and insist upon its statutory lien. Until that was done it was impossible to determine the particular . . . rent, or a proportion thereof, upon which the lien was based.” Id. at 357. “The landlord may have been mistaken as to the rental rate or as to payments previously made. . . .” Ibid. Is it likely that a landlord would be “mistaken” as to the periodic rental payments either with respect to amounts previously paid or as to rates?
25. Id. at 358.
26. Ibid.
27. Id. at 358–59.
30. 329 U.S. at 375.
31. Ibid.
32. Ibid. The lien attached to “all the personal property or rights thereto owned or thereafter acquired . . . and used . . . in . . . his trade . . . or business.” Id. at
specificity and perfection required title and possession in the lien-
or,33 and noted that the appointment of the receiver was merely "an initial step in the perfection of the lien."34 Moreover, the Court concluded that recordation of the state's lien did not perfect it.35

In Petition of Gilbert Associates,36 the state court granted priority to a town tax lien which had been foreclosed by sale of the property subject to the lien before the section 3466 priority for taxes arose. However, in United States v. Gilbert Associates,37 the Court reversed. Although the lienor was identified, the amount of the lien was certain, and the property subject to the lien was definite, the town's lien was said to be "general" and "unperfected" because "'specificity' requires that the lien be attached to certain property by reducing it to possession."38

Thus, through case-by-case analysis, the Court drove a wedge into the "first in time is the first in right" principle. The rule applicable to statutory liens competing with section 3466 claims became "the first specific and perfected in time is the first in right."

B. The Federal Tax Lien

The Court initially proceeded upon the stated premise that the Government's lien for taxes attached "subject to the rights of other lienholders"39 or, "saving, of course, the rights of incumbrancers."40 And so Government lawyers were not initially as successful in defeating statutory liens competing with the federal tax lien as they had been in urging the subordination of such liens to the section 3466 priority.41 Lower courts consistently applied the principle "the first in time is the first in right," and awarded priority accord-

32 & n.11. Under local law, it was required that the taxpayer file a schedule of all such property. Id. at 373. However, the taxpayer had not filed such a schedule. Thus, the state had no way of knowing with any degree of certainty to which property of the taxpayer its lien attached, and the lien was, therefore, on "indefinite" property.
33. Id. at 376.
34. Id. at 374.
35. Id. at 374, 376.
37. 345 U.S. 361 (1953) (Justices Frankfurter and Reed dissenting).
38. Id. at 366. Thus, the Court confused the tests for specificity with those of perfection and subordinated a completely "specific" lien, the holder of which had reduced its claim to title to the secured property. Curiously, the Court was not presented with the argument that since the town had title to the property in question, the debtor had no "property rights" to which a federal priority could attach.
40. Id. at 88. For an excellent historical study and analysis of the federal tax lien through 1954, see Kennedy, supra note 11, at 919–90. Courts and historians trace the federal tax lien statute back to 1866. Government fiscal requirements expanded during the Civil War, and tax collections were often frustrated by a transfer of a taxpayer's assets before the Government instituted tax collection proceedings. Id. at 919–20 & n.91. See also Detroit Bank v. United States, 317 U.S. 329, 334 (1943).
In the late 1940's, however, the Government began pressing for the application of the "general and unperfected lien" doctrine to federal tax lien litigation. The reason behind this argument by analogy was clearly to bring tax lien litigation within the rationale of section 3466 cases for the sake of uniform criteria in both areas. However, this argument was lost on lower courts which were unpersuaded by the necessity of harmony, and was generally rejected.

In 1950, however, the Government carried its analogy argument to the Supreme Court in United States v. Security Trust & Sav. Bank. A creditor's attachment lien and subsequent judgment straddled the filing of a federal tax lien. Under state law, since the attachment lien was filed, the creditor could defeat the claims of subsequent purchasers or encumbrancers. However, because the attachment lien could be dissolved unless the attaching creditor reduced his claim to judgment within three years, the Court held that the creditor's lien was "inchoate." Moreover, the Court specifically rejected the doctrine of relation back—merging the attachment lien with the subsequent judgment, and allowing the latter to relate back to the date of the former—to defeat federal interests arising in the interval. Hence, the prior attachment lien was subordinated to the federal tax lien, and the "general and unperfected lien" doctrine was adopted as the rule in federal tax lien litigation for determining questions of priority between statutory lienors and the Government.

Lower courts generally displayed stubborn resistance to the Security Trust decision. For example, in Petition of Gilbert Assoc...
ciates, the state court defeated federal tax liens by referring to the town's tax lien as specific and perfected, and by calling the town a "judgment creditor" within the notice-filing provision. The Court reversed, concluding that (1) since the town had not reduced its claim to title and possession, its lien was "general" and "unperfected," and (2) the notice-filing provision envisages "judgment creditors" in the "usual, conventional sense," that is, holders of judgments rendered by a "court of record."

In United States v. City of New Britain, the city claimed that its real estate tax and water rent liens took precedence over federal tax liens, without reference to which was prior in time. A circuity of liens problem was presented: two mortgages and a judgment lien had been foreclosed before the federal tax lien arose, thereby subordinating the Government's claim; however, under state law, the city's liens took precedence over the mortgages and judgment lien. The state court purported to find a congressional intent to subordinate federal tax liens not only to mortgages and judgment liens, but also to any lien superior to mortgages and judgment liens. On appeal, the only question presented was the priority between the city's liens and the federal tax lien, but the Court acknowledged the Government's subordination to the claims of the mortgagees and judgment lienor. The Court vacated the state court's holding that the federal tax lien was subordinated to both the city's liens and the claims of the mortgagees and judgment lienor, because the principle "the first in time is the first in right" had not been applied. However, the Court guardedly admitted:

In the instant case, certain of the City's tax and water-rent liens apparently attached to specific property and became choate prior to the attachment of the federal tax liens.

