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ATTORNEY'S FEES: A NEW RISK IN PAYMENT
UNDER PROTEST SUITS

South Central Bell Telephone instituted suit to recover transportation and communication utilities taxes which it paid under protest, and the defendant Tax Collector reconvened for attorney's fees of ten percent of the amount of taxes collected. The trial court held against South Central Bell on the tax issue, but denied the Collector's reconventional demand for attorney's fees. On appeal, the first circuit reversed the tax judgment against South Central Bell and did not pass upon the question of attorney's fees. The Louisiana Supreme Court, in reversing the first circuit on the substantive issue, also *held* that one who pays taxes under protest must pay the Collector's attorney's fees if he loses his suit challenging the tax. *South Central Bell Telephone Co. v. Traigle*, 367 So. 2d 1143 (La. 1978).

Prior to the establishment of Louisiana's payment under protest procedure in 1938, the taxpayer had been entitled to challenge a tax he thought illegally imposed by seeking an injunction against the collection of the tax.¹ He could also sue to cancel or reduce an assessment of a property tax.² Additionally, Act 170 of 1898 had imposed attorney's fees on the unsuccessful taxpayer who sought relief under either of these procedures.³ Thus, taxpayers could contest taxes they deemed illegal but, in seeking the prescribed remedy, faced possible liability for the Tax Collector's attorney's fees.⁴

However, the Louisiana Constitution of 1921 mandated that the legislature eliminate the injunction remedy that had been available

1. To insure payment, the tax litigant was required to furnish a bond "for an amount equal to that of all taxes, interest, penalties and costs of the amount of the taxes contested." 1898 La. Acts, No. 170, § 56.

2. 1898 La. Acts, No. 170, § 24.

3. 1898 La. Acts, No. 170, § 56 provided in pertinent part:

[T]he attorney at law who represents the tax collector, or tax collectors in all proceedings for the reduction of assessments and collection of taxes (license taxes excepted), and in all injunction proceedings wherein the tax collector or tax collectors are sought to be restrained from the collection of taxes, shall receive a compensation of ten per cent of the amount collected

See *Texas & Ry. Co. v. Flournoy*, 128 La. 71, 54 So. 475 (1911) (injunction proceeding); *Tulane Univ. v. Board of Assessors*, 115 La. 1025, 40 So. 445 (1905) (injunction proceeding); *State ex rel Stempel v. City of New Orleans*, 105 La. 768, 30 So. 97 (1901) (suit to cancel assessment); *Bonner v. Board of Assessors*, 52 La. Ann. 2062, 28 So. 369 (1900) (suit to reduce assessment).

4. The requirement of Act 170 of 1898 that the losing litigant pay the Tax Collector's attorney's fees withstood constitutional challenge. *Liquidating Comm'r of New Orleans Warehouse Co. v. Marrero Tax Collector*, 106 La. 130, 30 So. 305 (1901).

to taxpayers⁵ and replace it with some other "complete and adequate remedy."⁶ The legislature first attempted to provide this remedy in 1934, by prohibiting courts from enjoining collection of taxes but allowing reimbursement to the taxpayer of any tax declared illegal by the courts.⁷ Nevertheless, in 1937 a federal court issued an injunction against collection of a tax, finding that the 1934 Act did not provide an adequate remedy.⁸ In apparent response to this federal action the legislature passed Act 330 of 1938 which provided a more complete procedure for challenging taxes other than by injunction.⁹ The Act required the aggrieved taxpayer to pay the tax and then give the Collector notice of his intention to file suit for recovery of the tax. When the Collector received this notice, he had to segregate the amount paid by the taxpayer from the general fund

5. LA. CONST. of 1921, art. X, § 18. This provision was held not to be "self-operative" in *Taylor v. City of Hammond*, 163 La. 1097, 113 So. 573 (1927).

6. LA. CONST. of 1921, art. X, § 18. This section stated: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." The 1974 constitution has a similar provision. LA. CONST. art. VII, § 3.

7. 1934 La. Acts, 2d Ex. Sess., No. 16. This Act provided in part:

Section 1. Be it enacted by the Legislature of Louisiana, That no court of this State shall issue any process whatsoever to restrain the collection of any tax imposed by the State of Louisiana, or by any political subdivision of the State of Louisiana, under authority granted to it by the Legislature or by the Constitution.

