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THE LIEN OF A FEDERAL JUDGMENT†

ORRIN B. EVANS*

It's a poor choice between the frying pan and the fire. During the last fourteen years Missouri lawyers have been able to advise their clients with certainty that a judgment of a federal district court in Missouri was a lien on the debtor's land in the county in which the judgment was rendered from the time of rendition, for in Rhea v. Smith, the United States Supreme Court held ineffective the Missouri statute purporting to require registration of the judgment with the clerk of the state circuit court. Subsequently, the statute was repealed. As the price of their knowledge, records of the federal court, frequently not kept in the county where the judgment was rendered and the land was situated, must be searched for the clients they advise, and the laymen who do not consult them stumble unwittingly into one of the most deceptive snares of the law.

As to whether the lien extended to land in other counties in the federal district or in the state without recording, every state purporting to provide for and to regulate judgment liens by statute has been in the frying pan. To be sure, in Rhea v. Smith there was specific dictum that the lien of the federal judgment in Missouri was co-extensive with the district, but dictum is not decision—and at any rate the present Missouri statute, amended in 1935 in the legislative hope of complying with the mandates of that opinion, has not been before the court. No phase of the law of any other state has been considered by the Supreme Court, which alone can provide a formula for the necessary synthesis of state and federal statute. The technique of Rhea v. Smith has been so difficult of rationalization that it has furnished feeble light on any variation of the facts there involved.

†This paper is adapted from one chapter of a dissertation submitted to the faculty of the Yale Law School in April, 1940.
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1. 274 U. S. 434 (1927).
4. 274 U. S. at 444, 445.
5. In Rathbone Co. v. Kimball, 117 Neb. 229, 220 N. W. 244 (1928), the dictum was flatly disregarded. Certiorari was denied, 278 U. S. 655 (1929).
Not that the situation is unprecedented. In 1832 a judge of the Supreme Court of Ohio observed, "The subject of the lien of judgments in the United States courts has been looked upon by the profession as a vexatious one. . . . The act of May, 1828, we do not think, with the counsel for the plaintiff, removed all difficulties." The court was quite right; it did not.

I

Again and again we encounter the statement that judgment liens exist only by virtue of statute and were unknown at common law. Seldom challenged, the inaccuracy of the assertion was probably of little practical consequence. It is true—so far as it is possible to be positive as to the state of the law of England prior to 1285—that judgment liens as such were not recognized in English law before that date, and that it was the enactment of a statute in that year which marks the date. But even at common law the King, by virtue of his royal prerogative, could subject the lands of his debtor to payment of the debt and the lands were bound to satisfy the debt from the time of its inception, though they came to the hands of a bona fide purchaser. However, the private citizen could not ordinarily reach the land and the statute just referred to gave him that power. Though the statute said nothing about a lien, the courts decided that because judgment now gave a right to take the lands through an elegit there was a lien from the moment that right arose. The conclusion was logical, for a lien upon certain property is really no more than a right to take the property in satisfaction of a claim, but it was not inevitable. Both before and after the statute of Westminster II a private citizen might take his debtor's chattels by fi. fa. or lev. fa. with more certainty than under that

7. 4 STAT. 278 (1850).
9. Reference is always made to the Statute of Westminster II (13 Edw. I, c. 18), giving the right to a writ of elegit. In the same year, however, the statute of 13 Edw. I, c. 3 (de mercatoribus) provided for the satisfaction out of the lands of the debtor of recognizances entered under the terms of the statute.
10. See Sir Gerrard Fleetwood's Case, 8 Co. Rep. 171a (K. B. 1611); BACON'S ABRIDGMENTS, Execution, p. 664 (Bouvier ed. 1868).
11. The exception seems to have been the case of an action of debt against an heir upon the obligation of his ancestor. The reason, according to Bacon, was that the chattels had passed to the executor or administrator and if the creditor could not reach the land descended he could not reach the ancestor's estate. BACON'S ABRIDGMENTS, Execution, p. 664 (Bouvier ed. 1868). For a discussion of the niceties of this exception, see Harbert's Case, 3 Co. Rep. 11b (K. B. 1584), and notes in 76 Eng. Rep. 647.
statute by *elegit* he could take his lands, 13 but it was never held that judg-
ment gave a lien on the chattels. Instead, the lien on personal property
in favor of King or citizen dated at common law from the *testa* of the writ
under which they were taken, 14 and after 1676 only from the delivery
of the writ to the sheriff. 15 It is apparent there was an important step
between right of execution and judgment lien which the English judges had
to take on their own initiative, unsupported by statute, and although we
find in the books no discussion of the reasons for taking the step as to lands
and not as to chattels, speculation suggests considerations typical of common
law development. Perhaps the most persuasive is the repugnance of the
law to a separation of possession and title to personal property, a sentiment
existing to this day. Liens divorced from possession of movables are
potent sources of fraud to third persons, and while the courts did not
carry their principle to its logical conclusion, they at least eliminated the
creditor who slept on his judgment. One who sued out his writ would
shortly achieve possession in the normal course of execution. 16 The common
law rule was a compromise between logic and social interest, which
presently was considered to favor logic too much.

"... this created some inconveniency with respect to trade,
in making the goods still subject to execution, though in the hands of a
person who came by them for valuable consideration, and without notice
of any such execution; and as there was a farther inconveniency in making
a writ of execution taken out in vacation, to have relation to the last day
of the precedent term. ..." 17 Hence the statute previously referred
to, dating the lien on chattels from delivery of the writ to the sheriff.18

13. Even under an *elegit* the sheriff was not to "extend" the lands if there
were sufficient goods and chattels; he could never take all the lands, but only
one-half; the transfer was not absolute but only of possession until the debt
was paid.

Eliz. 440 (K. B. 1790); Parkes v. Mosse, Cro. Eliz. 181 (K. B. 1790); Sir
Gerrard Fleetwood's Case, 8 Co. Rep. 171a (K. B. 1611).

15. 29 Car. II, c. 3, § 16, "... that from and after the said fourth and
twentieth day of June no writ of *ieri facias*, or other writ of execution, shall
bind the property of the goods against which such writ of execution is sued
forth, but from the time that such writ shall be delivered to the sheriff, under-
sheriff, or coroners, to be executed ... ."

16. It was subsequently held that any action on the part of the creditor
tending to delay prompt levy by the sheriff would forfeit the lien. Smallcomb
v. Buckingham, 1 Salk. 320 (K. B. 1795). This is still law where execution
liens otherwise date from before levy. Delay not only endangers purchasers
but tends to shield the debtor from other creditors. Wise v. Darby, 9 Mo. 131
(1845).

17. BACON'S ABRIDGMENTS, Execution, p. 728 (Bouvier ed. 1868).

18. The English Parliament was apparently willing to let the subsequent
purchasers carry the risk of something less than instantaneous levy. A number
of American legislatures seem to be in accord. A curious paradox persists in
From very early times it was not the custom to deal with land solely on the basis of possession. The concept of a nonpossessory interest in land was no novelty in 1285. Moreover, an immovable could not be taken from the jurisdiction of the court and the proximity of its records. But one of the curious fictions of the common law—that all judgments were supposed to be entered on the first day of the term in which they were recovered—when applied to the new judgment liens upon real estate, could and apparently did result in hardship to third persons, for in that same statute of 29 Car. II, c. 3—which is better known as the Statute of Frauds—it was provided that the judge, or officer signing judgments, should set down in writing the date of his signature and that the judgment should bind the land as to bona fide purchasers only from that time.19

The English courts, as has frequently been observed, were notoriously reluctant to institute procedural novelties of their own volition. In matters of final process there may well be support in sound political theory for this approach. Furthermore, the English Parliament tinkered with the laws governing judicial activity with a restraint incomprehensible to American nature. It was not until considerably after the independence of the United States that a creditor might take all of his debtor's land, and even then might not sell it in execution.20 But at an earlier date it had been provided that English traders might seize colonial lands as chattels.21

II

There was no provision under the Articles of Confederation for the exercise of judicial power except in admiralty. The United States Constitution having corrected this omission and given to Congress power to create and regulate federal trial courts, at the first session of Congress a judicial code was enacted. A hastily drawn measure, it is not surprising

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Missouri. Liens on chattels date only from actual levy of execution on judgments of the circuit courts (Mo. Rev. Stat. (1929) §§ 1175, 1179) but from delivery (except as to bona fide purchasers for value) of writs issued by justices of the peace (Mo. Rev. Stat. (1929) § 2319).

That the statute of 29 Car. II, c. 3, was designed to protect only bona fide purchasers for value may be seen from an anonymous case reported in 2 Vent. 218 (K. B. 1728), where for this reason it was said that goods in the hands of an heir were bound to satisfy a judgment against the ancestor on which a fieri facias had been attested prior to but not delivered to the sheriff until after the ancestor's death.

19. §§ 13, 14, 15. Entry in an alphabetical docket, or "dogget," was later made a condition of a valid lien (445 W. & M. c. 20; 7 & 8 W. 3, c. 36) and "registration" was required in Middlesex and Yorkshire (5 Ann. c. 18, § 4).

