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State Treasurer, Auditor of Public Accounts, Superintendent of Public Education [before] the Judge of the District Court of the Parish in which the capitol of the State is situated"[40]) in cases where that parish is not the domicile of the defendant.

TAXATION

*Charles A. Reynard**

Income Tax

In *W. Horace Williams Company, Incorporated v. Cocreham*[1] the court decided the fifth case that has come before it under the provisions of the fifteen year old state income tax act.[2] In 1931, three years prior to the enactment of the statute, the plaintiff had realized a capital gain in excess of $450,000 from the sale of a portion of its property, accepting bonds secured by a mortgage in payment on the sale. Under the circumstances the plaintiff was permitted, and, in fact, did elect to avail itself of the optional provisions of Section 44(b) of the Internal Revenue Code[3] to report the profit on the transaction on an installment sale basis for federal income tax purposes. Beginning with 1936 and continuously thereafter until 1941 the plaintiff, in reporting its net income for state law purposes, took deductions for federal taxes, pursuant to Section 9 of the state act, including the portions thereof attributable to the profit on the installment sale. In 1941, by apparent inadvertence, the deduction was not taken and thereafter plaintiff filed a claim for a refund. To its very probable chagrin, the claim was not only denied, but led to a re-audit of its prior returns and a determination of deficiency for those earlier years on the theory that the item in question never was properly deductible in computing net income. The collector's action was based upon the ground that while Section 9 specifically authorizes the deduction of taxes in computing net income, nevertheless, Section 10(a)(5), broadly limiting deductions in general, rendered this item non deductible by providing that "no deduction shall in any case be allowed in respect of . . . any amount otherwise allowable as a deduction which is allocable to

40. La. Act 46 of 1940, § 86 [Dart's Stats. (Supp. 1949) § 2862.90].

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1. 214 La. 520, 38 So. (2d) 157 (1948).

2. La. Act 21 of 1934, as amended [Dart's Stats. (Supp. 1949) § 8587.1 et seq.]. The four previous cases are A. Wilbert's Sons Lumber & Shingle Co. v. Collector of Revenue, 196 La. 591, 199 So. 652 (1941); Rathborne v. Collector of Revenue, 196 La. 795, 200 So. 149 (1941); Bentley's Estate v. Director of Revenue, 199 La. 609, 6 So. (2d) 705 (1942); Standard Oil Co. of New Jersey v. Collector of Revenue, 210 La. 428, 27 So. (2d) 268 (1946).

3. 26 U.S.C.A. 44 (b).

income wholly exempt to the taxpayer from taxes imposed by this act."

Plaintiff thereupon instituted these proceedings before the state board of tax appeals contesting the deficiency on three grounds: *First,* that since the constitution[4] authorizes the imposition of taxes upon "net incomes," refusal to allow the deduction of taxes as an item of expense rendered the act unconstitutional; *second,* that the federal tax here involved was not allocable to "income" within the language of Section 10(a) (5) but to capital, seemingly "on the theory that since the income was earned in 1931, the proceeds received from the bonds . . . in subsequent years was capital;"[5] and *third,* that for the provisions of Section 10(a) (5) to be operative, the income to which the sought-to-be-deducted tax is allocable must be income which is *expressly exempted* from taxation by the act, not merely income which is *not taxable* (that is, as here, income which is simply beyond the reach of the statute because the right to it arose before the act's effective date). The collector's determination was affirmed by the board of tax appeals and its decision was affirmed on appeal by both the district court[6] and the supreme court.

