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Discharge of Federal Tax Liens in Executory Proceedings

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pledge promptly when the debt is paid or secure other reliable evidence of its payment in order to avoid any confusion at a later date.

The main risk for creditors after *Kaplan* is that they may find themselves holding an enforceable principal obligation but no security. Creditors should insert a stipulation in the pledge agreement that the failure of the debtor to reacknowledge the pledged promissory note within the prescriptive period is a condition of default.

The problems *Kaplan* poses to the security function of pledge may be minimized by such precautions; however, a sound approach to the constant acknowledgment problems would be to decide the issue of prescription on a case-by-case basis.⁶⁰ If a court finds that a pledge no longer has value, either because the pledge is prescribed or because it no longer exists, the constant acknowledgment rule should cease to apply. This approach would insure that the pledge remains a valuable security device, rather than a tool to interrupt prescription permanently.

Maureen Anne Noonan

DISCHARGE OF FEDERAL TAX LIENS IN EXECUTORY PROCEEDINGS

The plaintiff bought certain immovable property from a bank that had, through executory process, sued upon its mortgage and acquired the land at the subsequent sheriff's sale. Inferior federal income tax liens affecting the property were cancelled from the mortgage records by the parish clerk of court when the proceeds of the judicial sale to the bank did not cover the interests of the superior creditors. The Internal Revenue Service subsequently levied upon the property, claiming that, since the United States had not received proper notice of the judicial sale, the liens were still valid; the plaintiff sued, alleging that the federal tax liens had been discharged by the sheriff's sale of the property. The district court *held*: section 7425(b) of the Internal Revenue Code relating to "other sales," which requires written notice to the I.R.S., applies to Louisiana's executory process; because proper notice was not given, the judicial sale did not discharge the federal tax liens. *Myers v. United States*, 483 F. Supp. 1154 (W.D. La. 1980).¹

60. This approach was suggested in 1978-1979 *Term. supra* note 52, at 578.

1. The scope of this note is limited to the issue of whether or not the tax liens were discharged by the judicial sale.

A federal tax lien is created when a person liable to pay a tax fails to do so after demand.² The lien applies to all property of the tax debtor, whether real or personal.³ Although state law defines property and rights to property, federal law determines the federal tax consequences flowing from the state property status.⁴ A tax lien arises at the time assessment is made,⁵ exists until the liability is satisfied or until it becomes unenforceable by the lapse of time,⁶ and may pass with the property into the hands of a third person.⁷ Because the lien is created by federal statute, the existence, extent, duration, priority, and discharge of the lien are matters of federal law, and state law is relevant only to the extent that federal law adopts state provisions.⁸

State requirements for the registration of immovable property transactions⁹ were incorporated into the federal revenue laws as early as 1913,¹⁰ partly to alleviate the harsh effect of cases holding that "secret liens" on property (*i.e.*, liens of which the public lacks actual or constructive notice) were effective against subsequent bona fide purchasers.¹¹ The 1913 law, as codified, protects certain classes of persons from tax liens not filed properly for registry.¹² Even if properly filed, federal tax liens may be subordinate to other security interests; since the development of the "first in time, first

2. I.R.C. § 6321.

3. *Id.*

4. *United States v. Hunt*, 513 F.2d 129, 133 (10th Cir. 1975); *United States v. Sullivan*, 333 F.2d 100, 109 n.20 (3d Cir. 1964).

5. *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 88 (1963).

6. I.R.C. § 6322.

7. *United States v. Cohen*, 271 F. Supp. 709, 717 (S.D. Fla. 1967). See *Michigan v. United States*, 317 U.S. 338, 340 (1943). See generally 84 C.J.S. *Taxation* 593(b) (1954).

8. See *Michigan v. United States*, 317 U.S. 338, 340 (1943); *United States v. Second Nat'l Bank of N. Miami*, 502 F.2d 535, 545 (5th Cir. 1974); *S. D'Antoni, Inc. v. Great Atl. & Pac. Tea Co., Inc.*, 496 F.2d 1378, 1384 (5th Cir. 1974); *United States v. Bluhm*, 414 F.2d 1240, 1243 (7th Cir. 1969). Cf. *In Re Cal-neva Lodge, Inc.*, 186 F. Supp. 187 (D. Nev. 1960) (state statutes cannot frustrate federal tax collection). See generally W. PLUMB, JR. & L. WRIGHT, *FEDERAL TAX LIENS* 46-48 (2d ed. 1967); 35 Am. Jur. 2d *Federal Tax Enforcement* §§ 2 & 6 (1967).

