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the court decided *Herrin v. Perry*,[76] which held that the constitutional clause[77] and implementing legislation[78] which permitted the department to sue and be sued effectuated a general waiver of the immunity from suit formerly enjoyed. Since the *Herrin* case was a suit in tort, this was deemed to effectively dispose of the argument that the court had never held the phrase to "sue and be sued" to be a waiver of immunity in actions in tort.[79] The court also noted that it had said in *Hamilton v. City of Shreveport*[80] that the scope of the constitutional "amendment cannot be limited by this court since it is clear and precise in its wording. It enumerates all the governmental bodies that are to be affected, and makes the waiver of their immunity from suit and liability '. . . for all purposes . . .' all-inclusive."[81]

STATE AND LOCAL TAXATION

*Melvin G. Dakin**

License Taxes

Amongst the welter of "statutory" provisions contained in our Constitution is one exempting the pursuit of agriculture from occupational license taxes.[1] In *Stanford v. Louisiana Sweet Potato Advertising and Development Commission*,[2] plaintiffs using this constitutional provision attacked a legislative act which prescribed a "tax" on all shipments of sweet potatoes for which the inspection certificates and tags of the Louisiana State Department of Agriculture and Immigration had issued; the tax was to be imposed upon and collected from the shipper.[3] While the supreme court did not preclude the possibility of a constitutional fee covering only the cost of certification of sweet potatoes, here the determination was that the fee, if such it were, clearly exceeded the legitimate cost of regulation and the necessary or probable expenses of licensing, inspecting, and regulating the agricultural pursuit of raising sweet potatoes and was hence really a tax thereon.[4] The fact that the proceeds of the fee were

76. 254 La. 933, 228 So.2d 649 (1969).
77. LA. CONST. art. III, § 35.
78. LA. R.S. 48:22 (1950).
79. 255 La. 425, 437, 231 So.2d 375, 379 (1970).
80. 247 La. 784, 174 So.2d 529 (1965).
81. 255 La. 425, 438, 231 So.2d 375, 380 (1970).

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1. LA. CONST. art. X, § 8.
2. 255 La. 96, 229 So.2d 712 (1969).
3. La. Acts 1942, No. 294.
4. 255 La. 96, 101-02, 229 So.2d 712, 714 (1969).

devoted exclusively to advertising the sweet potato industry, thus promoting (and regulating) its growth, did not save the levy from being a license tax on the occupation of agriculture and hence in violation of the Constitution.[5]

Franchise Taxes

Louisiana has in its tax arsenal the familiar franchise tax on the privilege of doing business in the state. Generally, it has been construed to be valid if it is a tax on local activities only or is a tax in lieu of another tax on such activities.[6] In *Colonial Pipeline Co. v. Mouton*[7] a pipeline company constructed facilities in the state for the transport of petroleum products out of the state and for the transport of such products into Louisiana, thus rendering it a clearly interstate business activity. Nonetheless, a franchise tax was imposed alternatively either on the local activity of the pipeline company incident to the construction of these facilities or on such local activities as its qualification to do business in Louisiana, use of Louisiana courts, and operation of various pumping stations incident to the operation of its pipeline.[8] These bases for the assessment of a franchise tax were rejected by the court, the first on the ground that the pipeline company had contracted out all the work for the construction of its facilities in Louisiana and hence the contractor rather than the pipeline company was engaged in intrastate activity.[9] The other basis suggested for the imposition of the franchise tax was rejected on the ground that the above listed activities were not the exercise of privileges of sufficiently local nature, all of them being incidental to and in the furtherance of the company's primary object of transporting petroleum products in interstate commerce.[10] The First Circuit thus affirmed the district court in a determination that the tax was levied squarely upon the privilege of engaging in interstate business in Louisiana and was hence beyond state power.

