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THE “PRIORITY STATUTE” – THE UNITED STATES’ “ACE-IN-THE-HOLE”[†]

RICHARD H.W. MALOY*

INTRODUCTION

There has been a statute in effect, since 1797, which is so arcane that in a recent case neither the attorney for the government, nor the private party, were aware of its existence until they were informed by the Department of Justice.¹ The statute at issue was 31 U.S.C. § 3713,² popularly labeled the “Priority Statute.”³ It is surprising that this statute is known by

[†] Phrase & Word Origins, <http://www.yaelf.com/questions.shtml> (last visited July 27, 2006) (“In certain games of poker, some cards are dealt in such a manner that they are not visible to the other players, and the slang expression for these cards is ‘the hole.’ Having an ‘ace’ (a high card) in ‘the Hole’ can provide one with a decisive advantage when the cards are finally revealed.”).

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1. See *United States v. Mountzoures*, 376 F. Supp. 2d 13, 16 (D. Mass. 2005) (conceding that neither defendant nor the Bureau of Prisons knew of the priority statute until the Department of Justice informed them).

2. 31 U.S.C. § 3713 (2000).

3. See *S.E.C. v. Credit Bancorp, Ltd.*, 297 F.3d 127, 131 (2d Cir. 2002) (referring to § 3713 as “The Federal Debt Priority Statute.”); *Green Atlas Shipping v. United States*, 306 F. Supp. 2d 974, 975 (D. Or. 2003) (same). The Priority Statute is not to be confused with the “absolute priority rule” of bankruptcy law. Under bankruptcy law, if a class of unsecured claims is not being paid in full under a reorganization plan, the plan will not be considered “fair and equitable” unless, among other matters, the holder of any junior interest “will not receive or retain under the plan on account of such junior . . . interest any property . . .” 11 U.S.C. § 1129(b)(2)(B)(ii) (2000). In other words, the Bankruptcy Code provides that, if a reorganization plan is objected to by a class of unsecured claimants because such claims are not being paid in full, the plan will only pass the “fair and equitable” test required for confirmation if classes junior to the objecting class receive nothing on their claims. See *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. Lasalle St. P’ship*, 526 U.S. 434, 441-42 (1999). The same protection is provided to classes of equity security holders (i.e. stockholders and partners) 11 U.S.C. 1129(b)(2)(C)(ii) (2005).

so few when one realizes the United States Supreme Court has interpreted it forty-eight times;⁴ although, admittedly, one-third of that number were decided in the Nineteenth Century.

In my Debtor/Creditor Relations class we usually spend a day discussing the Priority Statute. Since there has not been an article written about this interesting, esoteric statute in many years, I decided it was about time to publicize it.⁵ This article will explore the Priority Statute by tracing its historical underpinnings; discuss Supreme Court decisions that have interpreted it; and, finally, the Conclusion will formulate the rules that the decisions have promulgated.

I. THE PRIORITY STATUTE

The Priority Statute is codified at 31 U.S.C. § 3713. In its entirety the statute provides:

(a) (1) A claim of the United States Government shall be paid first when —

(A) a person indebted to the Government is insolvent and —

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy⁶ is committed; or

At this point, it should be noted that this paper is not concerned with 31 U.S.C. § 9309, which deals with governmental priority in connection with surety bonds.

4. It is even more surprising, after realizing the opinions in these forty-eight decisions have been authored by several eminent jurists.

5. It is certainly an important, if little known, portion of our jurisprudence.

6. The Bankruptcy Act of 1898 identified "acts of bankruptcy" as follows: Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Bankruptcy Act of 1898, ch. 541, 30 stat. 544 (repealed 1978). *In re Tenn. Cent. Ry., Co.*, 463 F.2d 73, 77 (6th Cir. 1972), and *United States v. Schroeder*, 204 F. Supp. 199, 202 (S.D. Iowa 1962), refer to the statute, but do not quote it.

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11,⁷

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.⁸

In summary, in order for a claim in favor of the United States against a “person”⁹ to have unsecured first priority three prerequisites must be established: (1) the debtor must have been insolvent at the time the person owed the debt;¹⁰ (2) at least one of

As of 1976, the Bankruptcy Act defined “acts of bankruptcy” as follows: Acts of bankruptcy by a person shall consist of his having (1) concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them, or made or suffered a transfer of any of his property, fraudulent under the provisions of section 107 or 110 of this title; or (2) made or suffered a preferential transfer, as defined in subdivision (a) of section 96 of this title; or (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or distraint and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or disposition of such property; or (4) made a general assignment for the benefit of his creditors; or (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt.

11 U.S.C. § 21(a) (1976) (repealed 1978); *see also* Community Progress, Inc. v. White, 444 A.2d 1369, 1374 n.6 (Conn. 1982) (quoting the repealed statute). The Bankruptcy Act of 1800 specified ten “acts of bankruptcy”, the Act of 1841 specified five such acts, and the Act of 1867 specified nine acts. *In re Marshall*, 300 B.R. 507, 518 (Bankr. C.D. Cal. 2003). *See infra* notes 229, 288, 651 and 656 (discussing *In re Marshall*).

7. The wording of this subsection of the Priority Statute was added to the statute in 1978, as part of the major revamping of the Bankruptcy system under the Bankruptcy Reform Act of 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 322(b), 92 Stat. 2549, 2679; *see also* United States v. Estate of Romani, 523 U.S. 517, 531 n.15 (1998). The Bankruptcy Reform Act of 1978 became effective October 1, 1979. § 402(a), 92 Stat. at 2682. *See infra* notes 623-649 and accompanying text for a discussion of *Estate of Romani*.

8. The wording of this subsection was added to the statute by the Act of 1799. *Price v. United States*, 269 U.S. 492, 501 (1926); *see also infra* notes 289-298 and accompanying text for a discussion of *Price*.

9. A corporation is a “person.” *See Beaston v. Farmers’ Bank of Del.*, 37 U.S. 102, 134-35 (1838) (“The record in this case abundantly proves, that a bank may become largely indebted to the United States . . .”). *See also infra* notes 153-178 and accompanying text for a discussion of *Beaston*.

10. *See United States v. Vermont*, 377 U.S. 351, 358 (1964); *see also infra* notes 574-595 and accompanying text for a complete discussion of *Vermont*.

the following events must have occurred: (a) the debtor without enough property to pay all debts makes a voluntary assignment of all of its property,¹¹ (b) property of the debtor, if absent, is attached, or (c) an act of bankruptcy is committed;¹² and (3) the debtor must not be the subject of a bankruptcy case. In addition, if the representative of such a debtor (except a trustee appointed under the Bankruptcy Code) pays any part of a debt due to the United States before paying the United States, that representative will become personally liable to the extent of the payment for unpaid claims of the United States.

In order for a claim in favor of the United States and against "the estate of a deceased debtor" to have unsecured first priority, three prerequisites must be established: (1) the estate must be in the custody of an executor or administrator; (2) the estate is not enough to pay all debts of the debtor; and (3) the estate must not be the subject of a bankruptcy case. Similarly, if the representative of such a debtor's estate (except a trustee appointed under the Bankruptcy Code) pays any part of a debt due to the United States before paying the United States, the representative will also become personally liable to the extent of payment for unpaid claims of the United States.

11. By way of explanation, a voluntary assignment of all ones property was known under the common law as an "assignment for the benefit of creditors" (A.B.C.), which at one time was very popular among debtors as a way of avoiding bankruptcy; and is still in use. *Brecht v. Law Union & Crown Ins., Co.*, 153 F. 452, 455 (Cir. Ct. D. Or. 1907). See *In re Myers' Assigned Estate*, 47 Pa. C.C. 319 (Pa. Orph. 1918). The debtor assigns all, or substantially all, of its property to a third person (usually called an assignee or trustee), whose function is to work out a payment schedule with creditors. The debtor is relieved of dealing with creditors for the very pragmatic reason that the debtor has no more assets, and a judgment against the debtor would be of virtually no value. The assignment often, but not necessarily, occurs while the debtor's liabilities exceed its assets. See *id.*

12. The term "an act of bankruptcy" has a very precise meaning. Under the previous Bankruptcy Act, effective prior to the Bankruptcy Reform Act of 1978, a person (individual or artificial) could not be forced into bankruptcy by creditors unless an "act of bankruptcy" was committed. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978); see *Bramwell v. U.S. Fid. & Guar. Co.*, 269 U.S. 483, 489-90 (1926) (discussing "acts of bankruptcy"); see also *supra* note 6, *infra* notes 261, 284, 286, 288, 448, 656-61, 734 and accompanying text for further discussion of "acts of bankruptcy."

II. THE U.S. CONGRESSIONAL HISTORY OF THE PRIORITY ACTS¹³

The modern form of the Priority Statute is codified at 31 U.S.C. § 3713. Other priority statutes, however, were enacted during our Congressional history. We are fortunate to have some of the history of priority statutes chronicled for us by both Chief Justice John Marshall in *United States v. Fisher*,¹⁴ and Justice Joseph Story in *United States v. State Bank of North Carolina*.¹⁵ Chief Justice Marshall recounted that in early English law the King was given a preference in the collection of public monies.¹⁶ Justice Story further reported that the right of priority “[was] founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure adequate revenue to sustain the public burthens [sic] and discharge the public debts.”¹⁷ Justice Story further commented by stating that since this policy “has mainly a reference to the public good, there is no reason for giving to [the statute] a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.”¹⁸

The modern Priority Statute has been in effect since 1797 without material change.¹⁹ The first statute giving the United States priority in the payment of debts due to the United States was the Act of July 31 1789,²⁰ which permitted the posting of bonds by importers in lieu of payment of duties for release of import

13. This article will focus only on federal Congressional history. Several states, however, have enacted priority statutes. See *Pauley v. California*, 75 F.2d 120, 134 (9th Cir. 1934) (California law); *People v. Farmers’ State Bank of Hooppole*, 167 N.E. 804, 805 (Ill. 1929) (Illinois law); *Marshall v. New York*, 254 U.S. 380, 382 (1920) (New York law); *In re Carnegie Trust Co.*, 99 N.E. 1096, 1098 (N.Y. 1912) (same); *Field v. United States*, 34 U.S. 182, 201 (1834); *State of Maryland v. Bank of Maryland*, 1834 Md. LEXIS 16 (Md. 1834).

14. 6 U.S. 358 (1805). See *infra* notes 45-60 and accompanying text for a discussion of *Fisher*, 6 U.S. 358 (1805).

15. 31 U.S. 29 (1832); see also *infra* notes 103-112 and accompanying text for a discussion of *State Bank of North Carolina*.

16. See *Fisher*, 6 U.S. at 373 (explaining that, while the priority of the King applied to “cases where public monies have been received by an accountable officer to public use,” it did “not extend to transactions of a common nature”).

17. *State Bank of North Carolina*, 31 U.S. at 35.

18. *Id.*

19. *United States v. Moore*, 423 U.S. 77, 81 (1975); *United States v. Emory*, 314 U.S. 423, 428 (1941); *Hofman v. United Welding & Mfg. Co.*, 102 A.2d 878, 880 (Conn. 1954); see also *infra* notes 368-82, 612-28 and accompanying text for discussions of *Emory* and *Moore* respectively.

20. Act of July 31, 1789, ch. 5, § 21, 1 Stat. 29, 42 (1789); see also *Estate of Romani*, 523 U.S. 517, 526 n.9 (1998); *United States v. Marxen*, 307 U.S. 200, 206 n.12 (1939); *United States v. Oklahoma*, 261 U.S. 253, 259 (1923). See also *infra* notes 255-67 and 361-368 and accompanying text for a discussion of *Oklahoma* and *Marxen* respectively.

goods.²¹ The Act of August 4, 1790,²² dealing with the same subject, was the second priority statute that came into existence. With the establishment of the Act of March 3, 1791, The United States acquired priority with regard to other classes of creditors.²³ The following year, the Act of May 2, 1792²⁴ gave sureties the right of subrogation and limited priority to cases in which insolvency was manifested by one of the modes specified.²⁵

Though the Acts of 1797 and 1799 were modified slightly over the years, their basic premise remained constant.²⁶ The Act of March 3, 1797,²⁷ the precursor to § 3713(a)(1)(A), was titled "An Act to provide more effectually for the Settlement of Accounts between the United States, and Receivers of public money."²⁸ It extended the priority from cases concerning defaults on custom bonds to cases involving revenue officers or others becoming indebted to the United States:²⁹

And be it further enacted, that where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.³⁰

21. *Price*, 269 U.S. at 500-01.

22. Act of August 4, 1790, ch. 35, § 45, 1 Stat. 145, 169 (1790); *see also Oklahoma*, 261 U.S. at 259 (citing in reverse chronological order the priority statutes).

23. *State Bank of North Carolina*, 31 U.S. at 36.

24. Act of May 2, 1792, ch. 27, § 18, 1 Stat. 259, 263 (1792); *see also Marxen*, 307 U.S. at 206 n.12; *Oklahoma*, 261 U.S. at 259.

25. *Price*, 269 U.S. at 501.

26. *Emory*, 314 U.S. at 428; *State Bank of North Carolina*, 31 U.S. at 38; *Fisher*, 6 U.S. at 394. Indeed "[t]he 1797 and 1799 Acts have survived to this day essentially unchanged." *Moore*, 423 U.S. at 81.

27. Act of March 3, 1797, ch. 20, § 5, 1 Stat. 512, 515.

28. ch. 20, § 5, 1 Stat. at 512; *Fisher*, 6 U.S. at 398.

29. *See* ch. 20, § 5, 1 Stat. at 515. Prior to the passage of this statute an internal revenue service had been established in the United States, and extensive transactions had taken place, in the course of which many persons had become indebted to the United States. *Fisher*, 6 U.S. at 392. No attempt, however, had hitherto been made to give a preference in the collection of such internal revenue debts. *Id.* at 392-93; *see also infra* notes 44-60 and accompanying text.

30. ch. 20, § 5, 1 Stat. at 515.

The Act of March 2, 1799,³¹ the precursor to § 3713(a)(1)(B), introduced the provision making the Priority Statute applicable to executors, administrators, and assignees:³²

[W]here any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith . . . cause a prosecution to be commenced . . . ; and in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid³³

In the first session of the forty-third congress, the priority statutes of March 3, 1797 and March 2, 1799, were re-numbered as §§ 3466 (Rev. Stat. § 3466) and 3467 (Rev. Stat. § 3467), respectively, of the Revised Statutes of the United States.³⁴ Rev. Stat. § 3466 provided as follows:³⁵

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 of the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby 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.

31. Act of March 2, 1799, ch. 22, § 65, 1 Stat. 627, 676.

32. See ch. 22, § 65, 1 Stat. at 676; *Price*, 269 U.S. at 501. As was stated in *Moore*, 423 U.S. at 81, the provision gave “the priority teeth.”

33. ch. 22, § 65, 1 Stat. at 676; see also *Brent v. Bank of Washington*, 35 U.S. 596, 611 (1836) (discussing the priority statute as applicable to executors, administrators and assignees); *United States v. Hack*, 33 U.S. 271, 274-75 (1834) (same). See also *infra* notes 113-124 and 130-150 for discussion of *Heck* and *Brent* respectively.

34. There are minor differences in phraseology between the original Act passed on March 3, 1797, and Rev. Stat. § 3466, which do not work any changes in the purpose or meaning of the original legislation. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 371 n.9 (1946) (citing *Price*, 269 U.S. at 501). See *infra* notes 437-473 and accompanying text for a discussion of *Campbell*.

35. ch. 20, § 5, 1 Stat. at 515 (currently codified at 31 U.S.C. § 3713 (2005)).

Rev. Stat. § 3467 provided as follows:³⁶

Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.³⁷

On December 7, 1925, Congress re-codified Rev. Stat. §§ 3466 and 3467 as §§ 191 (§ 191)³⁸ and 192 (§ 192),³⁹ respectively, of the United States Code. On May 10, 1934, § 192 was slightly revised to read as follows:

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.⁴⁰

36. ch. 22, § 65, 1 Stat. at 676.

37. The relationship between Rev. Stat. § 3466 and Rev. Stat. § 3467 was explained in *Bramwell*, 269 U.S. at 490. The Court pointed out that the persons held liable under Rev. Stat. § 3467 were:

[E]very executor, administrator, or assignee, or *other person*. The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear.

Bramwell, 269 U.S. at 490.

38. 31 U.S.C. § 191 provided as follows:

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of 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.

Id. (current version at 31 U.S.C. § 3713(a) (2005)).

39. 31 U.S.C. § 192 provided as follows:

Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

31 U.S.C. § 192 (1926) (current version at 31 U.S.C. § 3713(b) (2005)).

40. Act of May 10, 1934, ch. 277, § 518(a), 48 Stat. 760 (1934); *Beasley v. C.I.R.*, 42 B.T.A. 275, 277 n.1 (1940).

In 1978, as part of the major revamping of the bankruptcy system, which repealed the Bankruptcy Act of 1898 and replaced it with a new version of Title 11 of the United States Code, Congress amended the Priority Statute by adding a section to § 191 which provided that “this section does not apply, however, in a case under title 11 of the United States Code.”⁴¹

In 1982, the Priority Statute under §§ 191 and 192 were again slightly revised and re-numbered to its current form under 31 U.S.C. § 3713(a)-(b). Section 3713(a) revised the phrase “the debts due to”⁴² United States to “a claim of.”⁴³ Section 3713(b) revised the phrase “a debt due” to “a claim of.”⁴⁴

III. THE U.S. SUPREME COURT DECISIONS THROUGH THE YEARS

A. 1805: *United States v. Fisher*⁴⁵

The decision in *Fisher* became the first by the highest court interpreting a priority statute. The defendant was the endorser of a foreign bill of exchange in favor of the State Collector, in his official capacity.⁴⁶ The defendant-debtor went into bankruptcy and his property was sold.⁴⁷ The Bankruptcy Act in effect at that time provided that “nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States”⁴⁸ The United States, in turn, sued the assignees that held the debtor’s property as a result of the bankruptcy.⁴⁹ A jury verdict was rendered in favor of the defendants/assignees.⁵⁰ The U.S. Supreme Court reversed the

41. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 322(a), 92 Stat. 2678 (1978); see also *Estate of Romani*, 523 U.S. at 531 n.15 (stating the amended priority statute of 1978 is expressly inapplicable to Title 11 bankruptcy caeses). The current version of the Priority Statute is without material change: “this subsection does not apply to a case under Title 11.” 31 U.S.C. § 3713(a)(2) (2005).

42. Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877 (1982). The present Bankruptcy Act defines “debt” as “liability on a claim.” 11 U.S.C. § 101(12) (2005). “Claim” is defined as a right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. 11 U.S.C. § 101(5).

43. 11 U.S.C. § 101(5)(2000).

44. Pub. L. No. 97-258, 96 Stat. 877 (1982).

45. 6 U.S. 358 (1805).

46. *Id.* at 370.

47. *Id.* While the opinion is not clear, the bankruptcy proceeding, under the Bankruptcy Act of 1800, must have been similar to the present-day Chapter 7 proceeding, in which the debtor’s property is liquidated in exchange for a discharge of the debtor’s personal liability.

48. *United States v. Fisher*, 25 F. Cas. 1087, 1087 (D. Penn. 1803).

49. *Fisher*, 6 U.S. at 358.

50. *Fisher*, 25 F. Cas. at 1089.

judgment with the majority opinion written by the late Chief Justice John Marshall.⁵¹

Chief Justice Marshall enumerated six points in his interpretation of the Act of 1797:

(1) The title of the 1797 Act, which spoke in terms of “receivers of public money,” did not limit the applicability of the Act to such “receivers” because an Act’s title is not part of the legislation.⁵²

(2) The 1797 Act was not confined to revenue officers and persons accountable for public money, but extended to debtors generally.⁵³

(3) The 1797 Act did not create a lien in favor of the United States, but only a priority in payment.⁵⁴

(4) A bona fide transfer of property in the ordinary course of business was not prohibited;⁵⁵ and a bona fide alienation of property before the right of priority attached was valid.⁵⁶

(5) Congress was within its Constitutional powers to enact the 1797 Act.⁵⁷

(6) It had been urged that the priority given to the United States would interfere with the state sovereignties respecting the dignity of debts, and would defeat the measures which they had a right to adopt in order to secure themselves against delinquencies on the part of their own officers.⁵⁸ The Court, however, found this was a

51. *Fisher*, 6 U.S. at 397. *The decision was unanimous*, Justices Cushing, Paterson, and Johnson, in addition to Chief Justice Marshall, voted to reverse. *Id.* Justices Chase and Washington did not participate in the decision. *Id.*

52. *Id.* at 386.

53. *Id.* at 395.

54. *Id.* at 390. Justice Brandeis in *Marshall v. New York*, 254 U.S. 380, 386 (1920), a case dealing with a state Priority Statute, said that “[t]he right of priority has been likened to an equitable lien . . . [t]he priority is a lien in the broad sense of that term.”

55. *Fisher*, 6 U.S. at 390. This proposition was further addressed in the second case considered by the court involving the Priority Statute. *United States v. Hooe*, 7 U.S. 73 (1805). See *infra* notes 61-67 and accompanying text for a discussion of *Hooe*.

56. *Fisher*, 6 U.S. at 395.

57. *Id.* at 396. The Court did not specifically refer to Article I, Section 8 of the Constitution, which gives Congress the power to “provide for the . . . general Welfare of the United States,” even though, that was the provision authorizing the enactment. The Court, rather, said: “it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised [sic] which was not indispensably necessary to give effect to a specified power.” *Id.* The Court continued with: “The government is to pay the debt of the union, and it must be authorised [sic] to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.” *Id.*

58. *Id.* at 397.

direct objection to the Constitution itself.⁵⁹ The mischief suggested, so far as it can readily happen, was a necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.⁶⁰

B. 1805: *United States v. Hooe*⁶¹

In *Hooe*, the second Supreme Court case interpreting the Priority Statute, Chief Justice Marshall referred to a point established in *Fisher*, and expanded on the meaning of “insolvency.” Marshall reiterated the points mentioned in *Fisher* that a bona fide alienation of property before the right of priority attaches is valid,⁶² and that “the priority to which the United States are entitled, does not partake of the character of a lien on the property of public debtors,” a “distinction [that] is always to be recollected.”⁶³ In the end, Marshall defined “insolvency” as a debtor “not having sufficient property to pay all his debts[.]”⁶⁴ and defined “property” as “unquestionably all the property which the debtor possesses.”⁶⁵

C. 1809: *Harrison v. Sterry*⁶⁶

The next Supreme Court decision was again written by Chief Justice Marshall, but did not specifically identify the statute in question; Marshall only referred to it as “the act, which entitle[s] the United States to a preference.”⁶⁷ The Court held that a

59. *Id.*

60. *Id.*

61. 7 U.S. 73 (1805).

62. *Id.* at 89; *see also supra* notes 55 and 56 and accompanying text. Chief Justice Marshall further commented that “[i]t is frequent for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due.” *Hooe*, 7 U.S. at 89. This point was acknowledged by the Court in *Savings & Loan Society v. Multnomah County*, a case which did not deal with the Priority Statute, but contained the following dictum: “This Court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor’s estate.” 169 U.S. 421, 428 (1898) (citing *Hooe*, 7 U.S. 73; *Thelusson v. Smith*, 15 U.S. 396, 426 (1817), and *Conard v. Atlantic Ins. Co.*, 26 U.S. 386, 441 (1828)). *See also infra* notes 75-86 and 83-99 and accompanying text for a discussion of *Thelusson* and *Conard* respectively.