New Britain was clearly a departure from the monotony with which the Court had previously disposed of competing statutory

51. "[T]he lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed. . . ." Int. Rev. Code of 1954, § 6323 (a).
53. Id. at 366.
54. Id. at 364.
55. Ibid.
58. Id. at 373-74, 94 A.2d at 15, citing Ferris v. Chic-Mint Gum Co., 14 Del. Ch. 232, 239, 124 Atl. 577, 580 (1924), and Board of Supervisors v. Hart, 210 La. 78, 93, 26 So. 2d 881, 886 (1946).
59. 347 U.S. at 88.
60. Id. at 85-86.
61. Id. at 86-87.
liens. But even though the Government did not completely defeat the city's liens, and the Court admitted that the claims of the mortgagees and judgment lienor had priority, the "general and unperfected lien" doctrine survived.

In 1955, the Court held that an Ohio attachment lien, 62 a Texas garnishment lien, 63 and a South Carolina distress lien 64 were "inchoate" within the decision in Security Trust and were, therefore, inferior to federal tax liens which were filed before the state-created liens were reduced to judgments. In United States v. White Bear Brewing Co., 65 a mechanic's lien for a specific amount was recorded three months before the federal tax lien arose. But the federal tax lien was filed before the lienor obtained judgment and sold the property at a public auction. The lower court subordinated the Government's claim, 66 but, in a per curiam decision, the Court reversed.

C. SUMMARY AND ANALYSIS

The tests which a competing statutory lien must satisfy before it may prevail over either a section 3466 priority or a federal tax lien are clear. The lienor must be identified, the amount of the lien must be certain, and the property subject to the lien must be definite. In addition to this tri-partite test for specificity, the lien must also be perfected, that is, reduced to title and possession. Although recording a lien is normally sufficient to perfect it under state law, the Court has rejected the argument that this is sufficient to perfect a statutory lien competing with either a section 3466 priority or a federal tax lien. As long as a statutory lien remains a lien, it will be subordinated to a federal claim under either section 3466 or section 6321. Thus, "a [statutory] lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent [federal] tax lien, short of reducing the lien to a final judgment." 67

Arguably, the "general and unperfected lien" doctrine is justifiably applied to subordinate statutory liens competing with a federal tax lien. The notice-filing provision protects those interests specifically designated "and no others." 68 In other words, Congress has implied in the notice-filing provision that before a statu-

66. 227 F.2d 359 (7th Cir. 1955).
tory lienor can prevail over an unrecorded federal tax lien, his claim must be reduced to a judgment, rendered by a court of record. Thus, the federal tax lien is superior to statutory liens as of the dates of demand and assessment. Although the Court has not expressly accepted the above analysis, clearly the conclusion must be that the Court has at least been guided by it. Unfortunately, the Court has been inconsistent. In New Britain, the Court conceded that some of the city's liens were specific and choate. However, none of the city's liens had been reduced to title and possession, a deficiency fatal to the town in Gilbert Associates, decided before New Britain, and to the lienor in White Bear, decided after New Britain.

The Court's interpretation of section 3466, however, does not find justification in the language of the provision. The section states, in pertinent part, that debts owing to the Government "shall first be satisfied," and refers to the Government's claim as a "priority." Thus, since section 3466 gives the Government a priority, not a lien, the words of the provision only afford the Government a preference over the claims of other unsecured creditors, and this preference should not extend to encumbered property of the insolvent debtor.

Although there is little indication that Congress has considered the problem, absence of remedial legislation may indicate that Congress has adopted the Court's castigation of statutory liens, an approach consistent with the treatment of state-created liens in bankruptcy proceedings. Although such liens are expressly recognized in the Bankruptcy Act, state-created liens on personalty, unaccompanied by possession of such property are invalid against the trustee in bankruptcy. Curiously, the Court has never used this argument by analogy in either section 3466 or federal tax lien

69. See note 3 supra.
70. See note 2 supra and accompanying text.
72. Bankruptcy Act, § 67(b), 66 Stat. 427 (1952), 11 U.S.C. § 107(b) (1952), recognizes that "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 to any State or any subdivision thereof . . . may be valid against the trustee. . . ."
73. Bankruptcy Act, § 67(c), 66 Stat. 427-28 (1952), 11 U.S.C. § 107(c) (1952), provides as follows:

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 . . . shall be postponed in payment to the . . . [first two priorities under section 64(a)(1), (2), 52 Stat. 874 (1938), 11 U.S.C. § 104(a)(1), (2) (1952)] . . .; and (2) . . . statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivi-
litigation. However, another reason why Congress may be assumed to have adopted the Court's requirement of specificity and perfection for competing state-created liens is that states should not be permitted to impair federal standing to collect taxes by creating liens which could defeat federal claims even though they attach arbitrarily, at uncertain times, in uncertain amounts, and to indefinite property. To allow states to do so would be to give efficacy to the exercise of a power which states do not possess, absent consent of Congress. The Court has suggested that the state-impairment of federal standing may have motivated the adoption and application of the "general and unperfected lien" doctrine in tax lien litigation. It may be reasonable to assume that the same fear of state-created liens was the underlying motive for the requirement of specificity and perfection in section 3466 cases.

Thus, the application of the doctrine to subordinate statutory liens competing with federal tax liens is justifiable as a matter of statutory construction. However, construction of section 3466 does not support the application of the same doctrine in federal priority cases. If the application of the "general and unperfected lien" doctrine to section 3466 litigation is justified at all, it can only be by reference to analogous treatment of state-created liens in bankruptcy proceedings and to rather abstract policy considerations.

