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Public Law: Local Government Law

Henry G. McMahon

because it is a piecemeal effort which limits state authority only in respect to foreign corporations selling "tangible personal property." But this argument runs counter to a long line of cases holding that if Congress has power with respect to a matter, it need not exercise all of it in order to satisfy the requirements of the Fifth Amendment.[31]

There has been a great deal of speculation about the constitutionality of the State Gas Gathering Tax,[32] the subject of which is the privilege of gathering gas, that is, transporting it, after severance from the well, to the first meter at or near the well. In *Bel Oil Corporation v. Fontenot*,[33] a case involving gas gathered by a Louisiana corporation for an intrastate purchaser, the State Supreme Court struck down the statute on the ground that it constitutes an additional "tax or license" on gas leases or gas rights in contravention of Article X, Section 21, of the State Constitution.[34]

Rights acquired under gas leases, under the reasoning of the court, include exploring, producing, and marketing. The right to market includes the right to transport and measure because these activities are necessary to the effective exercise of gas leases or rights. Moreover, they are an integral part of severing gas and reducing it to possession.

The *Bel Oil* case involved intrastate commerce and the decision is supported by an independent, adequate state ground. Accordingly, it makes consideration of the federal question of the constitutionality of the tax, under the Commerce Clause, as applied to gas gathered for interstate markets, academic.

LOCAL GOVERNMENT LAW

*Henry G. McMahon**

OFFICERS

The Lawrason Act,[1] which provides for the government of

31. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
32. LA. R.S. 47:671-677 (1950).
33. Docket No. 44,761 (Nov. 9, 1959).
34. "Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance; . . . . No severance tax shall be levied by any Parish or other local subdivision of the State.

"No further or additional tax or license shall be levied or imposed upon oil, gas or sulphur leases or rights, nor shall any additional value be added to the assessment of land, by reason of the presence of oil, gas or sulphur therein or their production therefrom. . . ."

LA. R.S. 47:631-646 (1950) levies a tax on the privilege of severance of gas.

*Professor and sometime dean, Louisiana State University Law School.

1. LA. R.S. 33:321-481 (1950).

municipalities operating under a mayor and board of aldermen, provides that no officer or alderman "shall be directly or indirectly interested in any work, business or contract the consideration of which is to be paid from the treasury of the municipality."[2] The subsequently enacted Public Works Act[3] requires public advertisement and the acceptance of lowest bids in all major purchases and contracts made by all public agencies, public corporations, and state subdivisions, but does not prohibit a purchase from or contract with an officer or member of a governing body, or with a firm or corporation in which he is interested. In *Bartley, Inc. v. Town of Westlake*[4] the issues presented were whether these two statutory provisions were in conflict, and if so whether the Public Works Act had not repealed impliedly the pertinent provisions of the Lawrason Act. The Supreme Court concluded that the Public Works Act was general legislation which did not repeal by implication any provision of the Lawrason Act. It, therefore, annulled a contract which the municipality had entered into with a corporation of which the mayor was a shareholder and officer. The Supreme Court, however, refused to award the contract to the plaintiff, which had submitted the only other bid for the contract, as the advertisement therefor had expressly reserved the right of the municipality to reject any and all bids.

No one may quarrel with the Supreme Court's decision, but it is obvious that the pertinent provision of the Lawrason Act is both anachronistic and unworkable. A contract for telephone service made by such a municipality with a subsidiary of the American Bell Telephone and Telegraph Company is illegal, if any officer or alderman happens to be one of the many millions of shareholders of the parent corporation. This case high-lights the need for legislative correction.

ZONING

The constitutionality and validity of a supplemental zoning ordinance recently adopted by the City of New Orleans was the issue in *Gaudet v. Economical Super Market.*[5] The named defendant, which operated a large food store on eight lots zoned for heavy commercial uses, wished to use adjacent vacant lots

2. *Id.* 33:385.
3. *Id.* 38:2211-2217.
4. 237 La. 413, 111 So.2d 328 (1959).
5. 237 La. 1082, 112 So.2d 720 (1959).

fronting on another street to provide off-street vehicular parking for its customers. As these lots were restricted to residential uses only, under the newly-adopted ordinance the named defendant filed an application with the city council, through the city planning commission, for a temporary permit for such use. After a public hearing, the planning commission recommended to the council that the permit be denied. Despite this adverse recommendation, the council by a vote of five to one directed the issuance of the permit. The plaintiffs, owners of residential property in the neighborhood, then instituted suit against the named defendant and the city, seeking injunctive orders to prevent the named defendant from establishing and maintaining parking facilities on the two lots, and the annulment of the permit issued by the city. The ordinance under which the council had purported to act was assailed by the plaintiffs as violative of the equal protection clauses of both the State and the Federal Constitutions.

