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## Local Government Law

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jury, take his chances upon the verdict, and, if against him, then by assignment of error or motion in arrest take advantage of it."<sup>124</sup>

#### *Appeal from Municipal Court Judgments*

The Louisiana Supreme Court's appellate jurisdiction over municipal court judgments is specifically limited to those cases where a fine exceeding \$300, or imprisonment exceeding six months is actually imposed, or where the constitutionality or legality of the penalty is attacked.<sup>125</sup> In *State v. LaBorde*<sup>126</sup> the defendant, convicted of petty theft, had been sentenced to pay a fine of \$200 and to serve one year in jail with nine months of the jail sentence being suspended upon the payment of the fine. In assuming appellate jurisdiction to review the sentence the supreme court held that a sentence of one year had actually been imposed. The suspension of nine months of that sentence upon payment of the fine would result in a conditional release of the defendant from imprisonment. If, however, the offender was convicted of another crime during the period of such suspension he would be subject to arrest and must serve the full time of his sentence in jail.<sup>127</sup> Justice McCaleb's majority opinion is consistent with the real nature and purpose of the suspended sentence. A sentence of imprisonment was actually imposed, but suspended on condition that the offender should abstain from further violations of the criminal law. The *LaBorde* case is different from the situation where imprisonment is imposed in default of the payment of a fine. In that instance payment of the fine completely relieves the offender from imprisonment and it has been consistently held that the imprisonment sentence is not, therefore, actually imposed within the meaning of the constitution.<sup>128</sup>

## VII. LOCAL GOVERNMENT LAW

*Albert H. Cotton\**

### ORGANIZATION AND BOUNDARIES

Perhaps the most important case decided by the Louisiana Supreme Court during the year in the field of local government

124. 214 La. 831, 853, 39 So.(2d) 76, 83, quoting from *State v. Stracner*, 190 La. 457, 182 So. 571, 576.

125. La. Const. of 1921, Art. VII, § 10.

126. 214 La. 644, 38 So.(2d) 371 (1948).

127. Art. 536, La. Code of Crim. Proc. of 1928.

128. *State v. Desimone*, 143 La. 505, 78 So. 751 (1918); *State v. Roy*, 152 La. 933, 94 So. 703 (1922).

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law was *State ex rel. Kemp, Attorney General v. City of Baton Rouge*,<sup>1</sup> where the validity of the new city-parish form of government was upheld. The first objection raised against the Baton Rouge plan was to the validity of the constitutional amendment authorizing it, Article XIV, Section 3a. It was contended that the amendment contained more than one subject, which is prohibited by Article XXI, Section 1, of the Louisiana Constitution.<sup>2</sup> The court rejected this contention on the grounds that all of the six allegedly different subjects were germane to the one main purpose, to establish a plan of government. This view would appear to be so obvious as to make the question scarcely worth litigating, if it were not for the decision in *Graham v. Jones*<sup>3</sup> which held that a plan for the reorganization of the state government, submitted as one amendment by Act 384 of 1940, violated Article XXI, Section 1. The court did not apply the doctrine of *Graham v. Jones* to the facts of the present case. As a result it appears that *Graham v. Jones* will not be used to thwart plans of governmental reorganization. The court will follow the rule that it is sufficient if all the provisions of a constitutional amendment are germane to one purpose or design. Progress in the field of governmental reorganization is difficult enough at best, and it could become impossible if the courts were to enforce one-subject rules with regard to constitutional amendments with the same strictness that some courts, sometimes, have enforced them against statutes. Certainly a mechanical invalidation of any amendment which affected more than one article or section of the constitution would make any comprehensive plan of government reorganization impossible.

Having disposed of this major obstacle, it followed easily enough that the changes specifically authorized by the amendment were valid against objections that they conflicted with prior constitutional provisions.

The decision is of most interest for its discussion of the

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1. 215 La. 315, 40 So.(2d) 477 (1949).

2. The provision is not in form a one-subject provision. What the constitution says is: "When more than one amendment shall be submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately." The court, however, has treated this as a one-subject provision, though not as so restrictive a one as applied to legislation by Louisiana Constitution Article III, Section 16, which reads, "Every law enacted by the legislature shall embrace but one object, and shall have a title indicative of such object." See discussion in principal case at 40 So.(2d) 477, 480, 481.