III. CONTRACTUAL LIENS AND THE "GENERAL AND UNPERFECTED LIEN" DOCTRINE

A. INTRODUCTION

In United States v. Snyder, the question presented was "whether the tax system of the United States is subject to the recording laws of the States." Deciding in the negative, the Court also necessarily implied that a secret tax lien was valid against a subsequent bona fide purchaser for value. Thus, in order to protect innocent third parties from the operation of the secret tax lien, Congress, in 1913, enacted an amendment to the tax lien statute which invalidated the lien as against mortgagees, purchasers, and judgment creditors until notice of the tax lien was filed. Pledges were added to the list of notice-filing beneficiaries in 1939.
The purpose of the notice-filing provision is clear. Congress intended to protect legitimate and recognized commercial transactions from castigation by a secret tax lien. The committee reports make it patently clear that Congress intended to protect contractual liens attaching prior or subsequent to the tax lien; for example, one report specifically states: "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."  

B. The Ball Case

In R. F. Ball Constr. Co. v. Jacobs, the facts, in chronological order, were as follows: Ball entered into a contract for a housing project in Texas and subcontracted a portion of the work to Jacobs. As part of his contract, Jacobs was required to furnish a performance bond. On July 21, 1951, Jacobs applied to the United Pacific Insurance Company for a bond payable to Ball. As consideration for the Company's undertaking, not only on the Texas project, but for "the payment of any other indebtedness or liability of . . . [Jacobs to the Company], whether [t]heretofore or [t]hereafter incurred," Jacobs assigned to the Company all right, title and interest to any sums then, or which might subsequently become, due under the Texas subcontract. This instrument was executed on July 23, 1951, but was never recorded.

On April 4, 1952, Jacobs applied to the Company for a similar bond required under a subcontract in Kentucky. As part of the consideration for the execution of this bond, Jacobs agreed to indemnify the Company against loss, and the assignment of the proceeds on the Texas project was to be additional security for the Company's undertaking.

On April 30, 1953, a balance of $13,228.55 became due to Jacobs on the Texas project, representing both progress payments and retained percentages. In March and May of 1953, federal taxes were

1954, § 6323(a). The 1939 amendment also provided that mortgagees, pledgees, and purchasers of "securities" were protected from the tax lien, even though filed, until they had actual notice of the lien. Int. Rev. Code of 1939, § 3672(b)(1), (2), 53 Stat. 882-83, now found in Int. Rev. Code of 1954, § 6323(c)(1), (2).

82. 140 F. Supp. 60 (W.D. Tex. 1956).
85. Such an agreement was actually unnecessary, as the bond furnished by the Company on the Texas project explicitly covered future indebtedness. See note 83 supra and accompanying text.
assessed against Jacobs. Thereafter, in May, June, and September of 1953, notices of federal tax liens were properly filed. Jacobs defaulted on the Kentucky project, and between December of 1953 and March of 1954, the Company was required to pay $12,971.88 on its performance bond. Ball instituted an action to determine to whom the $13,228.55 should be paid, and the dispute was reduced to a question of priority between the Company and the Government.

The Company contended that none of the cases relied on by the Government were controlling, since they involved "inchoate judgment liens" which arose by virtue of some statutory, rather than contractual, right. Moreover, the Company argued that its assignment as collateral security was based upon a contract which was prior in time to the federal tax liens, and that it was either a "mortgagee, pledgee, or purchaser" within the notice-filing provision.

The Government, on the other hand, argued (1) "if an attachment or other judicial lien is not sufficiently 'choate' or complete 'to defeat a subsequent tax lien' then a mortgage to secure future indebtedness should likewise be inferior to a subsequent tax lien;" and (2) since the Company had not recorded its assignment, the lien would not, even under state law, be binding against subsequent assignees or creditors, and, therefore, it could not be binding against the Government.

The district court held that the Company's lien prevailed over the federal tax liens, concluding (1) that previous cases involving the priority of competing statutory liens were not controlling; (2) that the Company was "more nearly" a "mortgagee" within the notice-filing provision; and (3) that the language of the notice-filing provision was clear, and did not require that the mortgage be "due at a certain time and in a certain amount and . . . duly recorded in accordance with law." On appeal, the Fifth Circuit affirmed in a per curiam decision.

88. Ibid.
89. Id. at 65.
90. Ibid.
91. Id. at 63.
92. Id. at 64.
93. Id. at 65.
The Supreme Court granted certiorari, and one commentator stated:

The commercial world will await the outcome with extraordinary interest because the Government's position, if successful, might subordinate a widely used credit arrangement—an assignment of money, due or to become due under an existing contract, as collateral security—such subordination being to a federal tax lien against the assignor, which tax lien was not in existence when the assignment was made, but arose subsequently.

In a per curiam decision, with four Justices dissenting, the Court held:

The judgment is reversed. The instrument involved being inchoate and unperfected, the provisions of [the predecessor of section 6323(a)] do not apply. See United States v. Security Trust & Savings Bank, 340 U. S. 47; United States v. City of New Britain, 347 U. S. 81, 86-87.

Thus, for the first time, the Court subordinated a prior contractual lien to a subsequently filed federal tax claim. Notwithstanding the frustrating brevity with which a majority of the Court dismissed the considered opinions of eight judges concerning such a vital question, there appear to be at least three possible interpretations of the Ball decision; that is, the Company was not entitled to the protection of notice-filing as a "mortgagee" because (1) it was not a "mortgagee" in the usual, commercial sense; or (2) even though a "mortgagee" in the commercial sense, it was not a "mortgagee" for tax purposes, either (a) because the interest created by the lien failed to meet the tests imposed by the "general and unperfected lien" doctrine, or (b) because the Company's lien failed to satisfy commercial standards of perfection.

