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COURTS – INTERNAL REVENUE – EXECUTION OF MORTGAGES

The Bank of America was the holder of a deed of trust covering property upon which there was a junior United States tax lien. The Bank foreclosed pursuant to a power of sale contained in the trust deed without giving notice to the United States, and later brought an action[1] to quiet title. The district court held that the United States' lien had been extinguished by the exercise of the power of sale. This decision was reversed by the court of appeals of the 9th circuit. The United States Supreme Court reversed, holding that the statute[2] was not exclusive as to other state procedures and that such a sale effectively extinguished the United States' lien. *Bank of America Nat'l Trust and Savings Assoc. v. United States,* 363 U.S. 237 (1960).

Mortgagees who found (when it became necessary to foreclose their mortgages) that a junior United States' lien had been filed against the property were, for years, confronted with a problem in obtaining clear title.[3] As far back as 1868 the United States was held to be an indispensable party to any action involving property in which it had an interest.[4] Such a suit was therefore against the United States and could not be maintained without its consent.[5] Only if the United States brought suit to enforce its own tax lien pursuant to a statute[6] passed that same year was the mortgagee able to obtain clear title. Again attempting to remedy the situation, Congress later passed a statute authorizing the mortgagee to start proceedings if the government failed to do so.[7] In 1931, Congress further permitted a private mortgagor to make the United States a party to an action in either a federal district court or in a state court.[8]

Meanwhile a substantial amount of litigation, involving the above legislation and the effect of state procedures on federal liens, had created considerable conflict in the federal courts.[9] The principal case, along with *United States v. Brosnan,*[10] finally, questioned whether the statute authorizing state action[11] was exclusive of

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1 Pursuant to 28 U.S.C. § 2410 (1948), as amended ch. 139, 63 Stat. 105 (1949). The pertinent part of the statute for this comment is included in § (a) as follows: "(a) Under the conditions prescribed in this section and § 1444 of Title 28 for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, * * * or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien."

2 28 U.S.C. § 2410 (1948), as amended, ch. 139, 63 Stat. 105 (1949).

3 H.R. Rep. No. 95, 71st Cong., 2d Sess. 1-3 (1931).

4 Siren v. United States, 74 U.S. (7 Wall.) 152 (1868); *accord,* Minnesota v. U.S., 305 U.S. 382 (1939).

5 Siren v. United States, *supra* note 4.

6 Act of July 20, 1868, ch. 186, § 106, 15 Stat. 167. A similar provision now appears in Int. Rev. Code of 1954, § 7403.

7 Int. Rev. Code of 1954, § 7424. This action was to be brought in a district court of the United States.

8 28 U.S.C. § 2410 (1948), as amended, ch. 139, 63 Stat. 105 (1949).

9 See 49 Yale L.J. 1106 (1940).

10 363 U.S. 237 (1960). This case came up to the Supreme Court at the same time as the principal case and will be mentioned briefly later in the comment.

11 28 U.S.C. § 2410 (1948), as amended, ch. 139, 63 Stat. 105 (1949).

other state procedures and, if not, then what was the effect of those procedures.

The type of procedure which was tested in the principal case was a non-judicial power of sale with no requirement for notice to the junior lienors. Cases involving this question usually arose when there had been a private sale pursuant to a power of sale contained in a trust deed and either the new owner brought an action to quiet title[12] or the United States brought an action to enforce its lien against the property which had been sold.[13]

In *Oden v. United States*,[14] the court, after declaring that the junior United States' lien on the property constituted an apparent cloud on the title so long as the lien remained of record, held the United States' lien had been extinguished by the exercise of a private power of sale.[15] However, the decision was somewhat limited by the court's holding that the lien was extinguished only in so far as it affected the title to that particular property.[16] A few years later two district courts in Texas also held that the private power of sale was a valid extinguishment of junior federal liens.[17] The court in *Minnesota Mutual Life Ins. Co. v. United States*,[18] based its decision primarily on the theory that the right of sale and contract was a valuable right which could not be impaired by any subsequent act of the debtor.[19] Since the United States derived its interest in the property from the debtor, it could not have a better right than the debtor.[20] Therefore, since the private sale (not adequate to cover the prior lien) extinguished any equity the debtor had, it likewise extinguished the United States' lien on that property.[21]

This reasoning was rejected by the court of appeals of the 6th circuit in *Metropolitan Life Ins. Co. v. United States*.[22] In that case the action was brought after a private sale had been held by the prior lien holder, in which the court was asked to declare the junior United States' lien extinguished by the private power of sale. It was held that the foreclosure under the power of sale had no effect on the United States' lien and that no suit could be maintained against the United States unless it strictly complied with the terms of the statute under which consent is given.[23] The *Metropolitan* case was criticized because the court did not distinguish between an action asking for a decree that the federal lien had been extinguished and an action asking for a decree of extinguishment.[24] This

12 Trust Co. v. United States, 3 F. Supp. 683 (S.D. Tex. 1933); Minnesota Mut. Life Ins. Co. v. United States, 47 F.2d 942 (N.D. Tex. 1931); Oden v. United States, 33 F.2d 553 (W.D. La. 1929).