63. *Hooe*, 7 U.S. at 90.

64. *Id.* at 91. Marshall added: “general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense.” *Id.* One hundred and twenty-one years later in *Bramwell v. United States*, 269 U.S. 483, 487 (1926), the Court identified “insolvency” by its most often used definition, i.e. where the amount of one’s debts exceed the value of one’s assets.

65. *Hooe*, 7 U.S. at 91.

66. 9 U.S. 289 (1809).

67. *Id.* at 298.

contract giving rise to a debt was effective to award the United States priority even if it were executed in a foreign country,⁶⁸ and that even though the statute was inapplicable to bankruptcy cases, the United States did not waive its priority by filing a claim in bankruptcy.⁶⁹

*D. 1814: Prince v. Bartlett*⁷⁰

In *Prince*, the Supreme Court established two rules concerning the application of the Priority Statute. First, the “insolvency” required by the Priority Statute had to be a “legal and known insolvency [sic] manifested by some notorious act of the debtor pursuant to law: not a vague allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors it would be difficult to ascertain.”⁷¹ The second tenet was that if a debtor was dispossessed of his property by a sheriff’s levy prior to the levy of another sheriff on behalf of the United States, the latter could not obtain priority.⁷²

*E. 1815: United States v. Bryan*⁷³

In *Bryan*, the Supreme Court held that the Priority Statute did not apply to a debt which became due to the United States prior to the passage of the Act.⁷⁴

*F. 1817: Thelusson v. Smith*⁷⁵

Thelusson recovered a judgment against a man named Crammond, and others in Pennsylvania.⁷⁶ The state judgment constituted a lien against the judgment-debtor’s real property.⁷⁷ Two days after Mr. Thelusson’s judgment was entered, Crammond made an assignment for the benefit of creditors of all his property while he was insolvent and indebted to the United States.⁷⁸ The United States recovered judgments against Crammond and his real property was levied upon and sold by the Marshal of the District of Pennsylvania (Smith), to satisfy the United States’ judgment.⁷⁹ Thelusson brought an action against the Marshal for

68. *Id.* at 299.

69. *Id.* at 299-300.

70. 12 U.S. 431 (1814).

71. *Id.* at 434.

72. *Id.*

73. 13 U.S. 374 (1815).

74. *Id.* at 387.

75. 15 U.S. 396 (1817).

76. *Thelusson v. Smith*, 23 F. Cas. 908, 909 (D. Pa. 1815).

77. *Id.*

78. *Id.*

79. *Id.*

such of the proceeds of the sale as would satisfy his judgment.⁸⁰ While the Court's opinion does not make it clear, apparently the theory of Thelusson's action against the Marshal was that his judgment primed the United States' judgments and the Marshal should not have preferred the United States to him. The trial court entered judgment in favor of the Marshal.⁸¹ The U.S. Supreme Court affirmed, resting its decision primarily on § 65 of the Priority Act of 1799.⁸² Under the Act, a judgment-creditor's lien against a judgment-debtor's property would not defeat the priority of the United States unless there had been a change in title or possession of those lands by an official's seizure, or some other equivalent act making the lien specific.⁸³ As Justice Washington's⁸⁴ interpretation states:

If . . . before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi fa [ie. Writ of fieri facias], the property is divested out of the debtor, and cannot be made liable to the United States But the act of Congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the Act of 1799.⁸⁵

In other words, since the judgment creditor (Thelusson) had not taken the debtor's property out of the debtor by the time the priority of the United States was accorded, the Marshal was correct in acknowledging that the U.S. primed the judgment creditor whose judgment was prior in time to that of the federal government.

80. *Id.*

81. *Id.*

82. 15 U.S. at 426. See *supra* text accompanying note 39 for the wording of § 65 of the Act of 1799.

83. *Thelusson*, 15 U.S. at 426. A mortgage could effect such a change. *Savings & Loan Society*, 169 U.S. at 428 (1898).

84. *Thelusson*, 15 U.S. at 423.

85. *Id.* at 426. In a later case, *Conard*, Justice Story explained *Thelusson* in his opinion for the Court, of which Justice Washington was a member. 26 U.S. at 386. Justice Story wrote:

The real ground of the decision, was, that the judgment creditor had never perfected his title, by any execution and levy on the [judgment debtor's] estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land, did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood, by the Judges who concurred in the decision; and it is obvious, that it established no such proposition, as that a specific and perfected lien, can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien.

Id. at 444.

However, to the extent the Court's opinion in *Thelusson* could be interpreted to provide a statutory priority always according the Government a preference over judgment creditors, that facet of *Thelusson* has been overruled.⁸⁶

G. 1828: *Conard v. Atlantic Insurance Co. of New York*⁸⁷

Conard, decided by the Supreme Court after *Thelusson*, also construed the Act of 1799.⁸⁸ The owner of tea on board two sailing ships pledged the tea as collateral for a loan from an insurance company (Atlantic Insurance Co. of New York) by an endorsement of a bill of lading.⁸⁹ While the borrower was insolvent he assigned his property for the benefit of creditors.⁹⁰ The United States obtained a money judgment against the borrower.⁹¹ Atlantic sued the sheriff (Conard), who levied on the tea.⁹² The borrower was joined in the suit.⁹³ The Supreme Court was presented with the issue of to whom the proceeds of the sale of the tea were due — the United States or the insurance company/lender?⁹⁴

Justice Story, writing for the Court, analyzed the position of Atlantic⁹⁵ by looking at the matter from the standpoint of the United States:⁹⁶

What then is the nature of the priority, thus limited and established in favour of the United States? Is it a right, which supersedes and overrules the assignment of the debtor . . . , so as to prevent such property from passing by virtue of such assignment to the assignees?⁹⁷ Or, is it a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees? We are of

86. See *Estate of Romani*, 523 U.S. 517 (overruling *Thelusson* on the ground that the government is not always provided priority over judgment creditors).

87. 26 U.S. 386 (1828).

88. *Id.* at 438.

89. *Id.* at 434. The Court found the pledge papers to be in order. *Id.* at 437. The fact that the lender never had possession of the collateral, did not constitute fraud. *Id.* at 449.

90. *Id.* at 435.

91. *Id.* at 434.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 438-39. One-hundred and seventy years later, Justice Stevens described this part of Justice Story's opinion as "dicta." *Estate of Romani*, 523 U.S. at 526. It could be that Justice Story was attempting to respond to the government's argument that, if the priority was not a lien, it was nonetheless superior to a lien. *Conard*, 26 U.S. at 440-41.

97. Reference to an assignment, no doubt referred to the transfer of Thomson's interest in the tea under the pledge, rather than to his assignment of his other assets for the benefit of creditors. *Conard*, 26 U.S. at 439. Either assignment, so long as it placed the debtor's property outside the ownership and control of the debtor prior to attachment of the United State's priority would defeat that priority. *Savings & Loan Society*, 169 U.S. at 428.

the opinion that it clearly falls, within the latter description. The language employed is that which naturally would be employed to express such an intent; and it must be strained from its ordinary import, to speak any other.⁹⁸

The rule of law embodied within this often-quoted passage apparently carried the day for the Court because the case was decided in favor of Atlantic and against the United States.⁹⁹

H. 1831: *Hunter v. United States*¹⁰⁰

In *Hunter*, the Supreme Court affirmed¹⁰¹ a circuit court decision restricting the United States' priority to a fund held by assignees/trustees after the costs of administering the assignment were deducted.¹⁰²

I. 1832: *United States v. State Bank of North Carolina*¹⁰³

In *State Bank of North Carolina*, one William H. Lippett owed the United States money for customhouse bonds.¹⁰⁴ Lippett, while insolvent, made an assignment for certain creditors of his in preference over others.¹⁰⁵ The United States filed a bill in equity for collection of the amount Lippett owed them.¹⁰⁶ The issue became whether the priority statute of March 3, 1791, applied to a debt contracted for prior to the assignment, but payable thereafter.¹⁰⁷ Concluding that the Government's claim to priority rested as a matter of settled law only on a statute,¹⁰⁸ Justice Story analyzed the wording of the statute, to wit: a debtor "becoming

98. *Conard*, 26 U.S. at 439.

99. *Id.* at 451. Justice Story made it clear that *Thelusson* "ha[d] been greatly misunderstood at the bar, and will require a particular explanation." He continued:

The United States . . . are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate, to a third person; or has mortgaged the same to secure a debt — or if his property has been seized under a *fieri facias*, the property is divested out of the debtor, and cannot be made liable to the United States.

Id. at 441. No execution had ever been issued in *Thelusson*. *Id.* at 442.

100. 30 U.S. 173 (1831).

101. *Id.* at 189.

102. See *United States v. Hunter*, 26 F. Cas. 439, 439 (D.R.I. 1828). The Circuit Court likened the matter to "the common case of administration. There, the expenses are first deducted, and the residue . . . distributable according to the priorities established by law." *Id.*

103. 31 U.S. 29 (1832).

104. *Id.* at 34.

105. *Id.* at 34-35.

106. *Id.* at 34.

107. *Id.* at 35.

108. *Id.*

indebted to the United States, by bond or otherwise, shall become insolvent . . . [and] the debt due the United States shall be first satisfied.”¹⁰⁹ Justice Story concluded that, though the word “due” is sometimes used to express the mere state of indebtedness, it is also sometimes used to express the fact that a debt has become payable.¹¹⁰ Therefore, the statute clearly intended to cover indebtedness, which might not occur until after an assignment had taken place.¹¹¹ The Court further concluded that its holding was compatible with the Act of March 2, 1799, which made every executor, administrator, assignee or other person answerable for failure to pay the United States first.¹¹²

*J. 1834: United States v. Hack*¹¹³

The Act of 1799 was again considered in *Hack*, where two partners, being financially “embarrassed and insolvent,” made an assignment of all partnership property for the benefit of creditors.¹¹⁴ The partnership property was sold, but the proceeds were insufficient to pay the partnership debts.¹¹⁵ The United States, as a creditor of one of the partners, sought to invoke its priority under the above statute on its debtor’s share of those proceeds.¹¹⁶ The Supreme Court held that the government’s claim could not be paid out of those proceeds due to the nature of the government’s priority right.¹¹⁷ The Court rhetorically asked the same question that was asked in *Conard*:¹¹⁸ What is the nature of the right?¹¹⁹ Is it a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so to prevent such property from passing by virtue of the assignment,¹²⁰ or is it a mere right of prior payment, out of the general funds of the debtor in the hands of the assignee?¹²¹ The Court answered in favor of the

109. *Id.* at 36.

110. *Id.*

111. *Id.* at 36-37. “The insufficiency spoken of in the act, is an insufficiency not to pay a particular class of debts, but to pay all debts of every nature.” *Id.* at 37.

112. *Id.* at 39. It should be remembered that in 1982 Congress amended the Priority Statute so that in § 3713(a) “debts due the” United States was changed to “a claim of” and in § 3713(b) “a debt due” was changed to “a claim of.” See *supra* note 44 and accompanying text.

113. 33 U.S. 271 (1834).

114. *Id.* at 274.

115. *Id.*

116. *Id.*

117. *Id.* at 275-76.

118. See *supra* text accompanying note 97.

119. *Hack*, 33 U.S. at 275.

120. *Id.*

121. *Id.*

latter.¹²² Having previously acknowledged that a lien was not created in favor of the United States,¹²³ and that they held a mere right of prior payment, the Court concluded that the proceeds consisted of joint property, rather than several.¹²⁴ As a result of there being insufficient joint property to pay all of the joint debts, the Court found there was no individual property available for payment to the United States.¹²⁵

*K. 1835: Field v. United States*¹²⁶

In *Field*, the Supreme Court ruled in favor of the United States, despite the fact that it was not a party to the litigation which awarded priority to the other creditor under a state priority statute.¹²⁷ Chief Justice Marshall wrote for the unanimous Court¹²⁸ and pronounced that “[t]he local laws of the state could not, and did not bind [the United States] in their rights. They could not create a priority in favour of other creditors in cases of insolvency, which should supersede that of the United States.”¹²⁹

*L. 1836: Brent v. Bank of Washington*¹³⁰

Brent owned several shares of stock of the Bank of Washington.¹³¹ Subsequently, Brent became indebted to the Bank as an endorser of three notes.¹³² Before his death, Brent made an assignment of all his estate in order to secure the United States and others to whom he was indebted.¹³³ The assignment was never accepted by the assignees/trustees and became inoperative.¹³⁴ Upon Brent’s death his executors called upon the Bank to allow them to transfer the stock for consideration to be received, but the Bank refused on the ground that it had a lien on the stock for the

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 276. Until such a surplus existed there was no individual property available for the payment of debts of the individual partners. *Id.* at 275. While the Court did not specifically refer to state law governing the partnership, it is submitted that state law would play a factor in the outcome of the case. If state law provided that a partnership was an entity by itself (such as a corporation), each individual partner would have no claim to partnership property, no matter whether that property exceeded in value the amount of the partnership debts.

126. 34 U.S. 182 (1834).

127. *Id.* at 202-03.

128. *Id.* at 199.

129. *Id.* at 201.

130. 35 U.S. 596 (1836).

131. *Id.* at 610.

132. *Id.*

133. *Id.*

134. *Id.* at 610-11.

amount owed to it by Brent.¹³⁵ Instead, the Bank demanded payment thereof before it would consent to the transfer.¹³⁶ The Bank, moreover, filed suit against the executors to collect on the notes.¹³⁷ The Bank prevailed as to one note; however, the executors prevailed on the two other notes under a statute of limitations defense.¹³⁸ The executors thereupon filed an action in equity for the “use” of the United States in order to force the Bank to consent to the transfer of the stock, free of any claim of the Bank.¹³⁹ The executors claimed that the estate, being a debtor of the United States (as was the deceased in his lifetime), had insufficient funds with which to pay the debt due the United States.¹⁴⁰ Hence the United States should have been paid before other creditors of the estate pursuant to the Act of 1799.¹⁴¹ The circuit court ordered the stock to be sold at public sale, or so much thereof as may be necessary to satisfy the notes, and the balance of the notes to be transferred to the United States.¹⁴² The Supreme Court in affirming the circuit court, made a clear ruling about equity jurisprudence and the function of a statute of limitations in equity.¹⁴³

With regard to whether the executors alleged a case in equity, the Court made clear, without explicitly stating the proposition, that because the executors would have an adequate remedy at law, the courts were justified in denying them equitable relief.¹⁴⁴ The Bank’s charter provided that its stock could be transferred only on its books; and that no transfer would be made if the bank is owed money.¹⁴⁵ The Court provided that those charter provisions would have constituted a complete defense in a suit at law against the

135. *Id.* at 611.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 613. The record contained no evidence of insolvency, but the case has been argued on the assumption that it existed. *Id.* at 613.

141. *Id.* at 611. The executors did not contest the Bank’s lien on any paramount right in them as executors. *Id.* at 613.

142. *See* Brent v. Bank of Washington, 4 F. Cas. 61 (D.C. Cir. 1824).

143. *Brent*, 35 U.S. at 611. The assignment was never accepted by the assignees/trustees and became inoperative. *Id.* The Court’s opinion commenced by stating that the uniform construction of the Act of 1797 was whether, in a case of insolvency, through a debtor’s death or his assignment of the property, the property of a debtor passes to the assignee or executor or administrator. *Id.* The priority of the United States did not act to prevent the transmission of the property, but the United States had a preference in the payment out of the proceeds. *Id.* The priority did not attach to the property legally transferred to a creditor, though that creditor may hold it subject to an account, equity, or trust for the borrower. *Id.* at 612. Such transfer would be protected against the United States. *Id.*

144. *Id.* at 613.

145. *Id.* at 613-14.

bank by the executors, either in their own names, or for the use of the United States.¹⁴⁶ In this case the Court did not find it difficult to decide what the rules of equity and good conscience required. The Bank lent money to Brent on the name, credit, and stock of the bank, which stock was owned by him, before the United States could have any claim of preference.¹⁴⁷ The right of the Bank was a legal right; the claim of the United States was statutory, not founded upon any bad faith of the bank.¹⁴⁸ The Court exclaimed that in "good conscience there can be no claim more equitable than that of the bank for money lent . . . [and] we can perceive no reason why the United States should be exempted from this fundamental rule of equity."¹⁴⁹

The executors took the position that the debt had been extinguished as to the two promissory notes because the statute of limitations as to them had run.¹⁵⁰ The Court in return stated that the only thing extinguished by the running of the statute of limitations was the remedy, not the debt.¹⁵¹ The Court held that as long as the debt remained unpaid, the notes could not form the basis of any equitable relief seeking to obstruct their payment.¹⁵²

*M. 1838: Beaston v. Farmers' Bank of Delaware*¹⁵³

Although *Beaston* was a complicated case, the Supreme Court laid down some very firm rules. The United States obtained a judgment against a Maryland bank for \$ 21,200.¹⁵⁴ A writ of *feri facias*¹⁵⁵ was issued against the Bank, and returned *nulla bona*.¹⁵⁶ It was admitted that the bank was unable to pay its debts.¹⁵⁷ After an appeal, in which the Supreme Court affirmed the judgment, the United States filed a bill in equity against the bank in an effort to locate assets upon which to satisfy its judgment.¹⁵⁸ For this action, receivers were appointed with authority to take possession of the

146. *Id.* at 614. The Court opined that, "though the law gives the king a better or more convenient remedy, he has no better right in court, than the subject through whom the property claimed comes to his hands." *Id.*

147. *Id.* at 615.

148. *Id.*

149. *Id.*

150. *Id.* at 617.

151. *Id.*

152. *Id.*

153. 37 U.S. 102 (1838).

154. *Id.* at 131.

155. A writ of *feri facias* is the common law writ used to execute on property of a judgment-debtor. BLACK'S LAW DICTIONARY 641 (7th Ed. 1999).

156. *Beaston*, 37 U.S. at 131. When a writ of *feri facias* (execution) is returned by a Sheriff or Marshal with a notation thereon to the effect that that official was unable to locate property of the judgment-debtor upon which to execute, it is said to be returned *nulla bona*.

157. *Beaston*, 37 U.S. at 131.

158. *Id.*

bank's property.¹⁵⁹ Subsequently, the Maryland Bank obtained a judgment against Beaston in the amount of \$500; and the Farmers' Bank of Delaware was able to secure a judgment against the Maryland Bank in the amount of \$5,000.¹⁶⁰ The Farmers' Bank turned around and garnished Beaston, as a debtor of its debtor, the Maryland Bank.¹⁶¹ Similarly, the United States also garnished Beaston, as a debtor of its debtor, the same Maryland Bank.¹⁶² Relying on the Priority Statute, the garnishee, Beaston, paid the United States his \$500 debt owed to the Maryland bank, in preference to paying the Farmers' Bank.¹⁶³ The Farmers' Bank was forced to bring an action against Beaston in the county court, seeking a declaration to the effect that the United States, under the facts, could not claim priority.¹⁶⁴ The county court agreed with Beaston's interpretation that because the United States had priority, he was correct in paying his \$500 debt to the United States.¹⁶⁵ The court of appeals reversed, holding in favor of the Farmers' Bank.¹⁶⁶ The U.S. Supreme Court affirmed, holding that under the facts, the United States' lacked the priority required for invocation of the Priority Statute.¹⁶⁷

Justice McKinley,¹⁶⁸ writing for the Court, designated four rules:

- (1) no lien was established by the priority statute;
- (2) although he may be unable to pay all his debts, the priority established could not attach while the debtor continues to be the owner and in the possession of the property;
- (3) no evidence could be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the statute;
- (4) whenever he was thus divested of his property, the person who becomes invested with the title, was thereby made a trustee for the United States, and was bound to pay their debt out of the proceeds of the debtor's property.¹⁶⁹

The opinion further stated two conclusions of law: (a) as the Priority Statute referred to the public good it ought to be liberally

159. *Id.*

160. *Id.* at 132.

161. *Id.* at 131-32.

162. *Id.*

163. *Id.* at 132.

164. *Id.* at 131.

165. *Id.* at 132.

166. *Id.* at 133.

167. *Id.* at 137.

168. *Id.* at 131.

169. *Id.* at 133-34 (following the holdings in *Fisher*, *Hooe*, and *Prince*).

construed,¹⁷⁰ and (b) Maryland Bank was a “person” within the wording of the statute.¹⁷¹ The Court also stated a finding of fact — the Maryland Bank had made no voluntary assignment of its assets,¹⁷² hence, the United States did not acquire priority as to the \$500 debt of Beaston.¹⁷³

Justice Story registered the first dissent in any of the Priority Statute cases.¹⁷⁴ Story thought that a corporation was not a “person” within the meaning of the Priority Statute,¹⁷⁵ and that the majority was acting “extrajudicial,” since the question was not raised or considered by the lower court.¹⁷⁶ Curiously, Justice Baldwin agreed with Justice Story, but also concurred with the judgment of the Court.¹⁷⁷ Justice McLean agreed with Justice Story, without qualification.¹⁷⁸

*N. 1875: Lewis v. United States*¹⁷⁹

Lewis was the trustee in bankruptcy for the estates of a partnership and its individual partners, both of which were insufficient to pay their creditors in full.¹⁸⁰ The United States, being owed money by the partnership, took an assignment of partnership assets as collateral for that debt.¹⁸¹ The United States chose not to assert in the bankruptcy court either its secured status over the partnership or to pursue the individual partners, who also owed the United States money.¹⁸² Instead, the United States chose to sue the bankruptcy trustee (Lewis) in a court of equity by asserting its right of priority against partnership assets in satisfaction of the claims against the individual partners, under the Priority Statute of March 3, 1797.¹⁸³ Lewis asserted the Equity Rule, incorporated into the Bankruptcy Act, which specified that partnership assets were to be used only for the payment of partnership debts, and that the debts of individual partners would be paid out of property belonging to the individual partners.¹⁸⁴

170. *Id.* at 134.

171. *Id.*

172. *Id.* at 136. The Receivers appointed in the United States’ bill in equity took no action under the authority given them by the court, and even if they had, such action would not constitute a voluntary assignment on the part of the bank. *Id.*

173. *Id.* at 137.

174. *Id.* (Story, J., dissenting).

175. *Id.*

176. *Id.* at 138.

177. *Id.* at 137 (Baldwin, J., dissenting).

178. *Id.* at 137 (McLean, J., dissenting).

179. 92 U.S. 618 (1876).

180. *Id.* at 619-20.

181. *Id.* at 619.

182. *Id.* at 620.

183. *Id.*

184. *Id.* at 624.

