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In all of these variations with reference to recognition of new governments, there is never any question about the continuing and irrevocable recognition of the foreign state.

A new government which has not been recognized does not have a right to institute suit in an American court, but the Castro government had been recognized by the United States and this is not affected by a break in diplomatic relations.

Thus there are three separate concepts which are distinct from each other: (1) the recognition of a new state, (2) the recognition of a new government in an existing state, and (3) the maintenance of diplomatic relations with the recognized government of a recognized state.

LOCAL GOVERNMENT LAW

Henry G. McMahon*

OFFICERS AND EMPLOYEES

This area of the subject, which usually yields a bountiful harvest of litigated cases, produced but a single case in the appellate courts during the past term, but this settled an extremely important point. Foti v. Montero answered the question of whether, in municipalities having the commission form of government, the employees of each municipal department were to be appointed by the commissioner in charge of the department or by the commission council itself. The action was brought by the mayor and commissioner of public health and safety of the City of Donaldsonville to restrain the enforcement of two ordinances adopted by the majority of the members of the commission council. The first ordinance declared that the council itself had the power to determine the positions to be filled in each department. The second declared that the council itself had the power to appoint and remove all employees of the city. On the date on which these ordinances were adopted, the council adopted a resolution designating the positions to be filled, appointing and assigning individuals to these positions, and fixing the compensation to be

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1. 243 La. 734, 146 So. 2d 789 (1962).
paid them. The trial court granted plaintiff the injunctive relief prayed for; but this decision was reversed by the Court of Appeal, First Circuit.\(^2\) Under certiorari, the Supreme Court affirmed the decision of the intermediate appellate court rejecting the plaintiff’s demands.

Plaintiff rested his position on two separate arguments: (1) each commissioner was given the responsibility for the efficient operation of his department, and this necessarily implied the power of appointment and removal of the department’s employees; and (2) since the pertinent statute\(^3\) expressly empowered the council to appoint designated officers and their assistants, and was silent as to the power of appointing other employees of the various departments, this power was reserved to the commissioner in charge of the particular department. Both of these contentions were rejected by the Supreme Court. An adequate answer to the first was found in the general pattern of commission council municipal government throughout the country imposing the responsibility for the efficient operation of all municipal departments on the council itself, and not on the particular commissioners. The second contention collapsed when the Supreme Court construed the statute as a whole as vesting the power of appointment and removal of all municipal employees in the council itself.

**POWERS AND DUTIES**

In *Washington Parish Police Jury v. Washington Parish Hospital Service District No. 1*,\(^4\) the plaintiff and certain citizens and residents of the parish sought to annul an election held by the defendant district which authorized the issuance of bonds. The principal ground of nullity relied on was that the defendant district, which had been created by the police jury, had been dissolved by the police jury prior to the election. The trial judge rejected the plaintiffs’ demand on the ground that the police

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\(^3\) LA. R.S. 33:501 et seq. (1950).

\(^4\) 152 So. 2d 362 (La. App. 1st Cir. 1963). The case was first appealed to the Supreme Court under the provisions of LA. CONST. art. VII, § 10(1), as amended pursuant to LA. Acts 1958, No. 581, vesting jurisdiction in the Supreme Court over any case where the constitutionality or legality of any tax, local improvement assessment, toll, or impost levied by the state or by any parish, municipality, board, or subdivision is contested. The Supreme Court held that it was without appellate jurisdiction over the case, and transferred it to the Court of Appeal, First Circuit, since no tax had yet been levied by the district. Washington Parish Police Jury v. Washington Parish Hospital Service District No. 1, 243 La. 671, 146 So. 2d 157 (1962).
jury had not acted timely in abolishing the defendant district, and had permitted the latter to enter into valid contracts with third persons whose rights could not now be divested. The Court of Appeal, First Circuit, affirmed the judgment appealed from, but on an entirely different ground. The intermediate appellate court held that the statute authorizing the creation of the district granted any district so created perpetual existence; and, unlike other statutory provisions authorizing the creation of local governmental districts and commissions, did not expressly vest in the police jury the power to abolish hospital districts created by it. The attempted dissolution of the defendant district by the police jury was held to be ineffectual.

In the twin cases of State ex rel. Village of Scott v. Broussard, the relator sought unsuccessfully in the trial court to mandamus the village mayor to perform certain ministerial duties in connection with the issuance of checks and the execution of contracts authorized by resolutions of its board of aldermen. The defenses successfully interposed in the trial court were that these resolutions had been vetoed by the mayor, and further that the contracts in question were not practicable or feasible. In view of the fact that the board of aldermen had overridden the mayor’s veto by a vote of two-thirds of its members, the Court of Appeal, Third Circuit, rejected the first defense tendered. Short shrift was made by the intermediate appellate court of the second defense interposed. The wisdom or expediency of the board of aldermen’s actions was held not subject to judicial review. The case was remanded to the trial court for the issuance of writs of mandamus.

