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to be followed, a city council seems justified in similarly abridging speech and press in the exercise of its police power directed toward the protection of its citizens and their property which it has properly found to be endangered.

LOCAL GOVERNMENT LAW

*Jerome J. Shestack**

Over two hundred years ago Thomas Madox wrote that the subject matter of corporated towns and communities is extensive and difficult.[1] The years have not denied this observation. On the contrary, time has brought added complexity. The available rules have simply not met the needs of an ever-enlarging field.[2] In the last term of the supreme court the local government cases proved no exception. Although generally reaching what appear to be sound results, the language of the opinions often presents perplexities that should elicit no enthusiasm from those concerned with municipal law.

ELECTION OF ORDINANCES

The question of what form a proposition must take when submitted to the electors of a municipality was raised in two cases.

In *Holt v. Vernon Parish School Board*[3] a proposition was submitted to the voters of a school district ward to incur debt and issue obligations "for the purpose of constructing and equipping a gymnasium-auditorium, lunch room, and repairing present school buildings" in the district. In *State ex rel. Bussie v. Fant*,[4] relators attempted to force the city council to submit to the electors of the city an ordinance raising the salaries of fire department employees ten cents an hour and police department employees fifteen cents an hour.

In each case it was contended that the proposition in question was illegal in that it contained more than one proposition without affording the electors an opportunity to vote on each one

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1. Thomas Madox, Historical Essay Concerning the Cities, Towns and Buroughs of England, taken from Records (1726) quoted in Dillon, Municipal Corporations, preface (5 ed. 1911) and in Harris, Municipal Corporations, 5 Rutgers L. Rev. 76 (1950).

2. A malady not localized of course to local government law.

3. 217 La. 1, 45 So. 2d 745 (1950).

4. 216 La. 58, 43 So. 2d 217 (1949).

separately. The contention was rejected in the *School Board* case and accepted in the *Fant*[5] case.

In both decisions the court stated the rule that separate objects cannot be submitted to the electors in one proposition. This is clearly so in the *School Board* case inasmuch as the statute under which the election was called so provides.[6] The rule is questionable, however, when applied to the *Fant* case. There the statute did not require that each ordinance contain a separate proposition. What then is the basis for the court imposing such a rule?[7] Most of the courts stating the rule cite the policy behind it, namely, to prevent "log-rolling" and to allow the voter to express freely his choice.[8] Granted that the policy is a good one and the rule desirable, it is nevertheless doubtful whether it is within the province of the court to impose such a rule in the absence of a statutory or constitutional[9] basis. And yet in most states the courts have blithely done so[10] without citing, seeking, or having any such basis.[11] It is perhaps hard to take issue with a court for following a rule so clearly desirable; nevertheless it should be recognized that this is judicial law making in what is normally and properly a legislative area.

Accepting the rule of separability as established, the next question is what test should be used in determining whether a proposition has more than one object. The test set forth by the supreme court in both cases is "whether or not there exists a natural relation between the structures or objects to be united

5. Since the court held the ordinance illegal in the *Fant* case, mandamus to compel the submission of the ordinance to the electors was refused. See discussion, infra p. 208.

6. La. Act 46 of 1921 (E.S.) § 16, as amended by La. Act 282 of 1938 and La. Act 6 of 1938 (E.S.) (La. R.S. [1950] 39:508 et seq.).

7. The only Louisiana authority cited by the *Fant* case for the rule was Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 So. 1011 (1907). But this is doubtful authority since it involved a taxing proposal covered by statute and Constitution. For a suggestion that a double purpose may be permitted in an ordinance, see Gray v. Bourgeois, 107 La. 671, 682, 32 So. 42, 47 (1902).

8. See, e.g., Re Validation Bonds, 170 Miss. 886, 156 So. 516 (1934); Rea v. LaFayette, 130 Ga. 771, 61 S.E. 707 (1908).

9. La. Const. of 1921, Art. III, § 16, requiring that each statute shall embrace but one object does not apply to municipal ordinances. City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941); Town of St. Martinville v. Dugas, 158 La. 262, 103 So. 761 (1925).

