THE SUPERPRIORITY OF A POSSESSORY LIEN
UNDER THE FEDERAL TAX LIEN ACT OF 1966

I. INTRODUCTION

The Federal Tax Lien Act of 19661 effected a number of significant changes in the scope and limitations of federal tax liens. The prior law concerning tax liens had remained unrevised for more than half a century,2 and changing commercial practices, as well as new commercial laws, had left the former lien law totally inadequate to deal with the various types of security interests which had developed in the interim.3 More particularly, the adoption of the Uniform Commercial Code by almost every state had created new forms of secured transactions which required a complete revision of the concepts of federal liens.4

In effecting these much needed changes, Congress saw fit to expand the number of interests which take priority over unfiled federal tax liens and also to enlarge the very limited category of those whose lien interests will prevail over even a filed federal tax lien. After the new enactment this latter category, known as a "superpriority" extended preferred status to a new party who had not been accorded such protection under former law, viz., the repairman who holds a possessory lien.5 The statutory requirements of this superpriority are found within section 6323(b) which provides:

(b) Protection for certain interests even though notice filed.—Even though notice of a lien imposed by Section 6321 has been filed, such lien shall not be valid—

. . . . .

(5) Personal property subject to possessory lien.—With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been continuously in possession of such property from the time such lien arose.6

The superpriority afforded by this section appears to some degree to be modeled upon that which the Uniform Commercial Code affords to a repairman through section 9-310 which provides:

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4. Id.
5. INT. REV. CODE of 1954, § 6323 (b) (5), 80 Stat. 1126.
6. Id.
Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.\(^7\)

The federal superpriority, however, goes further because it does not contain the above italicized condition. Since federal priorities are not controlled by state law such a limitation was obviously unnecessary.\(^8\) However, both section 6323(b) (5) and section 9-310 contain the requirement that the holder of the lien must be in possession of the goods in question,\(^9\) and the federal statute makes this requirement even more explicit by stating that such possession must be continuous “from the time such lien arose.”\(^10\)

It would appear from these clear statutory requirements, that the superpriority afforded to such a lienor under the federal law is founded mainly upon the common law requirements of possessory liens, and \textit{a fortiori} the designation of subtitle (5) as applying to “possessory liens”\(^11\) would appear to limit the protection of this subsection to only those parties whose liens meet the traditional common law requirements.

It is the purpose of this article first, to explore the general nature of a federal tax lien and how it affected the repairman prior to the 1966 changes; second, to contrast the newly afforded status of

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8. See text at note 40 infra.
9. Treasury Regulations have not yet been issued under this section. The comments under section 9-310 of the U.C.C. explain that the purpose of the section is:
   (1) To provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.
   (2) Apart from the Uniform Trust Receipts Act which had a section similar to this one, there was generally no specific statutory rule as to priority between security devices and liens for services or materials. Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have “title”. This Section changes such rules and makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the lienor’s business and the goods involved are in the lienor’s possession. Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This Section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this Section provides a rule of interpretation that the lien should take priority over the security interest (emphasis added).
11. \textit{Id.}
the repairman to his former status; and third, to examine the first judicial construction of this new superpriority\(^\text{12}\) in order to determine how the judiciary will view this new provision of the Federal Tax Lien Act.

II. THE FEDERAL TAX LIEN—PRIOR TO 1966

The establishment of a federal lien for taxes is an exercise by Congress of its Constitutional power to lay and collect taxes.\(^\text{13}\) Such a lien is created upon the failure or refusal of any person liable for the tax to make payment after notice and demand for same.\(^\text{14}\) The lien attaches to "all property and rights to property, whether real or personal, belonging to such person,"\(^\text{15}\) and it is immaterial to the attachment of the lien that the property is tangible or intangible.\(^\text{16}\) Once such a lien attaches, it has been held that the rights of the United States cannot be destroyed or lessened.\(^\text{17}\)

\(^{12}\) Citizens Co-op Gin v. United States, 427 F.2d 692 (5th Cir. 1970).

\(^{13}\) U.S. CONST. art. I, § 8, "The Congress shall have Power To Lay and collect Taxes, Duties, Imposts and Excises . . . ." See also Michigan v. United States, 317 U.S. 338 (1943).


\(^{15}\) Id. One defense to such a lien is that the party against whom the lien is being enforced has "no property". This defense is best utilized when the Government attempts to enforce its lien by levy on property of the taxpayer in the hands of another, such as debts and construction contract balances. For a discussion of this defense, see Comment, The No Property Rule in Federal Tax Lien Litigation, 24 MARYLAND L. REV. 310 (1964). Essentially the "no property" rule arose out of two Supreme Court cases, Aquilino v. United States, 363 U.S. 509 (1960) and United States v. Durham Lumber Co., 363 U.S. 522 (1960). These cases enunciate the rule that state law controls in the determination of whether the taxpayer has a "property interest".

\(^{16}\) United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968) (cache of swindler); United States v. Hubbell, 323 F.2d 197 (5th Cir. 1963) (unliquidated cause of action for construction contract balance); Division of Labor Law Enforcement v. United States, 301 F.2d 82 (9th Cir. 1962) (liquor license); Bensinger v. Davidson, 147 F. Supp. 240 (S.D. Cal. 1956) (cause of action for restitution against vendor of real estate).

\(^{17}\) Glass City Bank v. United States, 326 U.S. 265 (1945).

\(^{18}\) See United States v. Bess, 357 U.S. 51 (1958) (tax lien on cash surrender value of life insurance proceeds survive death of taxpayer). However, it should be noted that the Federal Tax Lien Act of 1966, Pub. L. 89-719, § 103(a), amended the provision of § 6325 for release, discharge or subordination of the Government's lien.

For limit on amount allowed in bankruptcy proceedings for debts owing to the United States, see Section 57(j) of The Bankruptcy Act, as amended (11 U.S.C.A. § 93). See also Section 17 of The Bankruptcy Act, as amended (11 U.S.C.A. § 35) which states "a discharge in bankruptcy shall not release or affect any tax lien . . . ." The recent case of United States v. Sanabria, 424 F.2d 1121 (7th Cir. 1970) has interpreted this
As stated by one commentator:

Once the United States obtains a lien upon the taxpayer's property, no one can acquire an interest in it greater than what he holds at that moment, except by Congressional grace. In effect the property has two owners, the taxpayer and the United States.¹⁹

A. GENERAL STATUTORY AND JUDICIAL REQUIREMENTS OF FEDERAL LIENS

The Internal Revenue Code provides that the lien "shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."²⁰ By virtue of this language the federal tax lien is in essence a "secret lien" which arises purely upon the ministerial act of placing the taxpayer's name upon the assessment rolls and making demand for payment.²¹ This form of a secret lien was first authorized by Congress in 1866²² and was re-enacted in 1875.²³

In 1893, however, the United States Supreme Court, in United States v. Snyder,²⁴ pointed up the inequity which such a secret lien could cause. It was there held that the Government's unfiled tax lien should prevail over the interest of a subsequent bona fide

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²¹. Demand to be effective must be in proper form. United States v. Coson, 286 F.2d 453 (9th Cir. 1961). Once the proper demand is made the date of the lien is deemed to relate back to the earlier assessment date, thus defeating interests arising between the date of assessment and the date of demand. North Gate Corp. v. North Gate Bowl, Inc., 149 N.W.2d 651 (Wis. 1967). Hence the lien is perfect from its inception. Glass City Bank v. United States, 326 U.S. 65 (1945).
²³. REV. STAT. § 3186 (1875). This statute was later amended and codified in Int. Rev. Code of 1939, ch. 36, § 3670, 53 Stat. 448, and is now INT. REV. CODE of 1954, § 6321.
²⁴. 149 U.S. 210 (1893).
purchaser even though at the time of purchase there was no way by which he could have acquired knowledge of the tax lien, and even though four years had elapsed since the purchaser had acquired the property in question from the delinquent taxpayer. The injustice of such a result subsequently led Congress in 1913 to remedy this defect by amending the lien laws to provide a limited form of protection from unfiled federal tax liens for parties falling within certain specifically stated categories—mortgagee, purchaser, and judgment creditor.25

Again in 1938, another inequity of the federal lien law was revealed in United States v. Rosenfield,26 which held that even though a taxpayer had endorsed stock certificates in blank and delivered them to a brokerage for sale, the bona fide purchaser of such shares took subject to a recorded federal tax lien, despite the fact that he had no actual knowledge of such lien. To remedy this inequity Congress again amended the lien laws to add the category of "pledgee" to those who receive protection against an unfiled federal tax lien, and, Congress further afforded a "superpriority" to mortgagees, pledgees, or purchasers of securities so that these parties would prevail over even a filed federal tax lien.27

After these amendments, section 6323 of the Internal Revenue Code of 1954 read in part as follows:

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor


[T]he lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.


