**Louisiana Law Review**

Volume 14 | Number 1
*The Work of the Louisiana Supreme Court for the 1952-1953 Term*
*December 1953*

# Public Law: Local Government Law

Henry G. McMahon

lative intention, particularly in Louisiana where all except emergency legislation becomes effective at the same date and hour. It is submitted that by the use of the same realistic doctrines which it invoked in the cases of the disappointed city judges, the court could have saved both acts and achieved what was most obviously the Legislature's true intent.

## LOCAL GOVERNMENT LAW

*Henry G. McMahon**

### EXTENSION OF MUNICIPAL LIMITS

Two grounds of the invalidity of an annexation ordinance were relied upon in *Doise v. Town of Elton.*[1] The principal question presented was with respect to the reasonableness of the annexation, an issue which the trial judge had resolved in favor of the municipality. The intermediate appellate court, after a review of the evidence, had concluded that the annexation was unreasonable, as it found that the additional area was not needed for the normal growth of the community and that annexation would not provide the residents thereof with additional sewerage facilities, nor added flood, police, or fire protection.[2] Under a writ of review, the Supreme Court reversed this decision of the court of appeal. The fact that the former municipal limits included areas not yet developed was held inconclusive in a determination of the need for the area sought to be annexed. The unsuitability of these undeveloped areas within the corporate limits for the construction of new homes, the population increase within the municipality of more than fifty per cent within the past decade, and the recent building of a number of new residences within the area sought to be annexed, all were held to support the reasonableness of the annexation ordinance.

The second question was presented by the adoption of the annexation ordinance at a meeting of the governing body of the town which twice had been continued by unanimous consent of the aldermen. The argument of the annexation opponents that the applicable statute prohibited more than a single continu-

* Professor of Law, Louisiana State University.
1. 222 La. 973, 64 So. 2d 238 (1953).
2. 56 So. 2d 604 (La. App. 1952).

ance of the meeting was held without merit, in view of the language of the statute in question.[3]

### OFFICERS

Four cases decided by the Supreme Court during the past term concerned the right of the Governor to fill vacant municipal offices by appointment, when the unexpired term of office exceeded one year. The pertinent constitutional provision merely authorizes the Legislature to "provide the mode of filling all offices created by it."[4] In all of these cases, the offices were created by the Legislature, and the inquiry was one into the legislative mode provided for the filling of the vacancy. The common difficulty was presented by two separate provisions of the Revised Statutes of 1950. The first of these[5] provided that, except as otherwise required by the Constitution and by law, the Governor was authorized to fill by appointment any vacancy occurring in any state, district, parish, ward, or municipal office. The second statutory section[6] provided that a vacancy in any elective office, when the unexpired term was in excess of one year, was to be filled by election. The Supreme Court held that, if possible, effect had to be given to both of these statutory provisions, and found that they could be reconciled readily. Accordingly, the second provision was held to require the filling of an elective office through election, whenever the unexpired term was in excess of one year; while the first provision was held to authorize the filling of the vacancy by gubernatorial appointment in all cases where the mode of filling the vacancy was not provided by law. The four cases involved the offices of judge of the Crowley City Court,[7] judge of the Lafayette City Court,[8]

3. La. R.S. 1950, 33:405, which provides that: "Meetings, whether regular or special, may be continued over to another specified date upon unanimous consent of the aldermen. If any meeting, regular or special, fails for want of a quorum, any number of the aldermen less than a quorum may adjourn the meeting to another specified date, but in no case shall adjourned meetings be prolonged beyond the end of the month in which they are scheduled to take place, or be continued or adjourned more than once, or to any date except that specified at the first continuance or adjournment." The Supreme Court concluded that the prohibition against a second continuance of the governing body's meeting applied only to the continuance required because of the absence of a quorum, and not to a continuance made with unanimous consent of all aldermen.

