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SMITKO v. GULF SOUTH SHRIMP, INC.: ANOTHER THREAD UNRAVELING THE EFFICACY OF SUITS TO QUIET TAX TITLES IN LOUISIANA

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I. Introduction

On July 2, 2012, the Louisiana Supreme Court potentially invalidated thousands of real estate titles in the state of Louisiana through its recent decision in Smitko v. Gulf South Shrimp, Inc. [1] In Smitko, the Louisiana Supreme Court addressed the very narrow procedural issue of whether the prescriptive period, which limits the time in which a tax debtor may attack the validity of a tax sale pursuant to a confirmation suit, applies to a claim asserting that the underlying tax sale was an absolute nullity because of constitutionally deficient notice. Answering this question with a resounding "NO," the Louisiana Supreme Court held that such a claim may be raised at anytime and is not precluded by the time limitations set forth by statute or the Louisiana Constitution. [2] The court reasoned that failure to give sufficient notice in an underlying tax sale is a due process violation that renders a tax sale absolutely null and, thus, precludes the confirmation of the tax sale. [3] In addition to invalidating the preclusive effect of the prescriptive period for annulling tax sales as it relates to claims of an absolute nullity, the decision now calls into question the res judicata effect of a judgment that has confirmed a purportedly absolutely null tax sale and casts a cloud on the efficacy of suits to quiet tax titles. ***398** This decision may potentially have a sweeping effect on the stability and merchantability of tax titles in Louisiana as it now calls into question the efficacy of judgments confirming tax sales and significantly reduces the ability to put at rest the validity of such titles through confirmation suits.

In Part II, this casenote will discuss the process of tax sales and will distinguish between the applicable redemptive, prescriptive, or peremptive periods as laid out by the Louisiana Constitution, statutes, and jurisprudence. This section will also discuss how confirmation suits to quiet title have been historically relied upon by real estate lawyers and practitioners as an effective method to confirm the validity of tax sales. Part III of this casenote will examine the facts and reasoning of the Smitko decision and discuss how the decision now calls into question the efficacy of suits to confirm tax titles. This section will also discuss the development and soundness of the reasoning relied upon in the Smitko decision. Part IV will discuss the alarming effect this decision has already begun to have on Louisiana's jurisprudence by invalidating the preclusive effects of prescriptive periods pursuant to confirmation suits and by calling into question the res judicata effect of final judgments confirming tax titles.

II. History of the Utility of Suits to Quiet Tax Title

A. What is a Tax Sale?

To understand the significance of the legal issues, it is important to understand exactly what a tax sale is. The Louisiana Constitution and Revised Statutes lay out the process by which tax sales of immovable property are to be conducted. [4] Each year, the tax assessor assesses ad valorem taxes for immovable property situated in Louisiana. [5] These taxes are due at the end of each year. [6] Real estate may be sold for nonpayment ***399** of property taxes. [7] Upon the expiration of the year in which taxes are due, the tax collector, without suit, may advertise the sale of the real estate on which the taxes are due after giving

notice to the delinquent tax debtor in the manner required by law.[8] On the day of the sale, a bidder may buy the property for the payment of the taxes.[9] A tax deed issued by a tax collector is prima facie evidence that a valid sale was made,[10] and a person attacking the tax sale has the burden of proving its invalidity.[11]

Prior to 2009, the tax collector was also required to send a written notice to the taxpayer for the amount of taxes due and the manner in which the property may be redeemed each year following the year of the original notice of delinquency.[12] Effective 2009, the statutes were amended to permit the tax sale purchaser to send notice of the sale to the tax sale parties.[13] In 2012, the statute for post-sale notice was again amended and now requires the tax collector to send only one post-sale notice to each interested party within thirty days of the filing of the tax certificate.[14]

1. Redemption Period: To Redeem the Property

Although a tax purchaser may purchase immovable property for the price of delinquent taxes, the original tax debtor still has an opportunity to redeem the property by paying the delinquent taxes owed plus a penalty.[15] The Louisiana Constitution provides that the tax sale is redeemable for three years after the date of recordation of the tax sale.[16] Any person may redeem the tax sale title, but the redemption must be made ***400** in the name of the tax debtor.[17] The three-year redemptive period is regarded as a peremptive period.[18] If this period expires without redemption, the tax debtor no longer has the right to redeem the property sold at the tax sale.[19]

2. Prescriptive Periods: To Annul the Tax Sale

A tax debtor may also institute a proceeding to annul a tax sale on the grounds of an irregularity in the tax sale.[20] The tax debtor enjoys a five-year prescriptive period to annul a tax sale.[21] This is different from the redemptive period, in that the three-year redemptive period provides the tax debtor an opportunity to regain his ownership simply by paying the delinquent taxes, penalties, and interest.[22] The redemptive period is a peremptive period, and if there is no irregularity of the tax sale, the tax debtor's ownership is irrevocably lost.[23] On the other hand, the five-year prescriptive period to annul a tax sale provides the tax debtor an opportunity to attack the validity of a tax sale based on a purported irregularity of the tax sale.[24] Therefore, a suit to annul is different from a redemption because the action is based on an irregularity of the tax sale, rather than a mere claim for redemption of property ownership.[25]

The prescriptive period to annul a tax sale also commences from the date of recordation of the tax sale and runs concurrently with the redemptive period.[26] The action must be brought within five years of the recordation of the tax deed.[27] So, even if the three-year redemptive period has run, a tax debtor still has an additional two years to attack the tax sale on the ground of an irregularity.[28]

*401 3. Prescription Periods Triggered by the Filing of a Suit to Quiet Title

If a tax purchaser commences a confirmation suit to quiet a tax sale within the five-year prescriptive period, the tax debtor has six months to answer the petition.[29] If no proceeding to annul the sale has been instituted within six months from the date of service of a suit to confirm or quiet tax title, a judgment is entered quieting and confirming the tax title.[30] If the suit to confirm tax title is instituted after the five-year period for annulment has elapsed, the delay for an answer by the owner is ten days instead of six months.[31] It is important to note here that it was the six-month prescriptive period triggered by the confirmation

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suit that was the central issue in Smitko. The time limits and effect of judgments obtained pursuant to confirmation suits will be discussed later in greater detail.

4. Grounds Upon Which a Tax Sale May be Annulled

As previously mentioned, even after the redemption period has expired, a tax title is still not generally considered merchantable because the tax debtor may still attack the tax sale for an irregularity, such as payment of taxes or lack of notice. Notably, some Louisiana courts have referred to the five-year period to annul a tax sale as a peremptive period. [32] However, this period to annul should be described as prescriptive because the period can be suspended by the tax debtor's physical possession of the property. [33]

The law currently recognizes specific grounds upon which a tax sale may be attacked. Louisiana statutes provide that a tax sale may be set aside for a payment nullity, a redemption nullity, or for sale to a prohibited buyer. [34] However, even after the five-year prescriptive period for annulling a tax sale has passed, the tax debtor can also annul the sale if he continues to possess the property because continuous possession suspends the running of ***402** this prescriptive period. [35] In Louisiana, peremption periods may not be suspended, thus, it is more accurate to describe the five-year period as a prescriptive period. [36]

B. Confirmation Suits: A Method to Finalize a Tax Deed

Because of the lengthy amount of time and the multiple opportunities a tax debtor has to redeem the property or to challenge the tax sale, purchasing tax deeds via tax sales may be a risky method for the acquisition of property. Therefore, in order to put at rest questions regarding the validity of the tax sale, tax purchasers have used the action to quiet tax title to obtain a judgment recognizing the validity of their tax deed. [37] The action, also referred to as a confirmation suit, is not intended to have the title declared good against the world; however, it is effective in confirming the validity of the tax title. [38] A suit to confirm a tax title may be brought after the three-year redemptive period has expired. [39] The judgment resolves any issues regarding the validity of the underlying tax sale and prevents claims that the sale was irregular from being raised. [40] The confirmation suit has been the equivalent of a “swan song” for a tax debtor as it is generally the last opportunity for the debtor to make an appearance and attack the validity of the tax sale. Prior to the 1983 United States Supreme Court's Mennonite decision, judgments obtained in Louisiana pursuant to confirmation suits were treated as having the effect of res judicata, which precluded subsequent claims attacking the validity of the underlying tax sales. [41] In other words, a judgment confirming a tax deed has been a virtual nail in the coffin preventing the resurrection of a claim that calls into question the validity of the tax sale.

