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## Public Law: Constitutional Law

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*v. Brinson*.<sup>9</sup> There the parties, whose celebrated marriage in Louisiana was null by reason of the man's undissolved marriage to another, later moved to Mississippi and continued to live together as man and wife after the man's first wife died. The court, admitting at least *arguendo* that under Mississippi law their conduct would have constituted the contracting of marriage, nevertheless presumed the continuation of concubinage in the absence of a formal ceremony of marriage. This decision in *Brinson* was criticized by Professor Dainow on the ground that the *form* of marriage celebration (exchange of consent) should be considered subject to the law of the place of celebration (exchange of consent).<sup>10</sup> The writer also considers this position correct and hence agrees that *Dupre* was decided correctly on this principal issue. It may be pointed out nevertheless that it would be wrong to presume the intent of a couple to be husband and wife simply because they live together in a jurisdiction recognizing informal marriage, especially if their life in common began in plain concubinage or after a marriage ceremony known to be invalid. The intent to be married must be shown to have existed at a time at which the parties could have contracted marriage informally, for the couple might indeed have been content to continue their illicit relationship.

## CONSTITUTIONAL LAW

*Hector Currie\**

The Louisiana Constitution provides that, except in a capital case, prosecution "shall be by indictment or information."<sup>1</sup> In *State v. La Caze*,<sup>2</sup> defendants, jointly charged in a bill of information with simple burglary,<sup>3</sup> moved to quash the information on the basis of the fifth amendment to the United States Constitution ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."), and the fourteenth amendment. The motions were overruled and the convictions affirmed. *State v. Young*<sup>4</sup> had held the quoted words of the fifth amendment inapplicable

9. 233 La. 417, 96 So.2d 653 (1957).

10. *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Conflict of Laws*, 18 LA. L. REV. 60, 62 (1957).

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1. LA. CONST. art. I, § 9.

2. 252 La. 971, 215 So.2d 511 (1968).

3. LA. R.S. 14:62 (1950).

4. 249 La. 609, 188 So.2d 421 (1966).

to the states, and the force of this decision was not lessened by *Duncan v. Louisiana*,<sup>5</sup> which dealt solely with the right to trial by jury.

In *City of Bogalusa v. May*,<sup>6</sup> the Supreme Court of Louisiana considered an ordinance containing this language: "No person shall distribute, or cause to be distributed, within the Corporate Limits . . . any printed, multigraphed, photographed, mimeographed, typewritten or written pamphlet, circular, card, dodger, poster or advertisement, by depositing same on the streets . . . or upon the private property of other persons . . . without their permission, if such does not contain the name of the person, association, organization, committee, partnership, or corporation responsible for its distribution." Penalties were defined. An information charging violation of the ordinance was dismissed on the ground that the ordinance infringed rights of free speech and press guaranteed by the Constitutions of Louisiana<sup>7</sup> and of the United States, and the judgment was affirmed. This result was in accord with *Talley v. California*,<sup>8</sup> which invalidated a Los Angeles ordinance that "bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them," of which the United States Supreme Court said: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."<sup>9</sup>

*Marino v. Waters*<sup>10</sup> was an action by a high school student, unable to continue in a parochial high school owing to his marriage, who moved to another school district, enrolled in a public high school, and sought to enjoin the high school athletic association from enforcing against him its rule that a student who transfers from one school to another may not represent the latter in athletic contests. The court emphasized its reluctance to interfere with the internal affairs of a voluntary association,<sup>11</sup> and held that there was no denial of due process as the challenged rule was rational and had been fairly and consistently applied.

Two recent cases raised issues under both federal and state

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5. 391 U.S. 145 (1968).

6. 252 La. 629, 212 So.2d 408 (1968).

7. LA. CONST. art. I, § 3.

8. 362 U.S. 60 (1960).

9. *Id.* at 64.

10. 220 So.2d 802 (La. App. 1st Cir. 1969).

11. *Cf. Heuer v. Crescent City River Port Pilots' Ass'n*, 158 So.2d 221 (La. App. 4th Cir. 1963).

constitutions. *Michel v. Edmonson*<sup>12</sup> dealt with R.S. 13:4522, which permits a defendant to require a plaintiff to post security for court costs.<sup>13</sup>

Plaintiff attacked the statute under article I, section 1 of the Louisiana Constitution; article I, section 2 (the due process clause); and especially article I, section 6, which provides:

“All courts shall be open and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay.”

The court properly held that the statute does not offend either the Louisiana Constitution or the equal protection clause of the United States Constitution. Consistently with the equal protection clause, “classifications of citizens who are similarly situated may be established by the legislature, so long as such classifications are based on reasonable grounds . . .,” and the court found “valid grounds to treat plaintiffs as a class in civil actions different from defendants under the state statute authorizing security for costs.”<sup>14</sup> The Louisiana Constitution requires no more. As the Louisiana Supreme Court said in *Grinage v. Times-Democrat Publishing Co.*:<sup>15</sup> “While a plaintiff is primarily bound for the costs of a suit he institutes, it is not always true that he is financially able to respond. A defendant may make large outlays in vindicating his position, and may successfully vindicate it, and yet at the end of the suit with a judgment discharging him, may be unable to recoup his expenditures. Therefore it is that the requirement of a bond for costs has always been sustained.”

