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## Public Law: State and Local Government

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## STATE AND LOCAL GOVERNMENT

*Melvin G. Dakin\**

## AMENDMENT AND REVISION OF THE CONSTITUTION

The Constitutional Convention which drafted the Louisiana Constitution of 1974 was expectably beset with controversy throughout the year during which the drafting process was going on. A final assault was made on it in our supreme court just prior to the election at which the constitution was adopted. The attack, in *Bates v. Edwards*,<sup>1</sup> centered on the convention call and on the composition of the convention; both attacks were easily rejected by the court. Though the Constitution of 1921 makes no provision for convening a convention and speaks only of amendments, the court found that the legislative power contained therein includes the power to call a constitutional convention.<sup>2</sup> Research of the court indicated that past constitutional procedures have included submitting the call to the people and thereafter promulgating a constitution without further reference to the electorate, or calling the convention by edict of the legislature and thereafter submitting the draft constitution to the electorate for approval; in one instance, there was submission of both the call and the proposed constitution to the electorate.<sup>3</sup> The 1974 procedure was thus found supported by precedent and was approved by the court.

The second attack, which was on the composition of the convention, centered on the argument that with some delegates being appointed by the governor and some elected, there was a violation of the equal protection clause of the federal constitution, specifically the "one man one vote" principle.<sup>4</sup> The court, however, concluded that drafting a proposed constitution was not a legislative function but only a proposing function and hence not violative of the principle. It was also noted that elected members of the convention had been chosen from properly apportioned districts and that "the existence of appointed delegates did not 'dilute' the power of the vote of any given citizen of the state."<sup>5</sup> Finally it was determined that the constitution of the convention did not violate the original act of Congress pursuant

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1. 294 So. 2d 532 (La. 1974).

2. *Id.* at 534. The amending procedure was found not applicable to formation of a new constitution since application would entail submission of a new constitution as amendments to the old, a result obviously not intended by its draftsmen.

3. *Id.* at 539-41.

4. *Id.* at 538.

5. *Id.*

to which Louisiana was admitted to the Union despite the fact that the enabling act provided for a constitutional convention at which all members were to be elected; the enabling act was deemed superseded by the adoption of the first state constitution and its approval by Congress.<sup>6</sup>

In 1968, Louisiana took a first step toward coordination in higher education by adopting an amendment to the education article of the Louisiana constitution providing for a Louisiana Coordinating Council for Higher Education. However, included in the amendment was a statement that, except for the guidance of the Council, Louisiana State University was to remain "under the direction, control, supervision and management of the present Board of Supervisors."<sup>7</sup> In 1972 the legislature, not satisfied with the progress of coordination under the Council, adopted legislation providing for a new Board of Regents which would replace the existing Board of Supervisors and State Board of Education.<sup>8</sup> It was viewed as legislation permitted by Article III, § 32 of the 1921 Constitution which authorizes the legislature to merge or consolidate state offices, boards or commissions. In *Roy v. Edwards*,<sup>9</sup> the Louisiana supreme court held the 1972 legislation unconstitutional, resting its decision on the ground that the 1968 amendment providing for a Council was the only constitutionally permitted impingement on the authority and power of the Board of Supervisors.<sup>10</sup>

#### ELECTIONS AND REFERENDUMS

The importance of properly promulgating election results was underscored in *Pratt v. Livingston Parish Police Jury*.<sup>11</sup> A ward beer license was refused by the police jury on the ground that the citizens of the ward had exercised their statutory option and had voted against alcoholic beverages being sold in the ward. The police jury contended on judicial review of its denial that the appeal was not timely since the thirty days provided by statute had long since run on a ward election held in 1948.<sup>12</sup> The results of the election, however, had never been promulgated by formal resolution or ordinance and the court held that "[i]n the absence of such a resolution or ordi-

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6. *Id.* at 539.

7. La. Const. art. XII, § 7 (1921).

8. LA. R.S. 17:3121-34 (1950).

9. 294 So. 2d 507 (La. 1974).

10. *Id.* at 510.

11. 278 So. 2d 897 (La. App. 1st Cir. 1973).

12. LA. R.S. 26:590 (1950).

nance the period within which to challenge the election does not toll.”<sup>13</sup> On the merits the court found the ward election invalid on the ground that procedures had not conformed to the statute then in effect.<sup>14</sup>

*Platt v. Municipal Democratic Executive Committee*<sup>15</sup> presented an interesting mode of compliance with a federal district court decision holding a state statute providing for “running by divisions” unconstitutional. Louisiana’s Attorney General had suggested reopening an election already set by divisions in order to provide for “running at large” in compliance with the federal court holding. The Second Circuit Court of Appeal held that setting a new election with a new qualifying period was not permissible under the statute<sup>16</sup> but that the election was nonetheless valid since candidates had participated and had by agreement “run at large.”<sup>17</sup>

Suits contesting elections on the basis of voting machine irregularities provided continuing opportunity for court interpretation of the legislative election framework. In *Gaudet v. Democratic Executive Committee of City of Gretna*,<sup>18</sup> the committee had rejected a protest of election irregularities and certified the winner in a second primary; on suit for relief, the trial court ordered a third primary. The Fourth Circuit Court of Appeal rejected the trial court solution as in direct contravention of state law. Nonetheless, the court held that the committee must provide some method of selection between the contestants.<sup>19</sup> A dissenting judge wondered what the committee could now do in view of the fact that it had already made its decision;<sup>20</sup> at best, it would seem it could only reconsider, hopefully thus freeing itself from any irregularities which might subject it to judicial review. In *Garrison v. Conick*,<sup>21</sup> the adequacy of the pleadings alleging elec-

13. 278 So. 2d at 899.

