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The Work of the Louisiana Supreme Court for the 1938-1939 Term*

This year's symposium covers the work of the Supreme Court of Louisiana during the judicial term which has just been completed—from October 1938 to September 1939. As in last year's survey[1] the object is to examine the activities of our highest appellate court and to give a panoramic topical consideration of the cases decided.

I. STATISTICAL SURVEY

During the 1938-1939 term, 464 cases[2] were filed in the Supreme Court docket. Two hundred and thirty-two, or 50% of the cases, were applications for supervisory writs and writs of certiorari or review to the Courts of Appeal, of which 171 were either granted or refused (see Tables VII, VIII).[3] On the other hand, 242 cases were decided in written opinions.[4] This makes a total of 413 cases actually disposed of by the Supreme Court (excluding applications for rehearings) or 89% of the total number of cases docketed from October 3, 1938 to September 29, 1939.[5] In addition, a total of 150 applications for rehearing were filed,[6] although rehearings were granted in only 11 instances (see Table VII).

The number of cases appealed to the Supreme Court from

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* This symposium has been contributed by the members of the faculty of Louisiana State University Law School as follows: Statistical Survey—Paul M. Hebert and Carlos E. Lazarus; Procedure, Security Contracts, Insurance—Henry G. McMahon; Family Law, Mandate, Partnership, Successions, Mineral Rights—Harriet S. Daggett; Conventional Obligations, Sale—J. Denson Smith; Prescription—Joseph Dainow; Torts and Workmen's Compensation, Public Law—Thomas A. Cowan; Criminal Law and Procedure—Wex S. Malone; Banking and Negotiable Instruments, Bankruptcy, Corporations—Dale E. Bennett; Miscellaneous—Joseph Dainow and Carlos E. Lazarus.

1. The Work of the Louisiana Supreme Court for the 1937-1938 Term (1939) 1 LOUISIANA LAW REVIEW 314-412.

2. This figure was obtained from The Official Daily Court Record showing the cases docketed in the Supreme Court from Oct. 3, 1938, to Sept. 29, 1939.

3. This information was gathered from The Official Daily Court Record.

4. This figure includes all cases for the 1938-1939 term officially reported in Volumes 189, 190, 191, 192, and 193 of the Louisiana Reports.

5. For the corresponding figures during the 1937-1938 term see The Work of the Louisiana Supreme Court for the 1937-1938 Term (1939) 1 LOUISIANA LAW REVIEW 314, 315.

6. This figure was obtained from The Official Daily Court Record.

District Courts was 206 as compared with 209 for the previous term.[7] Of this number, 53.5% of the judgments were affirmed, 14% were reversed and 32.5% were modified or otherwise disposed of (see Table II). The corresponding figures for the 1937-1938 term show that although a smaller percentage of the cases was affirmed during the 1938-1939 term, yet only 14% of the cases were reversed as compared with 20% for the preceding term.[8]

Only 18 cases reached the Supreme Court on writs of review to the Courts of Appeal. Of these, 67% were affirmed, 11% were reversed, and 22% were modified or otherwise disposed of. The corresponding figures for the preceding term show that only 26.5% of the cases brought on writs of review were affirmed, while 58.8% were reversed and 14.7% modified or otherwise disposed of.[9]

Table V shows that the bulk of litigation reaching the Supreme Court was again on appeal from the District Courts, such litigation accounting for 85% of the cases reported (as compared with 78% for the preceding term), while only 7.4% came upon writs of review to the Courts of Appeal (as compared with 12.7% for the 1937-1938 term), and 5.8% on supervisory writs to the lower courts.

Table VI shows that the Parish of Orleans gave rise to 24.3% of the cases appealed, an increase of 3% over the corresponding number for the preceding term.[10] The Parish of Caddo sent 11.1%; Evangeline Parish provided 4.9%; Webster—4.3%; Tangipahoa—3.8%; and East Baton Rouge—3.4%.

The topical analysis of decisions shown in Table IV has been made arbitrarily for convenience of treatment of the main subject matter to which the decisions relate. The tabulation shows that the greatest number of cases came up on procedural points, such cases accounting for 27.3% of the cases decided in written opinions. The next largest groups were: Criminal Law and Procedure—11.6%; Divorce—7.9%; Succession Matters—6.6%; Mineral Rights—5%; Torts and Workmen's Compensation—4.5%; Conventional Obligations—3.7%.

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7. Cf. The Work of the Louisiana Supreme Court for the 1937-1938 Term, supra note 4, at 316.

8. Cf. id. at 316.

9. Cf. id. at 316.

10. During the 1937-1938 term, the Parish of Orleans gave rise to 21.3% of the cases appealed. See The Work of the Louisiana Supreme Court for the 1937-1938 Term, supra note 4, at 316.

TABLE I

VOLUME OF JUDICIAL BUSINESS

Cases disposed of with written opinions	242
Applications for writs filed during 1938-39 term	232*
Applications for writs considered	171
Applications for writs pending	61
Applications for rehearings disposed of	150
Cases docketed during 1938-39 term (excluding writ applications)	232
Total matters docketed during 1938-39 term	464
Total cases handled by the Court (excluding rehearing applications)	413
Grand total of matters handled by the Court (including rehearing applications)	563

* This figure includes applications for supervisory writs to the lower courts as well as applications for writs of certiorari to the Courts of Appeal. See Table VIII.

TABLE II

DISPOSITION OF LITIGATION

	On Appeal from District Courts	On Appeal from City Courts	On Certiorari or Review from Appelate Courts	On Supervisory Writs to District Courts	On Supervisory Writs to Juvenile Courts	On Certified Questions from Court of Appeal	TOTAL
Affirmed	110	1	12	..	..	..	123
Amended and affirmed	14	..	1	..	..	..	15
Affirmed in part and reversed in part	6	..	..	..	..	..	6
Affirmed in part, reversed in part and remanded	1	..	..	1	..	..	2
Amended in part, reversed in part and affirmed	2	..	..	..	..	..	2
Reversed and rendered	29	..	2	..	..	..	31
Reversed and remanded	25	..	1	..	..	..	26
Reversed and judgment of lower court reinstated		..	1	..	..	..	1
Reversed and judgment of lower court amended		..	1	..	..	..	1
Remanded on motion	4	..	..	..	..	..	4
Motion to remand refused	1	..	..	..	..	..	1
Motions to dismiss appeal refused	8	..	..	..	..	..	8
Motions to dismiss appeal granted	2	..	..	..	..	..	2
Motion to dismiss appeal granted in part, refused in part	1	..	..	..	..	..	1
Transferred to Courts of Appeal for lack of jurisdiction	2	..	..	..	..	..	2
Appeal dismissed ex propio motu	1	..	..	..	..	..	1
Writs made peremptory	..	..	..	8	1	..	9
Writs recalled	..	..	..	5	1	..	6
Certified questions answered	..	..	..	..	..	1	1
TOTALS	206	1	18	14	2	1	242

TABLE III

DISPOSITION OF CASES REVIEWED ON WRIT OF CERTIORARI FROM COURTS OF APPEAL

	Parish of Orleans	First Circuit	Second Circuit	TOTAL
Affirmed	6	3	3	12
Amended and affirmed		1		1
Reversed and rendered	2			2
Reversed and remanded		1		1
Court of Appeal reversed and judgment of lower court amended		1		1
Court of Appeal reversed and judgment of lower court reinstated		1		1
TOTALS	8	7	3	18

TABLE IV

TOPICAL ANALYSIS OF DECISIONS

Banking and Negotiable Instruments	8
Colleges and Universities	1
Constitutional Law	7
Conventional Obligations	9
Corporations	2
Criminal Law and Procedure	28
Divorce	19
Elections	1
Highways	1
Husband and Wife	2
Insurance	4
Lease	2
Mandate	1
Mineral Rights	12
Minors, Tutorship and Emancipation	5
Mortgages	5
Municipal Corporations	8
Partition	1
Partnership	1
Pledge	1
Practice and Procedure	66
Prescription	7
Public Lands	1
Sale	8
Schools and School Districts	4
Successions	16
Suretyship	3
Taxation	8
Torts and Workmen's Compensation	11

TABLE V

JURISDICTIONAL ORIGIN OF CASES

Appeals from District Courts	206
Appeals from City Courts	1
On Writs of Review from Courts of Appeal	18
Questions certified by Courts of Appeal	1
On Supervisory Writs to District Courts	14
On Supervisory Writs to Juvenile Courts	2
TOTAL	242

TABLE VI

GEOGRAPHICAL DISTRIBUTION OF APPEALS FROM DISTRICT COURTS

A—By Parish

Parish	*No. of Cases*
Acadia	6
Allen	2
Bienville	2
Bossier	1
Caddo	23
Calcasieu	4
Claiborne	2
Catahoula	3
DeSoto	2
East Baton Rouge	7
East Carroll	1
East Feliciana	3
Evangeline	10
Iberia	5
Jefferson	5
Jefferson Davis	2
Lafayette	2
Lafourche	1
Lincoln	6
Morehouse	2
Natchitoches	2
Ouachita	6
Orleans Civil	50
Orleans Criminal	4
Plaquemines	2
Rapides	5
Richland	2
Sabine	2
St. Charles	1
St. James	1
St. John the Baptist	2
St. Landry	2
St. Martin	1
St. Mary	1
St. Tammany	1
Tangipahoa	8
Terrebone	3
Vermilion	3
Vernon	2
Washington	5
Webster	9
West Baton Rouge	1
Winn	1
TOTAL	206

B—By Judicial District

	No. of Cases
First District (Caddo)	23
Second District (Claiborne, Bienville)	4
Third District (Lincoln, Jackson, Union)	6
Fourth District (Ouachita, Morehouse)	8
Fifth District (West Carrol, Richland, Franklin)	2
Sixth District (East Carrol, Madison, Tensas)	1
Seventh District (Catahoula, Concordia)	3
Eighth District (Caldwell, Winn, LaSalle)	1
Ninth District (Rapides, Grant)	5
Tenth District (Natchitoches, Red River)	2
Eleventh District (DeSoto, Vernon, Sabine)	6
Twelfth District (Avoyelles)	0
Thirteenth District (St. Landry, Evangeline)	12
Fourteenth District (Calcasieu, Jefferson Davis, Beauregard, Cameron)	11
Fifteenth District (Acadia, Lafayette, Vermilion)	11
Sixteenth District (St. Mary, Iberia, St. Martin)	7
Seventeenth District (Terrebonne, Lafourche)	4
Eighteenth District (Iberville, West Baton Rouge, Point Coupee)	1
Nineteenth District (East Baton Rouge)	7
Twentieth District (East Feliciana, West Feliciana)	3
Twenty-first District (Tangipahoa, Livingston, St. Helena)	8
Twenty-second District (Washington, St. Tammany)	6
Twenty-third District (Assumption, Ascension, St. James)	1
Twenty-fourth District (Jefferson, St. John the Baptist, St. Charles)	8
Twenty-fifth District (St. Bernard, Plaquemines)	2
Twenty-sixth District (Bossier, Webster)	10
TOTAL	152
Orleans Civil District	49
Orleans Criminal District	5
TOTAL	206

TABLE VII

DISPOSITION OF APPLICATIONS FOR WRITS AND REHEARINGS

	Granted	*Refused*	TOTAL
Applications for Rehearings	11	139	150
Applications for Writs	15	156	171*
TOTALS	26	295	321

* This figure includes applications for supervisory writs to the lower courts as well as applications for writs of certiorari or review to the courts of appeal. See Table VIII.