9. I.R.C. § 6323(f). See LA. R.S. 52:51-55 (1950); *S. D'Antoni, Inc. v. Great Atl. & Pac. Tea Co., Inc.*, 496 F.2d 1384 (5th Cir. 1974).

10. Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016.

11. *United States v. Snyder*, 149 U.S. 210 (1893); *United States v. Hodes*, 355 F.2d 746, 749 (2d Cir. 1966); *United States v. Bond*, 279 F.2d 837, 841 (4th Cir. 1960). See *United States v. Lebanon Woolen Mills Corp.*, 241 F. Supp. 393, 396 n.1 (D.N.H. 1964).

12. *United States v. Tex. Eastern Transmission Corp.*, 254 F. Supp. 114, 117 (W.D. La. 1965). Although the federal statute requires indexing in addition to filing in certain cases, in all others the failure of state officials to properly record and index the notice of a tax lien does not affect the validity of the lien against third persons. *Adams v. United States*, 420 F. Supp. 27 (S.D.N.Y. 1976); I.R.C. § 6323(f)(4).

in right" rule by the courts,¹³ the ranking or priority of federal tax liens with the security interests of third persons is determined by the order of filing. Hence, perfected state-created security interests may relegate the Government to the status of a junior lienor.¹⁴

Even if the federal tax lien notices are filed properly before competing security interests are perfected, the lien may be discharged by the Government. The I.R.S. has several procedures by which it can enforce and collect overdue taxes secured by a lien;¹⁵ the I.R.S. also has authority, under certain circumstances, to discharge the lien from property where the interest of the United States is valueless.¹⁶ Whether these federal procedures for the discharge of tax liens are exclusive of state discharge procedures is not specified in the federal statutes.

By a narrow majority the United States Supreme Court in *United States v. Brosnan*¹⁷ ruled that federal procedures for the release or discharge of tax liens did not preempt state provisions governing mortgage foreclosures,¹⁸ which discharged inferior liens, although junior lienors were neither made a party to the proceedings¹⁹ nor received actual notice of them.²⁰ The dissenters to *Brosnan* expressed concern over the potentially adverse impact of the majority opinion upon the federal government fisc.²¹ Declining to apply the doctrine of sovereign immunity,²² however, the Court stated that it was filling a hiatus in the federal statutory scheme and that the result was to be followed "until Congress otherwise determines"²³

Reacting to the obvious hint in *Brosnan*,²⁴ Congress passed the 1966 Federal Tax Lien Act.²⁵ One provision of the Act, codified as I.R.C. § 7425, expressly regulates the discharge of federal tax liens.

13. See *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84 (1963); *S. D'Antoni, Inc. v. Great Atl. & Pac. Tea Co., Inc.*, 496 F.2d 1378 (5th Cir. 1974).

14. See *United States v. Bluhm*, 414 F.2d 1240, 1243 (7th Cir. 1969).

15. See, e.g., I.R.C. § 6331 (levy and distraint); I.R.C. § 6335 (sale of seized property); I.R.C. § 7425(d) (redemption by the United States of property, liens on which were discharged by sale).

16. I.R.C. § 6325(b)(2)(B).

17. 363 U.S. 237 (1960).

18. *Id.* at 252.

19. *Id.* at 250.

20. *Id.* at 239.

21. *Id.* at 261.

22. *Id.* at 250-51.

23. *Id.* at 252. See also *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957).

24. See G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* § 221A, at 436 (2d ed. 1970); W. PLUMB & L. WRIGHT, *supra* note 8, at 232.

25. Pub. L. No. 89-719, 80 Stat. 1125 (1966).

The statute distinguishes between "judicial proceedings,"²⁶ which require joinder of the United States as a party, and "other sales,"²⁷ in which the district director of the I.R.S. must be given written notice

26. I.R.C. § 7425(a). The text provides:

If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title—

(1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced, or

(2) shall have the same effect with respect to the discharge or divestment of such lien of the United States as may be provided with respect to such matters by the local law of the place where such property is situated, if no notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced or if the law makes no provision for such filing.