On appeal, the Supreme Court found that the bankruptcy statute then in existence (the Bankruptcy Act of 1867) and the Priority Statute both gave the United States priority, and there was no need for statutory construction as the two were to be considered *in pari materia*.¹⁸⁵ Although the Bankruptcy Act and the Priority Statute were identical in some of their wording, there was a difference as to what fund was to be applied to the payment of the United States' claims.¹⁸⁶ The Bankruptcy Act said to pay the United States' claim out of partnership assets, where on the other hand the Priority Statute ordered payment out of the individual partners' assets.¹⁸⁷

In order to make the determination of which statute applied, the Court thoroughly analyzed the Priority Statute of 1797.¹⁸⁸ The Court's analysis concluded that: the Priority Statute of 1797 affected persons who were "indebted to the United States[;]" the language was general, not qualified; the form of indebtedness was immaterial; the debt could be legal or equitable; the debtors could be joint or several, principals or sureties; there must be a bankruptcy or insolvency; and "Congress had the power to pass the act."¹⁸⁹ The claims of the United States, therefore, were not affected by the fact that Lewis held the assets of the partnership as a trustee in bankruptcy.¹⁹⁰ The United States were entitled to the same remedies as if Lewis had been appointed trustee by a court other than a bankruptcy court.¹⁹¹

The Court's analysis further provided that for several reasons the Priority Statute applied to the facts of the case. The case involved a trustee holding a trust fund and a *cestui que trust* claiming it, which gave the equity court original and general jurisdiction.¹⁹² Furthermore, the fact that the fund arose in a court of bankruptcy which also appointed the trustee did not affect the United States' right to pursue in another court both the fund and the trustee who held the fund.¹⁹³ Additionally, there was no need for the United States to pursue the collateral the trust was holding.¹⁹⁴

185. *Id.* at 622.

186. *Id.* at 620-24.

187. *Id.* at 624.

188. *Id.* at 620-21.

189. *Id.* at 621.

190. *Id.* at 622.

191. *Id.*

192. *Id.*

193. *Id.* The Court added that the same remedies would be applicable had the fund arisen and the trustee been appointed in any other manner. *Id.*

194. *Id.* "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." *Id.* at 623.

Finally, the Court announced that the Bankruptcy Act did not apply under the facts of the case because the bankrupt parties were all indebted to the United States, and they had separate estates, which entitled the United States to its claimed preference.¹⁹⁵ The obvious purpose of the Priority Statute was to abrogate the rule insisted upon by the trustee.¹⁹⁶ The legal relations of the partners with the United States in this controversy were just what they would have been if the partners had not been partners, or if the partnership had never existed.¹⁹⁷ The individual interests of the partners would have amounted to nothing of value, as the partnership was hopelessly insolvent.¹⁹⁸ The government could have no interest in the affairs of the firm. In order to be satisfied, the United States was forced to seek its remedies outside the bankruptcy forum.¹⁹⁹

O. 1877: *Bayne v. United States*²⁰⁰

In *Bayne*, the defendant fraudulently misappropriated U.S. Army paymaster funds.²⁰¹ The Supreme Court, in applying the Priority Statute to the collection thereof, said that the form of indebtedness or the mode in which it was incurred was immaterial.²⁰²

P. 1883: *Cook County National Bank v. United States*²⁰³

The Supreme Court denied application of Rev. Stat. § 3466 to a claim of the United States against a national bank.²⁰⁴ The United States had deposited certain funds in the Cook County National Bank as a depository.²⁰⁵ When the bank became insolvent, the United States demanded its deposits prior to the rights of any other creditor on the authority of Rev. Stat. § 3466.²⁰⁶

195. *Id.* at 624.

196. *Id.* Since the Priority Statute of 1797 was enacted 70 years before the Bankruptcy Act of 1867, the Court obviously meant that the Priority Act abrogated the equity rule incorporated into the Bankruptcy Act, not the Act itself.

197. *Id.* at 624-25.

198. *Id.*

199. *Id.* at 625.

200. 93 U.S. 642 (1877).

201. *Id.* at 642-43.

202. *Id.* at 643.

203. 107 U.S. 445 (1883).

204. *See id.* at 448 (applying "the act authorizing the formation of national banks," and ruling the issue of whether the bank was insolvent "unnecessary to consider").

205. *See id.* at 452 (identifying the issue as "whether the United States have the right to claim the payment of this demand out of the surplus moneys remaining in the treasury of the proceeds of the bonds deposited as security for the circulating notes of the bank").

206. *Id.* at 447-48.

The Court gave two reasons for denying the United States their claimed right of priority under Rev. Stat. § 3466. First, The National Banking Act, in effect at that time, undertook to provide a complete system for the establishment and governance of national banks, which was plainly inconsistent with the Priority Statute.²⁰⁷ The Priority Statute was general and comprehensive in its terms,²⁰⁸ whereas the National Banking Act dealt in specific terms with, *inter alia*, the subject of protecting creditors of banks which founder.²⁰⁹ The Court applied a doctrine that stated “[a] law embracing an entire subject, dealing within it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed.”²¹⁰ Second, The National Banking Act made a significant declaration that for any deficiency in the proceeds of the bonds deposited for security for the circulating notes of the bank, the U.S. would have a paramount lien upon all the bank’s assets, except for costs and expenses in administration of the same.²¹¹ The Court declared the aforementioned language unnecessary and quite superfluous if for such deficiency the United States already possessed, under the Act of 1797, the right to be paid out of the assets of the bank in preference to the claims of other creditors:²¹² “The declaration considered in connection with the ratable distribution of the assets, prescribed after such deficiency is provided for, is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed.”²¹³

The Court made it clear that the Bankruptcy Act of 1867 did not have an impact upon the Priority Statute lessening the United States’ rights of priority.²¹⁴ It was stressed by the Court that the bankruptcy enactment dealt with the estates of persons who are insolvent under that law,²¹⁵ and covered only the distribution of their estates.²¹⁶ The Act, it was concluded, had no further reach.²¹⁷

207. *Id.* at 451.

208. *Id.* at 447.

209. *Id.* at 449-50. When a bank founders, provisions are made for the Comptroller of the Currency to appoint a Receiver and take other steps for the protection of creditors. *Id.*

210. *Id.* at 451.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 451-52.

215. *Id.* at 452. Technically, under the Bankruptcy Act of 1867 voluntary petitions could be filed in bankruptcy cases by persons who were solvent and had considerable exemptions. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 1.6 b. (1997).

216. *Id.* at 452.

217. *Id.*

The final issue resolved by the Court was whether the surplus of monies that remained in the treasury after the sale of the bonds by the Receiver could be used by the United States for the payment of its claim, as such funds would have been more than sufficient to pay the government in full.²¹⁸ Viewing the money being held by the United States in its treasury as a trust, the Court applied trust law in giving a negative answer to the enquiry.²¹⁹ As a trustee may not set-off²²⁰ his individual claims against the settlor of a trust against trust property, so the Court held, the United States may not reach this trust fund to satisfy its claims against the bank, the entity which, while not the creator of the trust, was the reason for the money coming into existence.²²¹

Q. 1903: *Smythe v. United States*²²²

The Supreme Court affirmed a judgment on a bond given to insure the faithful performance of duties by the superintendent of the mint in New Orleans, despite the fact monies held by him were lost due to his negligence or fault.²²³ In answer to an objection raised to the form of the judgment, the Court referred to Rev. Stat. § 3467 only in passing.²²⁴ The Court emphasized that the enforcement of a judgment against the administrator of an estate will be interpreted and enforced subject to the priority given to the government in the distribution of the proceeds of the estate of any person indebted to the United States whose estate was insufficient to pay all debts against it.²²⁵

R. 1912: *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*²²⁶

In *Guarantee Title & Trust Co.*, the Supreme Court decided a contest between the Priority Statute and the Bankruptcy Act of 1898, in which the Bankruptcy Act prevailed. Title Guaranty was surety on a bond for a bankrupt and paid a judgment against its

218. *Id.*

219. *Id.* at 452-53.

220. *See id.* at 452 (viewing the procedure contemplated by the United States as a set-off).

221. *Id.*

222. 188 U.S. 156 (1903).

223. *Id.* at 171-72.

224. *See id.* at 177 (mentioning the Revised Statutes only to acknowledge the general proposition that priority is given to the government in the distribution of proceeds of any estate or person indebted to the United States).

225. *Id.* at 177 (citing Rev. Stat. §§ 3466, 3467). Justice Peckham, the author of *Lochner v. New York*, 198 U.S. 45 (1905), decided by the same Court two years later, dissented (along with Justice Shiras), as to the decision of the Court in *Smythe*, but not as to what the Court said, by way of dictum, about the Priority Statute. *Id.* at 178-83 (Peckham, J., dissenting).

226. 224 U.S. 152 (1912).

principal, the bankrupt, and sought, as subrogee of the rights of the United States, to be reimbursed before the other creditors were paid their indebtedness.²²⁷ The Bankruptcy Trustee (Guarantee Title & Trust Co.), however, argued that wage claims were to be paid before any claims due the United States.²²⁸

The Court examined the Bankruptcy Act of 1867²²⁹ and found it specifically gave the United States priority for the payment of expenses and for “all debts due to the United States and all taxes and assessments under the laws thereof.”²³⁰ Such priority was coextensive with that given by the Priority Statute — Rev. Stat. § 3466.²³¹

The Bankruptcy Act of 1898, then in effect,²³² gave no such priority to the United States.²³³ Wage claims, moreover, specifically primed claims of the United States.²³⁴ The Court concluded that Congress’ decision affecting a change in the Bankruptcy Act from its 1867 version to its 1898 version was intended and was beneficent.²³⁵ The Court’s closing words left no doubt of their conclusion:

It will be seen . . . that by the statute of 1797 (now § 3466) and § 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is “taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.” These were civil obligations, not personal conventions, and preference was given

227. *Id.* at 153.

228. *Id.* at 155.

229. The Bankruptcy Act of 1867 was the third Bankruptcy Act in effect in the United States. It was effective from 1867 until 1898, when the fourth Bankruptcy Act became effective. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 1.6 (1997).

230. *Guarantee Title & Trust Co.*, 224 U.S. at 159.

231. *See supra* note 34 and accompanying text.

232. The Bankruptcy Act of 1898 was the fourth Bankruptcy Act enacted by Congress. *In re Marshall*, 300 B.R. 507, 514 n.14 (Bankr. C.D. Cal. 2003). It lasted until October 1, 1979 when the Bankruptcy Reform Act of 1978 (the present law), became effective. *Id.* at 514. The first two bankruptcy acts were short-lived. The first was effective from 1800 until 1803, and the second from 1841 until 1843. *Id.* The third bankruptcy act was in effect from 1867 until its repeal in 1878. *Id.* Except during the effective dates of those Acts, the United States had no federal bankruptcy statute. *See Prince v. Bartlett*, 12 U.S. 431, 433 (1814) (acknowledging that at the time the case was decided there was no Bankruptcy Act in existence). States do not have bankruptcy statutes because Article I, Section 8, Clause 4 of the Federal Constitution gives that power to Congress.

233. *Guarantee Title & Trust Co.*, 224 U.S. at 160.

234. *Id.*

235. *Id.*

to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.²³⁶

*S. 1920: United States v. National Surety Co.*²³⁷

Justice Brandeis delivered the opinion for the Court in *National Surety Co.*²³⁸ National Surety Company ("National") executed two surety bonds to secure contracts entered into with the United States.²³⁹ The contractor defaulted and was subsequently adjudicated a bankrupt.²⁴⁰ National later paid the amount of the bonds to the United States.²⁴¹ Though the bankrupt's net assets were less than the amount of the government's claim, both the United States (under Rev. Stat. § 3466) and National (under Rev. Stat. § 3468)²⁴² filed claims in the Bankruptcy Court.²⁴³ National asserted priority on pro rata equality with the government.²⁴⁴ The referee in bankruptcy, the district court, and the eighth circuit ruled for National.²⁴⁵

On appeal, the Supreme Court reversed, holding that under Rev. Stat. § 3468, National would have priority over all creditors,

236. *Id.* at 159-60.

237. 254 U.S. 73 (1920).

238. *Id.* at 74.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 74-75. Rev. Stat. § 3468 read as follows:

Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

Rev. Stat. § 3468 (1875) (current version at 31 U.S.C. § 9309).

243. *Id.* at 74-75.

244. *Id.* at 75.

245. *Id.*

except the United States, if it discharged its obligations.²⁴⁶ Justice Brandeis concluded his opinion with an assessment that Rev. Stat. § 3468 applied an established rule of subrogation.²⁴⁷ Brandeis then continued:

What the surety asks here is not to enjoy like priority over such other creditors, but equality with the United States, a creditor whose debt is partly secured. To accord such equality would abridge the priority expressly conferred upon the Government. While the priority given the surety by the statute attaches as soon as the obligation upon the bond is discharged, it cannot ripen into enjoyment unless or until the whole debt due the United States is satisfied. This result is in harmony with a familiar rule of law of subrogation under which a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied.²⁴⁸

*T. 1923: United States v. Oklahoma*²⁴⁹

The decision in *Oklahoma* exemplifies the importance of pleading. In *Oklahoma*, a state bank examiner reported a state bank to the state Commissioner of Banks because the examiner found the bank was insolvent under Oklahoma law, unable to pay its debts, and would continue as a going banking concern.²⁵⁰ The state official, based upon that report and acting under state law, adjudged the bank insolvent and took charge and possession of its assets, books and records for the purpose of protecting the bank's depositors.²⁵¹ The United States was a depositor of money belonging to Indian tribes, and a beneficiary of a bond given by the bank for its protection.²⁵² As a result of the bank's insolvency, the United States filed a suit in the U.S. Supreme Court²⁵³ against the State of Oklahoma, seeking first priority to the bank's assets, which exceeded in value the amount of the United States' deposits.²⁵⁴ The State moved to dismiss the complaint on the ground that it failed to state a cause of action under the Priority Statute (Rev. Stat. § 3466).²⁵⁵

246. *Id.* at 76.

247. *Id.* at 75.

248. *Id.* at 76.

249. 261 U.S. 253 (1923).

250. *Id.* at 257.

251. *Id.*

252. *Id.* at 256.

253. *Id.* Under Article III, Section 2 of the United States Constitution, actions in which a State is a party may be filed as an original action in the U.S. Supreme Court.

254. *Id.* at 257.

255. *Id.* at 256.

The Supreme Court granted the motion on two grounds: (1) a lack of sufficient allegation of the bank's insolvency and (2) lack of a sufficient allegation of an "act of bankruptcy."²⁵⁶ The United States' complaint alleged that the bank was not able to pay its debts in the ordinary course of business, was a going concern, and that the bank examiner had found it to be insolvent.²⁵⁷ The Court found that one's inability to pay one's debts as they accrue may be considered a form of insolvency, but the Priority Statute required pleading and proof of the type of insolvency specified by the Bankruptcy Act of 1898, which was the liabilities-exceeding-assets test.²⁵⁸ With regard to the failure to allege an "act of bankruptcy," the Court demonstrated "[t]here is not alleged any conveyance to defraud, or preference through transfer or through legal proceedings, or general assignment for the benefit of creditors."²⁵⁹ Furthermore, the Commissioner of Banking was not acting as a receiver or trustee, but rather as an arm or instrumentality of the state in the exercise of its police powers to affect the purpose of state law for the protection of depositors.²⁶⁰ Hence, the Commissioner's taking charge of the bank's assets was not the same action as that of an assignee or trustee, which would constitute an "act of bankruptcy" under the Priority Statute.²⁶¹

*U. 1925: Davis v. Pringle*²⁶²

The majority opinion in *Davis* was written by Justice Oliver Wendell Holmes, Jr.²⁶³ *Davis* represented another clash between the Priority Statute and the Bankruptcy Act of 1898. The Supreme Court held the Bankruptcy Act gave the U.S. priority to all taxes legally due to the United States, but not to ordinary debts.²⁶⁴

The Court, in its analysis, relied more on a grammatical construction of the Bankruptcy Act than it did on legislative history. The first part of § 64 of the Bankruptcy Act required the

256. *Id.* at 263.

257. *Id.* at 260.

258. *Id.* at 261. A person was insolvent under the Bankruptcy Act of 1898 "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." *Id.*

259. *Id.* at 262.

260. *Id.* at 262-63.

261. *Id.* at 263.

262. 268 U.S. 315 (1925).

263. *Id.* at 316.

264. *Id.* at 317-19. Section 64(a) of the Bankruptcy Act of 1898 provided that "[t]he court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States . . . in advance of the payment of dividends to creditors." Bankruptcy Act of 1898, §64(a), ch. 541, 30 stat. 544, 563 (repealed 1978).

trustee in a bankruptcy to pay all taxes legally due to the United States in advance of other creditors.²⁶⁵ Justice Holmes thought it incredible anyone would argue, having given the United States such a conspicuous place with reference to taxes, that Congress "intended to smuggle in a general preference by muffled words at the end."²⁶⁶ Justice Holmes further added:

The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States. We are of opinion that to extend the definition of "person" here to the United States would be "inconsistent with the context"²⁶⁷

The Court concluded there was a change of purpose from the Bankruptcy Act of 1867, to the Bankruptcy Act of 1898, because the public opinion regarding the peculiar rights and preferences due to the sovereign had changed.²⁶⁸ As pronounced in *Guarantee Title & Trust Co.*,²⁶⁹ the Bankruptcy Act was an appropriate place in which to reflect public policy changes.²⁷⁰

V. 1926: *Bramwell v. U.S. Fidelity & Guaranty Co.*²⁷¹

In *Bramwell*, an Oregon bank had on deposit some money belonging to Indian tribes and individual members thereof.²⁷² The bank had posted a bond as depository of these funds with the U.S. Fidelity & Guaranty Co. ("Fidelity") as surety.²⁷³ When the bank became insolvent and suspended payment of the money so held, its Board of Directors passed a resolution giving Bramwell, as the Oregon State Superintendent of Banks, full control of the Bank's affairs.²⁷⁴ Pursuant to state law, Bramwell took possession and control of all of the Bank's property, including money on deposit, for the purpose of liquidating it.²⁷⁵ Fidelity paid the amount of the

265. *Id.*

266. *Id.* at 318.

267. *Id.* Section 64(b)(7) gave priority to "debts owing to any person who by the laws of the States or the United States is entitled to priority." *City of Lincoln v. Ricketts*, 297 U.S. 373, 374 (1936). The Court in *Ricketts* pointed out that on May 27, 1926 Congress amended § 64 (b)(7) of the Bankruptcy Act to specifically provide that the word "person" include corporations; since the United States was a corporation, the United States was included within the term "person." *Id.* at 376.

268. *Davis*, 268 U.S. at 318.

269. *See* 224 U.S. at 159-60 (pronouncing that the Bankruptcy Act takes into account the whole range of indebtedness of the Bankrupt).

270. *Davis*, 268 U.S. at 318.

271. 269 U.S. 483 (1926).

272. *Id.* at 485.

273. *Id.*

274. *Id.* at 485-86.

275. *Id.* at 486.

bond to the superintendent of the reservation on which the tribes were located and received from the United States an assignment of the United States' claim against the bank.²⁷⁶ Fidelity claimed it was entitled to assert the United States' priority and be paid first out of the bank's property.²⁷⁷ Bramwell acknowledged Fidelity's claim, but denied its assertion of priority.²⁷⁸

The Supreme Court affirmed the judgment in favor of Fidelity.²⁷⁹ The Bank's insolvency having been admitted,²⁸⁰ Supt. Bramwell focused on two main points in his argument to the Supreme Court. First, the resolution of the Board of Directors was not a "voluntary assignment" of its property within the provisions of Rev. Stat. § 3466,²⁸¹ and second, the bankruptcy statute then in effect²⁸² did not apply to banks;²⁸³ the bank, therefore, could not have committed an "act of bankruptcy."²⁸⁴ The Court rejected Bramwell's contentions, exclaiming that the bank's assignment of its property to the state's Superintendent of Banks, albeit required to do so under state law, was tantamount to an assignment of title to a debtor's property for the purpose of converting it into money for the payment of the debtor's debts; hence, it met the requirement of an "assignment" under the Priority Statute.²⁸⁵ In response to the "act of bankruptcy" argument, the Court answered that § 3(a) of the Bankruptcy Act defined "acts of bankruptcy" in a general manner.²⁸⁶ Therefore, Rev. Stat. § 3466 did not require that the debtor be in bankruptcy (i.e. be the subject of a bankruptcy case), but rather only that the debtor commit an "act of bankruptcy," or another of the two alternatives²⁸⁷ while

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 492.

280. *Id.* at 487.

281. *Id.* at 488.

282. The Bankruptcy Act of 1898 was the Bankruptcy statute in effect at the time *Davis* was decided. *Id.* at 487.

283. *Id.* at 488. The Bankruptcy statutes of the United States have never applied to banks or other named institutions because Congress has passed statutes which are specifically applicable to them in case of their financial difficulties. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 2.2 (1997).

284. *Bramwell*, 269 U.S. at 488. Supt. Bramwell apparently did not argue the point that Rev. Stat. § 3466 did not apply to Title 11 cases, because the Priority Statute was not amended to specifically so provide until 1978. See *supra* note 41 and accompanying text.

285. *Bramwell*, 269 U.S. at 491-92.

286. *Id.* at 489.

287. To wit, an alternative to an "act of bankruptcy" exists when a person (1) makes an assignment of all of his property, or (2) while "absent" has his property attached. Rev. Stat. § 3466 (1875) (current version at 31 U.S.C. § 3713 (2000)); see also *Bramwell*, 268 U.S. at 486 for reference to the language of Rev. Stat. § 3466.

insolvent.²⁸⁸

W. 1926: *Prince v. United States*²⁸⁹

In *Prince*, the Court announced that taxes due the United States are debts,²⁹⁰ and as such are covered by the Priority Statute.²⁹¹ A creditor sought equitable relief by appointment of a receiver on the basis that, if the corporate debtor's assets were sold in the ordinary course of business, there would be enough money with which to pay all debts; whereas, if some creditors' were allowed a free reign, it was doubtful whether such outcome would occur.²⁹² The debtor agreed and joined in the Petition, resulting in the appointment of a receiver.²⁹³ After the receiver commenced administration it was discovered that, in fact, there were insufficient assets to pay all creditors, and general creditors would receive no more than forty percent of their claims.²⁹⁴ The United

288. *Id.* at 490. A note of explanation is required here, especially for those who may not be completely conversant with bankruptcy law. Under bankruptcy statutes applicable in this county prior to October 1, 1979, when the Bankruptcy Reform Act of 1978 took effect, a debtor could not be forced into involuntary bankruptcy by its creditors unless it had committed an "act of bankruptcy." As the Court in *Bramwell* said, the Act defined "acts of bankruptcy" as a general assignment of property for the benefit of creditors, a requested or involuntary appointment of a receiver while the debtor was insolvent, and other such acts revealing a need of the protection of the nation's bankruptcy laws. 269 U.S. at 489. The Supreme Court also expressed an "act of bankruptcy" as an "insolvency manifested by some notorious act." *Prince v. Bartlett*, 12 U.S. 431, 434 (1814). The Bankruptcy Reform Act of 1978 did away with these "acts of bankruptcy" as a requirement for involuntary bankruptcy, except that sub-Section 303 (h)(2) of the Act came close to the "acts of bankruptcy." *Id.* It authorizes an involuntary bankruptcy petition to be filed if "a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession" within 120 days prior to the filing of the involuntary petition by creditors. 11 U.S.C. § 303(h)(2) (2005). A Bankruptcy Judge in *In re Marshall*, 300 B.R. 507, 519 (Bankr. C.D. Cal. 2003), interpreted both 11 U.S.C §§ 303 (h)(1) and (h)(2) to constitute acts of bankruptcy. For further discussion of this subject see *infra* notes 651-656 and accompanying text. See also The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.S., 28 U.S.C.S. (2005)). The Bankruptcy Reform Act of 1978 was the bankruptcy law in effect in the United States at the time of this article's publication; it contains no specific reference to "acts of bankruptcy."