TABLE VIII

DISPOSITION OF APPLICATIONS FOR WRITS

	Granted	*Refused*	*Pending*	TOTAL
Supervisory Writs to lower courts	5	28	41	74
Writs of Certiorari to Courts of Appeal.	10	128	20	158
TOTALS	15	156	61	232

TABLE IX

DISSENTS*

	With Opinion	*Without Opinion*	TOTAL
O'Niell, C. J.	4	10	14
Fournet, J.		4	4
Higgins, J.	1	1	2
Land, J.		1	1
Odom, J.	2	2	4
Ponder, J.	1	1	2
Rogers, J.		2	2
TOTALS	8	21	29

* In cases wherein rehearings have been granted, the dissents here tabulated are those from the opinion on rehearing. Dissents from the original opinions therein have not been included, since in such cases the final opinion of the court is that rendered on the rehearing. Total number of cases in which dissents were expressed—22.

II. CIVIL CODE AND RELATED SUBJECTS

A. Family Law

Alimony

The case of *Parker v. Parker*[1] consists largely of a resumé of evidence regarding the ability of a defendant husband to pay alimony, from which a discharge in bankruptcy does not relieve him.[2] Alimony was set at $100 per month for the wife and two children (reduced from $125). The wife was making $70 per month. The judge took into consideration evidence of the husband's living habits, and so forth. It was very difficult to ascertain what the husband was making. Defendant did *not* furnish federal income tax returns nor his quarterly reports to the State. His good faith was naturally questioned by the judge.

Martin v. Martin[3] was a suit for divorce under Act No. 269 of 1916 as amended by Act. No. 31 of 1932. The defendant, wife, in her answer, admitted the period had elapsed but, in reconvention, asked for alimony, alleging that she was not "at fault." She was awarded $30 per month under Article 160 having "proved by a preponderance of the evidence that she was not at fault in causing the separation, within the meaning of the provisions of Article 160, Revised Civil Code, as amended." The wife was also granted $50 for attorney fees and all costs.

In *Grisamore v. Grisamore*,[4] a husband sued for a separation on the ground of abandonment. The wife, denying that she had abandoned the husband, asserted that he abandoned her and asked for separation on the same ground and for alimony *pendente lite*. The lower court refused the demand for alimony on the ground that "she could obtain the financial support of her husband by returning to the matrimonial domicile." She appealed, and the husband moved to dismiss the appeal on the ground that, "inasmuch as each of the parties to the suit has been summoned to return to the matrimonial domicile, this appeal presents nothing for the court to decide." This motion was overruled. Article 148 allows alimony *pendente lite* if the wife needs it without reference to the merits of the suit, as an enforcement of the obligation of the husband to support his wife during the existence of marriage.

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1. 191 La. 559, 186 So. 27 (1939).
2. 52 Stat. 851, 11 U.S.C.A. § 35 (1938).
3. 191 La. 761, 186 So. 94 (1939).
4. 191 La. 770, 186 So. 98 (1939).

Davieson v. Davieson[5] came to the court by rule to reduce alimony. The wife had been allowed $80 to support herself and minor child. This amount was reduced to $50 as the child had become a major. Wife's condition of health and need were unchanged. The allegation that she had a boarder was not proved.

Bienvenue v. Bienvenue[6] was a suit for alimony under Article 160, giving relief to a wife who "has not been at fault." In a previous trial, the husband testified that the separation for which he had obtained the divorce under the four year act "was by mutual agreement." Now, the husband adduced evidence that he left the wife because of her quarrelsome nature—particularly because she threw an alarm clock at him! The court rested its final decision largely upon the husband's judicial admission in the earlier proceeding and awarded alimony.

When the appeal in *Grisamore v. Brennon*[7] reached the Supreme Court, it was held that the merits had been discussed and the issue disposed of upon the previous hearing of the motion to dismiss the appeal, and the plaintiff was condemned to pay $9.00 per week alimony *pendente lite.*

Marriage Annulment

Sunseri v. Cassagne[8] presents a marriage annulment case on the ground that the wife had colored blood of traceable amount, 1/16. The great-great grandmother of the wife, Fanny Ducre, was a slave, and with her three children, was emancipated by her owner, Leander Ducre, who, according to oral testimony, married her afterwards. There was much evidence which, "while persuasive, is not conclusive and does not warrant us in holding that defendant is a member of the colored race, particularly in view of the overwhelming testimony that she and her immediate associates have always been regarded as members of the white race and have been associated with persons of that race." Three certificates from the Recorder of Births and Marriages for Parish of Orleans recited, however, that defendant was colored and that her aunts were colored. They "are presumably correct and, if permitted to stand, will be decisive of the issues involved in this case." Defendant asked for a remand that she might have a chance to prove the incorrectness of these certificates and stated that she had discovered certain evidence since the appeal

5. 192 La. 44, 187 So. 49 (1939).
6. 192 La. 395, 188 So. 41 (1939).
7. 192 La. 1046, 190 So. 125 (1939).
8. 191 La. 209, 185 So. 1 (1938).

was taken which would prove the incorrectness. She was granted the remand. The court said:

> "We think that Defendant should be given an opportunity to do this, since her marriage should not be annulled on the ground that she is a member of the negro race unless all the evidence adduced leaves no room for doubt that such is the case."[9]

The wisdom of this statement is obvious. This problem is one of particular difficulty as are all of those touching matters of prejudice, tradition and social policy. The marriage restriction law does not contain a definition of "persons of color," as do the statutes of some of the states where the fraction is set forth. Our court has defined a colored person in another connection as being one with "an *appreciable* amount" of negro blood.[10] In the case under discussion a *traceable* amount of negro blood seems to be the criterion. Since these cases have thus far reached the court but rarely, no cause for alarm need be felt, but if their frequency should ever come to suggest a "blood purge" situation, the court or the Legislature may be forced to arbitrarily set the limit of a definite fraction.

Custody of Children

In *State v. McMillan*[11] the father and mother of the child lived apart though neither had applied for separation or divorce. The father put a four year old daughter in care of his sister in Mississippi. At the request of the child's mother, an affidavit was sworn out and filed in the Juvenile Court of New Orleans attesting that the child was a neglected child. The court found that the child was *not* neglected, hence the Juvenile Court was without jurisdiction (under Act 126 of 1921 (E.S.) § 7) to determine the question of custody. The Juvenile Court was prohibited from proceeding further with the case, and all orders issued in the Juvenile Court were set aside.

State ex rel. Martinez v. Hattier[12] held that Article 146[13]

9. 191 La. at 223, 185 So. at 5.

10. Lee v. New Orleans Great Northern R. Co., 125 La. 236, 51 So. 182 (1910).

11. 191 La. 317, 185 So. 269 (1938).

12. 192 La. 209, 187 So. 551 (1939).

13. Art. 146, La. Civil Code of 1870: "If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the wife, whether plaintiff or defendant; unless there should be strong reasons to deprive her of it, either in whole or in part, the decision whereof is left to the discretion of the judge."

prevails over Article 216[14] when a suit for separation or divorce has been filed. The child, a girl of three, was left with her mother.

In *Vice v. Vice*,[15] an appropriately entitled case, the father sued for the custody of a child placed in the mother's keeping after she had procured a separation from bed and board from him on the ground of cruelty consisting of having accused her of having had improper relations with his brother. The father also asked to be relieved of the payment of alimony to the wife for herself and the three year old son. The trial judge dismissed the rule, and the Supreme Court set aside the judgment and rendered one in plaintiff's favor, after having reviewed the record. The latter was filled with sordid and salacious details related by the husband, his brother and father, and certain cab drivers employed by the husband to accompany him to the alleged rendezvous of his wife and brother for the purpose of witnessing an adulterous act. Chief Justice O'Niell dissented on the same ground which he took in *Mouille v. Schutten*[16] that a man should not be heard on grounds of public policy to testify to his own immoral acts against his alleged accomplice and further on the ground that the trial judge had seen and heard the witnesses and must have had good reason for his judgment.[17]

In a state, where for practical purposes, adultery is the only ground for an immediate absolute divorce, testimony of this variety is particularly dangerous. It is common knowledge that this ground for divorce has long been used by unscrupulous lawyers and litigants to obtain what are in reality consent divorces and, under previous popular subscription to a chivalric code, the husband thus let the wife get the divorce decree whether she or he or both wanted it. Now it is possible that husbands are availing themselves of the device to secure divorces, obtain custody of children and defeat alimony decrees. At least three cases of this variety have reached the Supreme Court within a year, which, everything being considered, is a goodly number. There are many ways provided by the Legislature by which individuals may obtain divorces in one to two years, at least two of which obviate the necessity for the washing of dirty linen—not an undue

14. Art. 216, La. Civil Code of 1870: "A child remains under the authority of his father and mother until his majority or emancipation.

"In case of difference between the parents, the authority of the father prevails."

15. 192 La. 1002, 190 So. 111 (1939).

16. 190 La. 841, 183 So. 191 (1938).