27. Rev. Act of 1939, § 401, 53 Stat. 882. The reason for this amendment was disclosed in the Committee Report accompanying the Revenue Bill of 1939. H.R. Rep. No. 855, 76th Cong., 1st Sess. 26 (1939) states, in part, as follows:

While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. . . . An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. . . .
until notice thereof has been filed by the Secretary or his delegate.\(^{28}\)

Decisions under this section indicate that, despite the remedial purpose of the above amendments, the courts placed a strict interpretation upon each of the protected categories, and consequently withheld protection from any competing creditor who could not prove that he met the exact definitional requirements of the named preferred group.\(^{29}\) As stated by Justice Jackson in his concurring opinion to \textit{United States v. Security Trust & Savings Bank},

\begin{quote}
My conclusion from [the] history [of the tax lien law] is that the statute excludes from the provisions of this secret lien those types of interests which it \textit{specifically included} in the statute \textit{and no others}.\(^{30}\)
\end{quote}

And, as was later stated in \textit{United States v. City of New Britain}:

There is nothing in the language of [the statute] to show that Congress intended antecedent federal tax liens to rank behind any but the \textit{specific categories of interests set out therein} . . . .\(^{31}\)

Thus, it became highly important to creditors, whose liens were in contest with federal tax liens, that they be able to show that their interests fell within the specific categories named in the statute. The importance of meeting the express definitional requirements of one or more of these named protected categories was even further heightened when it became clear that the courts would utilize the judge-made rule of "choateness" to strike down even those competing liens which arose prior in time to the lien of the United States.\(^{32}\) This judicial test, which had been created to measure the validity of a competing lien at the time the federal

\begin{footnotes}
\item \(^{29}\) \textit{See}, e.g., \textit{United States v. Scovil}, 348 U.S. 218 (1955) (landlord attempting to enforce lien held not to be mortgagee, pledgee, judgment creditor or purchaser). The Senate Report accompanying the 1966 Federal Tax Lien Act appears to require this same definitional adherence even though other requirements have been eased. It is stated therein: \begin{quote}
Various types of secured creditor interests already having, or given, priority status over tax liens are \textit{specifically defined}, and it is provided that where those interests qualify under the definitions they are to be accorded this priority status whether or not they are in all other respects definite and complete at the time notice of the tax lien is filed. \textit{S. Rep. No. 1708, 89th Cong. 2d Sess., U.S. Code Cong. & Ad. News, 3722, 3723 (emphasis added).}
\end{quote}
\item \(^{30}\) 340 U.S. 47, 53 (1950) (emphasis added).
\item \(^{31}\) 347 U.S. 81, 88 (1954) (emphasis added).
\end{footnotes}
lien attached, proved an effective tool to deny priority to almost every type of lien other than those specifically protected by the statute.

B. THE “CHOATENESS” DOCTRINE

The doctrine of “choateness” originally arose out of three cases in which the assets of an insolvent taxpayer were subjected to distribution among competing creditors.\(^3\) In each of these cases, the United States based its priority claim upon the federal priority statute which is applicable to cases of insolvency only.\(^4\) However, subsequently, in *United States v. Security Trust & Savings Bank*,\(^5\) the Supreme Court extended the “choateness” rule from insolvency cases to non-insolvency situations based on the view that:

> If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail [in determining the relative priority of a federal tax lien in cases involving a kindred matter].\(^8\)

The “choateness” doctrine in essence required that general inchoate liens must yield to subsequently arising federal tax claims.\(^3\) The standards for determining whether a lien was choate or inchoate, however, were left undefined until the decisions of *United States v. Waddill, Holland, & Flinn, Inc.*,\(^3\) and *Illinois ex rel. Liverpool & London & Globe Ins. Co.*, 348 U.S. 215 (1955) (garnishment); *United States v. City of New Britain*, 347 U.S. 81 (1954) (real estate tax liens); and *United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950) (attachment lien).

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\(^4\) 31 U.S.C. § 191 which reads as follows:

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


\(^6\) Id. at 51. For an analysis of how the Court managed to read into tax lien legislation a purpose to afford priority over inchoate liens contrary to the interest of Congress, see Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L. Rev. 724 (1964-65).

\(^7\) County of Spokane v. United States, 279 U.S. 80 (1929).

\(^8\) 323 U.S. 353 (1945).
Gordon v. Campbell. 39

These two cases clarified the doctrine by holding that although state law may characterize the competing lien as "choate," the fact of "choateness" and the related priority to be afforded to such a lien in a contest against the United States, is a "federal question" to be decided by federal standards. 40 Such federal standards were enumerated as follows: (1) the identity of the lienor must be certain; (2) the amount of the lien must be definite; and (3) the particular property subject to the lien must be identified. 41

In 1953, this third requirement was further elaborated upon by the Supreme Court in United States v. Gilbert Associates, Inc., 42 which stated that a general lien is sufficiently definite as to particular property only when the lienholder has acquired title to or possession of the property subject to his lien. The thrust of that decision was that,

"[S]pecificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor [taxpayer]. . . . Until such possession, it remains a general lien. 43

In sum, due to the doctrine of "choateness," priority was accorded to the federal government in instances where its lien (even though unfiled) was competing against an earlier arising state lien which failed to meet the federal standards of choateness as set out above. 44 In addition, priority would also be accorded to a federal lien over the interest of any mortgagee, pledgee, purchaser, or judgment creditor, when the federal lien was properly filed before the

40. 323 U.S. at 356-57 and 329 U.S. at 371. If state law describes the lien as inchoate, however, the Court will take this determination as "practically conclusive" of the question. 329 U.S. at 371.
41. See also United States v. City of New Britain, 347 U.S. 81 (1954).
42. 345 U.S. 361 (1953).
43. Id. at 366 (emphasis added). The opinion also points out that the Supreme Court has never actually held that choate liens are excepted from the application of the federal priority statute, 345 U.S. at 365.
date upon which such parties acquired their lien.\textsuperscript{45} Hence, even these parties were required to search the files before extending any credit to the taxpayer if they wished to know whether they would hold a preferred status.

Recognizing that in some instances a search of such records is both impractical and burdensome, Congress in 1939 and again in 1964 provided for two exceptions to the general rule.\textsuperscript{46} By virtue of sections 6323 (c) and (d), mortgagees, pledgees, or purchasers, of securities and purchasers of motor vehicles were allowed to prevail over even a filed tax lien. Such unlimited protection has been termed a "superpriority" since the general rule of "first in time, first in right"\textsuperscript{47} is not applied in such instances.

As explained by William Plumb,

Congress had gradually recognized that searching for federal tax liens is impracticable in certain cases, and it accordingly had provided "superpriorities"—i.e., priority even over existing and filed tax liens, if prescribed conditions were met—in 1939 for purchasers and lenders on the security of "securities," and in 1964 for purchasers of motor vehicles.\textsuperscript{48}

C. THE REPAIRMAN'S POSSESSORY LIEN

It does not appear that the Supreme Court was ever required, under prior law, to directly answer the question of whether a repairman who is in possession of the taxpayer's property holds a lien which is of such specificity and choateness that it would prevail over a subsequently arising federal tax lien. However, in United States v. White Bear Brewing Company,\textsuperscript{49} the Court in a per curiam opinion reversed the decision of the United States Court of Appeals for the Seventh Circuit\textsuperscript{50} which had accorded such priority to a building contractor's lien for materials and labor. This position was taken even though (as the dissent points out) the statutory me-

\textsuperscript{45.} \textsc{Int. Rev. Code} of 1954, § 6323(a).


\textsuperscript{47.} The first statute creating federal tax liens did not specify priority rules (Rev. Act of 1866, ch. 184, § 9, 14 Stat. 107), however the courts dealt with the priority problem upon the assumption that Congress intended the "first in time, first in right" rule to govern. Eventually the United States Supreme Court so held in United States v. City of New Britain, 347 U.S. 81 (1954).