The trial court rejected the plaintiffs' demands. Under its supervisory jurisdiction the Supreme Court reversed, holding the ordinance unconstitutional.

The only provisions of the challenged ordinance which could be claimed to provide uniform rules or standards to guide the city council in its administration of the ordinance was the following:

"Whenever a petition has been filed requesting a permit for conditional use for a parking lot under the provisions of this Section and *the City Council has been satisfied that such a land use will not have an unduly detrimental effect upon the character of the neighborhood, traffic conditions, public utility facilities or other matters pertaining to the public health, public safety or general welfare,* the City Council shall authorize the issuance of a temporary permit by the Department of Safety and Permits for the installation of a parking lot . . . ." (Emphasis added.)

The italicized language was held sufficient to justify the plaintiffs' charge that the ordinance placed it within the power of the council to grant or withhold permits for conditional off-street parking according to its sole whim and fancy.

TAXATION

The procedural point decided in *New Orleans v. Davis Avia-*

tion[6] is both interesting and important. One statutory provision authorizes the collection of municipal licenses by rule to show cause why the tax debtor should not pay the license and penalties, or close his business.[7] A second statute, authorizing the collection of state licenses, likewise provides a summary procedure,[8] but goes beyond the first statute by requiring all defenses to be filed at the same time and prior to the time assigned for the hearing.[9] This second statute is also available for the collection of municipal licenses.[10]

In the principal case, after trial of plaintiff's rule, the trial court held that the defendant's evidence proved that it was not liable for the license. On the plaintiff's appeal, the intermediate appellate court reversed,[11] and held that the proceeding was brought under the second statute; and since the defendant had filed no pleading asserting his defense prior to the time assigned for trial of the rule in the court below, plaintiff was entitled to judgment. Under a writ of review, the Supreme Court reversed. Since the plaintiff's pleading did not apprise the court and the defendant that it was proceeding under the second statute, and the record indicated that plaintiff was actually proceeding under the first,[12] it was held that the provisions of the second statute could not be applied.

RATE REGULATION

In 1947 the City of Monroe granted a twenty-five year franchise to the United Gas Corporation for the sale and distribution of natural gas throughout the city. The franchise agreement, which was executed by the utility, set forth a schedule of rates to be charged during the term of the franchise. The city having refused to permit any increase of these rates, the utility sued to enjoin the city from enforcing the rate schedule embodied in the franchise agreement, contending that these rates were now confiscatory. The trial court rendered judgment for the utility.

6. 235 La. 992, 106 So.2d 445 (1958).
7. LA. R.S. 33:4784 (1950).
8. *Id.* 47:1574.
9. *Id.* 47:1574 (2).
10. *Id.* 33:2841.
11. New Orleans v. Davis Aviation, 102 So.2d 510 (La. App. 1958).
12. The Supreme Court concluded that since the plaintiff's rule was made returnable 23 days after service of the notice on defendant, and the second statute requires trial of the rule not less than 2 nor more than 10 days after notice, plaintiff must have been proceeding under the first statute.

On appeal, the Supreme Court reversed.[13] The court held that the state's power to regulate the rates to be charged by public utilities had been partially and validly delegated to the city in the latter's charter. It recognized the rule that in the exercise of its rate making function, the city could not impose rates which were confiscatory, but held this rule inapplicable to the facts of the case. The rates complained of had been adopted by a contract between the utility and the city, and whether these rates were confiscatory was immaterial.

MUNICIPAL OPERATION OF UTILITIES

Most of the litigation throughout the United States in the field of local government concerning utility rates is addressed to the reasonableness of rates fixed by the municipality, under its delegated governmental power to determine reasonable rates for the privately owned utilities operating within their limits. Three cases decided during the past term involved the legality of rates charged by the local government in its proprietary capacity as operator of the utilities.

