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The several coverage provisions above were all before the court recently in a situation involving a worker who, even prior to the accident in question, was possessed of only bare "motion vision" at best.[23] (He could see motion of an object 14 to 16 inches away from his eye but could not identify the object.) The accidental injury for which he now seeks compensation produced complete blindness in that eye, and it was thereafter necessary to remove it and substitute an artificial orb. The worker had returned to his job, and his initial claim for total disability was abandoned. The question before the court was whether the loss of a virtually useless eye could be regarded as one that falls within the schedule of specific losses. The opinion suggested that coverage for the loss of an eye could be afforded even though the organ was conceded to be utterly useless previously. This conclusion appears to be consonant with the accepted approach on specific losses in Louisiana. However, the award of compensation for one hundred weeks was not rested on this provision alone. The loss was considered a disfigurement even though previous to the accident most of the iris or colored portion of the eye had become white due to the presence of scar tissue. The substitution of an artificial orb at least presented a wholly different type of esthetic offensiveness from that which attended the earlier condition.

STATE AND LOCAL TAXATION

*Robert L. Roland**

AD VALOREM TAXES

The field of ad valorem taxes accounted directly for four cases in the court term and indirectly for another. In the latter category[1] Act 155 of 1970, establishing three tax assessors for Jefferson Parish, was held violative of Louisiana Constitution article XIV, § 9, which provides for a *tax assessor* to be elected by each parish. The court in a rather interesting and to some extent droll discussion of the meaning of "a" as "one," or "at least one" or "any" concluded that on the basis of the totality of the Constitution, "a" in this instance meant "one" and affirmed the

23. Landry v. Liberty Mut. Ins. Co., 258 La. 649, 247 So.2d 564 (1971).

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1. Chehardy v. Democratic Executive Comm., 259 La. 45, 249 So.2d 196 (1971).

trial court's judgment that Act 155 was unconstitutional. In *Churchill Farms, Inc. v. Louisiana Tax Commission*,[2] a court of appeal applied the provisions of R.S. 47:1998, granting to taxpayers who have filed a sworn list of property the right of judicial appeal, to uphold a decision of the trial court refusing an appeal to a taxpayer who had not filed such a list. This decision is in accord with the relatively recent supreme court decision in *Dixon v. Flournoy*,[3] but as a rather vigorous dissent by Judge Redmann points out, certain constitutional questions of due process are not answered. Apparently encouraged by the dissent, the taxpayer filed an application for rehearing, only to be met with the court's citation of a long line of cases holding that contentions not urged on appeal, in either oral argument or in brief, are waived.[4]

In a case decided by another court of appeals,[5] the *Dixon* case was also involved, but the court concluded that the taxpayer was contesting the *tax* itself rather than the *assessment* and that therefore neither R.S. 47:1998 nor *Dixon* was applicable. Citing *State* ex rel. *United Seamen's Service, Inc. v. City of New Orleans*,[6] which recognized the distinction between the right to sue to *annul* an assessment and the right to sue to *reduce* an assessment, it reversed the judgment of the trial court sustaining an exception of no right of action and remanded the matter for a trial on the merits.

The same court of appeal had before it a case[7] involving the taxibility of accounts receivable owned by Chrysler Credit Corporation which were secured by chattel mortgages on motor vehicles and which were due from selected Chrysler dealers who financed their automobile inventories in this fashion. The chattel mortgage forms were often improperly authenticated and seldom recorded. The trial court found the mortgages to secure the loans in form only and to be violative of certain provisions of the law. The court of appeal reversed, finding the mortgages valid as between the parties and therefore loans "secured by mortgages on property located exclusively in the

2. 249 So.2d 594 (La. App. 4th Cir. 1971).
3. 247 La. 1067, 176 So.2d 138 (1965).
4. 249 So.2d 594, 602 (La. App. 4th Cir. 1971).
5. Ford Motor Credit Co. v. Louisiana Tax Comm'n, 251 So.2d 392 (La. App. 1st Cir. 1971).
6. 209 La. 797, 25 So.2d 596 (1946).
7. Chrysler Financial Corp. v. Louisiana Tax Comm'n, 251 So.2d 482 (La. App. 1st Cir. 1971).

State of Louisiana" and as such, exempt from taxation under article IV, § 4, par. 3 of the Louisiana Constitution of 1921. The request of the Tax Commission that the proceedings be dismissed for failure to comply with R.S. 47:1998 was denied on the basis of *Ford Motor Credit*[8] and the cases cited therein.

In *Laventhal v. Lake Investment Corp.*,[9] the court found that the plaintiff had failed to prove the corporeal possession necessary to prevent the running of the five year peremption with reference to quieting of tax title provided by article X, § 11 of the Louisiana Constitution of 1921 as supplemented by R.S. 47:2228.

