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tween foreign ports or otherwise . . . addresses itself to the congress and not to the courts."[12]

RONALD E. OLIVEIRA

Mortgages—Effect of a Nonjudicial Sale Under a Contractual Power on a Junior Federal Tax Lien.—*United States v. Bank of America Trust & Sav. Ass'n.*[1]—The plaintiff was a mortgagee under a deed of trust on certain corporate realty. Subsequent to the execution of the deed of trust the federal government liened the land for unpaid taxes. Upon the corporation's default on the mortgage obligation the property was sold under a power of sale contained in the deed of trust. Plaintiff, the purchaser, brought an action to clear the title of the tax lien pursuant to 28 U.S.C. § 2410 (1958).[2] The action was removed to the United States District Court for the Southern District of California where judgment was entered for the plaintiff. On appeal to the United States Court of Appeals for the Ninth Circuit, reversed. Held: a federal tax lien, even though junior to a mortgage, cannot be extinguished by a nonjudicial foreclosure of the mortgage under a power of sale, since federal statutes provided specific methods for the extinguishment of tax liens,[3] and foreclosure under a power of sale is not among those enumerated. Consequently the court is powerless to clear the title.

The instant case relies heavily on *Metropolitan Life Insurance Co. v. United States*,[4] in which the Court of Appeals for the Sixth Circuit held that once a federal tax lien attached to property it could not be removed except by prescribed statutory methods. Only in such manner can the government be said to have waived its sovereign immunity from suit. Therefore a judicial determination in a proceeding other than those prescribed would have no effect in determining the status of the government's lien when an attempt is being made to remove it.

Opposed to this doctrine is the holding of *United States v. Boyd*,[5] in which the Court of Appeals for the Fifth Circuit determined that the government, as a junior lien-holder, does not have to be made a party in foreclosure proceedings in those situations where state law does not require,

[12] 267 F.2d 170 at 178.

[1] 265 F.2d 862 (9th Cir. 1959), cert. granted 361 U.S. 811 (1959).

[2] "The United States may be named a party in any civil action or suit . . . in any state court having jurisdiction of the subject matter to quiet title, or for the foreclosure of a mortgage or lien upon real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a) (1958).

[3] In addition to 28 U.S.C. § 2410, supra note 1, see also 28 U.S.C. § 7424 (1958) (providing for a judicial proceeding in which the court will adjudicate the validity of all claims and where a valid lien of the government is found to exist, the court may at its discretion decree a resale), and 68A Stat. 781 (1954), as amended, 26 U.S.C. § 6325 (1958) (providing for an administrative hearing to discharge valueless liens).

[4] 107 F.2d 311 (6th Cir. 1939).

[5] 246 F.2d 477 (5th Cir. 1957).

for the extinguishment of a junior lien, that the subordinate lien-holder be brought into the proceedings. If, under state law, the lien could be rendered worthless by foreclosure of a lien senior to it, it should not be necessary for the mortgagee to secure a judicial determination that the junior lien had in fact become worthless.

In a more recent case[6] the question of the waiver of the government's immunity from suit was again raised. The Court of Appeals for the Third Circuit, in opposition to the holding in the case under report, decided that when 28 U.S.C. § 2410 provides that the government "may" be named a party in litigation,[7] "may" is used in the permissive sense, and the government is required as a party only where state law would require a joinder of the junior lien-holders.

The point of pivotal significance in these cases would be the interpretation of the meaning of "rights to property" as used in 26 U.S.C. § 6321 (1958), which creates a lien in favor of the federal government for unpaid taxes on all "property or rights to property" of the delinquent taxpayer. While it has been recognized in all the cases in which the problem has arisen that the state law of the situs will prevail in determining what constitutes "rights to property,"[8] the extent to which the state law has been taken into account has varied. In the present case and in the *Metropolitan* case the application of state law was limited to the determination as to whether a sufficiently attachable interest was present. As pointed out in the dissenting opinion in *Metropolitan* the majority failed to take into account the precise nature of the interest of the mortgagor. The result is that while by state law the res to which the federal lien attached, to wit the interest of the mortgagor in the property, was capable of destruction on exercise of the power of sale, the lien which attached solely to the mortgagor's interest was not. There are, however, cases to the contrary holding that where by state law the mortgagor's interest is extinguished by the foreclosure of the senior lien the junior liens including a junior tax lien are also extinguished even though the government, as junior lien-holder, was not made a party to the foreclosure proceedings.[9]