Section 2. Any tax payer who has paid any tax, the whole or any part of which has been declared illegal by any court of competent jurisdiction, shall be reimbursed for the amount of the tax so declared to be illegal

8. *Texas Co. v. Wilkinson*, 21 F. Supp. 771 (E.D. La. 1937). Plaintiff brought the action to enjoin the defendant from assessing or instituting legal proceedings to collect back gasoline taxes. The court issued the injunction on the grounds that the 1934 Act did not provide an adequate remedy, although the court gave no reasons for this determination.

9. 1938 La. Acts, No. 330. Section 2(a) of Act 330 provided:

A right of action is hereby created to afford a remedy at law for any person aggrieved by the provisions of this Act; and in case of any such person resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such person shall pay the amount found due by the officer designated by law for the collection of the said tax and shall give the officer notice, at the time, of his intention to file suit for recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the officer designated by law for the collection of the tax for a period of thirty (30) days; and if suit be filed within such time for the recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the person prevails, the officer designated by law for the collection of the tax shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the officer designated by law for the collection of said tax to the date of refund.

for a period of thirty days. If the taxpayer filed suit within this period, the segregated funds were held pending outcome of the litigation. The Collector refunded the amount of the tax with interest covering the period from the date the funds were received to the date of refund if the taxpayer prevailed.¹⁰ However, unlike the former "injunction remedy," Act 330 did not expressly provide for the imposition of attorney's fees if the taxpayer was unsuccessful.

In 1940, the legislature passed the first comprehensive tax enforcement and collection act.¹¹ Originally, this Act did not mention awarding attorney's fees or payment under protest. In 1942, the legislature amended the Act to include provisions for both of these;¹² however, the provisions were included in different sections of the Act with no indication that the attorney's fees requirement should be applied to the payment under protest procedure. Under the 1942 amendment, the following language dealing with the power of the Collector to employ counsel was added to section 20 of the 1940 Act:

Employment of Counsel: The Collector is authorized to employ attorneys-at-law to assist in the collection of any taxes and to pay for said services out of current collection from the tax involved, provided that the fees for such services shall not exceed ten (10%) per centum of the amount collected.¹³

The attorney's fees award was implemented through the addition of section 4(b), providing for a penalty of attorney's fees in the amount of ten percent of the tax, interest, and other penalties "[i]f any delinquent tax imposed by any State tax law is referred to an attorney-at-law for collection."¹⁴ Meanwhile, the payment under protest procedure, taken from Act 330 of 1938, was included in section 31 of this 1942 amendment.¹⁵ Thus, the amendment continued the protest procedure created in 1938, but left unanswered the question of whether attorney's fees were to be imposed in this proceeding.

Also in 1942, the legislature instructed the Louisiana State Law Institute to prepare a revision of all the statutes of the state for the purpose, in part, of "correcting statutory incongruities."¹⁶ This pro-

10. The purpose of the creation of the payment under protest procedure was "to prevent the disruption of fiscal and governmental functions during pendency of taxpayer's suits." *Acosta v. Board of Comm'rs of Lake Borgne Basin L.D.*, 251 La. 789, 798, 206 So. 2d 496, 499 (1968).

11. 1940 La. Acts, No. 265.

12. 1942 La. Acts, No. 157.

13. 1942 La. Acts, No. 157, § 20(b).

14. 1942 La. Acts, No. 157, § 4(b).

15. 1942 La. Acts, No. 157, § 31.

16. 1942 La. Acts, No. 42. This Act provided in part:

Be it enacted by the Legislature of Louisiana, That the Louisiana State Law In-

posed comprehensive revision and reconciliation of state laws presented a further opportunity to determine whether attorney's fees should be awarded in protest suits. However, the opportunity to resolve the issue in express terms was not taken. The provisions dealing with attorney's fees and payment under protest taken from the 1942 Act was now in subtitle II, chapter 18 of title 47 of the Revised Statutes. Revised Statutes 47:1512,¹⁷ concerning the power of the Collector to employ counsel and providing for the award of attorney's fees, is found in part I, "General Powers and Duties of the Collector," and lists sections 20(b) and 4(b) of the 1942 Act as its source.¹⁸ Section 31 of the 1942 Act became the first paragraph of the payment under protest provision, Revised Statutes 47:1576,¹⁹ located in part III, "Assessment and Collection Procedures."

stitute is hereby instructed to prepare a comprehensive revision of the statutes of the State of a general character, including those contained within the revision of 1870, to simplify their language, to correct their incongruities, to supply their deficiencies, to arrange them in order, the sections thereof being numbered so as to provide for additions and amendments, and to reduce them to one connected text with a view to their adoption, in accordance with the provisions of Section 24 of the Article III of the Constitution of the State of Louisiana, as the Revised Statutes of the State.