3. 198 La. 507, 3 So.(2d) 761 (1941), criticized in *The Work of the Louisiana Supreme Court for the 1940-1941 Term* (1942) 4 LOUISIANA LAW REVIEW 215-219.

power of the state over municipal corporations, in the establishment and discontinuance of units, transfer of property between them, and establishment of their boundaries. The court adopts the view of the United States Supreme Court, that the Fourteenth Amendment imposed no restrictions on the states in this field,<sup>4</sup> and further finds no additional restrictions in the Louisiana Constitution.<sup>5</sup> This view, of course, disposed of all objections to the consolidation of functions whether urged from the point of view of the inhabitants or of the consolidated units as proprietors.

One novel feature of the Baton Rouge plan is the establishment of industrial districts, which do not fit into the conventional division of all land between urban and rural. The industrial districts are defined as districts where the industries themselves furnish substantial services normally provided by local governments.<sup>6</sup> It was provided that the parish tax limitations, rather than the municipal, should apply in the industrial areas. This three-way division of territory — urban-industrial-rural — while novel, appears to be more in accord with the realities of modern society and community planning than the traditional division and to open definite possibilities for future development.

The plan of government adopted went further than the constitutional provision and prohibited the construction of residential buildings in the industrial areas. This is an advance on conventional zoning technique, even within urban areas, where it is customary to permit residences everywhere, and to attempt only to keep industries and businesses out of residential areas. The court did not directly pass upon this feature of the plan. It was held to be severable, and hence its validity need not be decided where the constitutional attack was directed against the

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4. The court quoted extensively from *Laramie County v. Albany County*, 92 U.S. 307, 23 L.Ed. 552 (1876) and cited among others the leading cases of *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907) and *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471 (1923). It found, however, that no such injustice was actually wrought in this case as those approved in some of the United States Supreme Court cases.

5. The court cited with approval the case of *City of New Orleans v. Cazelar*, 27 La. Ann. 156 (1875), upholding an extension of the New Orleans city limits, which included a little plot of marsh land which received no police or fire protection or any of the other benefits of municipal government. In view of *Myles Salt Co. v. Board of Comm'rs of Iberia & St. Mary's Drainage Dist.*, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916), reversing 134 La. 903, 64 So. 825 (1914), it may be doubted if the United State Supreme Court would go so far, but the *Myles Salt* case might be limited to improvement districts and not applied to cities.

6. La. Const. of 1921, Art. XIV, § 3a.

plan as a whole. The court referred, however, to the power to zone conferred on municipalities by Louisiana Constitution, Article XIV, Section 29; and it appears to be a safe prediction that in a proper case the provisions relating to industrial districts would be upheld.

The extension of the city limits of Baton Rouge, authorized in the amendment and included in the plan of government, was the subject of a separate constitutional attack, although the arguments in support of the reorganization and consolidation provisions were conclusive on this question. The objection that the general state law on extending municipal limits<sup>7</sup> had not been followed was held to be without force, since the extension was authorized by the constitutional amendment. The court regarded the extension in the same light as one made by the legislature itself, and denied that it was invalid, under the Fourteenth Amendment, because no right was given to the people in the territory to be annexed to vote separately. This is in accord with the view the United States Supreme Court has taken on this question.<sup>8</sup>

Finally, objections to the levy of the full parochial tax rate within the City of Baton Rouge were rejected, since it was held that the maintenance of the streets had been validly transferred to the parish by the plan of government, and hence Article XIV, Section 8, of the Louisiana Constitution had no application.

The decision has importance beyond the City of Baton Rouge. The problems of the proper organization of local government and the elimination and coordination of overlapping units have attracted increasing attention in recent years. There has been an increased demand for municipal services all over the country, and at the same time the burden of taxes of all kinds has become more oppressive. One widely discussed solution is city-county consolidation. Students of city planning and local government will be encouraged to learn that the constitutional amendment authorizing the Baton Rouge experiment has met the approval of the Louisiana Supreme Court.

*Pyle v. City of Shreveport*<sup>9</sup> represents an unsuccessful attempt of a city to meet the problem of suburbs under the general state law, without benefit of a comprehensive plan of reorganization or a constitutional amendment. The City Council of

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7. La. Act 315 of 1946 [Dart's Stats. (Supp. 1949) § 5373.1].

8. *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907),

9. 215 La. 257, 40 So.(2d) 235 (1949).

Shreveport, acting under Act 315 of 1946,<sup>10</sup> after receiving two petitions for annexations of two different areas, annexed both under one ordinance. The court held that this could not be done under the terms of the statute.

On rehearing, the court considered the reasonableness of the annexations proposed. Objections to the proposed boundaries, found to make them unreasonable, were (1) the boundaries were irregularly drawn, in a manner not justified by natural or other barriers, apparently because certain property owners desired to be excluded and (2) the country club was excluded.