14. *Id.* at 900. An intervention after judgment by the Commissioner on Alcoholic Beverage Control was dismissed on the ground that LA. CODE CIV. P. art. 1091 provides for intervention only in a pending action even though such an intervenor might thereafter appeal. Had the intervenor coupled his petition for intervention with a petition to reopen the judgment on the ground of lack of notice and possession of additional evidence, it would seem that such intervention should be permitted in the interest of saving judicial time.

15. 281 So. 2d 476 (La. App. 2d Cir. 1973).

16. *Id.* at 478-79, *construing* LA. R.S. 18:309(A) (1950).

17. *Id.* at 480. The original qualification to “run by divisions” was said to be a “declaration of intention” which was “abandoned” and replaced by an election conducted in fact, with the acquiescence of all parties, as an “at large” election.

18. 278 So. 2d 556 (La. App. 4th Cir. 1973).

19. *Id.* at 559.

20. *Id.* at 560.

21. 291 So. 2d 778 (La. 1974).

tion irregularities was upheld although the court ultimately refused to overturn the election. The plaintiff, Garrison, had alleged a number of specific irregularities without listing the names of alleged irregular voters. He had also alleged total votes cast and that the outcome of the election would be changed by the resolution of irregularities. Reversing the court of appeal, our supreme court held that the petition stated a cause of action and that Garrison was entitled to a trial on the merits.<sup>22</sup> Similarly, in *Allen v. Gleason*,<sup>23</sup> allegation of the malfunctioning of a voting machine in a specific precinct was presumably adequate pleading since votes affected would be known. However, the pleadings were held inadequate because the plaintiff in *Allen* failed to allege vote totals for the entire election and had thus not alleged affirmatively that the irregularity would have changed the outcome of the election.<sup>24</sup>

Annexation proceedings were considered in *Stein v. Town of Lafitte*.<sup>25</sup> The annexation legislation involved, requiring "twenty-five percent in value of the property within the area," was held to require that twenty-five percent of the value of all property on assessment rolls, including commercial, industrial and public service rolls, must be represented on the petition.<sup>26</sup> In *Morrison v. City of Pineville*,<sup>27</sup> the city had failed to obtain data on public service property in the area to be annexed, contending that opponents to the petition had the burden of proving valuation. The Third Circuit Court of Appeal held that when opponents establish that the value of public service property is not included in the tally, their burden of proof is met.<sup>28</sup> While the court recognized the presumptive validity of an assessor's certificate, it held that the certificate in question was "meaningless" because of a failure to include the public service property.<sup>29</sup>

In the course of attempting to solve problems of flood control and urban redevelopment, Monroe city officials initially attempted to obtain approval of only a portion of the program, with the electorate rejecting the proposal. Thereafter officials prepared a comprehensive redevelopment plan which included acquisition of property for flood control facilities along with other redevelopment programs involving several areas in the city. The omnibus proposal was approved by the

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22. *Id.* at 781.

23. 293 So. 2d 267 (La. App. 2d Cir. 1974).

24. *Id.* at 269-70 *construing* LA. R.S. 18:364(B) (1950).

25. 266 So. 2d 516 (La. App. 4th Cir. 1972).

26. *Id.* at 521.

27. 288 So. 2d 705 (La. App. 3d Cir. 1974).

28. *Id.* at 707-08.

29. *Id.* at 708.

voters and the city officials promptly moved, in *Monroe Redevelopment Agency v. Faulk*,<sup>30</sup> to expropriate property necessary to implement the flood control plan which had been rejected earlier. The expropriation suit was attacked on the ground that the new agency was without authority to expropriate property for flood control purposes, that the election adopting the redevelopment plan was defective in requiring only one vote on multiple unrelated projects and further, that notice was inadequate.<sup>31</sup> All of the attacks were rejected, the court taking the view that the omnibus proposal was a "modern day approach to the solution of modern day urban problems, combining the use of police power and private enterprise."<sup>32</sup> Legislation contemplating an areawide approach with overall comprehensive planning for redevelopment of entire areas was said to have been approved by the United States Supreme Court as within the police power of the state, given the difficulties of solving urban problems on any piecemeal basis.<sup>33</sup> The fact that authorizing legislation required approval by the qualified electorate "of each development plan or project" was said not to preclude approval of an overall plan by the electorate, in effect authorizing specific projects within the plan to be undertaken without further electorate approval.<sup>34</sup> Strong dissents were registered in the court of appeal opinion, the dissenters relying upon *Tolson v. Police Jury*,<sup>35</sup> an early case in which the Louisiana supreme court nullified an election on the ground that it permitted a single vote for or against multiple unrelated projects and hence did not allow a voter free exercise of his judgment.<sup>36</sup> Whether our supreme court will apply the holding to such modern urban redevelopment proposals as here involved remains to be seen.<sup>37</sup>