Concerning the method of revision to be employed, the General Revision Committee, and the Council of the Institute adopted the following:

The Revision is not to be a mere compilation of existing laws. Neither is it to embody policy changes in the substance of the law. Existing laws are to be worked into a consistent and logical pattern. Obsolete provisions are to be deleted, but only after a careful check as to any possible utility. Incongruities are to be resolved, but only after a careful analysis of the statutes involved and with a conscientious effort to effectuate the true legislative intent.

LOUISIANA STATE LAW INSTITUTE, *Report*, in 1 PROJET OF THE LOUISIANA REVISED STATUTES OF 1950 xiii (1949).

17. LA. R.S. 47:1512 (1950) provides:

The collector is authorized to employ private counsel to assist in the collection of any taxes, penalties or interest due under this Sub-title, or to represent him in any proceeding under this Sub-title. If any taxes, penalties or interest due under this title are referred to an attorney at law for collection, an additional charge for attorney fees, in the amount of ten per centum (10%) of the taxes, penalties and interest due, shall be paid by the tax debtor.

18. The reference to "penalties" in section 4(b) of Act 157 of 1942 was dropped in the Revised Statutes; and, the phrase "attorney-at-law" found in section 20(b) of Act 157 was changed to "private counsel" to insure that these attorney's fees are not imposed on the losing taxpayer unless the Collector uses outside counsel. See *Schwegmann Bros. Giant Super Mkts., Inc. v. Mouton*, 309 So. 2d 686 (La. App. 4th Cir. 1974).

19. LA. R.S. 47:1576 (1950) (as it appeared prior to 1975 La. Acts, No. 458) provided in pertinent part:

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Subtitle, shall pay the amount found due to the collector and at that

If the legislature intended to impose attorney's fees on the losing litigant under Revised Statute 47:1576, seemingly such an intention would have been stated expressly. Due to this absence of express language, three recent appellate court decisions refused to award attorney's fees in unsuccessful protest suits.²⁰ One appellate court, finding "that the attorney fees provided for in La. R.S. 47:1512 are, as regards the pertinent taxpayer, an imposition of penalties,"²¹ held that they "should not be imposed except in cases which are clear and free from any doubt."²² Thus, strictly interpreting the language of Revised Statutes 47:1512, these courts found that attorney's fees could not be awarded in payment under protest proceedings.

In the instant case, South Central Bell brought a protest suit to recover transportation and communication utilities taxes which it paid pursuant to Revised Statutes 47:1576. The Collector reconvened for attorney's fees as provided for in Revised Statutes 47:1512. After finding the tax due, the supreme court, instead of strictly construing Revised Statutes 47:1512 as applying only to those situations in which a tax is "referred to an attorney at law for collection," found that the provision also applies to instances in which the Collector employs counsel to defend a payment under protest suit. It based this interpretation on a finding that Act 170 of 1898, requiring that the losing taxpayer pay the Collector's attorney's fees, is still in effect.²³ While Revised Statutes 47:1512 contains

time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

A 1975 amendment slightly changed the wording of the section and increased the recoverable interest to six percent. 1975 La. Acts, No. 458, *amending* LA. R.S. 47:1576 (1950).

20. *Colonial Pipeline Co. v. Traigle*, 353 So. 2d 728 (La. App. 1st Cir. 1977), *cert. denied*, 354 So. 2d 569 (La. 1978); *Parish of Calcasieu v. Traigle*, 296 So. 2d 418 (La. App. 1st Cir.), *cert. denied*, 303 So. 2d 492 (La. 1974); *L. A. Frey & Sons v. Lafayette Parish School Bd.*, 262 So. 2d 132 (La. App. 3d Cir. 1972).