SALES AND USE TAXES

Indicative of the fact that local taxing authorities are becoming more aggressive in the sales and use tax field were three cases involving these taxes. The supreme court had before it for review, in *St. John the Baptist Parish School Board v. Marbury-Patillo Construction Co.*,[10] a taxpayer's right to contest the taxing authority's determination of the tax due; the waiver of penalties; and, the ultimate liability of the owner for such taxes.

The court of appeal[11] had held that it was error on the part of the trial court to accept the estimated base for the tax since it consisted of the entire amount of the contract plus an additional arbitrary sum added to cover on-site equipment. Noting that the tax was levied only on tangible personal property purchased, used or consumed in the parish, it re-examined the evidence, disallowed the on-site equipment, deducted 20% as allowance for profit and overhead, and estimated that 60% of the remainder was subject to tax as materials purchased. It had also disallowed interest and penalties on the theory that the taxpayer was in good faith in resisting the tax. It had rejected an attempt to impose the tax liability on the port commission for which the terminal had been constructed on the ground that the commission was only a purchaser, not a purchaser-dealer, and hence exempt within the statute. The dissent would have rejected the suit on the ground that in proceeding by

8. 251 So.2d 392 (La. App. 1st Cir. 1971).
9. 252 So.2d 521 (La. App. 4th Cir. 1971).
10. 259 La. 1133, 254 So.2d 607 (1971).
11. 239 So.2d 387 (La. App. 4th Cir. 1970), *discussed in The Work of the Louisiana Appellate Courts for the 1970-1971 Term—State and Local Taxation*, 32 LA. L. REV. 311, 313 (1972).

estimate, the taxing authority was attempting an illegal jeopardy assessment; the majority had been willing to characterize the suit as properly brought, however, subject only to the objection that the assessment was based on an arbitrary and unreasonable calculation.

The supreme court granted writs and held that the school board's estimate of the taxes due had to be accepted because of (1) the definition of cost price, and (2) the failure of the taxpayer to file all its defenses prior to the time fixed for hearing. There is considerable jurisprudence supporting the latter conclusion; there is a serious question concerning the application of the definition to the facts of this case. The court further held that defenses to the applicability of the statutory penalties were also waived by not being timely filed but indicated that good faith and substantial efforts to comply would not be grounds for waiver—a holding which would seem to overrule the Fourth Circuit's conclusion on this same point in the *Richardson* case.[12] It agreed that the Port Commission owner was not liable for the tax on the ground that it did not contract for the purchase of movable property but rather for the construction of immovables. This holding is in accord with several other cases on this same point although none of these cases were cited by the court.[13]

The other two cases involved the sales tax levied by the Lafayette Parish School Board. To all intents and purposes that tax is identical with the state sales tax levied by the provisions of R.S. 47:301. In *Lafayette Parish School Board v. General Tire & Rubber Co.*,[14] the court had no difficulty in finding that General Tire was a dealer within the ordinance and as such subject thereto, despite the fact that the company maintained no retail outlet in the parish, nor did it have salesmen or employees therein. It did have an authorized dealer in the parish who purchased and resold tires to its customers and who serviced General Tire national account customers in Lafayette Parish. The court found that the local distributor was an agent of General Tire with reference to the national accounts and that this relationship provided a sufficient minimum connection to

12. Collector of Revenue v. J. L. Richardson Co., 247 So.2d 151 (La. App. 4th Cir. 1971).

13. Claiborne Sales Co. v. Collector of Revenue, 233 La. 1061, 99 So.2d 345 (1957); State v. J. Watts Kearney & Sons, 181 La. 554, 160 So. 77 (1934).

14. 249 So.2d 350 (La. App. 3d Cir. 1971).

satisfy due process requirements. In *L. A. Frey & Sons v. Lafayette Parish School Board*,[15] the court considered the applicability of the tax to purchases by L. A. Frey of non-returnable cardboard containers and of sawdust used to smoke its meat products. The court ruled that the cardboard containers were purchased for resale and the sawdust was purchased for further processing into articles of tangible personal property for sale at retail, and therefore not subject to tax. Both rulings appear to be at variance with the long standing position of the State Department of Revenue[16] and therefore possibly contrary to the holding of the Louisiana supreme court that the adoption of a statute from another jurisdiction includes all of the authoritative interpretations and constructions theretofore placed on such statute.[17]

OTHER TAXES

The Louisiana Corporation Franchise Tax statute[18] includes borrowed capital in the tax base and defines borrowed capital as "all indebtedness of a corporation subject to the provisions of this Chapter, maturing more than one year from the date incurred."[19] In *HEP Development Corp. v. Mouton*,[20] a court of appeal determined that property purchased by a taxpayer subject to a mortgage, but which mortgage was not assumed by the purchaser, nevertheless constituted borrowed capital within the meaning of the statute. The court recognized the jurisprudence to the effect that one who purchases property subject to a mortgage but without assuming same incurs no personal liability, but chose to interpret the statute broadly "to accord it full legislative intent." The court refused to follow non-Louisiana authorities to the contrary, citing a Louisiana case[21] which it believed supportive of a contrary result.