Sales Taxes

An attempt by the City of New Orleans to impose a sales

5. *Id.* at 103, 229 So.2d at 715.
6. LA. R.S. 47:601 (1950).
7. 228 So.2d 719 (La. App. 1st Cir. 1969), *rehearing denied*, Dec. 22, 1969.
8. *Id.* at 720.
9. *Id.* at 721.
10. *Id.*

tax on an agency of the state was aborted by a supreme court interpretation of constitutional limitations upon the exercise of such authority by the city in *City of New Orleans v. Board of Commissioners*.[11] The Constitution limits the implications to be drawn from its "home rule" provisions against any inference that the city is given any rights, powers, authority, or jurisdiction over the state or any state board.[12] Nevertheless the city, somewhat disingenuously, argued that when the legislature vested it with power to levy and collect a sales tax and legislatively defined "persons" to include the state and its political subdivisions, it thereby freed the city from the limitations of the Constitution, since the Constitution does not expressly prohibit taxation of the state or a state board by the city.[13] The supreme court said that the "plain and concise restriction" of the Constitution includes the power of taxation among the rights or powers which the city is precluded from exercising over the state or its boards.[14]

Inheritance Taxes

The First Circuit recently had before it important litigation involving tax valuation of the income interest in a trust where the trustee was vested with certain discretionary powers to invade the trust corpus in *Succession of Bellinger*[15] and *Succession of Kaufman*.[16] The tax collector took the position that in view of the fact that the trustee could invade the corpus for the benefit of the income beneficiary, it would be possible to exhaust the corpus on behalf of the income beneficiary; hence such beneficiary should be assessed an inheritance tax on the entire present value of the estate, less any exemption allowed for the income beneficiary as the surviving spouse.[17] In support of his position the collector cited the decision in *Succession of Lindsey*, where an inheritance tax had been assessed on such entire value in the hands of the income beneficiary.[18] The *Lindsey* case was distinguished by the court, however, by pointing out that there were no forced heirs in that case and hence inva-

11. 254 La. 981, 229 So.2d 69 (1969), *rehearing denied*, Dec. 15, 1969.
12. LA. CONST. art. XIV, § 22.
13. 254 La. 981, 987, 229 So.2d 69, 71-72 (1969).
14. *Id.*
15. 229 So.2d 749 (La. App. 1st Cir. 1969).
16. 229 So.2d 752 (La. App. 1st Cir. 1969).
17. Succession of Bellinger, 229 So.2d 749, 750 (La. App. 1st Cir. 1969).
18. Succession of Lindsey, 179 So.2d 669 (La. App. 2d Cir. 1965).

sion of the corpus could not result in depriving any other beneficiary of all or part of his legitime.[19]

The Trust Act carefully safeguards such forced heirs by providing that the legitime in trust may be burdened with an income interest to favor a person other than the forced heir only to the same extent as a usufruct of the same property could be stipulated in favor of the same person for a like period.[20] This limitation thus operates to prevent a trustee with power to invade corpus on behalf of the income beneficiary from carrying such invasion into that portion of the corpus subject to the rules of forced heirship. Consequently, as to this nondisposable portion of the estate in trust, no inheritance tax could be collected from the surviving spouse income beneficiary since the value of such forced portion could not be diverted to her under the powers of the trustee to invade the corpus on her behalf; the trustee would be limited, in his invasion, to the disposable portion.[21]

Ad Valorem Taxes

Presumably as a concession to the relatively lower profitability of agricultural pursuits, our Constitution exempts from ad valorem taxation "agricultural implements used in the cultivation, production and harvest of crops as well as other machinery and equipment used exclusively for agricultural purposes consistent with present day mechanized farm operations. . . ."[22] In *James Brothers, Inc. v. Perry*[23] parish authorities placed certain earth moving and land clearing equipment on the tax rolls, and the owner moved to recover taxes paid in connection therewith on the ground that such equipment was being used exclusively in agriculture *or in the clearing and preparation of land for agricultural purposes.* The language of the Constitution has to be strained somewhat to cover exemption of the equipment in question here since its only connection with agriculture was use in the clearing and preparation of land; once cleared, the land could equally well have been put to other purposes. The exemption would seem more plausibly to have been narrowly construed to relieve from taxation only implements immediately used in cultivation, production, and harvest of crops or for related agricultural purposes. Nonetheless exemption was upheld.[24] A

19. Succession of Bellinger, 229 So.2d 749, 750 (La. App. 1st Cir. 1969).
20. LA. R.S. 9:1845-47 (1950).
21. Succession of Bellinger, 229 So.2d 749, 751-52 (La. App. 1st Cir. 1969).
22. LA. CONST. art. X, § 34(3).
23. 229 So.2d 147 (La. App. 2d Cir. 1969), *rehearing denied*, Jan. 6, 1970.
24. *Id.* at 148.