\textsuperscript{48.} Plumb, \textit{Federal Liens and Priorities—Agenda for the Next Decade}, 77 \textsc{Yale L.J.} 228,229 (1967-68) (emphasis added) (footnotes omitted) [hereinafter cited as Plumb].

\textsuperscript{49.} 350 U.S. 1010 (1956).

\textsuperscript{50.} 227 F.2d 359 (7th Cir. 1955).
chanic's lien was "specific, prior in time, perfected in the sense that everything possible under state law had been done to make it choate, and was being enforced before the federal tax lien arose."\textsuperscript{51} This was obviously a giant step beyond the position adopted in \textit{United States v. Colotta},\textsuperscript{52} where the Court subordinated a mechanic's lien to a federal tax lien because, even though the mechanic's lien "had become definite in amount, no steps had been taken to file the statutory \textit{lis pendens} notice nor to enforce the lien before the federal lien arose and was recorded."\textsuperscript{53} As discerned by Justice Douglas in his dissent to the \textit{White Bear} opinion,

The court apparently holds that . . . a 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 final judgment.\textsuperscript{54}

In considering the refusal of \textit{White Bear} to accord priority to a mechanic's lienor whose lien attached to property which was not in his possession and the statement made in \textit{Gilbert Associates} that only "by reducing the property to possession"\textsuperscript{55} could a lien be considered of sufficient "specificity" to be choate by federal standards, it would appear that prior federal law would have accorded priority to a repairman, materialman, or other similar party, provided he held actual possession of the debtor/taxpayer's property on the date when the federal lien arose and did not release custody of the property thereafter.\textsuperscript{56}

III. THE 1966 FEDERAL TAX LIEN ACT

The Federal Tax Lien Act of 1966 produced an overall revision and modernization of the law of Federal tax liens.\textsuperscript{57} As explained in the accompanying Senate report:

\begin{itemize}
  \item 350 U.S. at 1010 (dissenting opinion).
  \item \textit{See} United States v. \textit{White Bear Brewing Co.}, 350 U.S. at 1011 (comments of dissent on \textit{Colotta}'s holding).
  \item \textit{Id.}
  \item United States v. Gilbert Assoc., Inc., 345 U.S. 361, 366 (1953).
  \item 345 U.S. at 366.
  \item This new statute was heralded by Professor Grant Gilmore as follows:
\end{itemize}

With respect to the priority of federal claims for debts and taxes, we have a brand-new statute—the Federal Tax Lien Act of 1966 (which does not, it should be noted, say anything about the federal priority under § 3466). One of the main purposes of the draftsmen of the Tax Lien Act was to give protection to certain types of secured financing against the doctrine of virtually absolute federal priority which, since 1950, the Supreme Court had been elaborating both under the earlier tax lien statute and under
Since the adoption of the Federal income tax in 1913, the nature of commercial financial transactions has changed appreciably. Business practices have been substantially revised and, as a result, many new types of secured transactions have been developed. In an attempt to take into account these changed commercial transactions, and to secure greater uniformity among the several States, a Uniform Commercial Code was promulgated some what over 10 years ago by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. A revised version of this code is already law in over 40 States and could well be adopted by many of the remaining States in the near future. Under the Commercial Code, priority now is afforded new types of commercial secured creditors not previously protected.

This bill is in part an attempt to conform the lien provisions of the internal revenue laws to the concepts developed in this Uniform Commercial Code. It represents an effort to adjust the provisions in the internal revenue laws relating to the collection of taxes of delinquent persons to the more recent developments in commercial practice (permitted and protected under State law) and to deal with a multitude of technical problems which have arisen over the past 50 years. The bill represents the culmination of a project initiated approximately 10 years ago by those concerned with the relationship of the tax lien provisions to the interests of other creditors. Since that time, the suggestions and ideas of various groups have been studied and analyzed carefully, both by the groups themselves and by the staffs of the Treasury Department and the congressional committees.

No attempt will be made herein to definitively review the nature and form of the numerous changes made by this Act; however, despite the disparagement of the commentators, it is evident that the doctrine of "choateness" has survived the revisions made by the Act.

§ 3466. The Tax Lien Act rivals even the Uniform Trust Receipts Act for the obscurity of its language and the subtlety of its concepts.

Gilmore, Security Law, Formalism, and Article 9, 47 Neb. L. Rev. 659, 677 (emphasis added).


59. Such a definitive discussion can be found in Plumb, Federal Liens and Priorities—Agenda for the Next Decade, 77 Yale L.J. 228 (1967-68); a more brief recap can be found in Phillips, supra note 19, at 34 n.22.

60. It is evident that the commentators agree that the choateness rule is still viable. See, e.g., Mordy, Superpriorities Under the Federal Tax Lien Act of 1966—The Demise of the Choate Lien Doctrine?, ABA Section of Ins., Neg. and Comp. Law 127 (1967) stating at 130 in regard to the new categories of § 6323 (a), "However, a considerable amount of 'choateness' is still required by the definition of these terms." See also Randall, Lienors & Purchasers—Their Rights After the Federal Tax Lien Act of 1966,
The House Report accompanying the bill contains the following observation:

Under decisions of the Supreme Court a mortgagee, pledgeree, or judgment creditor is protected at the time notice of the tax lien is filed if the identity of the lienor, the property subject to the lien, and amount of the lien are all established at such time. See United States v. City of New Britain, 347 U.S. 81 (1954). Except as otherwise provided, subsection (a) of new section 6323 retains this basic rule of federal law.61

Subsection (a) of section 6323, however, was greatly expanded to now protect any “purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor”62 against an unfiled federal lien, thus cutting back the reach of the “choateness” doctrine at least as to those interests.

A. SUPERPRIORITY FOR POSSESSORY LIENS

The provisions of the new Act which afford a preferred status to the holder of a possessory lien can be found in that portion of the Act which creates “an additional eight categories of interest in properties which are to be effective as against a tax lien, even though notice of the lien has been filed.”63

These eight categories, known as “superpriorities”, are set forth in section 6323 (b) and can be broken down into three categories:

(1) Those parties who are protected only if they are without actual notice or knowledge of the federal tax lien at the time their liens or interests arise. These would include:

(a) A purchaser of a security, a motor vehicle, or personal property at a casual sale. (A party in the latter category who has no knowledge of the tax lien but knows

6 Idaho L. Rev. 67, stating at 68, “Congress adhered to the choateness test in the 1966 Federal Tax Lien Act, but attempted to provide some definitional guidelines,” and Plumb, The New Federal Tax Lien Law—Part I, 13 Prac. Law. 63, states at 65, “Although the doctrine has not been wholly eliminated, the great bulk of transactions have been freed from its effect by the adoption of express relief provisions. In the interest of equity, those provisions have, in general, been made immediately and retroactively effective.”


62. Int. Rev. Code of 1954, § 6323(a). “Mechanic’s lienor” as used in this section is defined in § 6323(h) (2) as one who “under local law has a lien on real property . . . for services, labor, or materials furnished in connection with the construction or improvement of such property.”

that this casual sale is one of a series of sales will not meet the requirements for this superpriority.\(^64\)

(b) one who holds a security interest in a security,\(^65\)

(c) an insurer lending on a life insurance, endowment or annuity contract,\(^66\) and

(d) a savings institution which lends on a passbook account if it has been in continuous possession of such passbook from the time the loan is made;\(^67\)

(2) Those parties who purchase tangible personal property at retail unless by such purchase they intend to hinder, evade or defeat the collection of tax.\(^68\) (Hence, actual notice of the tax lien would not, in itself, defeat this superpriority status); and

(3) Those parties who will be protected against a previously filed tax lien even though they had actual notice or knowledge of the tax lien, these include:

(a) a holder of a mechanics lien for small repairs, not exceeding $1,000, to real estate,\(^69\)

(b) an attorney who under local law holds a lien for his services performed in creating or procuring such property,\(^70\)

(c) governmental bodies and public service or utilities holding liens against real estate which are entitled to priority under local law over other previously arising security interests in such property,\(^71\) and

(d) a person who holds tangible personal property subject to a possessory lien under local law who has been in continuous possession of the property from the time such lien arose.\(^72\)

This last category of "possessory liens" has been interpreted by one commentator as follows:

Section 6323(b)(5) provides protection for the workman who has been in continuous possession of tangible personal property and has a lien securing the reasonable price of the repair or improvement made to such property. Under this section, the workman will have priority even if he had actual notice of the tax lien. The reason for this is that it is assumed that the work he does will enhance the value of

\(^{64}\) Int. Rev. Code of 1954, § 6323(b)(1), (2) and (4).