20. 1 & 2 Vict., c. 110 (1838).

21. 5 Geo. II, c. 7 (1732).
that it made no mention of such details as judgment liens. After all, there was no legislative precedent to suggest the subject. Furthermore, the labor saving (from a legislative standpoint) expedient of letting state law—adjective as well as substantive—control the administration of federal justice was well suited to the popular temper. On September 24, 1789, what has come to be known as the Rules of Decision Act\(^2\) was enacted in its identical present form.\(^3\) On September 29, 1789, the first Process Act became law.\(^4\) By its terms it was to expire at the end of the next session of Congress but with some modifications, it was then made permanent.\(^5\)

We have only just witnessed an important change in this policy, in the authorization and adoption of the Federal Rules of Civil Procedure. Specific legislation in regard to federal judgment liens was adopted fifty years earlier—though still founded on a hope of federal and state conformity—but the chief problem today is so bound up with a concept developed under the earlier statutes that it is essential to consider the decision under them.

It was early held that by their authority federal judgment creditors might reach land in the hands of subsequent purchasers from their debtors, where by custom or statute state judgment creditors might do so.\(^6\) The only uncertainty was whether it was a rule of substantive property law or of practice, and under the two statutes the general question must be decided the same way in either event. Finer points necessitated more precise analysis.

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22. 1 Stat. 92, c. 20, § 34 (1850).
23. "... That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 28 U. S. C. § 725 (1935).
24. 1 Stat. 93, c. 21, § 2 (1850).
25. 1 Stat. 276, c. 36, § 2 (1850). Until the revision in 1828 it read: "... That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law... subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."
26. Taylor v. Thomson's Lessees, 5 Pet. 358 (U. S. 1831); Rankin & Schatzell v. Scott, 12 Wheat. 177 (U. S. 1827); see Lessee of Sellers v. Corwin, 5 Ohio 399 (1832). The first named case rested upon the state practice under the statute of Geo. II, c. 7, held by the Maryland courts to extend in favor of all creditors and even upon the land, which practice was considered to be law in force when the District of Columbia was ceded the federal government. In the second case the right was said to depend upon the power, under the
A. Duration of Lien

In *Thompson v. Phillips*, the Pennsylvania law requiring a *scire facias* every seven years to preserve a judgment lien was held a rule of property applicable to federal judgments and binding upon the federal courts. The case was exhaustively argued by Sergeant, Todd, and Binney, and the opinion displays much learning on the numerous problems of execution, but it is submitted that Mr. Justice Baldwin's analysis was unsound. The duration of the lien was a matter of federal law as truly as the mode of proceedings leading to the judgment; being a matter of federal law, the Rules of Decision Act was not applicable. It did not purport to require the solution of federal problems by state law.

Whether the decision could be justified under the Process Act was also uncertain. The result was clearly desirable, and in 1840, it was codified by federal statute. The most persistent problem under it has been, does the state law limiting the duration of the judgment lien, then adopted, apply to federal judgments in favor of the United States. The majority of cases hold not. If we assume the general rule that statutes of limitations state law, to reach the land under an *elegit*. The Ohio case was reconsidered in Lessee of Corwin v. Benham, 2 Ohio St. 36 (1853) and disposed of upon other grounds, but the earlier opinion was approved in Lawrence v. Belger, 31 Ohio St. 175 (1877). The Ohio lien statute, enacted subsequent to the passage of the Process Act of 1891, had not been adopted by formal rule of federal court, but its settled custom of conformity was considered equally effective. Fullerton v. Bank of the United States, 1 Pet. 604 (U. S. 1828).


28. Of course, in drafting federal law Congress might take inspiration and precedent from any source, and state law adopted by Congress for this purpose becomes federal law. But Congress did not, in the Rules of Decision Act, intend the same adoption that it did in the Process Acts. There is no reason to suppose it intended to forego all originality in legislating on federal matters. The significant part of the statute here is the limitation of state laws to "cases where they apply." If it be asked, "Why did Congress undertake to lay down rules of decision on subjects not federal, as to which it could not constitutionally direct the federal courts to apply a different rule and which they could not constitutionally decide upon other than state law (witness Erie R. R. v. Tompkins)," perhaps the answer lies in an uneasy concern over just such waywardness in federal judges as was demonstrated in the near century following Swift v. Tyson.

It must be acknowledged that in a number of cases the United States Supreme Court has talked as though the Rules of Decision Act controlled. The language of the cases there, and in other tribunals, is so equivocal that it is not practical to classify them as adopting one theory or another. Ward v. Chamberlain, 2 Black 430 (U. S. 1862), is one of many illustrating this statement.

29. " . . . Judgments and decrees hereafter rendered in the circuit and district courts of the United States, within any State, shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such State now cease by laws to be liens thereon; and the respective clerks of the United States courts in such State shall receive the like fees for making searches and certificates respecting such liens as are now allowed for like services to the clerks of the supreme court of such State . . ." 5 STAT. c. 44, § 4 (1850), 28 U. S. C., § 814 (1934).

do not run against the government to be well founded,32 there seems no sufficient reason why the public should be prejudiced by the failure of its representative to levy execution but not by their delay in prosecuting the action originally.32 The argument advanced by the Circuit Court of Appeals for the Second Circuit33—that the New York statute was not one of limitation but of affirmative grant of power to issue execution for five years, etc.—makes a distinction without a difference.

It has also been questioned whether the above statute adopted state law authorizing judges, in their discretion, to suspend the operation of the lien pending appeal, the defendant having given bond. In Myers v. Tyson,34 it was held not, because the federal act applied only where the liens cease "by law," not where they are suspended by order of the court exercising a discretion not vested in federal judges. However, in United States v. Sturgis,35 it was thought that the federal statute adopting "the forms and modes of process" of the state court authorized the use of this practice in the federal courts; that inasmuch as the lien depended upon the adoption of the state law, the law must have been taken with all the modifications and characteristics pertaining thereto.36

B. Territorial Limitations

In Manhattan Co. v. Evertson,37 a judgment had been rendered in the United States Circuit Court for the Southern District of New York against a debtor owning lands in the Northern and Southern Districts. It was held that the judgment was a lien upon all the lands which might be reached by execution of the court (in other words, upon all the land of the debtor in the state)38 and was not confined to the territorial jurisdiction to which its original process extended (that is, the district for which it sat). The


31. Cases are collected in Note, L. R. A. 1916 E, 96, and earlier notes.
34. 17 Fed. Cas. No. 9,995 (C. S. S. D. N. Y. 1876).
36. The 1828 amendment to the Process Act had provided that where the defendant, by state law, was entitled to an imparlance of the lien for one or more terms, he should be entitled to an imparlance of one term in the federal court. 4 STAT. 278, c. 68 (1850).
37. 6 Paige 497 (N. Y. Ch. 1837).
court observed that in pre-revolutionary days the statute giving the right to reach the land upon execution was considered to give a lien as extensive as the possibility of execution, which in the supreme court was state-wide. This right to take the land was continued by statute. In view of the weight later given to those factors it is unfortunate the court did not elaborate upon the character of jurisdiction exercised by the several state courts as compared to the circuit courts of the United States, their respective territorial jurisdiction, and the extent of process from each. It was apparently not considered important.

More difficult is the problem where the state by statute has limited specifically the territorial scope of the liens of state judgments. Conceivably such limitation might be absolute, but in fact wherever it has been imposed, it has been conditional. The first case was decided in 1840 and has influenced the course of decisions ever since.

In Indiana, judgments of the state courts had always been considered a lien on real estate by virtue of statutes subjecting such property to execution. In 1818, statute specifically recognized the lien, which was apparently co-extensive with the territory to which final process might be directed. In 1824, it was laid down that judgments of the state circuit courts should be liens from rendition on land in the county where rendered, but in other counties only from recording of the judgment with the clerks thereof. On December 5, 1837, judgment was rendered against Candler in the United States Circuit Court for the District of Indiana. It does not appear where the court sat at the time other than that it was

39. 5 Geo. II, c. 7 (1732).
41. A consideration which did concern the court was the law by which judgments in favor of the United States may be enforced anywhere within the United States. Did such judgments give nation-wide liens? The court concluded that there could be no state law giving a lien outside its territory to be adopted by the federal courts; that this was, therefore, not such a logical consequence of the principle of the instant case that its social undesirability should militate against the holding here.

In accord, Prevost v. Gorrell, 19 Fed. Cas. No. 11,400 (C. C. E. D. Pa. 1877). But see Lombard v. Bayard, 15 Fed. Cas. No. 8,469 (C. C. E. D. Pa. 1848); Rhea v. Smith, 274 U. S. 434 (1927). Cf. Dermott v. Carter, 109 Mo. 21, 18 S. W. 1121 (1892). The numerous cases holding that in adopting the state lien law the territorial jurisdiction of the federal district and circuit courts was to be approximated to county-wide original jurisdiction of the state courts would also seem opposed. See note 53. See also the language of many of the courts, where the issue was not before them, is very confusing. So, in United States v. Scott, 27 Fed. Cas. No. 16,242 (C. C. W. D. Tex. 1878), the court said, "The judgment of a federal court is a lien upon all lands in the district and within reach of its process." It is very common to encounter the statement that the lien was co-extensive with "the territorial jurisdiction" of the federal court, certainly an ambiguous phrase.