dissenting judge noted: "Our Constitution contemplates the use of the machinery in the *annual* production of agricultural activities, not a 'one shot' clearing of large or small tracts prior to the raising of crops or other agricultural pursuits."[25]

Difficulties for the administration of the equalization of assessments for state ad valorem tax purposes and further inequities in the operation of the property tax relief fund were averted by the recent decision of the Second Circuit in *Caddo Parish Police Jury v. Lancaster*.[26] The case drew in question the extent to which, within the governing statute, there may be deviations from tax commission valuations by local taxing bodies. Thus, while parishes may levy taxes on an assessment which is less than the full cash value, providing it does not fall below 25% thereof, the legislature has safeguarded the process to the extent of providing that for "local purposes the percentage shall operate equally and uniformly on all taxable property within the parish ... on the basis of the actual valuation fixed by the tax commission...."[27] It was urged upon the court that this language allows a different and lower percentage assessment for a special tax than for other local taxes but with the full cash value exemption for homestead owners and veterans nonetheless deducted therefrom.[28] The obvious effect of such a procedure would be to impose a greater share of the levy on the property tax relief fund than would be the case if the valuation were at the same percentage of cash value as the exempt property. The Second Circuit affirmed a district court holding that any percentage adopted by a local taxing authority for a special millage tax must apply to all levies made by that authority.[29] It also approved a procedure that, in calculating the contribution to local tax authorities from the property tax relief fund, entailed application of the same percentage of actual cash value to the homestead exemption as was applied to the total assessed value, thus equitably prorating the amount of tax which would be paid by the local taxpayer and that which would come from the homestead refund to the parish out of the property tax relief fund.[30]

Where property taxes remain unpaid, our Constitution contemplates the usual sales for taxes, but it also provides that

25. *Id.* at 150.
26. 232 So.2d 781 (La. App. 2d Cir. 1970), *rehearing denied*, Mar. 31, 1970.
27. LA. R.S. 47:1989 (1950).
28. 232 So.2d 781, 781-82 (La. App. 2d Cir. 1970).
29. *Id.* at 783.
30. *Id.* at 782-83.

there shall be no forfeiture of property for the nonpayment of taxes. Hence notice to delinquent must be given "in the manner provided by law. . . ."[31] The implementing statute provides that notice of delinquency must be sent to each taxpayer by registered or certified mail with return receipt requested. In addition, after completing such service, the tax collector is required by law to make out a *procès verbal* or affidavit stating the names and addresses of the delinquents, a description of the property and the amount of taxes due, and a statement as to how the service of notice was made.[32] The effect of the *procès verbal* has been interpreted to be primarily an instrument for the allocation of the burden of proof.[33] Thus in litigation drawing in question the validity of tax sales, introduction of the *procès* verbal results in a presumption that notices of delinquency were properly served; the tax debtor then has the burden of showing that no notice was in fact given. On the other hand if no *procès verbal* is introduced, no presumption arises, and the burden is on the tax purchaser to prove by clear and convincing proof that notice of delinquency, as a crucial prerequisite of a valid tax sale, was in fact given.[34] Recent application of these interpretations by the Second Circuit in *Succession of Wines v. Yerger*[35] has resulted in invalidation of a tax sale where there was no *procès verbal* and the notices and return receipts in connection therewith had been lost. The tax purchaser, relying solely upon the recollections of the parish officials, was found not to have sustained the burden of proving notice to the tax delinquent under the above test as to quality of proof. In the absence of such proof the tax sale was deemed a nullity.

Ad Valorem Taxpayers and Bond Elections

Our supreme court and several of the courts of appeal have now held that attempts to annul bond elections on the basis of limitations on the electors by way of property ownership requirements will be barred by prescription or peremption of sixty days pursuant to the Constitution and statutes.[36] However, in *Handy*