The difference in the attitude of the court toward the boundary extension in the Shreveport case and the Baton Rouge case is striking. However, it was invited by the legislature. In the general statute the court is directed to consider the "reasonableness" of the annexation.

The vesting of final discretion in the judiciary represents probably the best solution to the problem of the enlargement of cities. It has obvious advantages over an election procedure, especially if the territory to be annexed is permitted to vote separately. Despite the failure of this particular annexation, the basic scheme of Act 315 of 1946 appears to be sound. Generally, however, cities expand in several directions, and it may often represent better municipal planning to annex several suburbs at once. The court objected to the procedure used by the Shreveport council solely because it was not authorized by the act, but the legislature could easily adopt an amendment providing for annexation of two or more parcels by one ordinance.

As to the objections on grounds of reasonableness, it would be well for cities in future annexation ordinances to follow fairly straight boundaries unless natural barriers justify irregularity, and, in view of the majority opinion, to be prepared to justify the specific boundaries, as well as the annexation generally. Those who really trust local administrative discretion will prefer the approach to the problem in Justice Hamiter's dissenting opinion, but it is clear that the majority of the court will determine the question of reasonableness with but little, if any, presumption in favor of the local administrative action. As for the country club, it is better to annex it. Courts everywhere, if permitted to review city annexations with free judicial discretion, prefer to see the country club taken in.<sup>11</sup>

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10. Dart's Stats. (Supp. 1949) § 5373.1-5373.9.

11. See, for example, *Henrico County v. City of Richmond*, 177 Va. 754, 15 S.E. (2d) 309 (1941).

## ZONING

In *Carrere v. Orleans Club*,<sup>12</sup> the New Orleans Women's Club, a non-conforming user, had secured a building permit to erect an auditorium as an addition to its club building. Plaintiffs, neighboring landowners, secured an injunction in the lower court forbidding the construction on the theory that the following provision of the New Orleans zoning ordinance had not been complied with:

" . . . in the "C" and "D" Apartment Districts no building or premises shall be used and no building shall be hereafter erected or structurally altered, unless otherwise provided in this ordinance except for one or more of the following uses: . . . .

" 4. Private Clubs and Lodges, excepting those the chief activity of which is a service customarily carried on as a business, provided, however, that the Commission Council may in its discretion, permit private clubs and lodges, excepting those the chief activity of which is a service customarily carried on as a business, within the "C" and "D" apartment districts, upon the application of not less than seventy (70%) percent of the property owners within 300 feet of any or all portions of the premises to be so used."<sup>13</sup>

The court construed the second "excepting" as meaning "including" in order to avoid conflict with the first provision, which it regarded as an unqualified exemption from the requirements of the section of private clubs whose chief activities were not services customarily carried on as a business. This construction, which made it unnecessary to pass upon the constitutional question of the validity of the consent provision, was not placed upon this ground, but upon the grounds that (1) the lawmakers had not intended a contradictory provision and (2) zoning ordinances must be strictly construed in favor of the property owner and (3) that it was in accord with the construction of the municipal authorities and the city attorney. Consequently, the decision below was reversed and the suit dismissed.

To determine whether the club was carrying on activities customarily carried on as a business the court examined its activities in some detail. Except in that the activities appear typical of women's clubs, this aspect of the case is of little gen-

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12. 214 La. 303, 37 So.(2d) 715 (1948).

13. 214 La. 303, 306, 37 So.(2d) 715, 716.

eral interest. It is noteworthy, however, that the court regarded it as significant that the club was recognized as exempt from income and capital stock tax under Section 101(7) of the Internal Revenue Code.<sup>14</sup>

#### MUNICIPAL PROPERTY

The decision in *City of New Orleans v. Dupuy Storage & Forwarding Corporation*,<sup>15</sup> that the Public Belt Railroad Commission has implied power to sell property not needed for the operation of its railroad, is remarkable, not because the court reached an obvious common sense result, but because it illustrates the atmosphere in which the law of municipal corporations operates.<sup>16</sup>

Here the defendant-purchaser was in fact anxious to buy the land, and suit was brought because title attorneys questioned the authority of the Public Belt Railroad Commission to convey. The doubts were based on three grounds: (1) the lack of any specific authority to convey surplus property generally; (2) the presence of provisions designed to prevent the sale of the whole railroad system which might be construed as also prohibiting the sale of parts, including unused parts;<sup>17</sup> (3) the existence of provisions specifically authorizing sale of surplus property in the case of the Mississippi River Bridge.<sup>18</sup>

The court had no difficulty in finding an implied power of sale, for unused property, especially in view of its decision in *Board of Commissioners of the Port of New Orleans v. New Orleans Public Service, Incorporated*.<sup>19</sup> where a similar implied power to sell surplus property had been found to exist in the New Orleans Port Commission. Despite this decision, however, title attorneys would be well advised to continue to insist on court action to clear title in all cases where the vendor is a pub-

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14. 26 U.S.C.A. § 109(9).