\(^{67}\) Int. Rev. Code of 1954, § 6323(b)(10).

\(^{68}\) Int. Rev. Code of 1954, § 6323(b)(3).

\(^{69}\) Int. Rev. Code of 1954, § 6323(b)(7).

\(^{70}\) Int. Rev. Code of 1954, § 6323(b)(8).

\(^{71}\) Int. Rev. Code of 1954, § 6323(b)(6).

\(^{72}\) Int. Rev. Code of 1954, § 6323(b)(5).
the personal property which subsequently can be sold to partially, or completely, satisfy the tax lien. This superpriority does not, however, protect possessory liens such as warehousemen, common carriers, or innkeepers because their service does not usually improve or repair the property.\footnote{73}

The contrast of this new priority to former law has been described in this manner:

\begin{quote}
[A]t common law the word “lien” was used to describe the right of a person who repaired or improved a chattel to retain possession of the chattel until he was paid for his work. Under the 1954 provision, if a repairman had a possessory lien which arose before a federal tax lien arose, presumably the possessory lienor would prevail over the government under the “first in time, first in right” doctrine—provided that the lien was not found to be inchoate. If the possessory lien arose after the federal lien arose but before notice was filed, however, the government would prevail unless the possessory lienor could qualify as a mortgagee, pledger, purchaser, or judgment creditor, four categories then protected against unfiled federal tax liens under section 6323. Furthermore, if notice of the federal tax lien was filed before the possessory lien arose, the government would prevail in all events.\footnote{74}

Hence, it is clear that by enacting such a superpriority, Congress granted a privilege which would not otherwise have been available to a possessory lienholder who had repaired or improved property.\footnote{75} Such legislative grace, under general rules of construc-
tion would seem to require the same strict construction of the language of the statute as was imposed upon preferred lienors under prior law. As stated by one commentator:

Holders of superpriority interests are almost exempt from the perfection rules, but must meet rigid definitional requirements.77

And as further noted by this writer:

There is no exception under the Internal Revenue Code from the priority of a filed federal tax lien which expressly allows the completion of inanimate personal property in the process of manufacture of production. The only repair or improvement lien recognized in the code with respect to personal property is an uninterrupted possessory lien.78

This same writer further elaborates the possessory lien requirement by stating:

The 1966 amendments enlarge the field of qualifying interests to include others where reliance is placed by the market on possession or a tangible token of a property interest.79

If "rigid definitional requirements" are to be met and complied with, it thus becomes highly important to find the content and meaning of the statutory requirement of an uninterrupted possessory lien. In searching for such a meaning it might, therefore, be well to examine the traditional judicial requirements developed by the common law with regard to possessory liens. And, by further contrasting the nature of the common law lien to that of the lien which was created and recognized by equity, the key to interpreting the "superpriority" of a "possessory lien" might be found.

B. "Possessory Liens": Common Law v. Equitable Liens

In general terms, a lien may be described as an encumbrance

(1956), which held that even where a mechanic lienor had completed his work, filed his lien, and commenced foreclosure before the federal tax lien arose, the mechanic's lien was held inchoate.


Phillips, supra note 19, at 37 (emphasis added).

Id. at 54 (footnotes omitted) (emphasis added).

Id. at 35 n.25 (emphasis added).
upon property as security for the payment of a debt. The term "lien" has been somewhat indiscriminately used to embrace every species of special ownership which one may have in property, when general ownership is in another. However, aside from liens created by statute, there are two kinds of liens which have been traditionally recognized in our judicial system: common law liens and equitable liens.

The essential characteristic of a common law lien is the creation of a proprietary interest in the lienor by vesting him with the right to retain undisturbed possession of the debtor’s property until the debt or duty existing between the parties has been satisfied. The form of possession required by this lien is satisfactory in some jurisdictions if it is either actual or constructive; however, it has been held that only actual possession of the goods will suffice when third parties are involved. Furthermore, it has been said to be "indispensable" that the requisite possession, whatever its form, must be independent, exclusive and continuous from the time the lien arose. This latter aspect has been so strictly construed that once the lienholder releases his custody of the property, the possessory lien is deemed to be totally destroyed. And, even if the lienor should subsequently regain possession, the earlier lien does not re-attach. Thus, possession is the sine qua non of this lien.

The common law lien may be created by implication of law from the established usage of a particular trade or from a mode of

83. See Thourot v. Delahaye Import Co., 69 Misc. 351, 125 N.Y.S. 827 (1910). In this case the court, holding that the statute was a mere codification of the common law, said at 828:

It probably is true that under the statute, as under the common law, the possession upon which a lien is founded may be actual or constructive. While continued actual possession may not be necessary as between the immediate parties, we think continued actual possession is essential between the lienor and third parties situated as were the parties to this action (emphasis added).

See also Fishell v. Morris, 57 Conn. 547, 18 A. 717 (1889); Yellow Mfg. Acceptance Corp. v. Bristol, 193 Ore. 24, 236 P.2d 939 (1951). Although a statute was also involved here, the court held that the statute is declaratory of the common-law right to a possessory lien and must be interpreted in accordance with its principals. With respect to possession, the court also stated, that to pursue priority, the lienholder must be in "actual, continuous, and exclusive possession."

dealing between the parties concerning certain identified property.\textsuperscript{87} Traditionally, such liens have been recognized in favor of innkeepers, farmers, carriers, warehousemen and persons who by their labor and skill have imparted additional value to goods. The underlying reason for according such a lien to persons within this latter category is to afford the workman some form of security to insure the payment for his services which increased the value of the goods.\textsuperscript{88} By reason of this fact certain limitations are inherent in the common-law lien, viz., the property subject to the lien must be the identical property which is repaired or improved,\textsuperscript{89} and the amount of the lien cannot exceed the value of the improved goods.\textsuperscript{90} If the charge for services does exceed the value of the withheld property, the repairman stands as an unsecured creditor as to the remaining balance and cannot extend his "possessoriy lien" to the general assets of the debtor.\textsuperscript{91}

By contrast, the equitable lien is not conditioned upon possession of the thing to be charged.\textsuperscript{92} Although exact definition is difficult,\textsuperscript{93} an equitable lien has generally been described as a charge or encumbrance upon property arising out of some express\textsuperscript{94} or implied\textsuperscript{95} agreement between the parties which gives the creditor the right to proceed in an equitable action against the very thing itself.\textsuperscript{96}

\textsuperscript{87} Wilkinson v. Tarwater, 393 S.W.2d 538 (Mo. 1965).
\textsuperscript{88} Braufman v. Hart Publications, Inc., 234 Minn. 343, 49 N.W.2d 546, 25 A.L.R.2d 1030 (1951); McDearmid v. Foster, 14 Ore. 417, 12 P. 813 (1886).
\textsuperscript{89} Fishell v. Morris, 57 Conn. 547, 18 A. 717 (1889).
\textsuperscript{90} Id.
\textsuperscript{91} Clark v. Manufacturers Trust Co., 169 F.2d 932 (2d Cir. 1948).
\textsuperscript{92} Gregory v. Morris, 96 U.S. 619 (1887); Hauselt v. Harrison, 105 U.S. 401 (1881); McFerran v. Louisville Title Co.'s Receiver, 254 Ky. 362, 71 S.W. 2d 655, 657 (1934).
\textsuperscript{93} According to Gilmore, there are at least five different meanings for the word "equitable," and when the word is used in connection with "lien," the term has "come to have principally a pejorative meaning." Originally the term designated interests which the law favored by finding that they "ought" to be enforced "(even though common law precedents were lacking or common law formalities had not been complied with)." However the multi-faceted use of the word today has led Gilmore to comment:

Like the Holy Roman Empire, which was said to be neither holy nor Roman nor an empire, the equitable lien is neither equitable nor a lien. The moral is that the word "equitable" should, so far as possible, be avoided in legal writing (except as a useful device to obscure the issues) and that, wherever the word is found, its use should be carefully scrutinized.