It would appear then that the diversity of opinion rests largely on the fact that the Sixth and Ninth Circuits hold that once an attachable interest is found and a government lien attaches it cannot be removed except with the government's consent, this consent being granted only when a proceeding is instituted through one of the statutory methods. The Third and Fifth Circuits, however, hold that although a valid lien attached, it attached only to an interest which could be extinguished upon exercise of the contractual power of sale. Therefore when the power is exercised the lien likewise is

[6] United States v. Brosnan, 264 F.2d 762 (3rd Cir. 1959).

[7] See supra note 2.

[8] United States v. Bess, 357 U.S. 51 (1958).

[9] United States v. Brosnan, supra note 6 (recognizing a Pa. judicial sale to which the government was not made a party); Trust Co. of Texas v. United States, 3 F. Supp. 683 (S.D. Tex. 1933) (holding a federal lien extinguished on exercise of a power of sale).

extinguished. Thus there is no need for the government's joinder in the exercise of this power in order that their lien be removed.

The decision in the principle case may lead to at least two undesirable consequences. The court's interpretation of the requirements for clearing title under 28 U.S.C. § 2410 (1958) would seem to nullify its basic purpose. Since the right to bring an action to clear title was a later addition to the statute, the inference would appear to be that Congress sought to facilitate title clearance.[10] However, a holding that a prior judicial determination of the validity of the federal lien is a prerequisite to bringing an action to clear title would tend to be directly opposed to this. The opinion was raised in at least one case that to so require would tend to drive all foreclosures of land subject to a federal lien into the courts.[11] It would not appear likely that such a consequence was intended.

A second possible consequence of this holding would be a diminution of the use of the contractual power of sale and a resulting decrease in its economic value. The basic purpose of the power of sale is to allow the mortgagee to dispose of the property by a nonjudicial sale rather than requiring judicial foreclosure proceedings.[12] However, this advantage is decreased when a federal lien attaches, since the mortgagee then cannot exercise the power effectively without first seeking a judicial determination of the validity of the government's claim. This possibility has been criticized on the ground that it might amount to an impairment of a contract right by a subsequent act of sovereignty.[13]

EDWARD F. HENNESSEY

Mortgages—Pre-emption of State Law by Federal Statute when Government is a Mortgagee.—*John Hancock Mutual Life Ins. Co. v. Hetzel.*[1]—The United States became a second mortgagee under an F.H.A. loan on property of which the Plaintiff was first mortgagee. Plaintiff obtained a foreclosure order at a proceeding in a Kansas District Court at which the United States was made a party. At the foreclosure sale the plaintiff was the sole bidder and bid in for an amount equivalent to its interest. The District Court confirmed the sale and issued an 18 month exclusive redemption certificate to the mortgagor. The United States then commenced an action in the same court pursuant to Title 28 U.S.C. 2410(c)[2] to obtain a

[10] See United States v. Bank of America Trust & Sav. Ass'n, supra note 1, at 869, footnote 3.

[11] United States v. Boyd, supra note 5.

[12] 1 Glenn, Mortgages 607-614 (1943).

[13] United States v. Boyd, supra note 5; Minnesota Mutual Life Ins. Co. v. United States, 47 F.2d 942 (N.D. Tex. 1931).

[1] 185 Kan. 274, 341 P.2d 1002 (1959).

[2] "A judicial sale in such action or suit shall have the same effect respecting the discharge of property from liens and encumbrances held by the United States as may be provided with respect to such matters by local law of the place where the property is situated. Where such a sale of real estate is made to satisfy a lien prior to that of the