17. Carter v. Melchior, 150 La. 289, 90 So. 652 (1922).

amount of time for deliberation regarding a second marriage if the first has been a failure. Alimony is awarded with great care by Louisiana courts, and the Legislature has set a maximum. The defect in the law is that the statutes do not apply to both husband and wife. If allegations of adultery, supported by this type of evidence, are too often given credence, both husbands and wives may be placed at the mercy of spouses without decency or self respect. While it may be true that the so-called double standard of morals is passing, it is not yet obsolete, and the wife will suffer more in both social and business life than the husband if these attacks become common. Most important of all, children will be placed in unfit hands. In the majority opinion is found the statement that:

> "It is contended that the evidence given by the two taxicab drivers was unsatisfactory and unacceptable because no reliable and decent person would voluntarily go upon a mission to be an eye witness to such an affair. If every person took this view of these types of cases, the law would provide that adultery is a ground for a divorce and a cause for depriving the mother of the custody of her minor children, but it would be impossible to secure witnesses to prove the case. The testimony of witnesses in matters of this nature should be thoroughly considered and the court has no right to disregard such evidence without just reason. Of course, each case, to a great extent, depends largely upon its own facts."[18]

Many cases may be cited where circumstantial evidence was considered sufficient and in the nature of things, an "eye witness" not thought necessary, so that the cause of adultery need not be nullified by refusal to accept the type of testimony under discussion.

Divorce

Gauthier v. Matthews[19] was a suit for divorce by the wife on grounds of her husband's adultery. The case presents a question of fact only. The court applied the rule that:

> "In actions for divorce, courts must take such evidence as the nature of the case permits, circumstantial, direct, or positive, and bring to bear upon it the experiences and obser-

18. Vice v. Vice, 192 La. 1002, 190 So. 111, 114 (1939).
19. 191 La. 326, 185 So. 272 (1938).

vations of life, and thus weighing it with prudence and care give effect to its just preponderance."[20]

Having concluded that plaintiff had established her charges by a preponderance of the evidence, the court awarded the decree and alimony of $35 per month. The husband was making $198 per month as a fireman on the Missouri Pacific Railroad and had certain expenses while away from home. The wife had asked for $75 per month.

In *Bernard v. Jefferson*,[21] a divorce was granted a husband under the four year act. The lower court's decree was affirmed after a review of the evidence. The court did not believe the testimony of the wife that the husband had spent two nights at her home since the original separation, so the question of the effect of cohabitation upon the living apart prescribed by the statute was not presented.

In *Brupbacher v. Brupbacher*[22] the court held that a divorce *must* be granted when more than a year has elapsed since the date of judgment of separation if no reconciliation has taken place. The son was left with the father, and the daughter with the mother as the best interests of the children were thus served. $20 per month was allowed for the daughter's support. The wife was working.

Separation From Bed and Board

Cruelty. In *Peters v. Norris*[23] a wife was granted a separation from bed and board from her husband, a dentist, on the ground of habitual drunkenness and cruel treatment. The lower court had awarded the boy to the wife and the girl to the husband because of the alleged affection of the child for her father. This award on custody was reversed, and the girl was placed with the wife, as it did not appear to be to the greater advantage of the child to be put in her father's custody as he was away all day. The child was of "tender age," a girl, and the court thought she should be in her mother's care. Alimony was raised from $60 to $80 to care for the three. There was no conflict as to the amount of the husband's income.

The wife was awarded interest on her separate funds administered by her husband from the date of judgment. She had

20. 191 La. at 330, 185 So. at 273.
21. 191 La. 881, 186 So. 599 (1939).
22. 192 La. 219, 187 So. 555 (1939).
23. 191 La. 436, 185 So. 461 (1938).

no personal action to force an accounting from her husband as to his administration of her separate estate. She failed to ask to be recognized as owner of one-half of the community in her petition, and the "court cannot grant a relief not asked for in the pleadings" so the lower court was reversed on that point also.

In *Broderick v. Broderick*[24] a husband sued his wife for separation from bed and board on the ground of habitual intemperance, cruel treatment and outrages. The wife denied the accusation and set up a reconventional demand for separation on the ground of cruel treatment. The demands of both parties were rejected. The husband appealed, and his demand was rejected. The parties had been married but four months and eleven days. The court found that even if Mrs. Broderick did become intoxicated on several occasions, that was not habitual intemperance. Besides, said the court:

> ". . . habitual intemperance, like ill-treatment of one of the spouses toward the other—is not a just cause for a separation from bed and board unless 'such habitual intemperance, or such ill treatment, is of such a nature as to render their living together insupportable.' And the question whether the habitual intemperance, or ill-treatment, in any given case, is of such a nature as to render the living together of the parties to the marriage unbearable,—or 'insupportable,' as the Civil Code has it,—is a question for the court, and not for either of the parties to decide. *Mack v. Handy,* 39 La. Ann. 491, 2 So. 181. In deciding that question, in any given case, the court must consider the habits of the complaining party, and his or her conduct towards the other party to the marriage. For a period exceeding five months before Mr. Broderick married the present defendant he was going out with her regularly at nights, sometimes to night clubs and sometimes to picture shows, and he knew the extent of her drinking, because, in fact he drank with her; and he continued to condone her drinking until the morning of the very day he sued her for a decree of separation because of her drinking. We do not mean by this that Mr. Broderick approved of his wife's drinking to excess. But the fact is that, by accompanying her on drinking parties and by drinking with her, he encouraged her to drink, knowing, as he contends, that she was liable to become intoxicated. A man who drinks with his wife on every drinking

24. 191 La. 492, 186 So. 5 (1939).

party that she attends should not sue her for a separation from bed and board on the ground that such drinking constitutes habitual intemperance of such nature as to render their living together unbearable, without first discontinuing drinking with his wife, and without giving her a sufficient warning to reform her conduct in that respect."[25]

In *Temperance v. Herrmann*,[26] a separation was prayed for on grounds of slander and defamation and of cruel treatment. On rehearing, a divided court refused to grant the separation under the equal wrongs doctrine citing the following extract from previous jurisprudence:

> " 'Under our law, disappointment in the marriage relation and mere incompatibility of temper are not causes for a judicial separation between the spouses; excesses, outrages, and cruel treatment are, but always with the qualification that the complainant must be comparatively free from wrong.
>
> " 'Where the faults of husband and wife are nearly balanced and are of a similar nature, neither party can be heard to complain in a court of justice.' "[27]

The wife was *not* found to be "comparatively free from wrong." The court quoted the following:

> " 'Counsel for the parties have argued that the matrimonial relation is so strained as to render their living together impossible, and, with much earnestness, have urged upon us the advisability of putting an end to the unfortunate situation by entering up a decree in favor of their respective clients. We are unable to do this. The question with this court is not whether it is best for the parties, or for society, that they should be judicially separated, but whether they have brought their case within those provisions of the law which regulate the most important relation of social life.' "[28]

While this doctrine may seem unfortunate as a social policy, the court is eminently correct in refusing to legislate regarding it, particularly in view of the fact that the law-making body has provided a simple solution for spouses in this situation, in the two year divorce act, which should furnish ample relief to those who are not unduly anxious to contract a new marriage after having made a failure of the first.

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25. 191 La. at 496-497, 186 So. at 6.
26. 191 La. 696, 186 So. 73 (1938).
27. 191 La. at 711, 186 So. at 77.
28. 191 La. at 711, 186 So. at 78.

In *Moore v. Moore*[29] the husband, a doctor, sued his wife for separation on grounds of cruel treatment and excesses. The wife gambled—was extravagant and nagged and fussed! The court stated that:

> "Cruel treatment, under the jurisprudence of this state, is not confined to physical mistreatment, abuse, or injury, but can, likewise, result from mental harassment alone arising from conduct that is the 'very refinement of cruelty,' without either force or blows."[30]

The case was remanded. It presents an excellent review of cases on this subject with most interesting excerpts particularly from the *Krauss* cases.[31]

In *Talbert v. Talbert*[32] a wife sued her husband for separation from bed and board on the ground of cruelty. She also asked for alimony of $50 per month, $300 attorney fees, and a permanent injunction against disposing of community property. A preponderance of the wife's evidence showed that the alleged acts of cruelty—threats against the life, slander, and so forth were true.

In *Cormier v. Cormier,*[33] the court affirmed a judgment granting a wife a separation from bed and board on the ground of cruel treatment and awarded her permanent custody of her two daughters and alimony. The cruel treatment consisted of forcing the wife to live, not in the same house but in close proximity to a hostile mother-in-law, who was also permitted by the husband to keep one of the children all the time. The fact that the wife permitted this condition to exist for a long time was held to be forbearance rather than condonation. Since there was no complaint, the alimony award was left at $20 per month, which, the court commented, was certainly inadequate for the three persons.

Tutors

In the case of *In re Wyly's Tutorship,*[34] the mother, natural tutrix, had been duly appointed, and an uncle was made undertutor. The tutrix was paid the full amount owed by the United States Government in a life insurance policy. Four years after

29. 192 La. 289, 187 So. 670 (1939).
30. 192 La. at 292-293, 187 So. at 671.
31. Trautman v. Krauss, 159 La. 371, 105 So. 376 (1925); Krauss v. Krauss, 163 La. 218, 111 So. 683 (1927).
32. 192 La. 837, 189 So. 448 (1939).
33. 193 La. 158, 190 So. 365 (1939).
34. 191 La. 644, 186 So. 55 (1938).

payment, the Administrator of Veterans' Affairs filed a petition against the tutrix to show cause why she should not furnish bond or submit an accounting under Section 21 of the World War Veterans' Act.[35] The court held that while the Administrator has the right in certain cases to intervene and make known his complaint, the disposition of the complaint is left to the state courts. Louisiana requires no bond of a natural tutor. The amount had been paid already in this case, so the Administrator did not have the right to intervene under Louisiana Act 71 of 1932. The affairs were found to be in good order in any case—with "not the remotest cause for suspicion." The rule was dismissed.

In *Wallace v. Cassiere*[36] the court held that a tutrix is estopped to plead irregularities in a family meeting in order to defeat a mortgagee when she and the minors had received the benefits involved.

Support of Wife

In *State v. Dickinson*,[37] William Dickinson was found guilty of contempt of court for failure to pay money for support of his wife under Act 77 of 1932. He pleaded a divorce decree from Mississippi, which was found to be a nullity because the court granting it had no jurisdiction since he had not been a *bona fide* resident of Mississippi for one year, which was required under the Mississippi statute. The Juvenile Court was held to have had jurisdiction, and their judgment was good. Writs of prohibition and mandamus were refused.

