Louisiana Law Review

Volume 23 | Number 2
The Work of the Louisiana Appellate Courts for the 1961-1962 Term: A Symposium
February 1963

Public Law: Local Government Law

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Repository Citation
Henry G. McMahon, *Public Law: Local Government Law*, 23 La. L. Rev. (1963)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol23/iss2/19

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LOCAL GOVERNMENT LAW

*Henry G. McMahon**

OFFICERS

Roughly half of the cases of general interest in this area decided during the past term relate to the power to appoint officers and employees of local governmental bodies.

The legal issue presented in *Funchess v. Lindsey*[1] was not novel, even in Louisiana; but this decision serves admirably to clarify the law on the subject and to implement its ready application. There, the plaintiff, who was then serving as Superintendent of Schools of East Baton Rouge Parish, on January 5, 1961, was reappointed for another term of four years commencing on July 1, 1961. At the time of this appointment, the parish school board consisted of seven members, all of whom had been elected by the qualified voters of their parish and districts. Some few months later, four additional members of the parish school board were appointed by the Governor.[2] On June 8, 1961, a majority of the board, as thus enlarged, adopted a resolution rescinding the prior appointment of plaintiff; and on June 13, 1961, that same majority adopted a resolution appointing the named defendant as superintendent for the four year term.

When the validity of these actions was questioned judicially, the majority of the parish school board contended that the only board which had authority to appoint the parish superintendent to a new term of office was the board as constituted on the day this new term began. This contention was rejected by the trial court, which held plaintiff's appointment valid. On appeal, the Court of Appeal for the First Circuit affirmed.

The right of a parish school board to appoint a superintendent to a term of office a reasonable time in advance of the commencement of this term had been recognized in Louisiana previously.[3] So the issue actually presented was whether the East Baton Rouge Board had acted unreasonably in making the ques-

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1. 133 So. 2d 357 (La. App. 1st Cir. 1961).

2. Under La. Acts 1961 (2d Ex. Sess.), No. 7.

3. State *ex rel.* Russell v. Richardson, 178 La. 1029, 152 So. 749 (1934); Wilson v. Hardin, 123 La. 736, 49 So. 490 (1909).

tioned appointment. Both the trial and appellate courts resolved this issue favorably to the plaintiff, and both relied upon two admitted facts as controlling. First was the consistent practice, followed by the East Baton Rouge Board since 1929, of making these appointments five or six months in advance of the commencement of the term. The second was the fact that none of the members of the board on January 5, 1961, had any reason to know that the composition of their board would be changed prior to the commencement of the new term.

The time-honored remedy employed throughout the English-speaking world to test the right to hold public office is the writ of quo warranto. Its procedural functions have been broadened in the great majority of American jurisdictions to include the testing of the right to hold office in a *private* corporation, although England and Massachusetts have never broadened its functions similarly.[4] This great common law remedy was brought into the civil procedure of Louisiana by the Practice Act of 1805.[5] It was retained in the Codes of Practice of 1825 and 1870.[6] That the primary function of quo warranto in Louisiana was to test the right to hold public office is made evident by the code provision to the effect that "this mandate is only issued for the decision of disputes between parties in relation to the offices in corporations, *as when a person usurps the character of Mayor of a city, and such like.*"[7]

There have been two periods in our judicial history when the precise functions of this remedy were in some doubt. The first of these followed a holding by the Orleans Court of Appeal that quo warranto did not lie to test the right to hold office in a private corporation;[8] but this holding was soon overturned.[9] The second followed the adoption of the *Intrusion Into Office Act*,[10] which left some little doubt as to whether the new statutory remedy had not completely superseded quo warranto, insofar as its function to test the right to hold public office was concerned.

4. See the authorities cited in State *ex rel.* Palfrey v. Simms, 152 So. 395, 397 (La. App. Orl. Cir. 1934).

5. Acts of the Legislative Council of the Territory of Orleans of 1805, c. XXVI.

6. Arts. 867-873.

7. La. Codes of Practice art. 868 (1825, 1870).

8. State *ex rel.* Jones v. Carradine, 147 So. 554 (La. App. Orl. Cir. 1928).

9. Leidenheimer v. Schutten, 194 La. 598, 194 So. 32 (1940); State *ex rel.* Palfrey v. Simms, 152 So. 395 (La. App. Orl. Cir. 1934).

10. La. Acts 1928, No. 102, the present LA. R.S. 42:76-87 (1950).

This doubt, however, was resolved in *Slater v. Blaize*,[11] in which our Supreme Court held that, in a proper case, a plaintiff might use either quo warranto or the new statutory remedy.