10. See list of authorities by states in 4 A.L.R. 2d 617, 623-625 (1947).

11. It has been suggested that the rule has some sort of unannounced due process foundation. If so, why does it not prevent log-rolling in Congress and in state legislatures which are not limited by a provision such as Article III, Section 16, of the Louisiana Constitution? Does due process require separate propositions for the voters and not for the legislators? What is it that the voter is being deprived of without due process? Life? Liberty? Property?

in one proposition."[12] Under this test, of course, "a large discretion is vested in the courts."[13] Thus in the *School Board* case the supreme court found a natural relationship between constructing a school gymnasium-auditorium, constructing a lunchroom and repairing various school buildings, whereas in the *Fant* case it was unable to find a natural relationship between raising the wages of city policemen and city firemen. Obviously this kind of test will force the attorney seeking to advise council or client to spin a coin or read the biographies of the justices to learn their personal predilections. A recognition of the test's shortcomings does not, however, mean that a more desirable test can be formulated. The writer, at any rate, is unwilling to venture one.[14] It may nevertheless be suggested that this field is one in which the legislative bodies should act and a court should exercise restraint in using the test to void legislative ordinances or proposals.

The *Fant* case is also interesting in relation to the question of whether a court will decide the legality of an ordinance before it has been elected by the voters. In the *Fant* decision the court was willing to pass on the ordinance in advance of the election, and having decided on its illegality, refused to grant mandamus to compel submission of the ordinance to the voters.

The converse of this was before the court only a month later in *Bardwell v. Parish Council of East Baton Rouge*.[15] Here, certain parish residents sought to enjoin an election on various amendments to the East Baton Rouge plan of government on the ground that the amendments were illegal. This time the court refused to pass on the legality of the amendments and dismissed the suit on the ground that the threatened injury was not irreparable but remote, and was therefore premature.

Thus in the *Fant* case the taxpayer is saved an election that may turn out useless; in the *Bardwell* case, he is not. The *Fant* decision accrues to the taxpayer's benefit; the *Bardwell* one does not.[16] The court appears to have been led to this difference in

12. 217 La. 1, 45 So. 2d 745, 746 (1950).

13. Ibid.

14. Among the tests that have been used are identity of purpose, comprehensive purpose, unity of object, and so on. See 4 A.L.R. 2d 617, 630-632 (1947). All of these are vague and do not materially assist in an attempt to predict the decision of a court in an individual case.

15. 216 La. 537, 44 So. 2d 107 (1942).

16. For divers reasons various citizens opposed to the incumbent form of government have been known to submit ordinances to the council that are clearly illegal. The council may believe it expeditious to place the matter before the voters rather than reject the proposals on council responsibility. If the proposals are defeated, the council can claim, so to speak, a vote of

results because of the different procedures involved.[17] Where mandamus was brought the court was willing to examine the legality of the proposed ordinance. But where injunction was sought the court required a direct and irreparable injury before it passed on the proposal.[18]

Accepting this distinction between the two remedies, the court in the *Bardwell* case might nevertheless have reached the sounder result of the *Fant* decision. The ground for dismissal in the *Bardwell* opinion was that the suit was premature because the injury was remote. Yet elections are costly affairs and their cost must be borne by the taxpayer. The pro rata injury to each taxpayer may be small, but it is hardly remote. Had this been acknowledged, the court could have recognized the distinction between mandamus and injunction and still have decided the legality of the proposals before they were submitted to an expensive election, likely to prove a fruitless one.[19]

ANNEXATION

In *Barbe v. City of Lake Charles*,[20] plaintiffs challenged an ordinance of Lake Charles providing for the enlargement of the corporate limits of the city under the provisions of Act 315 of 1946.[21] After the ordinance of annexation had been adopted on

confidence. If the proposals are elected, court action is undertaken and the responsibility of vetoing the people's choice shifts to the court. Such maneuvering may reveal political acumen, but it hardly shows consideration for the taxpayer's purse. Common sense would dictate that the legality of the proposals be decided before the election was held.

