ASSESSMENT: Assessors should assess all real property if the ownership on June 1st of the year preceeding the collection of taxes.

April 20th, 1939.

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Hon. Henry F. Oelze,
Assessor of St. Charles County,
St. Charles, Missouri.

Dear Sir:

We wish to acknowledge receipt of your inquiry which is as follows:

"The question has arisen in St. Charles County, Missouri, as to whether or not lands in process of condemnation by the United States of America, in connection with the canalization of the Mississippi River, and more particularly by the construction of what is known as Lock and Dam No. 26 in the Mississippi River at Alton, Illinois, because of which certain property along the Mississippi River in St. Charles County, Missouri, which will be inundated, should be assessed for taxation purposes.

The policy of the Federal Government is to acquire the greater portion of this land in fee, taking flowage easements over land where the particular tract is highly developed or contains costly improvements.

The War Department files a petition in the United States District Court, asking for the condemnation of a particular tract of land. On the same day the petition is filed, the District Judge signs an order giving the United States the right to take im-

mediate possession. This is in accordance with Section 594, Title 33, United States Code Annotated. Under authority of this Order, when the dam at Alton was completed, it was placed in operation about July 1, 1938. Most of the suits for the condemnation of land overflowed as a result of the creation of this pool are still pending in the Federal Court. I am told by the District Engineer at St. Louis, Missouri, that, when the amount of compensation to be paid the property owners is finally determined by the court, that 6% interest is allowed the property owner as additional compensation for the taking of his land, from the date the Order of Immediate Possession was filed until the sum of money is deposited into the Registry of the Court. When the money is paid into the Registry of the Court, an Order Vesting Title in the United States is signed by the Federal Judge, and a certified copy thereof filed for record in the Office of the Recorder of Deeds.

Shall I stop assessing the property described in the various petitions (1) On the date the Order of Immediate Possession is entered, or (2) On the date when the dam was placed in operation, towit, on or about July 1, 1938, or (3) Wait until the Order Vesting Title in the United States is filed in the Recorder's Office?

An early reply will be appreciated, inasmuch as I shall soon have to begin preparing the books for the assessments as of June 1, 1939."

It occurs to us as a primary and undisputed principle of law that the Federal Courts will apply the State law in the decision of a case involving the construction of the revenue laws of Missouri, although the case being tried is in the Federal forum, provided the law on such question has been declared by the highest courts of the State.

As far back as 1864 the question was before the Supreme Court of this State as to when the lien attached in favor of the State for taxes, and in the case of Blossom v. Van Court, 34 Mo. 390, this State declared the law to be that the tax lien in favor of the State attached on the first day of February of the year that the assessment was to be made. Van Court deeded certain lands to Blossom by deed dated February 11, 1857. Van Court was owner of said land on the 1st day of February, 1857. The statute on the duty of assessors at that time, the 18th section of the 2nd article of the Act of 1855, provided:

> "Every assessor shall commence on the first day of February in each year, during his continuance in office, and go through all parts of the county * * * in which he is the assessor, and require every person who shall have owned * * * any property on the said first day of Februmay in each year, taxable by law, * * * to deliver him a written list of the same * * * ."

The court, speaking of the above provision, said (page 394):

> "The section above quoted appears to fix definitely that the tax should be assessed against the person who was on the first day of February the owner of the property, thus fixing his liability on that day,

> and charging the property with it as an encumbrance, (although the amount of the encumbrance is not ascertained until afterwards.) The defendant having conveyed the land on the eleventh day of February, was liable for the taxes assessed against the property on the first day of that month."

The court in that opinion states that the state and county taxes constitute a liability of the owner of the property as well as an encumbrance upon the land itself, which could be sold for their non-payment.

The principle and holding of the Supreme Court of this State as declared in the above case was reaffirmed in the case of McLaren v. Sheble, 45 Mo. 130. The facts in the latter case were that the defendant Sheble on the first Monday of September, 1866, owned certain real estate and thereafter in October conveyed the same to the plaintiff. The deed contained the covenant of warranty implied in the words "grant, bargain and sell." The grantee, plaintiff therein, paid the state and county taxes assessed against the property in the name of the defendant for the fiscal year 1866-7, the defendant refusing to do so, and brought this suit to recover from the defendant such payment. No actual assessment of the property for the year 1866 had been made at the date of the conveyance by deed. The assessment, however, was subsequently made in accordance with the statute in the name of the defendant as being the owner on the first Monday of September of that year. The court said, page 131:

> "Did the lien of the tax imposed by virtue of the assessment take effect by relation from that date? That is the only question presented for consideration, and it is substantially determined by the decision in Blossom v. Van Court, 34 Mo. 390. * * * That case decides in effect that the tax lien does relate back to

and take effect from the inception point of the assessment, although the assessment may not be consummated till a later day or month in the year. The language of the court on this point is clear and explicit. The statute under which that decision was made required the assessor to begin hiswork on the first day of February; thepresent statute requires the assessment to date from the first Monday of September.

