Louisiana Law Review

Volume 16 | Number 2
The Work of the Louisiana Supreme Court for the 1954-1955 Term
February 1956

Public Law: Constitutional Law

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CONSTITUTIONAL LAW

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The past term produced eight cases in the field of constitutional law. Three of these involved traditional doctrines — impairment of obligation of contract, due process of law, and equal protection of the laws — while the remaining five were primarily concerned with special provisions of the State Constitution.

In the contract clause case, *Dantoni v. Board of Levee Commissioners*,[1] actual decision on the point was avoided by the process of interpretation. The case arose as a consequence of the adoption of the constitutional amendment proposed by act 756 of 1954 which was described on the ballot at the 1954 elections as a proposal "decreasing the tax millage of the Board of Commissioners of the Orleans Levee District." The background and purpose of this amendment were set forth in these pages a year ago when it was said:

> "Greater school revenues for Orleans Parish without an increase in total taxation would be accomplished by companion Acts 751 and 756. The former, amending Article XII, Section 16, would increase the maximum Orleans school tax rate from ten mills to eleven and one-half mills from 1955 through 1959, and to 13 mills thereafter. The companion act, 756, amending Article XVI, Section 2, would reduce the permissive tax rate of the Orleans Levee Board by an amount equal to the increase granted to the school board."[2]

The specific language of the proposal read as follows:

> "The Board of Levee Commissioners of the Orleans Levee District, or their successors in office, for the purpose of constructing and maintaining levees, levee drainage, and for all other purposes incidental thereto, may levy annually for the years 1955, 1956, 1957, 1958 and 1959 a tax not to exceed three and one-half (3½) mills . . . . Provided that this amendment shall in no way affect or impair rights already acquired by holders of bonds or other obligations of the Orleans Levee District already issued or incurred."

Despite the adoption of the proposal by the voters at the No-

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1. 227 La. 575, 80 So.2d 81 (1955).

2. Owen, *The Proposed Constitutional Amendments*, 15 LOUISIANA LAW REVIEW 91, 96 (1954).

vember 1954 election, the commissioners nevertheless levied taxes at the old rate of five mills, and the plaintiff sued to restrain that portion of the levy in excess of three and one-half mills. A bondholder intervened seeking to have the amendment declared unconstitutional on the ground that its adoption impaired the obligation of his bond contract. Although the court discussed the principle of contract impairment and cited many cases on the point, decision on the issue was avoided by construing the amendment to be no limitation upon the taxing power of the Board. Despite the legislative history outlined above, the court concluded that the purpose and intent of the amendment was to limit the Board to an annual levy of three and one-half mills only for purposes of "construction and maintaining levees, levee drainage, and for all other purposes incidental thereto,"[3] and left it completely free to levy additional millage up to the former limit of five mills for the purpose of meeting bonded indebtedness and other obligations. The result was unquestionably a shock to Orleans Parish taxpayers who had been induced to vote for the two amendments as a "package" upon the assurance of legislative representatives that their total tax bill would not be increased in the process, assurance predicated upon the fact that the Levee Board's annual revenues had been running greatly in excess of the amounts needed for current expenses and bond retirement. In effect, the court concludes that the voters intended exactly the opposite of what they were told was the plain intendment of the proposals they were asked to approve.[4] In justification of its conclusion, the court cited the proviso regarding impairment of rights at the end of the amendment, quoted above and said:

> "The interpretation we have placed on this amendment is consonant with the clear and unambiguous language used in the amendment and gives the amendment a constitutional effect rather than to annul it. It is well settled that a law should be construed so as to give it a constitutional effect if possible to do so."[5]

This suggests that the majority felt, though it clearly does not so hold, that the amendment offended the contract clause. On

3. 227 La. 575, 580, 80 So.2d 81, 82 (1955).

4. Any doubt on this point is dispelled by the action of the 1955 session of the Legislature in enacting act 138 which proposes a further amendment to the same constitutional provision to be submitted to the electors in the April 1956 general elections, explicitly restricting the Board's authority to a 3 mill levy.

5. 227 La. 575, 585, 80 So.2d 81, 84 (1955).

this point there is real doubt, for as Justice McCaleb indicates in his dissenting opinion, the clause does not forbid any change whatsoever in the taxing power, but rather forbids "any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds."[6] There was no discussion of this phase of the case in the majority opinion, and while some reference is made to the facts on rehearing, there is no thorough-going analysis of the issue and the majority adhered to its original construction of the amendment which again made it unnecessary to pass upon the issue of contract impairment.