21. *Parish of Calcasieu v. Traigle*, 296 So. 2d 418, 425-26 (La. App. 1st Cir.), *cert. denied*, 303 So. 2d 492 (La. 1974).

22. *Id.*

23. *South Central Bell Tel. Co. v. Traigle*, 367 So. 2d 1143, 1151 (La. 1978). For the applicable provision of Act 170 of 1898, see note 3, *supra*. This Act assesses the losing taxpayer with attorney's fees in "all proceedings" for the collection of taxes. Although the court referred only to Act 170 of 1898, the legislature had, as early as 1890, required the losing taxpayer to pay the Tax Collector's attorney's fees in all proceedings

language substantially narrower than that contained in Act 170, the Court held that Act 170 was in effect at the time of the comprehensive statutory revision which produced Revised Statutes 47:1512. Since this revision was not intended to make substantive change in the law as it stood in 1950, the court found that Revised Statutes 47:1512 did not limit the award of attorney's fees to the Collector only to cases in which taxes were referred to an attorney at law for collection.²⁴ Thus, despite the narrow language of Revised Statutes 47:1512, attorney's fees can be awarded to the Collector in "all proceedings" for the collection of taxes.

The court further found that the payment under protest suit brought by South Central Bell was a proceeding for the "collection" of taxes. Although under Revised Statutes 47:1576 the taxpayer pays the tax, the money is segregated pending outcome of the suit, and the state cannot use these segregated funds. Based on this fact, the court found that the collection "is not complete until a final judgment denying the taxpayer's prayer for the return of taxes paid under protest."²⁵

By requiring South Central Bell to pay the Collector's attorney's fees, the court rejected the strict interpretation given to Revised Statutes 47:1512 in recent appellate court decisions.²⁶ If the Revised Statutes were intended to resolve the question of whether attorney's fees should be awarded in protest suits, then the court's decision depends upon a reading of Revised Statutes 47:1512 as not superseding Act 170 of 1898. Equally valid, however, is the view that Act 170 of 1898 is not presently in effect. As noted earlier, the 1942 amendment to the tax Act of 1940 did not indicate whether the attorney's fees provision was to be applied to the payment under protest procedure as it was applied in the "injunction remedy" by Act 170 of 1898. The legislature may have resolved the issue by using narrow language which excludes payment under protest and by failing to cite Act 170 of 1898 as a source of Revised Statutes 47:1512. Thus, the legislature may have found the attorney's fees provision an out-

for the reduction of assessments and collection of taxes, and in all injunction proceedings where the Tax Collector was sought to be restrained from collecting taxes. 1890 La. Acts, No. 106, § 56.

24. 367 So. 2d at 1151. See note 16, *supra*.

25. 367 So. 2d at 1151.

26. See note 20, *supra*. The supreme court did not regard the statute as a penal provision requiring strict interpretation. Supporting this view is the fact that as early as 1901, attorney's fees have been regarded as "costs," not "penalties." See *Liquidating Comm'rs of New Orleans Warehouse Co. v. Marrero Tax Collector*, 106 La. 130, 30 So. 305 (1901). Furthermore, the reference to "penalty" found in the source provision of Revised Statutes 47:1512 was dropped when the Revised Statutes were compiled. See 1942 Acts, No. 157, § 4(b).

dated vestige of the old injunction system and may have tacitly repealed it.

In order to give Act 170 effect in its broad interpretation of Revised Statutes 47:1512, the supreme court had to find the protest suit a proceeding for the collection of taxes.²⁷ Recent appellate court cases had held that a payment pursuant to Revised Statutes 47:1576 precludes any notion of having to refer to an attorney for collection, so attorney's fees could not be awarded under Revised Statutes 47:1512.²⁸ However, since the funds are segregated pending outcome of the suit, the payment is not one without strings attached.²⁹ Like the federal system,³⁰ the Louisiana tax system depends largely on self assessment for collection. If a deficiency is discovered, the taxpayer is notified, and generally, a settlement is made. If no agreement is reached as to the taxpayer's liability, the taxpayer must make a choice:

1. He may pay the tax and allow it to go into the general fund with the consequence that he may not thereafter sue for a refund; or
2. He may do nothing and allow the state to proceed against him either by ordinary or summary proceeding,³¹ and obtain a judgment against the taxpayer; or
3. He may have his tax liability reviewed by the Board of Tax Appeals³² or by the court under the protest suit.³³