Emancipation

In *Succession of Hecker*,[38] the court held that a minor is fully emancipated by marriage at eighteen under Article 382 of the Civil Code, even when married without the consent of the tutor. Hence a recorder of mortgages was right in his position that the court was without authority to authorize the substitution of a bond by the tutor in lieu of a special mortgage, which could only be cancelled ten days after an accounting should have been rendered by the tutor.

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35. 43 Stat. 613 (1924) as amended by 49 Stat. 607 (1935), 38 U.S.C.A. § 450 (Supp. 1938).

36. 192 La. 581, 188 So. 707 (1939).

37. 191 La. 266, 185 So. 20 (1938).

38. 191 La. 302, 185 So. 32 (1938), noted in (1939) 1 LOUISIANA LAW REVIEW 457.

B. Conventional Obligations

This division deals with applications of the general law of contract, a basic function of the judiciary. Just so long as individual possession and power of disposition are legally sanctioned, courts will be called upon to consider expressions of agreement to determine their legal stamina, their operative effect, their consequences, and their finality. Much of the difficulty which finds its way into the lap of the courts appears to be occasioned by the belief, seemingly often held, that the processes of the law may be employed to undo what the contracting parties had chosen to do, or to compel one of them to live up to an agreement he had not made. Necessity prompts an unwelcome choice; roseate plans and hopes dwindle and disperse; dreams give way to fact and fact to legal theory; and then the courts. Individuals will continue to chafe against the operation of rules in their particular cases and to search for methods of escape, hoping sometimes against hope that law can be made to fit the individual pattern, that all judges are Chancellors wearing shoes of varying sizes. But they are mostly mistaken.

Baker, owning certain interests in a tract of land, needed some money which Patton refused to lend with the interests as security. But Baker had to have the money so he made a cash sale of the interests to Patton and Patton gave him a counter-letter fixing a time limit during which Baker would have the power to repurchase. This period expired while Baker dozed in juridical slumber. The land increased in value and now Baker wants it back. So he sues. All he wants the court to do is to declare the transaction a pignorative contract or mortgage or hypothecation so that he can recover his title by redemption. But the court balks—it prefers to give effect to the intention of the parties and the spirit of the Code. *Baker v. Patton.*[1]

Then there was a Realty Company, thrilled over the prospect of a fat return from a new subdivision. Under the spell of this elation it entered into a written agreement with the Public Service Company for having gas mains extended to the subdivision, paid some ten thousand dollars for the favor subject to a stipulation for a refund of a fixed sum for each additional customer served from the extension up to the total amount of the payment, the refunds to be made during a period of ten years from the date of the contract, the remainder, if any, at the expiration of

1. 191 La. 784, 186 So. 336 (1939).

such period, to be retained by the Public Service. Within this time limit, refunds were made totalling approximately one-third of the amount paid by the realty company. But the venture proved unsuccessful and the liquidator of the realty company sued to recover the amount of the deposit less the amount refunded.[2] He apparently had conjured up three theories: (1) that the contract was *ultra vires* as to both parties; (2) that the contract lacked mutuality inasmuch as the Public Service was not obligated to do anything; and (3) that it contained a reprobated penal or forfeiture clause. The court was adamant. It properly disposed of the first two contentions by pointing out that the contract had been fully performed and the Realty Company had had the full benefit thereof. As to the third contention, it found no analogy between permitting the Public Service to retain the amount of the deposit over and above the refunds remaining at the end of the ten year period and decisions in prior cases disallowing the enforcement of forfeitures of amounts paid by defaulting purchasers of realty where the forfeitures appeared unreasonable and arbitrary.

Clearly enough, in the case at hand, the "deposit" was to compensate the Public Service for the expense incurred in extending the mains to serve the subdivision, and the provision for the refunds was charitably designed to enable the Realty Company to participate in or receive the advantage of any benefit that might accrue to the Public Service through additional connections made possible by the extension contracted for. The court devoted some time, however, to discussing the difference between penal or secondary obligations and primary obligations, finding that the refunding clause fell not within the former group but the latter. Perhaps, the tendency to believe that a "penal clause" is unenforceable should not be thus encouraged, because the penal clause is specifically sanctioned by the law. It is only when such a clause goes beyond reasonable compensation for damages incurred and is arbitrary and capricious that it should be denied effect. But to a common sense agreement the court accorded a common sense interpretation.

In like manner, an attempt to make a contract operate as not intended resulted in the case of *Rossignol v. Morgan & Jacobs.*[3] There an agreement to purchase a house and lot was conditioned

2. Reimann v. New Orleans Public Service, Inc., 191 La. 1079, 187 So. 30 (1939).

3. 191 La. 462, 185 So. 883 (1939).

on the purchaser's being able to obtain a permit for the operation of a cleaning and pressing business on the premises. This condition failed so the court annulled the contract and ordered the broker to return the purchaser's deposit. It took the reasonable view that the issuance of a temporary permit would not satisfy the condition. The court likewise refused to uphold a claim by the real estate broker for payment by the plaintiff of his commission, finding no warrant for such a claim in the contract. To make the rejection complete, the opinion suggested that the rule against forfeiture by the purchaser, established in an earlier case,[4] was applicable.

The fact that courts look with disfavor on forfeiture results both in a judicial reluctance to find an intention of this sort and an insistence on strict compliance with contract provisions which have such effect. Therefore, in *Schultz v. Texas & Pacific Ry. Co.*,[5] recovery for conversion was permitted against a lessor who assumed dominion of certain property placed on the leased premises by the lessee. The lease was for an indefinite term and provided that upon its termination and the lessee's failure to remove property placed on the premises "the same shall become forfeited to, and the title thereof shall become vested in the Lessor, should the Lessor so desire." Subsequently, the lessor, after notifying the lessee to vacate, and after obtaining a judgment of ejectment, converted the property (scrap iron) to its own use without notifying the lessee of its intention to declare a forfeiture. The court repeated that forfeitures are not favored, are to be construed strictly and will not be maintained unless the applicable requirements of the contract are strictly followed, and decided that since the forfeiture here depended upon the will or desire of the lessor he should have notified the lessee of his election to avail himself of the privilege. If ever a forfeiture was justified, the facts indicate that here was such a case because of the unjustifiable stubbornness of the lessee in the face of repeated efforts to bring about his surrender of the premises. But the lessor tried to give automatic operation to an option. The application of the rule against forfeitures does demonstrate how carefully the court will guard against encouraging such procedure.

Dispute over the meaning of an agreement led to the case of *Crowell & Spencer Lumber Co. v. Burns*,[6] where the court applied

4. Boisseau v. Vallon & Jordano, Inc., 174 La. 492, 141 So. 38 (1932).
5. 191 La. 624, 186 So. 49 (1939).
6. 191 La. 733, 186 So. 85 (1939).

the established rule that when, in a sale of standing timber, the time limit on removal by the buyer is fixed, such delay may not be extended by the court and that title to timber not removed before its expiration reverts to the seller. The applicable principles were not challenged, only the interpretation of the contract was disputed.

Judicial reluctance to interfere with a positive and permissible manifestation of intention was demonstrated in *Peterson v. Moresi.*[7] A deceased grantee, on the day he acquired a parcel of land by cash purchase, executed an instrument acknowledging an undivided ownership in several others for certain fractions thereof, and agreeing to transfer these interests on demand. A number of years later, after the grantee's death, the instrument was recorded and amicable demand was made by plaintiffs against the widow and heirs for recognition as fractional owners of the land. This suit, seeking a judgment "decreeing petitioners to be the owners of the undivided interests specified" and ordering the defendants to execute a conveyance to them of the respective interests, followed refusal of the demand. The chief defense was the prescription of ten years applicable to personal actions. The court found that the facts did not disclose an offer to sell, or a sale, or a mere promise to transfer, but was an acknowledgment of ownership in others, and that the plaintiffs' action to have this ownership recognized was a real and not a personal action, and so not subject to the prescriptive period of ten years. On French authority, the grantee was dubbed the *prête-nom* of the true owners.

The question of the admissibility of parol evidence to disprove an acknowledgment in an act of sale of the payment of a certain cash consideration—a problem that has occasioned some dispute in the Supreme Court—was before the court again in *Johnson v. Johnson.*[8] This problem involves the proper application and interpretation of Civil Code Articles 1893, 1900, 2236, 2237, and 2276 particularly, and goes back to the case of *Robinson v. Britton,*[9] decided in 1915. In the present suit, the plaintiff had acknowledged receipt of $500 cash "and other valuable considerations" in support of a transfer of real estate to her father-in-law. She brought suit to annul for fraud (which she failed to prove) or to have the transfer set aside for lesion beyond moiety. Her acknowledgment of $500 cash was held conclusive, although she

7. 191 La. 932, 186 So. 737 (1939).
8. 191 La. 408, 185 So. 299 (1938).
9. 137 La. 863, 69 So. 282 (1915).

claimed that no such amount was ever paid. For the rest, the court found the sale lesionary and ordered the appropriate relief.

Time was when the Chief Justice doubtless would have dissented on the parol evidence ruling. The supposition is that he now feels his position too clearly established by previous dissenting opinions,[10] and the rule too well settled by numerous prior decisions to warrant further complaint. But one may still wonder whether the present rule was ever required by the provisions of the Code, or whether it was justified, the common law rule appearing to be to the contrary.[11]

A case outside the operation of the rule just considered was presented to the court in *Cleveland v. Westmoreland.*[12] A transfer made in consideration of services rendered was attacked as a gift or gratuity. The court, speaking through the Chief Justice, took the view that under Article 1900—if the cause or consideration stated in a contract is not the true cause or consideration for which the contract was made—the contract is yet valid "if the party (against whom a want of consideration is pleaded) can show the existence of a true and sufficient consideration," and that such true consideration might be shown by parol evidence.