#### OFFICERS AND POWERS

In *Snell v. Stein*,<sup>38</sup> the Louisiana supreme court, in a statement of reasons for refusing writs, reaffirmed the doctrine of immunity of the sovereign from suit "when acting in the performance of a govern-

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30. 287 So. 2d 578 (La. App. 2d Cir. 1973).

31. *Id.* at 580.

32. *Id.* at 583.

33. *Id.*, citing *Berman v. Parker*, 348 U.S. 26 (1954).

34. The court relied upon the disjunctive use of "plan or project" in the statute. *Id.* at 584.

35. 119 La. 215, 43 So. 1011 (1907).

36. *Id.* at 223, 43 So. at 1014.

37. *Monroe Redevelopment Agency v. Faulk*, 287 So. 2d 578 (La. App. 2d Cir. 1973), writ denied, 290 So. 2d 900 (La. 1974).

38. 201 So. 2d 876 (La. App. 4th Cir. 1967).

mental function."<sup>39</sup> The decision was invoked in *Pettis v. State Department of Hospitals*<sup>40</sup> in an attempt to narrow the authority of a legislative waiver of suit to suits for active negligence only, excluding suits for passive negligence. That distinction was rejected by the court and *Snell* was interpreted to hold only that an "agent of the state is immune from liability for torts committed by him in the performance of his duties, provided that he was performing a governmental function at the time the tort was committed, and he was acting within the scope of his authority and in good faith at that time."<sup>41</sup> In *Pettis*, the Third Circuit Court of Appeal found that the operation of a hospital was not a government function but proprietary in character and that in any event evidence would be admissible to show that the doctors acted outside the scope of their authority or in bad faith.<sup>42</sup> A concurring judge was of the opinion that the majority's interpretation of the *Snell* case was overbroad and that immunity for officials discharging governmental functions should be limited to those duties involving discretion.<sup>43</sup>

In the interest of preventing unwarranted intrusions into local affairs by state police, the legislature provided that state police shall not act within the limits of any incorporated municipality which maintains a police force except upon invitation by local officials to "assist . . . in the investigation of the circumstances of any crime and in the identification, apprehension, and conviction of the perpetrators thereof."<sup>44</sup> The language conveys the impression that invitations may be extended only when offenses have been completed and the state police are invited to give assistance in the investigation thereof. However, in *State v. Swain*,<sup>45</sup> the Louisiana supreme court held that the statute is broad enough to permit requests to the state police to issue citations to traffic offenders who commit hazardous moving vehicle violations within the city limits, and even extends to arrest of violators if circumstances warrant, as in the case of a charge

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39. 251 La. 35, 202 So. 2d 652 (1967).

40. 281 So. 2d 881 (La. App. 3d Cir. 1973).

41. *Id.* at 887.

42. *Id.*

43. *Id.* at 888 (Culpepper, J., concurring). Rather anomalously, the judge cites as an illustration the case of the police officer held liable for use of excessive force but who is nonetheless performing a governmental function and acting within the scope of his authority with good faith. Here liability would seem to be coupled with a use of discretion, but a use of it which carried the officer beyond the bounds of his scope of authority, thus within the majority interpretation. See *Taylor v. Baton Rouge*, 233 So. 2d 325 (La. App. 1st Cir. 1970).

44. LA. R.S. 40:1391 (1950).

45. 292 So. 2d 495 (La. 1974).

of driving while intoxicated.<sup>46</sup> Home rule over local affairs was deemed subordinate, however, in *B. W. S. Corp. v. Evangeline*,<sup>47</sup> where it was clear that the legislature had preempted an activity to the exclusive control of the state. The police jury sought to deal with a problem of disposition of industrial waste under a legislatively delegated power to regulate disposition of trash, garbage, or "debris of any kind."<sup>48</sup> The Third Circuit Court of Appeal held that such authority would not support the police jury action where the legislature has provided by statute for exclusive jurisdiction in the state board of health over, among other things, "waste disposal within the state. . . ."<sup>49</sup> The board was held to have clear pre-empting authority over the regulation of disposal of industrial waste originating in the state.<sup>50</sup> The Second Circuit Court of Appeal failed to reach another home rule issue in *Gifford v. City of Shreveport*,<sup>51</sup> in which petitioner alleged that local authority to enact an ordinance requiring a police escort and imposing a fee therefor upon the *owners* of oversize vehicles on the city streets had been pre-empted by the state highway regulatory legislation.<sup>52</sup> Instead the court found that petitioner had failed to allege specific facts of injury to him as *operator* of an escort service for such vehicles and hence had failed to state a case for equitable relief.<sup>53</sup>

The general public policy of the state with respect to Sunday closing, as specified in a general statute, was held, in *National Food Stores, Inc. v. Cefalu*,<sup>54</sup> to preclude local officials from going beyond such policy by proscribing the operation of grocery stores on Sunday.<sup>55</sup> An alternative argument that authority was to be found in a special legislative grant authorizing municipalities to enact ordinances prohibiting "the desecration of the Sabbath" was rejected, the court noting that the ordinance could not consistently be upheld on a desecration basis since it precluded grocery store operation while allowing operation of other retail businesses, particularly those selling liquor, an operation which could also be construed to "desecrate

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46. *Id.* at 496.