The subject of local option elections in dry parishes, a perennial, again made its appearance during the past term. In Fuller v. Police Jury of Grant Parish, the defendant justified its refusal to call the election on the ground that the petition therefor contained a number of unauthorized and invalid signatures. The trial court refused to issue the mandamus prayed for by plaintiff. On appeal, the Court of Appeal, Third Circuit, found that after striking from the petition all such unauthorized and invalid signatures, it still had the minimum number of signatures

6. 153 So. 2d 131 (La. App. 3d Cir. 1963); 153 So. 2d 134 (La. App. 3d Cir. 1963).
7. 144 So. 2d 766 (La. App. 3d Cir. 1962).
required by law. The intermediate appellate court ordered the issuance of the mandamus sought by plaintiff.

ZONING

One of the most difficult problems of city planning is the regulation of the use of lands adjoining a city which ultimately grow into urban areas and are absorbed by the municipality. The solution employed in recent years in Louisiana has been the legislative delegation of zoning power to the parishes, so that land use in areas adjoining a municipality may be regulated in advance of actual development and eventual absorption into the municipality. Heretofore, it has been thought that, in the absence of an express constitutional grant to the legislature, the latter could not validly delegate the zoning power to parishes; and article XIV, section 29, of the Constitution has been repeatedly amended to grant to the legislature the power to delegate zoning powers to various parishes. While the legislature was granted express constitutional authority in 1921 to delegate the zoning power to municipalities, this was subsequently held to have been unnecessary. In State ex rel. Civello v. City of New Orleans the Supreme Court held that zoning regulations were an exercise of the police power, which could validly be delegated by the legislature to municipalities unless constitutionally prohibited. This ruling was broadened, in Plebst v. Barnwell Drilling Co., into a holding that, in the absence of any constitutional inhibition, the legislature could delegate the zoning power to parishes. Involved there was an ordinance of Caddo Parish which regulated the use of land adjoining and within five miles of the City of Shreveport. This ordinance had originally been adopted under authority of special legislation passed prior to the express constitutional grant of authority to the legislature to delegate the zoning power to Caddo Parish. This decision makes it unnecessary in the future to amend the Constitution each time a parish wishes to obtain a legislative delegation of the zoning power.

8. Parish of Jefferson (1944, 1946, and 1954); Parish of East Baton Rouge (1956); Parish of West Baton Rouge (1958); Parish of Calcasieu (1960); Parishes of Bossier and Rapides (1960); Parishes of Caddo, St. Bernard and St. Tammany (1962).

9. LA. Const. art. XIV, § 29.


Two other cases on the subject decided by the appellate courts during the past term presented no new problems.12

REVENUES

Only two cases worthy of note were decided by the appellate courts in this area during the past term. *Parish of East Baton Rouge v. Varnado,*13 under settled statutory and jurisprudential rules, held that a taxpayer who had paid through error and without protest an amount in excess of that due for a license tax could neither recover the excess nor apply it on the license tax currently due. Counsel for the parish had no alternative but to invoke, and the courts had to apply, the settled rules on the subject; but here is a rule of statutory law which should be changed. The present statute14 allows recovery of a tax not due in whole or in part only if paid under protest and a suit for recovery is instituted within thirty days. The present law makes no provision for the recovery of a tax not due which is paid through error.

Article X, section 21, of the Constitution, authorizing the imposition of severance taxes, provides that not less than one-third of the severance taxes collected in each parish (not in excess of designated amounts) shall be allocated "to the Parish from within which such tax is collected." The following mandate is imposed upon the legislature by this constitutional provision:

"The Legislature shall provide for the distribution of the funds allocated to the parishes under this provision among the governing authorities of such parishes as have jurisdiction over the territory from within which such resources are severed and the tax collected."

Section 646 of Title 47 of the Revised Statutes purports to comply with this constitutional mandate. Its first sentence, providing for the allocation to each parish, virtually tracks the con-

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12. In *Cush v. Bossier City*, 149 So.2d 196 (La. App. 2d Cir. 1963), an amendment of the zoning ordinance of the defendant municipality was held invalid on the ground that it had been adopted by the city council without prior submission to, and approval by two-thirds of the members of, the planning commission, in direct violation of La. Acts 1954, No. 189, § 4.

In *State ex rel. Garofalo v. Desselle*, 149 So.2d 621 (La. App. 4th Cir. 1963), it was held that a mandamus should issue to compel the parish engineer, and the Police Jury, of St. Bernard Parish to issue a permit to build a two-family dwelling on her lot, when not prohibited by the subdivision plan approved by the Police Jury or by the restrictions of the subdivider.