If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

27. I.R.C. § 7425. The text provides, in part:

(b) Notwithstanding subsection (a) a sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property—

(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c) (1); or

(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if—

(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

(B) the law makes no provision for such filing, or

(C) notice of such sale is given in the manner prescribed in subsection (c)(1).

(c)(1) Notice of sale.—Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.

(2) Consent to sale.—Notwithstanding the notice requirement of subsection (b)(2)(C), a sale described in subsection (b) of property shall discharge or divest such property of the lien or title of the United States if the United States consents to the sale of such property free of such lien or title.

at least twenty-five days prior to the date of sale.²⁸ Failure of the foreclosing creditor to join the Government in a "judicial proceeding" or to give the prescribed notice of an "other sale" results in the lien's remaining undisturbed; it remains attached to and will follow the property into the hands of a third party.²⁹

Notice of the federal tax lien in the instant case was filed *after*

28. Treas. Reg. § 301.7425-3(a) & (d) (Aug. 20, 1976), 41 Fed. Reg. 35180. The text of the regulations provides in part:

Except in the case of the sale of perishable goods described in paragraph (c) of this section, a notice (as described in paragraph (d) of this section) of a non-judicial sale shall be given, in writing by registered or certified mail or by personal service, not less than 25 days prior to the date of sale (determined under the provisions of paragraph (b) of § 301.7425-2), to the district director (marked for the attention of the chief, special procedures staff) for the internal revenue district in which the sale is to be conducted. Thus, under this section, a notice of sale is not effective if it is given to a district director other than the district director for the internal revenue district in which the sale is to be conducted. The provisions of section 7502 (relating to timely mailing treated as timely filing) and 7503 (relating to time for performance of acts where the last day falls on Saturday, Sunday, or legal holiday) apply in the case of notices required to be made under this paragraph.

With respect to a notice of sale described in paragraph (a) or (c) of this section, the notice will be considered adequate if it contains the information described in paragraph (d)(1)(i), (ii), (iii), and (iv) of this section.

(i) The name and address of the person submitting the notice of sale;

(ii) A copy of each Notice of Federal Tax Lien (Form 668) affecting the property to be sold, or the following information as shown on each such Notice of Federal Tax Lien—

- (A) The internal revenue district named thereon,
- (B) The name and address of the taxpayer, and
- (C) The date and place of filing of the notice;

(iii) With respect to the property to be sold, the following information—

(A) A detailed description, including location, of the property affected by the notice (in the case of real property, the street address, city, and State and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title),

(B) The date, time, place, and terms of the proposed sale of the property, and

(C) In the case of a sale of perishable property described in paragraph (c) of this section, a statement of the reasons why the property is believed to be perishable; and

(iv) The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the proceeds.

29. I.R.C. § 7425(b)(1). See *Baum v. United States*, 535 F.2d 1240 (2d Cir. 1975), *aff'g* 74-1 U.S. Tax Cases (C.C.H.) ¶ 9415; *National Cent. Bank v. United States*, 40 A.F.T.R.2d (P-H) 77-5471, 5473 (M.D. Pa. June 8, 1977); *Puls v. United States*, 387 F. Supp. 760 (N.D. Ca. 1974). *Cf.* *A.H. and R.S. Coal Corp. v. United States*, 461 F. Supp. 752, 756-57 (W.D. Pa. 1978) (dictum).

the suit was commenced but more than thirty days before the judicial sale.³⁰ If the executory proceeding were classified by the *Myers* court as a "judicial proceeding," the federal lien would have been discharged. On the other hand, if the court classified the action as an "other sale," the judicial sale would not have discharged the tax lien. The determinative issue before the *Myers* court was the proper classification, within the framework of the 1966 Federal Tax Lien Act, of an action on a mortgage utilizing Louisiana's executory process.³¹

Relying primarily upon an excerpt from the Senate Report on the Act,³² the court construed "judicial proceedings" to mean *plenary* judicial proceedings.³³ Concluding that Louisiana's executory process was "clearly not a *plenary* judicial proceeding,"³⁴ the district court discussed the nature of executory process, describing it as an expedited *in rem* action based upon the debtor's confession of judgment in the security instrument.³⁵ The court placed the foreclosure proceedings within the category covered by section 7425(b) dealing with "other sales," and found that the notice of a tax lien was filed properly by the Government and that the required prior notice to the I.R.S. had not been given; the court concluded that the tax liens were not discharged by the judicial sale.³⁶

The court's basic methodology is sound, although the brief analysis does not provide a sufficiently illuminative exposition of the

30. 483 F. Supp. at 1159-60. An earlier tax lien notice was filed properly before commencement of the foreclosure proceedings and more than 30 days before the judicial sale. Since the United States was not joined as a party to the action, and since the I.R.S. was not given proper notice at least 25 days prior to the judicial sale, the sale did not discharge the first tax lien.