*403 1. Pre-Mennonite: The Efficacy of a Suit to Quiet Tax Title

Generally, a suit to confirm a tax title instituted after the expiration of the redemption period triggers either a six-month or ten-day prescriptive period limiting the time in which the original owner can challenge the validity of the tax sale. [42] Prior to Mennonite, this time period would be the last chance in which the owner could assert any defenses to the validity of the tax sale, including defenses grounded upon the assertion that the tax sale was an absolute nullity. [43] Once the trial judge entered a final judgment confirming tax title, Louisiana courts typically regarded that judgment as having a preclusive effect. [44] This effect would bar owners from later challenging the validity of the tax sale, even if the tax sales were attacked on the grounds that they were absolute nullities. [45]

For example, in a pre-Mennonite decision, Warner v. Garrett, the Louisiana Supreme Court addressed the question of whether a judgment confirming a purportedly absolutely null tax sale should be given res judicata effect that would preclude the relitigation

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of issues affecting the underlying tax sale.[46] The plaintiffs asserted that the property sold at a tax sale was adjudicated to the State of Louisiana at the time of the nonpayment of taxes.[47] Consequently, because of the prior valid adjudication, the property was exempt from taxation and was not subject to the tax sale. The trial court held that the issue of the validity of the tax acquisition and cancellation of the tax sale were issues before the court in the confirmation proceeding.[48] In finding that neither question was raised in the confirmation action, those questions were put to rest between the parties to the confirmation suit and their successors.[49]

In deciding the issue, the Louisiana Supreme Court made an important distinction between a purported nullity of the ***404** underlying tax sale and a purported nullity of the judgment confirming a tax sale.[50] The court addressed the appellants' contention as to the validity of the underlying tax sale as follows:

We find Appellants' primary contention fails to distinguish between the alleged nullity of the tax sale which was adjudicated in the tax sale confirmation proceeding, and the purported nullity of the judgment rendered in said tax confirmation action. We initially point out that, under the posture of this case, at this stage of the proceedings, we are not concerned with plaintiff's title to subject property. The sole issue before us is the alleged nullity of the judgment confirming the tax sale to plaintiff's predecessor in title. It is settled law that an action to confirm a tax title is not intended to declare the tax purchaser's title good against the [world], but serves only the limited purpose of setting at rest the validity of the tax title sought to be validated.[51]

The Louisiana Supreme Court acknowledged the correctness of the appellants' contention that prescription does not apply to an absolutely null judgment.[52] However, the court pointed out that the grounds for declaring a judgment absolutely null are "exclusive."[53] The court reasoned that the circumstances under which a judgment may be attacked as null are limited by statute, and in order to attack a judgment confirming a tax sale, the judgment must be annulled on one of the grounds provided for by the Louisiana Code of Civil Procedure.[54]

The Code of Civil Procedure provides that a judgment may be annulled for vices of form or vices of substance.[55] A judgment containing a vice of form is absolutely null when it was rendered: ***405** 1) against an incompetent person not properly represented; 2) against a defendant who has not been duly served with process and who has not waived objection to jurisdiction or against whom no valid default judgment was taken; or 3) by a court lacking jurisdiction of the subject matter of the action.[56] An absolutely null judgment is one where the defect appears on the face of the proceedings or the court lacks jurisdiction.[57] Louisiana Code of Civil Procedure article 2004 provides the grounds for attacking a judgment for vices of substance.[58] Article 2004 provides that a judgment may be annulled for fraud or ill practice provided the action to annul is brought within one year of discovery of the fraud or ill practice alleged.[59]

In Warner, the Louisiana Supreme Court took the position that in order to annul the judgment confirming the tax sale, it would have to find the judgment contained either a vice of form or a vice of substance as prescribed by the Louisiana Code of Civil Procedure.[60] The court reasoned that the appellants were not alleging that the confirmation judgment was absolutely null on its face or for lack of jurisdiction; thus, in order to invalidate the confirmation judgment, there would need to exist a vice of substance.[61] Because there was no fraud or ill practice alleged, the court upheld the judgment.[62]

Most importantly, the Court discussed the res judicata effect of a confirmation judgment, even as to an underlying tax sale that is an absolute nullity:

Conceding the tax sale to Rausch may have been absolutely null because title to subject property was then in the state, it does not necessarily follow that the judgment confirming the adjudication was an absolute nullity as to the parties thereto... Defects which have been held to render tax sales absolutely null, and therefore incurable by prescription, include prior payment of taxes and ***406** dual assessment; lack of assessment,; inadequate description, and fraud.

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The clear import of the jurisprudence as shown from the above quotation from Fellman v. Kay, and authorities there cited, is that those nullities which are absolute and therefore survive the prescriptive periods applicable in cases of this nature, must be asserted in defense of the action to confirm the tax title... [63]

In deciding Warner, the Louisiana Supreme Court partially relied on the reasoning of the earlier case, Fellman v. Kay. [64] In Fellman, the court explained the purpose and effect of an action to confirm a tax title:

It is plain that, when the tax purchaser avails himself of this proceeding under section 1 of the act, he does not place at issue the validity vel non of his tax title; he simply invites assault thereon; and it is equally clear that if no action to annul be brought within six months, the only judgment that the court is authorized to render is one quieting and confirming the title by rendering a judgment against the former owner, forever barring and prohibiting him from assailing the tax deed, for the sole reason that he has not brought his action to annul within the six months allowed therefor. [65]

In Fellman, the Louisiana Supreme Court acknowledged there are two ways by which a tax debtor may seek to annul the tax sale after receipt of service of a suit to confirm a tax title: by an independent suit to annul or by reconventional demand.

It is quite clear that this suit to annul can be brought by the tax debtor either by an independent suit in that court or some other court of competent jurisdiction, or can be brought by way of ***407** reconventional demand, in which whatever invalidities or nullities there be in the tax title can be set up and prayer for the annulment of the tax deed. [66]

In Ashley Co. v. Bradford, the Louisiana Supreme Court also discussed the effect of the Louisiana constitutional provision providing for confirmation suits:

The constitutional provision under consideration [does] not seek to validate void or voidable tax titles. It does not merely prescribe a time within which a bad title may ripen into a good one. It does not establish a rule of property. Its object and effect is to bar by limitation the owner's remedy, if the time be suffered to elapse without suit. It bars all grounds or causes of action for setting aside the tax title save the two excepted from the operation of the provision. The constitutional provision takes nothing away-neither the right nor the remedy. It merely limits the time within which the original owner must present his claim. It really affirms the existence of a remedy, but limits its operation. The negligent owner is cut off by limitation because he failed to prosecute the remedy limited. [67]

Thus, prior to Mennonite, Louisiana jurisprudence recognized the res judicata effect of judgments confirming tax deeds, even as to claims alleging the underlying tax sale was an absolute nullity. [68] However, with the United States Supreme Court's decision in Mennonite, Louisiana appellate courts elevated tax sales deficient of notice to a due process violation and began to declare that such tax sales were an absolute nullity. [69] Consequently, with the application of the concept of ***408** absolute nullification to constitutionally deficient tax sales, courts began to invalidate the five-year prescriptive period as it applied to claims of insufficient notice. [70] The practice of invalidating prescriptive periods as it applies to tax sales with insufficient notice opened the door for the current state of the jurisprudence, which now calls into question the efficacy of judgments confirming such tax sales.

C. Post-Mennonite: Applying the Doctrine of Absolute Nullity to Tax Sales Seals the Fate for Confirmation Suits

In Mennonite, the United States Supreme Court recognized that the sale of property for non-payment of taxes is a state action that affects a property right protected by the Due Process Clause of the Fourteenth Amendment. [71] The Court reasoned that prior to an action that affected such a protected right, the state must provide notice that is reasonably calculated to apprise the

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interested parties of the pendency of the action and afford them an opportunity to present their objections. [72] The decision had the effect in Louisiana of raising the lack of notice in a tax sale proceeding from a relative nullity to an absolute nullity. [73] Thus, a challenge based on lack of notice was added to the imprescriptible class of absolute nullities that were exempt from prescriptive and peremptive periods.

