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LOCAL GOVERNMENT LAW

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OFFICERS AND EMPLOYEES

Under the Anglo-American doctrine of coverture, a wife acquires the surname of the husband on marriage. She may resume the use of her maiden surname after a divorce; but, in most jurisdictions, judicial authorization is still necessary for this "change of her legal name." Under French civil law, a woman retains her patronymic name throughout her life, and regardless of marriage. Hence, there is no necessity for judicial authority to resume the use of her maiden name after a divorce. Socially, the wife in France uses the name of her husband; but no legal effect flows from this social usage, as she must continue the use of her patronymic name in legal and judicial acts. For the purpose of indicating her marital status, French notaries and lawyers use the prefix "Mademoiselle" or "Madame," followed by language indicating that she is a "femme sole," or the wife, widow, or divorced or legally separated wife of the husband.[1]

By universal custom, the French practice was followed in Louisiana for more than a century,[2] and it continues to be followed today in New Orleans and considerable portions of South Louisiana. Prior to the past term, the applicability of the civilian rule had been questioned only once. In 1931, in *Succession of Kneipp*,[3] our Supreme Court expressly recognized and applied the civilian rule as to the legal name of a married woman. During the past several decades, what the writer has regarded as a loose practice has developed among notaries and lawyers in the central and northern parishes of the state, that of adding the husband's surname to the name of the wife. Since a recital of marital status is always requisite, this practice has produced no unfortunate results, as the unnecessary addition of the husband's surname could always be disregarded as harmless surplusage.

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1. See PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL nos 390, 395, 396 (12th éd. 1938); 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DU DROIT CIVIL FRANÇAISE nos 359, 363 (8e éd. 1934.)

2. See 1 MCMAHON, LOUISIANA PRACTICE 137 n.6, 147 (1939). See also MCMAHON & RUBIN, PLEADINGS AND JUDICIAL FORMS ANNOTATED, 10 LSA-CODE OF CIVIL PROCEDURE 100 n.1 (1963).

3. 172 La. 411, 415, 134 So. 376, 378 (1931).

In the light of this background, it is both surprising and disturbing to find the following language used in the majority opinion of our Supreme Court in *Wilty v. Jefferson Parish Democratic Executive Comm.*:[4]

> "We agree with the conclusions of the trial court and the Court of Appeal that there is no definite law or decision in Louisiana as to what is the legal name of a married woman. . . ."

The facts of the *Wilty* case are quite interesting. The controversy originated when the wife, legally separated but not divorced from her husband, qualified as a candidate for the office of parish assessor under the name of "Mrs. Vernon J. Wilty, Jr.," which she had used for some years in registering as an elector. The fly in the ointment was the fact that she was running for the office then held by her husband, Vernon J. Wilty, Jr., who was a candidate for re-election. He petitioned the defendant committee to disqualify his wife on the ground that she had not used her legal name in attempting to qualify as a candidate; and in the alternative, that she be required to use the name "Laura Verret Wilty" or "Mrs. Laura Verret Wilty," on the ground that her use of a name deceptively similar to his own might confuse those voting at the election. The fifteen members of the defendant committee unanimously rejected the husband's petition. He then appealed to the district court, which partially reversed the committee's decision by ordering it to list the wife's name on the ballot as "Mrs. Laura Verret Wilty." On appeal,[5] three judges of the Court of Appeal for the Fourth Circuit reversed the judgment of the district court and reinstated the decision of the committee,[6] with two of the judges dissenting. The majority of the intermediate court took the position that there was no provision of positive law or jurisprudence determinative of the question, and followed an Oklahoma decision thought to be in point. The dissenting judges were of the opinion that the Oklahoma case was readily distinguishable, and would have affirmed the judgment appealed from on the ground that the Louisiana Supreme Court had pre-

4. 245 La. 145, 155, 157 So. 2d 718, 721 (1963).