289. 269 U.S. 492 (1926).

290. *Id.* at 499. The Priority Statute, as amended in 1982, refers to "claims" due the United States, rather than "debts." See *supra* notes 43, 44 and accompanying text.

291. *Prince*, 269 U.S. at 499.

292. *Id.*

293. *Id.*

294. *Id.*

States filed a claim for taxes and unpaid customs duties.²⁹⁵ A special master found in favor of the United States; the district court and the court of appeals affirmed.²⁹⁶ The Supreme Court granted certiorari and affirmed,²⁹⁷ with the majority opinion noting the following rules of statutory construction:

The meaning properly to be attributed [to the word debts] depends upon the connection in which it is used in the particular statute and the purpose to be accomplished.

In the absence of another remedy made exclusive, an action of debt lies to recover taxes where the amount due is certain or readily may be made certain.²⁹⁸

X. 1926: *Stripe v. United States*²⁹⁹

The facts and issues in *Stripe*, were so similar to *Price* that the Court simply referenced *Price* in rendering its decision.³⁰⁰

Y. 1926: *United States v. Butterworth-Judson Corp.*³⁰¹

In *Butterworth*, the Court declared that the facts established in the trial court would be utilized to determine whether the Priority Statute would apply, regardless of what the pleadings alleged about the solvency of the debtor.³⁰²

Z. 1926: *Mellon v. Michigan Trust Co.*³⁰³

Approximately four months after deciding *Bramwell*, *Price*, *Stripe* and *Butterworth*, the Supreme Court held that a statute which provided that the Director General of Railroads, who operated railroads in this country during hostilities (World War I), was subject to the same laws as commercial operators of railroads.³⁰⁴ As such, the Director could not defend any legal actions against him by invoking sovereignty, and was not permitted to use the Priority Statute in collecting debts owed to him in his official capacity.³⁰⁵ The Court opined that “[t]o permit the claimed preference, we think, would conflict with the spirit

295. *Id.*

296. *Id.* (relying upon the decision in *Liberty Mutual Ins. Co. v. Johnson Shipyards Corp.*, 6 F.2d 752 (2d Cir. 1925)).

297. *Id.* at 503.

298. *Id.* at 500.

299. 269 U.S. 503 (1926).

300. *Id.* at 503.

301. 269 U.S. 504 (1926).

302. *See id.* at 513 (declaring respondent insolvent on the premise that is what the intervening petition showed when the creditors suit was initiated).

303. 271 U.S. 236 (1926).

304. *Id.* at 238.

305. *See id.* at 238-39.

and broad purpose of the statute [pertaining to the Director General's operation of railroads]."³⁰⁶

AA. 1929: *County of Spokane v. United States*³⁰⁷

The contested issue in *County of Spokane* was whether the United States had priority for taxes due under federal law, or did state and county taxes under a Washington statute prime federal taxes.³⁰⁸ A receiver was appointed for the insolvent debtor/taxpayer.³⁰⁹ The Supreme Court of Washington ruled in favor of the United States.³¹⁰ The United States Supreme Court, in an opinion written by Chief Justice William Howard Taft,³¹¹ considered a number of cases previously addressing the issue.³¹²

The rationale for the Court's decision to give priority to the federal government was grounded on the fact that the state tax was not a perfected lien upon the insolvent's property on the date of the receivership.³¹³ Affirming the lower court's judgment, Chief Justice Taft concluded his recitation of cases with the following words: "The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the States."³¹⁴ The Court reserved ruling on the issue of whether a different result would have been determined had the lien been proved at the time of the receivership.³¹⁵

306. *Id.* at 240.

307. 279 U.S. 80 (1929).

308. *Id.* at 85.

309. *Id.*

310. *Id.* at 86.

311. *Id.* at 85.

312. *The opinion considered the following cases: Fisher*, 6 U.S. 358 (1805) (holding that the U.S. was entitled to priority); *United States v. Nicholls*, 4 Yeates 251 (Pa. Cir. Ct. 1805) (holding that state taxes primed federal taxes, despite the federal priority statute); *United States v. Peters*, 9 U.S. 115 (1809) (holding that a state legislature may not annul the judgment of a federal court); *Field v. United States*, 34 U.S. 182 (1835) (holding that the United States need not be a party to litigation to be entitled to priority); *Lane County v. Oregon*, 74 U.S. 71 (1869) (holding that the states must not burden or embarrass the operations of the national government); *United States v. Snyder*, 149 U.S. 210 (1893) (stating that the grant of the power (to the federal government) and its limitations are wholly inconsistent with the proposition that the states can by legislation interfere with the assessment of federal power); and *United States v. Oklahoma*, 261 U.S. 253, 260 (1923) (holding that when a debtor is divested of his property, the person "invested with the title is made trustee for the United States" and bound first to pay the United States out of the debtor's property).

313. *County of Spokane v. United States*, 279 U.S. 80, 93-94 (1929).

314. *Id.* at 93.

315. *See id.* at 95.

*BB. 1930: United States v. Guaranty Trust Co. of New York*³¹⁶

The Supreme Court in *Guaranty Trust Co. of New York*, held that the Priority Statute did not apply to claims pursuant to the Transportation Act of 1920.³¹⁷ Title II of the Act provided for funding of debts to the United States incurred by railroads during the period of wartime control (World War I).³¹⁸ The Act also provided for new loans to the railroads.³¹⁹ As certain railroad lines became insolvent, the United States attempted to collect the loans by enlisting the assistance of the priority statute.³²⁰ The Court held the Priority Statute inapplicable because the purpose of the Transportation Act was to promote the general credit status of the railroads.³²¹ As such, railroads were required to furnish adequate security for the payment of both old and new loans.³²² For these reasons, the Court stated the United States would not be furnished an additional method of collection.³²³ In addition, the rate that was being paid by the railroads was “much greater than that which ordinarily accompanies even a business loan carrying such assurance of repayment as would have resulted from an application of the priority rule.”³²⁴ These two points convinced the Court that Congress had intended to exclude these loans from the scope of Rev. Stat. § 3466.³²⁵

*CC. 1933: New York v. Maclay*³²⁶

In *Maclay*, receivers were appointed for an insolvent debtor corporation under a consent decree, and they took possession and control of the debtor’s property.³²⁷ The United States filed a claim for taxes and expenses.³²⁸ The State of New York also filed a claim with the receivers for franchise taxes due, but not assessed or liquidated (i.e. the amount was not determined), until after the receivership.³²⁹ The district court held that under 31 U.S.C. § 191 the United States had priority over the State of New York with the

316. 280 U.S. 478 (1930).

317. *See id.* at 483 (“[I]t was the purpose of Congress that § 3466 should not apply to any indebtedness of the railroads to the United States arising under § 207, 209 or 210 of [the] Transportation Act [of] 1920.”).

318. *Id.* at 481.

319. *Id.* at 482.

320. *Id.* at 483.

321. *Id.* at 484-85.

322. *Id.* at 485.

323. *Id.* at 485-86.

324. *Id.* at 486.

325. *Id.*

326. 288 U.S. 290 (1933).

327. *Id.* at 291.

328. *Id.*

329. *Id.*

Second Circuit affirming.³³⁰

The decision written by Justice Cardozo³³¹ referred to the holdings in *County of Spokane*³³² and *Thelusson*.³³³ Relying on this precedent, the Court held the receivership had the effect of a general assignment.³³⁴ However, since its amount had not been determined as of that time, the lien was nothing more than a warning to mortgagees and purchasers of a contingent liability, not unlike a *lis pendens*.³³⁵ The lien, therefore, was not sufficiently choate³³⁶ to defeat the priority of the United States.³³⁷ The position of the Court thus became that the lien was not then enforceable, but instead served as the caveat of a more perfect lien to come.³³⁸

*DD.1936: United States v. Knott*³³⁹

In *Knott*, a New Jersey surety company deposited \$75,000 worth of securities with the State of Florida in order to be permitted to write bonds there.³⁴⁰ Subsequently, the surety company became insolvent and upon its petition a New Jersey court ordered the New Jersey Commissioner of Banking and Insurance to liquidate the surety company.³⁴¹ Though it had written many bonds in Florida, there were no unsatisfied judgments against it at the time liquidation proceedings commenced.³⁴² The New Jersey Commissioner of Banking and Insurance brought an action in Florida seeking to restrain the

330. *Id.*

331. *Id.*

332. *Id.* *County of Spokane* was cited for the proposition that the Court acknowledged Congress had the power to give priority to debts due the United States though the debts thereby subordinated were due to the people of a state or its political subdivisions. *Id.*; see also *supra* notes 307-315 and accompanying text.

333. *Id.* at 293. *Thelusson* was cited for the proposition that the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by statute unless there has been seizure by a Marshal or some other equivalent act has made the lien specific and brought about a change of title or possession. *Id.* at 293-94. See also *supra* notes 75-86 and accompanying text.

334. *Id.* at 291.

335. *Id.* at 293.

336. *Id.* Justice Thurgood Marshall, in *United States v. Kimbell Foods, Inc.*, justified the use of the word "choate" by noting that "it has proved difficult for nonfederal lienors to satisfy the strictures of the choateness test." 440 U.S. 715, 721 n.8 (1979).

337. *Maclay*, 288 U.S. at 294 (describing the lien in this case as a "lien of a tax not presently enforceable, but serving merely as a caveat of a more perfect lien to come").

338. *Id.*

339. 298 U.S. 544 (1936).

340. *Id.* at 545.

341. *Id.*

342. *Id.* at 545-46.

disposition of the deposited securities except upon order of the Florida court.³⁴³ This action was consolidated with a creditor's suit in Florida (under a Florida statute), seeking the appointment of a receiver.³⁴⁴ Thereafter, the United States filed a claim under 31 U.S.C. § 191 for a receivership action, seeking priority over the aggregate of twenty judgments on estreated bail bonds.³⁴⁵

During the state proceedings, the Florida court ruled that debts due to Florida, its political subdivisions, citizens, and residents were to be paid ahead of all other claims.³⁴⁶ However, the decree did not state whether the United States were entitled to receive, in Florida, payments from the residue, if any, or whether that residue was to be transmitted to New Jersey, the place of the domiciliary liquidation.³⁴⁷ The Florida Supreme Court affirmed.³⁴⁸

On appeal to the United States Supreme Court, Justice Brandeis³⁴⁹ reversed the Florida Supreme Court.³⁵⁰ The Court found the argument suggesting that Congress abrogated priority in favor of the United States through provisions in 6 U.S.C §§ 1-11, was without merit.³⁵¹ The Supreme Court of Florida had held that the statutory amendment requiring deposit did not change substantive rights of the parties; hence, there could not be a divestment of the right of priority under the precedents of the United States Supreme Court.³⁵² While the Court accepted the Florida Supreme Court's interpretation of the Florida statute to the extent that the deposit of securities constituted a trust fund for the benefit of Florida creditors,³⁵³ the Court rejected the argument that there would be a surplus which would be paid to the United States as there was no Florida court ruling to that effect, and the Florida judgment denying priority to the United States prejudiced their rights.³⁵⁴ Next, the argument that the Supreme Court lacked jurisdiction was also without merit, since the order appealed from was a final one.³⁵⁵ Finally, the Court did not accept the argument that a Florida court would not have jurisdiction to order priority

343. *Id.* at 546.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 546-47.

348. *Id.* at 547.

349. *Id.* at 545.

350. *Id.* at 552.

351. *Id.* at 547-48. 6 U.S.C. §§ 1-11 prescribes the conditions under which a surety company may write certain surety bonds in favor of the United States. *Id.* at 547.

352. *See id.* at 550 (referring to *Thelusson and Beaston*).

353. *Id.* at 548-49.

354. *Id.* at 551.

355. *Id.*

and stressed that because the claim originated in Florida and was reduced to a judgment there, jurisdiction was proper.³⁵⁶

Justice Brandeis concluded the opinion by emphasizing that the United States properly intervened in Florida in order to prevent the assets there from being applied in payment of local claims which they believed to be subordinate to its own; there was no rule of law which precluded the United States from asserting its priority in an appropriate proceeding in any jurisdiction in which property of the insolvent was being administered.³⁵⁷ The Florida court did not lack power to entertain the United States' application.³⁵⁸ The fact that the claim originated in Florida and was reduced to judgment there made it appropriate that the government should seek satisfaction in Florida, from funds deposited there to assure payment of judgments entered on surety bonds given there by the surety company.³⁵⁹ Finally, there was no good reason suggested why the United States should be denied the right to secure payment of its debt in the proceeding.³⁶⁰

*EE. 1939: United States v. Marxen*³⁶¹

The Federal Housing Administrator issued a policy insuring a bank against non-payment of its loans under the provisions of the National Housing Act.³⁶² One of the bank's customers defaulted on its loan from the bank and filed for bankruptcy protection.³⁶³ Rather than filing a claim in bankruptcy, the bank made demand upon the Administrator for payment.³⁶⁴ The Administrator paid the bank, and upon receiving an assignment from the bank of its claim on the note, filed a claim in the bankruptcy proceeding in the name of the United States.³⁶⁵ The issue became whether the Administrator's claim was entitled to priority under Rev. Stat. § 3466.³⁶⁶ Since the rights of creditors were fixed by the Bankruptcy Act as of the date on which the petition in bankruptcy was filed, the Court answered the issue in the negative.³⁶⁷ The

356. *Id.* at 551-52.

357. *Id.* at 552.

358. *Id.*

359. *Id.*

360. *Id.*

361. 307 U.S. 200 (1939).

362. *Id.* at 201.

363. *Id.*

364. *Id.*

365. *Id.* at 202.

366. *Id.*

367. *Id.* at 207. The date of filing the Petition in Bankruptcy is significant in identifying the bankrupt's debts, even though under the Bankruptcy Act of 1898 the subject of the proceeding was not adjudicated a "bankrupt" until a later date, whereas under the Bankruptcy Reform Act of 1978 upon the filing of the Petition in Bankruptcy the subject of the proceeding automatically becomes a "debtor" in bankruptcy. CHARLES JORDAN TABB, *THE LAW OF*

Court's opinion concluded by stating:

We are of the view that § 3466 is inapplicable to general claims in bankruptcy transferred to the United States, or to which it has become subrogated on payment, after the filing of the petition, for the reason that the rights of creditors are fixed by the Bankruptcy Act as the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves. The assets at that time are segregated for the benefit of creditors. The transfer of the assets to someone for application to "the debts of the insolvent, as the rights and priorities of creditors may be made to appear," takes place as of that time.³⁶⁸

*FF. 1941: United States v. Emory*³⁶⁹

In *Emory*, a corporation defaulted on a note it had given to a bank as evidence of a loan.³⁷⁰ The bank endorsed the note and delivered it to the Federal Housing Administration, acting on behalf of the United States under a contract of insurance and guaranty provided by Title I of the National Housing Act.³⁷¹ The United States, through the Federal Housing Administration, reimbursed the bank for the balance due on the note.³⁷² Employees of the corporation sought unpaid wages and the appointment of a receiver in state court on the ground that their employer was hopelessly insolvent.³⁷³ A receiver was appointed and took control of the corporation's property, the total value of which was \$678.00.³⁷⁴ The wage claims were slightly in excess of that amount, and the indebtedness to the United States was greatly in excess thereof.³⁷⁵ The wage claimants sought priority on the basis of a state statute, and the United States sought priority on the basis of Rev. Stat. § 3466.³⁷⁶ Procedurally, the state appellate court ruled under the Priority Statute the United States would have been entitled to priority, but the United States lost its

BANKRUPTCY § 1.15 (1997).

368. *Marxen*, 307 U.S. at 207-08 (quoting *Bramwell*, 269 U.S. at 490). The Court would not consider the question of whether Congress through the National Housing Act intended to give the Housing Administration an identity separate and apart from that of the United States, restricting its inquiry to a claim that was effectively assigned to the Administration by the claimant in fact. *Id.* at 203.

369. 314 U.S. 423 (1941).

370. *Id.* at 424.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 424-25.

priority by Congress' enactment of § 64(a) of the Bankruptcy Act of 1898.³⁷⁷

Upon granting certiorari, the Supreme Court analyzed the three United States Bankruptcy Acts.³⁷⁸ Finding the earlier Acts had not altered the Priority Statute, the Bankruptcy Act of 1898, the one then in force, had indeed altered the priority of claims in favor of the United States, possibly giving wage claims priority over the United States.³⁷⁹ The Court then had to determine whether Congress had intended this ranking of claims to apply to non-bankruptcy cases.³⁸⁰ On the basis of some scholarly writing and the fact that the Bankruptcy Act made it clear that the word "court" referred to the Bankruptcy Court, it was determined Congress did not extend the Bankruptcy Act's ranking of claims to matters handled by non-bankruptcy courts.³⁸¹

The last point of inquiry addressed by the Court was whether the National Housing Act evinced Congress' intent to create an exception to priority of the United States in connection with home loans.³⁸² Finding that priority of the United States was not altered by the Housing Act, which was passed only to stimulate the building trades and increase employment, the Court held Congress did not intend that the United States lose its rights under the Priority Statute.³⁸³

377. *Id.* at 426-27.

378. *Id.* at 428 (referring to the Bankruptcy Acts of 1800, 1841, and 1867).

379. *Id.*

380. *Id.*

381. *Id.* at 428-29.

382. *Id.* at 429-30.

383. *Id.* at 430. The opinion, by the following words, left no doubt as to the United States first priority:

In order to induce banks and other lending institutions to get the program under way, Congress promised that the United States would make good up to 20% on the losses they might incur on such loans. As between the Government and the lending institutions, it was clearly intended that the United States should bear the losses resulting from defaults. But beyond this we may not go. There is nothing to show a further intention that the United States should relinquish its priority as to claims against defaulting and insolvent borrowers whose notes it takes up from the lending institution pursuant to the insurance contract. That is, the ultimate collection of bad loans was consigned to the United States rather than to the lending institutions, but the collecting power of the United States was neither abridged nor qualified.

Id.

The Court added: "Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." *Id.* at 433. The Court repeated this pronouncement in *United States v. Moore*, 423 U.S. 77, 82-83 (1975), *Small Business Admin. v. McClellan*, 364 U.S. 446, 453 (1960), *Massachusetts v. United States*, 333 U.S. 611, 634 (1948), *U.S. Dep't. of Agric. v. Remond*, 330 U.S. 539, 544-45 (1947), and *Illinois ex rel Gordon v. United States*, 328 U.S. 8, 11 (1946). See also *In re Estate of Berretta*, 426 A.2d 1098 (Sup. Ct. Pa. 1981). The Supreme Court of

Justice Reed dissented,³⁸⁴ joined by Justices Roberts, Douglas, and Jackson.³⁸⁵ Justice Reed posited that the National Housing Act was not a revenue statute, and while there was no legislative history as to whether Congress considered its impact on the Priority Statute, its whole purpose reflected an intention on the part of Congress that any monetary losses were to be borne by the government; hence, Rev. Stat. § 3466 should not have applied to the case.³⁸⁶ He further added that each time the Court considered the legislative purpose of Rev. Stat. § 3466 in relation to governmental claims under public financial legislation affecting creditors competing with the government, it had determined that Rev. Stat. § 3466 did not apply.³⁸⁷

*GG.1941: United States v. Texas*³⁸⁸

In the same year as the *Emory* decision, the Court decided *Texas*, in which the holder of a promissory note and mortgage sued the maker, manufacturer, and distributor of motor fuel alleging a default, and that the value of the business was insufficient to pay the indebtedness on the note.³⁸⁹ A receiver was asked for, appointed, and authorized to sell the manufacturer's equipment.³⁹⁰ Another note holder intervened, as did the State of Texas and the United States, seeking payment of state and federal claims respectively.³⁹¹ The trial court found that the United States was entitled to priority, pursuant to Rev. Stat. § 3466, and that nothing was to be paid to Texas.³⁹² The Texas Supreme Court reversed and set the hierarchy as: Texas first, the assignee of the notes second, and the United States third.³⁹³ The United States

Pennsylvania affirmed the lower court decision that the Federal Tax Lien Act (26 U.S.C. § 6323) impliedly repealed the Priority Statute with regard to federal taxes. *Id.* at 1102. The Supreme Court of Pennsylvania was evenly divided — three on each side — and so the opinion was issued *per curiam*. *Id.* at 1097. The opinion issued in support of affirming the lower court distinguished *Emory* on the basis that, unlike the National Housing Act, the Federal Tax Lien Act contained a specific provision subordinating tax claims of the United States to non-federal claims. *Id.* at 1102-03. The opinion in support of reversal cited *Emory* as authority for the priority of the federal claim. *Id.* at 1109. However, in the only reported decision discussing *In re Estate of Beretta*, the District Court in *Carter v. Carter* held to the contrary. 681 F.Supp. 323, 329 (E.D. Va. 1988).

384. *Emory*, 314 U.S. at 433 (Reed, J., dissenting).

385. *Id.* at 440.

386. *Id.* at 435-36.

387. *Id.* at 437.

388. 314 U.S. 480 (1941).

389. *Id.* at 481.

390. *Id.* at 481-82.

391. *Id.* at 482.

392. *Id.*

393. *Id.*

Supreme Court reversed, finding that, even though there was a state statute providing that gasoline taxes payable by a distributor shall be a preferred lien on all of the distributor's property, the state's claim, similar to the state's claim in *Maclay*,³⁹⁴ was at most, inchoate.³⁹⁵ The court noted that *Thelusson, Conard, and Brent*, all held that there is an exception to the priority of the United States as to previously executed mortgages, based on the theory that at the time of the mortgage the property passed to the mortgagee.³⁹⁶ *Brent*, however, reserved ruling on the issue of whether a specific and perfected lien would defeat the priority of the United States.³⁹⁷ *Thelusson* had made it clear that a general judgment lien did not take precedence over claims of the United States unless an execution on the judgment has proceeded far enough to take the collateral out of the debtor's possession.³⁹⁸ In this case though, the state had made no move to assert the lien proclaimed in the aforementioned statute prior to the appointment of the receiver.³⁹⁹ In the end, the Court rejected the argument that the Texas statute created its own lien by declaring that the lien affected only the property of the distributor used in its business, as the language was neither "specific" nor "constant."⁴⁰⁰ More important, however, was the fact that the claim was "unliquidated" and "uncertain," since the lienor failed to take the final step of fixing the amount of the claim.⁴⁰¹

*HH.1945: United States v. Waddill, Holland & Flinn, Inc.*⁴⁰²

In *Waddill, Holland & Flinn*, the proprietor of a restaurant made an assignment for the benefit of creditors.⁴⁰³ After the trustee/assignee sold the restaurant property, four creditors claimed priority of payment: the United States,⁴⁰⁴ the State of

394. See *supra* notes 326-338 and accompanying text.

395. *Texas*, 314 U.S. at 488. Justice Marshall stated in *Kimbell Foods*, that "it has proved difficult for nonfederal lienors to satisfy the strictures of the choateness test." 440 U.S. at 721 n.8.

396. *Texas*, 314 U.S. at 484-85. It is common knowledge that this theory of the title of mortgaged property passing to the mortgagee is applicable only in "title" states, where a mortgage conveys title to the collateral from the borrower to the lender. It does not apply in "lien" states, where the mortgage gives the lender a lien against his collateral and there is no change of title.