As long as there is property there will be attempts to acquire it by fraud, and courts will be called upon to defend the victim. In *Emerson v. Shirley,*[13] the court set aside a deed covering mineral lands. It found that the principal defendant and the plaintiff were joint enterprisers which gave rise to a fiduciary relationship between them. The opinion does not make clear whether the decision was based on (1) fraud, resulting from the fact that the principal defendant did not give the plaintiff the benefit of information he possessed; or (2) the fact that the defendants took advantage of the plaintiff while he was in an intoxicated condition; or (3) contractual incapacity of the plaintiff resulting from drunkenness. A prior opinion in the case[14] gives support to the view that the real basis of the decision was temporary contractual incapacity caused by intoxication. However, the attention given in the present opinion to the relationship between the parties, coupled with the conflicting character of the testimony on the plaintiff's condition, leads to the belief that the decision was pri-

10. Robinson v. Britton, 137 La. 863, 69 So. 282 (1915); Pfeiffer v. Nienaber, 143 La. 601, 78 So. 977 (1918); Hemler v. Adcock, 166 La. 704, 117 So. 781 (1928).
11. See Restatement, Contracts (1932) § 82.
12. 191 La. 863, 186 So. 593 (1939).
13. 191 La. 741, 186 So. 88 (1939).
14. 188 La. 196, 175 So. 909 (1937).

marily based on fraud and overreaching on the part of the defendants. In the full light of the circumstances, the court refused to find a ratification by the plaintiff in the deposit to his account of the check received in payment and in the fact that certain checks were later issued against the account, in keeping with the rule announced in *International Accountants Society v. Santana.*[15]

In *Walter v. Caffall,*[16] a corporation was held liable on two grounds for an indebtedness due plaintiff: (1) on the theory that it had voluntarily assumed payment of the indebtedness at the time it took over the assets of another corporation, and (2) on the ground that it became the assumer in law of the obligations of the other corporation because the transfer of assets to it was simulated and fraudulent. Under the first theory the plaintiff would be a third party beneficiary. The second stems from the case of *Alliance Trust Co. v. Streater,*[17] where the present Chief Justice dissented against holding a fraudulent actual corporate transferee as an assumer. It is not entirely clear in the present case whether the court considered the second corporation as being only a reincarnation of the first instead of a distinct corporate entity. There is language to the former effect, however, and the facts perhaps were sufficient to justify such a conclusion.

The rule that a release of one co-tortfeasor operates to discharge the others because of their solidary liability, in the absence of a reservation of right against the latter, is well established. But creditors continue to complain against it, despite repeated rebuffs. This rule was applied, in the case of *Reid v. Lowden,*[18] where the court also held that when a written agreement of compromise and release containing no reservation is given to one co-tortfeasor, parol evidence is not admissible to show an intention to reserve. This view was apparently made to rest on two theories: (1) that the written compromise agreement was not ambiguous, and (2) that Article 3071, requiring written evidence of an agreement of compromise, had been relied on by the plaintiff and consequently parol evidence could not be received to "alter or change" the written agreement. The strictness of this application of the parol evidence rule, as expressed in the decision of the Court of Appeal, has been criticized,[19] and a general consideration of Articles 2100, 2101, and 2203, will appear in a later issue of this Review.[20]

15. 166 La. 671, 117 So. 768 (1928).
16. 192 La. 447, 188 So. 137 (1939).
17. 182 La. 102, 161 So. 168 (1935).
18. 192 La. 811, 189 So. 286, (1939).
19. Note (1939) 13 Tulane L. Rev. 642.
20. See the forthcoming January issue for a Comment on these articles.

Unfortunately, all too frequently is the court called upon to weigh security of ownership against the importance of protecting the purchaser of real property who relies on the public records. In *Bell v. Canal Bank & Trust Co.*,[21] the court applied the rule which protects one dealing with immovable property in reliance on the public records against the contention that the third party, a mortgagee and subsequent purchaser, could readily have discovered the real owner's claim inasmuch as such owner was then living on the property. The court felt that accepting a contrary argument urged by the plaintiff "would destroy the law of registry which is based upon sound public policy of stable and clear titles to realty."

If the principle upon which the rule rests be accepted, it is difficult to understand how the court could have justified reaching any other conclusion. That a mortgagee is protected to the same extent as a purchaser, is well established; and the fact that the mortgagor, the owner of record, was not in possession of the property at the time the mortgage was granted, was rightly held to be immaterial. The remedy of an owner who does not receive the required notice of a tax sale of his property—the unhappy plight of the plaintiff—is a direct action to have the sale set aside. Where the record is clear, third parties should be protected. The case well demonstrates how dangerous it is for a curator ad hoc to treat his appointment in too perfunctory a manner. Certainly the curator appointed in the suit to quiet the tax title could have discovered that those whom he was supposed to represent were then living on the premises. If so, the loss of their property would hardly have resulted. But hard cases cannot be allowed to make bad law.

Another opinion involving the protection of persons dealing with immovable property on the faith of the recorded titles was rendered in *Chachere v. Superior Oil Co.*[22] Here the plaintiffs who claimed as descendants and heirs brought a petitory action against a third party and his lessee alleging that their ancestor had made a pretended sale of the property, in fact a donation in disguise without any consideration, to the defendant's author in title. In approving the judgment of dismissal the court seemed to rest its decision on the theory that since the defendant owner was a third person who had purchased the property on the faith of the public records, he and his lessee should be protected. It did not consider

21. 193 La. 142, 190 So. 359 (1939).
22. 192 La. 193, 187 So. 321 (1939).

the pleas of ten and thirty years prescription acquirendi causa. In a concurring opinion the Chief Justice questioned the applicability of the doctrine of *McDuffie v. Walker*,[23] and felt that since the plea of prescription of ten years was a sufficient defense there was no occasion to rely on the doctrine. The doubt in the mind of the Chief Justice was based on Article 2239 of the Civil Code, allowing to forced heirs the right to annul the simulated contracts of their ancestors.

Inasmuch as the prevailing opinion did not decide the case on the plea of prescription, as it might easily have done, but employed instead the rule concerning recorded titles, the inference is that the court considered carefully the application of the rule to a case where the claimants were heirs and intended to settle the point. At the same time it is not necessary to conclude that the Chief Justice held a contrary view. He may have preferred to save final consideration of the question until a decision thereupon was necesary. Whether the *McDuffie v. Walker* doctrine should be modified to protect the forced heirs of an ancestor who has made a simulated transfer of his property will be considered in detail in a later issue of the Review.

The fact that novation destroys the obligation novated stood in the way of certain legatees claiming under a will after having surrendered their rights to claim the legacies in return for a promise of substitute performance in *Carbajal v. Bickmann*.[24] And the rule that novation is never presumed was properly applied in *Brock v. First State Bank & Trust Co.*[25]

Sufficiency of proof is always a problem for the advocate and frequently for the court as well. Questions of this nature continue to arise. Thus, in the opposition to an executor's allowance of certain claims against the estate of a decedent, the opponent objected that the claims had not been established by competent and legally sufficient proof, both generally, and under section 2 of Act 11 of 1926. In holding against these contentions, the court found sufficient evidence to establish a prima facie case and to satisfy the requirements of the statute in the testimony of the deceased's bookkeeper corroborated by the deceased's own records and the testimony of the executor. *Succession of Sterkx v. Sterkx*.[26]

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23. 125 La. 152, 51 So. 100 (1909) (protection of third parties dealing with immovable property on the faith of the public records).
24. 192 La. 56, 187 So. 53 (1939).
25. 192 La. 77, 187 So. 60 (1939).
26. 193 La. 322, 190 So. 568 (1939).

A problem of the same general nature was presented in *Burk v. Livingston Parish School Board*,[27] which reached the Supreme Court again[28] during the preceding term when the court granted a writ of review on petition of the plaintiff. The writ of review was granted, according to the court, because of the refusal of the Court of Appeal to allow the plaintiff, an architect, an item of $852.20 charged to traveling expenses. The Court of Appeal had refused to allow this claim on the ground that the amounts involved had not been proved with the required legal certainty, notwithstanding that the plaintiff testified that the charges were true and correct. The Supreme Court found that the School Board did not dispute that it was under a contractual duty to pay traveling expenses, and it felt, contrary to the Court of Appeal, that the evidence was sufficient to justify allowance of the claim. It agreed with the lower court that the contract was sufficiently explicit concerning the commission to be paid and therefore had to prevail over an alleged custom of the profession concerning its proper interpretation. The court also properly allowed interest from the time plaintiff's final account was rendered and demand for payment made.

Perhaps the most interesting case presenting a problem dealing with the general law of contract from the standpoint of theory was *Fite v. Miller*,[29] where the court divided on the allowance of damages for non-performance of a contract to drill an oil well. Not only did the plaintiff not have the well drilled by someone else, but at the time of the breach there was very good reason to believe that drilling would result in only a dry hole.

The dissenting opinion took the position that no damages were recoverable because the plaintiff had not proved any loss. It suggested that if the plaintiff had paid someone else to drill the well, an actual loss could have been shown. But since this course had not been pursued, and since plaintiff could not show that drilling would have produced oil, or how much, his claim for damages was incapable of proof.[30]

The majority view was that plaintiff's position under the contract was analogous to that of one who purchases an uncertain

27. 191 La. 364, 185 So. 284 (1938).

28. See earlier opinion dealing with other matters in 190 La. 504, 182 So. 656 (1938).

29. 192 La. 229, 187 So. 650 (1939), noted in (1939) 2 LOUISIANA LAW REVIEW 198 and (1939) 13 Tulane L. Rev. 639.

30. Cf. American Surety Co. v. Woods, 105 Fed. 741 (C.C.A. 5th, 1901), applying a similar theory to a contract to construct a sewerage system where plaintiff did not have the work completed by another.

hope—a thing of value and capable of valuation. By the breach, this value had been destroyed. It was something for which he had given what the parties considered an equivalent, and which was legally sufficient consideration—specifically an interest in a lease. And then, in undertaking to value the hope the court used as a criterion what it would cost to drill the well to the specified depth.

It can be agreed that the damages recoverable in this kind of case are to be measured by the value of the performance promised by the defendant as of the time performance is due. This value divides itself into two elements: (1) the loss sustained, and (2) the profit of which the aggrieved party has been deprived.[31] Whether performance would have been beneficial addresses itself wholly to the question of the gains prevented by the breach. If a plaintiff is unable to show that the breach has deprived him of a profit only this element of the value of the performance falls. The other element—the loss he has sustained—is another thing. In undertaking to determine such loss it is necesary only to determine the value of the performance itself—the value of the act—without regard to the benefit to be derived therefrom. No better measure of such value can be found than what it would cost to have the act done. Giving the plaintiff the monetary equivalent of the physical act is not evaluating a hope of which he had been deprived; it is merely compensating him for the loss of the value he contracted for, and for which he had given or promised an equivalent. Come what might from the drilling, he bargained for it, paid for it, and was entitled to it, or, in lieu of specific performance, its equivalent in money.