5. The appeal was first taken to the Supreme Court, but it held it had no appellate jurisdiction, and transferred the record to the Court of Appeal for the Fourth Circuit. Wilty v. Jefferson Parish Democratic Executive Comm., 245 La. 75, 156 So. 2d 712 (1963).

6. *Id.*, 156 So. 2d 800 (La. App. 4th Cir. 1963).

viously held that marriage did not change the legal name of a woman.

Under a writ of review, the majority of the Supreme Court reversed the decision of the intermediate appellate court, and reinstated the judgment of the trial court. The view of the Supreme Court majority with respect to the legal name of a wife is indicated by the excerpt quoted above from the majority opinion by Justice Hamlin. These Justices held that the use of the husband's name by the wife when running against him in an election was so deceptively similar to his own as to confuse the voters, and thus inject an element of unfairness into the election. Justice Hawthorne dissented on dual grounds. Firstly, he felt that only a political question was presented and the courts had no jurisdiction to substitute their judgment for that of the committee. Alternatively, he agreed with the majority decision of the intermediate appellate court. Three of the Supreme Court Justices concurred in the result. Justice McCaleb's concurring opinion supported the exercise of jurisdiction by the courts on the ground that they had been granted this jurisdiction by statute. On the merits, he expressed agreement with the majority opinion. Justices Sanders and Summers concurred in the result, but expressed the view that the legal name of the wife in Louisiana was definitely settled by the French authorities and by the prior decision in *Succession of Kneipp.*

Under the peculiar facts of the case, the result reached by the Supreme Court appears to accord substantial justice. As a practical matter, however, the writer shares Justice Hawthorne's curiosity and wonders how many voters who intended to vote for the *male* incumbent in the office would have been misled into pulling down the lever on the voting machine opposite the name "*Mrs.* Vernon J. Wilty, Jr." Because of the sweeping and unqualified language of the majority opinion, the writer fears that here substantial justice has won a Pyrrhic victory.

It would have been better for the court to have treated the subject as being *sui generis,* a matter of identity not controlled by the rules relating to the *legal* name, but calling only for the determination of the name customarily used and by which the candidate was known in the locality. Under the generalization used by the majority of the court to solve this problem, there is a contradiction lurking in the record, as the wife had *not*

used her legal name in registering as a voter, and hence was *not* a qualified elector eligible for candidacy for public office.

Even if restricted to the name which a married woman must use for purposes of voter registration and qualification for candidacy for public office, the decison is pregnant with future difficulty. An increasing number of professional women today commence careers prior to marriage, and continue these careers in their maiden names after marriage. When one of these wishes to run for public office in the future under the professional name by which she is identified in the locality, the effect of the following language of the majority opinion[7] will be a matter of conjecture:

> "We conclude that a married woman's designation or appellation should be that of *her Christian name and her husband's surname.* If she wishes to use her maiden surname as a middle name (for such reasons as identity), she has the right to exercise such privilege." (Emphasis added.)

A case of considerable interest, in a machine age with its inevitable crop of mechanical difficulties, is *Collier v. Democratic Executive Committee.*[8] In the first Democratic primary to elect nominees for the six state representatives from East Baton Rouge Parish, one candidate received a clear majority. In the second primary, four additional candidates received clear majorities. However, it was impossible for the defendant committee to determine which of the candidates receiving the fifth and sixth highest votes was elected. Because of faulty adjustment, one of the four voting machines in one precinct, which had been used by 295 voters, failed to register the votes for nomination for the House of Representatives. Accordingly, the committee ordered the election to be re-conducted in that precinct at a later date so that all of the electors who had voted in the second primary would be able to recast their votes for five of the ten candidates for the nominations.