1. Sutter v. Dane: Setting the Stage for Upstaging Confirmation Suits

In Sutter v. Dane, the Fourth Circuit Court of Appeal set the stage for, or rather up-staged, the efficacy of a confirmation suit. [74] In 1994, a tax purchaser acquired property at a tax sale conducted for unpaid ad valorem taxes. [75] The property was not redeemed and the tax purchaser brought an action to confirm his ***409** tax title, naming the original owner as the defendant. [76] Service of process was effected and a default judgment was rendered in favor of the tax purchaser. [77] No appeal was timely taken of the confirmation judgment. [78] Approximately one year later, after the confirmation judgment had been entered, the original owner brought an action to annul the tax sale. [79] The tax purchaser responded with exceptions of res judicata and prescription. [80] The trial court initially denied the exceptions and, after a trial on the merits, declared the tax sale was an absolute nullity and vacated the previous default judgment confirming the tax sale. [81]

The Fourth Circuit affirmed the trial court's decision, finding that the absence of notice of the tax delinquency and the subsequent tax sale offended the owner's due process rights. [82] Additionally, and most alarmingly, the Fourth Circuit also affirmed the denial of the tax purchaser's exception of res judicata. [83] Finding that the underlying tax sale was an absolute nullity, the court concluded that the judgment confirming the tax sale was also an absolute nullity. [84] The court relied partially on Louisiana Civil Code Article 2030, which provides that a contract that is absolutely null may not be confirmed. [85] In light of the Civil Code article, because the tax sale was absolutely null, the judgment confirming the tax sale was also null. [86] The Fourth Circuit affirmed the judgment of the trial court declaring the tax sale to be null and void despite the confirmation judgment affirming the tax sale. [87]

This decision was considered troubling. [88] For the first time post-Mennonite, a Louisiana appellate court invalidated a confirmation judgment not on the grounds provided by the Code ***410** of Civil Procedure or upon grounds provided by the Louisiana Constitution, but upon jurisprudentially recognized grounds that tax sales deficient of notice were absolutely null. [89] This ruling disregarded the preclusive effects of a final judgment in the State of Louisiana. [90] At the time the decision was rendered, many worried that, if followed, there may be "no effective method of laying to rest the validity of a tax sale since the procedural mechanism for doing so will be emasculated." [91]

This now brings us to Smitko v. Gulf South Shrimp. By adhering to the Fourth Circuit's reasoning in Sutter, the Smitko decision sets an alarming precedent for Louisiana courts to follow. The holding in Smitko goes a step further by not only adhering to the jurisprudence that the five-year prescriptive period does not apply to claims of insufficient notice, but it also invalidates the six-month peremptive period pursuant to confirmation suits as it applies to claims that the underlying tax is absolutely null for want of notice. [92] The decision also affirms that an absolutely null tax sale cannot be confirmed, which appears to contradict prior Louisiana jurisprudence that upheld confirmation judgments, even those that confirmed a purportedly absolutely null tax sale. [93] This concept of "absolute" nullity as it applies to tax sales with deficient notice did not seem to originate from Louisiana statutes, the Louisiana Constitution, or even the United States Supreme Court. Instead, the concept has been a jurisprudentially adopted concept that has come to conflict with Louisiana statutory and constitutional law.

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II. Smitko and Ramifications

A. Smitko: Facts and Procedural History

In understanding the effect of the Smitko decision, it is important to remember to distinguish between the prescriptive periods triggered by the recordation of the original tax deed and the prescriptive periods triggered by a suit to quiet a tax deed obtained through a tax sale. Smitko specifically addresses the ***411** very narrow issue of whether the expiration of the six-month prescriptive period triggered by a suit to quiet a tax deed precludes a challenge brought on the grounds that the tax sale is absolutely null for want of notice. [94]

1. Smitko v. Gulf South Shrimp: Facts

On June 25, 2003, Jerri G. Smitko purchased three tracts of land at a tax sale in Terrebonne Parish. [95] The tax deeds were recorded in the mortgage and conveyance records on July 7, 2003. [96] The previously recorded owner was listed as Gulf South Shrimp, Inc. (GSS). [97] GSS failed to redeem the properties within the three-year redemption period. [98] On November 16, 2006, Smitko filed a petition to quiet tax title naming GSS as defendant. [99] Smitko requested that a curator be appointed to represent GSS or its assigns because the last known registered agent could not be located. [100] Smitko further prayed that "if no proceeding to annul the tax sale was instituted within six months from the date of service of the petition, that judgment be rendered in favor of Smitko, quieting and confirming her title in the property." [101]

The attorney appointed to represent GSS accepted service on December 11, 2006 and, one week later, on December 18, 2006, GSS filed an answer through its own counsel that generally denied Smitko's allegations. [102] GSS also alleged that it never received notice of the tax delinquency and prayed for dismissal of Smitko's petition. [103] Seven months later, on July 10, 2007, Source Business and Industrial Development Company, L.L.C. (Source Bidco), who claimed to be a mortgage holder on the properties at ***412** issue, intervened and united with GSS to resist Smitko's demand to quiet title. [104] Source Bidco claimed that the failure to give notice to "all parties with an interest in the property" constituted a federal due process violation that rendered the tax sale null and void. [105]

On August 10, 2007, Smitko sold and transferred all of her rights and title to Dulac Dat, L.L.C. (Dulac Dat), which was subsequently substituted as the party plaintiff. [106] After being awarded possession of the subject properties, Dulac Dat then filed an opposition to Source Bidco's intervention, asserting exceptions of lack of procedural capacity, no cause or right of action, and no interest to institute the suit. [107] Then, "almost a year-and-a half after GSS attorney ad hoc accepted service of Smitko's petition," GSS filed a supplemental and amending answer and a reconventional demand against Dulac Dat on April 24, 2008. [108] GSS also filed a third party demand against the sheriff. [109] In its amending answer and reconventional demand, "GSS alleged "for the first time that the tax sale was an 'absolute nullity"' due to lack of notice of the tax delinquencies and tax sales. [110] More specifically, GSS asserted that the notices sent were deficient because the sheriff's office sent the notices to an address that was never the mailing address of GSS. [111] GSS further asserted that a judgment creditor and the IRS, who had a recorded lien, also did not receive notice. [112] Dulac Dat answered by filing exceptions of prescription, peremption, no cause of action, and improper cumulation of actions. [113]

GSS then filed a motion for summary judgment claiming the tax sales were nullities. [114] GSS supported its motion with an affidavit of the sheriff who admitted that the only notices ***413** regarding the tax delinquencies and tax sales were sent to an office located on East Airport Avenue in Baton Rouge, Louisiana. [115] An affidavit of one of GSS's stockholders "declared that GSS never maintained an office at the East Airport address nor did GSS ever list the East Airport address as its mailing

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or business address." [116] The affidavit further established that at the time of the tax sales, GSS's registered address was "7332 Grand Caillou Road, Dulac, Louisiana." [117]

The trial court denied GSS's motion for summary judgment "on the grounds that GSS did not timely institute a proceeding to annul the tax sales within six months from the date it was served" as required by Louisiana law. [118] After the trial court's ruling, Dulac Dat filed its own motion for summary judgment seeking an order to quiet the titles to the property. [119] The trial court granted Dulac Dat's motion and granted a judgment in its favor quieting the tax titles. [120]

GSS and Source Bidco timely appealed the judgment and the First Circuit Court of Appeal affirmed the trial court's decision granting a summary judgment to the tax purchaser. [121] The First Circuit addressed the question of whether the six-month prescriptive period triggered by a suit to confirm tax title precluded GSS's constitutional claim of lack of notice. [122] The court also addressed the question of whether a supplemental and amending answer filed a year later constitutes a "proceeding to annul" as required by the Louisiana Constitution and, if so, whether it related back to the GSS's original answer. [123] The First Circuit held that, while a reconventional demand constitutes a "proceeding to annul," the assertion of the claim of nullity as a defense through an answer "was not sufficient to comply with the constitutional and statutory requirement that 'a proceeding to ***414** annul' the sale must be 'instituted' within six months from the date of service." [124] In other words, the First Circuit held that raising the claim of lack of notice as a defense in an answer was insufficient to constitute a ""proceeding to annul." [125] Furthermore, the First Circuit treated the six-month time limit, triggered by the confirmation suit, as a peremptive period that is not affected by the "relation back" doctrine. [126] "The cause of action cannot be resurrected by filing a late supplemental and amending answer." [127] The court held the appellants did not timely attack the tax sale within the six-month peremptive period triggered by a confirmation suit. [128]

2. Smitko: Reasoning of the Louisiana Supreme Court

The Louisiana Supreme Court granted the writ application and reversed the First Circuit's decision. [129] The court did not directly address the question of whether the assertion of lack of notice as a defense was sufficient to constitute a proceeding to annul. Instead, the court agreed with the appellants that lack of notice was fatal to the tax sale proceeding. [130] The court held:

> We do not find the time limitation in La. R.S. 47:2228 precluded Gulf South from seeking to annul tax sales that may have already been fatally defective for want of due process. The cases relied on by Dulac Dat and the court of appeal were decided well before the Supreme Court in 1983 issued its opinion in Mennonite, which elevated that lack of notice in a tax sale to a due process violation rendering the tax sale null and of no effect. [131]

***415** The First Circuit focused on answering the question of whether the tax debtor's assertion of lack of notice as an affirmative defense in an answer was sufficient to "institute proceedings to annul the tax sale." [132] However, the Louisiana Supreme Court left this question unanswered and instead found that the time limitations set forth by the revised statutes did not preclude Gulf South from seeking to annul a tax sale that may have been fatal because of lack of notice. [133] Therefore, the reconventional demand filed almost a year later was timely. [134] The court reasoned that the United States Supreme Court's decision in Mennonite elevated lack of notice in a tax sale to a due process violation that renders a tax sale null and of no effect, and thus, such a violation precludes confirmation of the tax sale. [135] The Louisiana Supreme Court found that GSS had sufficiently established the Sheriff failed to provide the requisite notice and, thus, the tax sales were absolutely null and the reconventional demand was timely asserted. [136]