(1) Was the Company a "mortgagee" in the usual, commercial

98. United States v. R. F. Ball Constr. Co., 355 U.S. 587-88 (1958). The Court's citation of Security Trust and New Britain presents a curious analytical problem. Security Trust involved a subordinated statutory attachment lien, and New Britain involved statutory real estate tax and water rent liens which were not defeated by a federal tax lien. Thus, neither case could have been cited for the proposition that contractual liens may be defeated by a subsequently filed federal tax lien. Arguably, the citation of Security Trust was for the proposition that the doctrine of relation back does not apply to unperfected statutory or contractual liens where the effect would be to defeat a federal tax lien. The pages cited in New Britain discussed Security Trust and problems of inchoateness and relation back. Thus, it seems clear that the cases cited merely support the proposition that the doctrine of relation back will not apply to an unperfected contractual lien in order to defeat a federal tax lien.
99. One district court judge, three Fifth Circuit judges, and four Supreme Court Justices.
The Court has declared that the terms "judgment creditor" and "purchaser" are to be limited to their usual, conventional meanings. However, the Court has not defined a "mortgagee" within the notice-filing provision. Congress has similarly failed to provide a definition of "mortgagee," but it is arguable that Congress intended "mortgagee" to refer to a mortgagee of any sort and that it should make no difference whether the mortgage is to secure antecedent, newly acquired, or future debt, or whether or not the mortgagor is left in possession. The Treasury Regulations state:

The determination whether a person is a mortgagee... entitled to the protection of section 6323(a), shall be made by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person.

The Company, by virtue of the assignment as collateral security, became an indemnity mortgagee, an "indemnity mortgage" being one which is given to secure a surety on its contingent obligation. The Company's mortgage was made to secure future indebtedness which it agreed to assume on behalf of Jacobs on either the Texas project or future projects. It is also possible that the Company's lien was in the nature of a mortgage of after-acquired property, since the assignment from Jacobs secured sums due or to become due under the Texas subcontract. Thus, to say that the Company was not at least an indemnity mortgagee, and, therefore, a "mortgagee" in the usual, commercial sense, would be a failure to acknowledge realities.

(2) When is a "mortgagee" a "mortgagee" within the meaning of the notice-filing provision? Although the language of the notice-
filing provision is clear and appears to envision the holder of a mortgage and nothing more, it is arguable that Congress at least intended a "mortgagee" to be someone holding that kind of security which gives the holder a priority over unsecured as well as subsequently secured creditors and bona fide purchasers for value. The Court necessarily implied, in Ball, that it interprets "mortgagee" to mean someone who is not only a "mortgagee" in the usual, commercial sense, but also the holder of a "choate" and "perfected" lien. Thus, the question is when is a mortgage or other contractual lien "choate" and "perfected" so as to give its holder priority over prior unsecured as well as subsequently secured creditors. The answer to this question depends upon the answer to the question: Has the Court in Ball (a) held that a contractual lien must satisfy the tests imposed by the "general and unperfected lien" doctrine, or (b) merely indicated that contractual liens must at least be "commercially" perfected before the holder of a nonpossessory, contractual lien is deemed a "mortgagee" entitled to the protection of notice-filing?

(a) Has the Court in Ball held that a contractual lien must satisfy the tests imposed by the "general and unperfected lien" doctrine? There is no question that the doctrine could have been applied to the facts of Ball so as to subordinate the Company's lien. If the instrument held by the Company was a mortgage of after-acquired property, then the lien arose when the property came into existence, subject only to existing liens.106 Thus, the lien arose on April 30, 1953, subject to the federal tax assessment made in March of 1953. Since it was unknown in March when the sums would come into existence, or, if so, in what amount, the amount of the Company's lien was uncertain, and the property subject to the Company's lien was indefinite. Furthermore, pursuant to the test of specificity, since the Company had not been required to answer for a default on the part of Jacobs before the tax liens were assessed and filed, it was unknown whether the Company would ever assert or insist upon its rights under its lien.

Since the Company was entitled to the balance due from Ball only if and to the extent it was required to pay on one of its performance bonds, it seems more likely that the Company held a mortgage to secure future indebtedness,107 that is, an indemnity mortgage. No advance was made or required to be made until three months after the last of the federal tax liens had been filed. Thus, the Company's right to the balance due from Ball did not accrue until that time. Moreover, the Company's lien was not founded on a present debt,

106. See Osborne, Mortgages 99 (1951).
107. See note 104 supra and accompanying text.
but was made to indemnify the Company against a contingency which might in fact never have occurred.\footnote{108}

However, the view among the authorities is that where there is no debt or advancement made by the mortgagee prior to the perfection of a subsequent lien, but the mortgagee is unconditionally obligated to make a subsequent advance pursuant to an indemnity mortgage contract, the mortgagee's lien relates back, for priority purposes, to the time when the mortgage was executed.\footnote{109} Applied to \textit{Ball}, this view indicates that although the Company's lien was general when the tax liens were filed, the lien became specific when the Company was required to pay on the Kentucky performance bond, and, for priority purposes, related back to the date on which the mortgage was executed. Thus, the Company's lien, by relation back, antedated the tax liens by nearly two years. However, the Court has consistently refused relation back in cases involving competing statutory liens,\footnote{110} and in \textit{Ball} the Court refused to allow the Company's contractual lien to relate back to the date of execution.\footnote{111}

But even assuming \textit{arguendo} that the Company's lien was specific, was it also fully perfected? The Court has stated that before a \textit{statutory} lien is perfected the lienor must have divested the tax-

\footnote{108. The \textit{Ball} case has been interpreted to stand for the proposition that: [The] federal tax lien will prevail over a previous assignment to secure a contingent obligation if the event against which the assignee sought protection had not occurred when the federal tax lien arose and this upon the theory that until such event arose the assignment was inchoate and unperfected. \textit{Wolverine Ins. Co. v. Phillips}, 165 F. Supp. 335, 350 (N.D. Iowa 1958). Writing under an appropriate title, one commentator stated: If the effect of the \textit{Ball} decision reached no further than to affect the rights of sureties under indemnifying agreements, it would cause enough discomfort. But the implication of the decision goes far beyond the narrow issues which were decided. It throws doubt upon those cases in which mortgage holders may make optional advances . . . [for taxes and so on in order to protect the secured property]. Whether or not such payments will become necessary or will be made at all is entirely speculative at the time the mortgage instrument is executed. \textit{Heron, Federal Tax Claims Again, or Devastation Revisited}, 28 INS. COUNSEL J. 112-13 (1959). (Emphasis added.)}

\footnote{109. See S \textsc{Glenny}, \textsc{Mortgages}, § 402 (1943); 4 \textsc{Pomeroy, Equity Jurisprudence}, § 1196 (5th ed. 1941).}


\footnote{111. See note 98 \textit{supra}.}
payers of title or possession.\textsuperscript{112} or perhaps both.\textsuperscript{113} If the same test be applied to the Company's contractual lien, then clearly its lien was not perfected at the time the federal tax liens arose and were filed, because the Company had not reduced its lien either to title or possession.