47. 293 So. 2d 233 (La. App. 3d Cir. 1974).

48. LA. R.S. 33:1236(31) (Supp. 1966).

49. LA. R.S. 40:11 (1950).

50. 293 So. 2d at 237-38. This exclusive control was not weakened by provision for only "interested party" status for the board in the case of transportation of industrial waste into the state. LA. R.S. 40:1299.36 (Supp. 1973).

51. 291 So. 2d 419 (La. App. 2d Cir. 1974).

52. *Id.* at 421.

53. *Id.* at 421-22.

54. 280 So. 2d 903 (La. 1973).

55. *Id.* at 906-07, *construing* LA. R.S. 51:191-94 (1950).

the Sabbath."<sup>56</sup> A dissenter would not have probed beyond the town's assertion that the ordinance was "to prevent the desecration of the Sabbath."<sup>57</sup>

Shortly after prohibition was ended with the adoption of the twenty-first amendment the Louisiana legislature broadly delegated authority to effect parish-wide prohibition.<sup>58</sup> Pursuant to this authority Winn Parish enacted an ordinance prohibiting beverages with an alcoholic content in excess of  $\frac{1}{2}$  of 1% by volume. Thereafter in 1948 the authority to vote an entire parish dry by local option was deleted from the act but a saving clause purported to continue existing local ordinances which might otherwise have been invalidated.<sup>59</sup> The 1950 Revised Statutes, however, repealed this saving clause, substituting a general clause which in effect saved only the validity of acts already accomplished; it did not carry forward the operation of otherwise invalid ordinances and make them applicable to future conduct.<sup>60</sup> The Winn Parish ordinance sought to be applied in *State v. Sissons*<sup>61</sup> was thus found to have been effectively repealed in 1950 and conviction and sentence thereunder were reversed. In *Asbell v. Caddo Parish Police Jury*,<sup>62</sup> parishwide *regulation*, as distinguished from parishwide *prohibition*, was upheld where the regulation took the form of proscribing liquor sales on Sunday. Attacks on the ordinance as being prohibitory rather than regulatory, as failing to comply with the state Sunday closing law and as violating the first amendment of the United States Constitution by imposing governmental restraints prompted by religious views, were all rejected by the court of appeal.<sup>63</sup>

When Emprise Corporation was convicted of conspiracy to violate the Federal Anti-Racketeering Law,<sup>64</sup> an incidental result was revocation by the Commission on Alcoholic Beverage Control of beer licenses held by an Emprise subsidiary, Sportservice Corporation. The licensee sought judicial review in *Sportservice Corp. v. Department of Public Safety*.<sup>65</sup> The statute provides for routine revocation in the event of the conviction of a felony under the laws of the United

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56. 280 So. 2d at 908.

57. *Id.* at 909.

58. La. Acts 1934, No. 15.

59. La. Acts 1948, No. 372.

60. LA. R.S. 26:581-95 (1950).

61. 292 So. 2d 523 (La. 1974).

62. 292 So. 2d 848 (La. App. 2d Cir. 1974).

63. *Id.* at 850-51.

64. Emprise Corp., No. 8975 (D. Calif., July 10, 1972) cited in *Sportservice Corp. v. Department of Pub. Safety*, 293 So. 2d 530, 532 (La. App. 4th Cir. 1974).

65. 293 So. 2d 530 (La. App. 4th Cir. 1974).

States.<sup>66</sup> The Fourth Circuit Court of Appeal reversed the revocation of the permits, however, holding on the basis of encyclopedic jurisprudence that such conviction must be final before it can be used as a basis for revocation and that there is not such finality where an appeal is pending.<sup>67</sup>

In *Coleman v. Bossier City*,<sup>68</sup> city officials entered into agreements with real estate developers to reimburse fifty percent of the cost of water and sewage facilities in subdivisions without following prescribed city procedures and without adequate clearance from the State Bond and Tax Board as to the commitment of future revenues. There was also no compliance with competitive bidding requirements of the public contracts law.<sup>69</sup> In these circumstances, the Second Circuit Court of Appeal held that the contracts were null but that developers were nonetheless entitled to recover on an equitable *quantum meruit* basis since the contracts were entered into in good faith and hence deemed *malum prohibitum* rather than *malum in se*.<sup>70</sup> *Boxwell v. Department of Highways*,<sup>71</sup> which was used in *Coleman* to sustain recovery on a *quantum meruit* basis, was again cited in *New Orleans Transfer Co. v. City of New Orleans*<sup>72</sup> to sustain an injunction against performance by the city on a waste disposal contract which had not been subjected to public bidding.<sup>73</sup> While the contract involved a new and unique approach to garbage disposal and involved utilization of a research organization to experiment with resource recovery, the arrangement for the "collection, treatment and disposition of garbage" was made with a regular business corporation and involved "no unique obligations with the city"<sup>74</sup> which would preclude operation of the statute. Noting that under the *Boxwell* holding a contract made in violation of public bidding requirements

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66. LA. R.S. 26:279 (1950).