43. Act of January 30, 1824.
not in Cass County. The judgment was never recorded in any county clerk's office. On February 26, 1838, a judgment was rendered in the state circuit court in Cass County, where the land in question lay. The purchaser from the marshal, levying and selling under the federal judgment, then brought ejectment in the federal court against the purchaser from the sheriff who under the state judgment had first levied upon the land.

In holding for the plaintiff, Mr. Justice McLean argued three propositions. The first, on which chief reliance was placed, proceeded on the assumption that the state supreme court's judgments were, in 1828, liens throughout the state (an unsettled but reasonable contention), that subsequent limitation of the territorial scope of that lien (by statute in 1831) was irrelevant in view of the adoption as federal law in 1828 of only the "forms and modes of proceeding . . . now used in the highest court of original and general jurisdiction of the same," and that the lien of the federal circuit court judgment in 1837 was, therefore, state-wide without further recording.

A skeptical reader might ask a number of questions about this approach. Granting that the federal judgments were liens because the federal government had adopted state process, not because they had adopted state laws as rules of decision, the Process Act of 1828 made a clear distinction between mesne process and modes of proceedings, on the one hand, and final process and writs of execution on the other. It is the latter section, if any, which adopts state lien law, but it is only the former which refers to the "highest court" of the state. But even if we suppose the Act throughout meant to adopt the process, final as well as mesne, of the "highest court," note that that court is further identified as the "highest court, of original and general jurisdiction." The Supreme Court of Indiana was not a court of original and general jurisdiction; in most instances its jurisdiction was appellate. Such analogy between the state supreme court and the federal circuit court was the basis of the Missouri statute later condemned in Rhea v. Smith.

The learned Justice's second argument, less favored by himself, has proved to be the more enduring. In his own words, it runs:

". . . If the rules of proceeding by the circuit courts of the state be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the state, in the exercise of the jurisdiction of this court, is as the limits of a county to the local
court. The modes of judicial proceedings and rules of property are different in the different states; and, in adopting those rules, congress designed, as far as practicable, to give the same effect to them in the courts of the Union as in the courts of the state. . . . But if a state law, being framed in reference to the limited jurisdiction of the state courts, for this reason can not constitute a rule for the federal courts, the legislation of congress, on the subject, has been in vain. Such has not been the view taken by the courts of the United States. The law of the state regulates the proceedings of a sheriff on execution. He is to advertise the property, real or personal, &c., but his duties are all limited to the county. The same rule governs the marshal, and operates throughout the state. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction."

It may be observed that the federal statute spoke only of process, not of lien. A lien is not final process itself, not a form of writ of execution. Certainly it is not mesne process nor a "form of proceeding" (a phrase construed in Wayman v. Southard not to include judicial activity after judgment). It is a consequence of the judicial power over the person and property of the litigants before the court. Though the right of a successful litigant to satisfy his judgment out of property in the hands of a third party, to which property his adversary had title when the judgment was rendered, may perhaps be a substantive one, the fact that it flows from this aspect of federal sovereignty prevents that right from being a case where the laws of the several states apply, within the Rules of Decision Act.

This would seem to leave two alternatives. Congress had adopted as federal law the forms of final process and writs of execution of the state. These may include an elegit, fieri facias, levare facias, and others. If final execution could be levied upon the land to satisfy judgments of the state courts, federal execution could also be levied upon the land. The federal court might then take, on its own initiative, the step taken by the English courts after the enactment of the Statute of Westminster II, holding the point ungoverned by statute but determining on common law principles that the right to execution gave a lien. On reason and precedent such lien should be co-extensive with the right to execution, which was state-wide. State recording requirements would not be applicable.

45. 10 Wheat. 1 (U. S. 1825).
There being but one federal district in Indiana, the problem of *Manhattan Co. v. Evertson* did not arise, but the analysis just suggested would uphold that decision. However, in case execution on a state court judgment was not state-wide, in determining the territorial scope of federal execution under the Process Act, the court would still be confronted with the question of whether the "mode or final process" was adopted literally or in form adopted to the territorial organization of the federal courts.

The other alternative—and the rationale evidently though not expressly adopted by the court (and by federal courts ever since)—was that Congress by the Process Act intended to provide for and regulate all exercise of power by the federal courts in enforcing their judgment, whether or not the language employed was adequate for the purpose. Hence, the question of judgment liens was referable to that statute. And that statute might be freely construed to permit adaptation of the state law which in terms it purports to adopt literally. The necessity for that cavalier treatment of Congressional language may be stated as Justice McClean's third argument in favor of the decision.

The point is a practical one. If recording of the judgment were a condition precedent to a lien in counties other than that in which the judgment is rendered, the federal judgments would be liens of much less scope than the state court judgments. The federal courts did not sit in every county, there were no federal recording offices, the state recording officers were under no obligation, indeed had no authority to record the federal judgments.

Subsequent writers have generally assumed, as the court here stated, that state recording officers are under no obligation and could not be required to give equal treatment to transcripts of federal judgments. The proposition is not beyond question, however. Whether the state government had intended to impose a duty upon its officers to record federal judgments was a matter for the state courts to decide, but the federal courts might reasonably hold that the state could not discriminate against the federal government. Granting this, it does not follow as the night the day that the state recording requirements were not to be imposed upon federal judgments. It is at least plausible to insist that the state recording officers had to record the federal judgments, whether they would or no. Our

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47. When, in *Metcalf v. Watertown*, 153 U. S. 671 (1894), the Supreme Court held that a state might not impose a shorter statute of limitations for suits upon federal judgments than upon state judgments, it did not hold that the statute for state judgments was not applicable to federal judgments.
problem is whether Congress by the Process Act adopted the recording limitations of the state judgment liens along with the rest of the state lien law thought to be within the scope of the Process Act. It is not a complete answer that it did not because the state recording officers might not record federal judgments. If Congress did adopt the recording requirements, they perhaps could be made to. It could be considered a Congressional mandate to the state clerks to so act. Analogy is not wanting. Naturalization of aliens, for example, is a matter of exclusive federal control, but Congress has vested state courts of record as well as federal courts with jurisdiction of naturalization proceedings pursuant to the rules it has established, and it has imposed definite duties upon the clerks of those courts. Vigorous objection has been made to the Congressional delegation of authority, but the practice has long been sustained.

Moreover, the result of the instant case is not equality. So far as the district is concerned, federal judgments are in a position superior to those of the state. But if there are several districts in the state, by the very premise of the argument they may not be recorded so as to perfect the lien in any district but that of rendition.

The opinion concludes with this pregnant observation:
"If it shall be deemed important to have the records of the judgments of this court recorded in the county where the lands of the defendant are situated, it may be required by act of congress, or by a rule of this court, if the law of the state shall require the clerks to make such record."

Shrew v. Jones has been generally followed, though not without dissent. In Massingill v. Downs, Mr. Justice McLean, this time speaking

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L. REV. 259.
52. Professor Glenn has suggested that it would be possible to record a transcript of the judgment with the clerks of the federal district courts for the other districts, by each recording creating a lien throughout the particular district. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES (2d ed. 1940) § 23. This solution has never been adopted by any court and would seem to strain the "adaptation" of the state recording system to the breaking point.
53. In accord with that decision, Ludlow v. Clinton Line R. R., 15 Fed. Cas. No. 600 (C. C. N. D. Ohio 1851); Carroll v. Watkins, 5 Fed. Cas. No. 2,467 (D. C. S. D. Miss. 1870); United States v. Humphreys, 26 Fed. Cas. No. 15,422 (C. C. E. D. Va. 1879); Byers v. Fowler, 12 Ark. 218 (1851); Trapnell v. Richardson, 13 Ark. 543 (1853); Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089 (1898); In re McGill, 6 Pa. 504 (1847); Branch v. Lowery, 31 Texas 96 (1868); Commercial Bank v. Eastern Banking Co., 51 Neb. 766, 71 N. W. 1024 (1897); see Massingill v. Downs, 7 How. 760 (U. S. 1848); Ward (Continued on next page.)
54. 7 How. 760 (U. S. 1848).
for the Supreme Court, reiterated the second argument of his earlier opinion. The latter case is generally considered to have settled the law of federal judgment liens prior to 1888, but it may be noted that the decision really concerned only the question of the applicability of a state recording statute to a federal judgment rendered prior to its enactment.

An historically amusing situation developed in Mississippi, where Massingill v. Downs arose, the state courts persisting in their view that the federal judgment was no lien unless "enrolled," the federal courts following the Supreme Court decision. It would seem that the several state court decisions might have gone to the United States Supreme Court, which, consistent with its view that a federal judgment lien is a direct consequence of a federal statute (albeit some uncertainty as to which one), has invariably held that such decisions are reviewable as denying a right claimed under a statute of the United States. On principle it would seem undeniable that the federal courts should determine the question, whether their views were sound or not. The persistence of the state court in the earlier decisions may well reflect the spirit of the confederacy. If the United States court had reviewed those decisions, a reversal might not have been respected. But the decision in 1882 is an anachronism.