Thus, the "general and unperfected lien" doctrine could have been applied to subordinate the Company's lien, but the question remains whether the doctrine was applied. An argument can be made that the Court did apply the doctrine to geld the Company's lien. First, the words "inchoate" and "unperfected" have been used only in cases involving the subordination of competing statutory liens. Arguably, therefore, the Court may have indicated its application of the doctrine to a contractual lien in Ball through the use of those words. Secondly, the cases cited, Security Trust and New Britain, involved the question whether competing liens were "specific" and "perfected." Thirdly, the dissenting opinion in Ball did not specifically refute the notion that a majority of the Court had applied the doctrine to the facts involved. Rather the opinion dealt with an argument that not only was the Company's lien a "mortgage," perfected on its date so as to entitle the Company to protection as a "mortgagee" within the notice-filing provision, but also that the cases cited by the majority were not controlling. Even in dissent, four Justices tacitly resigned themselves to the supposed fact that the majority had applied the "general and unperfected lien" doctrine to castigate the Company's contractual lien, and some lower courts were similarly persuaded.\textsuperscript{114}


\textsuperscript{113} There is some question whether the requirements of title and possession are conjunctive or disjunctive. In United States v. Gilbert Associates, 345 U.S. 361 (1945), although the town had a tax title, it had not reduced its lien to possession. The Court stated that "specificity" required that the taxpayer be divested of possession, and concluded that the town's lien was "general" and "unperfected." Id. at 366. However, in New Britain, the city had reduced its lien to neither title nor possession, yet had a "choate" lien. Thus, quære whether title and possession are actually required if the lienor has an otherwise "specific" lien? Gilbert Associates implies that a lien is not even "specific" unless the lienor has reduced his claim to title and possession; however, New Britain merely indicates that a lien may be "specific" and "choate" regardless of whether the lien has been reduced to title or possession. Subsequent cases tend to follow the approach that a statutory lien must meet tests of both specificity and perfection, and that either alone is insufficient. See, e.g., United States v. White Bear Brewing Co., 350 U.S. 1010 (1956).

\textsuperscript{114} In First State Bank v. United States, 166 F. Supp. 204 (D. Minn. 1958), the district court construed Ball to mean that "an assignment . . . [does not constitute] a mortgage within the meaning of" the notice-filing provision. Id. at 210. The lower court apparently confused "perfection" with "specificity" in its analysis of Ball. See generally id. at 208–10. This is not inconsistent with the Court's predication in the Gilbert decision. See notes 7 & 113 supra. In Wolverine Ins. Co. v. Phil-
However, considering the effects of applying the doctrine to contractual liens, a more persuasive argument may be made that the Court did not apply the "general and unperfected lien" doctrine to the facts of Ball. The justifications that may exist for subordination of statutory liens to Government claims do not apply to contractual liens. Furthermore, practically no contractual security interest in property satisfies the Court's tests of specificity and perfection heretofore limited to statutory liens. Until a mortgage is terminated by payment, it is normally unknown whether the mortgagee will assert and insist upon his rights under his lien. The property subject to a mortgage may frequently be indefinite, as when the mortgage covers after-acquired property, accessions, or a shifting stock of goods. Furthermore, it is usually unknown in advance how much of the mortgaged property will be needed to satisfy the mortgagee's claim in the event the mortgagor defaults.

The amount of the secured debt is frequently unliquidated and uncertain, as when the mortgage covers future advances. Moreover, although the mortgagor will normally pay all or at least part of the secured debt, there may be disagreement over the amount or application of payments. And if the mortgagor pays the debt before maturity, the total amount of the debt will be reduced to the extent of interest payments saved.

The modern mortgage does not of its own force and effect divest the mortgagor of title or possession, although in some states the mortgagee is said to have title. Unless legitimate and recognized mortgage transactions are to be completely subordinated to subsequent federal claims, it is absurd to require a mortgagee to reduce...
his lien to title and possession in order to perfect it, since contractual liens are normally perfected either by filing the security instrument, or by taking possession of the secured property. But for tax purposes filing is insufficient to perfect a statutory lien, and possession without title is also probably inadequate. Pledges generally have possession, but not title. Mortgagees generally do not have possession, and will have title only in “title theory” states.

If contractual liens must be “specific” and “perfected” to qualify their holders as “mortgagees” or “pledgees” within the notice-filing provision, the impact on security transactions may be latent and dangerous. For example, lenders will be more reluctant to enter into legitimate security transactions with borrowers who incur large annual tax debts or those who are unable to provide additional security. However, commercial lenders could establish blanket interest rate increases, or could charge higher rates to borrowers who are unable to provide sufficient additional security. Presumably, borrowers with high annual tax liabilities may be in a position to give additional security of a fixed, definite character, so that financing institutions may be willing to extend credit to them at present interest rates. However, borrowers with the greatest need for secured financing may be in no position to provide such additional security or incur higher interest rates. Thus, security transactions could be seriously curtailed.

Perhaps the Government must be given an absolute preference over the property of delinquent taxpayers to give efficacy to proper administration of federal tax laws in order to assure that federal taxes will be collected. However, when Congress enacted the Bankruptcy Act, it did not consider an absolute priority necessary. In bankruptcy proceedings, the federal tax lien must be accompanied by possession or be enforced by sale before bankruptcy unless it applies to realty, or be deferred to the payment of claims entitled to the first two “priorities.” If the federal tax lien is on personalty

117. If commercial perfection is the test, holders of commercially perfected liens might further protect themselves from subsequently filed federal tax liens through the “no property” argument. See note 143 infra.