In *Osborn Funeral Home v. Louisiana State Board of Embalmers*,<sup>16</sup> plaintiff, which had advertised that it would credit against burial costs the face value of any valid burial policy, sought declaratory and injunctive relief against the board and challenged parts of R.S. 37:846 as in violation of the guarantees of free speech and press in the Constitution of Louisiana<sup>17</sup> and

12. 218 So.2d 103 (La. App. 3d Cir. 1968).

13. LA. R.S. 13:4522 (1950) excludes suits *in forma pauperis* and those against the state and its political subdivisions. Nor does it apply to Orleans Parish.

14. 218 So.2d 103, 105 (La. App. 3d Cir. 1968).

15. 107 La. 121, 123, 31 So. 682, 683 (1902).

16. 216 So.2d 145 (La. App. 2d Cir. 1968).

17. LA. CONST. art. I, § 3.

the United States, of the due process clause of both constitutions,<sup>18</sup> and of the equal protection clause of the United States Constitution. R.S. 37:846 gives the board the power to deny a license to any applicant found to be offering discounts or gratuities to prospective customers, or to revoke or refuse to renew a license. Funeral directors furnishing services under a contract with a burial insurance company are excluded from this provision.

Plaintiff's principal contention was that exemption of such persons was a denial to plaintiff of equal protection of the laws. The evidence established that "a large percentage of funeral homes in the state have direct connections with burial insurance companies and that the practice of designating themselves as the official funeral directors in the policies issued by the associated insurance companies results in these particular funeral establishments being allowed to solicit business through the sale by agents of burial insurance policies." It was also established that "funeral directors possessing these contracts give a discount on each burial policy serviced."<sup>19</sup> The court was unable to find any benefit to the health or welfare of the public from prohibiting plaintiff's advertisement and concluded that the exemption from R.S. 37:846A (2) of "funeral directors who service burial policies in which they are named official funeral director" gave them "a preference under the law which is denied to others of the same class," and violated the equal protection clause.

It is unlikely that the United States Supreme Court would reach this result. However the concept of equal protection may have evolved in other contexts<sup>20</sup> in the regulation of business the states have been left a large, indeed an almost unlimited sphere. Conceivably the legislature created the statutory exemption to encourage the sale of burial insurance which it rationally considered to be in the public interest. Statutes with classifications more difficult to justify have been sustained.<sup>21</sup> In fact,

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18. U.S. CONST. amend. XIV, § 1; LA. CONST. art. I, § 2.

19. 216 So.2d 145, 148 (La. App. 2d Cir. 1968).

20. For recent cases dealing with "personal rights" see *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (which is noted in this issue of the *Review*); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968).

21. See e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947).

there is only one instance<sup>22</sup> of a regulation of business struck down by the United States Supreme Court under the equal protection clause in the past thirty years, and one may respectfully doubt that that case was rightly decided.<sup>23</sup>

The issue in *State ex rel. McKeithen v. Ourso*<sup>24</sup> was whether the defendant in a removal proceedings under the Louisiana constitution<sup>25</sup> was entitled to trial by jury. The court found that the right of trial by jury when requested in such an action has been recognized since 1890,<sup>26</sup> and held, despite changes in the law traced by the court, that the right has continued to the present time. The Code of Civil Procedure expressly provides: "Except as limited by Article 1733, the right of trial by jury is recognized."<sup>27</sup> None of the limitations of article 1733 applies to a proceeding for removal.

*Mitchell v. Glasgow*<sup>28</sup> was a taxpayer's action to enjoin payment to the Director of the Louisiana Wild Life and Fisheries Commission, and receipt by him, of salary in excess of that provided in the Constitution and to compel restoration of any such excess already paid. The Constitution declares: "The salary of the director shall be not less than \$7,500.00 nor more than \$10,000.00 per annum."<sup>29</sup> The legislature increased the salary of the director above this range in 1965 and again in 1966,<sup>30</sup> relying on other language of the Constitution: "Salaries of public officers, whether fixed in this Constitution or otherwise, may be changed by vote of two-thirds of the members of each House of the Legislature."<sup>31</sup>

The question, then, was whether the director's salary ("not less than \$7,500.00 nor more than \$10,000.00") had been "fixed" within the meaning of the Constitution. The court answered in the affirmative, relying on Webster and a belief that it was never intended that the salary of the director could be increased above \$10,000 only by a constitutional amendment.

22. *Morey v. Doud*, 354 U.S. 457 (1957).

23. See Frankfurter J., dissenting *id.* at 472 (1957).

24. 213 So.2d 533 (La. App. 1st Cir. 1968).

25. LA. CONST. art IX, §§ 1, 6, 7.

26. *State ex rel. Leche v. Wagner*, 42 La. Ann. 54, 8 So. 209 (1890).

27. LA. CODE CIV. P. art. 1731.

28. 220 So.2d 173 (La. App. 1st Cir. 1969).

29. LA. CONST. art. VI, § 1(A)(7).

30. See LA. R.S. 56:3.1 (1950).

31. LA. CONST. art. III, § 34.