The several federal statutes enacted prior to 1888 seem not to have affected the decisions at all. The Act of 1840 was concerned solely with the duration and termination of the lien, although cited on this problem by a number of courts. The Conformity Act of 1872 spoke with greater

55. Tarpley v. Hamer, 9 Smedes & M. 310 (Miss. 1848); Bonaffee v. Fisk, 13 Smedes & M. 682 (Miss. 1850); Brown & Johnston v. Bacon, 27 Miss. 589 (1854); Hall v. Green, 60 Miss. 47 (1882). And see Miss. Code (1857) 525, arts. 262, 263.

(53—Continued)


Contra: Reid v. House, 2 Humph. 576 (Tenn. 1841) (arguing that the state recording requirement was not based upon jurisdiction of the courts but upon convenience in providing public records of title to lands); Vance's Heirs v. Johnson, 10 Humph. 214 (Tenn. 1849); Alsop v. Mosely, 104 N. C. 60, 10 S. E. 124 (1889); Tarpley v. Hamer, 9 Smedes & M. 310 (Miss. 1848); Brown & Johnston v. Bacon, 27 Miss. 589 (1854); Hall v. Green, 60 Miss. 47 (1882).

clarity of the extent of final process from the federal courts,\(^6\) and whatever doubt may have existed as to whether a statute adopting the "writs of execution and other final process" of the state inevitably adopted its judgment lien law, there is no room for argument under this law. Couched in terms of the rights of the judgment creditor, it clearly provides that if by state law, and to satisfy a state court judgment, he could reach property transferred by his debtor to a third person, he can also do so to satisfy his federal judgment. One might suppose that if there were any limitations or conditions on the right to pursue that land in the hands of a third party to satisfy the state judgment, those conditions would limit the remedies on the federal judgment. Nor is this denied by the decisions which, after 1872 as before, held that a federal judgment was a lien upon rendition throughout the district of the court (embracing several counties) whenever the state judgment was a lien throughout the county (but not elsewhere unless recorded).\(^6\) These cases argue that the state court judgment is a lien upon rendition primarily throughout the jurisdiction of the court; that when the state statute said "county," it meant the jurisdiction of the state trial court, which was county-wide. The adaptation of the statute to the federal districts did not, in their eyes, strip any conditions or limitations; it but adopted, in accordance with Congressional mandate, the true statute.

Of course, state legislators could have said "jurisdiction," if they had meant to emphasize that aspect of the case and to minimize the fact that counties are the established units for recording purposes of all kinds, whether co-terminous with court jurisdiction or not. A number of state courts have rejected the doctrine of *Shrew v. Jones*, *Massingill v. Downs*, and related cases, and, presumably, the rationalization upon which they

\(^{60}\) "That in common-law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the State within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules as aforesaid: Provided, That similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy." 17 STAT. 196, c. 255, § 6 (1873), 25 U. S. C. § 726 (1934).

are based. Granted that the power of the federal courts over the persons and property of litigants is a matter for federal determination, which the state courts may not conclude, Congress had disposed of the question by adopting the state law on state judgments. It was for the federal courts to determine whether Congress meant what it said; to twist Congressional language as they deemed necessary; but if Congress did mean to adopt literally the state rule, it was for the state courts to determine what that was. A clear assertion by the highest state court that the state recording requirements for judgment liens were part of its system of public records, based upon counties as the administrative unit of all recording acts and not at all upon the jurisdiction of the courts rendering the judgment, would preclude any argument that in holding a federal judgment a lien throughout the district the federal court was but adopting the true essence of the state law.

There would undoubtedly be the argument that to recognize a lien in counties other than where rendered only after registration would prejudice federal judgments, for there were (and are) not federal recording agencies in every county, and state officers need not, perhaps may not, record federal judgments. It has already been pointed out that this begs the question. Moreover, even though valid in other respects this argument amounts to saying not only that Congress did not foresee this difficulty and did not mean what it said in the Process Acts, but further that if Congress had foreseen and properly considered this difficulty, it would have spoken to the effect of Shrew v. Jones. In the second place, state mandate to state officers that they should register federal judgments equally with state judgments did not affect the decisions of the federal courts of those states as to the territorial extent of federal judgment liens.62

Where the state law requires the registration of the state judgment with a state officer unconnected with the courts, there is small room for the argument that the judgment is, upon rendition, a lien throughout the "jurisdiction" of the court rendering it. This was the law in only one reported case63 and its significance was not considered there, but it

62. This was the law when Carroll v. Watkins, 5 Fed. Cas. No. 2,457 (D. C. S. D. Miss. 1870) was decided. See text at note 56, supra. It was also the law which the court in Cooke v. Avery, 147 U. S. 375 (1893) refused to pass on.

63. United States v. Kendall, 263 Fed. 126 (D. C. E. D. La. 1920), where the court, on the altogether inadequate authority of Cooke v. Avery, 147 U. S. 375 (1893), said that the federal judgment was not, prior to 1888, a lien in Louisiana in the parish of rendition without further recording. However, there was no citation of Massingill v. Downs or the other cases finding an extended lien, no discussion of the principles for which they stand, no attempt to dis-
is improbable that the federal courts would interpret the Process Act to require the state recording of federal judgments as a condition of lien. As Judge Hughes observed in another case, 64

"... it may be laid down as a rule having few exceptions that in any case of a law of a state conferring rights upon conditions, or with exceptions, and adopted by congress as operative in that state, wherever the exceptions or conditions depend upon the action of state officers, so that the enjoyment of rights thus once conferred could be defeated or divested by the action, or refusal to act, of a state officer, such a condition, or exception, in the state law is uniformly held by the United States courts not to limit the rights conferred by the act of congress adopting the state law."

If this was the real reason for disregarding the recording requirements, why limit the lien to the district of the court? It would be more logical to hold it co-extensive with the power of execution in all cases. 65


65. The rationalization of these early cases is still of practical significance. As will be seen, it has been employed in interpretation of the Act of 1888. And where that Act does not apply, the Process Act of 1872 is still in force and the early cases are still law, except as Federal Rule of Civil Procedure 4f may have increased the "territorial jurisdiction"—whatever that phrase means—to the state borders.

The law of federal attachments (highly important in the New England states, where attachment process rather than judgment lien is relied upon to protect the creditor) and of its pendens is not affected by the Act of 1888. The rationalization of "lien throughout the jurisdiction," if valid at all, is quite as applicable to "attachment effective throughout the jurisdiction" or "notice throughout the jurisdiction." There is a considerable body of authority on the lis pendens problem, and it is nicely divided. That the state recording requirements effectively limit the doctrine of lis pendens as applied to federal actions: United States v. Calcasien Timber Co., 236 Fed. 196 (C. C. A. 5th, 1916) (the state statute purported to apply to federal suits and to authorize recording by state officers); United States v. Chicago, M. & St. P. Ry., 172 Fed. 271 (C. C. D. Minn. 1909); see Jones v. Smith, 40 Fed. 314 (C. C. E. D. N. Y. 1889); Tennis Coal Co. v. Sacket, 172 Ky. 729, 190 S. W. 130 (1916). Contra: Rutherglen v. Wolf, Fed. Cas. No. 12,175 (C. C. E. D. Va. 1876); McClaskey v. Barr, 48 Fed. 130 (C. C. S. D. Ohio 1891); King v. Davis, 137 Fed. 222 (C. C. W. Va. 1905), aff. sub nom., Blankenship v. King, 157 Fed. 676 (C. C. A. 4th, 1906); United States v. Olsak, 6 F. (2d) 1014 (D. C. N. J. 1925); Majors v. Cowell, 51 Cal. 478 (1876); Wilson v. Heflin, 81 Ind. 35 (1881); Stewart v. Wheeling & Lake Erie Ry., 69 Ohio St. 161, 41 N. E. 247 (1895). The basic split of opinion seems to have been over whether the recording law was a rule of property. It may be observed that the Advisory Committee drafting the Rules of Civil Procedure were of the opinion that it was a rule of substantive law, citing United States v. Calcasien Timber Co. See the Committee's note to Rule 64.

It is submitted that the Committee was quite right in refraining from drafting a rule on lis pendens, but that the question is not one of substantive property law. It is a problem of the inherent power of the court to protect
It took forty-eight years\textsuperscript{66} for Congress to accept Mr. Justice McLean's advice.\textsuperscript{67} On August 1, 1888, Congress enacted the following statute.\textsuperscript{68}

"That judgments and decrees rendered in a circuit or district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: Provided, That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

The third section was amended in 1895\textsuperscript{69} by the insertion of the words

\textsuperscript{66}

its dignity and effectuate its decrees. Recording does not so much furnish notice so that the plaintiff may prevail against subsequent encumbrancers or grantees as it ameliorates the danger of hardship to innocent parties in the course of the court's protection of its proceedings. While I firmly believe in the desirability of compliance with the state recording system, the present state of the decisions would seem to necessitate a federal statute.