118. Bankruptcy Act, § 67(c)(1), 66 Stat. 427 (1952), 11 U.S.C. § 107(c)(1) (1952). Although there are only five degrees of priority, there are actually several more classes of prior claims. The claims which are entitled to the first priority may be summarized as follows: (a) necessary expenses of maintaining the estate after the petition has been filed; (b) filing fees not paid by the bankrupt; (c) fees for the referees’ salary fund; (d) fees for referees’ expense fund; (e) costs incurred by creditors in recovering assets for the bankrupt estate; (f) costs and expenses of administration, including the trustee’s expenses incurred in opposition to a discharge or prosecuting a crime relating to bankruptcy; (g) witness fees; (h) attorneys’ fees for the petitioning creditors; and (i) attorneys’ fees for the bankrupt. See Bankruptcy Act, § 64(a)(1), 52 Stat. 874 (1938), 11 U.S.C. § 104(a)(1) (1952). The second priority is restricted to claims for wages. However, this priority is restricted, both as to the amount—$600—and with regard to the time when the wages were earned.
and is accompanied by possession, or has been enforced by sale before bankruptcy, it is satisfied from the bankrupt's assets before the claims of those entitled to priorities under the act. However, the lien is subject to the "first in time is first in right" principle with respect to competing liens.\footnote{119} Thus, if a contractual lien is perfected before the Government perfects its tax lien, the former is given priority. If the federal taxes are not liens, they have only a fourth priority over the residue of the bankrupt's unencumbered assets,\footnote{120} and all claims arising under section 3466, other than taxes, are relegated to the fifth and last priority,\footnote{121} and are likewise satisfied only from unencumbered assets. Since Congress has subordinated federal claims to perfected contractual security interests in bankruptcy proceedings, there is a strong argument that it would not withdraw the ordinary preferred position from contractual liensors in nonbankruptcy proceedings without expressly so providing.\footnote{122}

In the notice-filing provision, Congress has expressly protected mortgagees, pledgees, and purchasers from the operation of the secret tax lien, and it is probable that the underlying congressional intent was to give broad protection to such persons from interference with their legitimate and recognized commercial transactions. The application of the "general and unperfected lien" doctrine to contractual liens would do violence to such an intent, and virtually castigate most secured credit arrangements in favor of subsequently arising federal claims for debts or taxes.

The Court must have known of the mechanics of security transactions and that few, if any, contractual liens could meet the tests of specificity and perfection. Then the Court must have recognized that the application of the "general and unperfected lien" doctrine would have latent and dangerous effects on legitimate commercial transactions, and that business practices generally would be seriously curtailed. Furthermore, it is probable that the Court was aware of the protective congressional intent inherent in the notice-filing provision as well as the relative treatment of federal claims and contractual liens in bankruptcy proceedings. Thus, it is probable that the Court applied a more reasonable test of perfection, one more closely allied with congressional intent and commercial practices, which the Company's lien failed to satisfy.\footnote{123}

\footnote{119. See California State Dep't of Employment v. United States, 210 F.2d 242 (9th Cir. 1954).}
\footnote{122. See notes 79–81 supra and accompanying text.}
\footnote{123. But see notes 108 & 114 supra and cases discussed therein.}
(b) Has the Court in Ball merely indicated that contractual liens must at least be "commercially" perfected? The Court referred to the Company's lien as "inchoate and unperfected." The determination of relative priority between federal claims and competing statutory liens was initially said to depend upon whether the competing lien was "specific" and "completed" when the federal claim attached.\textsuperscript{124} Thereafter, "completed" was changed to "perfected."\textsuperscript{125} Subsequently "choate" was adopted.\textsuperscript{126} The tests for specificity and perfection are clear. Before a lien is "specific" the lienor must be identified, the amount of the lien must be certain, and the property subject to the lien must be definite. A statutory lien is "perfected" when it has been reduced to title and possession. Literally, the tests for specificity and perfection are separable. "Specific" and "choate" are not synonymous. But since "inchoate" means "incomplete," and "unperfected" means "not brought to completion,"\textsuperscript{127} the phrase "inchoate and unperfected" is literally redundant. If "perfected" does not include "specific," then the tests of "choateness" and "specificity" are also separable.\textsuperscript{128}

Arguably, therefore, since the Court held that the notice-filing provision did not apply to the Company's lien in Ball because it was "inchoate and unperfected," the Company's lien was subordinated because it was "incomplete," not because it was "general." If a contractual lien must be "complete" before its holder is a "mortgagee" or "pledgee" within the notice-filing provision, the question arises as to how and when such a lien is normally "completed."

Since Congress failed to specify a requirement of perfection for the beneficiaries of notice-filing, it may be that by referring to a "mortgagee" Congress merely had reference to the holder of a contractual, nonpossessory security interest in property, and nothing more. This construction, however, leads to the curious conclusion that a security interest binding against no one under state law except the immediate parties thereto, as in Ball, may be binding against the Government.\textsuperscript{129} Even assuming that Congress intended to give broad protection to the beneficiaries against interference with their legitimate security transactions, there is little justification for assuming further that Congress deemed it necessary to go that far in order to give mortgagees and pledgees necessary protection. Congress more likely intended that "mortgagee" refer to a person who is not only a "mortgagee" in the usual, commercial sense, but

\begin{itemize}
  \item \textsuperscript{124} County of Spokane v. United States, 279 U.S. 80 (1929).
  \item \textsuperscript{125} New York v. Maclay, 288 U.S. 290, 293 (1933).
  \item \textsuperscript{127} Merriam-Webster, New International Dictionary (2d ed. 1957).
  \item \textsuperscript{128} But see note 7 supra.
  \item \textsuperscript{129} This seems to be the conclusion reached by the dissenting opinion. United States v. R. F. Ball Constr. Co., 355 U.S. 597, 594 (1958) (dissenting opinion).
\end{itemize}
also the holder of that kind of security interest which protects the
holder against the claims of prior unsecured as well as subsequently
secured creditors. The holder of a security interest normally obtains
that degree of protection either by filing the security instrument or
by taking possession of the secured property.