The court had little difficulty with the first two grounds advanced by the plaintiff. As to the first it simply said:

> "We see no merit whatever in this proposition. The constitutional provision authorizing the levy of taxes upon net incomes plainly contemplates that the Legislature will have some discretion in defining net income by providing for deductions from gross income which will constitute such income. As long as reasonable and ordinary expenses are allowed as deductions in computing net income, the Legislature does not violate the constitutional provision."[7]

In disposing of plaintiff's second point the court was similarly brief, indicating that but for federal legislative grace the entire amount of the tax attributable to the 1931 transaction would have been due and payable at that time; solely by virtue of Section 44(b) of the federal act was the tax paid in installments and when so paid, it was in fact a tax paid on income, not capital. This is indeed, a realistic characterization of the treatment of the transaction under the federal act; that is, under the provisions

4. Art. X, § 1.
5. 214 La. 520, 527, 38 So. (2d) 157, 159 (1948).
6. For the Parish of Orleans.
7. 214 La. 520, 526, 38 So.(2d) 157, 159.

of Section 44(b), that portion of each year's installment which represents its share of profit on the whole transaction is the precise measure of the tax. Viewed in this light one might be moved to inquire why the state collector did not go further and seek to include that item in the taxpayer's gross income for the years in question. However, there is real doubt that such a claim would succeed. A strikingly similar proposition was once asserted by the federal collector of internal revenue with respect to premiums realized by a corporation on the sale of bonds prior to the effective date of the federal act. Such premiums, in accordance with good accounting practice (and in accordance with the Commissioner's Regulations with respect to transactions actually arising under the federal act),[8] are to be regarded as income which should be prorated or amortized over the life of the bonds. His claim was rejected by the Supreme Court of the United States, however, in *Old Colony Railroad Company v. Commissioner*[9] which in a later case[10] explained that its reason for doing so was "that the premiums, which were received as income ... had become a part of the taxpayer's capital before the Sixteenth Amendment."[11] It was perhaps this case, or at least the theory of it, which prompted plaintiff to advance his second ground. The cases are clearly distinguishable and the court quite properly rejected the argument.

It was to the third of the plaintiff's arguments that the court devoted the greater part of its opinion, finally concluding that the language of Section 10(a) (5) did qualify the broad language of tax-deductibility found in Section 9, making that portion of the federal tax in question non-deductible. To reach this conclusion, the court, of necessity, had to decide that the word "exempt" which appears in Section 10(a) (5) as above quoted, was not to be construed narrowly or in any restricted sense. If the section were to be given application in this case, the word was to be read, along with the balance of the section, to mean that it referred to all income which, for any reason was not taxed by the statute, that is, whether specifically exempt, or merely not within the reach of the statute. This is precisely what the court did, and in doing so noted, first, that the language was "practically identical with Section 24(a) (5) of the Federal Act,"[12] and, second, that the

8. Reg. 111, § 29.22(a)-17(2).
9. 284 U. S. 552, 52 S. Ct. 211, 76 L. Ed. 484 (1932).
10. Helvering v. Union Pacific R. R., 293 U.S. 282, 55 S. Ct. 165, 79 L. Ed. 363 (1934).
11. 293 U. S. 282, 288, 55 S. Ct. 165, 168, 79 L.Ed. 363, 367.
12. 214 La. 520, 528, 38 So.(2d) 157, 159.

cases interpreting and applying the federal provision had reached the same result.[13] A similar reference to the federal acts and the decisions of federal courts arising under them has been made in each of the previous cases arising under the state act, and the federal jurisprudence has similarly been adopted in all but one instance[14] (where the corresponding provisions of the two laws were substantially dissimilar) on the theory that the legislature's enactment of substantially similar laws carries with it the adoption of administrative and judicial interpretations of the federal provisions.[15] The force of precedent thus accorded the federal jurisprudence in the field may help to explain the almost phenomenal dearth of litigation under the state act. One of the federal cases so cited, *Curtis v. Commissioner*,[16] is squarely in point involving a taxpayer who was a notary public in the State of New York who sought to deduct expenses allocable to the earning of income in his official capacity which income at that time was not subject to the federal tax. The tax court denied the deduction saying,

> "The language of section 24(a)(5), including therein the phrase in question, is susceptible of only one sensible interpretation, namely, that a taxpayer is allowed no deduction for expenditures which are allocable to income that is nontaxable for whatever reason."[17]

The decision is sound in every respect and should, of its own force, settle the issue for the future. However, the legislature had assured the result for future cases by amending the act prior to the decision in the case.[18]

13. National Engraving Co. v. Commissioner, 3 T. C. 178 (1944); Curtis v. Commissioner, 3 T.C. 648 (1944); Heffelfinger v. Commissioner, 5 T.C. 985 (1945). Also cited is Lewis v. Commissioner, 47 F. (2d) 32 (C.C.A. 3rd, 1931), which reached the same result prior to the adoption of Section 24(a)(5) of the federal act in construing the Revenue Acts of 1918 and 1921.