\textsuperscript{94} Kukuk v. Martin, 331 Ill. 602, 163 N.E. 391 (1928).
\textsuperscript{95} Carpenter v. Dummit, 221 Ky. 67, 297 S.W. 695 (1927).
\textsuperscript{96} Averyt Drug Co. v. Ely-Robertson-Barlow Drug Co., 194 Ala. 507, 69 So. 931 (1915).
Contrary to the common law lien an equitable lien does not divest the debtor of title or possession and possession generally remains with the debtor. Hence, the lack of a requirement for possession prevents such a lien from being "possessory" in nature and vests no proprietary estate or right in the property in the lienor. As a result, the holder of an equitable lien cannot enforce his lien in a "possessory action," but rather, he must of necessity proceed by petitioning a court of equity to have his lien recognized, declared and enforced by sequestration of the property and application of its rents, profits or proceeds to the unpaid debt.

As with the common law lien, an equitable lien can arise in favor of one whose money, materials, or services have benefited the property of another. Thus materialmen, contractors and other repairmen can proceed directly against the property in a court of equity for the value of their services. It should be noted, however, that in some jurisdictions statutory remedies are available to such parties which are exclusive in nature and thereby preclude enforcement of an equitable lien.

In sum, since the equitable lien exists without any requirement of possession, and since the common law lien cannot exist in the absence of such an element, the term "possessory lien," as used in the title of subsection (5) of section 6323(b) would seem to clearly refer to a lien of a common law nature only. However, the language within the body of this subsection refers only to "a lien under local law" and such text does not clearly designate which type of lien is intended to be protected by the statute. And since equitable liens may arise from "repair or improvement" or from an agreement between the parties that certain

99. Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir. 1944); In re Interborough Consol. Corp., 228 F. 334 (2nd Cir. 1923), cert. denied, 262 U.S. 752, 32 A.L.R. 932.
100. Id.
103. Whether a claimant under an equitable lien must pursue a statutory remedy or show it is unavailable is the subject of dispute. For cases stating there is no basis for an equitable lien when a statutory remedy exists see, G.E.C. Corp. v. Levy, 119 Ga. App. 59, 166 S.E.2d 378 (1969) and Fidelity Sav. & Loan Assoc. v. Baldwin, 416 S.W.2d 482 (Tex. Civ. App. 1967). For cases contra, see Crane Co. v. Fine, 221 So. 2d 145 (Fla. 1969); O.H. Thomason Builders' Supplies, Inc. v. Goodwin, 152 So. 2d 797 (Fla. 1963); and Armstrong v. Blackador, 118 So. 2d 854 (Fla. 1960).
104. See text at note 102 supra.
property shall be considered security for a debt,\textsuperscript{105} it is clear that the ambiguous term "local lien" must be defined by looking to the words used in the title of this subsection—"possessory liens."

Such a method of construction was utilized by Chief Justice Marshall in \textit{United States v. Fisher},\textsuperscript{106} in order to resolve an ambiguity in the federal priority statute concerning insolvent taxpayers. As was there said:

On the influence which the title ought to have in construing the enacting clauses, much has been said. . . . Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case, the title claims a degree of notice. . . .\textsuperscript{107}

And as this same learned Judge pointed out in \textit{United States v. Palmer},\textsuperscript{108}

The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislator.\textsuperscript{109}

Hence, the ambiguity of "local lien" as used in the body of section 6323(b)(5) should be resolved by referring to the title of the subsection which denominates such liens as "possessory liens." And, since this term has a well recognized meaning at common law, it is evident that the term "possessory lien" should carry with it all of the common law elements inherent in such a lien.

It has been well recognized by the authorities that in construing a statute which uses words which have a definite and well known meaning at common law, "it will be presumed that the terms are used in the sense in which they were understood at common law, and they will be so construed unless it clearly appears that it was not so intended."\textsuperscript{110} This form of construction was expanded further in the case of \textit{Keck v. United States}.

\textsuperscript{111} There the United States Supreme Court was required to interpret a section of the Revenue statute which prohibited "smuggling." In determining the meaning of that term, the Court held that the recognized common

\textsuperscript{105} Wilkinson v. Tarwater, 393 S.W.2d 538 (Mo. 1965); Young v. J.A. Young Machine & Supply Co., 203 Okla. 593, 224 P.2d 971 (1950).
\textsuperscript{106} 2 Cranch 358 (1805).
\textsuperscript{107} \textit{Id.} at 385. \textit{See also} Daniels v. United States, 210 F. Supp. 942 (D. Mont. 1962).
\textsuperscript{108} 3 Wheat. 610 (1818).
\textsuperscript{109} \textit{Id.} at 630.
\textsuperscript{110} \textit{See} 50 \textit{AM. JUR. Statutes} § 279, p. 266 (1944). \textit{See also} United States v. Patton, 120 F.2d 73 (3rd Cir. 1941) and United States v. Kelly, 146 F. Supp. 747 (D. Colo. 1956).
\textsuperscript{111} 172 U.S. 434 (1899).
law meaning had been codified by the Act, and, as additional support for its holding, the Court went further to note:

The inference that the common law meaning of the word "smuggling" is to be implied, is cogently augmented by the fact that the statute also uses in connection with it words generally known in the law of England as a paraphrase for smuggling. In reason this is tantamount to an express adoption of the common law signification.\textsuperscript{12}

Hence, in the case of section 6323(b)(5), the use of the words "repair or improvement" in conjunction with the limiting phrase "continuous possession," would seem to be no less than a "paraphrase" of the common law possessory lien requirements. As such, the lien to be accorded superpriority status by section 6323(b)(5) could not be of an equitable nature. Only a common law possessory lien on specific identified property held in the custody of the lienor and repaired or increased in value by his services could qualify under this subsection. Release of custody or substitution of the secured property would therefore be grounds for denial of this preferred status.

IV. CITIZENS CO-OP GIN v. UNITED STATES: A JUDICIAL CONSTRUCTION OF THE SUPERPRIORITY FOR POSSESSORY LIENS

Because the Federal Tax Lien Act is such a recent enactment, decisions under this new law have been few. It was not until June of 1970, that a United States Court of Appeals was faced with the question of how to construe the possessory lien provisions of section 6323(b)(5). Hence, in \textit{Citizens Co-op Gin v. United States},\textsuperscript{13} the United States Court of Appeals for the Fifth Circuit noted: "In construing § 6323(b)(5) we write on a clean slate, since no other court has heretofore been called upon to interpret this statute."\textsuperscript{14}

In thus proceeding to make its marking upon the untouched face of this statute, the court used as its polar star the "remedial purpose of the legislation."\textsuperscript{15} As stated by the court:

\begin{itemize}
\item \textsuperscript{12} Id. at 455 (emphasis added).
\item \textsuperscript{13} 427 F.2d 692 (5th Cir. 1970).
\item \textsuperscript{14} Id. at 695.
\item \textsuperscript{15} Id. The court viewed the Congressional intent of the statute as follows:
\end{itemize}

The remedial purpose of the legislation, however, is quite clear. The statute was designed to protect those who add value to the government's tax lien by repairing or improving the property at their own expense in money or labor and who could not be expected to search the tax lien records. \ldots With this salutary purpose in mind we begin our investigation of the effect of § 6323 (b)(5) on the relative priorities among the claimants in this case.
[W]e are aware that the Act is susceptible of a different interpretation. The statute could possibly be read to deny any protection to the claimants in this case. Faced as we are, however, with the task of construing a relatively new statute having a remedial purpose, we feel justified in giving the statute a broad interpretation which will achieve that purpose.116

With this "remedial purpose" in mind the court proceeded to affirm the decision of the district court117 to accord the superpriority status of a possessory lienor first, to an unpaid farm laborer who had harvested a delinquent taxpayer's cotton crop and delivered it to a gin for processing receiving back a "gin ticket" as evidence of his claim for payment of his services,118 and second, to the gin which had processed the cotton and placed it in warehouse storage retaining warehouse receipts as evidence of its interest.