4. La. Const. of 1921, Art. V, § 11.

5. La. R.S. 1950, 42:370, codifying the provisions of La. Act 21 of 1934 (2 E.S.), § 1.

6. La. R.S. 1950, 42:371, codifying the provisions of La. Act 112 of 1912.

7. Chappuis v. Reggie, 222 La. 35, 62 So. 2d 92 (1952).

8. Babineaux v. Lacobie, 222 La. 45, 62 So. 2d 95 (1952).

judge of the West Monroe City Court,[9] and mayor of West Monroe.[10]

These four cases possess an importance much beyond the question of the right of the Governor to fill vacancies in municipal office. They announced a rule of prime importance with respect to the effect of the adoption of the Revised Statutes of 1950. In an earlier case,[11] the Supreme Court had held that the recent statutory revision constituted a valid legislative enactment of all of the various sections thereof, and that in the event of any difference between a section and its statutory source provision, the revised statute section must prevail. In the four cases in question, the Supreme Court supplemented this rule by holding that all sections of the Revised Statutes must be given effect, if at all possible, without regard to the date of enactment of the respective source provisions thereof. These holdings have gone far towards clarifying the effect of the recent legislative revision of the general statutes of Louisiana.

*State ex rel. La Nasa v. Hickey*[12] presented questions concerning the Governor's right to fill vacancies in constitutional offices. In 1951, the defendant had been given a recess appointment to the office of assessor of Orleans Parish by the Governor. At the commencement of the regular legislative session in 1952, the relator had been appointed by the new Governor to this vacancy, and his appointment had been confirmed by the senate. As relator's suit to be recognized as the lawfully appointed officer was filed prior to the termination of this legislative session, based upon the argument that his recess appointment was valid at least until the end of the 1952 legislative session, defendant contended: (1) that relator's appointment was invalid, as there was no vacancy in the office at that time; and (2) that, as defendant was holding office validly at the time relator's suit was filed, the petition therein disclosed no right or cause of action. This second defense was maintained on appeal, and the suit was dismissed.

The Supreme Court rejected relator's contention that defendant's right to hold the disputed office under his recess appoint-

9. State ex rel. Fudickar v. Heard, 223 La. 127, 65 So. 2d 112 (1953).
10. State ex rel. Fudickar v. Norris, 223 La. 135, 65 So. 2d 115 (1953).
11. City of Alexandria v. LaCombe, 220 La. 618, 57 So. 2d 206 (1952). The far-reaching effect of this decision was pointed out in The Work of the Louisiana Supreme Court for the 1951-1952 Term, 13 LOUISIANA LAW REVIEW 230, 297 (1953).
12. 222 La. 17, 62 So. 2d 86 (1952).

ment was terminated as soon as the Governor submitted relator's appointment to the senate for confirmation. In the majority opinion, however, the court upheld the right of the Governor in 1952 to make a valid appointment of relator to the office which would become vacant at the end of the pending legislative session. In reaching this conclusion, the majority of the court applied the general rule in American jurisdictions upholding, in the absence of a constitutional or statutory prohibition, the right of an appointing officer to fill prospective vacancies certain to be created during the term of the appointing officer. The recognition of this right to fill prospective vacancies was criticized sharply by Justice McCaleb, who concurred in the result solely on the theory that here the Governor was filling a present vacancy but only for an unexpired term, which would commence at the end of the 1952 legislative session. To clarify the position taken by the majority of the court, a *per curiam* opinion was rendered, which restricted the effect of the decision to cases where the gubernatorial appointment was made, and confirmed by the senate, to fill a vacancy which would occur upon the termination of the legislative session.

In the only other case decided during the past term concerning the right to public office, *Cox v. May*,[13] the Supreme Court held the successful independent candidate for police juror ineligible on the ground that at the previous Democratic primary he had unsuccessfully sought nomination as the party candidate for state representative. This result was reached through the application of the pertinent statute adopted to insure party regularity.[14]

### PUBLIC SCHOOL TEACHERS

In the Teachers' Tenure Law,[15] a teacher is defined as "any employee of any parish or city school board who holds a teacher's certificate and whose legal employment requires such teacher's certificate."[16] As the protection of the statute is afforded only

13. 222 La. 754, 63 So. 2d 745 (1953).