A claim of denial of procedural due process of law was rejected in *Patorno v. Department of Public Safety*[7] when the court affirmed a decision of the Civil Service Commission sustaining the appellant's dismissal by the Department of Public Safety. A principal point relied upon by the appellant was the Civil Service Commission's refusal to grant a rehearing to consider newly discovered evidence. After satisfying itself that the Commission was not required by statute or specific constitutional provision to grant the appellant a rehearing, the court concluded that he had not been denied procedural due process of law. The decision is clearly correct and accords with the federal jurisprudence on the point. So long as a party has a fair hearing prior to decision by an administrative agency, the constitutional requirement of due process is met and rehearing need not be granted.[8] In this particular case, however, the denial of a rehearing meant for all practical purposes that the appellant was likewise denied the right of appeal since the Supreme Court considers only questions of law in appeals from decisions of the Civil Service Commission — and appellant was hopeful of producing newly discovered evidence for consideration. However, this point has likewise been resolved against the appellant for it has long been an established principle of federal jurisprudence that the right of appeal, even in criminal cases, is not guaranteed by the due process clause.[9]

An issue of equal protection of the laws was raised but found to be without substance in *Stone v. Police Jury of Parish of Calcasieu.*[10] The plaintiff in that case had operated a limousine service between the city of Lake Charles and the airport serving the

6. Mobile v. Watson, 116 U.S. 289, 305 (1886).
7. 226 La. 471, 76 So.2d 534 (1954).
8. Pittsburgh, C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).
9. McKane v. Durston, 153 U.S. 684 (1894).
10. 226 La. 943, 77 So.2d 544 (1954).

city, established and operated by the police jury pursuant to statutory authority. Prior to March 1954 plaintiff's operations apparently had not been regulated in any manner but at that time the police jury issued public notice that it would receive bids for the exclusive franchise to furnish this service. Although the plaintiff submitted a bid, the franchise was awarded to another, and higher, bidder. An ordinance was then adopted forbidding the performance of such service at the airport except pursuant to franchise contract, and the plaintiff sued to restrain the enforcement of the ordinance, contending that it was invalid on three grounds: (1) lack of power in the police jury to enact the ordinance, (2) protection by ordinance of a monopoly contrary to article 19, section 14, of the State Constitution, and (3) violation of the equal protection clause of the fourteenth amendment of the Federal Constitution because it "undertakes to vest in the Police Jury the authority to discriminate in favor of or against persons engaged in a legitimate business by arbitrarily granting or withholding a license or permit."[11]

Concluding that existing statutory provisions[12] authorized the police jury to regulate the service in question, as they seem fairly to do, the court then held that no proper question of monopoly was presented, because the ordinance did no more than protect the right granted by the franchise contract. On this point it might have been more realistic to acknowledge that an element of monopoly was present, but hold that it was of the type traditionally and customarily permitted in the conduct of enterprises of a "public utility" nature. The issue of equal protection of the laws was rejected because the evidence clearly showed that the franchise had been granted to the highest bidder following public notice of intent to do so which plaintiff knew of and participated in. Under these circumstances it is hard to see how the court could have reached any other conclusion. The equal protection clause does not forbid all discrimination, but only such discrimination that is arbitrary, whimsical or capricious. The discrimination resulting from awarding a contract to the high-

11. *Id.* at 948, 77 So.2d at 546. There was a further basis urged in support of the equal protection argument, namely that the ordinance had been administered "with an unequal hand, as shown by the precipitate manner in which the warrant for his arrest was issued while the question of the validity of the Ordinance was on [suspensive] appeal." *Ibid.* The Supreme Court did not discuss this aspect of the case. The contention suggests that there may have been local political implications or personal animosities involved in the case.

12. LA. R.S. 2:131-141 (1950).

est bidder, far from meeting these tests, is uniformly recognized as the rational and equitable method of conducting public business.

Five other cases decided at the 1954-1955 term presented issues arising under special provisions of the State Constitution, These non-doctrinal decisions are mentioned briefly here, because of the general public interest in the subject matter, and will be discussed in their chronological order.

