the subject of recent widespread criticism.[26] The critics contend that the present patent system defeats the constitutional purpose "to promote the Progress of Science and useful Arts." They view the "poor inventor" as a myth hiding corporate interests which have, by suppression of patents,[27] patent-pooling, and restrictive licenses, prevented any approximation of the competitive ideal. Perhaps these critics have the ear of the Supreme Court. In a recent infringement suit,[28] Mr. Justice Douglas cited with approval Professor Walton H. Hamilton's *Patents and Free Enterprise*[29] and applied a strict test in the determination of the issue of patentability. The recent vigorous dissent of Mr. Justice Black, in which he was joined by Mr. Justice Douglas, urging that the Court should on its own initiative examine the issue of patentability[30] suggests that the test applied in the instant case may be extended beyond the situations involving tying clauses. If the patent grant is limited by "a public policy adopted by the Constitution and laws of the United States, 'to promote the Progress of Science and useful Arts . . . .,' "[31] many practices which have been condoned may be condemned.[32]

Receivers—Priorities—Debts Due United States Preferred over Wage Claims—[United States].—A Missouri bank was insured by the FHA against losses from loans made in accordance with Title I of the National Housing Act. A corporation obtained

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H.R. 9259, 75th Cong. 3d Sess. (1938); the bill is set forth and discussed in 83 Cong. Rec. 4327 (1938). The final recommendations of the TNEC, that restrictions on price, output, geographical areas, and use should be illegal, and that licensing should be compulsory, have not as yet been presented in a formal bill. TNEC, Final Report and Recommendations 36 (1941).

[26] Hamilton, op. cit. supra note 15; Meyers and Lewis, op. cit. supra note 15; Borkin, Patents and the New Trust Problem, 7 Law & Contemp. Prob. 74 (1940); Feuer, The Patent Privilege and the TNEC Proposals, 14 Temple L.Q. 180 (1940); Schechter, Would Compulsory Licensing of Patents Be Unconstitutional?, 22 Va. L. Rev. 287 (1936); see 83 Cong. Rec. 4327 (1938).

[27] An early case, Hoe v. Knap, 27 Fed. 204 (C.C. Ill. 1886), held that a patentee did not have the right to suppress his patent but that he was "bound either to use the patent himself or allow others to use it on reasonable or equitable terms. . . . ." This view was abandoned in Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288 (C.C.A. 6th 1896), where it was held that the position in Hoe v. Knap was "not supported by reason or authority," and that since the right to suppress includes the "lesser" right of allowing others to use conditionally, a tying clause requiring the licensee to use only supplies furnished by the patentee with the patented machine was valid. Although the Button-Fastener case has been overruled in Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), the proposition that the patentee can suppress has survived. See Carbice Corp. v. American Patents Development Corp., 283 U.S. 27, 31 (1931). The current attacks by the courts upon patent abuses have been directed at the conditions imposed rather than at the original premise that a patentee can suppress his patent.

[28] Cuno Engineering Corp. v. Automatic Devices Corp., 62 S. Ct. 37 (1941).

[29] TNEC Monograph No. 31 (1941).

[30] Exhibit Supply Co. v. Ace Patents Corp., 62 S. Ct. 513 (1942).

[31] Morton Salt Co. v. Suppiger Co., 62 S. Ct. 402, 405 (1942).

[32] It is conceivable that there will be a return to the doctrine of Hoe v. Knap, 27 Fed. 204 (C.C. Ill. 1886), since suppression may be at least as inimical to the public interest as are tying clauses.

such a loan[1] and after default the FHA took an assignment of the note and paid the bank the balance due. Thereafter, upon the petition of a workman seeking back pay from the corporation, a Missouri circuit court found that the corporation was insolvent and appointed a receiver. Against net corporate assets of $678 were filed the wage claims of twelve workmen totalling $900 and the claim of the United States, in behalf of the FHA, for $5,988.88. The wage claimants sought priority under a Missouri statute, while the United States asserted priority under Section 3466 of the Revised Statutes of the United States, which provides that "whenever any person indebted to the United States is insolvent . . . . debts due the United States shall be first satisfied. . . . ."[2] The circuit court found Section 3466 inapplicable; on appeal, the court of appeals held that this section granted the claim of the United States a priority subordinate to that of the wage claimants under the Missouri statute.[3] On writ of certiorari, the United States Supreme Court *held*, that the claim of the United States, in behalf of the FHA, was entitled to priority under Section 3466.[4] Judgment reversed, four justices dissenting. *United States v. Emory*.[5]

[1] In September, 1935, when the loan in the instant case was made, Title I of the National Housing Act provided for the insurance of approved financial institutions ". . . . against losses which they may sustain as a result of loans . . . . for the purpose of financing alterations, repairs, and additions upon improved real property, and the purchase and installation of equipment and machinery upon such real property [if] the loan . . . . is not in excess of $50,000. . . . ." Each lending institution was protected up to 20 per cent of the total of its loans. 48 Stat. 1246 (1934), amended by 49 Stat. 299 (1935), 12 U.S.C.A. § 1703(a), (b) (1936).

