Louisiana Law Review

Volume 19 | Number 2
The Work of the Louisiana Supreme Court for the 1957-1958 Term
February 1959

Public Law: Constitutional Law

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officer may at any time withdraw if he deems himself disqualified; and upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."[40]

It is, of course, only speculation but it would seem that provisions such as the foregoing, providing for public hearings and providing machinery for precipitating recusation before action is taken, might have the salutary effect of eliminating such troublesome issues in advance; at least where, as here, the rule is in any event firmly anchored only in proper rule-making considerations.

CONSTITUTIONAL LAW

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Constitutional issues were presented in ten of the cases decided at the last term. Seven of these posed traditional issues in the field — two each under due process and interstate commerce clauses; and one each in the areas of self-incrimination, delegation of legislative power and equal protection of the laws. Three other cases raised questions of special or local concern arising under the provisions of the State Constitution. The cases will be discussed in the order just mentioned.

DUE PROCESS OF LAW

A pair of interesting and contrasting cases arising under the due process clause served to illustrate the distinction which has come to be drawn between legislative measures imposing economic regulation on the one hand and those relating to individual liberty on the other. At bottom, the basic issue in such cases is the weight to be accorded the presumption of constitutionality which is said to attend all legislative enactments. In the area of economic affairs the Supreme Court of the United States, which earlier had exhibited a marked tendency to "second-guess" legislative bodies in appraising the wisdom of legislation, announced in 1937 that where the merits of such regulation are honestly debatable the "legislature is entitled to its judgment," despite

40. 60 STAT. 237, 241 (1946); 5 U.S.C. § 1006 (1952).

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judicial doubts.[1] The Court has remained faithful to that policy in the intervening years as attested by its refusal to invalidate a single statute on the ground of due process in the interim. In a recent pronouncement it had occasion to remark that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[2] Accordingly, in the realm of economic affairs, the presumption of constitutionality is accorded great weight when a statute is challenged on the ground of substantive due process. In the field of personal liberty, however, far less significance is accorded to the presumption, a development to which Mr. Justice Stone alluded in his now famous and oft-quoted footnote 4 in the case of *United States v. Carolene Products Company*.[3]

While the State Supreme Court made no reference to the dichotomy, it nonetheless observed the distinction when it invalidated the statute involved in *State v. Birdsell*[4] and sustained the one under attack in *Louisiana Motor Vehicle Commission v. Wheeling Frenchman*.[5] In *Birdsell* the defendant had been convicted under the provisions of La. R.S. 40:962 making it a felony to "possess a hypodermic syringe or needle unless such possession be authorized by the prescription or the certificate of a physician issued within the period of one year prior thereto." He contended that the legislative proscription of possession without regard for the intent or use for which the articles were possessed deprived him of his liberty without due process of law. On the original hearing the constitutional issue was curtly dismissed. On rehearing, and with full recognition of the state's interest in the prompt and effective suppression of drug addiction, the court concluded that "inasmuch as an accused . . . cannot show . . . that his possession of a hypodermic syringe or needle . . . is for harmless use such statutory provision, in our opinion, is unreasonable and hence unconstitutional. Created thereby is a conclusive presumption that the possession is for an illegal purpose — an unrebuttable presumption which factually runs counter to human experience."[6] The *Birdsell* case is the subject of a student note appearing elsewhere in this number, and the writer does not wish to enter into an extended discussion of the decision here.

1. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
2. Berman v. Parker, 348 U.S. 26, 32 (1954).
3. 304 U.S. 144, 152 (1938).
4. 235 La. 396, 104 So.2d 148 (1958).
5. 235 La. 332, 103 So.2d 464 (1958).
6. 104 So.2d 153.

However, it must be said that the court was here confronted with a considerable dilemma. There is a strong public interest in the apprehension and suppression of the traffic in narcotics; it is a subject of spirited debate at each session of the legislature. On the other hand, the public is equally interested in the preservation of our fundamental liberties. The courts, confronted with a balancing of these interests — as they frequently are in many areas of the criminal law — may be expected to discount the presumption of constitutionality when, as here, the act forbidden is one which in the light of human experience is not *per se* bad.