31. LA. CONST. art. X, § 11.
32. LA. R.S. 47:2180 (1950).
33. Pill v. Morgan, 186 La. 329, 172 So. 409 (1936).
34. Tangipahoa Parish School Bd. v. Fortenberry, 12 So.2d 639 (La. App. 1st Cir. 1943).
35. 234 So.2d 224 (La. App. 2d Cir. 1970).
36. Chambers v. Road Dist. 505, 255 La. 55, 229 So.2d 698 (1969); J. L. Andrieux v. East Baton Rouge Parish School Bd., 254 La. 819, 227 So.2d 370 (1969); Handy v. Parish School Bd., 234 So.2d 787 (La. App. 3rd Cir. 1970); Rankin v. East Baton Rouge Parish School Bd., 233 So.2d 573 (La. App. 1st Cir. 1970).

v. Parish School Board,[37] where plaintiff also alleged that the government body contemplates, and intends to call, further elections for the issuance of general obligation bonds and to permit only property taxpayers to vote at said elections, the Third Circuit was persuaded to rule further that the voting franchise in such general obligation bond elections could be limited to property taxpayers without violating the equal protection clause of the Fourteenth Amendment of the United States Constitution. The court espoused the theory that the *Kramer v. Union Free School District*[38] and *Cipriano v. City of Houma*[39] decisions did not preclude exclusion from voting in a special purpose election if the excluded elector is only remotely or indirectly affected by the election, while the franchised elector is directly interested and affected by it. The court found such direct affectation to be a compelling state interest which would withstand attack under the Fourteenth Amendment.[40] In a general obligation bond election in which there is reliance upon a property tax base for payment of the bonds, it is said that only property owners subject to a tax levy are primarily interested and affected; hence the vote may be properly limited to them. The fact that electors other than property owners may indirectly contribute to property taxes through the property tax relief fund was said not to give such electors a primary interest such as to entitle them to participate.[41]

The First Circuit, affirming dismissal of a bond election suit in *Rankin v. East Baton Rouge Parish School Board*[42] on the ground that it was untimely filed, went on to note that since under Louisiana ad valorem tax statutes, every taxpayer is required to fill out a list of all property, the owner of listed personal property would be entitled to vote equally with the owner of listed real property. The court rejected the theory that citizens who failed to list taxable personal property and thus failed to carry their share of the tax burden should nonetheless be entitled to complain about their exclusion from a bond election.[43]

In *Akin v. Caddo Parish Police Jury*[43] the Second Circuit also dismissed a bond election suit on the ground of untimeliness.

37. 234 So.2d 787, 793-94 (La. App. 3d Cir. 1970).
38. 395 U.S. 621 (1969).
39. 395 U.S. 701 (1969).
40. Handy v. Parish School Bd., 234 So.2d 787, 793 (La. App. 3d Cir. 1970).
41. *Id.* at 792-93.
42. 233 So.2d 573, 576 (La. App. 1st Cir. 1970).
43. 234 So.2d 203 (La. App. 2d Cir. 1970), *rehearing denied*, April 28, 1970.

However that court accorded standing to the taxpayer to bring suit questioning the legality of police jury action in "closing" a portion of what had been a park area for the purpose of additional public buildings. It found no "closing" but noted that taxpayers have the right to resort to judicial authority to restrain their public servants from transcending their powers where there is evidence (not present in this case) that the result thereof would be to increase the burden of taxation or otherwise injuriously affect the taxpayer.[44]

PROCEDURE

CIVIL PROCEDURE

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General Appearance

If, after filing a declinatory exception alleging lack of jurisdiction, and insufficiency of citation and service of process, the defendant files notice of the taking of a deposition, has he made a general appearance thereby waiving all objections to jurisdiction? This issue was raised in *Stelly v. Quick Manufacturing, Inc.*,[1] and the court ruled that the defendant had made a general appearance because the depositions were concerned with the merits of the case and were not limited to the objections as to *citation* and service of process which had been raised in the declinatory exception. Therefore, in taking the deposition, the defendant was seeking relief other than that permitted in article 7 of the Louisiana Code of Civil Procedure.

Although it may be argued that the defendant had not asked the court for any relief at all because he had not sought an order from the court, the ruling seems to be consistent with the intent of article 7 of the Code of Civil Procedure that if a defendant objects to jurisdiction, he must not voluntarily participate in the action except to challenge the jurisdiction of the court or to seek the limited relief allowed under that article. The filing of a notice of the taking of a deposition in preparation for a trial on the merits, although not a request for relief, is inconsistent with the non-resident defendant's position that he

44. *Id.* at 206-07.

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1. 228 So.2d 548 (La. App. 3d Cir. 1969).