An example may help. Let us assume that for a present adequate consideration paid to him, *A* contracts to dig a ditch on *B's* land. The ditch is wholly unnecessary, will actually destroy the value of *B's* land, although *B* does not know this, and that *B* wants it done purely and simply to annoy his neighbor who will have to look at it whenever enjoying the comfort of his porch. *A* defaults. Let us further assume that at the time the default occurs *B* has become friendly with his neighbor and is really glad at heart that

31. It will be admitted, of course, that if the value promised by a plaintiff when weighed against the value promised by a defendant, as of the time of the breach, shows a balance in favor of plaintiff this is in a sense a profit on the transaction. However, giving such an amount by way of damages is merely giving to the plaintiff the equivalent he bargained for, with its value fixed as of the time performance is due. Otherwise, this value would be a loss incurred.

A has broken his contract. Under the theory of the dissent *B* could not recover damages for the breach because he could prove no loss. Likewise, under the theory of the majority opinion no recovery would be possible because the plaintiff has not been deprived by the breach of the value of an uncertain hope. Damages are to be measured as of the time performance is due and surely at that time, under the assumed facts, no such value could exist. It would not do to answer that plaintiff could sue to resolve for non-performance by the defendant. He could, but he would not have to. The rule permits him to sue for damages. Their measure would be the monetary equivalent of the act he bargained for and which the other party failed to perform. He can recover no damages for profits of which he has been deprived because he has been deprived of none.

This line of approach might have reconciled the majority and minority. The dissenting opinion objected that damages for the profits of which the plaintiff had been deprived were incapable of proof and that plaintiff could not show a loss without showing that oil would have been found. Apparently, the majority opinion was considered as awarding damages for loss of profits although such loss could not be proved. And, under the theory invoked by the majority—that the plaintiff was entitled to the value of an uncertain hope—the plaintiff does seem to have been allowed to recover the value of uncertain future profits. The opinion is therefore open to criticism on this score. Fortunately, however, in undertaking to evaluate this uncertain hope the court used the cost of drilling as a measure. No harm resulted.

Clearly enough, if the plaintiff could have gotten someone else to do the drilling and elected not to do so, he would not have been entitled to damages for gains prevented because he could not have shown that defendant's failure to perform had deprived him of any profits. So, if the court in evaluating the uncertain hope, was awarding damages for possible gains prevented, its theory seems unsound. The breach by the defendant—assuming the plaintiff could have had someone else drill—did not result in deprivation of profits. If any such deprivation occurred, it was the result of the plaintiff's own failure to have someone else drill.[32] This must have been the thought from which the minority could

32. A case might be supposed, of course, where a party would be deprived of profits as a consequence of delay occurring between the time of breach and the time when performance by another could be secured. No such case was the present one.

not escape. But they seem to have overlooked the loss sustained by the plaintiff in losing the value of the act itself, that is, its market value. This loss he sustained because he bargained for that act and paid for it and then did not get it. And if a court can not give him the act, it should give him the monetary equivalent thereof, without regard to what he may do with the money when he gets it. If he does not want to drill a well with it, that is his own affair. He has not received something for nothing; nor is he in a better position than he would have been in if the contract had been performed.[33]

This brings us back to the case at hand and to the suggestion by the court that allowance should be made for the fact that if the well had been drilled the defendant would have had a half interest in it, and, further, that the defendant would have been entitled to retain one-half of the plaintiff's half of the oil and gas up to a certain amount to recompense him for the value of the equipment employed, if a producer had been brought in. Such allowances seem sound. In figuring the monetary equivalent of the performance to be rendered the cost of an exactly similar performance would have to be used as a guide. Therefore the value the plaintiff lost in not getting the act itself was the value of that performance by someone having similar interests in the venture.

C. Particular Contracts

Sale

In *Lee v. Perkins*[1] the court followed an earlier decision[2] in

33. See Chamberlain v. Parker, 45 N.Y. 569, 572 (1871), wherein it is said, "Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff, if the contract is broken.

"So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages, if the defendant omitted to perform the contract. . . .

"But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although it could be seen that performance would have not benefited, but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defense to an action by the employer for a breach of the contract to show that the act to be done or the erection to be made, would injure the land or impair its value.

"The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value."

Cf. Ardizonne v. Archer, 72 Okla. 70, 178 Pac. 263 (1919); Restatement, Contracts (1932) § 335, particularly Example 6; 5 Williston, Contracts (Williston & Thompson, 1937) 3798-3800, § 1354.

1. 192 La. 1049, 190 So. 126 (1939).

2. Langston v. Shaw, 147 La. 644, 85 So. 624 (1920).

holding that a plaintiff may avail himself of litigious redemption where the defendant transfers or sells an immovable or rights arising therefrom during the pendency of an action in revendication. In this case a mineral lease, which the plaintiff was seeking to have cancelled, was transferred by the defendant to a third party. The court remanded the case to permit the plaintiff to amend his pleadings and deposit the necessary amount in court for the purpose of redemption.

Two studies of the problem of transfers of litigious rights have recently been made.[3] The French authorities are divided on the question of permitting a plaintiff to avail himself of this kind of relief against the transferee of the defendant. The present case as well as *Langston v. Shaw*[4] seem definitely to place Louisiana on the side of those favoring its allowance. This view stems from the fact that Civil Code Articles 2652 and 2653 make no distinction between the plaintiff and the defendant in speaking of litigious redemption. The instant case makes no mention of a filing of a notice of lis pendens. This indicates, of course, that the filing of such a notice is not a prerequisite to redemption by a plaintiff. However, the case can hardly be considered as authority for such a proposition.

To similar effect was the decision in *Sterkx v. Sterkx*,[5] where the court also held that the exception to litigious redemption established by the first paragraph of Article 2654, "when the transfer has been made either to a coheir or to the coproprietor of the right,"[6] applies only when the transferor is a coheir or coowner of the right with the transferee.

The case of *Smith v. Cook*,[6] was again[7] before the court during the last term when a judgment rejecting plaintiff's demands was affirmed. Plaintiffs were trying to establish ownership to certain land but they were unable to prove that the defendant was guilty of any wrong toward their ancestor in purchasing the property at a tax sale through an agent, there being no fiduciary relationship which was violated.

Mandate

Power of Attorney. The case of *Cleveland v. Westmoreland*[8]

3. Comment, The Transfer of Litigious Rights in Louisiana Civil Law (1939) 1 LOUISIANA LAW REVIEW 593, 818; Comment, The Sale of a Litigious Right (1939) 13 Tulane L. Rev. 448.
4. 147 La. 644, 85 So. 624 (1920).
5. 193 La. 409, 190 So. 628 (1939).
6. 191 La. 575, 186 So. 32 (1939).
7. 189 La. 632, 180 So. 469 (1938).
8. 191 La. 863, 186 So. 593 (1939).

is concerned with the interpretation of a power of attorney given by a daughter to her mother, in order that the latter might sell or lease certain mineral rights. The mother was able to negotiate a very profitable lease for her daughter through the assistance of her brother and the services of an attorney. She paid these assistants by transferring them a fractional mineral interest in the land of her daughter. The daughter now sues to annul those transfers, but without success. The court found that the power of attorney was broad enough to enable its holder to make such a transfer, given in consideration for the services rendered in connection with leasing of the land. Furthermore, the court found that the services were worth this consideration; and that there was no fraud. It also held that plaintiff had ratified the contract by virtue of her knowledge and tacit consent by silence and acceptance of benefits of the lease for two years and five months after the transfers were made (or indeed until oil was produced by the lessee).

The case of *In Re Buller's Estates*[9] also involves an interpretation of a power of attorney.

> "The pertinent part of the power of attorney reads: 'to sell all and any of the produce of my lands or any movables and to pay and settle any and all such expenses and costs as he may incur, and I contract to pay him one-half (1/2) of the proceeds of the produce of my lands for his services in that respect.'
>
> "A mere reading of the power of attorney shows that it is not coupled with an interest. The agent was not given an interest in the property but was only to receive a percentage of the proceeds. The power not being coupled with an interest, it terminated at the death of the principal."[10]

Tutors. The case of *Parker v. Ohio Oil Co.*[11] decided that defendant oil company had paid rent royalties to the wrong party in continuing to remit to the father of the plaintiffs after the latter had become majors.[12] The opinion contains certain cited excerpts which clearly set forth the duty of a third person in dealing with an agent, particularly if that agent is the legal mandatory designated as a tutor.

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9. 192 La. 644, 188 So. 728 (1939). See discussion of this case under Successions title, infra p. 72.
10. In re Buller's Estates, 192 La. 644, 649, 188 So. 728, 729 (1939).
11. 191 La. 896, 186 So. 604 (1939).
12. See Section on Mineral Rights, infra p. 75.

". . . one dealing with a known agent 'is not authorized under any circumstances blindly to trust the agent's statement as to the extent of his powers; such person must not act negligently, but must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers.'

"The principle applies with equal, if not greater, force to one who deals with another as 'tutor', especially when the documents, the letters of tutorship, with which he is familiar show that the tutor was confirmed years before the dealings took place.