15. 215 La. 795, 41 So.(2d) 721 (1949).

16. The classic statement of the denial of power of officers of public corporations to act sensibly is 1 Dillon, *Municipal Corporations* (5 ed. 1911) § 237: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations."

17. La. Const. of 1921, Art. XIV, § 26.

18. *Id.* at § 28.

19. 161 La. 741, 109 So. 408 (1926).

lic body, and the statutory authority for the sale is unclear. This case indicates that the Louisiana court will not hamper public bodies by requiring them to retain permanent investments in unused properties. So long, however, as it remains general doctrine that the powers of municipal corporations and public bodies must be strictly construed and must be specifically conferred, it would be advisable for counsel to insist upon a decision with regard to the particular public body and statute involved. Legislative draftsmen can help by recognizing the problem of the disposal of surplus property in creating such agencies.

An incidental point of interest is that, under the implied power, the court upheld a privately negotiated contract, adopted by the commission by resolution. The absence of a statutory procedure for sale was held no bar to the making of the sale by normal business methods.

#### TAXPAYERS' ACTIONS

The case of *Tucker v. Edwards*<sup>20</sup> was a sequel to *Gravity Drainage District No. 2 v. Edwards*.<sup>21</sup> The Gravity Drainage District suit was an action to recover on a depository bond for money the district had lost in 1932 in a closed bank. In the trial court, a majority of the members of the board joined in a motion to dismiss the action, which was granted. The attorney for the board in the trial court took an appeal, dismissed in the supreme court, on motion of the district attorney, acting under a resolution adopted by the successor board to the board which originally instituted the suit.

The present action was started thereafter, on a tort theory, by plaintiffs as taxpayers, on behalf of the district, alleging that between the defendants, board members, obligees on the bond, and the district attorney who moved to dismiss the appeal there was a conspiracy to give away an asset of the district, that is, the right to recover on the depository bond. The suit was dismissed on the ground that failure to perform discretionary acts does not subject public officers to personal liability, and the judgment of dismissal was affirmed.

Technically, there seems no grounds for objection to any of the decisions in this dispute. As much cannot be said for

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20. 214 La. 560, 38 So.(2d) 241 (1948).

21. 207 La. 1, 20 So.(2d) 405 (1944), discussed in *The Work of the Louisiana Supreme Court for the 1944-1945 Term* (1946) 6 LOUISIANA LAW REVIEW 625.

the actual result. Here the drainage district deposited money in a bank, relying on an apparently valid depository bond given by a solvent party. Yet after seventeen years of litigation there has been no authoritative decision as to the actual validity of the bond, and the district has not recovered any money, except such sums as might have been paid in liquidation without regard to the depository bond. The nearest the matter came to consideration was in the trial of the first case, and there the majority of the board joined in the motion to dismiss, not on the grounds that the bond was invalid, but on the grounds that the deposit had been made and the bond given to aid the local bank from motives of the community's best interests rather than personal gain.<sup>22</sup> The statutes presently provide for audit of the accounts of drainage districts by the supervisor of public accounts,<sup>23</sup> and it appears that the first suit here was brought at the instance of that official<sup>24</sup> under threat of indictment of the members of the board. A more effective remedy would be to permit the state official to bring suit on behalf of the district.

There is, however, a more fundamental problem. To what extent, if any, in times of depression, are public officials justified in depositing public funds to bolster up shaky banks, on the theory that the whole community would be benefited if the bank can be saved? Should they start a home-town R.F.C.? There appears to be no legal justification for such a use of public funds. Yet here, and in many cases in the early 1930's such action was taken. The problem should be faced squarely, and liability or non-liability not left to be determined finally seventeen years later, upon the basis of the procedure attempted to be used to enforce the liability, or the attitude of the successor local boards in the particular case.

#### RIGHT TO PUBLIC OFFICE

Various aspects of the problem of the right to public office were before the court in five cases during the year. Perhaps the most important of these cases, from the point of view of the legal principles determined, was *State ex rel. Thompson v. Department of City Civil Service*.<sup>25</sup> Here the relator, a judge of the

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22. 207 La. 1, 5, 20 So.(2d) 405, 406 (1944).