The functions of quo warranto were expanded, rather than restricted, in the Louisiana Code of Civil Procedure, which defined it as "a writ directing an individual to show by what authority he claims or holds public office, or office in a corporation, or directing a corporation to show by what authority it exercises certain powers."[12] The intention of the redactors to retain its traditional function of testing the right to hold public office is further evidenced by an official Comment under this article, reading as follows:

> "The provision referring to public office was incorporated on the theory that the Intrusion into Office Act, R.S. 42:76 *et seq.*, does not give an individual the right to file suit except when he is claiming the office."[13]

In the light of this legislative history of quo warranto in Louisiana, it is interesting to learn from the "majority opinion" in *Lelong v. Sutherland*[14] that quo warranto does not lie to test the right to hold public office. There, the plaintiff, as a citizen and taxpayer, sought to enjoin the defendants, the elected members of the Orleans Parish School Board, from continuing to perform the duties of their office on the ground that the statute under which the defendants had been elected had subsequently been repealed, and a new board created, by legislative act.[15] The defense offered was that the recent legislation relied on by plaintiff had been held unconstitutional by the United States Supreme Court.[16] After a trial on the merits, the trial court refused to grant plaintiff the injunctive relief prayed for, holding that since the new board created by the recent legislation had been enjoined by the federal court from acting as such, an injunction preventing the defendants from acting would leave the public school system of Orleans Parish without any governing board whatsoever.

11. 204 La. 21, 14 So. 2d 872 (1943). See also Guillory v. Jones, 197 La. 165, 191, 1 So. 2d 65, 74 (1941).
12. LA. CODE OF CIVIL PROCEDURE art. 3901 (1960).
13. Comment (b) under art. 3901.
14. 134 So. 2d 627 (La. App. 4th Cir. 1961).
15. La. Acts 1960 (3d Ex. Sess.), No. 4.
16. In memorandum decisions in Denny v. Bush, 367 U.S. 908 (1961) and Legislature of Louisiana v. United States, 367 U.S. 908 (1961), affirming Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La. 1961).

The Court of Appeal for the Fourth Circuit affirmed, by a divided court and on different grounds. The author of the "majority opinion" held that obviously no relief could be granted the plaintiff under the Intrusion Into Office Act, as he was not claiming any office, and further that relief could not be obtained under quo warranto. The support offered for this latter holding was that the Intrusion Into Office Act was special legislation which conflicted with and prevailed over the general legislation embodied in the code articles. Because of "some slight fear that our new Code of Civil Procedure by Article 3901, in Chapter 4, 'Quo Warranto,' intended to give an individual the right to challenge the authority of someone purporting to hold public office," the concurring judge refused to subscribe to the "majority opinion," but concurred in the result on the ground that since the recent legislation had been held unconstitutional by the United States Supreme Court, no effect could be given to it. The dissenting judge thought that quo warranto was the proper remedy, and indicated his strong belief that the intermediate appellate court should render an independent decision with respect to the constitutionality of the recent legislation.

The first impression which the reader obtains from this case is that it may cause appreciable damage to the pertinent provisions of the new procedural Code. This reaction, however, dissipates under a careful evaluation of the case. In the first place, this fragmented decision will have no value as a precedent. Second, neither *Slater v. Blaize* nor the legislative history of the quo warranto provisions in the new procedural Code appear to have been brought to the attention of the court. Third, quo warranto was recognized as a proper remedy to test the right to hold public office by two other decisions of the appellate courts during the past term.[17]

In both of the cases where quo warranto was so employed, the office in question was membership on the Board of Commissioners of Waterworks District No. 3 of St. Mary Parish. In *Aucoin v. Spencer*,[18] the defendant was held to have vacated her office by missing four consecutive monthly meetings of the board.[19] In *Tabor v. Siracusa*,[20] the defendant was held to have

17. In Aucoin v. Spencer, 135 So. 2d 105 (La. App. 1st Cir. 1961) and Tabor v. Siracusa, 135 So. 2d 121 (La. App. 1st Cir. 1961).
18. 135 So. 2d 105 (La. App. 1st Cir. 1961).
19. Under the express language of LA. R.S. 33:3819 (1950).
20. 135 So. 2d 121 (La. App. 1st Cir. 1961).

been removed from office by the Governor. The court applied the rule that all gubernatorial appointees not requiring Senate confirmation, and not required to be appointed from a list of persons submitted by others, serve at the pleasure of the Governor and can be removed by him at any time. The statute creating the board required gubernatorial appointment from a list submitted by the police jury of the parish;[21] but this provision was held to apply only to original appointments, and not those made to fill subsequent vacancies.