13 United States v. Cless, 150 F. Supp. 687 (M.D. Penn. 1957); United States v. Ryan, 124 F. Supp 1 (D. Minn. 1954); United States v. Cox, 119 F. Supp. 147 (N.D. Ga. 1953); United States v. Taft, 44 F. Supp. 564 (S.D. Calif. 1942).

14 33 F.2d 553 (W.D. La. 1929).

15 *Ibid.*

16 *Ibid.*

17 Trust Co. v. United States, *supra* note 13; Minnesota Mut. Life Ins. Co. v. United States, *supra* note 13.

18 47 F.2d 942 (N.D. Tex. 1931).

19 *Id.* at 943.

20 *Id.* at 944.

21 *Supra* note 18.

22 107 F.2d 311 (6th Cir. 1939), *cert. denied*, 310 U.S. 630 (1940).

23 *Id.* at 312.

24 See 49 Yale L.J. 1106 (1940).

distinction was drawn by the court in *United States v. Boyd*,[25] which refused to follow the *Metropolitan* case.[26] The Boyd case was an action brought by the United States to foreclose its tax lien. The court held that a junior federal lien was effectively extinguished by a valid foreclosure in a non-judicial power of sale.[27]

A state judicial sale which did not comply with the statute[28] was sanctioned by the United States Supreme Court.[29] In that case, a sale of mortgaged land arose under a writ of *fieri facias*. Under Pennsylvania law this constituted a judicial sale which had the effect of extinguishing junior liens, even when their holders were not required to be parties to the proceedings. The Court held that such procedure did effectively extinguish the federal lien.[30]

The decisions in the principal case and in the *Brosnan* case appear to be based upon three major factors:

(1) A need for uniformity in tax law is outweighed by the severe dislocation to local property relationships which would result from disregarding state procedures.[31]

(2) The use of the word "may" in the statute[32] indicates a permissive tenor implying that other procedures are permissible.[33]

(3) The granting of a right to bring an action to quiet title indicates that Congress must have recognized the possibility that state procedures might affect federal liens.[34]

Although these decisions appear to be sound, four justices dissented. Consequently, state procedures to foreclose when junior federal liens exist should be used with caution.[35]

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25 246 F.2d 477 (5th Cir.), *cert. denied*, 355 U.S. 889 (1957).

26 *Id.* at 482. The court held that the *Metropolitan* case arose upon the unsound premise that the action was one to extinguish the United States' lien rather than to determine that the tax lien did not exist. It was pointed out that when the *Metropolitan* case was decided, § 2410 of Title 28 did not include actions to clear title. However, other cases such as Minnesota Mut. Life Ins. Co. v. United States, cited at note 18 *supra*, declared that the court being a court of equity could decree what was just, and was not required to decree another sale since it would be a vain and useless thing.

27 United States v. Boyd, *supra* note 25, at 483. In spite of this holding, the *Boyd* case gave effect to the provisions of § 2410(c) and gave the United States one year to redeem.

28 28 U.S.C. § 2410 (1948), as amended, ch. 139, 63 Stat. 105 (1949).

29 United States v. Brosnan, 363 U.S. 237 (1960). This case arose at the same time as the principal case. It should be noted that the lower federal courts had conflicted on this question. This conflict is evidenced by United States v. Cless, 254 F.2d 590 (3rd Cir. 1958), and United States v. Morrison, 247 F.2d 285 (5th Cir. 1957), both respectively holding such judicial sales valid; Remis v. United States, 273 F.2d 293 (1st Cir. 1960), and Metropolitan Life Ins. Co. v. United States, 107 F.2d 311 (6th Cir. 1939), both holding that the procedure as set forth in § 2410 must be strictly complied with.

30 United States v. Brosnan, *supra* note 29.

31 Bank of America Nat'l Trust and Savings Assoc. v. United States, 363 U.S. 237, 252 (1960).

32 Subsection (a) states, "Under the condition prescribed in this section * * * the United States may be named a party in any civil action * * * " (Emphasis added.)

33 Bank of America Nat'l Trust and Savings Assoc. v. United States, *supra* note 31 at 246.

34 *Ibid.*

35 The one-year right of redemption in the government must also be considered because in a later case involving a judicial sale wherein the United States was not a party, the Court held that state law was applicable only so far as it does not conflict with federal law. United States v. John Hancock Mut. Life Ins. Co., 364 U.S. 301 (1960). There the United States was allowed one year to redeem although state law allowed only six months. Even in cases of private sale, earlier courts have given the United States one year to redeem.