67. 48 C.J.S. *Intoxicating Liquor* § 175 (1947). Cf. LA. R.S. 26:285 providing that revocation for other "violations" requires only that a permittee has been found guilty by a trial court. Another Emprise subsidiary had been granted permits to sell beer at the same location, but in view of its holding, the court felt it unnecessary to probe this questionable practice. 293 So. 2d at 531.

68. 291 So. 2d 410 (La. App. 2d Cir. 1974).

69. *Id.* at 412.

70. *Id.* at 413-14. Interest on the recovery was disallowed on the ground that a state or its agency cannot be compelled to pay interest on unpaid accounts unless specific provision is made therefor. *Boxwell v. Department of Highways*, 203 La. 760, 14 So. 2d 627 (1943).

71. 203 La. 760, 14 So. 2d 627 (1943).

72. 284 So. 2d 362 (La. App. 4th Cir. 1973).

73. *Id.* at 363, citing LA. R.S. 38:2211 (1950) as amended by La. Acts 1970, No. 274 § 1, and Home Rule Charter of the City of New Orleans § 6-307.

74. *Id.* at 365.

is wholly illegal and unenforceable and that Louisiana law favors public and competitive bidding and does not favor negotiation of contracts, the court granted the injunction prohibiting the city from performance on the contract.<sup>75</sup>

#### STREETS AND HIGHWAYS

The case of *Bonvillain v. Terrebonne Parish Police Jury*<sup>76</sup> exemplifies the difficulties of enlarging a lot through purchase of an ostensibly unused street from a subdivider, at least where dedication may already have occurred. Such an acquisition and an attempt to occupy the property precipitated litigation which resulted in establishing dedication of the street and the consequent unlawfulness of blockading it.<sup>77</sup> Undaunted, the acquirer then persuaded the parish to revoke the dedication without inspection under a legislative grant of authority permitting it to do so "when the roads, streets and alleyways have been abandoned or are no longer needed for public purposes."<sup>78</sup> Evidence adduced established that the street was in fact used in rendering city and commercial services to the adjoining property and the court held that the revocation by the police jury was null because not based on evidence and hence arbitrary and capricious.<sup>79</sup> However, when a claim for public road or street status is based on implied or tacit dedication the problems of proof may be more elusive. Thus, in *Chargois v. St. Julien*,<sup>80</sup> a claim of dedication was refuted under a statute providing that roads or streets are public "which have been or are hereafter kept up, maintained or worked for a period of three years by authority of any parish governing authority . . . ;"<sup>81</sup> where only very meager upkeep was furnished by the parish, such token maintenance was not deemed sufficient to establish a tacit dedication to public use of private property.<sup>82</sup> On the other hand, in *Police Jury v. Briggs*,<sup>83</sup> where the parish had furnished culverts, gravel and grader work over a period of some twelve years, the statutory requirement was deemed to have been met and implied dedication to have taken place.<sup>84</sup>

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75. *Id.* at 365-67.

76. 288 So. 2d 898 (La. App. 1st Cir. 1973).

77. *Id.*

78. LA. R.S. 48:701 (1950).

79. 288 So. 2d at 899-900.

80. 280 So. 2d 847 (La. App. 3d Cir. 1973).

81. LA. R.S. 48:491 (1950).

82. 280 So. 2d at 849.

83. 291 So. 2d 472 (La. App. 3d Cir. 1974).

84. *Id.* at 474-75.

The early law was clear as to who would bear the cost when a public road intersected or was intersected by a railroad. The Public Service Commission was given authority to require the construction of a proper crossing whenever there was a crossing of a "public road already constructed or which may be constructed. . . ." <sup>85</sup> This authority was exercised under the police power and ability to pay was presumed in the railroad. Later, when the legislature provided for construction of a highway network, there was recognition of the fact that railroad resources might not be inexhaustible and provision was made that when a highway was to be constructed "the agency constructing or causing the construction of the highway shall be responsible for the construction of an appropriate and adequate crossing and for its subsequent maintenance." <sup>86</sup> In *Southern Pacific Transportation Co. v. Louisiana Public Service Commission*, <sup>87</sup> this latter language was deemed applicable to construction of a grade crossing by the city and parish of Lafayette where the road connecting with the interstate highway, which precipitated need for a crossing, was part of the parish highway system. <sup>88</sup> Not without dissent, the court concluded that the use by the legislature of the general term "agency" rather than "department" indicated a legislative intent not to limit the statute to crossings in the state highway system. <sup>89</sup> On the other hand, where the crossing is clearly within a municipality, the legislature has authorized the municipality to require, in the interest of public safety, the construction of an overpass and to impose one half of the cost of construction and maintenance upon the railroad. <sup>90</sup> If there is resistance by the railroad, there must be a hearing before the Louisiana Public Service Commission and the railroad afforded an opportunity to be heard in respect thereto. <sup>91</sup> In such a hearing, in *Southern Pacific Transportation Co. v. Louisiana Public Service Commission*, <sup>92</sup> the railroad attacked the ordered overpass as unnecessary to the interest of public safety, claiming that the scale and magnitude was arbitrary and unreasonable, and the allocation of cost resulted in the taking of the railroad's property without due process and in deprivation of equal protection. <sup>93</sup> The court reviewed the pro-