[2] After stipulating that in the event of insolvency debts due to the United States shall be first satisfied, § 3466 provides that this priority shall extend to three specified classes of cases, including "cases in which an act of bankruptcy is committed." Rev. Stat. § 3466 (1875), 31 U.S.C.A. § 191 (1927). In the instant case, it was held that the appointment of a receiver for the insolvent corporation constituted an act of bankruptcy which satisfied the requirements of § 3466.

[3] This statute provides that ". . . . when the property of any company, corporation, firm or persons shall be seized upon by any process of any court of this state, or when their business shall be . . . . put into the hands of a receiver or trustee . . . ." the wage claims of workmen shall be first paid in full, if such claims do not exceed $100 for each workman and represent labor performed during the preceding six months. Mo. Stat. Ann. (1939) § 1332. The court of appeals held that there was no conflict between this statute and § 3466, because the priority accorded wage claims over claims of the United States by § 64 of the Bankruptcy Act impliedly modified § 3466 with respect to such claims. Emory v. St. James Distillery, Inc., 143 S.W. (2d) 318 (Mo. App. 1940), noted in 8 Univ. Chi. L. Rev. 600 (1941) and 54 Harv. L. Rev. 706 (1941). This contention was rejected by the Court in the instant case. United States v. Emory, 62 S. Ct. 317, 319–21 (1941).

[4] Priority has been granted FHA claims in Wagner v. McDonald, 96 F. (2d) 273 (C.C.A. 8th 1938), noted in 52 Harv. L. Rev. 320 (1938); Korman v. FHA, 72 App. D.C. 245, 113 F. (2d) 743 (1940); In re Dickson's Estate, 197 Wash. 145, 84 P. (2d) 661 (1938). Priority has been denied FHA claims assigned after the filing of a petition in bankruptcy in United States v. Marxen, 307 U.S. 200 (1939); In re Miller, 105 F. (2d) 926 (C.C.A. 2d 1939); FHA v. Moore, 90 F. (2d) 32 (C.C.A. 9th 1937); In re Wissmeier, 26 F. Supp. 806 (N.Y. 1939); In re Stamford Auto Supply Co., 25 F. Supp. 530 (Tex. 1938); In re Monterey Brewing Co., 24 F. Supp. 463 (Cal. 1938). Priority was granted, although it is uncertain whether the assignment was made before the filing of the petition in bankruptcy, in In re T. N. Wilson, Inc., 24 F. Supp. 651 (N.Y. 1938), noted in 25 Va. L. Rev. 369 (1939); In re Dowell-Willis Chevrolet Co., 23 F. Supp. 236 (Tex. 1938).

[5] 62 S. Ct. 317 (1941).

Since the National Housing Act does not expressly waive priority for claims arising under Title I, such claims would seem, prima facie, entitled to priority under Section 3466. Such priority is not granted a claim of the United States, however, if the priority would be inconsistent with the purposes of the legislation under which the claim arose.[6] Thus, in *United States v. Guaranty Trust Co.*[7] priority was not granted for the collection of a federal loan to a railroad under the Transportation Act of 1920,[8] on the ground that such priority would discourage private investment and thus tend to defeat the purpose of the act, the provision of temporary credit until private capital should become available. Similarly, fear of priority accorded the FHA in the event of a borrower's insolvency would tend to deter the extension of additional credit to the recipients of loans insured by the FHA. As was emphasized by the minority,[9] such a restriction of credit would seem to defeat the purposes of the National Housing Act, which was part of a legislative program intended to relieve unemployment and to stimulate recovery in general.[10] The majority, however, viewed the purpose of the act more narrowly, as limited to the stimulation of recovery in the building trades.[11] But even under this narrower view, the purpose of the act will be defeated by the rule in the instant case to the extent that the retarding of credit resulting from the granting of priority includes credit for building purposes similar to those encouraged by Title I. This result would be especially burdensome to business debtors, who are more likely than individual borrowers to require building loans in excess of the maximum permitted under Title I.