The underlying facts of this case are important to an understanding of this decision. These facts are as follows:

On March 11, 1968, the Tax Court entered a judgment that taxpayers, J. B. and Leola Marion, were indebted to the United States for $37,261.51 in income taxes for the taxable years ending June 30, 1960 and June 30, 1962. The tax was assessed on May 3, 1968, and on July 16, 1968, the United States filed notice of the federal tax liens against the Marions' property in both Lubbock County and Hockley County, Texas.119

In the spring of 1968, the Marions had planted cotton on their 320 acre farm located in Hockley County. After the date the Government's lien was filed, an oral contract was made between the taxpayers and J. D. Rackler to harvest this cotton. Although the

116. Id. at 698 (emphasis added).
118. The cotton gin entered upon its accounts, the name of the harvester who furnished the labor and machinery necessary to harvest and deliver the cotton and issued him a "gin ticket" as evidence of his claim against these goods. 300 F. Supp. at 1194. The district court found as a fact that the harvester reasonably relied upon the universal custom in the vicinity of Lubbock and Hockley County, Texas, pursuant to which a cotton gin would, upon its lot, or upon the lot of a compress, hold possession of said crop until the same was placed in Government loan or was sold with the authority of the owner of the cotton and would then pay all charges for ginning services and storage furnished, all charges for custom farm labor, all interests of any tenant and render to the owner an accounting and the net proceeds of such sale or loan [300 F. Supp. at 1194].

The district court further concluded as a matter of law that:

J.D. Rackler, the harvester, has a lawful possessory lien superior to that of the United States of America under the provisions of 26 U.S.C.A. § 6323 [300 F. Supp. at 1195].

118. 427 F.2d 692, 694.
terms were not discussed, the customary charge for harvesting was fifty cents per hundred weight thus resulting in a debt for Rackler's services of $1,178.60. After completing the harvesting, Rackler delivered the cotton to the Citizens Co-op Gin, and according to local custom, the co-op was to gin, bale, press, and tie the cotton. Having completed these services, the gin then delivered the cotton to a warehouse for storage and received negotiable warehouse receipts in return. The customary procedure was for the gin to obtain and hold the warehouse receipts until the cotton was either sold or placed in government loan. Upon either event, the gin would exchange the warehouse receipts for the proceeds, deduct the ginning fees, pay the storage and farm labor fees, and then remit the net proceeds to the owner. In the present case, however, the proceeds were never realized for on November 7, 1968, the Commissioner of Internal Revenue served the gin with a notice of levy on the Marions' property and demanded the warehouse receipts covering the cotton in question.\textsuperscript{120}

In response the gin filed an interpleader action in which it asserted that it faced conflicting demands for the cotton harvested on the Marions' farm. The gin claimed a possessory lien of $120.52 for its services, Rackler claimed a possessory lien of $1,178.00 for his harvesting services and the Government claimed the total proceeds based on the prior filing of its tax lien.\textsuperscript{121}

Thus, under the requirements set out above, it would appear that for Rackler (the harvester) and the gin to be protected by the superpriority status of section 6323(b)(5), each must (a) hold a possessory lien arising under local Texas law, (b) have been in continuous possession of the cotton from the time this lien arose, and (c) have either repaired or improved the taxpayer's cotton.\textsuperscript{122}

A. Liens Arising Under Local Law

A review of the laws of Texas indicates that artisans, repairmen, and similar parties are protected by the following liens:

1. Section 37 of article 16 of the Texas Constitution provides that "mechanics, artisans, and material men, of every class shall have a lien" on articles repaired by them for the value of their services.\textsuperscript{123} This constitutional provision is the result of a combination

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} See also Brief for Appellant at 14.
\textsuperscript{123} 3 VERNON'S TEXAS CONST. art. 16, § 37. As between the parties this lien is self-executing, however, third parties must have either actual or constructive notice of the lien. Wood v. Barnes, 420 S.W.2d 425 (Tex. Civ.
of earlier separate constitutional liens concerning mechanic's liens on realty and mechanic's liens on chattels. Although it is essential to this lien that the value of the labor secured must have arisen in either repairing an article or constructing a building, possession is not required by this lien. Thus, this Constitutional lien would not qualify as a "possessory lien" under section 6323(b)(5).

(2) By statute Texas allows individuals, such as farm hands and mill operators, to acquire liens upon property for the amount of labor rendered. This statute, however, has been given a rather strict construction by the Texas courts, and it has been uniformly held that the statute gives a lien only to those who labor for wages,
and not to one who contracts with another to render services. The Texas statute also describes in detail the time and method of recordation necessary to fix this lien and it notes that “a compliance with the foregoing requirements in this article shall be necessary to fix and preserve the lien given under this law.” Hence, this statutory lien can exist only when it arises out of a laborer’s claim for wages and only when it has been perfected in the manner prescribed by the statute authorizing it. Since the statute, however, confers its lien even when the improved property “may be owned by or in the possession or under the control of the aforesaid employer . . .”, it is clear that this lien is also not one which meets the tests of section 6323(b)(5).

(3) Texas statutory law also provides specifically for a lien on cotton at the time of its storage. The nature and amount of the lien must clearly be set out on the warehouse receipt and the receipt must be signed by the owner of the cotton if it is negotiable in nature. This procedure, however, is not required if a non-negotiable receipt is issued. Again, since such a lien does not require possession of the property by the lienor, it is not in the nature of a “possessory lien.”

(4) In 1874, the Texas Legislature codified the common law artisan’s lien on chattels. This statutory lien, like its common-law predecessor, depended upon retention of possession by the lienholder for its existence, and was deemed to be lost by the voluntary and unconditional surrender of the property. The present Texas statute substantially re-enacts and restates the former 1874 law.

128. See Farmers’ Elevator Co. v. Advance Thresher Co., 189 S.W. 1018 (Tex. Civ. App. 1916) wherein the court held at 1021 that “The appellant... in operating his machine in threshing W.T. Waggoner’s wheat, was not an employee or farm laborer within the meaning of the statute. He simply contracted with the said Waggoner for an agreed consideration to thresh his wheat, and therefore does not come within any of the classes of persons mentioned in, and protected with a lien by, the statute.” See also Cotton Belt State Bank v. Roy H. Hatcherries, Inc., 351 S.W.2d 325 (Tex. Civ. App. 1961).

129. TEX. REV. CIV. STAT. art. 5486 (1958). The record for this case does not indicate that Rackler complied with the filing requirements of this statute—but even compliance would not give him a possessory lien (Brief of Appellant at 20).

130. See note 119 supra.


133. Id.

134. 3 VERNON’S TEX. CONST. art. 18, § 37, Interpretive Commentary.

135. TEX. REV. CIV. STAT. art. 5503 (1958): Whenever any article, implement, utensil or vehicle shall be repaired with labor and material, or with labor and without furnishing material by any carpenter, mechanic, artisan, or other...
Since the object of this statute is to codify the common law and provide an enforcement tool for a possessory lien, it has been made clear that this statutory lien does not impair other available liens or codify the lien for repairs arising under the Texas Constitution, which does not make possession an essential element to the lienor's right. This lien is therefore a "possessory lien" within the meaning of section 6323(b)(5).

(5) Texas law, also recognizes that a transaction can result in an equitable lien which a court of equity will enforce against property of the debtor. As explained previously, the distinguishing characteristic of an equitable lien which sets it apart from the common law lien is the fact that possession is not required for the equitable lien. Thus, it would appear evident that such a lien could not be termed a "possessory lien" within the meaning of section 6323(b)(5).

After viewing the facts and the above available liens, the Government argued that the parties did not hold a possessory lien of the nature required by the tax statute. However, the Government did concede that the harvester and the gin each held an equitable lien on the cotton in question since case law in Texas, as set out in Williams v. Greer, makes it clear that:

After a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a lien. . . . It is not neces-

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workman in this State, such carpenter, mechanic, artisan, or other workman is authorized to retain possession of said article, implement, utensil, or vehicle until the amount due on same for repairing by contract shall be fully paid off and discharged. In case no amount is agreed upon by contract, then said carpenter, mechanic, artisan, or other workman shall retain possession of such article, implement, utensil or vehicle, until all reasonable customary and usual compensation shall be paid in full (emphasis added).

136. McBride v. Beakley, 203 S.W. 1137 (Tex. Civ. App. 1918). Although the government claimed that neither Rackler nor the gin could claim this lien because of delivery of possession and also a failure "to repair" the cotton (Brief for Appellant at 19-20), it is interesting to note that the Court did not find it necessary to deal with this lien in the development of the theory of "continuous possession" (427 F.2d at 697) or in discounting the argument of "no improvement" (427 F.2d at 697).

