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# Public Law: State and Local Taxation

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by a municipality. Its provisions should be called specifically to the attention of lawyers throughout the state.

### ZONING

Two cases challenging the constitutionality of zoning ordinances were decided during the past term. *Sears, Roebuck & Co. v. City of Alexandria*[22] seems to be only an application of settled rules of law to the involved facts of the case. Its noteworthiness is due only to a clear analysis and statement by the Court of Appeal for the Third Circuit of the factors to be considered judicially in determining whether a "spot zoning" ordinance is arbitrary, unreasonable, and capricious.

The second case on the subject does not appear to the writer to warrant detailed consideration.[23]

## STATE AND LOCAL TAXATION

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### PROPERTY TAXES

During the period under consideration, a major portion of the appellate decisions involving matters of state and local taxation was concerned with the determination of rights in and to property sold for delinquent ad valorem taxes, either as a result of a sale to a third person pursuant to the provisions of R. S. 47:2183[1] or by adjudication to the state under R.S. 47:2186.[2] Despite considerable prior jurisprudence developed under these statutory provisions, and under the basic provisions of article X,

22. 155 So. 2d 776 (La. App. 3d Cir. 1963).

23. Garrett v. City of Shreveport, 154 So. 2d 272 (La. App. 2d Cir. 1963) presented a challenge to the constitutionality of a zoning ordinance on the ground that it was arbitrary, unreasonable, and capricious with respect to property restricted to residential use only because of its proximity to property zoned for commercial use.

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1. Sales of immovable property to satisfy ad valorem tax delinquencies are authorized by the provisions of LA. R.S. 47:2180-2229 (1950). They are conducted by the sheriff in his capacity as ex-officio tax collector. Under R.S. 47:2183 a deed of sale is executed in favor of the tax purchaser which conveys title to such purchaser, subject to the right of redemption at any time "for the space of three years beginning the day when the deed is filed for record."

2. If no bid is received "at least equal to the taxes, costs, and interest," the tax collector "shall bid in the property for the State."

section 11, of the Louisiana Constitution[3] tax sales continue to be a fruitful source of litigation. The most recent decisions may do much, through the reiteration of established principles, to reduce such litigation in the future.

It should be observed in passing, that these decisions often appear to reach harsh results, as the First Circuit Court of Appeal itself noted in an earlier case:

> "It is with some regret that we must disagree with the conclusions of our learned brother below, recognizing as we must that our contrary resolution of this legal question forces us to reach a result which does not strike us as being as fair as that which he reached. (For, by the simple payment of $10.98 back in 1939, without taking the slightest step to take possession of the land or to notify the widow of her lapse in the tax payment, the tax purchaser obtains by the result we have reached title to this valuable tract of land, upon which he never paid the taxes and upon which the widow has paid the taxes for herself and the owners — her children — every year from 1920 up to the present, except for those of the year 1938.)"[4]

An equally harsh, but legally proper, result was reached in *McCarthy v. Gonnet*,[5] in which the defendant purchased the lots in question on July 14, 1931, after the assessment roll had been prepared in the name of her vendor. The 1931 taxes were not paid. No notice of the subsequent tax sale was given defendant, contrary to the requirements of R.S. 47:2180,[6] and the property was adjudicated to the state for the delinquent 1931 taxes on December 20, 1932. The same property was adjudicated to the state in 1933 for unpaid 1932 taxes. In this latter instance, however, notice of the sale had been given the defendant, who subsequently redeemed the property, receiving an appropriate redemption certificate. From 1932 on, the defendant paid taxes on the property.

3. These basic provisions prescribe the three-year redemptive period, as well as the five-year peremptive period within which tax sales may be set aside for cause. The statutory provisions supplement the tax collection and enforcement provisions of the constitutional article.

4. Staring v. Grace, 97 So. 2d 669, 671 (La. App. 1st Cir. 1957).

5. 163 So. 2d 840 (La. App. 4th Cir. 1964).

6. Notice of delinquent taxes must be given the "record" or "actual" owner of the property at the time of issuance of notice. No other person than the owner has any interest in being notified of a tax sale. Sanders v. Abbitt, 29 So. 2d 718 (La. App. 2d Cir. 1947).