17. The *Bardwell* opinion's only reference to the *Fant* case was as follows: "Conversely, it is to be noted that a different rule has been recognized by some courts, including this one, in cases where a municipal council has refused to submit the initiative or referendum measure to the people and electors have sought to mandamus the body to compel a compliance with its ministerial duty. In such instances, it has been held that the writ will be denied if it is shown that the ordinance if adopted would be illegal or unconstitutional." Although not very explicit, the court is apparently attempting to draw attention to the procedural differences in the two cases.

A possible reconciliation between the decisions is that in each the court adopted a hands-off policy in municipal affairs. Although this objective has much to be said in its behalf, it was not enunciated in the opinion.

18. It seems generally accepted that irreparable injury need not be shown for mandamus to lie, since it is essentially a legal writ, whereas such injury must be shown in the case of an injunction which is an equitable remedy. See McQuillin, Municipal Corporations (3 ed. 1950) §§ 49.51, 51.49. As an original question, one might wonder why the two remedies should lead to opposite results under similar circumstances. For a suggestion that both remedies should be governed by common principles, see McQuillin, supra, at § 51.04.

19. The advisory opinion aspects of deciding the legality in advance should prove no obstacle. The proponents of the proposals are certainly bona fide party litigants. See Bardwell v. Parish Council of Parish of East Baton Rouge, 216 La. 537, 543, 44 So. 2d 107, 109 (1949).

20. 216 La. 871, 45 So. 2d 62 (1950).

21. La. R.S. (1950) 33:171-179.

second reading, a number of the signers of the annexation petition sought to withdraw their names from the original petition. There was no evidence that the signatures sought to be withdrawn had been obtained fraudulently or in bad faith, and the city council did not allow the withdrawals. Plaintiff-appellant urged that the right to withdraw signatures from an annexation petition terminates only after the adoption of the ordinance on third reading.[22]

The court held that the right of withdrawal was limited to the time when jurisdiction over the subject matter attached.[23] In this case, said the court, the city council became vested with jurisdiction after proper presentation of the petition, publication, and holding of a hearing as required under the statute.

In arriving at a decision the court had to consider two conflicting interests. On the one hand was regard for the individual right of the petitioner; on the other was regard for a workable process of annexation. The proverbial line had to be drawn between these two interests and since the statute was silent on the question, the court obviously had to do the drawing. The point chosen seems reasonable and considerate of both interests. It seems hardly desirable, however, for the court to have spoken in terms of jurisdiction attaching. Such language merely obscures. The "jurisdiction" of the council could just as logically have been said to attach at the point where the petition was presented to the council,[24] at the point where the council granted a hearing,[25] or at any number of other points along the way. To speak of jurisdiction in this type of situation is simply not very meaningful. What was desired is a practical point at which to limit withdrawal and this was chosen. There should be no need to masquerade a common sense choice in a jurisdictional jargon.

Justices Fournet and Ponder in a dissent point out that the "legislature in clear and unambiguous language sets out the procedure"[26] for annexing territory and that this procedure must be followed. To this amen. But the dissent then proceeds to read

22. Plaintiffs sought to overturn the annexation on a number of grounds. The contention concerning the withdrawal of signatures was the chief one discussed by the court. On rehearing the court restricted itself to this question.

23. The rules in other states are not in harmony. See in Annotation, 126 A.L.R. 1031 (1939); McQuillin, op. cit. supra note 18, at § 7.33.

24. Hawkins v. Carroll, 190 S.C. 11, 1 S.E. 2d 898 (1939); Seibert v. Lovell, 92 Iowa 507, 61 N.W. 197 (1894).

25. Cf. Miller v. Maier, 136 Minn. 231, 161 N.W. 513 (1917). See Annotation 126 A.L.R. 1031, 1057-1061 (1939).

26. 216 La. 871, 898, 45 So. 2d 62, 71 (1950).

into the statute the requirement that a petitioner must be allowed to withdraw until the third and final reading. Nowhere in the language of the statute is this requirement to be found. Nor is it probable that the legislature intended any such requirement, so likely to bog down annexation procedure.[27]

NEW ORLEANS

In 1948 the legislature enacted a statute changing the New Orleans form of government in a number of respects.[28] The major changes were (1) the number of elected public officials increased from a mayor and four councilmen to a mayor and seven councilmen; (2) each councilman to be elected by the electors of one of the city's municipal districts instead of from the city at large; and (3) the number of city departments increased from five to eight, to correspond to the number of elected officials, who, as before, are each to head a department.