\textsuperscript{67}

Unsuccessful attempts had been made during the forty-eighth and forty-ninth Congresses. Four similar bills were pending before the House of Representatitives when, as a substitute measure, the Judiciary Committee introduced the original bill which, with amendments, ultimately was enacted. See 19 Cong. Rec. 2359 et seq. (50th Congress, 1st sess., 1888).

\textsuperscript{68}

Proffered in Shrew v. Jones, 22 Fed. Cas. No. 12,318 (C. C. D. Ind. 1840), and quoted supra at p. 308.

\textsuperscript{69}


Act of March 2, 1895, 28 STAT. 813, c. 180 (1895).
"the same" between "or" and "parish" of the original statute, and by
the addition of the condition,

". . . if the clerk of the United States court be required by law
to have a permanent office and a judgment record open at all times for
public inspection in such county or parish."

This third section was then stricken from the statute altogether70 and
the first two sections enacted in 1888 now stand, with the Act of 1840,
as the entire federal legislation specifically concerned with the subject
of judgment liens. It is, of course, apparent that the Act of 1888 is only
conditionally applicable. If the conditions are not met, the Process Acts
and the interpretation discussed in the preceding section govern.

A. The Proviso of the Federal Act

The biggest problem of federal judgment liens is and always has been
the effect of state recording statutes. Although mention is made of it only
in the proviso, the whole purpose of the statute is to solve that problem.
Hence it is the proviso which is the important clause. Where the state lien
law includes recording provisions, the state law is adopted by the first
clause of the act only71 when "the laws of such State . . . authorize the
judgments and decrees of the United States courts to be registered, recorded,
docketed, indexed, or otherwise conformed to the rules and requirements

70. By Act of August 23, 1916, c. 397, 39 STAT. 531 (1917). This was the
second attempt. By Act of August 17, 1912, c. 300, 37 STAT. 311 (1913), it
was provided that the third section of the Act of August 1, 1888 be repealed.
Apparently it was overlooked that this section had been amended and re-enacted
by Act of March 2, 1895, which was not mentioned. It would seem the attempted
repeal was, therefore, ineffective, but no case arose to present the issue before
it was conclusively disposed of in 1916. It would seem the question might well
have been considered in Seventeenth Street Land Co. v. Hustead, 263 Pa. 342,
106 Atl. 540 (1919), but the court disposed of the case without recognizing
the difficulty. In United States v. Kendall, 263 Fed. 126 (D. C. E. D. La. 1920),
the first attempt was apparently thought to be effective. The case is the only
one presenting an issue of the repealed third section. Holding that judgments
which prior to 1888 were not liens in the parish where rendered (in the court's
view, for failure to comply with the state recording requirements) became
potential liens by the enactment of the Act of 1888 and perfected liens simply
by the filing and docketing in the federal clerk's office, the court then found
that the repeal of the third section of that Act—thus permitting once more the
application of state recording laws to the judgments in the county or parish
of rendition—was not intended to apply to vested liens.

The authorities are not in accord on whether a new recording statute applies
to an existing lien. That the enactment of the Act of 1888 required compliance
with the state recording system to validate the lien of an existing federal
judgment, First Nat. Bank v. Clark, 55 Kan. 212, 40 Pac. 270 (1895); that it

71. Even if the state lien law is not adopted by the Act of 1888 because
its conditions are not met, an adaptation of that law is adopted by the Conformity
Act, as shown in the preceding section.
relating to the judgments and decrees of the courts of the State." In the light of the earlier decisions the purpose is plain. Because it had been said that the federal government could not force state officers to record federal judgments;\textsuperscript{72} because such recording was necessary in fairness both to third parties and to litigants in federal and state courts; because a separate recording system for federal judgments would be cumbersome, expensive, and not always understood by the laymen, Congress gave the states an opportunity to require their officers to record the federal judgments. Indeed, it put pressure upon them to do so, for unless they imposed such duties the federal liens would exist in the previous fashion, to the hardship of the citizens of the state.

But it is not so plain what constitutes sufficient authorization or delegation to these state officials. The law in Pennsylvania may be examined for a concrete illustration of the problem.

The statute there provides that no state judgment shall be a lien upon real estate unless indexed in a judgment index by the prothonotary of the county where the land lies.\textsuperscript{73} The prothonotaries are authorized and required to receive, index and enter transcripts of federal judgments on the same basis as the state judgments.\textsuperscript{74} But it is expressly provided that nothing in the statutes should require the filing with the prothonotary of a transcript of a federal judgment in the same county.\textsuperscript{75} Under the Act of 1888 as originally enacted, there could be no question that a federal judgment was a lien in the county of rendition upon proper indexing by the federal clerk without filing a transcript with the state officer. After the amendment of 1895, this was still unquestionably true if the federal clerk maintained an office and complete records at all times within the county. If he did not, the third section of the statute dropped out and the case was governed entirely by the first two; essentially the same situation as has existed in all counties since 1916.\textsuperscript{76}

In Seventeenth Street Land Co. v. Hustead,\textsuperscript{77} we are not told when the

\textsuperscript{72} During the Congressional debate on the bill which became the Act of 1888, it was asserted by Mr. Henderson of North Carolina, a committee member, that the bill would have been drawn to require recording by the state officials if the committee had considered that Congress had the power to make such an order. 19 Cong. Rec. 2263 (1888).


\textsuperscript{74} Ibid, § 1932.

\textsuperscript{75} Ibid.

\textsuperscript{76} The former inclusion within the statute of an express provision preserving the judgment lien, which provision was inapplicable for lack of performance of an operative condition contained within it, perhaps created a stronger negative inference against the lien than can be found where the statute is silent on the matter altogether.

\textsuperscript{77} 268 Pa. 342, 106 Atl. 540 (1919).
federal judgment in question was rendered. The court deemed that irrelevant, but from the fact that the trial court's decree in the instant controversy dated July, 1916, there is a fair probability that the federal judgment was rendered before the third section was stricken from the federal Act. The federal judgment in question had been rendered in Pittsburgh, so there was every probability that the federal clerk maintained an office and records in the county of rendition. Under the circumstances, the decision that the judgment was a lien upon property in Allegheny County, in which Pittsburgh is located, though no transcript had been filed with the prothonotary of the common pleas court of that county, was probably sound for reasons apart from the analysis of the opinion, which proceeds upon a theory which, if sound, is applicable today.

In short, the court argued that it "was clearly within the power of the state to enact" the exemption of federal judgments from the state indexing system within the county of rendition; that this exemption in no way conflicted with the federal statute (apparently speaking as of the time of trial); and that the state law was adopted by Congress.

The trouble with this is that it was not within the power of the state to grant or extend a federal judgment lien any more than it was within its power to deny or restrict it. The fallacy derives from the emphasis placed upon denials of the state's power to prejudice federal judgments. The issue is not whether the state's statute purports to derogate or to prefer the federal judgment. The question is, does it purport to affect it at all? If so, it is invalid.

And Congress did not, by the Act of 1888 any more than by the Process or Conformity Acts, attempt to delegate a power to the states to regulate federal judgments, conditioned upon equal (or preferred) treatment with the state judgments. It couldn't if it wanted to. Nor did Congress approach that condition by attempting to adopt, as federal law, state statutes on federal judgments. The Act of 1888 is perfectly clear on this point. It adopts as federal law the state law on state judgments.

What was the law of state judgment liens? "The lien of no judgment . . . on real estate in the same or another county . . . shall commence or be continued as against any purchaser or mortgagee, unless the same be indexed in the county where the real estate is situated, in a book to be called the judgment index. . ." (italics mine)

It will not be overlooked that the state officer who is to record the judgments is the prothonotary or clerk of the state court rendering the
judgment. It is his affirmative duty to enter the judgment of his court on the judgment roll and index the same without further action (such as filing a transcript) by the judgment creditor.\textsuperscript{79} In the ordinary course of events the condition of the state judgment lien will, so far as the creditor is concerned, be automatically satisfied. Then must the state impose a similar affirmative duty upon the prothonotary to seek out the federal judgments and docket them promptly without further action by the creditor, if the operative condition of the Act of 1888 is to be satisfied? That Act says "authorize," which may not include the imposition of a duty to seek out what is not brought to him. On the other hand, in \textit{Rhea v. Smith}, the court emphasized the important difference between automatic liens and liens conditioned upon an additional step, no matter how simple, which may be overlooked, neglected, or forgotten.

In deciding in \textit{Seventeenth Street Land Co. v. Hustead}, that a federal judgment was a lien in the county of rendition without docketing by the state prothonotary the Pennsylvania Supreme Court unquestionably did not mean to espouse the point just made. If the failure to impose an affirmative duty on the state official to seek out and record the federal judgments as he seeks and records the state judgments is not "authorization to conform" the federal judgments to the docketing requirements of the state law, then the adoptive provisions of the Act of 1888 don't apply at all. The Process Act of 1872 controls and under it the courts held a federal judgment a lien throughout the entire district without any state recording.