* * *

"According to the rule laid down in Blossom v. Van Court, the defendant, being the owner and occupier of the premises on the first Monday of September, 1866, was liable for the taxes of the fiscal year beginning at that date, and such taxes consituted a lien upon the property, by relation, from and after the first Monday of September, although not actually levied till the year 1867. The rule is just. Suppose that A., on the first Monday of September in any given year, had $10,000 cash, and returned it as the law requires; and B., on the same day, had $10,000 invested in real estate, and in like manner returned it for taxation. Suppose then, that these parties, on some subsequent day prior to the consummation of the assessment, should exchange property, who should pay the taxes? A. would be compelled to pay the personal taxes assessed on account of the $10,000 cash returned, and, according to the theory of the defendant, also, the taxes assessed on account of the real estate returned by B.--thus paying the taxes of the two for that year, relieving his vendor from all tax payments whatever, in the case supposed. The true and equitable

> rule is for each party to pay the taxes assessed on account of the property owned by them respectively on the initial day of the assessment, in the absence of any stipulation to the contrary.
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> This equitable rule is recognized in Blossom V. Van Court, and that case, as already observed, decides that the tax lien takes effect and becomes an encumbrance from the inception of the assessment."

The statutes of 1865, which were operative when the case of McLaren v. Sheble was decided, provided (Sec. 31, p. 103, General Statutes 1865:

> "The clerk of the county court shall deliver to the assessor on or before the first day of September in every year the assessor's books of the preceding year * * * * and take his receipt therefor, and the assessor, so soon as he shall have completed his assessment and made his assessor's book for the year, shall return the whole of such papers and documents to the clerk."

We have examined the Laws of 1865, Chap. 12, beginning on page 98, and find that it is substantially the same with reference to the assessor's duties as the present law of Missouri, except it has no provision similar to Sections 9746 and 9747, R. S. Mo. 1929, which are noted hereafter.

The above two cases of Blossom v. Van Court and McLaren v. Sheble are approvingly cited by the Supreme Court of Missouri in the case of Stafford v. Fizer, 82 Mo. 393, 397.

In State ex rel. Watson v. Harper, 83 Mo. 670, these two cases are again approvingly cited, and on page 676 the court says:

> "Then again, this lien which attached upon the assessment of the taxes under the law 1867, supra, is retained and preserved by sec. 6832, R. S. 1879, which provides that the 'taxes due and unpaid on any real estate * * * shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained.' It is thus very evident that the law of 1867 provided for, and created a lien for the taxes and the law of 1877 preserved it."

Again in 1912, in the case of Morey Eng. & Const. Co. v. Ice Rink Co., 242 Mo. 241, the Supreme Court of this State approvingly cites the case of Blossom v. Van Court and McLaren v. Sheble, and with reference to said two cases states, page 249:

> "Both cases hold that the lien of the tax takes effect from the initial point of the assessment, and by virtue of the assessment."

Likewise, the Blossom and the McLaren cases are approvingly cited by the Supreme Court of Missouri as late as 1936. See the case of Dennig v. Swift & Co., 339 Mo. 604, 609, 610, where the court says:

> "Blossom v. Van Court and McLaren v. Sheble, as indicated by our previous reference to those cases, turned on the question of when the lien of the tax attached."

It will be noted that under the well defined law as declared by the highest court of this state, it is determined and settled that the lien for taxes attaches to the land and becomes fixed upon the initial date when it becomes the duty of the assessor to begin assessing the property. Section 9756, R. S. 1929, fixes the first day of June as the day he shall begin his work of assessing the property of his county, and under the holding in the McLaren case and the Blossom case, the lien attaches on the first day of June of a given year for the taxes that are payable in the fall of the next year.

In addition to the statutory law under which the Blossom and McLaren cases were decided, there has since then been placed on the statute books of Missouri Section 9746, R. S. Mo. 1929, which provides:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

and Section 9747, which in part provides:

> "Real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the State in all real property for all taxes thereon, which lien shall be enforced as hereinafter provided * * *."

The cases of Bannon v. Burnes, 39 Fed. 892, and United States v. Pierce County, 193 Fed. 529, relied on by the Justice Department of the United States as authority for the conclusion reached in their opinion, were both decisions of the inferior Federal Court. The Bannon case was decided by the Circuit Court for the Western District of Missouri in 1889, which is the same as the District Court at this time.

The case of United States v. Pierce County was decided by the District Court of the State of Washington in 1912. Both of those cases have been disapproved.