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85. LA. R.S. 45:841 (1950).

86. LA. R.S. 48:382 (1950).

87. 294 So. 2d 480 (La. 1974).

88. *Id.* at 482.

89. *Id.* at 483.

90. LA. R.S. 33:3701 (1950).

91. LA. R.S. 45:841 (1950).

92. 290 So. 2d 816 (La. 1974).

93. *Id.* at 818.

posal on the merits and found it not unreasonable, rejecting the constitutional attack on the ground that the action was within the police power of the state.<sup>94</sup>

Where the problem is the simpler one of making improvements on a street with abutting owners, the abutting front footage is all that is necessary to be shown to assess the cost of street improvements thereon, coupled with a square yardage apportionment of sidewalk cost.<sup>95</sup> In *Roman Catholic Church v. City of New Orleans*<sup>96</sup> the street widening improvement took all of the immediately abutting property, creating a new abutting owner and the argument was made that in order to be assessed, a landowner must be an abutting owner at the time construction was initiated. The argument was rejected on the ground that the statute is clear authority for "levying a local or special assessment on each lot or parcel of real estate abutting the street, road, sidewalk, or alley to be improved. . . ."<sup>97</sup> Nor did it make any difference that the abutting land was subject to a servitude in favor of the Sewerage and Water Board.<sup>98</sup>

#### UTILITIES

In the late 1940's it took an order of the Securities and Exchange Commission to compel Gulf States Utilities to divest itself of the Baton Rouge Bus Company.<sup>99</sup> For the bus company it has been largely downhill ever since. When the last private owner appeared ready to abandon the operation as no longer commercially viable, the city made arrangements to purchase in order to preserve some semblance of a public transportation system. To accomplish transfer of ownership the city agreed to purchase at the minimum appraisal with the right in the owner to seek a greater amount in litigation. Appraisals ranged from \$245,000 to \$445,000, including both tangibles and intangibles. In *Lanneau v. Capital Transportation Corp.*,<sup>100</sup> the First Circuit Court of Appeal reviewed the appraisals and affirmed a trial court decision of \$256,000, including \$53,000 for intangibles; the latter amount was deemed ample for a concern which had shown nothing but losses for some time and the maximum which could be approved.<sup>101</sup> "Going concern value" as an item of intangible value was

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94. *Id.* at 820-21.

95. LA. R.S. 33:3301-06 (1950).

96. 280 So. 2d 384 (La. App. 4th Cir. 1973).

97. *Id.* at 386-87.

98. *Id.* at 387.

99. 12 S.E.C. 41, 72, 46 P.U.R. (N.S.) 68, 99 (1943).

100. 292 So. 2d 810 (La. App. 1st Cir. 1974).

101. *Id.* at 825.

deemed nonexistent since there were no excess profits and in fact no profits at all to capitalize.<sup>102</sup> Reconstruction cost new less depreciation was used to value the tangibles, an approach deemed sufficiently generous since the owner, absent the city as a buyer, might well have been faced with closing down and selling his equipment wherever he could on a dismantled basis.<sup>103</sup> The court of appeal, on reviewing the record, found a contractual basis for assessing the cost of expert witnesses to the city rather than to the suing owner as had the trial court.<sup>104</sup>

#### CIVIL SERVICE

Among the procedural precedents for suspension and resignation of civil service employees is a statement that "if an officer removes an employee for cause, he cannot rescind the order and accept the resignation of the employee, and thus make him eligible to reappointment . . ." and that "one who [has] resigned [is] not permitted, without exhausting his administrative remedies before the Civil Service Commission, to maintain an action to have the court rescind or cancel his resignation and direct his reinstatement. . . ."<sup>105</sup> In *Gibson v. Municipal Fire & Police Civil Service Board*,<sup>106</sup> an officer resigned as of a future date in order to accept another position. In the interim, the officer was suspended from duty after being arrested and booked on criminal charges. The bill of information against him was later quashed and charges dismissed, but no further action was taken by the police department. The officer appealed to the board for rescission of suspension and reinstatement with back pay; the board, however, took no action other than to confirm that the officer had resigned.<sup>107</sup> The First Circuit Court of Appeal found no evidence that the resignation had been voluntarily withdrawn and rejected the argument that "the resignation once submitted is terminated by operation of law upon a suspension."<sup>108</sup> In these circumstances the court held that the effect of the suspension was to remove the officer from employment and to suspend the resignation during the period of dis-

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102. *Id.* at 823.