31. *Id.* at 1158.

32. *Id.* at 1158-59; S. REP. NO. 1708, 89th Cong., 2d Sess., reprinted in [1963] 3 U.S. CODE, CONG. & AD. NEWS 3722, 3748-49.

33. 483 F. Supp. at 1159.

34. *Id.* (emphasis in original).

35. *Id.* In concluding that executory procedure is not plenary, the *Myers* decision notes that clerks of court constitutionally may issue the decree. State constitutional and statutory provisions, however, give clerks of court quasi-judicial authority as neutral officers of the state. Clerks of court, like judges, have the discretionary authority and the duty to deny a legally defective request for executory process. In no case does a writ issue by mere praecipe of the seizing creditor. The title of the state official does not control the issue; rather, the inquiry centers on the relationship between the official's role in executory process and the goal of protecting the interest of the Government. Thus the fact that clerks of court may issue the decree is no barrier to the conclusion that an action by executory process may be a "judicial proceeding" within the terms of § 7425(a), at which the United States may appear to protect its interests. See LA. CONST. art. V, 28(A); LA. CODE CIV. P. art. 283(2); Hood Motor Co., Inc. v. Lawrence, 320 So. 2d 117 (La. 1975).

36. 483 F. Supp. at 1159-60.

issue. Proper analysis depends upon examining the federal statute, the nature of Louisiana's executory process, and their relationship. Although it is relevant,³⁷ the legislative history of the 1966 Federal Tax Lien Act is not conclusive as to the question of the legislative intent;³⁸ "reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously."³⁹ The regulations an executive agency with expertise in a particular area issues pursuant to the statute often are given significant interpretive weight,⁴⁰ if they comport with the clear meaning of the statute.⁴¹ The applicable agency regulations construe I.R.C. § 7425(a) as pertaining to "judicial proceedings . . . plenary in nature and [which] proceed on formal pleadings."⁴²

Neither the statute, the regulations, nor the court's opinion defines "plenary judicial proceedings." The definitions of the terms "plenary" and "judicial proceedings" suggest that "plenary judicial proceedings" are a complete and formal hearing or trial on the merits, in which the parties have the opportunity to be heard, and wherein the tribunal proceeds to a determination of law upon proved or conceded facts.⁴³ The proceedings are to be distinguished from a less strict and more informal summary hearing. Furthermore, I.R.C. § 7425(a) describes the consequences of a failure to join as a party the United States "in any civil action or suit described in [28 U.S.C. 2410(a)]." Such an action or suit includes one "to foreclose a mortgage or other lien upon . . . real or personal property on which the United States has or claims a mortgage or other lien." Section 2410 establishes the conditions, tailored to protect governmental interests, under which the United States may be joined in such an action or suit; these conditions provide further guidance as to the meaning of the term "plenary judicial proceeding." The most significant of them are that (1) the United States may be joined as a party; (2) the action is initiated by a complaint or other pleading; (3) pro-

37. S. REP. NO. 1708, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE, CONG. & AD NEWS 3722, 3748: "Where there is a plenary judicial proceeding The bill provides that in a plenary judicial proceeding"

38. See *Muniz v. Hoffman*, 422 U.S. 454, 468 (1975).

39. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977).

40. See *Goldman v. Commissioner of Internal Rev.*, 497 F.2d 382, 383 (6th Cir. 1974); *Redwing Carriers, Inc. v. Tomlinson*, 399 F.2d 652, 656 (5th Cir. 1968).

41. Cf. *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (deference to agency interpretation constrained by the obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history).

42. *Treas. Reg. § 301.7425-1(a)* (Aug. 20, 1976), 41 *Fed. Reg.* 35178 (1976). The text provides that the "judicial proceedings are plenary in nature and proceed on formal pleadings."

