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LOUISIANA CONSTITUTIONAL LAW

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FREEDOM OF RELIGION; RELIGIOUS DISPUTES IN CIVIL COURTS

From early times, English courts accepted the view that donations of property to religious bodies were impressed with an implied trust in favor of the basic doctrines of the body in existence at the time of the donation; if allegations were made that the religious body failed to adhere to those basic doctrines, civil courts would determine whether there was a variance from former doctrine and if so, award the property to another group more faithful to the trust.[1] Such civil court adjudication of questions of religious orthodoxy and heresy may be appropriate for a country with an established church, but such cases found disfavor in the United States.

In 1871, the United States Supreme Court in *Watson v. Jones*[2] decided as a matter of federal common law that while federal courts would decide matters relating to express trusts for religious purposes, they would not apply the implied trust doctrine so as to decide disputes over religious doctrine. Instead the courts would defer to the churches themselves on such questions—to the majority view in a congregational church and to the established authorities in a hierarchical church. This approach was made to rest on constitutional grounds in 1969 when the Court in the *Presbyterian Church*[3] case held that the free exercise and establishment clauses of the first amendment forbid civil courts from determining questions of religious dogma and the departure therefrom in deciding which competing group within a church had a right to title to the church's property. Free exercise values tend to be harmed by court decisions in such matters; there is a risk that the state will be used to support orthodoxy and to discourage dissident groups from expressing their view because of fear of loss of property or other benefits. Establishment clause values also are harmed because of the risk that the courts will reinforce the interests of existing churches and existing doctrine.

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1. *See, e.g.*, Craigdallie v. Aikman, 4 Eng. Rep. 435 (1820). *See also* Watson v. Jones, 80 U.S. (13 Wall.) 679, 724, 727-28 (1871).
2. 80 U.S. (13 Wall.) 679 (1871).
3. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

The current view would permit civil courts to apply "neutral principles" of law to resolve disputes involving churches but prohibit decisions of questions of dogma, doctrine or church governance.[4]

From an early date, the Louisiana Supreme Court adopted principles that permitted adjudication of only those church-related disputes that did not involve decisions concerning doctrine, dogma or spiritual authority. In 1843, the court enforced an agreement between the lay wardens of a corporation formed to own a Catholic church in Pointe Coupee and a priest with whom they had contracted.[5] Because the wardens had breached their contract and failed to pay the agreed salary, the court awarded damages to the dismissed priest. In the following year, the court refused to decide a dispute between the Catholic bishop and the lay wardens of the corporation formed to own the St. Louis Cathedral in New Orleans. In the celebrated case of *Wardens of the Church of St. Louis v. Blanc*,[6] whose report occupies forty pages in the Robinson reports, the court faced a demand by the wardens for damages based on the failure of the bishop to recognize their authority to appoint a curate for the church. The main dispute concerned the right to name a curate for the cathedral, and while the court recognized its powers to decide matters relating to the civil powers of the wardens, it refused to entertain the question of who had the authority to name the curate. In response to the wardens' argument that French and Spanish laws established such powers of patronage in lay groups, the court responded that those laws were superseded by the United States Constitution and its principles of separation of church and state.[7] The court stated:

> The Legislature have not, and could not in our opinion, authorize the wardens to interfere in matters of mere church discipline and doctrine. It could not constitutionally declare, what shall constitute a curate in the Catholic acceptation of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law. It would have as good a right to provide for the appointment of bishops, for the qualification of circuit riders, presiding elders, deacons, priests who officiate in the Jewish synagogues, and even for the election of the Pope.[8]

4. *Compare* Jones v. Wolf, 443 U.S. 595 (1979) *with* Serbian Easter Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).
5. Congregation of the Roman Catholic Church v. Martin, 4 Rob. 62 (La. 1843).
6. 8 Rob. 51 (La. 1844).
7. *Id.* at 86.
8. *Id.* at 83.