In *Miller v. Greater Baton Rouge Port Commission*[13] the court refused to enjoin the issuance of bonds and notes by the Commission and rejected numerous contentions challenging the Commission's activities based upon special constitutional provisions. The plaintiffs claimed, among other things, that the Legislature had not complied with constitutional requirements in enacting the proposed amendment to the Constitution creating the Commission, that the amendment was not self-executing, that it failed to provide for an allocation of indebtedness between the parishes affected and between the parishes and the state, that it constituted a loan of the credit of the state to a corporation, and that it failed to provide a method for initiating suits against the state. None of these contentions were held to be well founded, and some of them had been expressly ruled upon in the earlier case of *Greater Baton Rouge Port Commission v. Watson.*[14]

Miller v. Police Jury of Washington Parish[15] was an attack upon the validity of act 426 of 1952 which was subsequently submitted to the voters as a proposed amendment to the Constitution and, having been adopted, is now article 14, section 14(b.2), of the Louisiana Constitution. This amendment authorizes political subdivisions of the state to incur bonded indebtedness for the purpose of acquiring industrial sites to be sold, leased or otherwise disposed of to any enterprise which may be thus induced to locate or expand its facilities there. There was an attack upon the legislative procedure employed in the adoption of the measure which was rejected for the same reasons relied upon in the *Greater Baton Rouge Port Commission* case. Objections of vagueness were also overruled. A further claim that the amendment offends due process of law within the meaning of the fourteenth amendment to the Federal Constitution by taking

13. 225 La. 1095, 74 So.2d 387 (1954).
14. 224 La. 136, 68 So.2d 901 (1953).
15. 226 La. 8, 74 So.2d 394 (1954).

private property for a non-public purpose was also rejected. This contention, while evoking a dissent from Justice Hawthorne, seems to be without merit in terms of contemporary constitutional law. At one time the federal jurisprudence on the point supported the claim, but the United States Supreme Court has not overturned a state statute on the ground that it offends substantive due process of law in the economic field since 1936. Unless the legislative proposal can be shown to have no rational relation to the promotion of economic policy it will be sustained. While there may be honest debate regarding the wisdom of such industrial promotion schemes, it must at least be conceded that the proponents of such measures are not totally irrational in their claim that the entire community will be benefited in some degree by encouraging industry to locate there.

A new aspect of the old problem of legislative authorization of suits against the state was presented in *Long v. Northeast Soil Conservation District.*[16] In this case the plaintiff-widow had sued the defendant without legislative authorization in 1949 for damages resulting from the alleged wrongful death of her husband and was awarded a verdict by the jury that heard the case. Following the return of the verdict, however, the trial court granted the defendant's exception of no cause or right of action based upon its immunity from suit as a state agency. This action was affirmed by the court of appeal and, while the case was pending in the Supreme Court, the Legislature, at its 1954 session, passed a bill authorizing the suit and waiving immunity retrospectively. The sole issue presented was whether article 3, section 35, permits such retrospective authorization, and the court concluded that while it was not specifically provided for, there was nothing in that provision to prohibit what the Legislature had done. Since there is no other provision of the Constitution forbidding retrospective legislation (so long as vested rights are not impaired) the plaintiff was permitted to have a judgment based on the jury's verdict.

Gandolfo v. Louisiana State Racing Commission[17] posed for the first time the question whether the statutes permitting parimutuel betting conflict with article 19, section 8, of the State Constitution declaring that "Gambling is a vice and the Legislature shall pass laws to suppress it." The statute creating the

16. 226 La. 824, 77 So.2d 408 (1954).
17. 227 La. 45, 78 So.2d 504 (1954).

Louisiana State Racing Commission explicitly authorizes the Commission to "make rules . . . permitting 'pari-mutuel wagering' and the 'bookmaking form of wagering', both of which methods are legal."[18] It has long been recognized, of course, that the constitutional mandate is not self executing, and before persons may be punished for gambling, the Legislature must denounce the particular form of gambling and provide a specific penalty for the punishment of offenders. It is also clear that respect for coordinate branches of government dictates that the judiciary refrain from coercing the Legislature into discharging the function commanded of it by the Constitution. But these were not the issues before the court in this case. Here the issue was whether the particular act which the Legislature had in fact adopted conflicted with the constitutional provision. Certainly it cannot be said that there is a literal conflict, for in order to find a literal conflict, the constitutional provision would have to read, "Gambling is a vice and the Legislature shall pass no laws permitting it." The question, then, is whether the constitutional mandate as written fairly implies that the Legislature shall not pass laws permitting gambling. A majority of the court concludes that it does not. Justices Hamiter and Hawthorne in strong and persuasive dissenting opinions reach the other conclusion arguing that when the framers directed the Legislature to *suppress* gambling, they clearly did not intend or expect it to adopt laws *permitting* the vice. The majority's failure to find a negative implication in the mandate seems clearly erroneous.[19]