43. *BLACK'S LAW DICTIONARY* 762, 1038-39 (5th ed. 1979).

cess is served upon the United States; (4) the Government may appear, answer, plead, or demur; (5) the suit results in a judgment or decree; (6) the United States may intervene if not named as a party, "as if the United States had originally been named a defendant in such action or suit";⁴⁴ and (7) the action must seek judicial sale.⁴⁵

By negative implication I.R.C. § 7425(b), which deals with "other sales," provides additional evidence of the meaning of "judicial proceedings." The statute provides that, with respect to a sale pursuant to an instrument creating a lien on the property or to a confession of judgment on the obligation secured by an instrument creating a lien on the property, prior notice of the sale must be given to the I.R.S. The first sale listed is one made pursuant to a power of sale, a clause commonly found in mortgages giving the mortgagee the power to auction the property at public sale, to convey title to the purchaser, and to satisfy the debt out of the sale proceeds upon the breach by the mortgagor, without court participation.⁴⁶ The confession of judgment is a common-law mortgage foreclosure device authorizing the creditor to enter judgment against the debtor on a conclusory basis.⁴⁷ The characteristics common to these proceedings are the absence of meaningful judicial participation, the lack of opportunity for other creditors to be represented as parties, and the inability of opposing parties to assert effectively their interests. Congress recognized that under *Brosnan* the interests of the United States could not be protected adequately without an opportunity for the Government to be represented at these types of foreclosure sales and therefore treated them differently from "judicial proceedings." The required actual notice performs the same function in "other sales" as does joinder under section 7425(a) and 28 U.S.C. § 2410; notice allows the United States to appear and to take action to preserve its security interest. Thus, Congress probably intended "judicial proceedings" to mean those in which the Government could assert its interests before a neutral state judicial officer in hopes of altering the outcome of the foreclosure proceedings. If so, Louisiana's executory process may be a "judicial proceeding" for that purpose.

Executory process in Louisiana is an *in rem* action derived from

44. I.R.C. § 7424.

45. 28 U.S.C. § 2410(c) (1976).

46. See generally *National Life Ins. Co. v. Silverman*, 454 F.2d 899 (D.C. Cir. 1971); *Maynard v. Sutherland*, 313 F.2d 560 (D.C. Cir. 1962); R. KRATOVIL, *MODERN MORTGAGE LAW & PRACTICE* §§ 502-22 (1972); G. OSBORNE, *supra* note 24, §§ 337-45.

47. *United States v. Brosnan*, 363 U.S. 237, 250 (1960) (Pennsylvania foreclosure proceedings based on debtor's confession of judgment in the mortgage instrument).

continental civil law systems and is unknown to the common law.⁴⁸ It is a procedure "to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment."⁴⁹ The confession of judgment merely authorizes an action *in rem*;⁵⁰ the gravamen of the process is that, since the confession of judgment was made before a notary public and witnesses, the confession of judgment is entitled to at least prima facie judicial recognition. Essentially, executory process commences where an ordinary proceeding ends.

Upon presentation by the seizing creditor of the necessary authentic proof,⁵¹ the existence of which is emphasized heavily in the jurisprudence,⁵² an order directing the issuance of a writ of seizure and sale issues and is carried out in a manner similar to a writ of fieri facias;⁵³ a judicial sale follows the sheriff's seizure of the property.⁵⁴ The debtor may defend his interests by taking a suspensive

48. See *Ross v. Brown Title Corp.*, 356 F. Supp. 595 (E.D. La. 1973), *aff'd*, 412 U.S. 934 (1973); *Hood Motor Co., Inc. v. Lawrence*, 320 So. 2d 111, 112-13 (La. 1975); *Reed v. Meaux*, 292 So. 2d 557, 559 (La. 1974); *Buckner v. Carmack*, 272 So. 2d 326, 329 (La. 1973); *Louisiana Bank & Trust Co. v. Pernici*, 372 So. 2d 788, 791-92 (La. App. 2d Cir. 1979); *Cameron-Brown South, Inc. v. East Glen Oaks, Inc.*, 341 So. 2d 450, 457 (La. App. 1st Cir. 1976); *Mack Trucks, Inc. v. Dixon*, 142 So. 2d 605, 607 (La. App. 4th Cir. 1962). See also *Fleitas v. Richardson*, 147 U.S. 538, 544 (1893) (dictum that executory process is analogous to certain common law procedures). For a thorough analysis of Louisiana's executory process and its history, see McMahon, *The Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 555 (1958).