103. *Id.* at 821.

104. *Id.* at 825.

105. 4 E. McQUILLIN, MUNICIPAL CORPORATIONS § 12.268f (1968).

106. 289 So. 2d 362 (La. App. 1st Cir. 1973).

107. *Id.* at 363.

108. *Id.* at 365. Where dismissal follows suspension there is no double jeopardy since suspension is not then a sanction but a part of the procedural protection of the public interest. See *Floyd v. Wildlife & Fisheries Comm'n*, 283 So. 2d 537 (La. App. 1st Cir. 1973).

position of charges against him; upon a disposition in his favor suspension was terminated but the voluntary resignation was deemed restored to operation.<sup>109</sup>

Concerted efforts of firemen throughout the state to improve their economic position has precipitated occasional retaliation. Thus in *Crowley Firemen v. City of Crowley*,<sup>110</sup> the constitutionality of such a retaliatory ordinance forbidding "moonlighting" by city firemen was considered by the Louisiana supreme court. The validity of the ordinance when examined against the background of the legitimate demands of firefighting employment was determined to constitute a "direct infringement upon . . . the right to work . . ." and thus held contrary to substantive due process.<sup>111</sup> Quoting encyclopedic jurisprudence the court noted that "the validity of the police regulation . . . primarily depends on whether in all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power."<sup>112</sup> In *Frey v. Department of Police*,<sup>113</sup> suspension from duty for refusal to take a polygraph test was upheld as not unduly or improperly burdening the fifth amendment right against self-incrimination.<sup>114</sup> United States Supreme Court jurisprudence was construed to permit punitive action for failure to answer questions specifically and necessarily related to official duties and to proscribe only attempts on the part of public authorities to coerce employees into relinquishing their constitutional rights.<sup>115</sup>

In order to assure that civil service classification systems will not be distorted by governing authorities for political or other reasons, the constitution requires a public hearing prior to abolition of a civil service classification once it is adopted.<sup>116</sup> In *Odom v. City of Minden*,<sup>117</sup> the Second Circuit Court of Appeal determined that no public hearing was required where a city abolished only the position as distinguished from a classification.<sup>118</sup> The decision seems somewhat subversive of civil service principles, particularly in smaller systems where positions in a classification are limited.

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109. *Id.*

110. 280 So. 2d 897 (La. 1973).

111. *Id.* at 901.

112. *Id.* Three justices would have found the ordinance a reasonable exercise of the city's legislative authority and hence constitutional.

113. 288 So. 2d 410 (La. App. 4th Cir. 1973).

114. *Id.* at 411-12.

115. *Uniform Sanitation Men's Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 383 U.S. 493 (1967).

116. La. Const. art. XIV, §§ 15.1-15.8, 13 (1921).

117. 287 So. 2d 659 (La. App. 2d Cir. 1973).

118. *Id.* at 662.

## RETIREMENT SYSTEMS

The State Employees Retirement System provides for mandatory retirement at age sixty-five with employment to be extended from year to year only by certificate that superior skills and knowledge make continued employment advantageous to the state.<sup>119</sup> In *Martin v. Louisiana State Employees Retirement System*,<sup>120</sup> an employee member had reached mandatory retirement age and had been refused further extension. After applying for retirement benefits he nonetheless took a new position in a state office, arranging to work thirty-six hours out of a forty hour week in order to qualify under a board rule that part-time employment would not affect retirement benefits.<sup>121</sup> Thereafter the board adopted an additional rule providing for suspension of benefits if state employment resulted in earnings in excess of 50% of monthly retirement benefits<sup>122</sup> and suspended benefits to the employee for violation of the new rule. The Louisiana supreme court held that both board rules violated the legislative intent that there be compulsory retirement at age sixty-five with no further state service to be allowed except on proper certification and authorization.<sup>123</sup>

In a retirement system where benefits are not wholly based on years of membership but on years of prior service as well, there is clear economic advantage in expanding prior service in every way possible. Thus, while the teacher retirement system seems clearly to contemplate only full time service as eligible for service credit, there were nonetheless deviations therefrom, such as the allowance of teacher credit for part-time employment while enrolled as an education student, an allowance based on an opinion obligingly furnished by the Attorney General.<sup>124</sup> In 1973 the legislature specifically redefined service so as to exclude any credit for student aid or student employment in a college or university and in *Kidd v. Board of Trustees of Teacher Retirement System*,<sup>125</sup> retiring teachers attacked the statute mainly on the ground that their interest in such part-time employment credit had vested prior to the statute and that the administrative board was equitably estopped to disallow such credit. The court of appeal held that no such vesting could have occurred

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119. LA. R.S. 42:585 (1950).

120. 280 So. 2d 910 (La. 1973).