In *Kelly v. Kelly*[20] the court held that the Family Court for the Parish of East Baton Rouge, created by a constitutional amendment adopted in 1954,[21] did not have jurisdiction to issue the writ of habeas corpus in a child custody proceeding. The petitioner-mother, divorced by a decree of a California court which had awarded her custody of the child, alleged that the defendant-father had wrongfully taken the child from California after notice of the filing of the divorce proceedings and prior to judgment. The family court had granted the petition but on certiorari the Supreme Court reversed the order. The amend-

18. LA. R.S. 4:148 (1950).
19. For a more detailed discussion of the case see Note, page 437 *infra*.
20. 227 La. 275, 79 So.2d 307 (1955).
21. Proposed by La. Acts 1954, No. 738, p. 1293, the measure became § 53 of article VII upon adoption.

ment provides that the family court shall have jurisdiction, in part, over:

> "(5) All actions for divorce, separation from bed and board, annulment of marriages, and disavowal of paternity as well as of all matters connected therewith including, but not restricted to, matters relative to alimony pendente lite and permanent alimony, custody of children, and injunctive relief or proceedings for the preservation of the community, jurisdiction of which has heretofore vested in the Civil District Court for the Parish of East Baton Rouge. . . ."[22]

Relying upon article VII, section 2, which provides that only the judges of the Supreme Court, the courts of appeal and the district courts may issue the extraordinary writ of habeas corpus, the court concluded that the amendment did not enlarge this category, either expressly or by implication. It is clear that the amendment does not expressly amend article VII, section 2, and it is equally clear that it does not specifically confer jurisdiction upon the family court to issue the writ of habeas corpus. There is also support for the court's conclusion that jurisdiction was not conferred by implication. While it may be urged that the court should have this jurisdiction for the effective exercise of its principal functions, the specific grant of power to afford "injunctive relief or proceedings for the preservation of the community"[23] was a singling out of one of the extraordinary writs and afforded the basis for the application of the maxim "expressio unius est exclusio alterius," which though not mentioned, was relied upon in principle to reach the result indicated. Perhaps the most troubling aspect of the case is a dictum at the end of the opinion reading as follows:

> "Indeed, it is obvious from the clear language of the provision that the Family Court of East Baton Rouge Parish can entertain matters relative to the custody of a child only when that matter is an incident to or ancillary of an action filed in *that same court* for divorce, separation, disavowal of paternity, or annulment of marriage."[24] (Emphasis added.)

Again it may be said that while a literal reading of the amendment supports the view expressed, the unquestionable purpose was to vest jurisdiction in child custody matters in the family

22. *Id.* (5).
23. *Ibid.*
24. 227 La. 275, 281, 79 So.2d 307, 309 (1955).

court whether the divorce or other principal litigation was initiated there or not. It is assumed that these matters will be cured by amendments to be proposed at the next session of the Legislature.

LABOR LAW

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Last year, in the course of reviewing the court's invalidation of the Little Norris-LaGuardia Act at the 1953-1954 term, the writer voiced concern that the decision foreshadowed a return to the era of the labor injunction.[1] The record of the 1954-1955 term plainly demonstrates that this apprehension was no idle speculation. Three labor cases were decided by the court during the term, each of which held that union picketing for recognition should be enjoined. The cases arose in a variety of factual and legal contexts and hence will be discussed individually.

Taking the cases in their chronological order, the first was *Godchaux Sugars v. Chaisson*.[2] In this case the union was alleged to have picketed the plantation as well as the refineries and mills of the employers at the cane harvesting season for the purpose of compelling the employers to recognize the union as the collective bargaining agent for the agricultural employees working on the plantations. It was further alleged that the picketing was accompanied by violence which threatened the safety of persons and property. No evidence was taken on this issue, counsel for the union conceding "for the purpose of saving time, that if a restraining order were to issue it should cover violence and harm to person and property."[3] The Supreme Court construed this concession as "an admission that violence and tortious acts have, in fact, occurred during the course of this dispute,"[4] and sustained the issuance of the injunction against all picketing on the authority of the *Douglas Public Service* decision of the prior term.[5] This poses an apparent non sequitur, as the concession was made for the point of limiting the injunction, but was taken as an admission for the broader purpose of enjoining all picket-

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1. The case was Douglas Public Service Corp. v. Gaspard, 225 La. 972, 74 So.2d 182 (1954), discussed in *The Work of the Louisiana Supreme Court for the 1953-1954 Term — Labor Law*, 15 LOUISIANA LAW REVIEW 324 (1955).

2. 227 La. 146, 78 So.2d 673 (1955).

3. *Id.* at 165, 78 So.2d at 679.

4. *Id.* at 165, 78 So.2d at 680.

5. Douglas Public Service Corp. v. Gaspard, 225 La. 972, 74 So.2d 182 (1954).