Over the years, the courts have been reasonably consistent in applying the rule against deciding matters of church doctrine, while nevertheless hearing disputes relating to congregations that can be solved without deciding such questions. The courts have refused to decide the propriety of expulsion of members from church groups[9] or of defrocking a minister[10] when those issues could not be resolved by some standard provided by law or articles of incorporation; nor would they decide whether a change in the location of the church was proper;[11] nor would they annul a donation requiring use of the donated property for orthodox ritual when the issue would involve whether mixed seating was permissible under orthodox ritual.[12]

On the other hand, Louisiana courts have decided church-related disputes determining the validity of a sale,[13] the ownership of property and the rights related to that ownership,[14] the validity of an election of the directors of a church group that was organized as a non-profit corporation when the corporation law provided rules for elections,[15] and a suit for defamation by a former minister against a church board that investigated him.[16]

In the current term, three cases continue the development of the law along the same lines. In *Bourgeois v. Landrum*,[17] the supreme court granted the demand of members of a non-profit/religious corporation for exercise of their right under the state's corporation law to examine the records of the corporation. Speaking for a unanimous court, Justice Dennis stated:

> First Amendment values are plainly not jeopardized by a civil court's enforcement of a voting member's right to examine these records. . . . No dispute arising in the course of the litigation requires the court to resolve an underlying controversy over religious doctrine. The proper judicial function in such a case presents no hazard to the free development of religious doctrine or of implicating secular interests in matters of purely ecclesiastical concern.[18]

9. State *ex rel.* H.W. Soares v. Hebrew Congregation "Dispersed of Judah," 31 La. Ann. 205 (1879); State *ex rel.* Johnson v. Tulane Ave. Baptist Church, 144 So. 639 (Orl. App. 1932).
10. Joiner v. Weeks, 383 So. 2d 101 (La. App. 3d Cir. 1980).
11. Henry v. Newman, 351 So. 2d 1277 (La. App. 1st Cir. 1977).
12. Katz v. Singerman, 241 La. 103, 127 So. 2d 515 (1961).
13. Rock Zion Baptist Church v. Johnson, 47 So. 2d 397 (La. App. 1st Cir. 1950).
14. Macedonia Baptist Foundation v. Singleton, 379 So. 2d 269 (La. App. 1st Cir. 1979).
15. State *ex rel.* Nelson v. Ellis, 151 So. 2d 544 (La. App. 4th Cir. 1963); State *ex rel.* Nelson v. Ellis, 140 So. 2d 194 (La. App. 4th Cir. 1962).
16. Joiner v. Weeks, 383 So. 2d 101 (La. App. 3d Cir. 1980).
17. 396 So. 2d 1275 (La. 1981).
18. *Id.* at 1277-78.

Bourgeois is a good demonstration that the basic doctrine, contrary to dictum in some cases, allows the court to decide more than cases involving title to property. While most justiciable disputes in this area do involve property use and transfer, other disputes such as this one can be decided without violating the basic principles of non-interference in religious questions.

The *Bourgeois* case also reflects the increasing impact of many religious organizations taking advantage of the benefits of incorporation and submitting themselves to the legal principles of corporate management. An increasing number of management-related disputes within a church will become justiciable even though such disputes may be motivated by issues of doctrine and dogma. For example, should statutes limit expulsion of members to stated objective criteria, judicial overview could be accomplished without having to decide matters of faith or doctrine. In *Wilkerson v. Battiste*,[19] the court of appeal for the first circuit dealt with a church that was incorporated under a charter which specified the requirement for election of directors. It was thus permissible to hear a quo warranto suit that inquired into the validity of the election of directors of the corporation. Judge Lottinger wrote:

> The procedural niceties attending the election of a board of directors for a nonprofit religious corporation have nothing to do with religious law, custom or policy and are not ecclesiastical matters within the exclusive domain of a particular religious group.[20]

However, a separate issue contesting the board's selection of a minister was found to involve non-reviewable issues for which there are no neutral legal principles according to law, and for which the charter provided no legally neutral standard.

A third case, *United Pentecostal Church International v. Sanderson*,[21] involved the decision not to decide a number of demands made by a central church and some members of the local church against the current pastor and board of the latter church. On the central question of whether the local church could disaffiliate from the central organization, the court was clearly correct in refusing to decide the dispute. No neutral legal principles were applicable, and contract law was not alleged as applicable. Allegations of violations of the central church rules were made, but application of those rules (as opposed to rules established by law or in articles

19. 393 So. 2d 195 (La. App. 1st Cir. 1980).
20. *Id.* at 197.
21. 391 So. 2d 1293 (La. App. 2d Cir. 1980).

of incorporation) would involve matters of internal church governance which the civil courts would not apply. On a more basic level, the issue whether to associate with like-minded religionists, and the corresponding termination of that relationship, goes to the core of free exercise values and should be insulated from state entanglement. Similar considerations would properly lead to a refusal to hear a dispute about whether the pastor was qualified to continue in his office after being defrocked by the central church.