121. State Employees Retirement System, Rule 8.17 (1973).

122. *Id.* Rule 8.24.

123. 280 So. 2d at 913. Nonetheless the legislature has now amended the statute to permit some part-time service after retirement. See LA. R.S. 42:572 (Supp. 1968).

124. 1972 LA. OP. ATT'Y GEN. (May 18, 1972).

125. 294 So. 2d 265 (La. App. 1st Cir. 1974).

since no such rights were clearly granted under the act before its 1973 amendment. Rather, the court noted the act from its inception contemplated only full time service by persons whose principal occupation was that of teacher.<sup>126</sup> Since the amount of regular compensation is also crucial in the determination of benefits upon retirement, there is a substantial economic interest in making sure all amounts properly includable are counted even though it entails making additional contributions. In *State ex rel Coglaiti v. Board of Trustees of the Police Pension Fund*,<sup>127</sup> police officers requested that the court mandamus the board to accept five percent of compensation received for mandatory additional time required of police officers. The court held that such time was not overtime in the sense of being irregular and at unplanned intervals but regularly required additional time, thus entitled to be included as part of regular compensation.<sup>128</sup>

If a retirement plan is of a non-actuarial nature the return of contributions will often be precluded even though the member does not qualify for retirement benefits, as was the case in New Orleans and Shreveport prior to 1967.<sup>129</sup> In *Hoffpauir v. City of Crowley*,<sup>130</sup> however, the applicable statute had no provision barring refunds and the court of appeal held that the maxim "expressio unius est exclusio alterius" was fairly relied upon as a basis for inferring that the legislature did not intend that such refunds be barred; consequently, the court allowed their recovery.<sup>131</sup> Trustees will also guard a retirement system against avoidable disability retirements. Thus in *Miller v. Board of Trustees of Police Pension Fund*,<sup>132</sup> the Fourth Circuit Court of Appeal noted that a retirement system "does not purport to be a second workmen's compensation law" and upheld the trustees in refusing disability retirement even though the employee had qualified for workmen's compensation disability payments, basing their decision on the fact that the police officer, while unable to do general police work, was still capable of performing clerical police work.<sup>133</sup>

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126. *Id.* at 271.

127. 294 So. 2d 557 (La. App. 4th Cir. 1974).

128. *Id.* at 559. *See also* *State ex rel. Spann v. Board of Trustees of the Police Pension Fund*, 283 So. 2d 294 (La. App. 4th Cir. 1973).

129. LA. R.S. 33:2298 (1950).

130. 284 So. 2d 114 (La. App. 3d Cir. 1973).

131. *Id.* at 115-16. Systems based on actuarial computation normally allow refund of contributions to members separating from the system, with or without interest. *See, e.g.*, LA. R.S. 33:2294.2 (Supp. 1967).

132. 286 So. 2d 788 (La. App. 4th Cir. 1973).

133. *Id.* at 790. The court did not, however, exclude the possibility, in a proper case, of both benefits being payable. *Id.* at 789-90.

## MISCELLANEOUS AGENCY ACTION

Since a large part of the cost of brucellosis eradication in cattle herds must be borne by the owner through quarantine and treatment costs, state veterinarians do not uniformly encounter full cooperation in restraint of cattle for testing.<sup>134</sup> Thus, in *Pearce ex rel Livestock Sanitary Board v. Pitre*,<sup>135</sup> an owner had to be ordered to restrain his cattle for this purpose and countered by attacking the validity of the statute. By statute, restraint may be ordered against any person owning or having cattle over eight months of age "in a herd which has shown evidence of brucellosis infection."<sup>136</sup> The owner admitted he owned cattle but argued the Sanitary Board must prove the existence of a herd and had failed to do so.<sup>137</sup> The court held that the Sanitary Board adequately proved its case in establishing that the owner did in fact run cattle. The statutory language "in a herd" was deemed intended by the legislature to be applicable where an owner had multiple herds not all of which would necessarily be subject to restraint for brucellosis testing because of the absence of evidence of the disease in some of them.<sup>138</sup>

Another minor episode in the saga of *Schwegman Brothers Giant Supermarket v. Louisiana Milk Commission*<sup>139</sup> resulted in victory for the commission. Schwegman made a written offer to his customers to make refunds in the event that the Louisiana Orderly Milk Marketing Act<sup>140</sup> should be declared unconstitutional or repealed and the commission sought an injunction. The commission's request for an injunction was upheld by the Louisiana supreme court as to refund offers based on repeal but was denied as to offers "expressly conditioned upon an adjudication of retroactive unconstitutionality of the act."<sup>141</sup>

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134. LA. R.S. 3:2221-32 (1950).

135. 281 So. 2d 800 (La. App. 3d Cir. 1973).

136. LA. R.S. 3:2221(A) (1950), *as amended by* La. Acts 1966, No. 291 § 1.

137. 281 So. 2d at 802.

138. *Id.* at 803.

139. 290 So. 2d 312 (La. 1974).

140. LA. R.S. 40:940.1-.23 (Supp. 1958).

141. 290 So. 2d at 315-17.