138. See text at notes 81 to 112 supra.
139. See Brief for Appellant at 15 to 21.
140. 427 F.2d at 696.

sary that a lien is created by express contract or by operation of the statute; courts of equity will apply the relations of the parties and the circumstances of their dealings in establishing a lien based on right and justice.\textsuperscript{142}

However, the Government claimed that since this lien was equitable in nature, it did not meet the definitional requirements of section 6323(b)(5) which deals only with "possessory liens." It was the contention of the Government that before a superpriority under this section could be accorded to a lienholder, his lien must be "possessory in the sense that the state law creating the lien must give the claimants the legal right to withhold delivery of the property to the owner until payment is made. An equitable lien . . . confers no such right on the creditor."\textsuperscript{143}

Without reviewing the constitutional and statutory lien provisions of Texas law, the court focused its attention directly upon the equitable lien which each party clearly held under local case law. The court agreed with the Government's argument that an equitable lien does not depend upon possession for its validity, but it disagreed that in the instant case and in other similar situations an equitable lien could not confer a right to possession. As the court stated:

It is true, as the government argues, that an equitable lien does not depend upon possession for its validity. It does not follow, however, that in all cases an equitable lien gives the lienholder no right to possession. \textit{In the instant case the equitable lien arose because of the implied agreement among the parties that Rackler and the gin would in fact maintain possession of the cotton until the charges for harvesting and ginning were paid. Their continued possession of the cotton was therefore legal. We think this is sufficient under § 6323(b)(5). To hold otherwise would require us to infer an intent on the part of Congress to protect only those lienholders who happened to live in a state which had explicitly pronounced a right of possession in the lienholder. We find nothing in the Act which indicates that Congress intended for the superpriority to depend on the vagaries of this aspect of the various state laws. The precise wording of § 6323(b)(5) requires only that the property by subject to "a lien under local law"; it does not specify that the lien must be one depending upon or authorizing possession. Since this is clearly remedial legislation, we see no need to read such a restriction into the statutory scheme. Indeed, since Congress did specify continuous possession of the property as a prerequisite to superpriority

\begin{itemize}
\item \textsuperscript{142} 122 S.W.2d at 248.
\item \textsuperscript{143} 427 F.2d at 696.
\item \textsuperscript{144} Id.
\end{itemize}
protection, we think it was the maintenance of possession with which Congress was concerned, not the particular wording of the state lien laws. We conclude, therefore, that the equitable lien was sufficient under § 6323(b)(5) to entitle both Rackler and the gin to priority over the federal tax lien. 144

Hence, under the Fifth Circuit's interpretation, the requirements of section 6323(b)(5) are met if the parties have agreed by implication that possession will be withheld from the owner of property until payment for the services of all parties who dealt with the property in the process of its improvement has been made. The fact that the lien of each party is equitable in nature was therefore deemed not determinative of the issue. Nor was it found to be necessary that the lien depend upon or authorize possession. So long as it was understood between the parties that local custom required payment before release of the property, the "local lien" requirement of section 6323(b)(5) was considered met without further distinction as to whether such lien was "possessory" in the common law sense or not.

B. CONTINUOUS POSSESSION UNDER SECTION 6323(b)(5)

The Fifth Circuit further found that both the harvester and the gin fully met the tax statute's requirement that the holder of the lien must be "continuously in possession of such property from the time such lien arose." 145

The Government attempted to argue that the common law requirements of a possessory lien make it necessary that the lienholder cannot release the property subject to the lien from his actual possession nor can he accept a substitute security. It was the opinion of the Government that the harvester lost his possessory lien when he delivered the cotton to the gin 146 and that the gin gave up its possessory lien when it accepted warehouse receipts as evidence of its interests in the stored cotton. 147

The court dismissed the contention that neither party had possession by finding, first, that the gin did have possession of the cotton and second, that the possession of the gin was also the possession of the harvester. 148

In regard to the gin's possession, the Government had argued that the warehouse receipts held by Citizens Co-op Gin gave it "no

145. INT. REV. CODE of 1954, § 6323(b) (5).
146. 427 F.2d at 697. See also Brief for Appellant at 17.
147. 427 F.2d at 697.
148. Id. at 696-697.
right to any specific bales of cotton so [the gin] no longer held any possessory rights in the specific property upon which they had performed their services" and "a substitute security arrangement" does not meet the requirements of section 6323(b)(5).149

In response, the Gin pointed out that,

Cotton is not a fungible good that may be intermingled. The gin tag and warehouse receipt identify the bale from field to factory, always referring to a specific bale. The warehouse receipt . . . never gives rise to "rights to similar property" as in the case of small grains.150

The court, however, did not deal with the problem of fungibility or with the common law requirement of limiting a possessory lien to the specific identified goods which were improved. Instead, in line with its purpose to give a broad interpretation to a remedial statute, the Fifth Circuit found that constructive possession, as symbolized by warehouse receipts, is sufficient to satisfy the statutory requirement of "continuous possession." As the court explained:

It is well understood in commercial practice that possession of a negotiable warehouse receipt is constructive possession of the goods represented by that receipt and that delivery of the receipt is symbolic and legal delivery of the goods . . . (citing cases) . . . Possession of the warehouse receipt so controls the right to actual possession of the goods represented by the receipt that possession of the receipt is for most purposes equivalent to possession of the property. . . . Common sense dictates that Congress could not have intended to protect from the federal tax lien only those creditors who have physical facilities large enough to allow on-premise storage of goods; constructive possession of goods in storage must be sufficient under the continuous possession requirement of the Tax Lien Act. We therefore conclude that the gin's constructive possession of the cotton through its actual possession of the warehouse receipts was sufficient under the "continuous possession" requirement of § 6323(b)(5).151

It appears, therefore, from such an interpretation that fungibility and identification of property subject to the lien will not present problems for holders of warehouse receipts on such commodities as corn and wheat, and that the constructive possession which

149. Brief for Appellant at 22-23. The Government's argument was predicated upon the rule recognized in Texas that mechanic's and material men's liens do not attach to property separate and distinct from those upon which the improvement or repair is made. See Lambert v. Williams, 2 Tex. Civ. App. 413, 21 S.W. 108 (1893).
150. Brief for Appellees at 4-5.
151. 427 F.2d at 697.
such receipts represent is sufficient to meet the statutory require-
ment of "continuous possession."

While the above view of "possession" does not greatly expand
the essentials of the common law concept, the court's view that the
gin's possession was also the possession of the harvester does tran-
scend these traditional boundaries. In finding that the harvester
was "continuously in possession" of the cotton "from the time his
lien arose" until the time of the Government's levy, the court
viewed the entire process of harvesting, processing, baling, and stor-
ing as a whole and found that it would be "absurd" to require that
any party in this chain of improvers must retain the property in his
actual personal possession in order to hold a qualifying lien.\textsuperscript{152}
Such retention, the court observed, in the case of Rackler would
have "completely destroyed\textsuperscript{153} the cotton. Since the underlying
purpose of the superpriority for possessory liens was found to be
to "protect the improver and thereby to encourage the improve-
ment of property in order to increase the value of the federal tax
lien,"\textsuperscript{154} the court felt that:

This purpose would be completely defeated in every case
in which the improvement requires the skill or services of
more than one person if continuous personal possession
were required of each improver. In circumstances where
the improvement requires a chain of improvers, we think
the possession of one is the possession of all so long as those
in the chain intend to withhold the property from the
owner until the improvement charges against the property
are satisfied.\textsuperscript{155}

Hence, the requirement of "continuous possession," as viewed
by the Fifth Circuit, is not restricted by common law concepts of
identification of property subject to the lien, nor is it limited by the
idea that a lienholder's release of custody of the property to an-
other thereby destroys his lien. Since it is highly doubtful that the
harvester could ever be accorded the right to recover the possession
of the property, it also appears that the common law proprietary
interest is not an essential of such a priority. The breadth of this in-
terpretation will no doubt have far reaching effects in future tax
cases since, under this rationale, a superpriority status could be ac-
corded to every party in a chain of processors even when it is known
from the outset that the original owner of the goods seeks only the
ultimate proceeds from their sale and not their actual return.

\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
C. Repair or Improvement of the Property

Section 6323(b)(5) requires that the lien to be accorded super-priority status must secure the "reasonable price of the repair or improvement of such property." The term "repair" has usually been defined to mean "to mend, remedy, restore, renovate, to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." And, "improvement" has been said to be "a valuable addition made to property . . . or an amelioration in its condition, amounting to more than mere repairs or replacement of waste . . . ."