Though the facts alleged are not as clear as they might be, allegations apparently were made that members of the board of directors of the local church corporation were improperly removed; that successor directors were empaneled improperly; and that the articles of incorporation were changed without complying with law.[22] Those matters concern compliance with state law and could be decided without violating the rules of improper entanglement in religious questions.

In any event, the developing cases in the area emphasize that the issue is not the character of the parties, nor the fact that the dispute implicates religion in a broad sense. More precisely, courts will not decide *issues* for which no neutral, non-religious standards exist or which would require the court to inquire into religious beliefs or doctrine. However, the courts will decide issues between groups of and groups within religious bodies that involve civil laws and regulations.

Indeed, in this light, it is probably incorrect to speak of lack of jurisdiction over such religious disputes. Courts of general jurisdiction, such as Louisiana's district courts, have jurisdiction over all civil matters, which under article IV of the constitution could include all disputes involving religious groups. But, if the dispute requires the decision of *religious issues*, article I makes that issue nonjusticiable. It is probably inaccurate to say, as the first circuit did in *Wilkerson*, that there is subject matter jurisdiction as it relates to the defendant board members but not as it pertains to the appointment of a minister. It is more accurate to say that there is jurisdiction over the law suit, and that relief can be granted as to the election of the board, but that the issue of appointment of a minister is not justiciable. The ultimate effect is not great, for under either view the matter can be handled by pre-trial exceptions or motions and, under either view, the court can notice its lack of power to decide the issue without the parties raising it.

22. Transcript, Petition paragraphs 8, 11, 14.

DUE PROCESS—CHANGES IN PERIODS OF LIBERATIVE PRESCRIPTION

Conventional legalese would produce the following propositions: (a) Normally, statutes apply only prospectively; (b) however, remedial or procedural statutes can apply retroactively; (c) statutes changing periods of limitation are remedial or procedural, and thus can apply retroactively; (d) but, remedial or procedural statutes cannot apply retroactively if they divest a vested right; and (e) a cause of action is a vested right in some instances.

Under this analysis, one can easily ask several questions: (a) What is the standard to decide whether a statute is remedial or non-remedial? (b) What is the standard to determine whether a statute is procedural or substantive? (c) Why is a statute changing a period of prescription remedial or procedural? (d) What is a vested right? (e) Why is a cause of action a vested right in some cases and not in others?

This rhetoric obviously employs complex terms of art that have no meaning other than that given them in particular cases, and masks a basic question as to whether the cutting off of an individual's expectations arising from potential lawsuits is reasonable. It might help focus on that question if the legalese were dropped and the issues faced more directly. The following analysis is suggested.

The problem is not one of "prospective" or "retroactive" application of a statute; indeed, confusion could be lessened by ceasing to use those terms. The Louisiana Constitution, in article III, section 19, specifies the effective date of statutes.[23] That provision applies to all statutes—procedural or substantive, remedial or non-remedial—and that provision must be given effect. If the statute specifies a standard of conduct, the standard applies as of the effective date. If the statute governs court procedure, it applies to procedures occurring as of the effective date. If a statute establishes a period of limitation, the statute applies as of its effective date. For example, consider Act 444 of 1977, effective July 1, 1978, which adopted Louisiana Revised Statutes 9:5629 (Supp. 1977), as follows:

> Actions for the recovery of damages sustained in motor vehicle accidents brought pursuant to uninsured motorist provisions

23. LA. CONST. art. III, § 19 provides:

> All laws shall take effect on the sixtieth day after final adjournment of the session in which they were enacted, and shall be published prior thereto in the official journal of the state as provided by law. However, any bill may specify an earlier or later effective date.

> in motor vehicle insurance policies are prescribed by two years reckoning from the date of the accident in which the damage was sustained.[24]

As of July 1, 1978, all such actions were prescribed by two years, reckoning from the date of the accident. If the accident occurred in 1975, by the terms of the statute, the claim is prescribed. If the accident occurred July 10, 1976, the statute applies and allows suit to be filed until July 10, 1978. This rather simple analysis is an application of the clear text of article III, section 19 and applies *unless* some other constitutional provision intervenes. That other constitutional provision, of course, is the due process clause[25] which carries with it a flexible prohibition against unreasonable deprivations of reasonable expectations. This is a more direct means of stating that statutes cannot be applied so as to divest vested rights, and it avoids the inquiry into the rather sterile question of whether an interest in filing a lawsuit is a vested right. The preferable formula focuses instead on whether the individual interest in having the continuing power to assert a claim by a lawsuit was taken away unreasonably. This inquiry then centers around the notice a person was given of the promulgation of the new statute and how much time has intervened since its adoption.