The Circuit Court of Appeals for the Second Circuit, in 1931, in the case of United States v. City of Buffalo, 54 Fed. (2d) 471, cited the above two cases, 39 Fed. and 193 Fed., and Judge Hand, writing a separate concurring opinion, said the following, page 474:

> "I agree in the result but for other reasons than my brothers. The question appears to me wholly one of state law, with which the sovereignty of the United States has nothing to do, although of course I agree that no state may tax property of the United States. On the other hand I do not understand it to be disputed that when the United States takes over property, it takes it subject to whatever liens are upon it, tax liens like the rest. If the law of a state were that all taxes should be liens as of March first, the time of the assessment, but might be computed, levied and extended on the rolls before July first, I see no reason why they should not be a lien upon land conveyed to the United States on March second. The act of liquidating and formally imposing the tax would not in my judgment be in defeasance of the sovereignty of the United States. I cannot agree with the contrary ruling in U. S. v. Pierce County (D.C.) 193 F. 529. Bennon v. Burnes (C.C.) 39 F. 892, contains a dictum in accord, but it was altogether unnecessary to the

> result. The levy and extension on the rolls are not adversary proceedings against the United States, like an arrest or seizure of its property; they do no more than fix the amount of a charge already imposed, and the liquidation does not depend upon questions in which the United States is interested except as all other owners of property. They are not directed against it individually, as is a suit, or a condemnation."

This view above expressed by Judge Hand was approved by the United States Circuit Court of Appeals of the 9th District in 1933 in the case of United States v. John K. & Catherine S. Mullen Benev. Corp., 65 Fed. (2d) 48. The court there in a unanimous opinion, after quoting the above quoted portion of the opinion of Judge Hand, said, page 54:

> "While it is conceded in the case at bar that the assessments made by the City of American Falls was void by reason of the fact that the government owns the property subjected to the assessment, we are inclined to agree with the position taken by Circuit Judge L. Hand in his concurring opinion."

The decisions cited in the opinion of the Department of Justice are not authority for the conclusion reached in said opinion because those decisions are overruled in later cases by superior Federal Courts. The Bannon and the Pierce County cases, sup a, overlook the fact that in the construction of state revenue laws the Federal Court will adopt the construction of the highest State Courts as placed on said laws by the State Courts. If authority were desired supporting this latter statement, see Stone v. Southern Illinois & Missouri Bridge Co., 206 U. S. 267, 51 L. Ed. 1057, where the court said:

> "These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the State Supreme Court."

Also, Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. Ed. 327, where the Supreme Court of the United States, speaking of the construction of a state statute said:

> "Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the state court is final on that question."

Likewise, Ughbanks v. Armstrong, 208 U. S. 481, 52 L. Ed. 582, where the Supreme Court said with reference to the construction of a statute defining the Michigan indeterminate sentence and the construction thereof by the Michigan courts, the following:

> "In such a case as this we follow that construction of the Constitution and laws of the state which has been given them by the highest court thereof."

Such a rule has also been applied with reference to treaties. See Re. Ghio, 157 Cal. 552, 108 Pac. 516, 37 L.R.A. (N.S.) 549, 555, where the Supreme Court of California said:

> "The clause of the Argentine treaty relates to legal proceedings for the settlement of estates, and the words used are to be given the meaning they usually have in their respective countries when used in that connection."

If question might be raised as to the liability of the United States for the lien which had attached to real estate at the time the United States became the record owner thereof, the case of Mullen Benev. Corp. v. United States, 40 Fed. (2d) 937, holds that the United States by taking possession of realty impliedly contracts to pay the amount of liens at that time against said property. The court says:

> "Admittedly an action may be maintained against the United States and upon an implied contract. If, under circumstances, where it has taken over for a public purpose, the private property of another, a contractual obligation will be imposed by law on it to compensate for destroying the interests of another, * * *. When the United States, without compensating the plaintiff, a lienholder, took permanent and exclusive possession of the lands and devoted them to reservoir purposes, it destroyed the lien back of the bonds and made it impossible for the plaintiff to collect on its bonds, and when in doing so it was taking private property without just compensation and impliedly contracted with the bondholder and obligated itself to pay the lien upon the property. Otherwise, one who may have a lien interest in land would be deprived of his right to realize upon his lien."

It is noted that your inquiry is based upon the statement that when the money is awarded by the Commissioners as damages for the land is paid into the registry of the court, " an order vesting title in the United States" is made by the Federal Court.

The ownership of the land is your guiding star as to when you should or should not assess real estate for taxation purposes.

The date under the Laws of Missouri that real estate is taxable is June 1st of a given year, the taxes then so assessed being payable in the fall of the following year. If the title to the land in question was on June 1st of a given year vested in the Federal Government, then it would be your duty as assessor to not assess said land. If, on the contrary, on June 1st of a given year the title was not in the Federal Government but was in an individual, then it would be your duty to assess said property, although the taxes were not actually payable until some eighteen months thereafter.

The question of whether the dam was actually in operation has nothing to do with whether you as assessor should assess the property, likewise, the question of whether the order is filed in the Recorder's Office can not be the determining fact.

CONCLUSION

It is our opinion that it is your duty as assessor of St. Charles County to assess for taxation purposes such real estate as on June 1, 1939, located in St. Charles County, if, at that time, the title thereto had not been actually vested in the Federal Government. However, when the title has been vested in the Federal Government, then it is your duty not to assess said real estate as of June 1st, of any year thereafter and this is true regardless of whether the dam for the erection of which the land was condemned, was placed into operation and regardless of

whether the order vesting title is filed in the Recorder's Office of your county.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

HARRY H. KAY
(Acting) Attorney General.

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