397. *Texas*, 314 U.S. at 485.

398. *Id.* The Supreme Court's decision, although bound by the Texas courts' rulings regarding Texas statutes which govern levy, seizure, and sale of property belonging to delinquent taxpayers, was not affected by state statute, as to who was entitled to priority of payment.

399. *Id.* at 486.

400. *Id.* at 487.

401. *Id.*

402. 323 U.S. 353 (1945).

403. *Id.* at 353-54.

404. See *id.* at 354 (claiming federal unemployment compensation taxes, and

Virginia,⁴⁰⁵ the City of Danville, which distrained on the restaurant property,⁴⁰⁶ and the landlord.⁴⁰⁷ The State conceded its claim was subordinate to that of the United States.⁴⁰⁸ The state court, pursuant to a request for a determination of priority made by the trustee/assignee, ruled that the City of Danville primed all claimants, the landlord was second, and the United States and the State shared third place.⁴⁰⁹ The Virginia appellate court affirmed.⁴¹⁰ The United States Supreme Court, however, reversed.⁴¹¹

During the Court's review, it determined that on its face, Rev. Stat. § 3466 admitted no exceptions to the priority of the United States, but that Supreme Court decisions had recognized that certain exceptions could be read into it:⁴¹² "The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment."⁴¹³ The Court hinted that such an exception, if it existed, would have caused the Court to affirm the lower court's decision.⁴¹⁴ Nonetheless, the Court did not answer the question because neither the lien of the landlord nor the municipality was "sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States."⁴¹⁵ The Court noted that Virginia state courts had ruled that under its statutes the landlord has "a lien which is fixed and specific, and not one which is merely inchoate . . ."⁴¹⁶ However, in response to this point the Court couched the following words:

These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization

a debt for a Federal Housing Administration transaction).

405. *See id.* (claiming state unemployment compensation taxation).

406. *See id.* (claiming personal property taxes).

407. *See id.* (claiming rent).

408. *Id.*

409. *Id.* at 354-55.

410. *Id.* at 355.

411. *Id.* at 360.

412. *Id.* at 355.

413. *Id.* The Court referenced *Conard, Brent, County of Spokane, Maclay, Knott*, and *Texas* in relation to this point.

414. *Id.* at 359.

415. *Id.* at 356.

416. *Id.*

of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority.⁴¹⁷

Relying on federal precedent, the Court found that even if a landlord's lien existed in the case, it was not sufficiently "specific and perfected"⁴¹⁸ or "specific and ascertainable,"⁴¹⁹ to qualify as an exception to the Priority Statute.

As to the lien of the municipality, the Court held that under Virginia law a municipal tax conferred a lien on personal property only if an assessment was specifically made on such property.⁴²⁰ The trial court recognized the rule, but held that assessment of the furniture and equipment as a unit was sufficient to satisfy this rule "so long as they remained on the premises where the owner's business was conducted."⁴²¹ In this case, the city tax collector did not restrain the property until thirteen days after the voluntary assignment for the benefit of creditors.⁴²² During this thirteen-day period, it was uncertain whether the furniture and equipment would remain intact.⁴²³ This prompted the Court to opine: "Such a lien cannot be said to be so explicit and perfected on the date of the voluntary assignment as to fall within the claimed exception to the priority of the United States."⁴²⁴ Justice Jackson dissented in this case on the ground stated by the Virginia Supreme Court of Appeals.⁴²⁵

II. 1946: *Illinois ex rel. Gordon v. United States*⁴²⁶

The Illinois Supreme Court awarded priority to claims of the United States under Rev. Stat. § 3466 against a taxpayer, who while insolvent made an assignment of all his property for the benefit of creditors.⁴²⁷ The claims were for federal unemployment

417. *Id.* at 356-57.

418. *Id.* at 357.

419. *Id.* at 358.

420. *Id.* at 359.

421. *Id.* (internal quotation marks omitted). While the Court did not explain, there must have been a concept of relation-back in the lower court's rationale.

422. *Id.*

423. *Id.*

424. *Id.* at 360. See also *supra* note 396.

425. *Id.* at 360. In the view of the Virginia Supreme Court:

[I]f before the Government's right of priority attaches, a creditor acquires a specific and perfected lien on the property of the insolvent debtor, the estate of the latter is, for all practical purposes, diminished to the extent of the claim secured by such lien, and the Government's right attaches only to the residue.

Waddill, Holland & Flinn, Inc., 28 S.E.2d at 743 (referring to *Brent* for authority).

426. 328 U.S. 8 (1946).

427. *Id.* at 9.

compensation taxes and federal insurance contribution taxes under the Social Security Act then in effect.⁴²⁸ The State argued that the Social Security Act evinces, implicitly rather than explicitly, a Congressional “purpose” to free state unemployment tax claims from Rev. Stat. § 3466.⁴²⁹ The State further argued that the enforcement of priorities would weaken state unemployment compensation funds and frustrate the manifest purpose of Congress to promote, in the national interest, “sound financial and stable” state unemployment systems.⁴³⁰

The Supreme Court, in an opinion authored by Justice Hugo Black,⁴³¹ agreed with the State that the social security legislation provided a method of promulgating state and federal unemployment relief systems and that sound state systems were essential to the success of the Congressional plan.⁴³² The Court observed, however, that the underlying philosophy of the Social Security Act was to keep the state and federal systems separately administered.⁴³³ It nowhere indicated a purpose of treating a state unemployment claim as tantamount to a claim of the United States.⁴³⁴ The Court indicated that federal social security taxes were subject to other provisions of law relating to the assessment and collection of taxes, unless such provisions were inconsistent with the Social Security Act.⁴³⁵ Those provisions indicated that Congress intended, so far as practicable, to apply to social security taxes all of the remedies available to the federal government in collecting other taxes; and Rev. Stat. § 3466 was simply one of those remedies.⁴³⁶

*JJ. 1946: Illinois ex rel. Gordon v. Campbell*⁴³⁷

In the following Term, but in the same year, the Court considered some matters not taken up in the previously decided case of *Illinois ex rel. Gordon v. United States*.⁴³⁸ The Director of Labor for the State of Illinois sued Chicago Waste & Textile Co. to enforce a statutory lien for unemployment compensation contributions.⁴³⁹ A company, Associated Agencies, was made a defendant in the Director’s suit.⁴⁴⁰ The Director alleged that

428. *Id.*

429. *Id.* at 9-10.

430. *Id.* at 10.

431. *Id.*

432. *Id.* at 11.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. 329 U.S. 362 (1946).

438. *Id.* at 364.

439. *Id.*

440. *Id.*

Associated was a judgment-creditor of Chicago Waste & Textile, who had executed a judgment against its debtor, and that Associated's claim was subordinate to the Director of Labor because its execution was effected long after the recording of the Director's Notice of Lien.⁴⁴¹ It was further alleged that Chicago Waste & Textile was insolvent, and a receiver was subsequently appointed.⁴⁴² Thereafter, the Collector of United States Internal Revenue filed a claim in the action seeking priority for federal insurance contributions and federal unemployment taxes, to which the state Director of Labor objected.⁴⁴³ Upon the receiver's sale of the debtor's property, the proceeds were deposited into the court registry, and the court ordered that ninety percent of the proceeds be paid to the state, and ten percent be paid to the United States.⁴⁴⁴ During the state proceedings, the Illinois Supreme Court reversed, holding the United States was entitled to complete priority.⁴⁴⁵

Before the Supreme Court, Illinois argued that Rev. Stat. § 3466 did not apply because the receiver appointed by the trial court was not a "receiver" under the Bankruptcy Act's definition of an "act of bankruptcy,"⁴⁴⁶ which required a "general" receivership rather than one incidental to the enforcement of a lien.⁴⁴⁷ The Court, however, did not need to consider the point since it concluded that it was a "general" receivership within the purview of Rev. Stat. § 3466.⁴⁴⁸ The State further argued that Chicago & Waste Textile was not insolvent.⁴⁴⁹ In response, the Court dictated that the State should have been estopped from questioning the issue since the receiver was appointed under the State's petition; and, moreover, the record established insolvency.⁴⁵⁰ For the State's final argument, the Court observed that on several occasions it had reserved ruling on the issue of whether a fully perfected and specific lien would defeat the United State's priority rights,⁴⁵¹ and found again that the Court need not decide the issue since the instant lien was not "fully perfected and specific."⁴⁵²

The Court reiterated seven previously established rules. First, the effect and operation of a lien in relation to the United

441. *Id.* at 364-65.

442. *Id.* at 365.

443. *Id.* at 365-66.

444. *Id.* at 366.

445. *Id.*

446. *Id.* at 368.

447. *Id.*

448. *Id.* at 369.

449. *Id.* at 368.

450. *Id.* at 369.

451. *Id.* at 370 (referring to *Conard, Brent, County of Spokane, Maclay, Texas, and Waddill, Holland & Flinn, Inc.*).

452. *Id.* at 370-71.

State's claim of priority is always a federal question.⁴⁵³ Second, the priority given to the United States cannot be impaired or superseded by state law.⁴⁵⁴ Third, a state's characterization of a lien as specific and perfected was not conclusive.⁴⁵⁵ Fourth, and in contrast, a state's characterization of its lien as inchoate was practically conclusive.⁴⁵⁶ Fifth, the recording of a notice of lien does not fully perfect the lien where, as in the present case, the State did not know the amount owed by the debtor, or the type of property belonging to the debtor to which the lien is to attach as of that time.⁴⁵⁷ Sixth, the appointment of a receiver was only an initial step in the perfection of a lien under state law.⁴⁵⁸ Seventh, there were three requirements for a lien to be perfected at the time the United States acquires its priority: (1) "identity of the lienor;"⁴⁵⁹ (2) "the amount of the lien";⁴⁶⁰ and (3) "the property to which [the lien] attaches."⁴⁶¹ Further, regarding this last rule, "[i]t is not enough that the lienor [had] power to bring these elements, or any of them, down from broad generality to the earth of specific identity."⁴⁶² As applied to the present case, the Court noted here that the notices of lien and state statute made the identity of the lienor certain before the government's priority attached.⁴⁶³ The notices also fixed the amount of the liens, though miscalculated in this case.⁴⁶⁴ Yet, neither the notices nor the appointment of the receiver made definite and certain what property was being encumbered.⁴⁶⁵ Justice Rutledge's⁴⁶⁶ concluding paragraph made

453. *Id.* at 371.

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* at 372-73. As the Court pointed out, the debtor files a schedule of its property after the Notice is recorded, and until that schedule is filed the state has no idea of what property the debtor possesses. *Id.* at 374.

458. *Id.* The appointment, together with the injunction protects whatever rights in the property that the state may have. *Id.* However, "it [is] not a final assertion or attachment of rights to specific property," as exists, for example, in the case of an execution and levy. *Id.* (citing *Conard*, 26 U.S. 386).

459. *Id.* at 375.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* ("property devoted to or used in his business . . . is neither specific nor constant." (quoting *United States v. Texas*, 314 U.S. 480, 487 (1941))). Goods subject to the lien had not been severed from the general and free assets of the tenant/owner from which the claims of the United States were entitled to priority. *Id.* at 375-76. As in *Maclay*, there was "merely 'a caveat of a more perfect lien to come.'" *Id.* at 376. As in *Thelusson and Maclay*, the State had acquired neither title nor possession. *Id.* Since the Receiver's possession was that of the court, not of the state, and did not sever the lien property from the debtor's general assets as of the crucial date — the date on

crystal-clear the position taken by the Court, and the reason therefore:

To permit the recording of the notices or the receiver's appointment, or both, in circumstances like these, to overcome the Government's priority would be in substance to overrule the numerous decisions cited in which liens no less "specific and perfected" have been held impotent for that purpose. It would open the door, too, we think, to substantial nullification of the Government's priority. For then this could be accomplished simply by recorded notices of lien, disclosing claims to property not segregated from the debtor's general estate; designated only by general words of classification, including after-acquired property as here; and ascertainable definitively only by further procedures. Congress alone should make such a change, if it should be made at all.⁴⁶⁷

Joined by Justice Jackson,⁴⁶⁸ Justice Reed dissented.⁴⁶⁹ Justice Reed posited that the State's Notice of Lien was sufficiently specific.⁴⁷⁰ Justice Reed further dissented on the ground that the holding in *Texas*⁴⁷¹ was distinguishable from the facts in this case, contrary to the majority's view. He observed that it was true that the description of the property was the same as that in *Texas* (i.e. the personal property owned and operated by the debtor at his place of business), however, in his opinion the fault of the lienor in *Texas* lie not in the property description, but in the fact that the lienor failed to take the final step of fixing the amount of the claim.⁴⁷² Justice Reed argued that the lienor in this case had taken that final step.⁴⁷³

*KK. 1947: U.S. Department of Agriculture v. Remund*⁴⁷⁴

During the depression, Congress passed legislation creating the Farm Credit Administration, to lend money to farmers so they could purchase supplies for growing crops.⁴⁷⁵ A South Dakota farmer received such a loan from the Farm Credit Administration in the amount of \$370.00.⁴⁷⁶ The farmer died without having

which the United States acquired its priority — the State's lien could not prime the federal priority. *Id.* See also *infra* notes 736-737 and accompanying text for an explanation of when the United States acquires priority.

466. *Campbell*, 329 U.S. at 364.

467. *Id.* at 376.

468. *Id.* at 378 (Jackson, J., joining in the dissent).

469. *Id.* at 376 (Reed, J., dissenting).

470. *Id.* at 377. The name and address of the creditor were given, as was the amount of the claim. *Id.*

471. See *supra* note 400 and accompanying text.

472. *Campbell*, 329 U.S. at 378 (Reed, J., dissenting).

473. *Id.*

474. 330 U.S. 539 (1947).

475. *Id.* at 540.

476. *Id.*

repaid the debt. Because his estate had insufficient funds with which to pay all his debts, the Farm Credit Administration filed a claim in probate court seeking priority under Rev. Stat. § 3466.⁴⁷⁷ The probate court denied the claim for priority; an intermediate appellate court, as well as the South Dakota Supreme Court affirmed.⁴⁷⁸ The South Dakota Supreme Court had taken the position that giving priority to the United States would have conflicted with the holding of *Guaranty Trust Co.* that giving priority to the collection of loans owed to railroads during World War I would be contrary to protection of railroads in time of war, the purpose of the statute under which the loan was made.⁴⁷⁹

Before addressing the contention under *Guaranty Trust Co.*, the Court opined on two other points. First, an argument was made that the Farm Credit Administration could not claim priority, as it was an entity separate and apart from the United States.⁴⁸⁰ The Court rejected this contention, as the Administration was simply one of many administrative units of the U.S. government established to carry out the functions delegated by Congress.⁴⁸¹ According to the Court, the Administration had none of the features of a *government* corporation with an identity separate and apart from the United States.⁴⁸² Secondly, it made no difference that the claim was filed in the name of the agency (or for that matter, in the name of its authorized official), rather than in the name of the United States, since the Acts under which the agency was established were meant to give emergency relief to distressed farmers, rather than to restore their credit status.⁴⁸³

As to the alleged conflict raised by the *Guaranty Trust Co.* decision (i.e. giving emergency loans to farmers and seeking priority in repayment), the Court said such priority in no way impaired the aid which the farmers sought, nor would it have embarrassed them in their daily operations.⁴⁸⁴ When considering the conditions prevailing during the depression, moreover, there was no indication that Congress meant its first lien, which it had required in these loans, to be the sole security to which the government could look for repayment.⁴⁸⁵

477. *Id.*

478. *Id.*

479. *In re Buttke's Estate*, 23 N.W.2d 281, 286-88 (S.D. 1946). *See also supra* notes 316-325 and accompanying text.

480. *Remund*, 330 U.S. at 541.

481. *Id.*

482. *Id.*

483. *Id.* at 542-43.

484. *Id.* at 544.

485. *Id.* Justice Douglas dissented, without opinion, because he thought the case was governed by *Guaranty Trust Co.* *Id.* at 545 (Douglas, J., dissenting).

*LL. 1948: Massachusetts v. United States*⁴⁸⁶

In *Massachusetts*, liquidation of a debtor's assets subsequent to a common law assignment for the benefit of creditors⁴⁸⁷ yielded an amount of money that was more than the federal government's two claims under Titles 8 and 9 of the Social Security Act, and a small amount for capital stock taxes.⁴⁸⁸ However, the liquidation was insufficient to pay all three of the federal government's claims.⁴⁸⁹ The State of Massachusetts had a claim for unemployment taxes which was in between the two federal claims in size.⁴⁹⁰ The assignee paid the State's claim in full, and paid the balance of the proceeds of the sale to the federal government in satisfaction of its Title 8 claim.⁴⁹¹ The assignee did not pay the remaining Title 9 or the capital stock claims.⁴⁹² On appeal, the district judge sustained federal priority for the capital stock tax and the Title 8 claim, and for a payment of the ten percent balance owed to the federal government on its Title 9 claim.⁴⁹³ The basis for the district judge's ruling as to the ten percent was that section 902 of Title 9 gave the assignee an "alternative right" to pay ninety percent of a state's claim to an approved state unemployment compensation fund, and receive credit for "payment" of that amount to the federal government on its claim.⁴⁹⁴ According to the district judge, the *Illinois* cases⁴⁹⁵ had sustained federal priority for the capital stock taxes and Title 8 claims, but they had not ruled on Title 9 claims, as § 902 governed the issue.⁴⁹⁶ The circuit court of appeals reversed the district judge on his ruling vis-à-vis Title 9, and held that the United States was entitled to priority for the full amount of all its claims.⁴⁹⁷

In affirming the circuit court of appeals the Supreme Court agreed that § 902 of Title 9 gave the assignee an "alternative right" to take credit for ninety percent of any monies paid to an approved state unemployment fund.⁴⁹⁸ The Court found, however,

486. 333 U.S. 611 (1948).

487. *Id.* at 613 n.1.

488. *Id.* at 612-13.

489. *Id.* at 613.

490. *Id.* at 613 n.1.

491. *Id.*

492. *Id.* The reason for not paying the claim for capital stock tax was probably that there was not enough money in the proceeds with which to pay it.

493. *Id.* at 613-14.

494. *Id.* at 614.

495. *Illinois ex rel. Gordon v. United States*, 328 U.S. 8 (1946), see *supra* notes 426-436 and accompanying text, and *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362 (1946), see *supra* notes 437-473 and accompanying text.

496. *Massachusetts*, 333 U.S. at 614 n.4.

497. *Id.* at 614.

498. *Id.* at 616.

that the right was altered when the debtor was insolvent, because Rev. Stat. § 3466 excluded Section 902.⁴⁹⁹ The Court gave several reasons for taking this position. First, in *Campbell* the state court did not reach the basic question of the force of Rev. Stat. § 3466 to create priority for federal Title 9 claims — it expressly avoided that issue.⁵⁰⁰ In the *Illinois* cases, the state court ruled that federal claims for Titles 8 and 9 taxes are “debts” within the purview of Rev. Stat. § 3466 and, therefore, are entitled to priority over state claims.⁵⁰¹ The Court observed that its decisions in the *Illinois* cases, “generally and without distinction” between Title 8 and 9, adjudicated priority for both types of claim.⁵⁰² The Court further observed that prior Supreme Court decisions have held that taxes due the United States are “debts” within the meaning of Rev. Stat. § 3466.⁵⁰³ In the *Illinois* cases, the Court applied this rule to Title 8 and Title 9 as against state claims for contributions.⁵⁰⁴

The Court next noted prior decisions holding that priority attached as of the time of insolvency.⁵⁰⁵ If, however, credit could be taken after Rev. Stat. § 3466 attached (“i.e. after insolvency, effective to set aside the federal priority up to ninety percent of the Title 9 claim”), the priority to that extent becomes conditional, not absolute: “Its effectiveness then becomes contingent upon the happening of subsequent events”⁵⁰⁶ Not only the priority, but the “debt” itself becomes contingent, and the “debts due” language of Rev. Stat. § 3466 could be questioned.⁵⁰⁷ The Court said it knew of no application of Rev. Stat. § 3466 creating such “conditional priority,” nor did the majority of its members see how one could be made consistently with Rev. Stat. § 3466’s terms or purposes.⁵⁰⁸ If § 902 created an exception to Rev. Stat. § 3466, the Court

499. *Id.* at 628.

500. *Id.* at 620.

501. *Id.* at 621.

502. *Id.* at 622. The Court also pointed out that the decision in the *Illinois* Supreme Court could have been made on the basis of the more narrow ground that the Title 8 claim was more than sufficient to exhaust the fund and therefore sustain the priority, for that claim alone would dispose of the case. The decision could have rested on either the broad or the narrow ground. *Id.* at 622-23.

503. *Id.* at 625, 625 n.24.

504. *Id.* at 625-26.

505. *Id.* at 626, 626 n.25.

506. *Id.* at 626.

507. *Id.* at 626-27. Congress intended debts to mean “debts,” not “other forms of obligation.” *Id.* at 627 n.26. The Court’s discussion of “debts” as a specific exposition of that word can be disregarded in light of the 1982 amendment of the Priority Statute, changing “debt” to “claim.” See *supra* note 44 and accompanying text. The amendment, however, did not cause the Court’s discussion to lose its value as statutory construction.

508. *Massachusetts*, 333 U.S. at 627.

concluded that an exception would apply to all federal taxes, not just those imposed by Title 9.⁵⁰⁹

In further rejecting the State's arguments, the Court expressed that the *Illinois* cases did not expressly discuss the "10-90" percent distribution of Title 9 taxes, but this did not mean the decisions did not encompass such a possibility.⁵¹⁰ The decisions extended generally to all cases where credit is sought after insolvency.⁵¹¹ In the *Illinois* cases, federal priority attached as of the time of insolvency, and the Court adjudicated: "Our decision held that right cut off by the incidence of § 3466 at the time of insolvency."⁵¹²

The Court lastly examined whether the *Illinois* decisions should be overruled.⁵¹³ Justice Rutledge,⁵¹⁴ also the author of the *Illinois* decisions, concluded that they should not be, expressing:

Until the federal claims for taxes, whether under Title 8, Title 9 or other taxing provisions, are paid in full, the states are not entitled either to collect or to retain any part of the insolvent debtor's assets. We do not anticipate that any of the state unemployment insurance programs will fail or be seriously impaired by reason of this decision, or their consequent failure to secure the small sums characteristically at stake in this extended litigation and, apparently, in other cases most likely to produce similar controversy. Nor would the Federal Treasury have been rendered bankrupt by a contrary result.⁵¹⁵

A scathing dissent was issued by Justice Jackson,⁵¹⁶ in which he wrote: "This decision announces an unnecessarily ruthless interpretation of a statute that at its best is an arbitrary one . . . ; [t]he interpretation of the Priority Act to thus gouge [sic] the states and private creditors is contrary to the purpose and spirit of the Act itself."⁵¹⁷ Justice Jackson reiterated Justice Story's definition from over a century ago regarding the "motives of public policy" underlying the federal priority statutes: "in order to secure an adequate revenue to sustain the public burthens and discharge the public debts . . ."⁵¹⁸ It was obvious to Justice Jackson that the ninety percent of Social Security tax involved was not contemplated as federal revenue to meet federal burdens, but

509. *Id.* at 628.