Plaintiff, who had received the fifth highest number of votes which the voting machines in the parish had registered, sought a mandamus in the district court to compel the committee to declare his nomination, and to enjoin any re-run of the second primary in that primary. The trial court granted plaintiff the

7. 245 La. at 162, 157 So. 2d at 724.
8. 245 La. 773, 161 So. 2d 76 (1964).

relief for which he had prayed. In the exercise of its supervisory jurisdiction, the Court of Appeal for the First Circuit reversed.[9] Under its paramount supervisory jurisdiction, the Supreme Court annulled the decision of the intermediate appellate court, enjoined the defendant from conducting the proposed election, and ordered it to select the fifth nominee from the candidates who had received the fifth and sixth highest vote registered by the voting machines.

The majority opinion, written by Chief Justice Fournet, was pitched on the statutory provision[10] prohibiting a third primary, and requiring the committee to select the nominee in any situation not specially provided for by statute. Justice Hamlin dissented on the ground that the decision of the intermediate appellate court was correct. Justices Sanders and Hamiter concurred in part and dissented in part. They agreed with the majority that the selection of the nominee should be made by the committee, but thought that the recasting of votes in a single precinct was not a third primary, and saw no statutory objection to the committee, in making its selection, consulting the will of the majority of voters.

Under the pertinent statute, it is difficult to quarrel with the majority Supreme Court opinion. However, as presently phrased, the statute vests plenary power in the committee to determine the nominee in close contests whenever there is a maladjustment of a single voting machine. It should be amended to require the recasting of votes in the precinct affected, as the defendant committee had attempted to do in this case.

Fakier v. Picou[11] was a mandamus suit brought against the mayor and board of aldermen of a Louisiana municipality to compel re-instatement of plaintiff as its police chief, on the ground that he had a civil service status and had been illegally dismissed from office by the defendants. A three-fold defense to the suit was interposed: (1) the municipal fire and police civil service board, which had attempted to appoint plaintiff, was illegally constituted and its members had not complied with the requirements of law respecting the recording of their oaths of office; (2) the Municipal Civil Service Act, insofar as it

9. Collier v. Democratic Executive Comm., 159 So. 2d 786 (La. App. 1st Cir. 1964).

10 LA. R.S. 18:358(E) (1950), as amended by La. Acts 1958, No. 2, § 1.

11. 246 La. 639, 166 So. 2d 257 (1964).

relates to police departments, was unconstitutional; and (3) plaintiff had no civil service status since, by virtue of a special statute, he held office at the pleasure of the governing authority.

The Court of Appeal for the First Circuit affirmed the decision of the district court,[12] which had ordered re-instatement of the plaintiff and had overruled all three defenses. The Supreme Court issued a writ of review, limited to the question of whether plaintiff was a classified civil servant.[13] After argument, it affirmed the decision of the intermediate appellate court, holding that there was no conflict between the Municipal Civil Service Act and the special statute, as the latter had been adopted to bring the office of chief of police into the classified service when the municipality's growth would bring it within the application of the general statute.[14]

There is one feature of the case which, because of its availability as precedent in the future, worries the writer: namely, the intermediate appellate court's recognition of the appointing civil service board members as *de facto* officers, whose acts could not be questioned collaterally. The civil service board was appointed during the regime of the prior governing body. Under the pertinent statute,[15] only one of the five members of the board could be appointed directly by the governing authority; one member was to be elected by the employees of the fire department; one by employees of the police department; and the two public members were to be appointed by the governing authority from a panel of four selected by the executive head of the nearest institution of higher learning. In this case the two public members were not appointed in compliance with the statute. The governing authority submitted a panel of four names to the executive head of the educational institution to select two of these as public members. The difference between the two procedures is striking. Under the statutory procedure, "stacking of the deck" by the governing body was impossible, as it could control the appointment of only *one* of the five members; under the procedure used it controlled the selection of *three* of the five members.