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This decision is significant because, previously, the time period prescribed for annulling a tax sale after a suit to quiet title had been filed was treated as a peremptive period. [137] In Fellman, the Louisiana Supreme Court held:

[I]f no action to annul be brought within six months, the only judgment that the court is authorized to render is one quieting and confirming the title by rendering a judgment against the former owner forever barring and prohibiting him from assailing the tax deed, for the sole reason that he has not brought his action to annul within the six months allowed therefor. [138]

***416** By applying the doctrine of absolute nullity to tax sales purportedly deficient of notice, Smitko now renders this peremptive period inapplicable against such claims. The Court reasoned that lack of notice renders a tax sale absolutely null. [139] Thus, it is incapable of confirmation and may be invalidated even if a proceeding to annul is not instituted within the statutory timeframe. [140] Later we will also see a tax sale may now be invalidated on such grounds even despite a final judgment confirming the tax sale. [141]

B. Whether the Doctrine of Absolute Nullity Should Apply to Tax Sales?

1. How the Doctrine of Absolute Nullity Has Come to be Applied to Tax Sales

In Mullane v. Central Hanover Bank & Trust Co., the United States Supreme Court held that constructive notice by publication was insufficient to meet the due process requirements of the Fourth Amendment, but instead, actual notice that is reasonably calculated to apprise parties of the pending sale is required. [142] Mennonite further expounded upon Mullane and established that the actual notice requirement extends to any party having a substantial interest in the property when his/her names are reasonably ascertainable. [143] Neither case directly addressed exactly what effect deficient notice has on the underlying tax sale.

The United States Supreme Court made it clear that deficient notice to an interested party in a tax sale proceeding was a constitutional violation offending one of the most ***417** fundamental rights of American citizens: property rights. [144] Still, courts all over the nation were left to interpret how to remedy such a violation. Should the tax sale or state proceeding be completely voided and nullified having no effect? Or should the nullification be limited only to the extent that it affects the property rights of those parties actually injured by the lack of notice?

In Louisiana, prior to the Mullane and Mennonite decisions, there were conflicting interpretations among Louisiana circuit courts on the effect deficient notice had on underlying tax sales. [145] Some circuits adopted the reasoning that lack of notice was a relative nullity that was curable by statutory, prescriptive, and peremptive periods. [146] On the other hand, later Third Circuit cases adopted the alarming approach that the constitutional violation rendered the proceeding absolutely null and, thus, placed the claims for such a violation in an imprescriptible class. [147] The First and Fifth Circuits adopted the Third Circuit's approach in adhering to the reasoning that failure to give notice to a record owner rendered the tax sale a nullity that is not cured by the five-year prescriptive period. [148]

In 2006, the Louisiana Supreme Court answered the question of whether each of multiple co-owners is entitled to written notice in Lewis v. Succession of Johnson. [149] In Lewis, the Louisiana Supreme Court ultimately found that all attempted ***418** means of notice were deficient and, therefore, rendered the tax sales null and void as to all the co-owners. [150] The court, however, did not reach the question of whether lack of notice to one co-owner renders the tax sale void in its entirety as to all co-owners. [151] Still, in nullifying the tax sale to the extent of the interests of co-owners who did not receive the requisite notice, Lewis laid the framework for answering the question raised in the following case.

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In 2010, the Louisiana Supreme Court again confirmed the application of the doctrine of absolute nullity to constitutionally deficient tax sales in C & C Energy, L.L.C. v. Cody Investments, L.L.C. [152] The question that was not reached in Lewis was affirmatively answered in C & C Energy. The court held that the failure to provide the requisite notice of the tax sale to each co-owner rendered the tax sale null and void in its entirety with regard to all co-owners, including the co-owner who received notice of the tax sale. [153] Therefore, in C & C Energy, the Louisiana Supreme Court formally adopted and confirmed the reasoning that deficient notice of the pending tax sale renders the proceeding absolutely null. [154] This confirmation of the application of the doctrine of absolute nullity to tax sales laid the foundation for the holding in Smitko, which further declared that such a claim of absolute nullity resulting from lack of notice is not susceptible to statutory prescriptive and peremptive periods, ***419** even as to the historically peremptive six-month period triggered by a confirmation suit. [155]

But is such a harsh remedy necessary? Does the United States Constitution or the United States Supreme Court decisions of Mullane and Mennonite even mandate such a remedy? Does Louisiana statutory law provide for such a remedy? The next few sections will explore whether a concept like absolute nullity is required or necessary to remedy such an offensive constitutional violation.

2. Absolute Nullification is not a Federally Mandated Remedy: The Misinterpretation of Mullane and Mennonite

In 1987, and in one of the earliest cases post-Mennonite, a Louisiana Supreme Court decision provided one approach to addressing the effect deficient notice had on a state proceeding selling property. In Magee v. Amiss, community property was sold at a sheriff's sale to satisfy a judgment against the husband. [156] The property was recorded in both the husband and wife's name, and the Act of Sale recited that the purchaser was married to and living with the plaintiff at the time of the sale. [157] Only the husband received notice of the sale, and the property was sold without the wife receiving notice. [158] The wife filed suit to nullify the sheriff's sale to the extent it sold her half interest in the property, claiming that she had been denied due process under the state and federal constitutions. [159] The trial court granted summary judgment against the wife and in favor of the defendants, and the First Circuit Court of Appeal affirmed the trial court's decision. [160]

The Louisiana Supreme Court reversed, finding that it was apparent from the property records that the wife, as a co-owner, had a substantial interest in the property, and thus, she was entitled to actual notice of the pending sheriff's sale. [161] ***420** Consequently, the purchasers at the sheriff's sale acquired only the undivided one-half interest in the property owned by the husband. [162] The sheriff's sale was invalid only to the extent that it sold the wife's interest in the property. [163] Notably, the Louisiana Supreme Court did not adopt the position that the entire sheriff's sale was completely null and void and having no effect. [164] The court recognized the sheriff's sale was still valid to the extent it sold the husband's half-interest, who had received actual notice. [165]

In 1988, the Third Circuit Court of Appeal was one of the earlier Louisiana appellate courts to interpret the effect of lack of notice on tax sales in light of the Mennonite decision. In Murphy v. Estate of Sam, a purchaser at a tax sale brought suit to quiet tax title to a lot located within the city of Opelousas. [166] The district court held, and the court of appeal affirmed, that the failure of the city to attempt to notify the record owners of the tax delinquency and pending tax sale rendered the tax sale null and void, despite the expiration of the peremptive period. [167] Recognizing that the Mennonite decision led to conflicting holdings in Louisiana courts as to the effect of the failure to give notice in tax sale cases, the Third Circuit adopted the reasoning that such a constitutional violation renders the tax sale null and void. [168] In answering the question of whether the Louisiana constitutional peremptive period was applicable, the court further reasoned that the peremptive period limiting an injured owner's ability to assert such a claim was also a due process violation. The court held:

To the extent that our holding in this case may conflict with prior jurisprudential interpretations of the peremptive period provided by La. Const. Art. 7, § 25(C) it is clear, at least with respect to the peculiar facts and circumstances of this case, ***421**

that such jurisprudence offends and does not comport with the due process requirements of the 14th Amendment to the U.S. Constitution as set forth by the U.S. Supreme Court in Mennonite Board of Missions v. Adams, supra. We must, therefore, defer to the mandate of the U.S. Constitution as interpreted by the U.S. Supreme Court. [169]

Judge Knoll's dissenting opinion probably adopts the more correct approach that the peremptive period limiting the time in which to assert a constitutional violation does not necessarily violate due process requirements. The judge's dissent stated:

Even though the lack of notice is undisputed, I find that the five year peremption provided by LSA-Const. Art. 7, Section 25(C) cured any irregularity in that regard since the record does not establish sufficient possession by any party to interrupt the peremption. Contrary to the majority's holding, I do not find that under Mennonite Board of Missions v. Adams, that our constitutionally provided peremptive period is violative of the due process requirements of the 14th Amendment of the U.S. Constitution. [170]

In Murphy, the Third Circuit properly recognized that, in light of the Mennonite decision, lack of notice in a tax sale proceeding was a due process violation and, thus, was valid grounds for invalidating the tax sale. [171] But the problem with the decision is that it went a step further by holding that the Louisiana constitutionally mandated five-year prescriptive period, which limits the time in which a tax debtor may contest the validity of a tax sale, was also a due process violation. [172]

The Third Circuit's reliance on Mennonite in making this interpretation appears to be misguided. In Mennonite, the issue was whether the failure to provide notice to a mortgagee was a ***422** due process violation. [173] An Indiana court granted a tax purchaser's petition to quiet title against a mortgagee's timely asserted constitutional challenge of deficient notice of a pending tax sale. [174] At the time the tax sale was conducted, Indiana's tax sale statutes required only that notice be sent by certified mail to the property owner, but the statutes did not require notice by mail or personal service to a mortgagee. [175] The Indiana trial court upheld the tax sale statute against the mortgagee's constitutional challenge and the Indiana Court of Appeals affirmed. [176] The United States Supreme Court reversed. [177] The Court ultimately found that a mortgagee "clearly has a legally protected property interest, [and] he is entitled to notice reasonably calculated to apprise him of a pending tax sale." [178]