"What the Supreme Court of Arizona said in *Brutinel v. Nygren,* 17 Ariz. 491, 154 P. 1042, L.R.A. 1918F, 713, as to the duty of one dealing with an agent is applicable to those dealing with tutors. We quote [page 1045]:

" 'The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to "stop, look, and listen," and if he would bind the principal is bound to ascertain, not only the fact of agency, but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises.' "[13]

The defendant further invoked the French theory of "tacit mandate," which she contended was applicable because the children upon their majority suffered their father to continue the administration of their property. The court disposed of this contention in the following words:

"But defendant is in no position to invoke the doctrine of tacit mandate because it had the means of knowing the truth, of knowing the limitation or lack of the agent's authority. It had sufficient information to put it on guard, as we have already explained. The letters of tutorship dated in 1922 were themselves 'danger signals,' sufficient to cause any prudent person to 'stop, look, and listen.' *Brutinel v. Nygren,* supra. Defendant's agents were negligent."[14]

Brokers' Commission. The facts of the case of *Guy L. Deano, Inc. v. Michel*[15] were that a husband listed a piece of property

13. Parker v. Ohio Oil Co., 191 La. 896, 913-914, 186 So. 604, 610 (1939).
14. 191 La. at 914-915, 186 So. at 610 (1939).
15. 191 La. 233, 185 So. 9 (1938).

for sale with a real estate agent, plaintiff in this suit. The agent found a purchaser, thus entitling the broker to a commission under his theory. After the husband had accepted the offer of purchase and after the title had been examined and the act of sale prepared, the wife of the woud-be vendor recorded a declaration of family home in accordance with the provisions of Act 35 of 1921, Extra Session. This prevented the husband from being able to execute the deed and entitled the purchaser to a return of deposit and costs. The court held that the real estate agent could not collect the commission agreed upon from the husband,[16] because in the situation under discussion "the failure of Michel to complete the sale was not due to any defect in the title but was due to a condition arising subsequently which made it impossible for him to comply with his agreement. Michel had a marketable title at the time he listed the property with Deano, Inc., and it was through no fault of his that the sale to Miss Bauman was not consummated."[17]

Partnership

The case of *Dunlap v. Ramsey & Dunlap*[18] reiterated the doctrine that the issue of whether or not a partnership "should be dissolved is separate and distinct from the question of partitioning of the property or the liquidation of the affairs of the dissolved partnership" and that "the latter only comes into legal existence after the partnership has been dissolved."[19] Furthermore, the court said:

> "Counsel has not cited any statute or decision which holds that an action for the dissolution of the partnership is a summary and not an ordinary one. In the absence of any rule of law making such a case a summary proceeding, the defendant was entitled to be proceeded against in the ordinary way through service of a petition and citation."[20]

The case of *Brandin Slate Co., Inc. v. Bennett*[21] is concerned with a thorough review of evidence, including a document purporting to dissolve the partnership. From this evidence the court found that a partnership had been formed between the defendants. Whatever the money-furnishing member had in contempla-

16. Mathews Bros. v. Bernius, 169 La. 1069, 126 So. 556 (1930).
17. Guy L. Deano, Inc. v. Michel, 191 La. 233, 237-238, 185 So. 9, 9-10 (1938).
18. 191 La. 158, 184 So. 710 (1938).
19. 191 La. at 161, 184 So. at 711.
20. 191 La. at 163, 184 So. at 711.
21. 193 La. 89, 190 So. 342 (1939).

tion, he was liable to third persons as "an ordinary or common partner" as he failed to record the articles of co-partnership in the mortgage office as required by the provisions of Article 2845 of the Revised Civil Code. The partnership was engaged in the contract business of erecting and repairing roofs. Since this could not be regarded as a merchandise business, members were liable to the plaintiff jointly and not *in solido*. It was found further that one member had signed a continuing guaranty for the plaintiff's account and hence he was also liable individually for that sum.

Security Contracts

(a) *Pledge.* The only two decisions[22] involving this subject which were handed down by the Supreme Court during the past term applied the trite rule that the continued possession by a creditor of property pledged operates a suspension of prescription on the principal obligation.

(b) *Continuing Guaranties.* In *Brandin Slate Co. v. Bennett*[23] plaintiff sought to hold defendant liable on the ground that he had executed a continuing guaranty to secure the credit purchases of a partnership. Defendant resisted the action on the dual ground that the purported guaranty contract was a forgery and that the indebtedness sued on was extinguished by payments improperly credited to other obligations of the partnership. A code article[24] bars the assertion of any other defense by a defendant who has unsuccessfully pleaded the forgery of the instrument sued on. Since plaintiff was held to have proved the authenticity of the contract, the court refused to consider the additional defense of improper imputation of payments and affirmed a judgment against the defendant.

(c) *Suretyship.* Under Article 3058 of the Civil Code, a surety may enforce contribution from his co-sureties only when he has paid the obligation in consequence of a lawsuit filed against him. Four years ago, the Supreme Court broadened this right to enforce contribution by holding that where the co-sureties had knowledge of payments made by the surety and consented thereto, they would be deemed equitably estopped from invoking the

22. Reconstruction Finance Corporation v. Holloway, 191 La. 583, 186 So. 35 (1938); Walter v. Calcasieu Nat. Bank of Lake Charles, 192 La. 402, 188 So. 43 (1939).

23. 193 La. 89, 190 So. 342 (1939).

24. Art. 326, La. Code of Practice of 1870.

code provision.[25] Under this ruling, a judgment of the trial court maintaining an exception of no cause of action filed by the co-sureties to the surety's suit to enforce contribution was reversed and the case remanded for trial. The cause came before the court again this year, on appeal from a judgment rendered in favor of the defendants after a trial on the merits. Under a finding that no knowledge or consent of the co-sureties to the payments made by the surety had been proven, the judgment appealed from was affirmed.[26]

An elementary rule of suretyship views the discharge of the principal debtor as working the release of the surety.[27] This principle was applied in *Williams v. De Soto Bank & Trust Co.*[28] There the plaintiffs sought to hold the defendants (other than the bank named) as the sureties on all obligations of a defunct bank which was indebted to plaintiffs. The named defendant was sued because it had purchased all the assets and assumed all the obligations of the defunct bank. In due course the plaintiffs compromised their claim against the named defendant bank, and thereupon all the other defendants pleaded their release. Under a holding that the pertinent banking statute[29] made the named defendant the principal debtor upon its purchase of the assets and assumption of the obligations of the defunct bank, the court maintained the defense asserted and dismissed plaintiff's suit.

In *Brock v. First State Bank & Trust Co.*[30] the defendant bank in liquidation was sued on a promissory note, various individuals having been joined as guarantors of the obligation. A number of the defenses unsuccessfully urged have no connection with the present subject and will be discussed hereinafter.[31] The defendant guarantors sought to escape liability on the theory that the guaranty was one personal to the original creditor which could not be urged by the plaintiff merely because of his acquisition of the note. Since the latter and the guaranty contract were parts of the same transaction, and since no language in either obligation contained restrictive provisions limiting the benefit of the guaranty contract to the payee of the note, the court overruled this defense.

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25. Leigh v. Wright, 183 La. 765, 164 So. 794 (1935).
26. Leigh v. Wright, 192 La. 224, 187 So. 649 (1939).
27. Art. 2205, La. Civil Code of 1870.
28. 192 La. 848, 189 So. 451 (1939).
29. La. Act 300 of 1910, as amended by La. Act 198 of 1934 [Dart's Stats. (1939) §§ 697-706].
30. 192 La. 77, 187 So. 60 (1939).
31. Infra, p. 123.

(d) *Mortgages.* Article 3269 of the Civil Code announces the general rule[32] that privileges on immovables prime mortgages, and further provides that the loss which results from this priority "must be borne by the creditor whose mortgage is the least ancient." In *Blappert v. Succession of Welsch*[33] two mortgage creditors had enforced their claims against separate pieces of property, leaving no assets from which sufficient funds could be realized to pay the privileged debts and charges of the succession. Under the rule noticed above, the contest resolved itself into a determination of "whose mortgage is the least ancient." The holder of the most recent mortgage, to escape the effect of the code provision, contended that his mortgage was merely the renewal of an older one executed prior to that of his competing creditor. Since the inscription of this older mortgage had been cancelled by agreement of the parties, and also because the new mortgage effected the hypothecation of additional property, the court rejected this contention.

In *Wallace v. Cassiere,*[34] under proceedings of a family meeting regular on their face, the general mortgage of minors on the property of their natural tutrix was subordinated to a special mortgage to be executed by the tutrix thereafter. The latter hypothecation was effected for the purpose of raising sufficient funds to pay another mortgage on the property which primed the minors' mortgage and thus avoiding an imminent foreclosure. The proceedings of the family meeting were attacked on the grounds that no such meeting had ever been held and that the under-tutor had not been present. Since the minors had benefited from the special mortgage, they were held equitably estopped from urging the invalidity of the family meeting.

In *People's Homestead & Savings Ass'n v. Worley*[35] plaintiff had obtained judgment against two defendants in solido, which when recorded became a judicial mortgage against the property of both. Counsel for the judgment creditor, without authority and through error, cancelled the judgment as to one of the solidary debtors without reserving its rights as against the other. Plaintiff

32. One exception to this rule is that the mortgage primes the privilege of materialmen for supplies furnished in the construction of improvements commenced after the recordation of the mortgage. La. Act 298 of 1926, §§ 1, 12, as amended by La. Act 323 of 1938, § 1 [Dart's Stats. (1939) §§ 5106, 5117]. Others result from the failure of the creditors to have their privileges timely recorded. Art. 3274, La. Civil Code of 1870, as amended by La. Act 45 of 1877.

33. 192 La. 173, 187 So. 281 (1939).

34. 192 La. 581, 188 So. 707 (1939).

35. 191 La. 453, 185 So. 880 (1939).

therefore sought to reinstate the judgment insofar as the latter was concerned. The trial court's judgment maintaining an exception of no cause of action to the petition was reversed and the case remanded for trial. The opinion, unfortunately, does not state sufficient facts to permit the reader to appraise the court's decision.[36]

Jordan v. Crichton[37] is of interest because of its holding that a compromise between mortgagor and mortgagee, confirmed by the moratorium commissioner,[38] has the effect of a judgment between the parties. The judgment of the trial court decreeing the specific performance of the compromise order was affirmed on appeal.

Trite principles of the law relative to mortgages were applied by the two remaining cases on the subject. In one,[39] the court reiterated the settled rule that the mortgagee is not affected by any defects of title not apparent on the face of the public records. The other[40] applied the rule that only the effect of the registry of a mortgage ceased after the lapse of ten years. Since the mortgage indebtedness had not prescribed, the mortgage remained valid as to the mortgagor.

(e) *Chattel Mortgages.* A source of some annoyance to Louisiana attorneys generally, and to title examiners in particular, lay in the fact that buildings were susceptible of hypothecation both under a chattel mortgage and a mortgage on immovables. An examination of the immovable mortgage records was not sufficient to justify an opinion that the property and all of its improvements were free from encumbrance. One of the most important decisions handed down by the Supreme Court of Louisiana during the past term was *Buchler v. Fourroux,*[41] which

36. The precise reason why the judgment was cancelled insofar as it affected the first debtor does not appear from the opinion. If such cancellation resulted from a compromise which the attorney had no authority to execute, then clearly the result of the decision is correct. But if the cancellation was the result of an authorized compromise, and counsel merely failed to make the proper reservation of rights against the named defendant, then notwithstanding the apparent claim that "counsel was not authorized to fail to make the proper reservations," it would seem that the decision is questionable. Cf. Art. 2203, La. Civil Code of 1870. There is a vast difference between the agent's performance of unauthorized acts, and his failure to comply with instructions.