There are further facts of interest. The members of the ap-

12. Fakier v. Picou, 158 So. 2d 285 (La. App. 1st Cir. 1963).
13. *Id.* 245 La. 636, 160 So. 2d 227 (1964).
14. *Id.*, 246 La. 639, 166 So. 2d 257 (1964).
15. LA. R.S. 33:2476(C) (1950).

pointing civil service board were appointed on October 31, 1961 — just eight months before the expiration of the term of office of the prior governing body. Certification of plaintiff as chief of police was made by the civil service board on June 20, 1962 — ten days before the expiration of the term of office of the prior governing body, and after the election of the defendants. Plaintiff was dismissed from office by defendants on July 17, 1962, seventeen days after they took office.

The rule precluding a collateral attack on the acts of a *de facto* officer is a sound rule which was adopted for the protection of members of the public who had a right to assume that the official dealt with was a *de jure* officer.[16] Under the facts of this case, the writer does not believe that this rule should have been applied here. There was no acquiescence by the public in the illegal composition of the appointing board for any considerable length of time.

PUBLIC CONTRACTS

Two cases of interest in this area were decided during the past term. In *T. L. James & Co. v. Jefferson Parish Council*,[17] plaintiff, an unsuccessful bidder, sought to enjoin the defendant council from awarding a paving contract to another bidder, Lambert, and to compel it either to award the contract to plaintiff or to reject all bids. The council had accepted Lambert's total bid of $2,063,199.39, which was $9,348.02 under the total bid of plaintiff, as that of the "lowest responsible bidder who has bid according to the contract, plans and specifications as advertised." Plaintiff presented two ingenious arguments to support its contention that its bid was actually the lowest. The contract did not require the completion of the work in any limited period. Plaintiff's bid specified a completion date 135 days earlier than Lambert's bid. Based on this, plaintiff argued that when these 135 days were evaluated on the stipulated delay demurrage of $25.00 a day, plaintiff's bid was actually some $60,000.00 lower than Lambert's. Further, because the paving was for a thoroughfare rather than an ordinary street, the specifications called for an 8-inch concrete base, instead of the customary 6-inch base. The parish, rather than the abutting prop-

16. Comment, *De Facto Public Officers in Louisiana*, 12 LA. L. REV. 200 (1952).

17. 161 So. 2d 597 (La. App. 4th Cir. 1964).

erty owners, was committed to pay the additional cost of the thicker concrete base. As plaintiff had included a figure of $24,410.00 for this additional cost, as compared with Lambert's figure of $40,725.00, it was argued that plaintiff's bid was actually lower insofar as the parish was concerned. The trial court rejected the plaintiff's demands, and the Court of Appeal for the Fourth Circuit affirmed its judgment, for identical reasons. The defendant council was held vested with the legal power to make the decision in both instances, and there was no showing of any abuse of its discretion.

The principal question presented in *National Car Rental System v. City of New Orleans*[18] concerned the validity of a renewal option in two agreements for the leasing of city property. The controlling municipal ordinance required all leases of city property to be granted to the highest responsible bidder after due advertisement for bids. Both agreements, for the rental of space at the New Orleans International Airport and for five-year terms, were granted by the city and its creature, the New Orleans Aviation Board, after compliance with this ordinance. However, each agreement granted the lessee an option to renew the lease at a rental to be determined by negotiation between lessor and lessee, but which in no event would be less than that provided for the original term of the lease.

Plaintiff, a car rental company, brought the suit against the city, its aviation board, and the two lessees, which were also car rental companies, to enjoin the city and its board from giving any effect to the renewal option, and to require them to advertise for bids and award the leases to the highest responsible bidders. The trial court issued a preliminary injunction as prayed for by plaintiff. On appeal, this decision was affirmed by the Court of Appeal for the Fourth Circuit.

The legal question presented is a close one. Certainly the city could originally have granted a lease for a term of ten years, if it had solicited bids for such a lease. Further, it is believed that the city could have granted an original lease for five years with an option to extend the term for an additional period at the same rental as provided for the original term. The decisive factor here, in the writer's opinion, is the indefiniteness of the rent during any extended term. A flooring was provided by the

18. 160 So. 2d 601 (La. App. 4th Cir. 1964).

stipulation that this rent would be no less than that for the original term; but there was no way of determining the highest responsible bidder, insofar as the extended term was concerned. Completely lacking was any opportunity to compare the rent which the parties might agree to after negotiation with that which another might offer through a competitive bid.