This is consistent with the manner of perfecting a contractual
security interest under the Bankruptcy Act. Congress has provided
in the preference section of the act that a contractual interest in
personalty is deemed perfected when no subsequent lien upon the
same property could be obtained which could create rights superior
to those of the original lienor. If realty is involved, the contractual
interest is deemed perfected when no subsequent bona fide pur-
chaser from the debtor could gain rights in the realty greater than
those of the original lienor. And a person may so perfect his
rights either by filing his security instrument or by taking posses-
sion of the secured property, depending upon requirements under
state law.

State laws vary as to the time allowed for a lienor to file or take
possession. In some states, a grace period is allowed. Thus, in such
states, the interest must be perfected by filing the security instru-
ment or by taking possession within a specified number of days
after the contract is executed, or creditors or lienors who become
such during the interval take priority regardless of later perfection.
In states where there is no grace period legislation, one of two views
prevails: either the lienor is given a “reasonable time” after execu-
tion of the agreement within which to perfect his interest, or the
lienor’s security interest is void against subsequent parties until per-
fected by filing or by taking possession of the property. Some
states have a combination of grace period and no grace period leg-
islation. For example, in Minnesota, holders of trust receipts are

130. See, e.g., Minn. Stat. § 511.01 (1957).
(1952).
132. Ibid.
96(a)(6), (7) (1952).
178, § 1 (1954) (20 days).
135. The Courts cannot agree on what constitutes a “reasonable time.” Matter
of Paramount Finishing Corp., 250 N.Y. 558, 182 N.E. 180 (1932) (6 days be-
tween delivery and filing was not unreasonable); in Mitschele-Baer, Inc. v. Liv-
ingston Sand & Gravel Sales Co., 108 N.J. Eq. 286, 154 Atl. 752 (1931), the mortgage
papers traveled five times through the mails to cure formal defects, and 12 days
between execution and recording was not unreasonable. However, where the
mortgage was received by the recorder 5 days after execution, but was not recorded
until the recording fee arrived 10 days later, it was held that the delay was un-
136. See, e.g., Minn. Stat. § 511.01 (1957) (chattel mortgages); Minn. Stat.
§ 511.18 (1957) (conditional sales contracts).
allowed thirty days\textsuperscript{137} within which they must record their interests and holders of factor's lien contracts are allowed fifteen days\textsuperscript{138} within which to record. The statutes regulating conditional sale contracts\textsuperscript{139} and chattel mortgages\textsuperscript{140} do not specify a stated time for recordation, and both security interests are void against subsequent parties until recorded. Assignments of accounts receivable have been validated by statute in Minnesota,\textsuperscript{141} and need not be filed to be valid against subsequent parties.

Because of the variation among states as to how and when a contractual lien is perfected, two problems remain. The first problem is whether in a grace period or "reasonable time" jurisdiction a federal tax lien filed during the interval between execution and commercial perfection of the contractual lien will take priority over the latter. If the principle "the first in time is the first in right" is strictly applied, the federal tax lien should prevail, although the contractual lien will be valid against creditors or lienors becoming such in the same interval if the contractual lien is perfected within the grace period or "reasonable time" allowed. Although the Bankruptcy Act allows relation back with certain restrictions,\textsuperscript{142} the notice-filing section makes no such provision. The second problem is whether security interests which are validated by state law without recordation will subordinate subsequently filed federal tax liens. If the bankruptcy test of perfection is the standard, such interests are perfected when executed. However, it is suggested that the notice-filing provision be amended to provide that such security interests be invalid against subsequently filed federal tax liens unless notice

\textsuperscript{137} MINN. STAT. § 522.07 (1957).
\textsuperscript{138} MINN. STAT. § 514.83 (1957).
\textsuperscript{139} MINN. STAT. § 511.18 (1957).
\textsuperscript{140} MINN. STAT. § 511.01 (1957).
\textsuperscript{141} MINN. STAT. § 521.02 (1957).
\textsuperscript{142} Bankruptcy Act, § 60(a)(7)(I)(A), 64 Stat. 26 (1950), 11 U.S.C. § 96(a)(7)(I)(A) (1952), provides that where state law allows a specific period of not more than twenty-one days after the execution of a security agreement within which to perfect such agreement, and the lienor perfects within such stated period, the date of perfection relates back to the date of execution. Hence, in Minnesota, factor's lien contracts must be perfected within fifteen days of the date of execution to entitle the holder to relation back for bankruptcy purposes. However, Bankruptcy Act, § 60(a)(7)(I)(B), 64 Stat. 26 (1950), 11 U.S.C. § 96(a)(7)(I)(B) (1952), provides that where state law specifies no such period, or specifies a period of more than twenty-one days within which a security interest must be perfected, and the interest is perfected within twenty-one days, then the date of perfection relates back to the date of execution for bankruptcy purposes. Applied to Minnesota law, since neither chattel mortgages nor conditional sales contracts are allowed a specified period within which to be perfected, the holder of either interest will be entitled to relation back if he records or otherwise perfects, as by taking possession, within twenty-one days after execution of the contract. The holder of a trust receipt, on the other hand, must perfect his interest within twenty-one days after execution of the trust receipt agreement.
of the lienor's interest is first filed with the local Director of Internal Revenue.