In 1954, the property was sold by the state (based upon the 1932 adjudication) to the plaintiff and a patent issued. Plaintiff also paid taxes on the property from 1955 to the time of litigation.

When suit was filed by the plaintiff to quiet title, the periods of redemption and peremption established by article X, section 11, of the Louisiana Constitution had long since elapsed. Defendant nonetheless relied on *Ryals v. Todd*[7] to support her contention that failure to give notice to the owner of the property at the time of the sale was such a defect as to nullify the tax sale, and the five-year constitutional peremption did not preclude annulment where defective notice appeared on the face of the record. The court held *Ryals* not to turn on a question of peremption, but that even if *Ryals* was authority for defendant's position, it was well settled by a multitude of subsequent cases "that a tax sale cannot be attacked after the passage of five years from the recordation of the tax deed, even if no notice was given to the owner of the property."

Defendant further contended that her redemption in 1938 of the tax sale which occurred in 1933 divested the state of all title to the property, and thus prevented it from selling the property to the plaintiff in 1954. The court disposed of this argument by pointing out that the 1933 tax sale was made subsequent to the adjudication of 1932. Where property has been adjudicated to the state, "the taxing officers are without power to assess and sell property again." Thus, defendant, despite timely redemption of the property after the second sale and payment of taxes from 1932 on, and despite a defective tax notice which would form the basis for annulment within the peremptive period, was divested of her title. Such a result leads one to feel that the time has come when a review of the constitutional and statutory provisions relative to the enforcement and collection of ad valorem taxes is in order.[8]

7. 165 La. 952, 116 So. 395 (1927). The decision involved similar factual circumstances, and invalidated a tax sale where notice was not given to the record owner. The opinion affirmatively reflects that the period of redemption had elapsed, but is not clear on the period of peremption. In any event, Ryals was in "the actual possession and living on the property at the time of the sale" — sufficient to suspend the peremptive period.

8. When the 1921 Constitution was adopted, ad valorem taxes and the revenues produced by them were the primary source of state and local financing. This is no longer so. In addition, the need for reform in assessment practices and procedures, upon which the tax levy is based, has been recognized for many years.

The plaintiff in *Wainer v. Zor, Inc.*,[9] was more fortunate, having brought suit to annul within the peremptive period. The court held that failure to give notice to the record owner did not satisfy the mandatory requirements of the Constitution and statutes, and the tax sale was "null and void."

In *Bradford v. Patterson*,[10] suit was instituted to annul a tax sale, and, in the alternative, to redeem the property. Plaintiffs contended that their continued possession suspended the running of the redemption period, and they were entitled to redeem the property even though more than three years had elapsed since the tax sale. While continuous corporeal possession will suspend the running of the peremption period, it does not interrupt or suspend the running of the redemptive period. Under these circumstances, plaintiffs were relegated to an attack on the validity of the tax sale, which they could not sustain.

Under article X, section 11, of the Louisiana Constitution, prior payment of the taxes for which the property is sold specifically invalidates the sale and a suit to annul may be instituted at any time, irrespective of the peremption period. This principle was recognized in *Kallenberg v. Klause*,[11] an interesting case only because the property in question had been sold by the tax sale purchaser to the Louisiana Department of Highways. Therefore, when the tax sale was set aside, the department sought a return of the purchase price.

The tax purchaser contended that sale for delinquent taxes is a sale by the State of Louisiana. The department was thus bound by that sale and estopped to claim reimbursement. The court noted that there was a distinction between a sale to a third person at tax sale, and an adjudication to the state. In the first instance, the state is not invested with any title; it possesses only a lien and privilege on the property to secure payment of delinquent taxes, and in the enforcement of its security it may sell the property. In such cases, the interest conveyed is only that of the delinquent taxpayer. On the other

See Fordham & Lob, *Some Plain Talk About the Louisiana General Property Tax*, 4 LA. L. REV. 469 (1942). A commission has been appointed by Governor McKeithen to study the problem. The study should include a review of tax enforcement provisions which compel such a harsh and unfair conclusion as that reached in *McCarthy*.