The problem is a grave one, for while very few states follow Pennsylvania in deliberately trying to prefer federal judgments, a considerable number\textsuperscript{80} condition the state judgment liens in the county of rendition upon docketing by the clerk of the court rendering the judgment, the independent duty of which clerk it is to enter the judgment as announced and to index it. Some of these states would alleviate the unfairness of requiring a transcript of the federal judgment to be filed with the state clerk by providing that the docketing by the \textit{federal} clerk, in accordance with the duty imposed upon him by the second section of the Act of 1888, would suffice to create the federal lien in the county of rendition.\textsuperscript{81} This would be a more satisfactory and equitable situation, but the generous provision is invalid, since the state can't stipulate when the federal judgment shall be a lien, and Congress has adopted the law of state judgments. However,

\textsuperscript{80} \textit{Inter alia}, Idaho, Indiana, Montana, Minnesota.
\textsuperscript{81} \textit{Inter alia}, Minnesota.
these invalid provisions furnish a clue to a possible solution. Of the law of those states it can be fairly said that the primary intent and true essence is that judgments of the state court shall be liens in the county of rendition when docketed, not by a specific officer but by the clerk of the court rendering the judgment. Hence a federal judgment is a lien throughout the county of rendition when docketed by the clerk of the court rendering the judgment; i.e., the federal clerk. That possibility is also present in Pennsylvania, where we are directed not to construe the statute to require docketing of the federal judgments with the state prothonotary in the county of rendition. Can this direction, in Section 1932, be used as a guide in construing Section 1922? The possibility is more remote where the statute purports to require the docketing of the federal judgment with the clerk of the state court in the county of rendition; that evinces a pretty clear basic intention that the record shall be filed with a single specified official.

No solution is satisfactory. To find that the Act of 1888 is not conditioned upon the states' imposing a mandate (which none have done) upon state clerks of court to enter the federal judgments as announced and to index the same is to impose upon the federal judgment creditors the hazard of neglecting the filing—a hazard not encountered by the state judgment creditor. To hold that the Act of 1888 cannot apply is to put a judgment lien upon the entire district, perpetuating the admittedly unsatisfactory situation which induced the Act of 1888. (And it is poor comfort to third parties to answer that it is the fault of the state for enacting such a stupid lien law.) To construe the state law as requiring only the docketing by the clerk—be he federal or state—of the court rendering the judgment creates difficulties with the federal lien. Either the docket may not be kept in the county of rendition,\(^2\) in which event there may be a lien without a record in the county, or the statute must be considered to limit the state lien to counties of rendition in which a record is kept,\(^3\) in which case it is not possible to have a federal lien in certain counties (Congress not authorizing the federal records to be maintained in every county where court is held and the state lien law not authorizing the filing of state judgments in the county of rendition in any other way).

The first alternative seems the most reasonable interpretation of the

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82. To illustrate: The Middle District of Pennsylvania is composed of thirty-two counties. The federal district court sits in five cities, but the clerk maintains offices only in two. 28 U. S. C. § 184 (1934).

83. This is expressly provided by statutes in Idaho. IDAHO CODE ANN. (1932) § 7-1109.
statute. Congress did require the federal clerks to enroll and index the judgments, but it did not in any way condition the existence of a lien on the performance of the clerk's duty, whether the lien arose under the Act of 1888 or the Process Act. Throughout the statute Congress has chosen to utilize the state recording machinery, rather than to establish a federal system. It will be seen that the state statutes conditioning the state liens upon docketing by the clerk in the county of rendition do not make the test whether it is the duty of the clerk to enroll and docket the judgment without reminder. If he fails to docket though obligated to do so, there is no lien. If he docketed, but only at the insistent reminder of the creditor, there is a lien. The performance of his duty is not an element in the lien. If, then, it is less convenient for the federal judgment creditor to record with the state clerk, if he cannot simply rely on the independent obligation of the clerk to hear his judgment announced and enroll and index it, that is but a result of Congressional policy to use state officials whose other duties may benefit the state judgment creditors. That policy makes a condition of equal recording facilities; it does not make a condition of the extension to federal courts of other duties by the state officials, duties such as Congress has required of federal clerks without relationship to the federal lien. It is sufficient if the state clerks are "authorized" to "conform" the judgments; they need not be commanded to duplicate all the functions of the clerk of the federal court.

This is a very common type of lien statute, although the wording of the various acts is seldom identical. In some states, statutes which appear to make the state lien date from rendition have substantially the same effect by virtue of the state law that a judgment is not "rendered" until enrolled and indexed. The same point was potentially present in Re Jackson Light & Traction Co., though not considered by the court.

B. Discriminatory Regulation of Federal Liens

Re Jackson Light & Traction Co. was a proceeding in bankruptcy in which the petitioner claimed a preference under the lien of a judgment, rendered in his favor against the bankrupt by the Federal District Court for the Southern District of Mississippi a year previously. This judgment had been docketed by the federal clerk, but no transcript had ever been filed with the clerk of the state circuit court. The property on which the

84. 259 Fed. 223 (C. C. A. 5th, 1920).
lien was claimed was situated within the county where the judgment had been rendered.

By the state law enrollment of state judgments by the clerk of the circuit court where the property lay was a condition of lien, but that requirement being complied with, the lien took effect within the county of rendition against the debtor and purchasers under him as of the time of rendition. It further purported to require the filing of an abstract of federal judgments with the same official, and enrollment by him, after which they were liens within the county from the time of enrollment. The petitioner argued that this requirement was prejudicial to the federal judgments and void, but the court ruled against him.

The decision is absolutely sound but the rationalization is faulty. The court found an obvious legislative intent to provide a single repository within each county for all notice of judgment liens, which repository was the office of the clerk of the state court. Within this office notice of the state judgments rendered in that county could be obtained at any time after rendition by reference to the clerk’s “minutes.” The subsequent enrollment merely provided a convenient index of those judgments; enrollment was made a condition of the lien to bring pressure upon the parties to insure this practical convenience, but it was not necessary for the protection of the public that the lien be postponed until that enrollment. In the case of federal judgments, it was not possible to obtain any notice within that established repository until the abstract was filed. The discrimination was, therefore, not unreasonable and did not invalidate the statute.

Inherent in this approach is a commonly held and fallacious presumption that the test of the validity of the state regulation of federal liens is the comparative equality with the provisions for state judgment liens. It is sometimes said that the regulations of federal liens must “conform” to those of the state judgment liens. Reading of the Act of 1888 should disclose the inaccuracy of this premise. Nowhere does it validate state regulation of federal judgments, be it discriminatory, equal or indulgent. The only discretion allowed the state in the matter is in providing equal facilities for recording or registering federal judgments. The only reference to “conformity” is in the requirement that state officials be authorized

87. Throughout this paper, this approach is designated the “conformity” theory.
to "conform" the federal judgments to the condition (of recording) of state judgments. The states may, by providing inferior or no opportunities for recording federal judgments, prevent the adoption by Congress of the state recording requirement for state judgments. If equal facilities are provided, through mandate to the state officers, state regulations become federal regulations, willy-nilly. The attempted state creation or limitation of the federal judgment liens may simply be disregarded, except that they may under some circumstances be regarded as requiring of the state officer the reception and enrollment of tendered transcripts of federal judgments (which may or may not, according to the particular law, be equal to the recording procedure of state judgments).

It follows that there was no lien in Re Jackson Light & Traction Co. because equal recording facilities for federal judgments had been provided, the Federal Act of 1888 was in force, it adopted the state law of the liens of state judgments, state judgments were not liens unless enrolled with the state clerk of court, this judgment had not been enrolled, and the fact that the place of record was the state clerk-of-court's office makes no difference for reasons discussed in connection with Seventeenth Street Land Co. v. Hustead.88

But if the judgment had been enrolled by the state officer, the federal lien would have dated back to the time of rendition, despite the contrary state statute and despite the possible presence of a reason for discrimination. The lien would be the same as the state judgment lien. An omnipotent Congress decided there was no reason for distinguishing them.

Another form of state attempt to discriminate against federal judgments was present in the famous case of Rhea v. Smith,89 the only decision of the United States Supreme Court under the present federal statute. If the provisions of the Act of 1888 and their inevitable application have been reiterated ad nauseam, it is because it is necessary to have them firmly fixed in mind as one approaches the tortuous opinion in that case.

The facts were these. In 1921 a judgment (for costs) was rendered against one Blanche Whitlock in the United States District Court for the Western District of Missouri, then sitting at Joplin, in Jasper County.

88. Edwards, Federal Court Judgment Liens (1931) 6 Wash. L. Rev. 49, and Hackman, Concerning Rhea v. Smith (1929) 22 Lawyer & Banker 35, take the opposite position, arguing that because there was a positive duty of enrollment on the state clerks, the state lien was really effective from rendition.

This judgment was never recorded with any state officer. Blanche Whitlock was then the owner of certain lands in Jasper County, which she subsequently conveyed for value to the defendant. Shortly thereafter execution issued on the judgment, under which the property was sold to the plaintiff, who brought this action of ejectment in the state courts. Both the trial court and the state supreme court found the judgment not a lien because not recorded with the clerk of the circuit court for Jasper County. The United States Supreme Court granted *certiorari*.