Thus, "any mortgagee" probably refers to a person holding a nonpossessory, contractual security interest in property, by reference to the realities of the situation, the mechanics of the transaction and commercial construction of the transaction, whose lien has been perfected either by filing the security instrument or by taking possession of the secured property so as to protect himself from the claims of subsequent parties. Even though the Company in Ball was a "mortgagee" in the usual, commercial sense, it was not a "mortgagee" with that kind of security required by commercial lenders in general, because by failing to record its interest the Company held a claim binding only between the immediate parties. The Court properly determined that the Company's lien was "inchoate and unperfected" until after the federal tax liens were filed, and accordingly subordinated the Company's mortgage to the Government's claim for delinquent taxes. The rule of the Ball case may, therefore, be stated as follows: Unless a nonpossessory, contractual lien is perfected in the commercial sense, a subsequently filed federal tax lien will be given priority pursuant to the "first in time is first in right" principle.\textsuperscript{143}

\textsuperscript{143} It has been suggested that the Internal Revenue Service is of the opinion that a purchase money mortgage recorded after a federal tax lien has been filed should be given priority. Cross, supra note 96, at 23, citing Mosner, \textit{The Nature and Scope of Federal Tax Liens}, 17 Md. L. Rev. 1, 7 n.25 (1957). Similarly, a conditional sale contract subsequent to a recorded federal tax lien was given priority. United States v. Anders Contracting Co., 111 F. Supp. 700 (W.D.S.C. 1953). The subordination of the federal tax lien in both cases is justifiable on the ground that a purchase money mortgagee and conditional vendor have first claims to the property in question when it enters the possession of the mortgagor and the vendee. Thus, the Government has merely a junior lien in both cases, clearly inferior in time and right to the claims of the mortgagee and vendor.

If the Company in Ball had commercially perfected its lien, the argument could have been made that the assignment from Jacobs divested him of all title to the sums due or to become due; that since Jacobs had been divested of all title with respect to the property, Jacobs had no "property" or "rights to property" to which the subsequently filed federal tax lien could have attached. The question whether Jacobs had a property interest to which the tax liens could have attached would depend upon his right to recover the sums under state law, since it has been expressly held that: "classification of interests is a federal question; the existence of the interests to be federally classified, however, is solely a question of state law." Fidelity & Deposit Co. v. New York City Housing Authority, 341 F.2d 142, 144 (2d Cir. 1965). (Emphasis added.) The Supreme Court has apparently adopted this view. See United States v. Bess, 357 U.S. 51 (1958), where the Court declared: "section 3670 [the predecessor of § 6321] creates no property rights but merely attaches consequences, federally defined, to rights created under state law . . . [citing the Fidelity case]." Id. at 55. Lower courts have developed the "no property" theory by which competing contractual, as well as statutory, liens have been given priority over federal claims without reference to either the "general and unperfected lien" doctrine or to commercial perfection, since a decision can be made in favor of the competing lienor as soon as it is determined that the taxpayer had no "property" or "rights to
IV. SUMMARY AND CONCLUSION

Originally, the Government had priority among unsecured creditors under section 3466, and an ordinary lien for delinquent taxes under the predecessors of section 6321. Both statutory provisions were initially construed to attach subject to the rights of antedating lienors, whether statutory or contractual. The first departure from this approach came when the Court conjured the "general and unperfected lien" doctrine, by which a section 3466 priority could defeat antedating statutory liens which were not specific and perfected; that is, the competing statutory lien was required to meet each of the following tests: (1) the lienor must be identified, (2) the amount of the lien must be certain, (3) the property subject to the lien must be definite, and (4) the lien must be reduced to title and possession.

In Security Trust, the Court required statutory lienors competing with federal tax liens to meet the same tests of specificity and perfection. However, in New Britain, the Court finally conceded that competing statutory liens were "specific" and "choate," although the lienor had not reduced its claim to title and possession. But in White Bear, the Court made it clear that the tests of specificity and perfection had not been abandoned, and it became patently clear that as long as a statutory lien remained a lien, it could be defeated.

Construction of the tax lien statute justifies the application of the "general and unperfected lien" doctrine to subordinate statutory liens competing with the federal tax lien, and although there is no similar justification in the language of section 3466, rather abstract policy considerations tend to warrant application of the doctrine to section 3466 litigation. However, there is no justification for applying the doctrine to subordinate contractual liens. In fact, application of the tests of specificity and perfection imposed by the "general and unperfected lien" doctrine to subordinate contractual liens may prove to be too much. If the language includes statutory liens, the assertion that such interests may prevail over subsequently filed federal tax liens merely through compliance with local recording statutes is clearly erroneous, for it neglects specific holdings to the contrary. E.g., Illinois ex rel. Gordon v. Campbell, 329 U.S. 362, 374, 376 (1946). However, the above statement does imply that even though a contractual lien may be perfected within a specified grace period or a "reasonable time," a federal tax lien filed in the interval will take priority.
unperfected lien” doctrine to contractual liens would do violence to congressional intent and castigate recognized commercial transactions.

In *Ball*, although the Company was clearly a “mortgagee” in the commercial sense, it had failed to record its security instrument or take any other steps to protect its lien against the claims of subsequent creditors or assignees of Jacobs. For this reason, the Company’s lien was not even perfected in the commercial sense. Because of the latent and dangerous effects created by applying the “general and unperfected lien” doctrine to legitimate security transactions, the Court probably applied commercial tests of perfection to the Company’s lien. Thus, by referring to the Company’s lien as “inchoate and unperfected,” the Court probably indicated that contractual liens must be “commercially” perfected before the holder of a nonpossessory contractual lien is deemed a “mortgagee” entitled to the protection of notice-filing. And unless a nonpossessory, contractual lien has been perfected by filing before a federal tax lien is filed, the latter will be given priority.

The rationale of decisions from *Spokane County* to *Ball* appear to be easily separable into two distinct rules: (1) if the competing lien is statutory, it is normally perfected by reducing it to a final judgment, and unless this act has been performed before a federal priority arises or before federal tax liens are filed, the Government’s claim will be given priority; (2) if the competing lien is contractual, it is normally perfected either by filing the security interest or by taking possession of the secured property, and *either* act, accomplished before a federal tax lien is filed, is sufficient to perfect the former for tax purposes, entitling the holder to protection of notice-filing as a “mortgagee” or “pledgee.”