It also seems doubtful whether Congress intended that losses incurred under Title I should be shifted from the Government to creditors of the insolvent borrower. The majority stated that Congress contemplated that such losses should be borne by the Government rather than by the lending institution, but that priority under Section 3466 was nevertheless reserved to minimize such losses.[12] There appears to be no indication from the legislative history of the National Housing Act that Congress considered the applicability of Section 3466. But the apparent reliance upon estimates of losses compiled from the experience of lenders lacking Government priority,[13] as well as the references to losses which would be incurred by the Government as the price of recovery in the building trades,[14] suggest an assumption that these losses would not be shifted to competing creditors. Moreover, the FHA's policy of discouraging the rapid

[6] In Cook County Nat'l Bank v. United States, 107 U.S. 445 (1882), it was held that the United States was not entitled to priority under § 3466 for the collection of a deposit in an insolvent national bank, since the granting of such priority would have been inconsistent with the provisions of the National Banking Act. Priority was also denied a claim of the Director General of Railroads arising during the period of Government operation of the railroads, on the ground that priority would have conflicted with the congressional intent that railroads should not receive preferential legal treatment as a result of federal operation. Mellon v. Michigan Trust Co., 271 U.S. 236 (1926).

[7] 280 U.S. 478 (1930).

[8] 41 Stat. 456–99 (1921), 49 U.S.C.A. §§ 71–80 (1929).

[9] United States v. Emory, 62 S. Ct. 317, 323–25 (1941).

[10] 78 Cong. Rec. 11191 (1934).

[11] United States v. Emory, 62 S. Ct. 317, 321–22 (1941).

[12] Ibid., at 321.

[13] 78 Cong. Rec. 11195, 11981 (1934).

[14] Ibid., at 11981.

assignment of defaulted obligations by lending institutions[15] seems to indicate that the FHA itself did not anticipate priority, since assignments made after the filing of a petition in bankruptcy do not receive priority.[16] If priority had been contemplated, it is reasonable to suppose that FHA regulations would have provided for more rapid assignment, unless it was believed that the increased collection costs resulting from such a policy would exceed the value of the priority obtained.

It is uncertain whether the priority recognized in the instant case extends to claims arising under Title II, which provides for the insurance of mortgage-secured loans which do not exceed a specified percentage of the value of the mortgaged property.[17] The Court has found that no priority was intended in cases of loans made under federal statutes requiring security which must be approved by a Government official.[18] Since Congress itself established the security requirements for loans to be insured under Title II, it seems especially doubtful whether claims arising under this title will receive priority. Moreover, the FHA is required to collect from insured lending institutions a premium which was intended by Congress to be,[19] and which has thus far proved to be,[20] sufficient to meet all losses incurred under Title II.

Taxation—Capital Gains Tax—Realization of Gain on Stock Transferred under Lump Sum Alimony Settlement—[Federal].—A taxpayer's wife sued for a divorce from bed and board and for alimony. Subsequently, she amended her libel and asked for an absolute divorce, which in Pennsylvania cuts off the wife's right to alimony.[1] Before an absolute divorce decree was entered the taxpayer and his wife entered into a contract for full settlement of the wife's claims for maintenance and support. Shortly after the decree was awarded, in accordance with one of the terms of the agreement, the taxpayer transferred to his wife 7,200 shares of stock which had cost the taxpayer $7,574 and had a fair market value of $156,975 at the date of delivery. The Board of Tax Appeals overruled the tax commissioner's assessment of a taxable gain to the taxpayer, declaring that even if a divorce settlement were taxable as "a sale or other disposition of property"[2] it was impossible to satisfy Subsection 111(b) of the Internal

[15] According to FHA regulations, assignments cannot be made by lending institutions to the FHA before sixty days following default, and are not mandatory until seven months after default. Property Improvement Loans Under Title I of the NHA Regulations Effective Feb. 4, 1938, at 28. Moreover, FHA regulations permit collection by the lending institution on an instalment basis, which may delay assignment for several years. Modernization Credit Plan, Bull. No. 1, at 8 (1934).

[16] Cases cited note 4 supra.

[17] 48 Stat. 1247 et seq. (1934), 12 U.S.C.A. §§ 1709 et seq. (Supp. 1941).

[18] Priority was denied a claim of the United States in Cook County Nat'l Bank v. United States, 107 U.S. 445 (1882), in which the Court emphasized that the National Banking Act provided that the Secretary of the Treasury should require pledges of Government securities for deposits of the United States in national banks. Likewise, in United States v. Guaranty Trust Co., 280 U.S. 478 (1930), in which priority was denied a claim of the United States, it appeared that the approval of the ICC was necessary for security offered by railroads seeking loans under Title II of the Transportation Act of 1920.

[19] 78 Cong. Rec. 11195 (1934). [20] 7th Annual Report of the FHA 107, 109 (1941).

[1] Pa. Stat. Ann. (Purdon, 1930) tit. 23, §§ 45–47, construed in Dixon v. Com'r, 109 F. (2d) 984 (C.C.A. 3d 1940).

[2] Revenue Act of 1934, at § 22(e), 48 Stat. 688 (1934), 26 U.S.C.A. § 22(f) (1940).