14. La. R.S. 1950, 18:365, providing that "No one who participates in the primary of any political party may participate in any primary of any other political party, with a view of nominating opposing candidates, nor shall he sign any nomination papers for any opposing candidate, nor shall he be himself a candidate in opposition to any one nominated at or through a primary in which he took part." This statute was held not to contravene La. Const. of 1921, Art. VIII, § 15, providing the method whereby a person having the necessary qualifications may become an independent candidate for office.

15. La. R.S. 1950, 17:441 et seq.

16. La. R.S. 1950, 17:441.

to a "teacher," the statutory definition was sufficient to dispose of two cases decided during the past term of court,[17] where the plaintiffs held no teacher's certificate.

In a third case, *State ex rel. Parker v. Vernon Parish School Board*,[18] the defendant school board sought to justify its refusal to employ plaintiff on the ground that the position of supervisor of class rooms, which he had held for two years previously, had been abolished. The evidence introduced proved that plaintiff had been employed as a class room teacher for several years prior to World War II, and that during the latter he had been on active duty with the armed forces under a formal military leave. Upon his release from active duty, plaintiff spent two years doing graduate work, without obtaining a formal, written leave from the defendant board, although he sought to prove that an oral leave had been granted by his employer. Upon the completion of his graduate work, plaintiff had been re-employed by defendant board as a supervisor for two years, after which the position had been abolished. Under these circumstances, the Supreme Court found it unnecessary to determine whether plaintiff had been granted leave to do graduate work. As he possessed at least the status of probationary teacher, and the statutory requirements for the dismissal of such a teacher had not been complied with, plaintiff was held to have been discharged illegally. The defendant was ordered to provide him with employment as a supervisor, or in a position of like status and salary, and to pay plaintiff the salary due from the date of his illegal discharge.

### Bond Issues

*Dennis v. Rapides Parish School Board*[19] presented a novel and interesting question concerning the validity of a proposed bond issue. In 1948, the taxpayers of a Rapides Parish school district had levied a special tax of five mills,[20] to run for a period of five years, at a special election called for such purposes. In 1952, this tax still had one year to run, but no bonds or certificates of indebtedness were outstanding to which this tax had been dedicated. As it wished to issue new certificates of indebtedness

17. State ex rel. Sibley v. Ascension Parish School Board, 222 La. 923, 64 So. 2d 221 (1953); Barnette v. Bienville Parish School Board, 66 So. 2d 569 (La. 1953).

18. 222 La. 91, 62 So. 2d 111 (1952).

19. 66 So. 2d 583 (La. 1953).

20. Under La. Const. of 1921, Art. X, § 10, as amended.

secured by a special five mill tax to run for a period of ten years, in 1952 the parish school board called an election by the taxpayers of the school district to: (1) cancel the special five mill tax authorized in 1948; and (2) levy a five mill tax for a period of ten years for the purpose of issuing certificates of indebtedness to obtain funds to construct and improve certain schools in this district. Both proposals were adopted by the majority in number and assessment of the taxpayers voting at this election. All proceedings in connection with the election and the sale and proposed delivery of the certificates of indebtedness were sought to be declared null and void by the plaintiff taxpayer. The grounds of invalidity asserted were a lack of authority by the taxpayers of the district to cancel the special five mill tax levied in 1948, and the resultant nullity of the five mill tax levied at the 1952 election as exceeding the constitutional maximum of special taxes for school purposes. Both the trial and appellate courts rejected these contentions. In the absence of a constitutional or statutory prohibition, it was held that the taxpayers might lawfully cancel an outstanding special tax levy, if at the time of cancellation no bonds or certificates of indebtedness secured by a dedication thereof were outstanding. Since the cancellation of the original special tax levy was held valid, plaintiff's second contention fell of its own weight.

In another case challenging the validity of an election authorizing the issuance of bonds,[21] the court found that plaintiff had failed to prove anything beyond mere irregularities at the election which had no effect upon its outcome. The election and all subsequent proceedings connected with the issuance of the bonds in question were held valid.