In the instant case, the Government argued that rather than repairing or improving the cotton, the harvester and the gin had participated in the manufacturing or processing of raw materials and thus were outside the scope of the statute. Rather than deal with such a definitional distinction, the Fifth Circuit found that the "improvement" requirement of the statute "means nothing more than the lien claimant must add value to the property." In support of its interpretation the court turned to the legislative history of another portion of the Act which deals with subordination of the Government's lien whenever the value of the tax lien will be increased thereby. In recommending passage of that new section, the Senate Finance Committee had commented that one instance in which a tax lien would be increased in value would be "in the case of a crop which needs harvesting and without which the tax lien of the Government has little or no value." Relying upon this example as an instance where harvesting would be an "improvement" within

156. INT. REV. CODE of 1954, § 6323(b)(5). For full text of this section see text at note 6 supra.
158. BLACK'S LAW DICTIONARY 890 (Rev. 4th ed. 1968).
159. 427 F.2d at 697. Cf. text at note 67 supra.
160. 427 F.2d at 697.
161. INT. REV. CODE of 1954, § 6325(d) provides:

(d) Subordination of lien.—Subject to such regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of subordination of any lien imposed by this chapter upon any part of the property subject to such lien if—

(1) there is paid over to the Secretary or his delegate an amount equal to the amount of the lien or interest to which the certificate subordinates the lien of the United States, or
(2) the Secretary or his delegate believes that the amount realizable by the United States from the property to which the certificate relates, or from any other property subject to the lien, will ultimately be increased by reason of the issuance of such certificate and that the ultimate collection of the tax liability will be facilitated by such subordination.

the meaning of section 6323(b)(5), the Court held that Rackler had improved the cotton by his services. The process of ginning and baling the cotton, thus easily met this "but for" test of increasing the value of the goods, hence the Gin was also deemed to have met this definitional requirement.

Obviously such a "but for" test will take in almost every party who deals with property from the field to factory, including stevedores, transportation companies, factory unloaders, etc., since without such services, the taxpayer's property would either remain in the field, remain on the transport vehicle, or remain on the loading docks of the factory and be thereby destroyed (if perishable) or lessened in value.\textsuperscript{163} Only the other two requirements of the statute dealing with "liens under local law" and "continuous possession" could prevent such a far-reaching consequence. However, the broad construction which the Fifth Circuit has placed upon these other elements would also seem to include these parties.

D. THE SIGNIFICANCE OF Citizen's Co-op Gin

The interpretation placed upon section 6323(b)(5) by the Fifth Circuit deliberately broadens the scope of this superpriority in order to effectuate the remedial purposes of Congress. The statute, as now construed, extends its protection to holders of equitable liens whose possession of property can be constructive in nature and whose services may be rendered to prevent the destruction or loss of value of the property. According to the tests of the Fifth Circuit, so long as it is agreed between the owner of the property and those whose liens arise in a chain of improvers, that possession of the property will be withheld from the owner until all charges for services are paid, the essential requirements for this superpriority status have been met.

The basic requirements for a common law possessory lien were, therefore, found not to be a necessary part of the statutory scheme. Hence, continuous possession without release of custody, identification of the improved property without substitution of another security, and an arrangement anticipating the ultimate return of the improved property to its owner without its conversion into sales

\textsuperscript{163} Plumb has noted that the rejected suggested categories deal with services which increase value in a less tangible nature. As he states: The factor of enhancement of value of the liened property is present in some of those [A.B.A. proposed] cases, although it is less tangible than in the situations Congress chose to favor: business property, at least, ordinarily gains value when transported to another place, or when safeguarded from the elements, else the owner would not incur the cost of such services.

Plumb, supra note 48, at 687.
proceeds or loan proceeds by the lienor on the owner's behalf—such elements were each found to be without significance to the acquisition of the preferred status of a lienor who holds a superpriority claim.

The breadth of such an interpretation in the hope of effectuating a remedial Congressional intent may portend a new approach to the formerly restrictive manner of construing the specific categories of lienors who would prevail over a federal tax lien. Whether other courts will follow this expansive method of interpretation, however, is a question which only future decisions can answer.

V. CONCLUSION

At the time of the drafting of the Federal Tax Lien Act of 1966, the American Bar Association's Committee on Federal Liens submitted a proposed draft of a new section 6323 which included the following suggested subsection with regard to the superpriority of a possessory lien:

(o) Liens and Interests Preferred Regardless of Time.
—The following liens and interests shall, to the extent herein provided have priority over the lien under Section 5321 regardless of when such lien arises or notice thereof is filed . . .

(6) Certain Liens Upon and Security Interests in Personal Property.—Any of the following liens upon and security interests in personal property (including animals), acquired under applicable law or by contract, unless acquired in bad faith:
(A) A lien or security interest securing the reasonable price of the production, improvement, alteration, repair, care, safekeeping, preservation or carriage of the property subject to the lien;

In the ultimate enactment of this priority, it is significant that Congress chose to reject the proposal that liens for such services as production, alteration, care, safekeeping, preservation and carriage be included within the superpriority section. Instead, Congress chose to entitle the new subsection “Personal property subject to possessory lien,” and Congress specifically limited the privilege of that superpriority to those parties whose liens arise under “local law” from the “repair or improvement” of the taxpayer's property provided the lienor has been “continuously in possession of such property from the time such lien arose.”

164. See text at note 76 supra.
166. INT. REV. CODE of 1954, § 6323(b) (5).
The title of this subsection, the limitations of its language, the wording of its content and the underlying common law concepts of "possessory liens," as well as a comparison of the A.B.A.'s proposed draft and the final enactment, should lead to the conclusion that the Congressional intent in creating this preferred status was to protect only those who clearly come within the definitional common law bounds.\textsuperscript{167}

Prior to 1966, it was evident that the Supreme Court of the United States imposed strict definitional requirements in the construction of each narrow statutory category which accorded a party any priority over a federal tax lien.\textsuperscript{168} Such treatment has been the general mode of construction whenever a taxpayer or a third party claims a statutory privilege such as a deduction, exemption, credit, or priority, since the according of such a privilege results in a reduction of the revenue of the United States.\textsuperscript{169}

*Citizens Co-op Gin v. United States,*\textsuperscript{170} appears to forecast a less restrictive approach to the solution of tax lien problems. The intent of the Fifth Circuit to advance the Congressional purpose of aligning the federal lien laws with present day commercial practices, is irreproachable, and, indeed, is a duty of a reviewing court. However, the breadth of the language used by the court in resolving this particular dispute seems to transcend the actual limits of the very technical wording of the statute itself. Hence, unless this decision is viewed as a resolution which was fashioned solely to deal with a unique local custom existing only within the State of Texas, the reach of its rationale may encompass situations which Congress explicitly intended to exclude from the superpriority status.

It has been argued that not only the repairman, but others who have dealt with the property in ways not favored by Congress should be entitled to a "superpriority" on the grounds that:

The tax collector, by not enforcing the tax lien, clothes the owner with power to make normal use of the property and with apparent authority to incur liens for the cost of normal services thereto by persons who could not be expected to make a search for federal tax liens. To enforce a prior tax lien at their expense compels them to bear an-

\textsuperscript{167} See 112 Cong. Rec., 22,225 (1966) wherein the Chairman of the House Ways and Means Committee explained this subsection as follows:

In addition, your committee believed that where a garageman or other repairman adds value to a piece of property, such as a damaged automobile by repairing it and as a result increases the value of the government's lien, he should not be deterred from doing his useful work because a notice of Federal tax lien has been filed.

\textsuperscript{168} See text at notes 29 to 32 *supra.*

\textsuperscript{169} See note 76 *supra.*

\textsuperscript{170} 427 F.2d 692 (5th Cir. 1970).
other's tax burdens, from which they could not reasonably protect themselves even by normal diligence.\textsuperscript{171}

Congress, however, did not choose to adopt such an all encompassing rationale. Thus, while such a result may be desirable from the standpoint of the particular lienor in contest against the United States, the underlying purpose of the tax lien laws, "to insure \textit{prompt and certain} collection of taxes due the United States from tax delinquents,"\textsuperscript{172} should cause a superpriority status to be bestowed upon only those parties who clearly fall within the narrow bounds of the statutory privilege.

\textit{James Silhasek—'72}

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171. Plumb, supra note 48, at 687 (footnotes omitted).
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