510. *Id.* at 629.

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.* at 612. The other members of the five member majority were: Chief Justice Vinson, and Justices Black, Murphy, and Reed. *Id.*

515. *Id.* at 634-35.

516. *Id.* at 635 (Jackson, J., dissenting). Jackson was joined by Justices Frankfurter, Douglas, and Burton. *Id.*

517. *Id.* at 635, 638.

518. *Id.* at 638. (citing *State Bank of North Carolina*, 31 U.S. at 35).

rather was laid to induce and to enable the State to assume specific obligations to the unemployed.⁵¹⁹ Justice Jackson ended by expressing the belief that the priority statute was now being invoked to deny, in this case, the aid promised in meeting those obligations.⁵²⁰

*MM.1950: United States v. Security Trust & Savings Bank*⁵²¹

In this next case the Supreme Court applied the rule established under the Priority Statute to a federal tax lien statute.⁵²² The plaintiff in a state lawsuit obtained a pre-judgment attachment under state law and thereafter recorded it.⁵²³ Subsequently, the Internal Revenue Service recorded a tax lien; subsequent to that, the plaintiff obtained a judgment lien by recording a certified copy of his judgment.⁵²⁴ The state courts had described the attachment lien as “a potential right or a contingent lien.”⁵²⁵ In the words of the U.S. Supreme Court, “[t]hus the attachment lien is contingent or inchoate — merely a *lis pendens* notice that a right to perfect a lien exists.”⁵²⁶ In its reference to Rev. Stat. § 3466 the Court opined, “it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it.”⁵²⁷ The Court thereupon applied the same priority rule to the federal tax lien statute, by holding:

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 here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment lien⁵²⁸

*NN.1952: Nathanson v. N.L.R.B.*⁵²⁹

In 1952, the Supreme Court determined that certain back pay claims owed to former employees of a bankrupt as a result of an unfair labor practice were not priority claims under Rev. Stat.

519. *Id.* at 638-39.

520. *Id.* at 639.

521. 340 U.S. 47 (1950).

522. *Id.* at 48.

523. *Id.*

524. *Id.* The judgment lien was obtained in the same action in which he obtained the attachment.

525. *Id.* at 50 (ruling out application of any relation-back doctrine).

526. *Id.* The Court further described it as “a mere ‘*caveat*’ of a more perfect lien to come.” *Id.* (citing *Maclay*, 288 U.S. at 294).

527. *Id.* at 51.

528. *Id.*

529. 344 U.S. 25 (1952).

§ 3466, because the claimants were simply private persons who had been discriminated against by their employer.⁵³⁰ The Court distinguished the *Bramwell* case,⁵³¹ which extended the United States's priority to a claim for Indians' money, on the grounds that the Indians were wards of the United States for whom this country was responsible for the continual protection of their interests.⁵³² The wage claimants in *Nathanson* occupied no such status.⁵³³

*OO.1953: United States v. Gilbert Associates, Inc.*⁵³⁴

Gilbert Associates, Inc. involved a contest between a town in New Hampshire and the United States, who both held general tax liens on all of a taxpayer's personal property.⁵³⁵ The debtor, while insolvent, caused a receiver to be appointed, who sold all of the debtor's personal property before the town ever took possession or title thereto.⁵³⁶

The Supreme Court noted that this was another case in which it would not answer the question as to whether a fully perfected lien would trump the priority of the United States under Rev. Stat. § 3466, since the town did not perfect its lien.⁵³⁷ Citing *Thelusson*, the Court opined: "[I]n claims of this type, 'specificity' 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."⁵³⁸ Additionally, the Court relied on *Texas* as authority expressing, "[w]here the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States."⁵³⁹

530. *Id.* at 27-28.

531. *See supra* notes 271-288 and accompanying text for a discussion of the *Bramwell* case.

532. *Nathanson*, 344 U.S. at 28.

533. *Id.*

534. 345 U.S. 361 (1953).

535. *Id.* at 362.

536. *Id.*

537. *Id.* at 365.

538. *Id.* at 366 (citing *Thelusson*, 15 U.S. 336). In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 721 n.8 (1979) Justice Marshall referenced *Gilbert* when noting that "it has proved difficult for nonfederal lienors to satisfy the strictures of the choateness test."

539. *Id.* (citing *Texas*, 314 U.S. at 488).

*PP. 1954: United States v. City of New Britain*⁵⁴⁰

This case involved a contest between a city, which held a specific statutory tax lien⁵⁴¹ against certain real property, and the federal government, which held a general tax lien⁵⁴² against the same property owned by a solvent taxpayer.⁵⁴³ The Supreme Court held Rev. Stat. § 3466 did not apply, but rather that the “first in time is the first in right” rule was applicable.⁵⁴⁴ The Court found that since the identity of the lienor, the encumbered property, and the amount of the lien were established, there was nothing more to be done for the city to have a choate lien.⁵⁴⁵ The city gained no advantage over the federal government by the fact that its lien was specific as “the State cannot on behalf of the City impair the standing of the federal liens, without the consent of Congress.”⁵⁴⁶ The Court further commented that obviously Congress may determine priorities between and among liens, but Congress did not do so in the statute creating the federal tax lien.⁵⁴⁷ It was said Congress created federal priority under Rev. Stat. § 3466, which the federal government may use against property of the debtor wherever it is located.⁵⁴⁸ This broad reach of the federal priority was determined to differ from the State’s power, which is limited to property located within its state’s boundaries.⁵⁴⁹ The application of Rev. Stat. § 3466, however, was restricted to insolvent debtors, and the debtor was found not to be insolvent.⁵⁵⁰ Therefore, the Court asserted that “the first in time is the first in right” rule was applicable to the case.⁵⁵¹

The city disagreed with the Court’s position that the first-in-time rule should apply, taking the state appellate court’s position that Congress by enacting I.R.C. § 3672 expressed the intention that federal liens should be subordinated to such mortgages and judgment liens as are described therein.⁵⁵² The city further argued that the Federal position was subordinated to other encumbrances

540. 347 U.S. 81 (1954). *City of New Britain* was unanimously decided by the same Court that decided *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1954), also a unanimous decision.

541. *City of New Britain*, 347 U.S. at 84. The city’s lien was for *ad valorem* real property taxes and water rent. *Id.* at 83.

542. *Id.* at 84. The federal government’s claim was for withholding and unemployment taxes, as well as insurance contributions. *Id.* at 82.

543. *Id.* at 85.

544. *Id.*

545. *Id.* at 86-87.

546. *Id.* at 84.

547. *Id.* at 84-85.

548. *Id.* at 85.

549. *Id.*

550. *Id.*

551. *Id.*

552. *Id.* at 87-88.

as they have priority over mortgages and judgment liens.⁵⁵³ The Court disagreed, stating that the United States was not interested in whether the State received its taxes and water rents prior to the mortgage and judgment creditors.⁵⁵⁴ The Court held that the reason for its position was a matter of state law.⁵⁵⁵ As to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, however, the Court determined Congress intended to assert the federal priority.⁵⁵⁶ The case was eventually remanded to the state court for a determination of the priority of the various liens asserted, in accordance with the Court's ruling in the case.⁵⁵⁷

*QQ.1960: Small Business Administration v. McClellan*⁵⁵⁸

In *McClellan*, The Small Business Administration (S.B.A.)⁵⁵⁹ joined a private bank in making a loan to a borrower who became bankrupt.⁵⁶⁰ The S.B.A. agreed to pay the bank one-quarter of the money it collected from the bankrupt.⁵⁶¹ A question arose as to the priority in favor of the United States under Rev. Stat. § 3466 and the Bankruptcy Act.⁵⁶²

The Supreme Court held that the S.B.A. was entitled to full priority,⁵⁶³ but not until it answered four issues raised in the case. The first issue discussed was whether the S.B.A. was an entity separate and apart from the United States, so as not to be entitled to the United State's priority?⁵⁶⁴ The Court found that the S.B.A. was an integral part of the United States, so as to be entitled to the priority of the United States.⁵⁶⁵ The second issue was whether

553. *Id.*

554. *Id.* at 88.

555. *Id.*

556. *Id.*

557. *Id.* See *United States v. Vermont*, 377 U.S. 351, 354-55 (1964) (citing *City of New Britain*, 347 U.S. at 86, in determining a conflict between tax claims of the federal and state governments based on virtually identical worded statutes involving a solvent taxpayer).

558. 364 U.S. 446 (1960).

559. *Id.* at 447. The S.B.A. was created in 1953 to protect, as far as possible, the interests of small business concerns in order to preserve free competitive enterprises and to maintain and strengthen the overall economy of the nation.
Id.

560. *Id.*

561. *Id.*

562. *Id.* 11 U.S.C. § 104 (§ 64 of the Bankruptcy Act), in existence at the time of the case, gave the United States fifth priority among creditors of the bankrupt. *Id.* at 447 n.5.

563. *Id.* at 453.

564. *Id.* at 448.

565. *Id.* at 450. The Court reminded its readers that in *Remund* priority was given to the Farm Credit Administration, which was, as was the S.B.A., "an integral part of the governmental mechanism' created to accomplish what Congress deemed to be of national importance." *Id.* (citing *Remund*, 330 U.S.

Marxen governed. In *Marxen*, the Court held that priority attached only to those debts owing to the United States on the date of commencement of the bankruptcy case, and not those that came into effect after that date.⁵⁶⁶ The Court in *McClellan* held *Marxen* did govern, as the case met *Marxen*'s requirements, since the debt was contracted nine months pre-bankruptcy, even though the assignment of the note evidencing the loan to the S.B.A. was not made until after the filing in bankruptcy.⁵⁶⁷ The third issue for the Court's resolution was whether the S.B.A. lost its right to priority by agreeing to turn over ¼ of the money it collected to the private bank, since, per *Nathanson*, priority was not given to collections for the benefit of private parties.⁵⁶⁸ The Court distinguished *Nathanson* stating that no money would have gone to the United States in that case, whereas in this case the money would have gone to the government.⁵⁶⁹ Furthermore, the fact that the government would thereupon pay some of the money to a private party was of no moment.⁵⁷⁰ It was true that the bank would fare better than other creditors of the bank, but that was the result of the bank's valid contract with the S.B.A., rather than any inequality of distribution.⁵⁷¹ The fourth issue considered by the Court was the argument that giving the S.B.A. priority would make it more difficult for small businessmen to borrow money from other lenders who know that they may be second best in their collection attempts.⁵⁷² The Court had already rejected the same argument in *Emory*, concluding that "only the plainest inconsistency would warrant our finding an implied exception to . . . so clear a command as that of § 3466;" and that the argument did not establish such an inconsistency.⁵⁷³

*RR. 1964: United States v. Vermont*⁵⁷⁴

The decision in this case involved a contest between a federal tax lien based on federal statutes and a state tax lien identical to the federal statutes.⁵⁷⁵ Similar to the situation in *City of New Britain*, the claims in this case were against a solvent taxpayer.⁵⁷⁶ Due to the solvency of the taxpayer, the Court ruled that the

at 542).

566. *Id.* See also *supra* notes 361-368 and accompanying text.

567. *McClellan*, 364 U.S. at 450.

568. *Id.* at 451.

569. *Id.*

570. *Id.*

571. *Id.* at 452-53.

572. *Id.* at 453.

573. *Id.* (internal quotation marks omitted). Justice Douglas dissented without opinion. *Id.* at 453.

574. 377 U.S. 351 (1964).

575. *Id.* at 352.

576. *Id.* See also *supra* note 543 and accompanying text.

Priority Statute did not apply, but Justice Potter Stewart,⁵⁷⁷ author for the unanimous Court, made some clear pronouncements on the statute before ruling:

When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by § 3466 of the Revised Statutes, 31 U.S.C. § 191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority. Where the debtor is not insolvent, Congress has failed to expressly provide for federal priority . . . although the United States is free to pursue the whole of the debtor's property wherever situated.⁵⁷⁸

*SS. 1964: King v. United States*⁵⁷⁹

A New Jersey corporation filed for a Chapter XI adjustment of its debts under the Bankruptcy Act of 1898.⁵⁸⁰ The company's President, King, was appointed as the distributing agent in the proceeding.⁵⁸¹ Though a plan of reorganization was confirmed, the bankrupt's indebtedness to the United States⁵⁸² was not provided for and King only partially paid their claim.⁵⁸³ As a result, priority was sought under § 64 of the Bankruptcy Act, and Rev. Stat. § 3466, the Priority Statute.⁵⁸⁴ The Government thereupon sued King personally under Rev. Stat. § 3467.⁵⁸⁵ The United States District Court dismissed the complaint on the ground that a distributing agent in bankruptcy was not an "executor, administrator, or assignee or other person" within the meaning of Rev. Stat. § 3467.⁵⁸⁶ The distributing agent, unlike those mentioned in Rev. Stat. § 3467, was not a personal representative of the debtor, but rather an arm and representative of the Bankruptcy Court, without any discretionary powers, and who merely follows the dictates of the court.⁵⁸⁷ The Third Circuit reversed, causing the U.S. Supreme Court to grant certiorari.⁵⁸⁸

577. *Vermont*, 377 U.S. at 351.

578. *Id.* at 358. The Court went on to find the state lien sufficiently choate to prime the later-recorded federal lien. *Id.* at 359.

579. 379 U.S. 329 (1964).

580. *Id.* at 331.

581. *Id.*

582. *Id.* The cause arose out of the bankrupt's breach of contract concerning a military arsenal. *Id.*

583. *Id.* at 332.

584. *Id.*

585. *Id.* at 333. See also *supra* text accompanying note 38 for the language of Rev. Stat. § 3467.

586. *King*, 379 U.S. at 333-34.

587. *Id.* at 334.

588. *Id.*

By holding that Rev. Stat. § 3467 was applicable to suits against the distributing agent of a bankruptcy case, the Court first traced the history of 31 U.S.C. § 191, and discussed its *raison d'être*.⁵⁸⁹ Two years after granting the federal government priority under the Act of March 3, 1779, Congress established personal liability for those who frustrated the Government's priority.⁵⁹⁰ The Court asserted that the two statutes must be interpreted *in pari materia*.⁵⁹¹ The Court chose not to articulate a general rule concerning disbursing agents in bankruptcy cases, but rather to decide that on the facts of the case, King possessed sufficient powers to expose himself to personal liability for failing to honor the United States with its full priority.⁵⁹² The facts demonstrated that as President of the bankrupt, King was certainly aware of the United State's claim; he took an active role in the formulation of the plan, which contained at least a reference to the Government's claim; he was present at the confirmation hearing at which the claim was discussed; and, he was one of the major distributees under the plan.⁵⁹³ When the Court came to a close it formulated this rule:

In these circumstances we think King was possessed of a sufficient degree of control over the allocation among creditors of the assets in his possession to give rise to responsibility under § 192 for seeing that the government priority was paid, a responsibility which King, so far as the record reveals, made no effort to discharge. This is not to say that King acted dishonestly in any way or that he positively intended to thwart the Government's claim.⁵⁹⁴

Although King may have had an honest belief that the Government would be paid in full, the Court held, "§ 192 required more of King than an honest belief that the Government would be paid. It imposed on him a duty to see that this was done."⁵⁹⁵

*TT. 1970: United States v. Key*⁵⁹⁶

In *Key*, The Court announced that the Priority Statute and the Bankruptcy Act of 1898⁵⁹⁷ were compatible, and a plan of

589. *Id.* at 334-35.

590. *Id.* at 335.

591. *Id.* at 336.

592. *Id.* at 339-40.

593. *Id.* at 339.

594. *Id.*

595. *Id.* at 339-40.

596. 397 U.S. 322 (1970).

597. The Bankruptcy Act of 1898 was repealed by the Bankruptcy Reform Act of 1978, effective October 1, 1979, which presently furnishes most of the statutory law dealing with bankruptcy in the United States (popularly referred to as "the Code"), under Title 11 of the United States Code. It is unclear whether the 1898 Bankruptcy Act still furnishes the only extant definition of "acts of bankruptcy," as that statute has been repealed. *See infra*

reorganization in bankruptcy that did not comply with the Priority Statute could not be confirmed.⁵⁹⁸ A liquidation plan⁵⁹⁹ was proposed in a Chapter X case⁶⁰⁰ under which the bankrupt's main asset was to be sold, and the down payment used to satisfy certain wage claims as well as state and local tax claims in full.⁶⁰¹ The United States objected to the deferred payment plan, arguing that the plan violated the Priority Statute.⁶⁰² The Trustee in Bankruptcy (Key) took the position that the Priority Statute did not apply to Chapter X cases, as the Bankruptcy Act of 1898 exclusively governed that type of bankruptcy case.⁶⁰³

Justice Thurgood Marshall wrote the opinion for a unanimous Court.⁶⁰⁴ Justice Marshall reiterated the establishment of the taxpayer's insolvency, and adhered to the Court's previous rule that a tax due the United States was a debt.⁶⁰⁵ Since no provision of the Bankruptcy Act governing Chapter X specifically excepted corporations in reorganization from the Priority Statute, the question to be decided by the Court was whether the legislative scheme of Chapter X implied that such an exception was intended

notes 650-656 and accompanying text.

598. *Key*, 397 U.S. at 332-33.

599. A liquidation plan was permitted, though not the typical plan contemplated, in reorganization under the prior (1889 Act), as well as under the present bankruptcy statute. Under such a plan the debtor's property is liquidated (i.e. all of its assets are sold and distributed to creditors), rather than the being reorganized. *See generally* 11 U.S.C. § 1101(1). The reason for liquidating in Chapter 11 (the reorganization chapter of the bankruptcy statute) rather than in Chapter 7 (the chapter devoted to liquidations), is that Chapter 7 liquidation will be performed under the supervision of a Trustee in Bankruptcy, whereas under the reorganization chapter (the prior Chapter X or the present Chapter 11), the debtor controls the liquidation, as the Debtor in Possession ("D.I.P.").

600. Under the Bankruptcy Act of 1898 Chapter X dealt with corporate reorganizations, whereas Chapter XI dealt with arrangements of debts, the former involving more restructuring of the bankrupt than the latter. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 1.6 (1997).

601. *Key*, 397 U.S. at 333. The plan was to satisfy about twenty percent of unsecured debt and about ten percent of United States taxes, the balance of which was to be paid out in seventy-eight monthly installments, which the bankrupt was to receive in payment for its principal asset. *Id.*

602. *Id.* at 323. At the time, the priority statute was codified as 31 U.S.C. § 191. Although in his opinion, Justice Marshall more often referred to the statute as Revised Statute § 3466.

603. *Id.* at 327.

604. *Id.* at 322. Justice William O. Douglas wrote a concurring opinion in which he stressed the fact that the Chandler Act, which amended the Bankruptcy Act, provided that any creditor who objected to a plan must be dealt with in a "fair and equitable" manner. *Id.* at 333 (Douglas, J., concurring). Compromising the rights of senior creditors to protect junior creditors was not "fair and equitable." *Id.* at 333-34 (Douglas, J. concurring).

605. *Id.* at 324.

by Congress.⁶⁰⁶ Recognizing that the statute was to be given a liberal construction consonant with the public policy underlying it,⁶⁰⁷ Justice Marshall found that because the proposed plan did not comply with the Priority Statute, it could not be confirmed.⁶⁰⁸

*UU.1975: United States v. Moore*⁶⁰⁹

In *Moore*, a contractor defaulted on his contracts with government entities, and made an assignment to Moore for the benefit of creditors, to which the federal government did not consent.⁶¹⁰ Moore, as assignee, refused to accord priority to the government's claims filed with him.⁶¹¹ The ninth circuit reversed the district court's ruling, which had granted the United States priority on the ground that at the time of the assignment the amount of the claim was not certain, and hence, was not a "debt due," as that term was used in the Priority Statute.⁶¹²

In reversing the circuit court, the Supreme Court stated three reasons for not construing the Priority Statute narrowly.⁶¹³ First, there was nothing on the face of the statute and no potential difficulty in administration was requiring a distinction between liquidated and unliquidated debts, since all that the statutes provided was that "debts due the United States shall be first satisfied."⁶¹⁴ The language did not require the amount of the debt be certain as of the date of the assignment if liability was determined by that date, and the amount payable was determined as of the date of payment.⁶¹⁵ Second, all of the Bankruptcy Acts⁶¹⁶ permitted proof of unliquidated claims, which would have been allowed if they were liquidated or could be reasonably estimated soon enough that the distribution of the estate would not be unduly delayed.⁶¹⁷ The Court proffered that a meaning more restrictive than the bankruptcy statutes have given it for over 175 years would defeat the Priority Statute by unreasonably

606. *Id.*

607. *Id.* In contrast, in *Emory* the Court held that "only the plainest inconsistency would warrant [a] finding of an implied exception to the operation of so clear a command as that of § 3466." 314 U.S. at 433.

608. *Key*, 397 U.S. at 324-34. The holding in this case was implicitly overruled by the complete revamping of the bankruptcy system brought about by the Bankruptcy Reform Act of 1978. *See supra* note 41 and accompanying text.

609. 423 U.S. 77 (1975).

610. *Id.* at 78-79.

611. *Id.* at 79.

612. *Id.* 79-80.

613. *Id.* at 83.

614. *Id.* (internal quotation marks omitted).

615. *Id.* at 83.

616. *See id.* at 84-85 (referring to the Bankruptcy Acts of 1800, 1841, 1867 and 1898).

617. *Id.* at 85.

restricting the application of the word “debts” within a narrow or technical meaning.⁶¹⁸ Third, the Court in *King* and *National Surety Co.*, and other Federal courts,⁶¹⁹ had regularly applied the Priority Statute to debts that were, in fact, unliquidated, although without discussing the present issue.⁶²⁰ Chief Justice Burger⁶²¹ concluded the Court’s opinion on grounds of stare decisis, emphasizing the practice had been to apply the Priority Statute to unliquidated debts for so long a period of time that there were “strong grounds for a liberal construction.”⁶²²

VV. 1998: *United States v. Estate of Romani*⁶²³

In *Estate of Romani*, the Court considered the question of whether a federal tax claim should be given preference over a judgment creditor’s perfected lien on real property even though such preference is not specifically authorized by the Federal Tax Lien Act of 1966.⁶²⁴ A corporation recorded a judgment it obtained against an individual, acquiring a judgment lien under the laws of the state where the judgment was rendered.⁶²⁵ Thereafter, the Internal Revenue Service (I.R.S.) recorded notices of tax liens against the judgment debtor’s real property.⁶²⁶ When the individual taxpayer died, the value of his estate was far less than either the amount of the judgment or the tax liens.⁶²⁷ The estate administrator sought permission of the probate court to transfer the estate property to the corporate judgment creditor in lieu of execution.⁶²⁸ The I.R.S. acknowledged that the judgment lien primed its tax liens as a result of its being recorded prior to the recording of the Tax Notice.⁶²⁹ The I.R.S., however, claimed priority on the basis of the Priority Statute, 37 U.S.C. § 3713.⁶³⁰ The lower state courts, including the state supreme court,⁶³¹

618. *Id.* As stated above, the Court’s discussion of “debts” as a specific exposition of that word can be disregarded in light of the 1982 amendment of the Priority Statute, changing “debt” to “claim.” See *supra* notes 507 and accompanying text. The amendment, however, did not cause the discussion to lose its value for statutory construction.