Chapman v. Bordelon[22] resolved an open question raised by a hiatus in the Lawrason Act, regulating the government of municipalities using the mayor-board of aldermen form of government. Specifically, the question presented was whether the mayor of Ville Platte had the right to veto the appointment of municipal employees by the board of aldermen. Under the statute, the right to appoint municipal employees was not granted expressly to either the mayor or the board of aldermen, but certain general language therein could be interpreted as granting the power to both.[23] The board of aldermen contended that it held the appointive power, since appointment constituted an administrative act. The mayor insisted that he had the right to veto the board's appointment of employees, under his statutory power to veto "any law, by-law, or ordinance adopted" by the board.[24] The case, therefore, turned on the meaning to be given to the word "ordinance." The trial court held that the mayor had no right to veto any appointments except to the offices of city attorney, street commissioner, and city treasurer. The Court of Appeal for the Third Circuit, by a divided court, held that the mayor had no power to veto any appointments of municipal officers and employees made by the board of aldermen.[25] The majority of this court held that the mayor's power to veto ordinances was restricted to the vetoing of legislation, and did not extend to the board's appointment of employees on simple motion. This majority further held that under the clear statutory language the board of aldermen had the exclusive power to elect the city attorney, street commissioner, and city treasurer. The dissenting judge agreed with this latter position, but he expressed the view that the majority of the court had construed

21. LA. R.S. 33:3813 (1950), as amended by La. Acts 1956, No. 229.
22. 242 La. 637, 138 So. 2d 1 (1962).
23. LA. R.S. 33:362, 33:401(A) (1950).
24. *Id.* 33:404.
25. Chapman v. Bordelon, 132 So. 2d 533 (La. App. 3d Cir. 1961).

the word "ordinance" too strictly and that the mayor had the power to veto the board's appointments of municipal employees.

Under certiorari, the majority of the Supreme Court approved the views of the dissenting judge of the intermediate appellate court. One of the Supreme Court Justices, however, dissented, and accepted the reasoning of the majority of the court of appeal. This dissenting Justice further pointed out that, as a result of the holding of the majority of Justices of the Supreme Court, the failure of a mayor and a board of aldermen to agree with respect to the appointment of municipal employees might easily lead to an *impasse* depriving the people of the community of necessary municipal services. If the opinion of the dissenting Justice does nothing more, it definitely indicates a pressing need for clarification in the Lawrason Act.

A somewhat similar struggle over the power of appointing municipal employees was presented in *Foti v. Montero,*[26] where the municipality was operating under the mayor-commission council form of government. There, the intermediate appellate court held that, under the applicable statute, the commission council as a whole, and not the mayor, had the exclusive power, duty, and function of appointing all municipal employees.

ORDINANCES

The subject of the redistricting of political districts has been an extremely popular one during the past few years. It is not surprising, therefore, to find the subject judicially presented with respect to municipal election districts. The Home Rule Charter of the City of New Orleans requires the municipal council to redistrict the five councilmanic districts of the city after each federal census; and in compliance with this mandate, the city council adopted a redistricting ordinance after the 1960 census. This ordinance was held invalid by the Supreme Court in *Schlekau v. New Orleans,*[27] on the ground that it did not comply with the Home Rule Charter mandate, requiring equal division, as nearly as possible, of the city's population among its five councilmanic districts. A population disparity of 28,086 between two of these districts was held to be arbitrary, unreasonable, and capricious.

26. 136 So. 2d 784 (La. App. 1st Cir. 1962).
27. 241 La. 1079, 133 So. 2d 603 (1961).

REGULATION OF UTILITIES

The defendant in *Town of Coushatta v. Valley Electric Membership Corp.*[28] was an electric cooperative which had obtained a franchise from Red River Parish to distribute electricity throughout the parish, but outside of its incorporated municipalities. Certain of its transmission lines were constructed in areas near, but outside of, the Town of Coushatta. In 1956, the latter extended its municipal limits to include additional areas. In 1960, without the permission or consent of the municipality, the defendant extended its transmission lines to serve a single customer whose property lay completely within one of these annexed areas. The Town of Coushatta and Central Louisiana Electric Company, which held the municipal franchise to distribute electricity within the municipality, sought to enjoin the defendant from distributing electricity to any customer within the municipal limits, as extended.

On the original hearing, the Court of Appeal for the Second Circuit held that the defendant had acted at its peril in constructing its lines adjacent to a growing municipality; and that when the latter extended its territorial limits, only the holder of a municipal franchise could supply customers within any annexed areas.

In the wake of this sweeping decision, the intermediate appellate court was "besieged with requests by amici curiae for permission to file briefs on behalf of numerous interested utility cooperatives," and a rehearing was granted to reconsider all phases of the controversy. On rehearing, the majority of the court restricted its original holding appreciably. The majority opinion on rehearing, recognizing the fact that the defendant had obtained a franchise from the parish some years before, held that any lines which the defendant might have constructed in areas *subsequently annexed* could be controlled by the municipality only after expropriation.[29] However, since the single transmission line involved had been constructed by the defendant *after* the municipality's annexation of the property of the single customer served by this line, and without the permission or consent of the municipality, the court granted injunctive relief to the plaintiffs to restrain any continuance of that service.

28. 139 So. 2d 822 (La. App. 2d Cir. 1961), rehearing 1962.

29. On this point, see City of Thibodaux v. Louisiana Light & Power Co., 126 So. 2d 24 (La. App. 1st Cir. 1960).