The case of the *Wheeling Frenchman*, on the other hand, illustrates the extent to which the legislature may make inroads upon economic liberty, notwithstanding the presence of equally competing considerations of public policy. In this case the defendant was restrained from violating the provisions of the Motor Vehicle Commission Law[7] which forbids the sale of "new and unused" cars by persons who are not regularly franchised dealers of a manufacturer or distributor. The defendant contended that the legislation was invalid on four grounds, namely, that it: (1) created a monopoly contrary to the due process clauses of both State and Federal Constitutions, (2) conferred a special benefit or privilege contrary to state constitutional provisions, (3) denied equal protection of the law under both State and Federal Constitutions, and (4) delegated legislative power to private persons.

Taking judicial notice of the fact that franchised dealers, recently under considerable pressure to dispose of large inventories of new cars, have disposed of them through used car dealers who, many times, are not financially responsible and not in a position to extend the manufacturer's warranty, thereby threatening considerable risks to the car-buying public, the court sustained the measure. The cynical observer, in a casual reading of the two cases might conclude that the court simply agreed with the legislative judgment in the case of the *Wheeling Frenchman* and disagreed in *Birdsell's* case. However, as already pointed out, there is substantial precedent for the differing results in the cases and the contradiction is much more apparent than real.

THE COMMERCE CLAUSE

In another pair of cases, likewise reaching conflicting conclu-

7. LA. R.S. 32:1251 *et seq.* (1950).

sions, the court sustained the application of the state income tax over commerce clause objections in *Brown-Forman Distillers Corp. v. Collector of Revenue*[8] and invalidated the gas gathering tax on commerce clause grounds as sought to be applied in *Louisiana-Nevada Transit Co. v. Collector of Revenue.*[9] In *Brown-Forman*, a suit for the recovery of income taxes paid, the plaintiff, a Kentucky corporation, alleged that insofar as its Louisiana activities were concerned it was engaged solely in interstate commerce and hence was not subject to taxation here. The taxpayer's activities in Louisiana were shown to consist of sending "missionary men" into the state to call on local wholesalers and occasionally to accompany the latter's salesmen on calls. No orders for the taxpayer's products were taken by the "missionary men" and all orders were solicited and received by salesmen working for Louisiana wholesalers. These orders, when received by the taxpayer in Kentucky were approved there and the goods shipped to Louisiana wholesalers for delivery.

Following its 1956 decision in the case of *Collector of Revenue v. John I. Hay Co.*,[10] previously noted in these pages,[11] the court dismissed the plaintiff's suit. The Supreme Court of the United States has granted the plaintiff's petition for a writ of certiorari together with two other cases from other jurisdictions and will presumably issue an opinion on the subject at the current term. Prior jurisprudence on the point indicates that the action of the Louisiana court should be affirmed.[12]

In *Louisiana-Nevada*, a suit for refund of taxes paid under the provisions of the state's gas gathering tax, the relevant facts briefly stated by the court disclosed that the taxpayer purchased gas from producers in two fields in northeast Louisiana. The taxpayer's main line ran from the area of Cotton Valley north into Arkansas. Another, smaller, line ran from Haynesville to a junction with the main line near Springhill. It was shown that four-fifths of all gas purchased by the taxpayer was destined for sale in Arkansas and the remaining one-fifth was sold in Louisiana. The taxpayer's principal contention was predicated upon the United States Supreme Court's decision in *Michigan-*

8. 234 La. 651, 101 So.2d 70 (1958).
9. 233 La. 600, 97 So.2d 409 (1957).
10. 228 La. 1031, 84 So.2d 810 (1956).
11. 17 LOUISIANA LAW REVIEW 374 (1957).
12. West Publishing Co. v. McColgan, 328 U.S. 823 (1946); Peck & Co. v. Lowe, 247 U.S. 165 (1918), and United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918).

Wisconsin Pipe Line Co. v. Calvert,[13] invalidating the Texas statute as sought to be applied there. On the original hearing the Louisiana court distinguished the cases, largely upon the point that the metering equipment in *Louisiana-Nevada* was owned by the taxpayer, whereas in *Michigan-Wisconsin* this equipment was the property of the producer who sold gas to the pipeline company. On rehearing a majority of the court concluded that the *Michigan-Wisconsin* case was not in fact distinguishable and granted the plaintiff recovery of taxes paid on all gas which it gathered in Louisiana. Justice ad hoc Hamlin, organ of the court on first hearing, dissented.