The first circuit opinion in *Johnson v. Fournet*[26] is probably inconsistent with the general view in finding a denial of due process in applying the two-year limitation of 9:5629 to a suit when the new time period still allowed plaintiff some 8½ months in which to file after the effective date of the new statute. The third circuit, in *Tilley v. Government Employees Insurance Co.*,[27] is more in accord with existing authority in finding a period of almost 11 months a reasonable time.

The supreme court in 1979 suggested that a change in the medical malpractice prescription, effective in September, 1975, from one year of knowledge to three years of an alleged act of negligent treatment,[28] could not apply to treatment that occurred in January, 1972.[29] Certainly, as to a suit filed immediately after the effective date, the change would totally cut off the right to sue with no addi-

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24. Act 444 of 1977 actually adopted LA. R.S. 9:5604 (Supp. 1977), which was later redesignated as LA. R.S. 9:5629 (Supp. 1977) on authority of LA. R.S. 24:253 (1950).
25. LA. CONST. art. I, § 2.
26. 387 So. 2d 1336 (La. App. 1st Cir. 1980).
27. 396 So. 2d 525 (La. App. 3d Cir. 1981).
28. LA. R.S. 9:5628 (Supp. 1975), *as admended by* 1976 La. Acts, No. 214, § 1.
29. Lott v. Haley, 370 So. 2d 521 (La. 1979).

tional time after promulgation to file the action. However, if one waits almost 1½ years after the effective date of the change, as in that case, before bringing suit, that would surely be waiting beyond a reasonable time, and one can hardly be heard to say that an unreasonable deprivation occurred.

Clearly liberative prescription periods are based on the societal need for certainty and release from uncertain, stale claims. They depend on more than negligence of the plaintiff. It follows that a statute providing for a ten year liberative prescription for actions against building contractors can constitutionally apply, even if the damages resulting from the defendant's conduct are not manifested within ten years of the construction. The fourth circuit, in *Stipe v. Joseph A. Neyrey General Contractor*[30] and *Bordlee v. Neyrey Park, Inc.*,[31] recognized those propositions and applied the prescription. Since the house in *Stipe* was constructed in 1961, and the house in *Neyrey* sold in 1963, the 1964 statute establishing the limitation could apply, for there was the reasonable time of nine and seven years after the effective date for plaintiff to have brought suit.

A more difficult problem was raised in *Clements v. State Department of Health, Social & Rehabilitation Services*.[32] A medical malpractice suit was filed timely against a hospital in June 1974. Almost four years later, in June 1978, the plaintiffs amended their petition to join as defendants the two treating physicians and their liability insurer. Meanwhile, Act 808 of 1975 and Act 214 of 1976 had intervened to provide for Louisiana Revised Statutes 9:5628 (Supp. 1975 & 1976), which establishes a period of three years from the date of neglect as the applicable prescription of malpractice claims. The court allowed the plaintiffs to amend to join the defendants, maintaining that application of 9:5628 to the plaintiffs would deprive them unreasonably of their right to amend their suit so as to join additional in solido defendants. That holding is not necessary for the case:

(1) *If* the filing of the suit in 1974 was an interruption of the prescription of one year that was then running, and *if* the in solido defendants are to be treated identically with the original defendants,[33] *then* the countinuing pendency of the first suit benefits the doctors, and the statute by its terms should not apply to them. The

30. 385 So. 2d 568 (La. App. 4th Cir. 1980).
31. 394 So. 2d 822 (La. App. 4th Cir. 1981).
32. 391 So. 2d 66 (La. App. 4th Cir. 1980).
33. LA. CIV. CODE art. 2097.

prescription as to them was interrupted by the filing of suit before the effective date of the statute and the suit should proceed.

(2) *If* the filing of the 1974 suit was an interruption *plus* a continuing suspension until disposition of the case, the statute has no effect, and the prescription remains suspended.

(3) *If* the filing of the suit was merely an interruption as to the doctors, without their being on the same level of rights as the hospital and without there being a continuing suspension pending the proceedings, *then* the one year prescription began to run again. That period was completed in 1975 before the statute was adopted, and the plaintiffs' claim to join the doctors should have been denied.