### ZONING

Three cases decided by the Supreme Court during the past term presented interesting points as to the validity of zoning ordinances. In the first, *State ex rel. Harris v. Zoning Board of Appeal and Adjustment*,[22] the appellate court affirmed the judgment appealed from, which had annulled a resolution of the Zoning Board of Appeal and Adjustment of the City of New Orleans. This resolution, adopted at the instance of a property owner, authorized the commercial use of property in a zone

21. Daigle v. Mayor and Board of Aldermen of Town of Rayne, 222 La. 556, 62 So. 2d 833 (1953).

22. 221 La. 941, 60 So. 2d 880 (1952).

restricted to residential purposes by the applicable zoning ordinance. Under the latter, the continued commercial use of property was permitted if it was being used for such purposes on the date of the adoption of the ordinance, except that in no event could such non-conforming use continue for more than twenty years thereafter; and if the property ceased to be used commercially for a continuous period of six months, a non-conforming use thereafter was prohibited. At the time of the adoption of the ordinance, and for some years thereafter, the property in question had been utilized for commercial purposes; but for a period of more than six years it had not been so used. Under these circumstances, the court held that the adjustment board could not, under the guise of permitting a variation, completely disregard the area classification of the ordinance.

In *Simmons v. City of Shreveport*,[23] the Supreme Court held a city ordinance prohibiting the sale of package liquor in plaintiff's place of business unconstitutional as a denial of the equal protection of the law.[24] For several years prior to the adoption of the ordinance, plaintiff had been operating a drug store in an area classified by the applicable zoning ordinance as a "neighborhood commercial district." One section of this zoning ordinance permitted the sale of package liquors by a "bona fide drug store" which had been in operation for a period of one year. Under this provision, as well as the regulatory liquor ordinance, on November 26, 1948, plaintiff applied for and was granted a city permit to sell package liquors. This permit was renewed on January 3, 1949. Shortly thereafter, the city adopted the challenged ordinance, which prohibited the sale of package liquors in certain defined zones (including that in which plaintiff's drug store was situated), except as to stores which had been selling package liquor for more than one year prior to its adoption. Following the adoption of this ordinance, the city demanded the surrender of plaintiff's liquor permit for cancellation, and offered to refund the unearned portion of the fee received therefor. While the challenged municipal legislation actually amended the city's regulatory liquor ordinance, it had many of the characteristics of a zoning measure, as it referred to various zones and to the city's comprehensive zoning ordinance.

Plaintiff sought to enjoin the enforcement of the new ordi-

23. 221 La. 902, 60 So. 2d 867 (1952).

24. Under Section 1 of the 14th Amendment of the Constitution of the United States, and La. Const. of 1921, Art. I, § 2.

nance, alleging a number of grounds of invalidity. Only two of these are pertinent here: the contention that, if the challenged legislation was a zoning ordinance, it was invalid because it failed to comply with the requirements of the applicable statute with respect to advertisement of its introduction and of a hearing thereon; and the plea of unconstitutionality, if deemed a liquor regulatory measure, because of its denial of the equal protection of the law.

The city strenuously resisted the suit. First, it contended that the plaintiff was not operating a "bona fide drug store," as he maintained no pharmaceutical department for the compounding of drugs called for by physicians' prescriptions. In this connection, the city relied strongly upon the definition contained in a statute regulating drug stores maintaining such departments.[25] As the plaintiff sold prepared and nationally known drugs and other items commonly sold by drug stores, he was held to have been operating a "bona fide drug store," although not one subject to regulation under the statute invoked. Failure of the plaintiff to submit a formal application for the original liquor permit, and to advertise his intention to submit such an application, likewise were relied on by defendant to defeat the suit, but these requirements were held waived by the action of the city in issuing the permit in 1948 and renewing it in 1949.