9. 161 So. 2d 378 (La. App. 4th Cir. 1964).
10. 159 So. 2d 342 (La. App. 2d Cir. 1964).
11. 162 So. 2d 73 (La. App. 4th Cir. 1964).

hand, where property is adjudicated to the state, it becomes invested with title. Since the former situation, not the latter, was here involved, the state acquired no interest in the property and tax purchaser was obligated to return the purchase price to the Department of Highways under the warranty deed in favor of that department.[12]

Another exception, not established by the Constitution but by jurisprudence, which suspends the running of the peremption period, or more correctly forms the basis for setting aside a tax sale after it has run, is that of "no assessment." The decisions recognize that where the property has not been sufficiently described by the assessor to identify it, there is a want of assessment and thus, in fact, no basis for the tax sale.

This particular exception was urged without success in *Choate v. O'Brien*,[13] where certain property was added by supplemental assessment in 1951 under the heading of "unknown owners." The property was then sold for delinquent taxes. Plaintiff sought to set aside the tax sale on several grounds:

1. That the property was not sufficiently described;
2. That even if it was, the tax purchaser was acting for a public official prohibited by R.S. 47:2194 from purchasing at a tax sale;
3. That the supplemental assessment was never approved by the Louisiana Tax Commission.

The court found the description sufficient to sustain the assessment and held that the other objections were mere irregularities cured by passage of the peremptive period.

*State* ex rel. *Wanner v. Fitzgerald*[14] is interesting only because of the little used statutory provision which was there before the court. Under the provisions of R.S. 47:1991 an assessment may be cancelled where an affidavit is executed by the sheriff and assessor showing the assessment to be the result of a clerical error, erroneous or a double assessment, or that the property was in fact exempt from taxation. In this case, plain-

12. The court further recognized the Department of Highways as being a separate legal entity from the state, and presumably not bound by any acts other than those of its own employees.

13. 163 So. 2d 157 (La. App. 4th Cir. 1964).

14. 163 So. 2d 819 (La. App. 4th Cir. 1964).

tiff purchased the property prior to 1949 and thereafter received notice from the Board of Commissioners of the Pontchartrain Levee District to vacate the property by reason of levee construction. Plaintiff alleged that he was informed that it would not be necessary for him to pay further taxes on the property in view of the public use to which it would be put. The property was nevertheless asserted to the relator in 1951, and subsequently sold for delinquent taxes.

Relator, by writ of mandamus, sought to compel the sheriff and the assessor to give approval and verification to the affidavit which he had prepared pursuant to the provisions of R.S. 47:1991, and which these parties had refused to execute. The district judge had granted judgment in relator's favor. The appellate court reversed on purely technical grounds, holding that the "verification and approval of the foregoing facts would involve an exercise of discretion," circumstances under which mandamus is not a proper remedy. While procedurally the appellate court was correct, it is somewhat difficult to appreciate the fairness of the result, if the facts alleged by the relator were true.

## SALES AND USE TAX

In *Central Marine Service v. Collector*,[15] the plaintiff urged new and interesting grounds for avoidance of the sales tax on the rental of tangible personal property, but with no more success than others who have felt that the multiple application of the tax constituted double taxation.

Plaintiff was a Louisiana corporation engaged in the rental of barges for use on the navigable waters of the state. There was no issue concerning the collection of the tax on rentals paid by plaintiff's customers; the litigation arose out of the fact that plaintiff leased the barges which were, in turn, subleased to its customers, and the litigation involved the validity of the rental tax as applied to the original lease.

Although it was urged that "leases for releasing" should be exempt under the sales and use tax statute to the same extent as "sales for resale,"[16] this particular argument had been dis-

15. 162 So. 2d 81 (La. App. 4th Cir. 1964).

16. LA. R.S. 47:301(10) (1950) defines "retail sale" or "sale at retail" so as to exclude sales for resale. In this regard, the Louisiana sales tax was traditionally imposed on the ultimate consumer. However, by La. Acts 1964 (E.S.), No.

posed of in *Gulf Coast Rental Tool Service, Inc. v. Collector*[17] adversely to plaintiff, and this point would have hardly justified the litigation. Plaintiff's primary contention was that a tax on the rental of vessels to be used on the waterways of the State of Louisiana was prohibited by the Enabling Act of February 20, 1811,[18] and the Act of Admission of Louisiana into the Union,[19] both of which made it a condition that "the River Mississippi and the navigable rivers and waters leading into the same and into the Gulf of Mexico, shall be common highways, and forever free . . . without any tax, duty, impost or toll therefore."