The pertinent statutes of Missouri were these:

"'Lien of judgment in supreme court, courts of appeals and federal courts in this state.—Judgments and decrees obtained in the supreme court, in any United States district or circuit court held within this state, in the Kansas City court of appeals or the St. Louis court of appeals, shall, upon the filing of transcript thereof in the office of the clerk of any circuit court, be a lien on the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.'"

"'Lien in courts of record, generally.—Judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held.'"

"'The commencement, extent and duration of lien.—The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien shall commence on the last day of the term at which they are rendered.'"

At the outset, the court was confronted with a true problem of statutory construction. It was impossible to decide the case until the court found which of the several Missouri lien statutes on state judgments, let alone federal judgments, was by the Act of 1888 adopted or compared. The state courts had said, the lien statutes on judgments of the state appellate courts, for they are analogous to the federal courts in embracing several counties within their jurisdiction, and the purpose of these statutes

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is to provide a record in each county. The United States Supreme Court said, the statute applicable to the "court of first instance of general jurisdiction," for that is the essential character of the federal district court. The conclusion seems eminently sound. It is substantiated by the history of the Process Acts and the common sense reason that trial court judgment liens are, in the whole, the important ones to the public. While, as was argued in *Re Jackson Light & Traction Co.*, there may be a reason for additional recording of the federal judgments, and while on this issue it begs the question to answer that Congress decided otherwise in adopting the state law on state primary courts of general jurisdiction, the decision that Congress did so intend is not unreasonable.

With this premise established, the reader will not be surprised to learn that the Supreme Court held the judgment to have been a lien on the land in Jasper County. A full and sufficient reason would have been that a judgment of the state circuit court sitting in Jasper County would have been a lien from rendition, without further enrollment. This was adopted as the law for federal judgment liens by the Act of 1888. The precise holding of the case cannot be attacked.

But the rationalization caused confusion and concern. The court proceeded:

(1) Prior to the Act of 1888 the judgments of federal courts were liens throughout the territorial jurisdiction of the court whenever the judgments of the state courts were liens throughout their counties. This resulted from the adoption by the Process Act of the final process of the state courts, adapted to the increased territorial jurisdiction of the federal courts by the technique of *Massingill v. Downs*.

(2) The Act of August 1, 1888, expressly adapting the lien law of the several states and inferentially their recording requirements did so only conditionally. The act limited the rule of *Massingill v. Downs* "only in those States which passed laws making the conditions of creation, scope and territorial application of the liens of federal court judgments the same as state court judgments."

(3) The question is one of "great nicety" and mere "approximate conformity" will not suffice. There is danger that the agent or attorney

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95. The court is reported to have said, "Massingill v. Jones." The unimportant misstatement or typographical error graphically illustrates the fusion of *Shrew v. Jones* and *Massingill v. Downs* into a well defined doctrine.
of the federal judgment creditor may forget to file his transcript with the state officer in Missouri. The Missouri law did not "secure the needed conformity in the creation, extent and operation of the resulting liens." "It is the inequality which permits a lien instantly to attach to the rendition of the judgment, without more, in the state court which does not so attach in the federal court in that same county that prevents compliance with the requirement of section one of the Act of 1888."

(4) The condition of the Act of 1888 not being satisfied, the case comes under the Process Act of 1872 and the doctrine of Massingill v. Downs. "The lien of federal court judgments in Missouri therefore attaches to all lands of the judgment debtor lying in the counties within the respective jurisdictions of the two federal district courts in that state."

(5) Re Jackson Light & Traction Co. "may well be distinguished from this one because necessity of enrollment was exacted as to every court."

The vulnerable paragraph is the second. There is no room for quibbling or argument. The court was simply wrong in its statement of the Congressional Act of 1888. Because that was wrong, the whole approach and technique is wrong. The Act contains not one word conditioning its application upon a state statute providing equally for "the creation, scope or territorial application" of federal judgment liens. That would be no more than a conditional delegation of power to the state legislature to regulate the power of federal courts over the litigants before them, impossible and not attempted. The Act did say that it did not adopt state lien law which required of state court judgments recording or indexing with or by state officers unless those same officers were by state statute authorized to register, record, docket, or index federal judgments in conformity with the rules for the state judgments. That is, the issue is purely one of providing equal recording facilities; if that is not done by the states, the Act of 1888 is indeed inoperative and the federal judgment liens depend upon the Act of 1872. Of course, that Act, too, purports to adopt state law, but it would be vain to contend now that the judgment lien is not under it at least district-wide.

Did the law of Missouri "authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed or otherwise conformed to the rules and requirements relating to the judgments

96. The error of the court's rationalization on this point is very clearly demonstrated by Edwards, Federal Court Judgment Liens (1931) 6 WASH. L. REV. 49.
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and decrees of the courts of the State?" It certainly did. Of course, it authorized recording which wasn't necessary; it vainly purported to require unnecessary recording; but that doesn't obscure the essential fact that it did authorize recording of federal judgments whenever and in the manner required of state judgments. The greater includes the less. The invalid assertion of authority must be disregarded, but the mandate to the officer to record when the transcript is filed remains unaffected. The unrecorded judgment was not a lien in other counties, any more than an unrecorded state judgment would have been.97

The decisions in both *Re Jackson Light & Traction Co.* and *Rhea v. Smith* were right, but they cannot be reconciled on the "interpretation" of the Act of 1888 employed in the latter case. If the matter is one "of great nicety" for which "approximate conformity won't do" (the circuit court of appeals thought in the former case that substantial equality, with no arbitrary distinctions, was enough), then it becomes a play upon words in an arbitrary test of conformity to say that the Mississippi statute was adopted because it made "the conditions of creation" equal, when it differentiated the time of effectiveness.98

C. The Nature of the State Lien Law Adopted

While Chief Justice Taft, speaking for an undivided court, adopted the rationalization just outlined, a different interpretation of the decision in *Rhea v. Smith* is possible, and though apparently not enunciated, it seems to underlie some expressions of opinion on the scope of federal

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97. Accord: *Rathbone Co. v. Kimball*, 117 Neb. 229, 220 N. W. 244 (1928), *cert. denied*, 278 U. S. 655 (1929). The denial of *certiorari* proves little but is much to be regretted, for the case offered a perfect opportunity for the Supreme Court to have clarified the disconcerting *dictum* of *Rhea v. Smith*. Under a statute which, if anything, discriminated against federal judgments more violently than the Missouri law, the Nebraska court held the unrecorded federal judgment not a lien in counties other than that in which it was rendered. There being equal recording facilities, the attempted state limitation of federal judgment liens was simply ineffective.

98. It has been argued that no distinction could be made between the two cases because in both, in effect, the state lien in the county of rendition dated from rendition. See note 88, *supra*. The contention confuses two distinct elements in the problem. Whether or not the state officers were required, of their own initiative, to perform the essential recording is a pertinent consideration on the question of whether the state really provides equal recording facilities for federal judgments. Howsoever that question is answered, the fact remains that the record was a condition of the state lien. If the state officers were derelict, there was no lien. But the Missouri statute made the judgment a lien from rendition, and enrollment is not an element of rendition in that state. Hence, in Mississippi the unrecorded federal judgment was either no lien at all, or a lien throughout the district. In Missouri, the unrecorded federal judgment was a lien in the county of rendition. Despite the *dictum* to the contrary, there appears no reason for thinking it a lien elsewhere.
judgment liens in given states.\textsuperscript{99} It adopts the decision and the \textit{dictum} of \textit{Rhea v. Smith}, that a federal judgment was in 1921 a lien throughout the federal district in Missouri. Starting with the proposition that the Act of 1888 adopts for federal courts the lien law of the state for state courts, and conceding that the character of state attempts to regulate federal liens is irrelevant except as it fails to provide recording facilities equal to those for state judgments, the question is simply, what is the state law as to comparable state courts? In answering the question these lawyers take a familiar but, I believe, an altogether unjustified position. They say a judgment of a circuit court in Missouri was a lien throughout the entire jurisdiction of the court immediately upon rendition. Emphasis is placed upon the words of Section 1555, "the county \textit{for which} the court is held." It follows that the judgment of the federal district court was upon rendition a lien throughout the territorial jurisdiction of that court, and of course, the county in which ("for which") it was rendered.

As its advocates admit, this view results in serious inconvenience and occasional hardship in every state in which the state judgment is a lien throughout its jurisdiction without further enrollment.\textsuperscript{100} The concept is drawn from the decisions prior to 1888, and it is submitted that it was just such interpretation of the Process Acts that Congress meant to render unnecessary by the Act of that year.\textsuperscript{101} The doctrine of \textit{Shrew v. Jones} and \textit{Massingill v. Downs} is hard to justify on principle. It represents a judicial determination that the federal courts should not be less powerful than their state rivals, despite Congressional apathy—or, perhaps, despite Congressional intent—and was necessitated by inability to assure registration by state officers where that would seem to be required. The plain import

\textsuperscript{99} The following interpretation of the Act of 1888 is adopted by many title examiners in Missouri, who in a very direct sense have had to wrestle with the implications of \textit{Rhea v. Smith}, not only under the Missouri statutes then before the court but also under the subsequent amendment. And see Note (1936) 1 Mo. L. Rev. 96.