The original issues were narrowed by the city's admission that the challenged ordinance was not a zoning measure. Under this admission, both the trial and the appellate courts experienced little difficulty in holding the ordinance in question unconstitutional as a denial of equal protection, in prohibiting the continuance of plaintiff's sale of package liquors while permitting such sales in other stores in the zone which had been selling package liquors for more than a year prior to the adoption of the ordinance.[26]

In the third case, *New Orleans v. Levy*,[27] the constitutionality of the Vieux Carre Commission ordinance adopted several years ago by the City of New Orleans was again upheld. The only ground of attack urged which had not been considered previously by the court[28] was the contention that an amendment to the

25. La. R.S. 1950, 37:1171 et seq., formerly La. Act 469 of 1948.
26. The constitutional aspects of this case are discussed supra p. 89.
27. New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953).
28. In New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559 (1941), and New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941).

ordinance made the original measure unconstitutional, as shrinking the Vieux Carre area beyond that delineated in the constitutional amendment[29] authorizing the adoption of the ordinance. As the subject matter of the amending ordinance was not pertinent or material to any of the issues raised in the case, the court refused to consider this point.

### LOCAL GOVERNMENTAL RESPONSIBILITY IN TORT

Application of the trite rule that a municipality is not liable for the offenses and quasi offenses committed by its agents or employees while engaged in the performance of a purely governmental function disposed of two cases where municipalities were sued for the tortious acts of their employees. In one of these cases,[30] an exception of no cause of action was maintained to a suit brought by a property owner to recover damages to his lot caused by the improper grading of the abutting street by employees of the defendant. In the second,[31] the same exception was maintained, as to the defendant municipality, to a suit brought against it, its mayor, marshal, and a member of its governing body, to recover damages alleged to have resulted from the malicious prosecution of the plaintiff. The exception was overruled, however, as to the individual defendants, against whom the petition was held to state a cause of action.

### CONTRACTS

In 1933, pursuant to an ordinance, the City of New Orleans leased to a chapter of the Disabled American Veterans eight lots owned by the city, and not needed for governmental purposes, for a term of thirty-five years. The ordinance was specifically authorized under a legislative charter provision empowering the commission council to make a lease of such property to the defendant. Under the agreement, the lease was granted for a consideration of one dollar a year, and agreements by the lessee to keep the buildings on these lots insured at face value, to keep them in good repair, and to assume full responsibility for all injuries suffered by anyone while using these buildings.

In *New Orleans v. Disabled American Veterans*,[32] the muni-

29. Art. XIV, § 22A, as added by constitutional amendment adopted on November 3, 1936.
30. Prunty v. Shreveport, 66 So. 2d 3 (La. 1953).
31. Taulli v. Gregory, 223 La. 195, 65 So. 2d 312 (1953).
32. 223 La. 343, 65 So. 2d 796 (1953).

cipality brought a declaratory action to have this lease declared null and void. Three distinct grounds of invalidity were urged by the city: (1) the lease was not advertised and adjudicated to the highest bidder, as required by law; (2) the consideration for the lease was not serious; and (3) the legislative act authorizing the city to execute such a lease was unconstitutional, as violating the constitutional prohibition[33] against the loan, pledge, or grant of public property. In the trial court, exceptions of no cause of action and estoppel filed by defendant were overruled; and after a trial, judgment was rendered holding the lease null and void.

This judgment was reversed on appeal. As the statute authorizing the lease required no advertisement and adjudication to the highest bidder, and specifically authorized the lease to defendant, the general requirements of law were held inapplicable. The agreements made by the lessée to keep the buildings repaired and insured, and to assume responsibility for all injuries sustained therein, were held to provide the serious consideration required for the validity of the contract. The Supreme Court held the third contention of the municipality equally without merit, by pointing out that the leasing of governmental property was not a loan, pledge, or grant within the intendment of the constitutional prohibition.

## PUBLIC UTILITIES

*Melvin G. Dakin**

It has now been some seven years since the Louisiana Public Service Commission promulgated its opinion and order fixing a rate base and a rate of return for Louisiana Power and Light Company:[1] the event was significant because it marked the adoption of a "prudent investment-cost of capital" approach to the determination of the rate base and the rate of return. The opinion provided:

> "The rate base to be used in determining a fair return shall be the total original cost of the property in useful service plus the allowable amount of utility plant acqui-

33. La. Const. of 1921, Art. IV, § 12.

* Professor of Law, Louisiana State University.

1. 65 PUR (NS) 18 (1946).