Therefore, Mennonite explicitly held that lack of notice to a mortgagee was also a due process violation and was valid grounds for invalidating a state proceeding lacking the requisite notice. [179] However, Mennonite did not necessarily hold that statutory limits on the time in which an aggrieved party may assert such a claim were also due process violations. [180] Mennonite also did not declare the tax sale void in its entirety or an absolute nullity. Dissenting Judge Knoll, in Murphy, properly distinguished the issue of recognizing lack of notice as a due process violation from the issue of limiting the time frame in which an assertion of a due process violation may be brought. [181] After a careful reading of Mullane and Mennonite, his interpretation is probably more in line with the United States Supreme Court's decisions, in not finding that the "peremptive period is violative of the due process requirements of the 14th Amendment of the U.S. Constitution." [182]

***423** In an early case, the United States Supreme Court discussed the constitutionality of time limits imposed on the ability to bring causes of action:

The state could recognize, as it did recognize, that there might be claims derived from it, asserted or to be asserted, rightfully or wrongfully, involving conflicts which should be decided and quieted in the public interest, and therefore, enacted the statute. And such is the rationale of statutes of limitations. They do not necessarily lessen rights of property or impair the obligation of contracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal... [183]

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Thus, the United States Supreme Court has previously acknowledged a difference between a state's right to limit the time frame in which a cause of action may be brought from the individual's right to have his cause of action recognized. [184] The state can acknowledge and recognize the existence of an individual's right while limiting the timeframe in which that individual may assert a claim of a violation of that right. [185] Thus, the question of the applicability of prescriptive and peremptive periods to claims of lack of notice in tax sale proceedings should not be posed as a question of constitutionality, but instead, a question of reasonableness. In other words, the question should not have been posed as to whether the five-year prescriptive period, limiting the time in which a tax debtor may raise such a claim, was also a due process violation, but whether such a five-year limit was reasonable as to afford an original tax debtor a reasonable opportunity to be heard prior to final disposition of his property. Likewise, the six-month peremptive period pursuant to a confirmation suit should also be evaluated in light of its reasonableness. "It may certainly be argued that a procedural requirement imposing a six-month limitation for filing a reconventional demand within six months of the service of the ***424** suit to confirm is not an unreasonable one and should not have been lightly disregarded by the court." [186] The reasoning that the presence of a due process violation in a tax sale proceeding necessarily makes prescriptive periods limiting the time to assert such claims also due process violations is questionable. The United States Supreme Court and legislatures have recognized the state's rights to limit the time period of asserting such claims.

3. The Doctrine of Absolute Nullity as Defined by the Louisiana Civil Code does not Apply to Tax Sales

In Sutter v. Dane, the Fourth Circuit Court of Appeal held that a constitutionally deficient tax sale was an absolute nullity. [187] Applying Louisiana Civil Code. Article 2030, the court reasoned:

[A] contract that is absolutely null may not be confirmed Given that, because the tax sale is null, then for purposes of res judicata, where the validity of the judgment is called into question, there is no res judicata. We find that the underlying nullity of the contract, i.e., the tax sale, makes the judgment confirming the title acquired from this null tax sale invalid. Thus, the trial court's decision setting aside Sutter's default judgment confirming his tax title and declaring that tax sale an absolute nullity was proper. [188]

At first glance, this reasoning appears to be correct. An absolutely null contract may not be confirmed. [189] Therefore, if deficient notice renders a tax sale absolutely null, then such a tax sale cannot be confirmed. [190] There are two things wrong with this ***425** reasoning. First, it relies on the questionable reasoning that lack of notice results in an absolute nullity. Second, the reasoning assumes that a tax sale is a contract. Article 2030 comes from Title IV of Book III of the Louisiana Civil Code, which governs conventional contracts in Louisiana. [191] But is a tax sale a contract?

In a recent decision, C & C Energy, L.L.C. v. Cody Investments, L.L.C., the Louisiana Supreme Court declined to apply Civil Code articles to tax sales. [192] In C & C Energy, the issue was whether lack of notice to one co-owner also nullified the tax sale as to a co-owner who actually received notice. [193] In holding that lack of notice to one co-owner invalidated the tax sale as to all co-owners, the court found a Civil Code article inapplicable, reasoning:

Although a co-owner may 'freely lease, alienate or encumber his share of the thing held in indivision,' La. Civ.Code art. 805, a tax sale is an involuntary transfer of ownership facilitated by action of the State for non-payment of ad valorem taxes. Yet, '[t]he purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes.' [194]

Although the Louisiana Supreme Court ultimately confirmed the reasoning that lack of notice rendered a tax sale absolutely null, the court declined to apply conventional contract principles that would allow a co-owner actually receiving notice of the proceeding to forfeit only his share of the property by failing to redeem the property or challenge the validity of the tax sale. [195] As the court noted, a tax sale is an "involuntary" transfer of ownership. [196] Without consent, a tax sale fails to meet the requirements of a contract. [197] Therefore, Article 2030 arguably cannot be relied ***426** upon in precluding the confirmation of a tax sale that is purportedly deficient of notice.

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Historically, Louisiana jurisprudence has typically recognized that the laws governing tax collection and sales are separate and distinct, and consequently, Civil Code principles are generally not applicable. [198] In Lisso & Brother v. Police Jury of Parish of Natchitoches, the plaintiffs relied upon Civil Code articles in urging the court to find they were entitled to recovery of the purchase price paid for erroneous tax sales. [199] The Louisiana Supreme Court noted that the plaintiffs, in relying upon the Civil Code, "lose sight of the fact that laws regulating the collection of taxes are sui generis, and constitute a system to which the general provisions of the Civil Code have, ordinarily, little or no application." [200]

Article 2030 currently provides that:

A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed. Absolute nullity may be invoked by any person or may be declared by the court on its own initiative. [201]

At first glance, the reliance on Article 2030 in rendering tax sales absolutely null as a result of deficient notice seems logical. An irregularity reaching the magnitude of a due process violation would certainly violate a rule of public order. Undoubtedly, a tax sale with such a defect is absolutely null.

But reliance upon this article in reaching this conclusion is questionable. Such reasoning ignores the operative word contract and fails to recognize that the contractual relationship governed by the Civil Code does not exist in a tax sale. [202]

***427** A tax sale is the act of the state, the manifestation of it[s] solemn duty to preserve the compact among the citizens of the state. If there is a contract in the realm of tax sales, it is the duty of the citizen to pay taxes on property and shoulder this responsibility. [203]

Therefore, the Civil Code fails to provide a statutory basis upon which a court may rely upon in applying the imprescriptible doctrine of absolute nullity to tax sales.

4. The Louisiana Constitution or Revised Statutes do not Mandate Absolute Nullification of Tax Sales Purportedly Deficient of Notice

As previously discussed, the Louisiana constitution and revised statutes recognize specific grounds upon which a tax sale may be invalidated, which include payment of taxes, redemption nullities, sale to a prohibited owner, and continuous possession. [204] The legislature has refused to recognize the constitutional violation as grounds for absolute nullification unaffected by prescriptive and peremptive periods. [205]

III. The Ripple Effects of Smitko

A. Cititax Group, L.L.C. v. Gibert: Following in the Footsteps of Smitko

In December 2012, the Fourth Circuit Court of Appeal had the opportunity to apply the newly minted Smitko holding, which confirmed the line of reasoning that the six-month prescriptive period pursuant to confirmation suits of tax titles was inapplicable to claims of due process violations based on lack of notice. [206] In Cititax Group, L.L.C. v. Gibert, the defendant ***428** appealed a trial court judgment quieting the title to property, which had been purchased by the plaintiff at a November 2002 tax sale. [207] The plaintiff filed suit to quiet title in March 2010. [208] Approximately ten months later, the defendant, Gibert, filed a separate

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suit to annul the tax sale, alleging that the City of New Orleans failed to provide the constitutionally sufficient notice and, thus, rendered the tax sale an absolute nullity. [209] Gibert's suit to annul was consolidated with Cititax's suit to quiet title, and the case proceeded to a bench trial in which the judge found that the notice given was sufficient. [210] The Fourth Circuit first addressed the initial issue of whether the trial court made a correct factual determination that notice was sufficient in light of the Mennonite and Mullane decisions. [211] Ultimately, the court found that the trial court made a manifestly erroneous determination that the notice given was sufficient. [212]

The court then turned to the question of whether the suit to annul, which was instituted ten months after service of the confirmation suit and after the expiration of the prescriptive period, was timely filed. [213] Recognizing the time limits set forth under the Louisiana Constitution and Louisiana Revised Statutes 47:2266(A)(2), the Fourth Circuit relied on Smitko in finding that such time limits did not bar the defendant's suit at hand. [214] Citing Smitko, the court reasoned:

In Smitko, the defendant (the former record property owner), who never received notice of a tax sale, filed a reconventional demand seeking to annul the tax sale sixteen months after filing its original answer to a petition to quiet title. The trial court granted summary judgment in favor of the tax purchaser. Part of its ruling was based on a ***429** prior finding that the defendant's reconventional demand was barred because it was filed more than six months after the defendant was served with the petition and citation to quiet title. A divided First Circuit court affirmed, finding that the reconventional demand, filed after the six month time limitation set forth in La. R.S. 47:2228 (now, La. R.S. 47:2266) was untimely. In reversing the lower courts, the Louisiana Supreme Court stated:

[W]e find the failure of the Sheriff to provide notice of the tax delinquencies and tax sales to [defendant], if proven by [defendant], was a violation of due process that would preclude confirmation of the tax sales Accordingly, because the tax sales were apparently of no legal force or effect, [defendant's] reconventional demand to annul the tax sales for lack of due process was timely before the trial court. [215]

Resting on Smitko, the Fourth Circuit concluded that the tax sale, which was constitutionally deficient of notice, was an absolute nullity. [216] Consequently, such a defect rendered Gibert's petition to annul timely and insusceptible to prescriptive or peremptive periods. [217]

B. A look at Chase v. Webeland: A Final Confirmation Judgment Unraveled

In Chase v. Webeland, a lawsuit was instituted seeking to annul a tax sale and subsequent judgment confirming the tax sale. [218] A title company purchased a tract of immovable property at a 2005 tax sale. [219] The company then sold the property to ***430** Webeland by a quitclaim deed. [220] The sale was recorded in the mortgage records. [221] Eight months later, the original owners executed and recorded a promissory note with Chase Bank on the property. [222] Three years after the tax sale, Webeland filed an action to confirm and quiet title of the property, naming the original owners and Chase Bank as defendants in the litigation. [223] Both defendants were properly served. [224] Neither defendant answered, nor instituted a proceeding to challenge the validity of the tax sale. [225]

Over six months after service, Webeland filed a motion for preliminary default, and the trial court entered a default judgment in favor of Webeland confirming and quieting title. [226] One year after the judgment was entered confirming title, Chase Bank filed suit seeking to annul the tax sale and the default judgment confirming the tax sale. [227] Chase urged that the tax sale was null for lack of constitutionally required notice and such a tax sale could not be confirmed. [228] Webeland filed exceptions of no cause of action, no right of action, res judicata, prescription, and a motion for summary judgment. [229] The trial court denied

Webeland's exceptions and the motion for summary judgment, finding that the notice of the tax sale was improper, rendering the sale an absolute nullity under Louisiana Civil Code Article 2030.[230] Thus, the tax sale could not be confirmed.[231] The trial court reasoned that prescription does not run against absolutely null acts under Civil Code Article 2032 and overruled the prescription exception.[232]

***431** Webeland sought supervisory writs from the First Circuit Court of Appeal.[233] The First Circuit granted the writ application, reversed the action of the trial court, and maintained Webeland's exception of res judicata as to all of Chase Bank's claims related to the validity of the tax sale.[234] The appellate court concluded that the default judgment of the trial court confirming and quieting the tax title met all the statutory requirements of res judicata.[235] The court reasoned that any cause of action Chase Bank may have had to attack the validity of the tax sale had been "extinguished and merged into the final default judgment."[236] In finding the requirements for the application of res judicata were met, the final judgment had acquired the authority of the "thing adjudged."[237] The First Circuit disagreed with the Sutter decision and was of the opinion that Sutter casted doubt upon the efficacy of a suit to quiet a tax title.[238] The First Circuit's decision created a short-lived split among the circuits.[239]

In September 2012, the Louisiana Supreme Court quietly granted the supervisory writ application and reversed the First Circuit's decision, finding that the district court did not err in denying the exceptions of prescription and res judicata.[240] Without much further explanation, the Louisiana Supreme Court reversed the First Circuit decision, citing the recent Smitko decision and the Fourth Circuit's Sutter decision.[241] In doing so, the Louisiana Supreme Court tacitly held that the prescriptive periods and res judicata effects of confirmation judgments were not preclusive against claims of an absolute nullity grounded in lack of notice, even as to claims that were asserted collaterally and almost one year after a final confirmation judgment had been rendered and ***432** after all the time delays for appeals had expired.[242] By holding that the "district court did not err in denying the exceptions of prescription and res judicata,"[243] the Louisiana Supreme Court achieved two things: 1) it solidified its holding in Smitko, that prescriptive periods do not apply to claims of absolute nullity and 2) it signaled its endorsement of the Fourth Circuit's position in Sutter, that the res judicata effects of confirmation judgments are not preclusive against claims of absolute nullity of the underlying tax sale.[244] The recent action by the Louisiana Supreme Court now casts a serious cloud over confirmation judgments that have already been obtained. In light of the court's current position, suits to confirm tax title are now virtually ineffective against contentions of due process violations resulting from lack of notice.

IV. Conclusion

The problem with these decisions is that they misinterpret the effects of the Mullane and Mennonite decisions by confusing the issue of the invalidity of a tax sale with the issue of the curability of a tax sale. In Mullane, the Supreme Court declared that constructive notice by publication is not enough, but that actual notice that can reasonably be expected to inform the interested party must be used.[245] In Mennonite, the Supreme Court expanded its decision in Mullane by recognizing that parties with a substantial property interest, such as a mortgagee, are also entitled to that same "actual notice" requirement.[246] These decisions recognize that constructive notice, instead of actual notice, are insufficient to satisfy the due process requirements of the federal constitution and, therefore, are grounds for invalidating a tax sale conducted with deficient notice.

***433** However, the United States Supreme Court did not address how to remedy such a violation.[247] Instead, the cases were remanded to lower level courts to render a decision consistent with the United States Supreme Court's holdings.[248] By declining to prescribe a remedy, the Court's holdings sent a limited message to courts and state legislatures across the country that constructive notice alone is insufficient to put property owners or parties with substantial interests on notice and, thus, results in a constitutional violation. What the United States Supreme Court did not expressly hold, which is what much of

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the Louisiana jurisprudence has interpreted, [249] is that the constitutional violation results in an absolute nullity such that the timeframe in which to assert such a claim could never be limited by statute. [250]

In conclusion, when litigating timely claims of due process violations within tax sales, courts should always recognize claims of constitutionally deficient notice as valid grounds for invalidating an underlying tax sale. Property rights are one of the most valued and fundamental rights recognized by the United States Constitution and should be fiercely protected. Still, property rights do not exist in a vacuum and these rights should be balanced against the public policy interests in maintaining stability of titles in the real estate markets and keeping immovable property in commerce. [251] Procedural statutes limiting the time frame in which such claims may be asserted has historically been effective in fostering certainty and stability in real estate markets. However, the recent line of reasoning confirmed by the Louisiana Supreme Court adopts the harsh remedy of applying the doctrine of absolute nullity to tax sales purportedly deficient of notice. This application has the sweeping effect of invalidating the preclusive effects of both prescriptive ***434** and peremptive periods, and now, final confirmation judgments, which have been previously relied upon to put to rest issues regarding an underlying tax sale. What Louisiana courts have missed is that prescriptive periods limiting the time in which a party may assert a claim of a constitutional violation does not purport to cure a constitutional violation. A constitutional violation will always be a constitutional violation. However, prescriptive statutes merely limit the time in which claims of such violations may be raised. Thus, they are necessary to prevent a tax debtor, other interested parties, or their successors from raising such violations ten, twenty, fifty, or one hundred years later.

Footnotes

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1 Christopher Davidson, Louisiana Supreme Court to Real Estate Closing and Title Industry: Drop Dead, PARISHTAXSALES.COM (July 10, 2012), http:// parishtaxsales.com/?p=326.

2 Smitko v. Gulf S. Shrimp, Inc., 11-2566 (La. 7/2/12), 94 So. 3d 750, 759.

3 Id. at 759.

4 Christopher Davidson, Due Process-Flexible or Flaccid?: Jamie Land Co. v. Touchstone, 35 S.U. L. REV. 459, 461 (2008); see also LA. CONST. art. VII, §25(B); LA. REV. STAT. ANN. §§47:2152 - 2163 (2008).

5 Davidson, supra note 4, at 461.

6 LA. REV. STAT. ANN. § 47:2153 (2008).

7 PETER S. TITLE, 2 LOUISIANA PRACTICE SERIES: LOUISIANA REAL ESTATE TRANSACTIONS§ 17:1 (2d ed. 2012); See generally LA. CONST. ART. VII, §25.