14. Rathborne v. Collector of Revenue, 196 La. 795, 200 So. 149 (1941).

15. See, e. g., Standard Oil Co. of New Jersey v. Collector of Revenue, 210 La. 428, 27 So.(2d) 268 (1946), where the court remarked: "Since the provisions of the act were taken verbatim from the Federal Act, it is proper for this Court to examine the Federal authorities interpreting the Federal Act, for it is a well established rule of construction that the adoption of a statute of another state or country includes all of the authoritative interpretations and constructions theretofore placed on such statute." 210 La. 428, 436, 27 So. (2d) 268, 271.

16. 3 T.C. 648 (1944).

17. Id. at 651.

18. La. Act 203 of 1946, § 1, which reads in pertinent part as follows: "Sec. 10(a). In computing net income no deduction shall in any case be allowed in respect of . . .

"(5) Any amount otherwise allowable as a deduction which is allocable to income not subject to the tax imposed by this act, and any amount otherwise allowable as a deduction which is allocable to income which for any reason whatsoever, will not bear the tax imposed by this Act . . . "

Horsepower Tax—An Excise—No Double Taxation When

State v. Triangle Drilling Company, Incorporated[19] was a suit by state taxing authorities to recover from the defendant the amount alleged to be due under the provisions of the "privilege tax of Fifty Cents (50c) per annum for each horsepower of capacity" of machinery used by persons for producing power required in the conduct of their business for the fiscal year ending July 31, 1945, pursuant to Act 25 of 1935 (2 E. S.) as amended by Act 5 of 1935 (4 E. S.).[20] It appeared that the defendant had owned and operated the machinery in question (of 362.08 horsepower) during the months of August, September and October, 1944, but on November 1, 1944, had sold it to another corporation which used it in its business thereafter, paying the tax for the fiscal year in question. Notwithstanding the payment of the tax by the purchaser at the full rate for the year at issue, the taxing authorities asserted liability on the part of the defendant also for the full measure of the tax for the same year and defendant resisted the claim on the ground that such payment would constitute double taxation.

In sustaining the claim of the state over defendant's objection the court alluded to the obvious fact that the tax in question is an excise on the privilege of use, not a property tax, and that it might thus be exacted of as many persons as exercised that privilege during the year, regardless of the fact that each of them may have used the identical machine. Unlike a property tax, the excise involved here is not to be exacted as a result of mere ownership; the owner of such a machine pays no tax if it stands idle throughout the year. But if the machine is put to use—even for one day—the tax liability attaches as an incident to the exercise of that privilege. "Double taxation," said the court, "occurs when one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once."[21] Measured by this test it is clear that no such double contribution was exacted in the instant case. Defendant, which had paid no tax at all, was required to make the single payment required by the act for the privilege it exercised of operating the machine. The exaction of an identical payment from the purchaser for exercising a similar privilege did not work a double contribution to the same burden—the privileges

19. 214 La. 273, 37 So. (2d) 598 (1948).
20. Dart's Stats. (1939) § 8790.
21. 214 La. 273, 278, 37 So.(2d) 598, 599.

taxed, while identical in nature were nonetheless different, since they were exercised by different persons. Thus neither the same person (obviously) nor the same subject of taxation were required to contribute twice.

Tax Sales of Real Property and Adjudication to the State

A group of three cases disposed of in the course of the term involved, in varying aspects, questions touching upon title to real property where a tax sale or adjudication of the property to the state were involved.