To the writer, the *Michigan-Wisconsin* case is distinguishable from *Louisiana-Nevada*, not by reason of the differing ownership of the metering equipment, but upon the point of remoteness and indefiniteness of interstate movement of the gas itself. In *Michigan-Wisconsin* it was clearly established that the entire body of gas involved there did in fact move in interstate commerce, and the movement was relatively quick and uninterrupted following the taxable incident. After passing through the producer's metering equipment the gas moved a distance of 1,215 feet to the taxpayer's compressors where pressure was increased and from thence it traveled but 1.74 miles to the state border into interstate commerce without further interruption. In the *Louisiana-Nevada* case the gas was not merely admitted into the taxpayer's system through its own metering equipment, but more critically, at that moment there was no way of ascertaining whether a particular portion of the gas would ever move in interstate commerce. The undisputed facts showed that one-fifth of it never left the state, and the four-fifths which did, was only *thereafter* ascertainable. The Supreme Court of the United States in *Michigan-Wisconsin* had most significantly stated that "the problem in this case is not whether the state could tax the actual gathering of all gas whether transmitted in interstate commerce or not . . . but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun."[14] In thus stating what the *Michigan-Wisconsin* case *was not*, the writer submits, the Court put aside the very kind of a case presented by the facts in *Louisiana-Nevada*.

13. 347 U.S. 157 (1954).
14. *Id.* at 166-167.

SELF-INCRIMINATION

In 1955 the court held that a witness in a public bribery investigation who was then under indictment in federal court for acts growing out of the same events might invoke the protection of the Fifth Amendment to the Federal Constitution notwithstanding the fact that Article XIX, Section 13, of the State Constitution calls for disclosure and extends immunity from prosecution.[15] A student note in the pages of this *Review* indicated that the decision was not supported by the cases in the federal courts or other state courts of last resort.[16] At the past term the case of *State v. Ford*[17] presented a substantially similar situation except that the defendants there (cited for contempt based upon their refusal to answer questions in a public bribery investigation) were merely under federal investigation and had not been actually indicted as in the *Dominguez* case. The court was unanimous in its decision that the defendants were not entitled to invoke the federal privilege and that the state's action in compelling the defendants to testify did not constitute a denial of due process of law. Federal jurisprudence is clear on the point and squarely holds that the Fifth Amendment's self-incrimination clause is not one of those fundamental concepts of ordered liberty which have been incorporated into the Fourteenth Amendment's due process clause.[17] Under the circumstances, therefore, it is clear that the court has reached a result which accords with the settled law on the subject. The *Dominguez* case was not overruled (as Justice McCaleb, in his concurring opinion, suggests should have been done), but is simply distinguished on the point that the defendant there was under actual indictment whereas the defendants in *Ford* were merely under investigation.

DELEGATION OF LEGISLATIVE POWER

In *Ezell v. City-Parish Plumbing Board of Baton Rouge*[18] the court was confronted with the timeworn problem of attempting to reconcile the requirement of legislative designation of ascertainable standards for administrative guidance and the need for flexibility and discretion in the conduct of the agency's affairs. Prior decisions on the point have indicated a marked tendency on

15. State v. Dominguez, 228 La. 284, 82 So.2d 12 (1955).
16. 16 LOUISIANA LAW REVIEW 434 (1956).
17. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).
18. 234 La. 441, 100 So.2d 464 (1958).

the part of the Louisiana court to invalidate legislation of this type which is in any way questionable.[19] The federal jurisprudence reflects a much more liberal approach to the problem.[20]

In Ezell's case the license of a master plumber had been revoked for alleged violations of the city's plumbing code. The code, adopted by the city pursuant to authority conferred by Act 169 of 1898, fixed the duties of the Plumbing Board to be "to formulate such regulations as the Plumbing Board deems necessary to govern inspectors, plumbing, plumbers and gas fitters and others doing plumbing or gas work" and further provided that licenses might be revoked following inspection by the City Plumbing Inspector who "is to be the judge of quality of the material and workmanship, and the construing of the regulations to their meaning." Construing these provisions on their face, the court concluded that no ascertainable standards whatsoever had been prescribed by the legislative body, thereby placing it in the unfettered discretion of the Plumbing Board to adopt, rescind, or change regulations as it saw fit. Mention is made in the opinion of other sections of the code which were said to prescribe specifications, but nothing contained in the quoted provisions of the city ordinance creating the Board was thought to control or govern the Board in the administration of its authority. Viewed in this light, the decision seems to be sound. It is to be assumed, of course, that the city's purpose in adopting the code was to protect the public health and safety, and to authorize administrative action directed to that end. However, the provisions of the code empowering the board to adopt measures which it "deems necessary" omitting even general reference to these public ends appears to be "delegation running riot," as Mr. Justice Cardozo once so aptly described it.[21] The principal difficulty which confronts a court in these situations is, of course, that the legislature's failure to designate specific and identifiable standards to be observed by the administrative agency leaves the court without guides for the determination of administrative adherence to legislative purpose.