49. LA. CODE CIV. P. art. 2631.

50. Nathan, *The "In Rem" Mortgage*, 44 TUL. L. REV. 497 (1970).

51. LA. CODE CIV. P. arts. 2635-37. See LA. CIV. CODE art. 2224.

52. See *American Bank & Trust Co. in Monroe v. Carson Homes, Inc.*, 316 So. 2d 732, 734 (La. 1975) ("If the essential authentic evidence is lacking, executory process is unavailable, and the creditor's remedy is by ordinary process"); *Miller, Lyon & Co. v. Cappel*, 36 La. Ann. 264 (1884) ("To justify the order of seizure and sale every muniment of title, and every link of evidence must be in the authentic form. In such a proceeding the judge can entertain no matter in pais"); *American Sec. Bank of Ville Platte v. Deville*, 368 So. 2d 167, 169 (La. App. 3d Cir. 1979) (at the corpus of executory process is the requirement of authentic evidence); *Ford Motor Co. v. Herron*, 234 So. 2d 517, 519 (La. App. 3d Cir. 1970); *American Budget Plan, Inc. v. Small*, 229 So. 2d 190, 192 (La. App. 4th Cir. 1969).

53. LA. CODE CIV. P. arts. 2638, 2721-24.

54. LA. CIV. CODE arts. 2616-25. See *Wetherbee v. Lodwick Lumber Co.*, 194 La. 352, 372, 193 So. 671, 677 (1940); *New Orleans Mut. Ins. Co. v. Ruddock*, 22 La. Ann. 46, 47 (1870). See also *Yazoo & Miss. Valley R.R. Co. v. City of Clarksdale*, 257 U.S. 10, 19 (1921); *Williamson v. Berry*, 49 U.S. (8 How.) 495, 547 (1850); *United States v. Branch Coal Corp.*, 390 F.2d 7, 9 (3d Cir. 1968); *Prudential Ins. Co. of America v. Land Estates*, 90 F.2d 457, 458 (2d Cir. 1937); *In Re Haywood Wagon Co.*, 219 F. 655, 659 (2d Cir. 1914); *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 F. 162, 165 (8th Cir. 1908); *Chew v. Hyman*, 7 F. 7, 14 (1881).

appeal from the order directing issuance of the writ of seizure and sale⁵⁵ or by obtaining an interlocutory injunction arresting the seizure and sale.⁵⁶

Viewed in isolation, executory process would not appear to meet the conditions of a "plenary judicial proceeding." When viewed as a part of the totality of Louisiana's procedural system, however, executory process should be classified as plenary *because non-seizing creditors may participate in the proceedings in order to determine the validity, rank, and amounts of competing claims against the property, and the distribution of the proceeds of the judicial sale.* These creditors may assert their interests voluntarily by intervening⁵⁷ or may be ruled into court via summary process by the seizing creditor.⁵⁸ Intervention may take place at any time before distribution of the proceeds of the judicial sale.⁵⁹ By intervening, the United States does "not thereby admit judicially the validity, nor is . . . [it] estopped from asserting the invalidity, of the claim of the seizing creditor."⁶⁰ But since intervention may not be compelled,⁶¹ the United States may refrain from intervening and assert the continued validity of the tax lien after the judicial sale. Although one court has stated in dictum that when the Government has the opportunity to intervene in a mortgage foreclosure proceeding and does not do so, the Government is estopped from asserting the validity of its lien,⁶² this rationale provides little assurance to title examiners, to seizing creditors, or to subsequent purchasers of the property encumbered with the tax lien.

A seizing creditor may, by a rule to show cause at the time he petitions for executory process, ensure the Government's participa-

55. LA. CODE CIV. P. art. 2642.

56. LA. CODE CIV. P. arts. 2642 & 2751-54.

57. LA. CODE CIV. P. arts. 1092, 1093, 2592 & 2643.

58. *Merrick v. McCausland*, 24 La. Ann. 256 (1872); *Munson v. Risinger*, 114 So. 2d 56, 58-59 (La. App. 1st Cir. 1959). See also *Courshon v. Mauroner-Craddock, Inc.*, 219 So. 2d 254, 257 (La. App. 1st Cir. 1968); *Hibernia Homestead & Sav. Ass'n v. Fletcher*, 181 So. 2d 815 (La. App. 4th Cir. 1966).