In any event, none of the three possibilities for disposition of the case calls for a constitutional decision on the matter. If such a decision were to be made, certainly there was a reasonable time for the plaintiffs to act. The statute was effective in 1975, and the doctors were not sued until 1979—three years ought to be more than enough.

REMOVAL OF JUDGES

Small v. Guste[34] holds there is no authority under the intrusion into office statute for a private citizen to obtain a mandamus to order the attorney general to institute an action to remove a judge from office. Underlying the action was the contention that Judge S. Sanford Levy was violating article V, section 23(B) of the Louisana Constitution, which provides that a judge shall not remain in office beyond his seventieth birthday and that he was not entitled to benefit from the grandfather clause of section 23(A). On its facts, the case may be correct, but it leaves open many questions about removal of judges.

Supreme Court, court of appeal and district court judges are subject to impeachment under article V, section 24, as are all "State or district" officials, for commission or conviction of a felony or for malfeasance or gross misconduct. Judges, by specific provision of article X, section 25, are not subject to removal by suit, as *Small* apparently recognizes. They also are not subject to recall, under article X, section 26. However, in exchange for immunity from removal by suit or by recall, judges are subject to more stringent standards of conduct and are subject to removal by the supreme court upon recommendation by a Judiciary Commission. *Small* is correct in recognizing that the failure of a judge to leave office upon reaching

34. 383 So. 2d 1011 (La. 1980). *See also* City of Plaquemine v. Dupont, 388 So. 2d 127 (La. App. 1st Cir. 1980).

the mandatory retirement age would be grounds for removal under article V, section 25,[35] but is probably going beyond the facts of the case in suggesting that removal by the supreme court upon recommendation of the Judiciary Commission is the exclusive means of removing a judge. As mentioned earlier, impeachment by the legislature is allowed; however, there is more to the problem.

Impeachment as well as removal under article V, section 25 upon recommendation of the commission relate primarily to misconduct or some type of fault. Removal or other discipline is imposed as a kind of punishment for various misdeeds. In addition, under section 25, a judge may be retired involuntarily for disability that interferes with the performance of his duties. The basis for removal here is inability to serve, a basis which normally involves some factual determinations about the medical condition of the judge. In these areas where some factual determinations are involved, the scheme is to have a screening device—the commission composed of judges, lawyers and laymen—weed out unmeritorious claims. Indeed, the commission is a type of protection for judges, for the supreme court cannot act on its own under section 25, but can act only if the commission recommends action to discipline or retire involuntarily.

However, there may be instances when judges are not eligible to hold their office for some reason that does not involve the kind of discipline-related or fact-finding related problems that the impeachment and removal by commission procedures involve. For example, if a judge refuses to surrender his office at the end of his term after he had been defeated, would he have to be "removed"? Would article V, section 25 have to be invoked to "remove" someone whose term is expired and who is no longer entitled to hold office? Similarly, is violation of the mandatory retirement provision the kind of discipline-related or fact-finding problem that is mentioned in article V, section 25? If, after a judge takes his oath, it is discovered that he was not qualified for the office because he was never validly admitted to the bar, is the commission procedure exclusive? Certainly, one could argue as to matters of qualification, term of office, or retirement age—matters not of discipline or necessarily of wrongdoing—that the commission procedure should be neither necessary nor exclusive. Its protective aspect ought not to be applied to the kind of situation when the constitution clearly requires some qualifications.

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35. Such a failure to abide by the law by one charged with administering the law certainly would be willful misconduct relating to one's official duty as well as failure to perform one's duty and persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute. 383 So. 2d at 1014.

In this regard, there is something to be said for Chief Justice Dixon's dissent in *Small* and his argument that the inherent authority of the supreme court is not constrained by article V, section 25 in matters such as those involved in that case. As to matters of leaving office at the end of a term and mandatory retirement, the supreme court can invoke article V, section 5 and adopt "administrative rules not in conflict with law" to regulate such procedures. The court simply would invoke those rules and order a judge out of office, not as a matter of discipline or punishment, but simply as a matter of enforcing the qualifications requirements established by the constitution. It would appear relatively easy to conclude that such matters as payment of salary, taking office, leaving office, paying retirement benefits, etc. are administrative matters relating to the judicial system that come under the reach of article V, section 5.