The value of a revocable inter vivos trust whose assets consisted of stocks, bonds, debentures, treasury bills, cash and a mineral interest, all physically located in Oklahoma, was held

15. 262 So.2d 132 (La. App. 3d Cir. 1972).
16. *See, e.g., Rules and Regulations Promulgated in Connection with Louisiana General Sales Tax* (Supp. 1964)—Article 2-19—Containers; Articles 2-71(4)—Printers's Suppliers; Article 2-72—Paper and Ink.
17. Standard Oil Co. v. Collector of Revenue, 210 La. 428, 27 So.2d 268 (1946).
18. LA. R.S. 47:601 (1950).
19. LA. R.S. 47:603 (1950).
20. 256 So.2d 744 (La. App. 1st Cir. 1971).
21. State v. Union Building Corp., 185 La. 598, 170 So. 7 (1936).

includible in the succession of the Louisiana domiciled grantor for the purpose of ascertaining the inheritance tax due in *Succession of Reynolds*.[22] The taxpayer argued unsuccessfully that a revocable inter vivos trust is not a gift in contemplation of death but rather a gift intended to take effect at or after death. Because Louisiana taxes inheritances, legacies, donations and gifts made in contemplation of death[23] as opposed to the federal taxation of the estate of the decedent, a factual situation may arise where this argument would be accepted by a court. The state's right to tax movable property owned by Louisiana residents wherever situated[24] was apparently resisted by the taxpayer on jurisdictional grounds which the court brushed aside on the basis of the executor having filed the suit in question and on the authority of *Curry v. McCanless*.[25] While *Curry* is still good authority for the right of the state of domicile to tax intangibles belonging to its residents, it adverted to the general rule that tangibles may be taxed only by the government within whose territorial limits they are found.[26] Quaere: Are cash and mineral interests tangibles within the meaning of the general rule?

The sweet potato tax[27] continued to be a source of litigation in *State v. United Vegetable Growers Association, Inc.*,[28] where the taxpayer filed its defenses to a rule for the taxes some nineteen days after the date first set for hearing and could not overcome the statute[29] and jurisprudence[30] which bar the consideration of defenses not timely filed.

In *Smith v. Louisiana Sweet Potato Advertisement & Development Commission*,[31] the plaintiff-shipper of sweet potatoes claimed that since persons belonging to cooperative associations and farmers who shipped their own potatoes were exempt from the tax, its application only to persons in the sweet potato business who neither shipped their own sweet potatoes nor be-

22. 260 So.2d 811 (La. App. 2d Cir. 1972).
23. LA. R.S. 47:2401 (1950).
24. LA. R.S. 47:2404(A) (1950).
25. 307 U.S. 357 (1939).
26. Frick v. Pennsylvania, 268 U.S. 473 (1925).
27. LA. R.S. 3:451 (1950).
28. 260 So.2d 26 (La. App. 3d Cir. 1972).
29. LA. R.S. 13:5032 (1950).
30. St. John the Baptist Parish School Bd. v. Marbury-Patillo Constr. Co., 259 La. 1133, 254 So.2d 607 (1971); State v. Ernest M. Loeb Co., 8 So.2d 739 (La. App. Orl. Cir. 1942).
31. 264 La. 64, 262 So.2d 371 (1972).

longed to marketing cooperative associations violated the equal protection clauses of the federal and state constitutions. Although the plaintiff's indignation at having to bear the entire tax burden for advertising which benefits all sweet potato farmers is understandable, the court's conclusion that there was a reasonable basis for the classification between shippers and growers and that the legislation was therefore constitutional should not have surprised anyone in view of previous decisions in the area of classification.[32]

PROCEDURE

CRIMINAL PROCEDURE I

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MOTION TO SUPPRESS

In *State v. Wilkerson*,[1] the supreme court held that the motion to suppress can be used to provide a pretrial determination of the admissibility of identification testimony resulting from a lineup. The court recognized that

> "although a literal reading of Article 703 of the Code of Criminal Procedure would seem to confine that motion to search and seizure evidence and evidence of written confessions and inculpatory statements, the motion is well attuned to the relief sought in this case, we have sanctioned it, and Article 3 of the Code provides authorization for the position we have taken."[2]

Article 3 authorizes courts to adopt procedures, although not specifically created by legislation, which are "consistent with the spirit of this Code."[3]

In sustaining the use of the motion in cases involving identification evidence, it is submitted that the court did not require that objections to identification procedures necessarily be raised by pretrial motion to suppress. It merely sanctioned the use of the motion in such instances. In *State v. Walker*,[4] the defense

32. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); State Dept. of Agric. v. Sibille, 207 La. 877, 22 So.2d 202 (1945); State v. Arthur Duvic's Sons, 185 La. 647, 170 So. 23 (1936).

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1. 261 La. 342, 259 So.2d 871 (1972).
2. *Id.* at 350, 259 So.2d at 873.
3. LA. CODE CRIM. P. art. 3.
4. 261 La. 545, 260 So.2d 618 (1972).