59. LA. CODE CIV. P. art. 1092.

60. *Id.*

61. LA. CODE CIV. P. arts. 1092, 2643 & 5053. Cf. *Hibernia Homestead & Savings Ass'n v. Fletcher*, 181 So. 2d 815, 816 (La. App. 4th Cir. 1966) (dictum).

62. *Galesi v. United States*, 406 F. Supp. 623 (D. Vt. 1976), *aff'd per curiam*, 544 F.2d 606 (2d Cir. 1976) (holding when the United States filed a tax lien notice after the commencement of a strict foreclosure mortgage proceeding to which I.R.C. § 7425(a) applied, and the United States was not joined as a party thereto, the judgment order of foreclosure discharged the tax lien.). Cf. *Runkel v. United States*, 527 F.2d 914 (9th Cir. 1975). *But cf.* *Dime Sav. Bank of Brooklyn v. Sherman*, 314 N.Y.S.2d 86, 64 Misc. 2d 457 (1970).

tion in the proceedings. The articles on summary process expressly provide that the "determination of the rank of mortgages, liens, and privileges on property sold judicially, and of the order of distribution of the proceeds thereof," properly may be raised by a rule to show cause.⁶³ Therefore, the seizing creditor may summon into court other creditors, including the United States, to show cause why their interests should not be ranked as inferior to his. Service of a copy of the rule and a hearing on the rule affords other creditors, including the United States, ample opportunity to protect their interests.

All of the characteristics of the type of action contemplated by 28 U.S.C. § 2410 are inherent in this expanded analysis of executory process, for (1) the United States becomes a party defendant in rule; (2) the action is initiated by the petition of the seizing creditor to let executory process issue and to have a copy of the rule served on the defendants in rule; (3) copies of the rule and the order assigning the date and hour of the trial on the rule are served upon the designated representatives of the United States; (4) the Government may answer the rule, assert the validity, priority, and amount of its lien, and also contest the claims of the seizing creditor and other claimants; (5) the action results in a court decree fixing the validity, priority, and amount of the claims and in an order directing issuance of the writ of seizure and sale; (6) the United States may intervene; and (7) the action seeks a judicial sale of the seized property. Since executory process, in conjunction with the interrelated procedural articles on intervention and summary process, can be viewed as a *plenary* judicial proceeding, I.R.C. § 7425(a) should have controlled the issue before the *Myers* court. By the terms of that statute, since the tax lien was not filed at the commencement of the proceedings, the lien should have been discharged by the judicial sale.

An appropriate amendment to the Code of Civil Procedure articles on summary process, expressly providing for the joinder of the United States in executory proceedings where the Government has or claims a tax lien, is desirable to dispel the uncertainty created by the clash of federal and state law in the instant case. Absent such an amendment or persuasive appellate opinion, seizing creditors should satisfy the requirements of both "judicial proceedings" and "other sales." This precaution is necessary, for if executory process is classified as a "judicial proceeding," the written notice required for "other sales" is not sufficient to discharge the tax lien; conversely, if executory process is classified as an "other

63. LA. CODE CIV. P. art. 2592(7).

sale," joinder of the United States is likewise insufficient to discharge the lien. The rule should satisfy the informational requirements of 28 U.S.C. § 2410(b),⁶⁴ and both a copy of the rule and written notice satisfying the "other sales" provisions should be served upon the appropriate representatives of the United States and upon the district director of the I.R.S. of the district in which the property is located, at least twenty-five days before the judicial sale. When time permits and when the interest of the United States is without value, the seizing creditor may obtain and file a "Conditional Commitment to Discharge Certain Property From Federal Tax Lien"; with certain limitations the commitment is conclusive evidence that the federal tax lien has been discharged from the property.⁶⁵

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64. 28 U.S.C. § 2410(b) (1976) provides:

The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

65. W. PLUMB & L. WRIGHT, *supra* note 8, at 41, 43. See I.R.C. § 6325.