When the taxpayer does not pay or chooses to have his case re-

27. The location of Revised Statutes 47:1576 in part III, "Assessment and Collection Procedures," seems to support the court's conclusion that this is a proceeding for "collection" of taxes. The alternative methods of collection listed in Revised Statutes 47:1561 include assessment and distraint, LA. R.S. 47:1562-73 (1950), summary court proceeding, LA. R.S. 47:1574 (1950), and ordinary suit. No distinction is made among these methods of collection and payment under protest regarding the award of attorney's fees under Revised Statutes 47:1512. Lending further support to the court's finding is the decision in *Collector of Revenue v. Gulf States Utilities Co.*, 289 So. 2d 367 (La. App. 1st Cir. 1973), in which the court awarded attorney's fees to the Collector in a summary proceeding.

28. The court in *Colonial Pipeline Co. v. Traigle*, 353 So. 2d 728 (La. App. 1st Cir. 1977), cert. denied, 354 So. 2d 569 (La. 1978), stated: "[P]ayment under protest,' albeit a qualified payment, is nevertheless, a payment. . . . [T]he term 'payment,' by definition, precludes any 'collection.'" *Id.* at 730.

29. As noted in *Ortlieb Press, Inc. v. Mouton*, 268 So. 2d 85, 89 (La. App. 1st Cir. 1972): "[T]he granting of the right to pay under protest does not constitute a release or extinguishment of an obligation or indebtedness due the State"

30. See J. FREELAND, S. LIND & R. STEPHENS, *FUNDAMENTALS OF FEDERAL INCOME TAXATION* 970-81 (2d ed. 1977).

31. LA. R.S. 47:1574 (1950).

32. LA. R.S. 47:1565 (1950 & Supp. 1972).

33. LA. R.S. 47:1576 (1950 & Supp. 1975).

viewed by the Board of Tax Appeals, it is obvious that the state cannot use the tax revenues it had anticipated. But, the state is in the same position when the taxpayer chooses to pay under protest. Since the money paid is held in escrow until final judgment in the suit, the state is without the use of these funds and must take affirmative steps to collect the tax. These steps require the assistance of counsel.³⁴

The court's conclusion could not have been reached solely on the basis of determining the legislature's intent, because, as just illustrated, this intent is most unclear. Thus, the decision reached could have been influenced by certain policy factors. If the court had refused to impose these fees on the losing litigant, it would have relieved from liability those taxpayers who could afford to make the payment under Revised Statutes 47:1576, while the fees would be recoverable only against those who refuse to make the payment or who cannot afford to make the payment. Those who can afford the payment can usually afford the best representation available. The Collector should be able to obtain equally qualified representation; however, this may not be possible if he has to bear the burden of his attorney's fees in all protest suits. Thus, to insure that the Collector and the taxpayer are in an equal adversarial position, the losing litigant should be liable for the Collector's attorney's fees.³⁵ Also, the fact that the losing taxpayer is exposed to liability for the Collector's

34. In *Chicago Bridge & Iron Co. v. Cocreham*, 303 So. 2d 750 (La. App. 1st Cir. 1974), *rev'd on other grounds*, 317 So. 2d 605 (La. 1975), the first circuit noted:

There is no question but that when the Collector of Revenue is met with a proceeding under R.S. 47:1576 or for the collection by suit of any other taxes, he is in dire need of private counsel and is authorized and empowered to employ private counsel to represent him in any proceeding to assist in the collection of any taxes, penalties, or interest in accordance with R.S. 47:1576

Id. at 757.

35. Normally, both parties in a civil action must bear the burden of their own attorney's fees; however, recently, Congress has enacted statutes which authorize the court to award attorney's fees to one of the litigants. "These statutes were not passed for the purpose of making the prevailing counsel rich, but rather to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition." Comment, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717, 719 (1976).

In 1976, one such statute, The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, was enacted to allow the prevailing party, other than the United States, a reasonable attorney's fee "in any civil action or proceeding, by or on behalf of the United States of America, to enforce . . . a violation of a provision of the United States Internal Revenue Code or title VI of the Civil Rights Act of 1964 . . ." Pub. L. No. 94-559, § 2, 90 Stat. 2641. However, this may not prove to be of much aid to the aggrieved taxpayer since the statute awards attorney's fees as costs only where the United States is the plaintiff, and in these tax protest suits, it is the taxpayer who brings the action.

attorney's fees might discourage the taxpayer from bringing a suit which lacks merit.³⁶ Finally, fairness may dictate that the taxpayer who challenges his liability and is mistaken should bear the costs, rather than the taxpayers generally, the majority of which will never be involved in litigation with the Collector.