8 See generally Title, supra note 7, at § 17:1; LA. CONST. ART. VII, §25(A); LA. REV. STAT. ANN. § 47:2153 (2008).

9 Id.

10 Title, supra note 7, at § 17:1; LA. CONST. ART. VII, §25(A).

11 Title, supra note 7, at § 17:1.

12 Id. at § 17:8.

13 Title, supra note 7, at § 17:8; LA. REV. STAT. ANN. § 47:2156(A) (2012).

14 Title, supra note 7, at § 17:8; LA. REV. STAT. ANN. § 47:2156(B)(1) (2012).

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15 LA. CONST. ART. VII, §25(B)(1).

16 Id.

17 LA. REV. STAT. ANN. § 47:2242; LA. Const. art. VII, §25(B).

18 Title, supra note 7, at § 17:3; LA. REV. STAT. ANN. § 47:2241.

19 Title, supra note 7, at § 17:3.

20 Id. at § 17:9.

21 Title, supra note 7, at § 17:11; LA. Const. art. VII, § 25(C).

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23 Id.

24 Id. at § 17:9.

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26 LA. Const. art. VII, § 25(C).

27 Id.

28 Title, supra note 7, at § 17:11.

29 LA. REV. STAT. ANN. § 47:2266(A)(2) (2008).

30 Id.

31 LA. REV. STAT. ANN. § 47:2266(B) (2008).

32 Id.

33 Title, supra note 7, at § 17:11.

34 See LA. REV. STAT. ANN. § 47:2286, 2162 (2008).

35 Title, supra note 7, at § 17:11.

36 Id.

37 Title, supra note 7, at § 17:23; see also LA. REV. STAT. ANN. § 47:2266 (2008).

38 Title, supra note 7, at § 17:23.

39 Id.; see also LA. REV. STAT. ANN. § 47:2266 (2008).

40 Id.

41 See Chase Bank USA, N.A. v. Webeland, Inc., 2010-2180, 2011 WL 6779555, at *4-7 (La. App. 1 Cir. 12/21/11), writ granted, judgment rev'd, 2012-0240 (La. 9/28/12), 98 So. 3d 823 (unpublished opinion); Warner v. Garrett, et al., 268 So. 2d 92, 95-97 (La. App. 1 Cir. 1972).

42 See generally Warner v. Garrett, et al., 268 So. 2d 92, 95 (La. App. 1 Cir. 1972); LA. REV. STAT. ANN. § 47:2266 (2008).

43 Warner, 268 So. 2d at 95-97.

44 Id. at 97-98.

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45 Id.

46 Id. at 93.

47 Warner v. Garrett, et al., 268 So. 2d 92, 94 (La. App. 1 Cir. 1972).

48 Id. at 97.

49 Id.

50 Id. at 95.

51 Warner v. Garrett, et al., 268 So. 2d 92, 95-96 (La. App. 1 Cir. 1972) (citations omitted).

52 Id. at 96.

53 Id. at 97.

54 Id. at 96.

55 LA. CODE CIV. PROC. ANN. art. 2002; LA. CODE CIV. PROC. ANN. art. 2004.

56 LA. CODE CIV. PROC. ANN. art. 2002.

57 Warner, 268 So. 2d at 96.

58 La. CODE CIV. PROC. ANN. art. 2004.

59 Id.

60 Warner, 268 So. 2d at 97.

61 Id.

62 Id. at 97-98.

63 Id. at 97.

64 Fellman v. Kay, 86 So. 406, 409 (La. 1920).

65 Id.

66 Id. at 410.

67 Ashley Co. v. Bradford, 33 So. 634, 639 (La. 1902).

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69 Amicus Curiae in Support of the Respondent by Amici Curiae Future Trends, LLC et al., at 4, Smitko v. Gulf South Shrimp, Inc., 94 So. 3d 750, 759 (2012) (No. 11-2566).

70 See discussion infra Part II.B.

71 See generally Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 797-800 (1983).

72 Id. at 795-797.

73 See Davidson, supra note 4 at 465.

74 Sutter v. Dane Inv., Inc., 2007-1268 (La. App. 4 Cir. 6/4/08), 985 So. 2d 1263, writ denied, 2008-2154 (La. 11/14/08), 996 So. 2d 1091.

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75 Id. at 1265.

76 Id.

77 Id.

78 Id.

79 Sutter, 985 So. 2d at 1265.

80 Id.

81 Id.

82 Id. at 1267.

83 Id. at 1268.

84 Id.

85 Sutter v. Dane Inv., Inc., 2007-1268 (La. App. 4 Cir. 6/4/08), 985 So. 2d 1263,1268, writ denied, 2008-2154 (La. 11/14/08), 996 So. 2d 1091.

86 Id.

87 Id. at 1268-69.

88 Title, supra note 7, at § 17:23.

89 See generally Sutter, 985 So. 2d at 1268.

90 Title, supra note 7, at § 17:23.

91 Id.

92 See Title, supra note 7, at § 17:16.

93 See cases cited supra note 64.

94 Smitko v. Gulf S. Shrimp, Inc., 11-2566 (La. 7/2/12), 94 So. 3d 750, 754-55.

95 Smitko v. Gulf S. Shrimp, Inc., 2010-0531 (La. App. 1 Cir. 10/19/11), 77 So. 3d 1012, 1015, writ granted, 2011-2566 (La. 2/17/12) 82 So. 3d 273, and rev'd, 2011-2566 (La. 7/2/12), 94 So. 3d 750.

96 Id.

97 Id.

98 Id.

99 Id.

100 Smitko, 77 So. 3d at 1015.

101 Id.

102 Id. at 1015-16.

103 Id. at 1016.

104 Id.

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105 Id.

106 Smitko v. Gulf S. Shrimp, Inc., 2010-0531 (La. App. 1 Cir. 10/19/11), 77 So. 3d 1012, 1016, writ granted, 2011-2566 (La. 2/17/12) 82 So. 3d 273, and rev'd, 2011-2566 (La. 7/2/12), 94 So. 3d 750.

107 Id.

108 Id.

109 Id.

110 Id.

111 Smitko, 77 So. 3d at 1016.

112 Id. at 1017.

113 Id.

114 Id.

115 Id.

116 Id.

117 Smitko v. Gulf S. Shrimp, Inc., 2010-0531 (La. App. 1 Cir. 10/19/11), 77 So. 3d 1012, 1017, writ granted, 2011-2566 (La. 2/17/12) 82 So. 3d 273, and rev'd, 2011-2566 (La. 7/2/12), 94 So. 3d 750.

118 Id. at 1018.

119 Id.

120 Id.

121 Id.

122 Smitko, 77 So. 3d at 10.

123 Id. at 1020-21.

124 Id. at 1020.

125 Id.

126 Id. at 1021.

127 Id.

128 Smitko v. Gulf S. Shrimp, Inc., 2010-0531 (La. App. 1 Cir. 10/19/11), 77 So. 3d 1012, 1024, writ granted, 2011-2566 (La. 2/17/12) 82 So. 3d 273, and rev'd, 2011-2566 (La. 7/2/12), 94 So. 3d 750.

129 Smitko v. Gulf S. Shrimp, Inc., 11-2566 (La. 7/2/12), 94 So. 3d 750, 751-52.

130 Id.

131 Id. at 759.

132 Smitko, 77 So. 3d at 1020.

133 Smitko, 94 So. 3d at 759.

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134 Id.

135 Id.

136 Id.

137 Smitko v. Gulf S. Shrimp, Inc., 2010-0531 (La. App. 1 Cir. 10/19/11), 77 So. 3d 1012, 1021, writ granted, 2011-2566 (La. 2/17/12) 82 So. 3d 273, and rev'd, 2011-2566 (La. 7/2/12), 94 So. 3d 750 (The First Circuit indicates that the relation back of a pleading cannot interfere with the running of the six-month peremptive period set forth for the annulment of tax sales.)

138 Fellman v. Kay, 86 So. 406, 409-10 (La. 1920).

139 Smitko v. Gulf S. Shrimp, Inc., 11-2566 (La. 7/2/12), 94 So. 3d 750, 759.

140 Id.

141 See discussion infra Part III.B.

142 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). At issue in the case was whether notice by newspaper publication was sufficient to satisfy due process requirements so as to notify beneficiaries of a common trust fund. The United States Supreme Court held that statutory notice by newspaper publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or mailed notice.

143 Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800.

144 Id. at 798-800.

145 See Davidson, note 4 at 464-65.

146 See generally Davidson, note 4 at p. 464; Title, supra note 7, at 17:20; Thompson v. Walker, 104 So. 2d 721 (La. 1958); Preston v. McGehee, 502 So. 2d 171 (La. Ct. App. 3d Cir. 1987); Kemper v. Dearing, 369 So. 2d 1208 (La. Ct. App. 2d Cir. 1979); Lasseigne v. Clement, 311 So. 2d 600 (La. Ct. App. 4th Cir. 1975); Welsch v. Carmadelle, 264, So.2d 341 (La. Ct. App. 4th Cir. 1972).