EQUAL PROTECTION OF THE LAWS

The equal protection clause evoked much discussion in the

19. City of Baton Rouge v. Shilg, 198 La. 994, 5 So.2d 312 (1941); State v. Maitrejean, 193 La. 824, 192 So. 361 (1939); and City of Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925).

20. Yakus v. United States, 321 U.S. 414 (1944).

21. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935).

case of *New Orleans v. Levy*,[22] although the ultimate decision of the court on rehearing makes it quite clear that this was not the ground of decision in the case. This case was an injunction proceeding in which the city sought to compel the defendant to remove a plastic covering which he had installed as a roof over a court yard in the French Quarter where he operated a restaurant, on the ground that the structure constituted a non-conforming use in the area. The defendant sought to show that numerous other instances of non-conformance had gone unrestrained and upon the basis of such a showing contended that enforcement of the Vieux Carré ordinances as to him would constitute a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment of the Federal Constitution. On original hearing the court dismissed the city's suit saying, inter alia, "that the injunctive relief sought . . . should not be granted until and unless the regulatory measures under consideration are enforced in like manner as to all other persons similarly situated." The city sought rehearing in the case, contending that the court had mistakenly applied the equal protection clause to the facts of the case. From the portion of the opinion quoted above, it is clear that this was only an implication, but it was an implication fairly drawn from the general language of the decision, particularly when viewed in the light of the defendant's contention, and more particularly in the light of the concurring opinion of Justice McCaleb who felt that the denial of injunctive relief in the case was properly in accord with equitable principles, but expressly rejected the equal protection argument, citing a long and impressive line of federal jurisprudence which holds that discriminatory enforcement of legislation contravenes the equal protection clause only when it is shown to have been knowing, intentional, or purposeful. On rehearing, the court stated that the city was mistaken in its thesis that the opinion on original hearing had been predicated upon equal protection considerations, acknowledged the rule of the federal cases, and made it clear that injunctive relief was being denied solely and simply upon equitable grounds. It is clear, therefore, that there is no constitutional issue in the case and the court's reference to the equal protection clause is dictum.

LOCAL OR SPECIAL CONSTITUTIONAL PROVISIONS

Brief mention should be made of three cases involving issues

22. 233 La. 844, 98 So.2d 210 (1957).

arising under local or special provisions of the State Constitution. In *Shannon v. Morgan City Harbor & Terminal District*[23] it was held that a constitutional amendment specifically providing for the creation of the harbor district and authorizing the issuance of bonds without a vote of the property owners in the district superseded all other general provisions of the Constitution relative to the issuance of bonds. In *Short & Murrell v. Department of Highways*[24] it was held that the power of the Board of Highways "to establish, construct, extend, improve, maintain and regulate the use of the State highways and bridges,"[25] authorized it to direct the Highway Department to enter into contracts looking toward the construction of a proposed office building to house the departmental activities. In *Ewell v. Board of Supervisors of Louisiana State University*,[26] the court held that to the extent that sums collected for licenses, fees, and penalties under the provisions of fertilizer,[27] feed,[28] and pesticide[29] statutes exceeded the cost of administering these measures, the statutes were to be regarded as revenue levies. As a consequnce, it was proper for the University, to whom the excess revenue was dedicated, to bond the revenue and use the sums thus acquired for the purpose of constructing a building to house the activities of the state chemist, charged with the duty of enforcing these measures.

LOCAL GOVERNMENT LAW

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OFFICERS AND OTHER PERSONNEL

The officers of the Town of Mansura were elected for a two-year term on June 12, 1956. At the same time the electorate of the town voted to have their municipal affairs regulated in the future by the Lawrason Act.[1] Under the pertinent provision of this statute, officers of a municipality in office when it elects to come under the provisions of the Lawrason Act retain their

23. 234 La. 1035, 102 So.2d 446 (1958).
24. 233 La. 735, 98 So.2d 170 (1957).
25. LA. CONST. art. VI, § 19.1.
26. 234 La. 419, 100 So.2d 221 (1958).
27. LA. R.S. 3:1311 *et seq.* (1950).
28. *Id.* 3:1891 *et seq.*
29. *Id.* 3:1601 *et seq.*

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1. LA. R.S. 33:321 *et seq.* (1950).