TORT LIABILITY

The settled rule in Louisiana of sovereign immunity of a parish from suits to recover damages for the wrongful acts of its employees was applied in one case decided during the past term.[19] There, plaintiffs sought to recover damages for the alleged destruction of their oyster bed caused by the acts of the parish's contractors and employees in the dredging of the Houma Deep Water Channel. In a fruitless effort to avoid collision with the rule of sovereign immunity, plaintiffs sought to bring the case within the exception recognized for the governmental *taking* of property, by alleging that the destruction of their oyster beds was due to the deposit of silt on them and the alteration of the natural tidal currents so as to affect the salinity of the waters flowing over these beds. The trial court sustained an objection to its jurisdiction, holding that the exception to the rule of sovereign immunity had no application, as the facts alleged showed *damage* to the property rather than its wrongful appropriation. The Court of Appeal for the First Circuit affirmed.

SPECIAL ASSESSMENTS

The trial court, in *Ammen v. City of Pineville*,[20] rendered a declaratory judgment holding a paving assessment invalid on the ground that the property assessed for a portion of the street improvement did not abut the street. The Court of Appeal for the Third Circuit reversed on appeal. It sustained the city's exception to the suit on the ground that it was not brought within thirty days of the adoption of the resolution authorizing the issuance of the paving certificates, as required by a recent statute.[21] The noteworthiness of the case is due only to the fact that this is the first time this statute appears to have been invoked

19. Marie v. Police Jury of Parish of Terrebonne, 161 So. 2d 407 (La. App. 1st Cir. 1964).
20. 161 So. 2d 284 (La. App. 3d Cir. 1964).
21. LA. R.S. 33:3319 (1950), as amended by La. Acts 1958, No. 238, § 1.

by a municipality. Its provisions should be called specifically to the attention of lawyers throughout the state.

ZONING

Two cases challenging the constitutionality of zoning ordinances were decided during the past term. *Sears, Roebuck & Co. v. City of Alexandria*[22] seems to be only an application of settled rules of law to the involved facts of the case. Its noteworthiness is due only to a clear analysis and statement by the Court of Appeal for the Third Circuit of the factors to be considered judicially in determining whether a "spot zoning" ordinance is arbitrary, unreasonable, and capricious.

The second case on the subject does not appear to the writer to warrant detailed consideration.[23]

STATE AND LOCAL TAXATION

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PROPERTY TAXES

During the period under consideration, a major portion of the appellate decisions involving matters of state and local taxation was concerned with the determination of rights in and to property sold for delinquent ad valorem taxes, either as a result of a sale to a third person pursuant to the provisions of R. S. 47:2183[1] or by adjudication to the state under R.S. 47:2186.[2] Despite considerable prior jurisprudence developed under these statutory provisions, and under the basic provisions of article X,

22. 155 So. 2d 776 (La. App. 3d Cir. 1963).

23. Garrett v. City of Shreveport, 154 So. 2d 272 (La. App. 2d Cir. 1963) presented a challenge to the constitutionality of a zoning ordinance on the ground that it was arbitrary, unreasonable, and capricious with respect to property restricted to residential use only because of its proximity to property zoned for commercial use.

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1. Sales of immovable property to satisfy ad valorem tax delinquencies are authorized by the provisions of LA. R.S. 47:2180-2229 (1950). They are conducted by the sheriff in his capacity as ex-officio tax collector. Under R.S. 47:2183 a deed of sale is executed in favor of the tax purchaser which conveys title to such purchaser, subject to the right of redemption at any time "for the space of three years beginning the day when the deed is filed for record."

2. If no bid is received "at least equal to the taxes, costs, and interest," the tax collector "shall bid in the property for the State."