It has been the general rule throughout this country, however, that attorney's fees are not included as part of the costs imposed on the losing party in a suit. Perhaps the American rule should apply in this situation,³⁷ as the decision reached by the court might offend due process by having a chilling effect on the taxpayer's right to challenge the tax. He may opt to refrain from pursuing his remedy under Revised Statutes 47:1576 due to the possibility of losing and having to pay the Collector's attorney's fees. Such a situation could render the remedy inadequate, and it would thus fail to meet the requirement of the Louisiana constitution to provide the taxpayer with a "complete and adequate remedy."³⁸ If the remedy is found inadequate, the federal district court is authorized to issue an injunction, which would put the state in the same position it was in prior to the establishment of the payment under protest procedure.³⁹

Just as the legislative history affords no absolute basis for the court's conclusion, the policy considerations provide no clear justification for the decision announced. In reaching its decision, the court

36. It has long been the policy in England to award reasonable attorney's fees to the prevailing party as a part of costs. It was thought that this would make the injured party "whole" and reduce congestion in the courts. "Allowing attorney fees as part of costs would join reality and theory by making the injured party 'whole.' . . . The court calendar would not be as populous with the disappearance of . . . groundless claims of would-be plaintiffs who now bring actions with no chance of winning." Comment, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426, 429 (1975).

37.

Although it is true that those who formed our legal system drew heavily upon English tradition, it is equally true that this tradition was tempered by the particular attitudes of early American life. Our early society was characterized by the sparsely settled frontier community and by the rugged individualistic spirit of the pioneers who lived in those communities. . . . It is this early philosophy of intense individualism which, it is submitted, underlies the development of the American rule and the subsequent rejection of the English rule on fees. . . . Further, the assertion of individual rights was so important to the early American that litigation flourished and was encouraged

Comment, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1219-20 (1967).

38. LA. CONST. art. VII, § 3.

39. 28 U.S.C. § 1341 (1948). Section 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

may have been influenced by the particular taxpayer involved in the suit. South Central Bell, as well as the other large corporations, will have the resources to challenge the taxes and will not be deterred from doing so as a result of this decision. For this reason, the court may have weighed more heavily those policy factors in favor of awarding attorney's fees to the Collector. However, the potential impact of this decision is yet to be seen; in those cases involving substantial sums paid under protest, the award of attorney's fees alone could be staggering.⁴⁰ In such situations, the amount awarded in attorney's fees may seem unwarranted, and the supreme court may be forced to question whether the practice of imposing attorney's fees on the losing litigant in protest suits provides the "adequate remedy" required by the Louisiana constitution.

Allen P. Jones

RIGHT TO TRIAL BY JURY: NEW GUIDELINES FOR STATE CRIMINAL TRIAL JURIES

In the past ten years, a series of United States Supreme Court decisions has reshaped the state criminal trial jury by abandoning the traditional common law formula requiring twelve-member juries and unanimous verdicts. In place of that formula, the Court has imposed new guidelines based upon a functional model of the jury, a theoretical construct embodying jury size and unanimity requirements consistent with the function of the jury in contemporary society. In its two most recent decisions concerning jury size and unanimity requirements, *Ballew v. Georgia*¹ and *Burch v. Louisiana*,² the Court has further defined the perimeters within which states may organize their criminal trial juries. In *Ballew*, the Court held that in a state criminal trial involving a noncapital offense, the sixth and fourteenth amendments³ require that the jury consist of no

40. Currently, several pipeline companies plan to challenge the First Use Tax, LA. R.S. 47:1301-07 (Supp. 1978), by paying under protest, unless the tax is declared unconstitutional before the first payment is due. It is estimated that the potential liability of these companies under this tax is over 100 million dollars annually. If the companies lose the protest suit, the award of attorney's fees will be ten percent of that amount.

1. 435 U.S. 223 (1978).

2. 99 S. Ct. 1623 (1979).

3. U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and