147 Title, supra note 7, § 17:20; see also Murphy v. Estate of Sam, 527 So. 2d 1190 (La. Ct. App. 3d Cir. 1988); Smith v. Brooks 714 So.2d 735 (La. Ct. App. 3d Cir. 1998); Security First Nat. Bank v. Murchison, 739 So. 2d 803 (La. Ct. App. 3d Cir. 1999).

148 See Drury v. Watkins, 546 So. 2d 1280 (La. App. 1st Cir. 1989); Future Trends, LLC v. Armit, 890 So. 2d 13 (La. Ct. App. 5th Cir. 2004).

149 Lewis v. Succession of Johnson, 925 So. 2d 1172 (La. 4/4/06). A purchaser of property at a tax sale brought suit to quiet tax title. Heirs of the original owner answered, alleging they did not receive proper notice of the sale. The court held that failure to notify each co-owner of the tax sale violated their due process rights and publication of notice of sale that failed to identify each co-owner also violated the co-owners' due process rights.

150 Id. at 1184.

151 See generally C & C Energy, L.L.C. v. Cody Inv., L.L.C, 41 So. 3d 1134, 1138 (La. 7/6/10).

152 Id. at 1134. The Louisiana Supreme Court dealt with the question of whether the failure to send notice of the tax sale to all record co-owners rendered the tax sale null and void, even as to the co-owner that actually received the requisite notice. In this case, a father and his children co-owned the property. Only the father received notice of the pending tax sale and the property was sold at a tax sale. Eight years after the tax deed had been recorded, C & C Energy, successors to the children's title, filed suit to annul the tax deed on the grounds that not all of the owners had received notice of the tax sale. The Louisiana Court held that failure to provide the requisite notice of the tax sale to each co-owner renders the tax sale null and void in its entirety with regard to all co-owners, including the co-owner who received notice of the tax sale.

153 Id. at 1140-41.

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154 Id.

155 See Smitko v. Gulf S. Shrimp, Inc., 11-2566 (La. 7/2/12), 94 So. 3d 750, 757-59.

156 Magee v. Amiss, 502 So. 2d 568, 569 (La. 1987).

157 Id.

158 Id.

159 Id. at 570.

160 Id.

161 Magee, 502 So. 2d at 573.

162 Id. at 572.

163 Id.

164 Id.

165 Id.

166 Murphy v. Estate of Sam, 527 So. 2d 1190, 1191 (La. App. 3 Cir. 1988).

167 Id.

168 Id. at 1194.

169 Id. at 1194-1195.

170 Id. at 195 (Knoll, J., dissenting) (citations omitted).

171 Id. at 1194.

172 Murphy, 527 So. 2d at 1194-95.

173 Mennonite Bd. of Missions v. Adams, 462 U.S. 791.

174 Id. at 795.

175 Id. at 793.

176 Id. at 795.

177 Id. at 800.

178 Mennonite, 462 U.S. at 798.

179 Id. at 798-99.

180 See generally id. at 800.

181 See Murphy v. Estate of Sam, 527 So. 2d 1190, 1195 (La. App. 3 Cir. 1988) (Knoll, J., dissenting).

182 Id.

183 Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190, 197 (1922) (emphasis added).

184 Id.

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185 Id.

186 Title, supra note 7, at § 17:16.

187 Sutter v. Dane Inv., Inc., 2007-1268 (La. App. 4 Cir. 6/4/08), 985 So. 2d 1263, 1268, writ denied, 2008-2154 (La. 11/14/08), 996 So. 2d 1091.

188 Id. at. 1268.

189 LA. CIV. CODE ANN. art. 2030.

190 See generally Lewis v. Succession of Johnson, 925 So. 2d 1172, 1184 (La. 4/4/06); Sutter v. Dane Inv., Inc., 2007-1268 (La. App. 4 Cir. 6/4/08), 985 So. 2d 1263, 1268, writ denied, 2008-2154 (La. 11/14/08), 996 So. 2d 1091; C & C Energy, L.L.C. v. Cody Inv., L.L.C., 2009-2160 (La. 7/6/10), 41 So. 3d 1134, 1140-41.

191 LA. CIV. CODE ANN. art. 2030.

192 C & C Energy, L.L.C. v. Cody Inv., L.L.C., 2009-2160 (La. 7/6/10), 41 So. 3d 1134, 1140-41.

193 Id. at 1138.

194 Id. at 1140 (emphasis added).

195 Id.

196 Id.

197 LA. CODE CIV. PROC. ANN. art. 1927.

198 Amicus Curiae in Support of the Respondent by Amici Curiae Future Trends, LLC et al., at 10, Smitko v. Gulf S. Shrimp, Inc., 94 So. 3d 750, 759 (2012) (No. 11-2566).

199 Lisso & Bro. v. Police Jury of Parish of Natchitoches, 127 La. 283, 53 So. 566-67 (1910).

200 Id. at 567.

201 LA. CODE CIV. PROC. ANN. art. 2030.

202 Amicus Curiae in Support of the Respondent by Amici Curiae Future Trends, LLC et al., at 10, Smitko v. Gulf S. Shrimp, Inc., 94 So. 3d 750, 759 (2012) (No. 11-2566).

203 Id.

204 See generally LA. CONST. art. VII, §25(B); LA. REV. STAT. ANN. §§47:2286, 2162 (2008).

205 Amicus Curiae in Support of the Respondent by Amici Curiae Future Trends, LLC et al., at 10, Smitko v. Gulf S. Shrimp, Inc., 94 So. 3d 750, 759 (2012) (No. 11-2566).

206 Smitko v. Gulf S. Shrimp, Inc., 11-2566 (La. 7/2/12), 94 So. 3d 750, 759.

207 See Cititax Group, L.L.C. v. Gibert, No. 2012-CA-0633, 2012 WL 6621389, at *1 (La. App. 4 Cir. 12/19/12).

208 Id.

209 Id.

210 Id.

211 Id. at *4.

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212 Cititax Group, L.L.C. v. Gibert, No. 2012-CA-0633, 2012 WL 6621389, at *7, 9-10 (La. App. 4 Cir. 12/19/12).

213 Id. at *7-9.

214 Id. at *8.

215 Id. at *8-9.

216 Id. at *9-10.

217 Cititax Group, L.L.C. v. Gibert, No. 2012-CA-0633, 2012 WL 6621389, at *9-10 (La. App. 4 Cir. 12/19/12).

218 Chase Bank USA, N.A. v. Webeland, Inc., 2010-2180, 2011 WL 6779555, at *1 (La. App. 1 Cir. 12/21/11), writ granted, judgment rev'd, 2012-0240 (La. 9/28/12), 98 So. 3d 823 (unpublished opinion).

219 Id.

220 Id.

221 Id.

222 Id.

223 Chase, 2011 WL 6779555, at *1.

224 Id.

225 Id.

226 Id.

227 Id. at *2.

228 Id.

229 Chase Bank USA, N.A. v. Webeland, Inc., 2010-2180, 2011 WL 6779555, at *3 (La. App. 1 Cir. 12/21/11), writ granted, judgment rev'd, 2012-0240 (La. 9/28/12), 98 So. 3d 823 (unpublished opinion).

230 Id.

231 Id.

232 Id.

233 Id.

234 Chase, 2011 WL 6779555 at *7.

235 Id. at *6.

236 Id.

237 Id.

238 Id.

239 See generally Title, supra note 7, at § 17:23; Sutter v. Dane Inv., Inc., 2007-1268 (La. App. 4 Cir. 6/4/08), 985 So. 2d 1263, 1268, writ denied, 2008-2154 (La. 11/14/08), 996 So. 2d 1091; Chase Bank USA, N.A. v. Webeland, Inc., 2012-0240 (La. 9/28/12), 98 So. 3d 823.

240 Chase Bank USA, N.A. v. Webeland, Inc., 2012-0240 (La. 9/28/12), 98 So. 3d 823.

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241 Id.

242 Id.

243 Id.

244 Christina Peck Samuels, Trusts, Estate, Probate & Immovable Property Law, 60 La. B.J. 349, 350 (2013).

245 See generally Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

246 See generally Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 797-800 (1983).

247 Id.

248 Id. at 800.

249 See generally Lewis v. Succession of Johnson, 925 So. 2d 1172, 1184 (La. 4/4/06); Sutter v. Dane Inv., Inc., 2007-1268 (La. App. 4 Cir. 6/4/08), 985 So. 2d 1263, 1268, writ denied, 2008-2154 (La. 11/14/08), 996 So. 2d 1091; C & C Energy, L.L.C. v. Cody Inv., L.L.C., 2009-2160 (La. 7/6/10), 41 So. 3d 1134, 1140-41.

250 See generally Mennonite, 462 U.S. at 800.

251 Michael H. Rubin, Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite, 48 LA. L. REV. 535, 592 (1988).

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