619. See *United States v. Brummer*, 282 F.2d 535 (10th Cir. 1960) (applying the Priority Statute to debts that were not liquidated); *United States v. Barnes*, 31 F. 705 (S.D.N.Y. 1887) (same).

620. *Moore*, 423 U.S. at 86.

621. *Id.* at 78.

622. *Id.* at 86.

623. 523 U.S. 517 (1998).

624. *Id.* at 519.

625. *Id.* at 519-20.

626. *Id.* at 520.

627. *Id.*

628. *Id.*

629. *Id.*

630. *Id.*

631. The Pennsylvania Supreme Court took the position that the Tax Lien

disagreed with I.R.S.'s argument, and the United States Supreme Court agreed, overruling two circuit courts of appeals decisions.⁶³²

Justice Stevens wrote the opinion⁶³³ for the unanimous Court.⁶³⁴ In his opinion, Stevens first discussed *Thelusson*, which gave the United States a preference over a creditor who had a general lien on a debtor's real property.⁶³⁵ The Government suggested that the decision could be viewed as holding the statutory priority always accorded the federal government a preference over judgment creditors.⁶³⁶ However, for two reasons the Court did not accept that interpretation.⁶³⁷ First, in 1817, when *Thelusson* was decided, there was no procedure for recording a judgment and thereby creating a choate lien on real property.⁶³⁸ Second, and of greater importance, was Justice Story's explanation of *Thelusson* in *Conard*.⁶³⁹ In *Conard*, Justice Story pointed out that in *Thelusson* the creditor had not perfected his title (by execution or levy) on the judgment debtor's property.⁶⁴⁰ All the creditor had in *Thelusson* was a potential lien.⁶⁴¹ The Government also relied on dicta from the decisions in *Key*, and *Emory*.⁶⁴² Justice Stevens discounted such reliance because those cases

Act of 1966 modified the Priority Act by providing that federal tax liens "shall not be valid" as against judgment creditors until a prescribed notice has been given. *Id.* at 520. The U.S. Supreme Court did not explicitly accept or reject the Pennsylvania court's analysis.

632. *Id.* at 521. The Circuit Court decisions overruled were *Kentucky ex rel. Luckett v. United States*, 383 F.2d 13 (6th Cir. 1967), and *Nesbitt v. United States*, 622 F.2d 433 (9th Cir. 1980). In its brief, the government argued that the state Supreme Court's position not only conflicted with the two Courts of Appeals' decisions, but also conflicted with the U.S. Supreme Court's decision in *Thelusson*. *Estate of Romani*, 523 U.S. at 521; see also *supra* notes 75-86 and accompanying text. The Supreme Court disagreed.

633. *Id.* at 519.

634. Justice Scalia concurred, but disagreed with Justice Stevens' opinion to the extent it recognized that in 1966 and 1970, Congress decided to disregard the suggestion of the American Bar Association to subordinate the priority statute to the Federal Tax Lien Act, Congress expressed its will. *Id.* at 535-36 (Scalia, J., dissenting). Justice Scalia believed that Congress expresses its will by action, not inaction. *Id.* That Court was identical to the present Court barring Chief Justice John G. Roberts, Jr. succession as Chief Justice, and Justice Samuel A. Alito's replacement of Justice Sandra Day O'Connor.

635. *Id.* at 526.

636. *Estate of Romani*, 523 U.S. at 527.

637. *Id.*

638. *Id.* Notwithstanding a judgment, a bona fide purchaser could have acquired a debtor's property free from any claim of the judgment creditor. *Id.*

639. *Id.* at 528. See also *supra* note 99 and accompanying text (discussing Justice Story's explanation of the *Thelusson* case in *Conard*, 26 U.S. 386 (1828)).

640. See *supra* note 99.

641. *Estate of Romani*, 523 U.S. at 528.

642. *Id.* at 528.

involved completely unsecured claims, unlike the instant situation.⁶⁴³

Furthermore, the Court refused to take up the seemingly interesting pursuit of deciding whether the Tax Lien Act of 1966 amended the Priority Statute, concluding it did not think it appropriate to “view the issue in this case as whether the Tax Lien Act of 1966 has implicitly amended or repealed the priority statute. Instead, we think the proper inquiry is how best to harmonize the impact of the two statutes on the Government’s power to collect delinquent taxes.”⁶⁴⁴ The Court accomplished this by examining how three statutes, other than the Tax Lien Act, had impacted the Priority Statute without expressly amending it.⁶⁴⁵ Each of the identified statutes had effectively superseded the Priority Statute, according to Supreme Court decisions.⁶⁴⁶ The Court illustrated reasons for treating the Tax Lien Act of 1966 in the same manner:

[T]he Tax Lien Act is the later statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens. It represents Congress’ detailed judgment as to when the Government’s claims for unpaid taxes should yield to many different sorts of interests (including, for instance, judgment liens, mechanic’s liens, and attorneys’ liens) in many different types of property (including, for example, real property, securities, and motor vehicles). Indeed, given our unambiguous determination that the federal interest in the collection of taxes is paramount to its interest in enforcing other claims, it would be anomalous to conclude that Congress intended the priority statute to impose greater burdens on the citizen than those specifically crafted for tax collection purposes.⁶⁴⁷

In other words, when the Federal Tax Lien Act of 1966 said that “[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary,”⁶⁴⁸ it meant just that. The government’s later-filed tax lien was not going to trump a prior-recorded judgment lien because the Priority

643. *Estate of Romani*, 523 U.S. at 529. The Court in *Key*, moreover, made it clear that it was not deciding a secured-claim case. See *supra* notes 596-608 and accompanying text.

644. *Estate of Romani*, 523 U.S. at 530.

645. *Id.* at 530-31. The three statutes impacting but not amending the Priority Statute were the National Bank Act, the Transportation Act of 1920, and the Bankruptcy Act of 1898. *Id.*

646. *Id.* at 531.

647. *Id.* at 532 (internal citations omitted).

648. *Id.* at 521 n.3.

Statute only gave the United States priority under different circumstances.⁶⁴⁹

IV. HAVE THE "ACTS OF BANKRUPTCY" CHANGED WITHOUT SUPREME COURT RECOGNITION?

It is very possible that the number of "acts of bankruptcy," one of which the debtor must have committed before the United States will be entitled to priority under the Priority Statute has been reduced from six under the 1976 amendment of the 1898 Bankruptcy Act to two under the Bankruptcy Reform Act of 1978.⁶⁵⁰ Indeed, a bankruptcy judge in California hearing a bankruptcy case (not a Priority Statute case) believed the number of "acts of bankruptcy" have been reduced.⁶⁵¹ This is in opposition to the position taken by a magistrate judge in Illinois, who thought the "acts of bankruptcy" had been abolished,⁶⁵² as well as to the position taken by a district court judge in Virginia, who stated that "[w]hile the concept of an act of bankruptcy is no longer needed in Title 11 law, it remains a vital part of the Insolvency [Priority] Statute."⁶⁵³ No appellate court to date has answered the question

649. The likely reason for the Court's not mentioning *Sec. Trust & Sav. Bank* is that the judgment lien in that case had not been perfected. See *supra* notes 521-528 and accompanying text.

650. See *supra* note 6 (comparing the lists outlining "acts of bankruptcy").

651. See generally *In re Marshall*, 300 B.R. 507 (Bankr. C.D. Cal. 2003) (deciding that a Petition may be filed by a debtor in Chapter 11, even though the debtor was not insolvent at the time of filing). Judge Bufford said in dictum, "The Bankruptcy Code, while reducing to two the acts of bankruptcy that can support an involuntary petition continues to permit an involuntary bankruptcy notwithstanding the debtor's solvency." *Id.* at 519. This statement was dictum because the Petition filed in the case was a voluntary one, rather than an involuntary one filed by a creditor.

652. See *Budd Co. v. Applied Composite Corp.*, No. 02-C154, 2005 U.S. Dist. LEXIS 19090, at *9-10 (N.D. Ill. June 27, 2005) (recognizing that it is no longer necessary for a creditor wanting to file an involuntary petition forcing a debtor into bankruptcy to allege and prove the debtor had committed an act of bankruptcy). In *Budd Co.*, U.S. Magistrate Judge Martin C. Ashman expressed this thought in a case in which the plaintiff sought to enforce a settlement against a defendant which, instead of making payments to the plaintiff made an assignment for the benefit of creditors. *Id.* The Magistrate Judge's remarks about "acts of bankruptcy" were, therefore, *obiter dicta*. Indeed, the intent of the statement relied on by Judge Ashman that "[t]he Bankruptcy Reform Act of 1978 abolished the concept of 'acts of bankruptcy'" was that it is no longer necessary for a creditor wanting to file a Petition forcing a debtor into bankruptcy (i.e., an involuntary petition) to allege and prove that the debtor committed an "act of bankruptcy." *Id.* (citing U.S. CODE & ADMIN NEWS 1978, pp. 5787, 5820).

653. *Carter*, 681 F. Supp. at 326 n.13. In that case District Judge Ellis, pursuant to the Priority Statute, gave the United States priority for its tax claim, rather than following the Federal Tax Lien Act (26 U.S.C. § 6323), because the government's attorneys plead, pursuant to the Priority Statute, that the debtor while insolvent committed an act of bankruptcy. *Id.* at 326-27.

regarding whether “acts of bankruptcy” still exist. The district judge in Virginia was partially correct in saying that “the concept of an act of bankruptcy is no longer needed in Title 11 law,”⁶⁵⁴ because unlike prior bankruptcy statutes it is no longer a prerequisite to the bringing of an involuntary case against a debtor, and the phrase “act of bankruptcy” is no longer physically written into the present Bankruptcy Act. The concept of an “act of bankruptcy,” however, may still be needed in Title 11 law, because if the debtor contests an involuntary petition, there must be a trial on the issue of whether the petition was properly filed against the debtor. The case will proceed against the debtor only if the court finds that:

[T]he debtor is generally not paying such debtor’s debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or⁶⁵⁵

[W]ithin 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed and took possession.⁶⁵⁶

These subsections of the present Bankruptcy Act are what prompted the bankruptcy judge in California to assert that the number of “acts of bankruptcy” has been reduced to two.⁶⁵⁷ The question is: are these statutory provisions “acts of bankruptcy?” Neither of them were specified in the 1898 Bankruptcy Act as an “act of bankruptcy,” and they do not serve the function of those specified “acts.” An involuntary Petition in Bankruptcy could not be filed against a debtor under the prior statutes unless the debtor had committed one of those “acts.” No such prohibition exists under the present statute, which allows the creditor to file a petition and get relief, unless the filing of the petition is successfully contested by the debtor. It is only in the event of a contest that these Code sections become operative. The creditor will be permitted to continue with its bankruptcy case against the debtor only if the court finds the debtor (1) is not paying debts as they become due, unless those debts are the subject of a bona fide dispute as to liability or amount, or (2) within 120 days of the

The Judge did not identify which “act of bankruptcy” the debtor committed.

654. *Id.* at 326 n.13.

655. 11 U.S.C. § 303(h)(1).

656. 11 U.S.C. § 303(h)(2). In *In re Marshall*, Bankruptcy Judge Bufford noted that in his twenty years as a Bankruptcy Judge, only one of the 100,000 bankruptcy cases to have come before him was based on 11 U.S.C. § 303(h)(2). 300 B.R. at 519 n.24. This statistic suggests the major reason for granting the creditor relief was a result of the debtor not paying debts as they become due, a “cash-flow”, and not a “balance-sheet” form of insolvency.

657. 300 B.R. at 519.

filing a custodian of a particular type had been appointed or authorized to take charge of less than a substantial portion of the debtor's property for the purpose of enforcing a lien against the debtor's property. Thus, the "act of bankruptcy" under prior statutes served an entirely different function than the two Code provisions which the bankruptcy judge in California believed are "acts of bankruptcy." If the present Bankruptcy Code does not designate "acts of bankruptcy," then the United States is relegated to satisfying their prerequisite "act of bankruptcy" in order to establish priority under the Priority Statute, as they were defined in the Bankruptcy Act of 1898. That Act, however, has been repealed. It would seem that this is a conundrum for the courts to figure out, or perhaps for Congress to resolve.

V. IS THE PRIORITY OF THE UNITED STATES THE EQUIVALENT OF A "FLOATING LIEN?"

There remains a perplexing scenario which has not been discussed by the Supreme Court in any of the cases referred to in this article. The scenario involves the assignment of all of a debtor's property for the benefit of creditors.⁶⁵⁸ Unless the debtor has property at the time the United States' priority arises, there is nothing to which the priority can attach. If the debtor assigns all of his property while insolvent, priority, will spring into existence, but because of the assignment, there will be nothing to which that priority can attach. What happens to the priority? Does it remain something similar to a "floating lien" until the debtor acquires property to which the lien can attach, or does it expire because there is nothing to keep it alive? It probably would not expire, for in such a case there would be no distinction between assigning property while solvent and assigning property while insolvent. This is a matter for the courts to resolve.

VI. CONCLUSION

Priority Statutes had their beginnings in post-Hastings England where the king was given a preference in the collection of public monies. The preference was "founded not so much upon any personal advantage to the sovereign, as upon motives of public policy in order to assure adequate revenue to sustain public burthens and discharge public debt."⁶⁵⁹ Today, the object of giving the sovereign priority is virtually the same; and the claim of governments to priority rests entirely on statute.⁶⁶⁰ The first such statute in the United States was enacted in 1789,⁶⁶¹ under

658. See *supra* note 11 and accompanying text.

659. *State Bank of North Carolina*, 31 U.S. at 35.

660. *Estate of Romani*, 523 U.S. at 524.

661. See *supra* note 20 and accompanying text.

Congress' constitutional power to do so.⁶⁶² The precursors to the present Priority Statute were enacted in 1797 and 1799.⁶⁶³ The present Priority Statute in the United States appears as 31 U.S.C. § 3713(a)-(b), and there has been virtually no material change⁶⁶⁴ from its beginnings, so that the early pronouncements of the Supreme Court are still authoritative.⁶⁶⁵

In essence, in order for a claim in favor of the United States and against a "person"⁶⁶⁶ to have unsecured first priority, three prerequisites must be established: (1) the debtor must have been insolvent at the time that person owed the debt,⁶⁶⁷ and (2) at least one of the following events must have occurred: (a) the debtor without enough property to pay all debts makes a voluntary assignment of all of its property;⁶⁶⁸ or (b) property of the debtor, if absent, is attached;⁶⁶⁹ or (c) an act of bankruptcy is committed by the debtor,⁶⁷⁰ and (3) the debtor must not be the subject of a bankruptcy case.⁶⁷¹ In addition, if the representative of such a debtor (except a trustee appointed under Title 11 of the United States Code — the Bankruptcy Code), pays any part of such a debt due to the United States before paying the United States, that representative is personally liable to the extent of the payment for unpaid claims of the United States.⁶⁷² In order for a claim in favor of the United States and against "the estate of a deceased debtor" to have unsecured first priority, three prerequisites must be established: (1) the estate must be in the custody of an executor or administrator;⁶⁷³ (2) the estate "is not enough to pay all debts of the debtor";⁶⁷⁴ and (3) the estate must not be the subject of a bankruptcy case.⁶⁷⁵ In addition, if the representative of such a debtor's estate (except, again, a trustee appointed under Title 11 of

662. *Lewis*, 92 U.S. at 621; *Fisher*, 6 U.S. at 396.

663. See *supra* notes 27-32 and accompanying text.

664. *Moore*, 423 U.S. at 81; *Emory*, 314 U.S. at 428; *Hoffman v. United Welding & Mfg. Co.*, 102 A.2d 878, 880 (Conn. 1954).

665. The most significant change came in 1982 when the word "debt" in the original statutes was changed to "claim". See *supra* text accompanying notes 43 and 44. This was not, however, a material change. The present Bankruptcy Act defines "debt" as liability on a claim. 11 U.S.C. § 101(12). "Claim" is defined as a "right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5).

666. Recall that a corporation is a "person." *Beaston*, 37 U.S. at 136.

667. *State of Vermont*, 377 U.S. at 358.

668. *Estate of Romani*, 523 U.S. at 519 n.1 (citing 31 U.S.C. § 3713).

669. *Id.*

670. *Id.*

671. *Id.*

672. 31 U.S.C. § 3713(b).

673. 31 U.S.C. § 3713(a)(1)(B).

674. *Id.*

675. *Id.*

the United States Code — the Bankruptcy Code), pays any part of such a debt due to the United States before paying the United States, that representative is personally liable to the extent of the payment for unpaid claims of the United States.⁶⁷⁶

Justice Stephen Breyer wrote in his recent book, *Active Liberty*: “the fact that members of historically different Supreme Courts have emphasized different constitutional themes, objectives or approaches over time allows us to characterize a Court during a period of its history and to speak meaningfully about changes in the Court’s judicial ‘philosophy’ over time.”⁶⁷⁷ Over the span of 193 years, it is significant that there has been little disagreement among the eighty-seven different Supreme Court Justices regarding interpretation and applicability of the Priority Statute in the forty-eight cases that have interpreted the applicability of the Priority Statute. Only one of those forty-eight cases was overruled, and only implicitly, rather than explicitly.⁶⁷⁸ Moreover, in only eight cases has there been a dissenting opinion about the Priority Statute.⁶⁷⁹ As a consequence, the Court has made some very clear observations about the Priority Statute, and fashioned some very specific rules about the following sixteen subjects.

A. Conflict With Other Statutes

The Priority Statute offers the United States a remedy in the collection of its unsecured claims against debtors. Certainly it is not the only remedy at the disposal of the United States. There are other remedies offered by other statutes and sometimes the two statutes conflict. It has been observed that since the Priority Statute, the purpose of which is to protect the United States as an unsecured creditor, is general and comprehensive in its terms, when it conflicts with another statute, such as the National Banking Act, which is specific in protecting certain creditors, the general and comprehensive Priority Statute will be applied, rather than the more specifically structured statute.⁶⁸⁰

676. 31 U.S.C. § 3713(b).

677. STEPHEN BREYER, *ACTIVE LIBERTY* 9 (2005).

678. The decision in *Key* was implicitly overruled by the passage of the Bankruptcy Reform Act of 1978. *See supra* note 596.

679. *See Beaston*, 37 U.S. at 137 (Story, J., dissenting); *Smythe*, 188 U.S. at 178 (Peckham, J., dissenting); *Emory*, 314 U.S. at 433 (Reed J., dissenting); *Waddill, Holland & Flinn, Inc.*, 323 U.S. at 360 (Jackson, J., dissenting); *Campbell*, 329 U.S. at 366 (Reed, J., dissenting); *Massachusetts*, 333 U.S. at 5454 (Douglas, J., dissenting); *McClellan*, 364 U.S. at 453 (Douglas, J., dissenting). Including the Justices who concurred in the dissenting opinions, only ten of eighty-seven Justices (thirteen different Chief Justices) disagreed with the majority opinion regarding the Priority Statute.

680. *Cook County Nat'l Bank*, 107 U.S. at 451.

B. Interference With State Sovereignty

Any interference with state sovereignty is not the fault of the Priority Statute, but of the Supremacy Clause of the Federal Constitution.⁶⁸¹ The Court has decided that Section 902 of the Social Security Act, which allows a debtor to take credit against its liability to the federal government for ninety-percent of all monies paid to a state approved unemployment compensation fund, is abrogated if the debtor is insolvent.⁶⁸² In the event of the debtor's insolvency, the Supreme Court has ruled that the Priority Statute applies and the state loses its ninety percent of the debtor's payment.⁶⁸³

C. Recipient of Money Collected

Since the purpose of the Priority Statute is to allow this country to be able to collect money to operate its government, for the Statute to apply the federal government, and not some third person, must receive the money collected,⁶⁸⁴ unless that third person is considered a ward or beneficiary of the United States.⁶⁸⁵

D. State Priority Statutes

States can have Priority Statutes,⁶⁸⁶ but a state statute cannot create a priority in favor of other creditors which supersedes the priority of the United States.⁶⁸⁷ State courts may be called upon to rule on both the state and federal priority statutes.⁶⁸⁸

681. *Fisher*, 6 U.S. at 397. See also *supra* notes 426-436 and accompanying text for a summary of *Illinois ex rel. Gordon*. While there is no indication that Congress had the Priority Statute specifically in mind while drafting the Social Security Act, the provisions of the Social Security Act indicate that Congress intended, so far as practicable, to apply to social security taxes all of the remedies available to the federal government in collecting other taxes. The Priority statute provides one of those remedies. Since it does not conflict with the express language or purpose of the Social Security Act, it must be applied to the collection of federal unemployment compensation taxes.

682. *Commonwealth of Massachusetts*, 333 U.S. at 620 n.13; see also *supra* notes 486-520 and accompanying text. This was one of only two 5-4 decisions concerning the Priority Statute. The other 5-4 decision was in *Emory*, 314 U.S. 423; see also *supra* notes 369-387 and accompanying text.

683. *Massachusetts*, 333 U.S. at 634-35. Justice Robert Jackson stridently objected. *Id.* at 635; see also *supra* notes 516-520 and accompanying text.

684. *Nathanson*, 344 U.S. at 28. As long as the government receives the money collected, it does not matter if subsequently it shares some of that money with third persons. *McClellan*, 364 U.S. at 451-52.

685. See *Nathanson*, 344 U.S. at 28 (explaining that monies may be collected for third parties when they are declared wards of the state (citing *Bramwell*, 269 U.S. at 483)).

686. *Marshall v. People of State of New York*, 254 U.S. 380, 381-82 (1920).

687. *Campbell*, 329 U.S. at 371; *Field*, 34 U.S. at 201.

688. Even though the primary focus of this article has been on United States Supreme Court decisions, it should not be overlooked that there is substantial

E. Identity of the United States

A question has arisen as to just who (or what) is the United States. The Court has opined that the United States may include the many administrative agencies which do not have an identity separate and apart from this union of states.⁶⁸⁹ The Farm Credit Administration is one such agency.⁶⁹⁰ The Small Business Administration is another.⁶⁹¹ A claim may be filed in the name of the agency or its head and be entitled to priority.⁶⁹²

F. Applicability to Debtors Generally

The statute applies to debtors, generally;⁶⁹³ it does not matter if the debt originated as part of a foreign contract.⁶⁹⁴ The form of the debt is immaterial;⁶⁹⁵ it might be legal or equitable, the debtors may be joint or several, principals or sureties.⁶⁹⁶ A large number of debts have been for the collection of taxes.⁶⁹⁷

G. A Liberal Interpretation

Priority statutes should not be given a narrow interpretation, but rather a liberal one; one which is fair and reasonable according to the just interpretation of its terms.⁶⁹⁸

state court jurisprudence interpreting the federal Priority Statute. *See, e.g.*, *Community Progress, Inc. v. White*, 444 A.2d 1369 (Conn. 1982); *In re Berretta's Estate*, 426 A.2d 1098 (Pa. 1981).

689. *See Remund*, 330 U.S. at 541.

690. *Id.* at 540.

691. *McClellan*, 364 U.S. at 450.

692. *Remund*, 330 U.S. at 542.

693. *Fisher*, 6 U.S. at 395. From the beginning, the title of the Act has not restricted its coverage. *Id.* at 386. That is to say that the language of the statute is "general and not qualified." *Lewis*, 92 U.S. at 624.