In *Hicks v. City of Monroe Utilities Commission*,[14] customers of the municipally owned and operated utility living outside of the municipal limits brought a suit to annul a rate classification as unreasonable, arbitrary, and discriminatory, and to enjoin the city, as owner, and its utilities commission, as operator, from collecting or attempting to collect the alleged unlawful rates. The dispute stems from a rate classification which established one water rate for suburban customers who were using electricity supplied by the municipal utility, and another rate (nearly four times as high) for water consumed by suburban customers not using the electricity supplied by this utility. When the case was tried in the court of original jurisdiction on the plaintiffs' rule for a preliminary injunction, the entire case was tried on its merits by stipulation of the parties. The trial court maintained the defendants' exceptions of no right and no cause of action, and rejected the plaintiffs' demands. The intermediate appellate court reversed, overruled the exceptions, and rendered judgment annulling the rate classification complained of and enjoining the defendants from collecting or attempting to col-

13. United Gas Corporation v. City of Monroe, 236 La. 825, 109 So.2d 433 (1958).

14. 237 La. 848, 112 So.2d 635 (1959).

lect such rates.[15] Under a writ of review, the Supreme Court affirmed the decision of the intermediate appellate court. The plaintiffs' contentions that the rate classification was unreasonable and discriminatory were upheld, as the classification employed was based upon matters completely collateral to the service being furnished.

The other two cases upheld the right of a waterworks district to increase its water rates charged to the defendant municipalities.[16] In both, the plaintiff waterworks district had entered into a contract with the municipality, with a flat rate to be charged for all water supplied the municipality during a primary term; and which further provided that if, after the primary term the original rates were found to be inadequate to cover operating costs and service charges on revenue bonds which the waterworks district proposed to issue, the municipal officers would meet with the officers of the waterworks district within thirty days of notice thereof, to consider and discuss higher rates. The bond indenture, under which the district had issued a large amount of revenue bonds, bound the district to impose rates adequate to cover operating costs and to service the revenue bonds. After the expiration of the primary term, the rate charged the municipality under both of these contracts was bound to be inadequate for the purposes mentioned above, and in each case the waterworks district notified the municipality thereof and requested the meeting provided in the contract. In each case, the municipality by letter refused to meet for such purpose, and informed the waterworks district that it would not consent to any increase of the rates.

The waterworks district then revised its rate schedule upward, and sued the municipality in both cases to recover the difference between the amounts which would be due under the original rate (and which had been paid without prejudice) and the amounts allegedly due under the revised rate. In each case, the trial judge construed the contract as binding the waterworks district not to charge any rate in excess of that charged originally, maintained the defendant's exceptions of no right and no cause of action, and rejected the demands of the waterworks district. On appeal, the Supreme Court reversed both judgments.

15. Hicks v. City of Monroe Utilities Commission, 108 So.2d 127 (La. App. 1958).

16. Waterworks District No. 3 v. City of Alexandria, 236 La. 804, 109 So.2d 426 (1959); Same v. City of Pineville, 236 La. 824, 109 So.2d 433 (1959).

In both it was held that, under the plaintiff's pleadings, the municipality had breached the contract by refusing to meet to consider any revision of the rates. Accordingly, the waterworks district not only had the legal right to revise its rates upward, but was under an obligation to the holders of its revenue bonds to do so.

PUBLIC UTILITIES

*Melvin G. Dakin**

During the term no appeals of an unusual nature came to the court from the Public Service Commission. The *Faulk-Collier* case[1] involved an attempt by competing carriers to have a new Commission certification annulled on the ground, apparently, that it was more broadly drawn than the public interest required. The Commission was held not to have acted arbitrarily in certifying a carrier to transport, on irregular routes, household goods originating in, or destined for, an area within a 30-mile radius of a designated city where it was shown that no carrier terminals existed within the area; the service was needed, and certification limited solely to the area was found economically not feasible. Since public interest in the area would be served by the certification, it was held to be of no importance that competition would be somewhat increased outside the area.

The *Kemper* opinion[2] was actually decisive of eight appeals. The Public Service Commission had since enactment construed language in the Motor Carrier Act as mandatory in requiring a contract carrier with more than five shipper contracts to be certified as a common carrier.[3] This construction was brought into question by some eight contract carriers submitting for the approval of the Commission one or more additional contracts. Such approval being refused, suits were instituted in district court to compel such approval; from district court judgments dismissing the suits, the present appeals were taken.[4]

In holding against the construction urged by the Commission, the court pointed out that the Motor Carrier Act clearly contem-

*Professor of Law, Louisiana State University.

1. Faulk-Collier Bonded Warehouse, Inc. v. Louisiana Public Service Commission, 236 La. 357, 107 So.2d 668 (1958).

2. Kemper, Inc. v. Louisiana Public Service Commission, 235 La. 1035, 106 So.2d 460 (1958).

3. LA. R.S. 45:162(4) (1950).

4. *Ibid.;* 235 La. 1046-52, 106 So.2d 464-67 (1958).