Shortly after this act went into effect, the City of New Orleans instituted proceedings to have the act declared unconstitutional and to enjoin the Board of Supervisors of Elections from holding an election for mayor and councilmen under the act.[29]

Two arguments were chiefly relied upon by the city to support their argument of unconstitutionality.

The first was based upon the so-called "home rule" clause of the Louisiana Constitution, which provides: "The electors of the City of New Orleans . . . shall have the right to choose their public officers."[30] It was contended that Act 234, by providing for the election of the commissioners from districts, instead of from the city as a whole, denied the electors the right to choose their officers. After an extensive review of the past forms of government enjoyed by New Orleans the court concluded that the "home rule" provision shows that:

> ". . . the drafters of the constitution simply intended the officers controlling the ordinary governmental functions of the

27. As the majority pointed out: "To hold otherwise we would, in effect, be saying that the opponents of a proposed annexation under the provisions of the act, . . . after the governing authorities of such municipality have acted upon the petition, could by merely inducing the signers of the petition for annexation to withdraw their signatures from the original petition, . . . necessitate that the proponents of annexation seek additional signatures . . . and to institute the entire proceedings anew. . . . Such a holding would unreasonably hinder and interfere with the procedure for annexation." 216 La. 871, 893-894, 45 So. 2d 62, 69 (1950).

28. La. Act 234 of 1948.

29. City of New Orleans v. Board of Supervisors of Elections for the Parish of Orleans, 216 La. 116, 43 So. 2d 237 (1949).

30. La. Const. of 1921, Art. XIV, § 22.

City of New Orleans . . . should be chosen or elected by the electors of the city rather than be appointed by the governor or entitled to hold office in some other manner that might be prescribed by the legislature under its plenary powers."[31]

This history of New Orleans government clearly indicates the correctness of the court's conclusion.[32] The constitution insures only against legislative interference in the election of officials. It was not intended to interfere with legislative control over the system of government of New Orleans, nor to prohibit the legislature from designating the number of offices or the manner by which they were to be filled.

The second argument for the unconstitutionality of the statute was based upon Section 16, Article 3, of the Louisiana Constitution, which provides, "Every statute enacted by the Legislature shall embrace but one object, and shall have a title indicative of its object." The city contended and the trial court agreed that the above section was violated by Act 234 because the act purported to amend and reenact Act 159 of 1912, providing for a commission form of government, whereas the body of the act actually established an aldermanic form.[33]

Upon appeal, the supreme court reversed. The court undertook a detailed analysis of the difference between the commission and the aldermanic forms of government. The distinctive feature of the commission form, stated the court, was the delegation of both executive and legislative powers to a single board consisting of a mayor and a limited number of other officials; the basic characteristic of the aldermanic form is the placing of executive powers in the hands of an executive officer and the legislative power in a separate body, commonly called a council or board of aldermen. Inasmuch as the amending act did not place the legislative and executive powers in separate bodies, the court concluded that the act did not substitute an aldermanic organization for a commission form. In addition, said the court, the form of government previously established by the act of 1912

31. City of New Orleans v. Board of Supervisors of Elections for the Parish of Orleans, 216 La. 116, 132, 43 So. 2d 237, 242 (1949).

32. 216 La. 116, 127-132, 43 So. 2d 237, 241-242 (1949).

33. La. Act 234 of 1948 was entitled: "*An act to amend and reenact* . . . [certain sections] of Act 159 of the Legislature of the State of Louisiana for the year 1912 (as amended by Act 338 of 1938) entitled: 'An act to incorporate the City of New Orleans; *to provide a commission form of government for the administration of the affairs of the city*. . . .'" (Italics supplied.)

was in itself a hybrid rather than a true commission form[34] and the recent amendments merely continued the hybrid nature.