In *Meshell v. Bauer*,[22] the plaintiff alleged, and the court found, that he had been in actual, physical possession of the land in dispute over a period of more than thirty years (although he possessed no semblance of record title nor had paid taxes on the property) and on the basis thereof he asked to have his title thereto declared and his possession quieted. It was also shown without dispute that defendant had acquired the land at a tax sale in 1940 when the property had been sold for delinquent taxes owed by a third party who held under a regular claim of title. In 1944, following the expiration of the three-year period of redemption, the defendant's tax deed was quieted and confirmed. On the basis of these undisputed facts the court invoked the provisions of Article X, Section 11, of the Constitution, saying that "a tax deed under such an assessment [to the record owner] is prima facie evidence of a valid sale. It may not be set aside for any cause, except on proof of payment of the taxes for which the property was sold prior to date of the sale,"[23] and noted that the only exception which the courts have ever read into this peremption has been where "the tax debtor or his heirs and/or legal representatives and his or their vendee or vendees held actual physical possession of the property."[24] Since the plaintiff here, while in actual, physical, possession, was not the tax debtor, or in privity with him, the court saw no reason to invoke the exception.

Doll v. Meyer[25] and *Kemper v. Atchafalaya Basin Levee District*[26] were both cases in which land offered at tax sales for delinquent taxes were, for lack of bidders, adjudicated to the state with subsequent entangling consequences. In the *Doll* case

22. 41 So.(2d) 237 (La. 1949).
23. 41 So.(2d) 237, 239.
24. Ibid.
25. 214 La. 444, 38 So.(2d) 69 (1948). See the discussion of this case in the section on "Sale" under the civil code portion of this article, supra p.——.
26. 214 La. 383, 37 So.(2d) 844 (1948).

the land which had been thus acquired by the state in 1934 was sold to the plaintiff at public auction in 1946 and a patent issued. In 1947 the plaintiff, unable to locate the tax debtor in order to purchase whatever interest he or his heirs might have in the property, initiated proceedings under the provision of Act 106 of 1934 to have his title to the property quieted and confirmed. A curator ad hoc was appointed to represent the interests of the tax debtor and his heirs and the case proceeded to judgment in accordance with plaintiff's prayer. Thereafter the plaintiff entered into a written agreement to sell the property to the defendant and when the latter ultimately refused to carry out the contract, alleging defects in plaintiff's title, this suit was instituted to compel specific performance. Relief was denied following the initial hearing in the matter, the court assigning as its reason, that "it does not appear in the agreed statement that Philip Romano [the person in whose name the land had been adjudicated to the state for delinquency] was the proprietor or title owner of the property[27] or that there was no dual assessment thereof,[28] it necessarily follows that we cannot say the title being tendered the defendant is not suggestive of litigation."[29] On rehearing the court affirmed its previous disposition of the case but went further and effectively put it beyond the plaintiff's power to cure the errors previously indicated with respect to the title confirmation proceeding by holding that Act 106 of 1934 (adopted pursuant to the provisions of Article X, Section 11, of the Constitution) may only be invoked to quiet and confirm titles acquired at tax sales as distinguished from purchases of property from the state which in turn had acquired them by adjudication for lack of bidders at a tax sale. The result of the decision seems exceedingly harsh and leaves the plaintiff saddled with property of highly dubious merchantability—a situation from which he seems powerless to extricate himself. Furthermore, the decision may well deter prospective future bidders from purchasing land held by the state at public auction where the state seeks to dispose of such parcels. It is barely possible that some legislative correction for the situation may be forthcoming, but even this avenue is clouded by uncertainty as the opinion of the court on rehearing contains the statement: "We have again reviewed this section of the Constitution and are firmly convinced that it has reference only to

27. This is made a requirement by the statute, La. Act 106 of 1934 [Dart's Stats. (1939) § 8502 et seq.].

28. This is made a basis for attacking the validity of tax sales by La. Const. of 1921, Art. X, § 11.

29. 214 La. 444, 449, 38 So. (2d) 69, 71.

what is properly termed tax sales, i. e., tax sales to persons other than the State."[30] This does not necessarily imply that the legislature is powerless to provide a remedy, but it does pose a problem calling for careful study before any such steps are taken and in the interim attorneys should be alert to advise their clients of the potential hazards in this type of case.