23. Dart's Stats. (1939) § 7368.

24. 207 La. 1, 5, 20 So. (2d) 405, 406.

25. 214 La. 683, 38 So.(2d) 385 (1948).

Recorders Court of the City of New Orleans, contended that he was protected against dismissal by the City Civil Service Act.<sup>26</sup> The court held that it was not the legislative intent to include judicial officers in the civil service act, relying on an analysis of the act showing that many provisions were obviously inapplicable to judicial officers, and the general rule that civil service acts do not cover the judiciary, even though broad language referring to all officers and employees is used. The decision is based upon the legislative intent in the act involved, and would not preclude the legislature from devising a civil service system for judicial officers, if it desired to do so, and conformed to constitutional provisions relating to the judiciary.

*Blessing v. Levy*<sup>27</sup> involved an attempt by the judge of the New Orleans Juvenile Court to remain in office, contending that the adoption of Section 96 of Article VII of the Constitution, voted on the same day as the election of her successor, had the effect of extending her term of office for an additional eight years and voiding the election of her successor. The court rejected this contention, in reliance on the rule that a construction which would have unseemly and absurd consequences should be avoided. On this issue the decision of the court was unanimous. As an alternative ground, Judge Levy contended that Judge Blessing had not practiced law for five years as required by the constitutional amendment and that she was entitled to hold office until a qualified successor was chosen. The court rejected this contention, holding that the only issue under the statute<sup>28</sup> was title to the office, and not eligibility, applying the same rule as obtains in intrusion to office suits under Act 102 of 1928.<sup>29</sup> Justice Fournet dissented from this portion of the opinion.

The rule that statutes would not be construed so as to give them absurd and ridiculous meanings was again employed in *Berteau v. Police Jury of Parish of Ascension*<sup>30</sup> to uphold the action of the police jury in constituting itself the Board of Commissioners of the East Ascension Consolidated Gravity Drainage District No. 1, as specifically authorized in Act 91 of 1948. Plaintiff unsuccessfully contended that another provision of the act, requiring the police jurors to appoint the commissioners "in ac-

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26. La. Act 171 of 1940 [Dart's Stats. (Supp. 1949) § 6281.

27. 214 La. 856, 39 So.(2d) 84 (1949).

28. Dart's Stats. (1939) §§ 2849-2852.

29. Dart's Stats. (1939) § 7712 et seq.

30. 214 La. 1003, 39 So.(2d) 594 (1949).

cordance with law" required them to appoint five resident property owners as required by Act 212 of 1942.<sup>31</sup>

*Avant v. Ouachita Parish School Board*<sup>32</sup> required a determination of whether the words "of a city" in Section 17 of Act 100 of 1922<sup>33</sup> should be construed as meaning "belonging to a city" or as meaning "within a city." The court adopted the construction of "within a city," relying primarily on the legislative intention and the unfairness of the opposite result, which would be to deny residents of a city representation on a parish school board operating schools within the city. The significance of the decision, however, appears limited by its particular facts and the peculiar dual school systems operated in the City of Monroe.

#### BOND ISSUE—ATTORNEY'S FEES

The case of *First Sewerage District of the City of Lake Charles v. City Council of Lake Charles*<sup>34</sup> was an injunction proceeding brought by the sewerage district to prevent the city council from paying a special fee to the city attorney for services in connection with a bond issue sold for the sewerage district by the city. The city proposed to deduct the fee, as an expense, from the proceeds of the bond issue, before turning them over to the sewerage district. The court held that the city had implied power to pay such a fee, where the statutory provisions for the employment of a special attorney<sup>35</sup> were complied with, and that the fee could be paid to the city attorney in view of the amendment striking out the provision providing that the city attorney should serve as attorney for sewerage districts *ex officio*, without compensation.<sup>36</sup> The decision follows logically from the statutes, and the implication of the power to employ counsel in a matter as complex as a municipal bond issue is clear enough. It should be noted, however, that the case passes only on the right of the city to employ and pay counsel. The right of the sewerage district to have employed and paid its own counsel was not passed on, since this in fact had not been done.

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31. Dart's Stats. (Supp. 1949) § 7032.

32. 215 La. 990, 41 So.(2d) 854 (1949).

33. Dart's Stats. (1939) § 2236.

34. 215 La. 428, 40 So.(2d) 808 (1949).

35. Dart's Stats. (Supp. 1949) § 7409.

36. La. Act 46 of 1928, § 7.