The Louisiana Sales and Use Tax Statute is much broader in its tax coverage than similar statutory provisions in other jurisdictions. It includes not only a tax on sales, as defined by the statute, but a tax on the use of tangible personal property, as well as a tax on the lease or rental of such property, and on certain designated services. The tax under consideration was not a "use tax" but was a tax upon a transaction, that is, "the leasing and renting of property when the subject matter of the lease is possessed or used by the lessee in this State." The incidence of the tax was upon the rental, not upon the right to use the barges. Consequently, there was no direct burden upon the use of the navigable waters, and no violation of the prohibitions relied upon by plaintiff.

*Offshore Transp. Corp. v. Continental Oil Co.*[20] likewise involved a consideration of the use tax, although the State of Louisiana was not a party to the proceedings. The tax had previously been paid by the plaintiff, and suit was instituted to recover the amount of the payment under a contract between the parties.

Plaintiff was the owner of two new motor vessels, constructed by a ship yard in Mississippi. Upon completion, the vessels were imported into the State of Louisiana and the use tax was clearly applicable under the provisions of R.S. 47:301-318.

9, the tax was extended to certain sales by wholesalers, manufacturers, and jobbers, who are now required to collect as "advance sales tax" the tax imposed by R.S. 47:301-318, this "advance sales tax" being applicable to the sale of certain commodities such as food, drugs, liquor, and cosmetics and the sale of any tangible personal property to certain designated businesses, such as supermarkets, to name but one.

17. 98 So. 2d 704 (La. App. 1st Cir. 1957).
18. 2 Stat. 641 (1811).
19. 2 Stat. 701 (1812).
20. 158 So. 2d 254 (La. App. 4th Cir. 1963).

The contract between the parties provided that the owner would not be responsible for any use tax "resulting from the operation and use" of the equipment during the period of the charter, and further provided that the vessels were to be delivered to the defendant in Louisiana, with the charter to begin upon delivery. Under these circumstances, the court correctly held that the use tax was incurred upon entry of the vessels into this state and while they were in the hands of plaintiff, and did not result from their operation and use during the charter. In the course of its opinion, the court pointed out that reimbursement could only be permitted where a special agreement imposed all tax liability upon the charterer and this suggestion might be of interest to those attorneys who engage in the preparation of such charter agreements.

## INHERITANCE TAXES

Under the provisions of Civil Code article 916, the surviving spouse enjoys the benefit of a usufruct where the predeceased husband or wife has (1) left issue of the marriage with the survivor and (2) has not disposed, by last will and testament, of his or her share in the community property. Recognizing that the surviving spouse, under these circumstances, acquires the usufruct by operation of law and not by inheritance, the cases have uniformly held that no inheritance tax is due on the value of the usufruct, even where confirmed by will.[21]

In *Succession of Norton*,[22] the wife died intestate, leaving only community property. After the succession was opened, all of the forced heirs renounced. As stated by the court, the only issue for resolution was whether there should be deducted the value of the usufruct from the value of the community interest inherited by the surviving spouse, where the surviving spouse owned the community interest in full ownership by virtue of the renunciation.

The court was of the opinion that by virtue of the renunciation, the surviving spouse *inherited* only a naked interest in the community property, and it was only on this interest that the inheritance tax was due. One Justice dissented, being of the

21. Succession of Schrader, 94 So. 2d 317 (La. App. Orl. Cir. 1957); Succession of Gremillion v. Downs, 165 So. 481 (La. App. 2d Cir. 1936).
22. 157 So. 2d 909 (La. App. 1st Cir. 1963).

opinion that when the heirs renounced, the husband and father was in the same situation as if there had been no children, and he, therefore, inherited the entire community interest on which the tax should be based.

The opinion, of course, recognizes that the surviving spouse should not be in a different tax position by virtue of the renunciation than he would have been without renunciation. Viewed from the moment of death, as would be the case in an estate tax situation, the conclusion reached by the court is proper. However, Louisiana's inheritance tax is determined from the time of acceptance of the succession and to this extent, the logic of the dissenting opinion has merit.