The combination of executive and legislative functions may indeed be a characteristic feature of the commission form of government, but the election of councilmen from districts is no less characteristic of the aldermanic method.[35] And if the act of 1912 already placed the commission form into a Humpty-Dumpty like position, the act of 1948 seems to have given Humpty-Dumpty so healthy a shove that even legal analysis is hard put to piece him together again.

But all this concern over affixing a label to the New Orleans form of government is beside the point. The purpose of the Article III, Section 16, as applied to this case is simply to prevent deception and surprise in legislation.[36] Thus the problem before the court was whether the particular title was deceptive in view of the changes wrought by Act 234. If we approach this question from the point of view of a person totally unacquainted with Louisiana affairs, there can be little doubt that such a reader would be misled by the title. However, this approach to Section 16 of Article III would be to introduce an objectivity *reductio ad absurdum*. Realistically speaking, the title of the act did not at all deceive Louisianians as to the intention of the legisalture with regard to New Orleans.[37] Whatever else was contravened, the reasons behind Article III, Section 16, were not,[38] and the court, although taking a circuitous route, was correct in rejecting this section as a ground for the unconstitutionality of Act 234.

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34. This is because, under Act 159 of 1912, a portion of the municipal powers were exercised by boards, commissions and ex-officio bodies instead of by the city commissioners.

35. See Anderson and Weidner, American City Government (rev. ed. 1950) 367-371, 403.

36. "Its object is to prevent the practice, common in all legislative bodies where no such provision exists of embracing in the same bill incongruous matters, having no relation to each other, or to the subject specified in the title, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation." State of Louisiana v. Pilsbury, 105 U.S. 278, 289 (1881). The court quoted this section, but then went on to compare aldermanic with commission forms of government.

37. Perhaps this introduces a subjective standard. But surely the court should be able to take judicial notice of the wide publicity connected with the passage of this act. And if a subjective standard is introduced, would it be so undesirable in this case?

38. See note 36. An excellent discussion of the subject appears in Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 1367-1368, 24 So. 809, 812-813 (1898).

ILLEGAL CONTRACTS

In *Smith v. Town of Vinton*,[39] plaintiff sought recovery for work performed in repairing defendant's electrical system, pursuant to a verbal contract with the mayor. The court noted that under the contract the making of repairs was merely incidental to the principal undertaking of rebuilding the defendant's electrical system at a cost of approximately $25,000. This being so, the contract was void as a violation of the statute requiring advertising and competitive bidding where the amount of the public work exceeds $500. However, said the court, since the transaction was *malum prohibitum*, not *malum in se* and since no fraud was involved and the city received the benefits, plaintiff could recover for the actual cost of the materials under the unjust enrichment theory of the civil law.

Strictly speaking, in allowing recovery for the actual cost of the materials to the vendor, the court departed somewhat from the unjust enrichment theory of the civil law. For in the civil law, the amount recoverable under this theory "must not exceed the enrichment of the defendant or the impoverishment of the plaintiff," whichever is smaller.[40] Very often, of course, the two measures of damages produce the same result. Nevertheless, language loosely interchanging the two measures may lead to an erroneous choice in a case where a difference does exist.[41]

STATE AND LOCAL TAXATION

*Charles A. Reynard**

State excises and local property taxes occupied the attention of the court in four cases decided during the course of the term, three of which involved constitutional issues of significance, state or federal or both, but the result in none of them affects the over-all tax structure of the taxing authorities involved.

Interstate Oil Pipe Line Company v. Guilbeau[1] was an action in which the plaintiff, seeking to recover levee district

39. 216 La. 9, 43 So. 2d 18 (1949).

40. David, Unjustified Enrichment in French Law, 5 Camb. L.J. 205, 222 (1934); Rinfret, The Doctrine of Unjustified Enrichment in the Law of Quebec, 15 Can. Bar Rev. 331 (1937).

41. The court also cited Article 1965 of the Revised Civil Code in support of its decision. Although this article as interpreted would seem to support the instant case, it should be noted that the interpretations of this article vary in several respects from the unjust enrichment theory of the civil law. See note 40, supra.

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1. 217 La. 160, 46 So. 2d 113 1950).