\textsuperscript{100} See Hall, \textit{Work of Wisconsin Legislature (Creditors' Rights)} (1936) 11 Wis. L. Rev. 142.

\textsuperscript{101} The Congressional debate on the Act of 1888 shows very plainly that the condition existing under the doctrine of "Massingill v. Jones" was highly unsatisfactory and that the prime purpose of the bill was to remove the necessity of searching the federal district court records, wherever kept, for liens on land anywhere within the district. The very argument here made—that the state judgment is a lien throughout the jurisdiction of the court rendering it—was there considered, it being the opinion of Mr. Warner of Missouri that the bill as introduced by the committee perpetuated the undesirable condition in adopting that state lien law. Certain amendments were made to meet, so far as was possible, that objection, and the bill was passed upon the assurance of the committee that it embodied the best possible language to preserve conformity \textit{and to avoid the interpretation feared by Mr. Warner}. 19 Cong. Rec. 2359 et seq. (50th Congress, 1st sess. 1888).
of the later statute was to destroy the doctrine whenever its basis of necessity was removed; i.e., whenever the state assumed the same burden of recording federal judgments it did for state judgments. Whether even now the federal government could regulate the state officers in the performance of their duty or punish them for dereliction need not be considered; Congress did not condition its statute upon that power.

This is indeed an artificial construction of the state law said to be adopted. What was said above in regard to the doctrine of Massingill v. Downs is applicable here. The doctrine misreads the intention of the state statutes, supplanting plain geographical terminology (deliberately used to provide recording of judgment liens within the recording units created for every other lien or property interest) with jurisdictional concepts, and disregards the authoritative state court's interpretation of the statute of its own legislature. It is premised upon the illusion that there are well defined territorial limits to the jurisdiction of the state and federal trial courts of record coinciding exactly with county and district respectively, whereas, in most state and in all federal courts, both original and final process run throughout the state,102 and whereas in perhaps the majority of states the circuits or districts embrace several counties and the designation of the court when sitting in a certain county as "the circuit (or district) court for X county" is largely a matter of venue and of organization for administrative purposes. It purports to rationalize both the holding and the dictum of Rhea v. Smith, but in fact is quite opposed to the reasoning of that case, which nowhere intimates that a federal judgment must upon rendition be a lien throughout the district simply because a state judgment is a lien throughout the county of rendition without recording. It is wasteful of time and energy, forcing a search of federal court records wherever they are kept within the district (or state) in regard to every real estate transaction. It is seldom suspected or understood by laymen, who reasonably suppose complete records of title can be found in each county, and who, reasonably or otherwise, are prone to suppose the state statute is binding, on both counts being disastrously lulled into a false sense of security.103

102. In the federal courts, by virtue of Rev. Stat. § 985 (1875), 28 U. S. C. § 838 (1934), as to final process, and Federal Rule of Civil Procedure 4 f., as to original process. It might well be queried, what is the effect of this new rule on the old controversy of Manhattan Company v. Everson (see text, supra, and notes 37 and 41) in cases where the Act of 1888 does not apply.

103. The result of the operation of the doctrine of Massingill v. Downs, embodying the same concept, is well described by Judge Caldwell in Dartmouth Savings Bank v. Bates, 44 Fed. 546, 549 (C. C. D. Kan. 1893), one of the first cases to consider the Act of 1888.
Most proponents of the doctrine argue that these practical objections are not a necessary consequence, that they can be avoided by a requirement of recording state judgments in the county of rendition. But, once adopted at all, there is no logical reason why the terminology of "county" should not be transformed into "jurisdiction" after recording, also. Immediately after recording within the county of rendition, the state judgment is "a lien throughout the jurisdiction of the court." So applied, it would obviously defeat the Act of 1888; not less truly does it contravene the statute in its more limited scope. However, in a very recent case\textsuperscript{104} a federal district court held that a federal judgment rendered in Kansas City gave no lien even upon property in that city until it was recorded with the "clerk of the circuit court for civil causes," a condition of the lien of Missouri state court judgments in cities of over 100,000 population.

\textbf{D. A Proposed Model Statute}

A number of states\textsuperscript{105} condition the lien of state court judgments, even in the county of rendition, upon recording with a county officer unconnected with the state court of primary jurisdiction. The Missouri statute involved in \textit{In re B. P. Lientz Mfg. Co.},\textsuperscript{106} is partly of this type, for there are a number of divisions of the circuit court in the large Missouri cities, and that decision furnishes a guide for the safest possible statute.

1. The recorder of every county within this state is hereby authorized to receive duly authenticated transcripts of all judgments and decrees rendered by courts of record of this state, and by courts of the United States held within this state. It shall be his duty to note upon such transcripts the exact time and date when they were received, and to enter them promptly and uniformly in a judgment book, to be kept for that purpose. He shall also maintain an index to the judgment book, and shall index

\begin{quote}
"This rule resulted in giving suitors in the federal courts a preference over those in the state courts as to the territorial extent of the lien, and worked a hardship on the citizens generally. The mass of people relied confidently on the records in the clerk's office of their county disclosing all judgments that were liens on property in the county. Most people were ignorant of the all-pervading lien of a judgment in a federal court, and they bought and sold lands on the faith of what the county records disclosed. The result was that cases of great hardship occurred. Persons who bought and paid for lands on the faith that records in the county clerk's office showed the condition of the land with reference to judgment liens thereon, afterwards lose their land by reason of the liens of judgments in federal courts held in some other county, and often at a distance of hundreds of miles from the county in which the lands lay."\textsuperscript{107}
\end{quote}

\textsuperscript{104} \textit{In re B. P. Lientz Mfg. Co.}, 32 F. Supp. 233 (W. D. Mo. 1940), noted (1941) 6 Mo. L. Rev. 214.

\textsuperscript{105} Alabama, Arizona, California, Colorado, Connecticut, Louisiana, New Mexico, New York, Oregon, Texas, and West Virginia.

\textsuperscript{106} 32 F. Supp. 233 (W. D. Mo. 1940).
the judgments by the names of every judgment debtor, alphabetized to the first letter of his family name.

2. Judgments and decrees of courts of record of this state, and of courts of the United States rendered within this state, shall be liens upon real estate situated in any county of this state in which a transcript thereof has been filed with the recorder of that county, as above provided. The lien shall be effective from the time the transcript is filed with the recorder.

3. Any bona fide purchaser for value of real estate subject to the lien of a judgment of the courts of this state or of the United States may maintain an action against the recorder of any county for damages suffered because of the delay of said recorder in entering and indexing said judgment.

Several points of this proposed statute deserve discussion. In the first place, the clause of section two which reads, "and of courts of the United States rendered within this state," is superfluous, since states can't regulate federal judgment liens and since the Act of 1888 would operate completely on the clause relative to the state judgments. Nevertheless, it does no harm, and as long as courts talk about "conformity in the creation, extent and operation of the resulting liens upon land as between federal and state court judgments," it is silly to take the risk of an adverse decision.

In the second place, the statute requires recording within the county of rendition. An argument can be made in favor of a lien in that county immediately upon rendition, since, so far as the state courts are concerned, there will be a record of it within the county. But even so to those courts, the record will not be with the other records of title, may be overlooked by laymen, and will cause inconvenience to others. *Rhea v. Smith* squarely and properly held that you can't have a state judgment lien within the county from rendition and still require recording of a federal judgment rendered within the county. Since federal court records are not kept in every county in which federal judgments are rendered, if you do not require recording of state judgments in the county of rendition, you will have federal liens of which there is no record in the county. Recording within the county of rendition also serves to make more plain the essential illogic of the "lien throughout the jurisdiction" argument and is supported by the decision in the *Lienz* case.107

107. It is also squarely supported by the decision of Niemi Bros., Inc. v. Rosenbluh, 147 Misc. 159, 263 N. Y. Supp. 445 (Mun. Ct. N. Y. 1933). The case is of inconclusive authority, however, not only because rendered by a court of inferior jurisdiction, but also because of lack of discussion of the problem.
The county recorder was designated instead of the clerk of the state court to avoid the argument already considered in connection with *Seventeenth Street Land Co. v. Hustead*. Although it requires some little extra trouble on the part of state judgment creditors, it saves a corresponding amount of trouble for title searchers.

Local policy and conditions must affect the form of the statute in any event, but questions of the duration of the lien and methods of revival are so apart from the recording issue that no mention was made of them. For various adaptations of the form here recommended, consider the statutes of Alabama, Arizona, or New York.

It would possibly be more productive of result to suggest modification of the Act of 1888. That involves changing one statute instead of many. The only possibility of a more successful act lies in the suggestion previously made that Congress might require state officers to record federal judgments. No problem of “conformity” or of “equal recording facilities” could arise. On the other hand, that is a debatable question and the *dica* in the cases discussed might be considered judicial authority against the validity of such action. In any event, it is perhaps more politic to let the state superintend and discipline its own officers, and not confuse them with a double allegiance. Re-examination of the problem by the Supreme Court should eliminate much of the uncertainty without any statutory changes, state or federal.