In the *Kemper*[31] case the land in dispute had been adjudicated to the state in 1910 in the name of Thomas Vining for delinquent taxes in 1909. As a matter of fact Vining, who had held the land under a patent from the state issued in 1858, had transferred it to James Todd in 1859. In 1911 the state transferred the land to the defendant levee district by conveyance not contested here, which held record title continuously to the date of these proceedings. In the interim, the following events had occurred in the chronological order in which they are listed: (1) The plaintiffs, heirs of James Todd, had, in 1936, been granted a certificate of redemption for the property by the register of the state land office who acted under authority of Act 161 of 1934 as amended by Act 14 of 1934 (4 E. S.). (2) The court, in 1938, decided the case of *State ex rel. Hodge v. Grace*,[32] in which it was held that the 1934 acts did not authorize the issuance of certificates of redemption in such cases where the state, subsequent to the acquisition of land by adjudication, and prior to the receipt of an application for a certificate of redemption, had transferred the property to a levee district. (3) The legislature in 1940 adopted Act 256 declaring "That all certificates of redemption of property issued by the State Land Office under [the 1934 Acts and others] . . . are hereby ratified, validated and confirmed. . . ."

On the basis of these facts, plaintiffs sought to establish title to the property on the strength of the 1936 certificate of redemption despite the holding of the *Grace* case, contending that the rule of that case had been set aside by the legislature's adoption of Act 256 of 1940. In denying the plaintiff's claim the court stated the controlling issue to be "whether it was the intention of the legislature by enacting Act 256 of 1940 to divest the levee board of its title and to vest title in these appellants,"[33] and resolved that issue in the negative by observing, first, that "our jurisprudence shows that both the judicial and legislative branches of our government have stressed the importance of

30. 214 La. 444, 451, 38 So. (2d) 69, 72.
31. 214 La. 383, 37 So.(2d) 844 (1948).
32. 191 La. 15, 184 So. 527 (1938).
33. 214 La. 383, 388, 37 So.(2d) 844, 845.

carefully dealing with the lands granted by the State to the levee boards under the provisions of the various acts making such grants, so that they were not lightly to be considered as revoked or repealed by the Legislature,"[34] and, second, in the light of such careful dealing, an intent to divest the board of title was not to be lightly inferred particularly since "it would have been a very simple matter for the Legislature to have used appropriate language showing such intention."[35]

III. CIVIL CODE AND RELATED SUBJECTS

SUCCESSIONS AND DONATIONS

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In a contest between a brother and sister, both seeking appointment as administrator of their mother's estate, the supreme court in *Succession of Brown*[1] upheld the trial judge's appointment of the brother, stating that the matter was largely in the discretion of the judge unless abuse was shown. The rule that the term "beneficiary heir" applies to heirs who may accept with benefit of inventory, as well as to those who have thus accepted, was reiterated. Article 1033 of the Revised Civil Code was said to govern the presented situation.

The facts in *Kiper v. Kiper*[2] showed that Mrs. Kiper, widow, died, leaving four children and an interest in a piece of property formerly belonging to the community between herself and her deceased husband. Her husband had left a will in which he donated to her his one-half of the community. This amount was reduced to the disposable portion, one-third of his one-half, thus giving the widow a two-thirds interest in the land. After the mother's death, two of the children sued the other two for partition of the property by licitation, claiming that the four children owned in equal shares. The defendants produced not only the will of their father, but also an unprobated will of the mother in which she left her entire two-thirds interest to the daughter who had cared for her for many years. The words of her testament showed her intention to remunerate the daughter for services, which were proved. The court likened the remunerative donation to a dation en paiement. Plaintiffs maintained that services of a child are

34. Ibid., citing State ex rel. Hodge v. Grace, 191 La. 15, 184 So. 527 (1938).

35. 214 La. 383, 389, 37 So.(2d) 844, 846.

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1. 214 La. 377, 37 So. (2d) 842 (1948).

2. 214 La. 733, 38 So. (2d) 507 (1948).