694. *Harrison*, 9 U.S. at 298.

695. *Bayne*, 92 U.S. at 643.

696. *Lewis*, 92 U.S. at 624.

697. *See generally Estate of Romani*, 523 U.S. 517 (seeking to establish that tax liens take priority over judgment liens); *Key*, 397 U.S. 322 (seeking payment of federal tax claims); *Massachusetts*, 333 U.S. 611 (seeking federal insurance contribution taxes under Title 8 and unemployment compensation taxes under Title 9 of the Social Security Act); *Waddill, Holland & Flinn*, 323 U.S. 353 (seeking payment of federal taxes prior to state taxes); *Texas*, 314 U.S. 480 (seeking payment of federal gasoline taxes); *Maclay*, 288 U.S. 290 (seeking payment of corporate taxes); *County of Spokane*, 279 U.S. 80 (seeking payment of income taxes); *Stripe*, 269 U.S. 503 (seeking payment of corporate taxes); *Price*, 269 U.S. 492 (seeking payment of income taxes).

698. *Beaston*, 37 U.S. at 134; *Bramwell*, 269 U.S. at 492; *Marxen*, 307 U.S. at 206; *Moore*, 423 U.S. at 85, 86; *State Bank of North Carolina*, 31 U.S. at 35.

H. Liens Not Created

Priority statutes do not create a lien in favor of the sovereign, but only a priority for payment⁶⁹⁹ from the general funds of the debtor held by the assignee of the assignment.⁷⁰⁰ The priority is not a right which overrides and supersedes the assignment to prevent the debtor's property from passing by virtue thereof; it is merely a right to prior payment.⁷⁰¹ In other words, the United States remains an unsecured creditor. All it has under the statute is first call against the property of the debtor.⁷⁰² If the United States is a secured creditor, by virtue of having taken collateral, it does not lose its right of priority,⁷⁰³ and is not required to pursue collateral.⁷⁰⁴

I. Exceptions to the Priority Statute

There are exceptions to the Priority Statute. For example, where another statute reflects remedial attention to a certain class of debtors that is in conflict with the objectives of the Priority Statute, which is merely to allow the United States to collect money, the latter has been held inapplicable.⁷⁰⁵ On the other hand, as stated above,⁷⁰⁶ where the opposing statute is specific in protecting certain creditors, the Priority Statute, which has been described as "general and comprehensive," will be applied rather than the more specifically structured one.⁷⁰⁷ The Supreme Court has emphasized that "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so

699. *Beaston*, 37 U.S. at 133; *Hooe*, 7 U.S. at 91; *Fisher*, 6 U.S. at 396-97.

700. *Hack*, 33 U.S. at 275.

701. *Conard*, 26 U.S. at 386.

702. *Knott*, 298 U.S. at 552. As such, however, it may assert its priority in any jurisdiction where property of the insolvent debtor can be found. *Id.* at 552.

703. *Lewis*, 92 U.S. at 623.

704. *Id.*

705. See *Mellon*, 271 U.S. at 237-38 (holding that the Director General of Railroads, who operated railroads during this country's engagement in hostilities and was given the same privileges and duties of railroads in general, was not permitted to utilize the Priority Statute in collecting the debts of railroads). However, The purpose of the Transportation Act of 1920 was to promote the general status of railroads, and it provided that railroads furnish adequate security for the payment of their loans. See § 439, Pub. L. No. 152, ch. 91, 41 stat. 456, 494 (codified as amended in scattered sections of 49 U.S.C. (2000)). But the Court in *Guaranty Trust Co.*, could see no reason why the United States needed an additional method of collection. 280 U.S. at 485. Indeed, it has been judicially determined that there is no conflict between the Priority Statute and the statute which gave financial aid to farmers during the Depression. *Remund*, 330 U.S. at 544.

706. See *supra* notes 208, 209 and accompanying text.

707. *Cook County Nat'l Bank*, 107 U.S. at 451.

clear a command as that of § 3466.⁷⁰⁸ If there are third parties who have a prior interest in the property, the United States might be primed out of its otherwise favorable position. If a third party's lien reveals the identity of the lienor, the amount of the lien, and the property to which the lien attaches, the lien will prime the United States' priority.⁷⁰⁹ In such case the lien will be described as "specific and perfected,"⁷¹⁰ or "specific and ascertainable,"⁷¹¹ or "explicit and perfected,"⁷¹² or that the lien has "specificity."⁷¹³ In such cases the lien will prime the United States' priority.⁷¹⁴ On the other hand, if the third party's lien is not perfected, the priority of the United States will prevail.⁷¹⁵ The interpretation of state law by state courts is binding on federal courts; the question of whether a lien has been perfected so as to prime the priority of the United States, however, is a federal question.⁷¹⁶ Hence, a state court's characterization of a lien as "specific and perfected" cannot operate by itself to impair or supersede a long-standing Congressional declaration of policy.⁷¹⁷ On the other hand, a state's characterization of a lien as "inchoate" is "practically conclusive."⁷¹⁸

J. Insolvency of Debtor

It has been clearly stated that without insolvency on the part of the debtor there will be no priority accorded the United States.⁷¹⁹

708. *Emory*, 314 U.S. at 433; *Moore*, 423 U.S. at 82; *McClellan*, 364 U.S. at 453; *Remund*, 330 U.S. at 544-45; *Illinois ex rel. Gordon*, 328 U.S. at 11 (1946). It was held in *Emory*, that the National Housing Act did not alter the priority of the United States under the Priority Statute. 314 U.S. at 430. The Court in *McClellan* held that even if it were a fact that giving priority to the Small Business Administration in the collection of its debts would make it more difficult for small businessmen to borrow money, it was not within the "plainest inconsistency" category referred to in *Emory*. 364 U.S. at 453.

709. *Campbell*, 329 U.S. at 375. The recording of a lien does not perfect it when the lienor does not know the amount owed by the debtor or the type of property owned by the debtor. *Id.* at 373.

710. *Waddill, Holland & Flinn*, 323 U.S. at 357.

711. *Id.* at 358.

712. *Id.* at 360.

713. *Gilbert Associates*, 345 U.S. at 366.

714. *Estate of Romani*, 523 U.S. at 532.

715. *Security Trust*, 340 U.S. at 51; *Texas*, 314 U.S. at 486, 87; *County of Spokane*, 279 U.S. at 93. In *Maclay*, a state lien for taxes, due but not determined in amount until after a receiver had been appointed, was not able to prime the Priority Statute as it was said to be just a caveat of something more to come. 288 U.S. at 291-92.

716. *Security Trust*, 340 U.S. at 49; *Campbell*, 329 U.S. at 371.

717. *Waddill, Holland & Flinn*, 323 U.S. at 357-60; *Campbell*, 329 U.S. at 371.

718. *Campbell*, 329 U.S. at 371.

719. *Vermont*, 377 U.S. at 358; *City of New Britain*, 347 U.S. at 85. Where the debtor is solvent the "first in time is first in right" rule applies to a claim of the United States against its debtors. *Id.* at 85.

It has been opined that insolvency means the debtor does not have sufficient property with which to pay all debts owed.⁷²⁰ The debtor's insolvency must be established by a notorious act of the debtor pursuant to law.⁷²¹ A determination of whether the debtor is insolvent is made from the facts, not from the pleadings.⁷²² For the statute to apply, the debtor need not be in bankruptcy, merely insolvent. In fact, if the debtor is in bankruptcy the Priority Statute will not apply.⁷²³ If a debtor of the United States is the subject of a bankruptcy case, in order for the United States' debt to be satisfied the government will have to file a claim in bankruptcy as either a secured or unsecured claim-holder. It will be assigned priority pursuant to the terms of the Bankruptcy Act, not the Priority Act.

K. Assignment For Benefit of Creditors

In order for the United States to have priority, the debtor, while insolvent, must have made a voluntary assignment of its property for the benefit of its creditors. Several rules have been pronounced in connection with that requirement. It has been opined that this means that all of the debtor's property must be assigned.⁷²⁴ The person to whom the assignment has been made is called an "assignee" or "trustee." A trustee in bankruptcy will qualify as such an "assignee" or "trustee".⁷²⁵ If an assignment is made, the costs of administering the assignment is deducted from the money paid to the United States.⁷²⁶ The priority of the United States attaches to the property of the debtor, real or personal, or its proceeds or product because that is the source from which the claim may be satisfied.⁷²⁷ If the debtor has no property at the time

720. *Hooe*, 7 U.S. at 91. In order for the Priority Statute to apply an assignment must be made, even though the debtor may be unable to pay its debts. *Beaston*, 37 U.S. at 133.

721. *Prince*, 12 U.S. at 434. That a debtor's insolvency must be established by a "notorious act . . . pursuant to law" must mean according to the Priority Statute. *Id.*

722. *Butterworth*, 269 U.S. at 513.

723. 31 U.S.C. § 3713(a)(2) specifically provides that "[t]his subsection does not apply to a case under title 11." Before the Priority Statute was amended to include this provision it did apply to bankruptcy cases, but there was no requirement that the debtor be in bankruptcy. *Bramwell*, 269 U.S. at 530.

724. *Hooe*, 7 U.S. at 91.

725. *Lewis*, 92 U.S. at 624.

726. *Hunter*, 30 U.S. at 439.

727. The intricacies of property ownership are of vital significance here. In *Hack*, one partner of a partnership was a debtor of the United States. 33 U.S. at 274-75. The government argued that its priority should reach that partner's interest in the partnership property. The Court ruled that only if the total value of all partnership property exceeded the amount of partnership debts would the partnership property be available to satisfy the claim of the United States.

the priority arises there is nothing to which the priority can attach.⁷²⁸ If a receiver has been appointed for the debtor's property and the receiver converts the property to cash in order to pay claims, the Court in one case has likened those proceeds to a trust fund (i.e. no longer belonging to the debtor any more than a trust corpus would belong to the settlor of the trust).⁷²⁹ No evidence of insolvency may be received unless the debtor has been divested of its property.⁷³⁰ The requirement that the assignment be "voluntary" has been given a somewhat unusual interpretation. In one case, a foundering bank was required, under state banking laws, to turn over its property to a Banking Commissioner. The Court held that though the debtor, a bank, was required to do so under state law, its turn-over met the provisions of the Priority Statute because the purpose of the turn-over was to convert the property into cash for the payment of the bank's debts.⁷³¹

L. Attachment of Debtor's Property

In order for the United States to have priority, the debtor, while insolvent and absent, must have had his property attached.⁷³² We assume the word "attached" refers to a procedure in which the property is taken into *custodia legis*, because in one case⁷³³ the Court found that an attachment lien which was "contingent or inchoate — merely a *lis pendens* notice that a right to perfect a lien exists,"⁷³⁴ was insufficient authority for the invocation of the Priority Statute. The attachment must take the property out of the debtor's ownership.

M. The Time of Acquisition of United States' Priority

As we have seen, under the Priority Statute the priority of the United States arises upon the happening of one of three events: an

728. If the priority of the United States would otherwise attach, but the debtor possesses no property because it has been levied upon, or the debtor had previously made a bona fide conveyance of his interest in the property to a third person, or mortgaged the same to secure a debt (applicable in a "title" state), the property cannot be made subject to the preferred position of the United States because the debtor has been divested of it. *Thelusson*, 15 U.S. at 426; *Fisher*, 6 U.S. at 395.

729. See *Cook County Nat'l Bank*, 107 U.S. at 452 (denying the government's attempt to impose its preference upon the proceeds of a receiver's sale because a trustee may not set-off debts owed him by the trust's Settlor against trust property).

730. *Beaston*, 37 U.S. at 133.

731. *Bramwell*, 269 U.S. at 491.

732. Alternatively, the debtor must have made an assignment of its property or it must have committed an "act of bankruptcy."

733. *Security Trust Sav. Bank*, 340 U.S. at 50.

734. *Id.*

A.B.C.,⁷³⁵ an attachment of the debtor's property while the debtor is absent, or the committing by the debtor of an "act of bankruptcy," while the debtor is insolvent. The Court has slightly modified this conclusion by ruling that the priority may arise at another time — the date of the appointment of a receiver.⁷³⁶ A later decision said that priority arose on the date the debtor loses control over his property.⁷³⁷

N. *The Importance of Equity*

Though the Priority Statute does not specifically require it, the Court has held in several cases that rules of equity apply to the attempted invocation of the statute. The government may not successfully assert priority against another creditor whose position is based on contract and good conscience.⁷³⁸ Even though an opposing creditor has been denied the remedy of collecting on his cause of action because of the running of the statute of limitations, as long as the debt remains unpaid, and the opposing creditor's position is otherwise perfected, the running of the statute bars only the remedy but not the cause of action; therefore, default will prevent the U.S. from becoming a preferred creditor unless the creditor transfers his interest.⁷³⁹ When, however, the Priority Statute abolished a rule of equity as to the payment of debt, which was later adopted by the Bankruptcy Act, the method of the Priority Statute prevailed over the method previously adopted by the Bankruptcy Act.⁷⁴⁰

O. *Liability of Person Who Ignores the Statute*

There is a scarcity of law pertaining to 31 U.S.C. § 3713(b) and the liability of a representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government.⁷⁴¹ 31

735. See *supra* note 12.

736. See *Campbell*, 329 U.S. at 373 n.14 (citing *Oklahoma*, 261 U.S. at 260, and *Spokane*, 279 U.S. at 93). As a matter of fact, the decision in *Oklahoma* did not say whether the priority arose upon the appointment of the Receiver, or upon the Receiver's taking over the debtor's property. It would seem that the Court in *Oklahoma* was correct because, even though a Receiver's taking over the debtor's property is not an A.B.C. it is closer to that procedure than the Receiver's appointment, which could be accomplished considerably in advance of the debtor being divested of its property. The Court in *Campbell* also stated that the appointment of a Receiver can be the first step in the perfection of a lien. 329 U.S. at 374.

737. *Massachusetts*, 333 U.S. at 617 n.8 (citing *Campbell*, 329 U.S. 362, *Waddill, Holland & Flinn, Inc.*, 28 S.E.2d 741, and *Oklahoma* 261 U.S. 253).

738. *Brent*, 35 U.S. at 615.

739. *Id.* at 617.

740. *Lewis*, 92 U.S. at 624.

741. See *Smythe*, 188 U.S. at 177 (affirming, in dictum, that a judgment in

U.S.C. § 3713(a) and 31 U.S.C. § 3713(b) must be considered *in pari materia*.⁷⁴² A “distribution agent” in a Chapter XI case under the Bankruptcy Act of 1898 was held personally liable under 31 U.S.C. § 192, the precursor of 31 U.S.C. § 3713(b).⁷⁴³ In that case, the distribution agent, the president of the bankrupt corporation was aware of the United States’ claim; took an active role in the formulation of the plan, which contained at least a reference to the Government’s claim; was present at the confirmation hearing at which the claim was discussed; and, was one of the major distributees under the Plan.⁷⁴⁴

P. The Priority Statute is Applicable to Taxes

Prior to the 1982 amendment of the Priority Statute, which changed the word “debts” to “claims,”⁷⁴⁵ the Supreme Court had ruled that the Statute was applicable to taxes.⁷⁴⁶ The 1982 amendment did not change that ruling. The present Bankruptcy Act defines “debt” as liability on a claim.⁷⁴⁷ “Claim” is defined as a right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.⁷⁴⁸ Therefore, taxes due qualify as a claim under both the Bankruptcy Act and the Priority Statute.

VII. A FINAL NOTE

A definitive work about the Priority Statute, a little-known but important part of our jurisprudence, is long overdue. Hopefully this article has met that need.

such a case would be “interpreted and enforced” according to the Priority Statute). When the debtor is divested of its property “the person who becomes invested with title is thereby made a trustee for the United States, and is bound to pay debt first out of the proceeds of the debtor’s property.” *Beaston*, 37 U.S. at 133-34.

742. *Security Tr. Sav. Bank*, 340 U.S. at 50; *see also King*, 379 U.S. at 336-38 (discussing 31 U.S.C. §§ 191-92, the precursors of 31 U.S.C. §§ 3713(a)-(b)).

743. *King*, 379 U.S. at 339-40.

744. *Id.* An honest belief that there were sufficient funds available for payment of the government’s claim will not save the trustee from liability. *Id.*

745. *See supra* note 44 and accompanying text.

746. *Stripe*, 269 U.S. at 503; *Price*, 269 U.S. at 499.

747. 11 U.S.C. § 101(12).

748. 11 U.S.C. § 101(5).

APPENDIX

*The Supreme Court Complement During the Cases**United States v. Fisher*, 6 U.S. 358 (1805)

Chief Justice John Marshall
Justice William Patterson
Justice William Cushing
Justice Bushrod Washington
Justice Samuel Chase
Justice William Johnson

United States v. Hooe, 7 U.S. 73 (1805)

Chief Justice John Marshall
Justice William Patterson
Justice William Cushing
Justice Bushrod Washington
Justice Samuel Chase
Justice William Johnson

Harrison v. Sterry, 9 U.S. 289 (1809)

Chief Justice John Marshall
Justice H.B. Livingston
Justice William Cushing
Justice Bushrod Washington
Justice Samuel Chase
Justice William Johnson

Prince v. Bartlett, 12 U.S. 431 (1814)

Chief Justice John Marshall
Justice H.B. Livingston
Justice Joseph Story
Justice Bushrod Washington
Justice Gabriel Duvall
Justice William Johnson

United States v. Bryan, 13 U.S. 374 (1815)

Chief Justice John Marshall
Justice H.B. Livingston
Justice Joseph Story
Justice Bushrod Washington
Justice Gabriel Duvall
Justice William Johnson
Justice Thomas Todd

Thelusson v. Smith, 15 U.S. 396 (1817)

Chief Justice John Marshall
Justice H.B. Livingston
Justice Joseph Story
Justice Bushrod Washington
Justice Gabriel Duvall
Justice William Johnson
Justice Thomas Todd

Conard v. Atlantic Ins. Co. of New York, 26 U.S. 386 (1828)

Chief Justice John Marshall
Justice Smith Thompson
Justice Joseph Story
Justice Bushrod Washington
Justice Gabriel Duvall
Justice William Johnson
Justice Robert Trimble

Hunter v. United States, 30 U.S. 173 (1831)

Chief Justice John Marshall
Justice Smith Thompson
Justice Joseph Story
Justice Henry Baldwin
Justice Gabriel Duvall
Justice William Johnson
Justice John McLean

United States v. State Bank of North Carolina, 31 U.S. 29 (1832)

Chief Justice John Marshall
Justice Smith Thompson
Justice Joseph Story
Justice Henry Baldwin
Justice Gabriel Duvall
Justice William Johnson
Justice John McLean

United States v. Hack, 33 U.S. 271 (1834)

Chief Justice John Marshall
Justice Smith Thompson
Justice Joseph Story
Justice Henry Baldwin
Justice Gabriel Duvall
Justice William Johnson
Justice John McLean

Field v. United States, 34 U.S. 182 (1834)

Chief Justice John Marshall
Justice Smith Thompson
Justice Joseph Story
Justice Henry Baldwin
Justice Gabriel Duvall
Justice James M. Wayne
Justice John McLean

Brent v. Bank of Washington, 35 U.S. 586 (1836)

Chief Justice Roger B. Taney
Justice Smith Thompson
Justice Joseph Story
Justice Henry Baldwin
Justice Phillip P. Barbour
Justice James M. Wayne
Justice John McLean

Beaston v. Farmers' Bank of Delaware, 37 U.S. 103 (1838)

Chief Justice Roger B. Taney
Justice Smith Thompson
Justice Joseph Story
Justice Henry Baldwin
Justice Phillip P. Barbour
Justice James M. Wayne
Justice John McLean
Justice John Catron
Justice John McKinley

Lewis v. United States, 92 U.S. 618 (1876)

Chief Justice Morrison R. Waite
Justice Ward Hunt
Justice Nathan Clifford
Justice William Strong
Justice Samuel F. Miller
Justice Joseph P. Bradley
Justice Noah H. Swayne
Justice Stephen J. Field
Justice David Davis

Bayne v. United States, 93 U.S. 642 (1877)

Chief Justice Morrison R. Waite
Justice Ward Hunt
Justice Nathan Clifford
Justice William Strong
Justice Samuel F. Miller
Justice Joseph P. Bradley

Justice Noah H. Swayne
Justice Stephen J. Field
Justice John M. Harlan

Cook County Nat. Bank v. United States, 107 U.S. 445 (1883)

Chief Justice Morrison R. Waite
Justice Samuel Blatchford
Justice Horace Gray
Justice William B. Woods
Justice Samuel F. Miller
Justice Joseph P. Bradley
Justice Stanley Matthews
Justice Stephen J. Field
Justice John M. Harlan

Smythe v. United States, 188 U.S. 156 (1903)

Chief Justice Melville W. Fuller
Justice Edward D. White
Justice Oliver Wendell Holmes
Justice Rufus W. Peckham
Justice Henry D. Brown
Justice George Shiras
Justice David J. Brewer
Justice Joseph McKenna
Justice John M. Harlan

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U.S. 483 (1926)

Chief Justice Edward D. White
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Joseph R. Lamar
Justice William R. Day
Justice Charles Evans Hughes
Justice Joseph McKenna
Justice Mahlon Pitney

United States v. National Surety Co., 254 U.S. 73 (1920)

Chief Justice Edward D. White
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice William R. Day
Justice John H. Clarke

Justice Joseph McKenna
Justice Mahlon Pitney

United States v. Oklahoma, 261 U.S. 253 (1923)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Joseph McKenna
Justice Edward T. Sanford

Davis v. Pringle, 268 U.S. 315 (1925)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
Justice Edward T. Sanford

Bramwell v. U.S. Fidelity & Guaranty Co., 269 U.S. 483 (1926)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
Justice Edward T. Sanford

Price v. United States, 269 U.S. 492 (1926)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
Justice Edward T. Sanford

Stripe v. United States, 269 U.S. 503 (1926)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
Justice Edward T. Sanford

United States v. Butterworth-Judson Corp., 269 U.S. 504 (1926)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
Justice Edward T. Sanford

Mellon v. Michigan Trust Co., 271 U.S. 236 (1926)

Chief Justice William Howard Taft
Justice Willis Van Devanter
Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
Justice Edward T. Sanford

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Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
Justice George Surtherland
Justice Harlan F. Stone
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Justice Oliver Wendell Holmes
Justice James C. McReynolds
Justice Louis D. Brandeis
Justice Pierce Butler
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Justice Harlan F. Stone
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Justice Louis D. Brandeis
Justice Pierce Butler
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Justice Wiley R. Rutledge
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Justice Frank Murphy
Justice Stanley F. Reed
Justice Robert H. Jackson
Justice Harold H. Burton

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Justice Harold H. Burton

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Justice Stanley F. Reed
Justice Robert H. Jackson
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Justice Harold H. Burton

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Justice Charles E. Whitaker
Justice John M. Harlan
Justice Potter Stewart

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Justice Potter Stewart

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Justice Thurgood Marshall
Justice Byron H. White
Justice William H. Rehnquist
Justice Potter Stewart

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Chief Justice William H. Rehnquist
Justice Anthony M. Kennedy
Justice Ruth Bader Ginsburg
Justice David H. Souter
Justice John Paul Stevens

Justice Clarence Thomas
Justice Steven G. Breyer
Justice Antonin Scalia
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