13. 153 So. 2d 100 (La. App. 1st Cir. 1963).

stitutional language. Its second sentence, however, provides that

"Such apportionment and distribution shall be made . . . in proportion to the amount of ad valorem property taxes payable to each such governing authority as shown by the last completed assessment roll . . . ."

Since the constitutional provision requires the allocation to each parish of not less than one-third of the severance taxes collected therein (not in excess of designated amounts), the language quoted immediately above would seem to indicate some legislative intent to distribute the parish's allocation to all governing authorities in the parish (i.e., police jury or parish council and the boards of all parish districts), rather than to the governing authority of the parish (i.e., police jury or parish council).

In Police Jury of the Parish of St. Charles v. St. Charles Parish Waterworks District No. 2,15 the parish challenged the constitutionality of this statute and sought a judgment declaring that it was entitled to the full constitutional allocation. The trial court held the statute unconstitutional, but rather curiously construed the constitutional provision as making the allocation to the governing authorities of the parish and of those parish districts within which severance taxes were collected. Since no such taxes were collected within the territory of the defendant parish districts, they were held not entitled to share in the allocation. On appeal, the Supreme Court reversed and held the statute constitutional. The defendant parish districts were held entitled to share in the allocation. The constitutional language "as have jurisdiction over the territory within which such resources are severed and the tax collected" was held to qualify the word "parishes" and not the words "governing authorities."

This case vividly illustrates the slippery nature and elusive character of words. The writer finds himself unable to accept the reasoning of either the trial or the appellate court, and believes that the statute is patently unconstitutional. The constitutional provision first imposes the duty of allocating the designated portion of the severance tax "to the Parish from within which such tax is collected"; and then imposes the legislative mandate to provide for the distribution of "the funds allocated to the parishes under this provision among the governing au-

15. 243 La. 764, 146 So. 2d 800 (1962).
thorities of such parishes as have jurisdiction over the territory from within which such resources are severed and the tax collected.” Under this view, the legislature had no power to distribute the parish allocation to any of its districts.

**Contracts**

One case decided during the past term highlights and emphasizes the need for broadening the Public Works Lien Act. In *Martinolich v. Albert* the Court of Appeal, First Circuit, held that neither the contractor doing construction work for a local governmental unit nor its surety was liable on a claim against its subcontractor for the rental of “manned equipment.” The appellate court’s decision is unassailable, as it follows prior jurisprudence strictly construing the statute. However, construction equipment is becoming so expensive that many contractors and subcontractors are now forced to rent it when needed. The statute should be amended to afford protection to one who rents equipment to a public contractor or his subcontractors, when “manned” or not.

**Regulation of Utility Rates**

Article VI, section 4, of the Constitution of Louisiana vests generally in the Louisiana Public Service Commission the power to regulate the rates charged by public carriers and utilities operating within the State. However, section 7 of this article of the Constitution provides that:

“Nothing in this article shall affect the powers of supervision, regulation and control over any street railway, gas, electric light, heat, power, water works, or other local public utility, now vested in any town, city, or parish government unless and until at an election ... a majority of the qualified electors of such town, city, or parish, voting thereon, shall vote to surrender such powers. ...”

The majority of the cities and larger towns of the state in 1921 were operating under special charters which, either expressly or impliedly, vested the power to regulate the rate of local public utilities in their governing authorities. In these municipalities, the courts have consistently held that the regu-

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17. 143 So. 2d 745 (La. App. 1st Cir. 1962).
latory power over the rates of local utilities was vested in the governing body of the municipality, and not in the Commission.\textsuperscript{18} On the other hand, with equal consistency, municipalities which in 1921 or subsequently were operating under the Lawrason Act\textsuperscript{19} have been held to be without the power to regulate the rates of local public utilities; and, in such cases, this power was vested exclusively in the Commission.\textsuperscript{20}

In \textit{United Gas Pipe Line Co. v. Town of Washington}\textsuperscript{21} the plaintiff utility sued to recover the wholesale price of natural gas sold to the defendant municipality for distribution to the latter's retail customers. Originally, the parties had entered into a contract which fixed the price of the gas, but the Commission had subsequently increased this price. The defendant resisted the suit on the ground that plaintiff was bound by the contract price, and the Commission had no jurisdiction or power to increase this price. As the defendant municipality was operating under the Lawrason Act, the appellate court upheld the validity of the Commission's increased rate and rendered judgment for the plaintiff as prayed for.

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\item 18. City of Monroe v. Louisiana Public Service Commission, 233 La. 478, 97 So. 2d 56 (on second rehearing, 1957); Baton Rouge Waterworks Co. v. Louisiana Public Service Commission, 156 La. 539, 100 So. 710 (1924); State v. City of New Orleans, 151 La. 24, 91 So. 533 (1922).
\item 21. 143 So. 2d 613 (La. App. 3d Cir. 1962).
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