ATTORNEY GENERAL AND DISTRICT ATTORNEY

The finely tuned provisions of article IV, section 8 balancing the power allocation between the attorney general and the district attorneys are supplemented by an additional grant of power that gives the attorney general "other powers and . . . other duties authorized . . . by law." Such laws cannot conflict with the constitution's allocation of authority between the attorney general and the district attorney, but otherwise the legislature is free to grant power as it wishes. Code of Criminal Procedure article 66 allows the attorney general to issue subpoenas as part of his investigations. As this power to investigate in no way conflicts with the powers of a district attorney granted by the constitution, *In re Morris Thrift Pharmacy*[36] recognizes that a private citizen cannot contest the validity of an attorney general's subpoena for records based on an argument that the attorney general has no investigatory authority without prior judicial authorization. Judicial authority is needed, under article IV, section 8, when the attorney general seeks to institute, prosecute or intervene in a criminal action or proceeding or to supersede an attorney representing the state. None of those requirements are met when, as in *Morris*, the attorney general issues subpoenas in exercising his power to investigate.

The district attorney has a protected area of prerogative in article V, section 26, which essentially gives him charge of every criminal prosecution by the state in his district as well as the power of being the legal advisor to the grand jury. In that area, the attorney general cannot control the district attorney except as provided in article IV, section 8. It also follows that a parish governing

36. 397 So. 2d 1301 (La. 1981).

authority cannot control the district attorney in the exercise of his power to decide whether to prosecute. However, no other constitutional immunity or protected jurisdiction is given the district attorney. It follows that a parish governing body ought to be able to inquire into the other non-protected activities of a district attorney without constitutional prohibition. In *Perez v. Plaquemines Parish Commission Council*,[37] the fourth circuit acknowledged that the parish has no

> right to interfere with the district attorney in his official capacity or to usurp his prosecutorial functions but it may investigate with respect to the property and equipment belonging to the parish, including the activities of Leander H. Perez, Jr. and Arthur O. Cope, in their individual capacities relating to parish funds, property and equipment.[38]

Though the court's opinion may be more narrow than it need be, it does recognize that the district attorney has no general immunity from investigation by the parish governing authority. It probably would be accurate to state that as a legislative body, a parish council has a power similar to that of the legislature and the United States Congress to conduct investigations of various sorts so long as they are reasonably related to the kind of legislation that body could adopt. This view would be consistent with the general approach of the constitution, which is to encourage checks among governing authorities to keep any person or institution from becoming too powerful. Having the attorney general serve as a check at the central governmental level, and the parish governing authority seve as a check at the local level, supports that basic policy.

The convoluted political disputes in Plaquemines Parish also gave rise to the supreme court's first major application of the power of the attorney general to supersede a district attorney. In a short statement explaining a granting of writs, reversing a judgment upholding an exception, and returning the matter to a specially appointed judge ad hoc, the court stated that the attorney general had alleged facts which, if proven, were cause for the district court to authorize the attorney general to supersede the district attorney in the pending matters.[39]

At issue was the accusation that the district attorney prematurely dismissed a grand jury when he learned that the jury had voted to indict him for theft. The lower court had reasoned that

37. 391 So. 2d 1308 (La. App. 4th Cir. 1980).

38. *Id.* at 1312.

39. *In re* Superseding the Dist. Attorney of the 25th Jud. Dist., 401 So.2d 967 (La. 1981).

even this allegation was not a ground to supersede the district attorney because the power to supersede could only apply to pending criminal cases. Since there had been no institution of prosecution, there was no power to supersede. The supreme court is clearly correct in reversing the lower court. The power to supersede with respect to certain matters ought to include matters before the grand jury, matters relating to preliminary hearings, and any other kinds of "action" in which the state is being represented by the district attorney. To hold otherwise would be to withdraw from the central authority its check on actions by the district attorney before the grand jury. Especially in political cases, the fact of an indictment or no indictment is often a pivotal matter which can be more important for public perception than a later jury verdict. To insulate the district attorney's activities at the grand jury level is to work against the basic policy of checks between the authorities. Particularly when an indictment against the district attorney himself is at issue, his power should be curbed. The language of article IV, section 8 supports this decision, for it is the court "which would have original jurisdiction" that must approve the superseding. That word choice would not have been used had pre-indictment activities of a district attorney been meant to be excluded.

The decision reflects fundamental values as reflected by legislative action. When the same district attorney successfully argued he could not be recused before commencement of a prosecution, the legislature adopted Act 195 of 1980 to allow specifically recusation based on conduct during investigatory and grand jury proceedings.[40]

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40. *See* Plaquemines Parish Comm. Council v. Perez, 379 So. 2d 1373 (La. 1980).