37. 191 La. 920, 186 So. 612 (1939).

38. Under the provisions of La. Act 2 of 1934 (2 E.S.).

39. Bell v. Canal Bank & Trust Co., 193 La. 142, 190 So. 359 (1939).

40. Schutzman v. Dobrowolski, 191 La. 791, 186 So. 338 (1939), noted in (1939) 13 Tulane L. Rev. 637.

41. 193 La. 445, 190 So. 640 (1939).

apparently ended this annoyance. Section 1 of the Chattel Mortgage Act,[42] permitting the execution of chattel mortgages upon "buildings on leased ground," was held unconstitutional as being broader than the title of the statute. Under the civil law of Louisiana buildings erected on real estate become immovable by nature. The title's announced legislative intent to permit the mortgaging of movable property was held not to afford sufficient indication of a provision sanctioning the mortgaging of immovables by nature.

The Chattel Mortgage Act[43] requires the reinscription of the mortgage every five years for its continued validity as to third persons. In *E. C. Palmer & Co. v. Louisiana Printing Co.*[44] the plaintiff had proceeded *via executiva* to enforce its chattel mortgage on certain machinery and equipment of the defendant. The latter was then in the process of judicial liquidation and at the request of the liquidators plaintiff agreed to refrain from judicial sale of the movables to enable the defendant to continue its business. These agreements were renewed from time to time, until more than five years had elapsed since the execution of the mortgage. The liquidators then urged the invalidity of the chattel mortgage because of plaintiff's failure to reinscribe. Under these facts, the court properly held the liquidators equitably estopped from urging this defense.

D. Successions

Wills

(a) *Interpretation.* In *Succession of Vatter*[1] a bequest to "all my other Nieces & Nephews 5,000—"[2] was found "plain and unambiguous."[3] The phrase was interpreted to indicate a single gift of $5,000 to all rather than separate $5,000 gifts to each. Since the services rendered by the attorneys were "purely routine" and included "no serious litigation"[4] the court reduced the fee from $15,000 to $10,000. A claim by the brother of the testatrix for services rendered was disallowed as it lacked necessary corroboration.

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42. La. Act 198 of 1918, § 1 [Dart's Stats. (1939) § 5022].
43. La. Act 198 of 1918, § 17, as amended by La. Acts 81 of 1922 and 232 of 1924 [Dart's Stats. (1939) § 5028].
44. 192 La. 757, 189 So. 126 (1939).
1. 192 La. 657, 188 So. 732 (1939).
2. 192 La. at 661, 188 So. at 733.
3. 192 La. at 667, 188 So. at 736.
4. 192 La. at 665, 188 So. at 735.

(b) *Revocation. Succession of Dambly.*[5] The essence of this case is found in decision of the question whether a will is revoked by a later will which is intact but unfit for probate due to its having been found in three pieces. The court held that the first will stood. The details and possibilities of this very interesting case have been previously discussed in this journal and need not be again presented at this time.

(c) *Annulment for insanity.* The case of *Finck v. Delmore,*[6] stripped of procedural and administrative questions, resolves into a consideration of the factual question of the sanity of an uninterdicted testator. After most careful consideration, the court upheld the will. It stated that even admitting the technical, medical classification to have been one of insanity, it was shown that the testator made her will at a "lucid interval." The court reiterated the rule, announced in *Succession of Ford,*[7] that the opinions of experts, "however weighty and plausible, must yield when opposed to facts." The old question of whether an *interdicted* person can make a valid will during a "lucid interval" is still open. Dictum in the case under discussion indicates that such a will would be invalid.[8]

The will in question had provided for certain legacies, the usufruct of the whole being given to the testator's mother, an interdict. It was held that the special legacies might now be collected from the succession of the mother, who had enjoyed the usufruct until her death.

In *Succession of Tyler,*[9] decedent's will was annulled because it was clearly proved that the testatrix was insane at the time she executed the instrument. In the will itself was a clause providing for the "tombstone to be preserved and used in some way."[10] The proof was not sufficient to support the idea of a "lucid interval," which the court described as a "temporary cure," continuing long enough to give "certainty of the temporary restoration of reason."[11]

(d) *Proof of handwriting. Succession of Beals*[12] is concerned with proof regarding the authenticity of the handwriting of

5. 191 La. 500, 186 So. 7 (1939), noted in (1939) 1 LOUISIANA LAW REVIEW 464.
6. 192 La. 317, 188 So. 15 (1939).
7. 151 La. 571, 92 So. 61 (1922).
8. Finck v. Delmore, 192 La. 317, 324, 188 So. 15, 17 (1939).
9. 193 La. 480, 190 So. 651 (1939).
10. 190 So. at 652.
11. 190 So. at 656.
12. 192 La. 153, 187 So. 275 (1939).

decedent who had made an olographic will. Since the statements of "experts" were in direct conflict, the court relied upon the testimony of those who had "frequently seen the decedent write" and "were familiar with the decedent's handwriting." The proof satisfied the court that the will had been

> ". . . entirely written, dated and signed in the handwriting of the testator. . . . Moreover, it would appear that it would only be reasonable and the natural thing for the decedent to will his estate to his wife who had lived with him for twenty-six years instead of leaving it to his nieces and nephews who, from their own evidence, admit that there was no closeness between themselves and Joseph C. Beals's family for the last fourteen years."[13]

(e) *Universal legatees.* In *Succession of Peters,*[14] the testator had provided for particular legacies to his wife and unborn child and left to his brothers and sisters "in equal proportions the remainder of my estate," describing this remainder. The child was born alive, and the legacy left him was found to be less than one-third, his forced portion. The court declared that the brothers and sisters were "residuary or universal legatees" under the phraseology of the will and hence were obligated to make up the necessary contribution for the légitime of the child. The wife, as a particular legatee, suffered no diminution of her bequest.

Reduction

Prescription. Succession of Dancie.[15] This case is concerned with two definite and clear cut questions—one, factual, to determine where the deceased's domicile was in order to make certain that proper jurisdiction had been exercised in previous probate proceedings[16]—and second, to determine whether prescription had run on the right to bring an action for reduction. The court removed all doubt which hitherto may have existed regarding the rule that the five year prescription period in bar of actions to reduce excessive donations[17] begins to run on the date of judgment probating a will and *not* from the date of death or the date of actual putting in possession. The cause of action was said to have arisen at the time of probate. The parties at interest

13. 192 La. at 156, 187 So. at 276.
14. 192 La. 744, 189 So. 122 (1939).
15. 191 La. 518, 186 So. 14 (1939).
16. Art. 935, La. Civil Code of 1870.
17. Art. 3542, La. Civil Code of 1870.

are then informed that there was a will, who the testamentary heirs were, and so forth. In the words of the court,

> "The proceeding provides the forced heir with all the information necessary to enable him to prepare his suit to reduce the disposition to the disposable quantum. He is left in no doubt as to the person against whom his action must be brought. His right to demand a reduction accrues when the will is proved before a competent tribunal, recognized as valid, and its execution is ordered."[18]

The contention was made that the rule was not uniform and was thus confusing and that the position of the court was not consistent. It was pointed out that the jurisprudence was consistent in finding that in a testate succession, the prescriptive period begins to run from the date of probate, and in an intestate succession from the date of death, because in the latter case, reduction would have to deal with gifts *inter vivos,* and forced heirs would, in the latter case, be in possession of the necessary facts at the date of death. The case is valuable for its logic, its resumé of jurisprudence and for its definite and satisfactory conclusion on a hitherto not clearly defined point.

In the case of *Succession of Grivaud,*[19] opposition was made to the final account of a testamentary executor. The opponent contended that the disposable portion had been exceeded. However, the court found that, even admitting the allegation, the right to reduce had prescribed. It was urged that a tutor or curator should have been appointed for a minor who was alleged to be insane. This contention failed because it was not shown that the minor's interest had been in any way neglected.

Representation

Mims v. Sample.[20] This case again records the principle that an individual inheriting by representation is not bound for the warranties of the represented if he has renounced the latter's succession or accepted it with benefit of inventory. In this case, a minor for whom acceptance, if at all, must be with benefit of inventory, after coming of age renounced her father's succession. She cannot now be held for a warranty binding upon her father, who had illegally sold an undivided interest in land belonging

18. Succession of Dancie, 191 La. 518, 534, 186 So. 14, 19 (1939).
19. 192 La. 181, 187 So. 284 (1939).
20. 191 La. 677, 186 So. 66 (1939).

to his father, in whose succession the grandchild now claims a part by representation.

Irregular heirs

In *Succession of Bonner*,[21] it was alleged by petitioner that a will (naming him as executor) had been found and should be probated. The defendants, who had been recognized as heirs in a previous judgment, were the natural brothers and sisters of the deceased, and they claimed that the will in question had been confected after the death of the alleged testator and was spurious. The court reviewed the testimony most thoroughly and found that "the trial judge was not only justified in rejecting the plaintiff's evidence, but that he was eminently correct in doing so."[22] With proper judicial restraint, the court remarked that "they [plaintiffs] tell a most extraordinary story."

The case is of particular interest in that the half-blood, natural brothers and sisters of the deceased were recognized as the legal heirs under Article 923 of the Civil Code, apparently without controversy as to acknowledgment by their common ancestor. Ordinarily, proof sufficient to establish this relationship would constitute proof of informal acknowledgment. The decision is eminently correct and particularly satisfactory to students who have been disturbed by previous confusion in the jurisprudence. While the proof used in the lower court to establish the relationship does not appear in the opinion, the very fact that the court does not go into the question and apparently takes it as a matter of course in following the language of Article 923 is most encouraging. Since the common parent of these children was dead, the decision obviously would not be authoritative as to the rights of the natural brothers and sisters in a situation where the parent was alive. It might be persuasive, however, in giving similar unfortunates the right to the estate of a deceased brother or sister even when the living parent could not take for lack of having formally acknowledged. The reason for refusing the right to a parent is excellent but should not be asserted to prevent a natural brother or sister from benefiting. The result would be an additional penalty on the innocent illegitmate. This opinion avoids mention of the theory that the rights come to the brother or sister *through* the parent and hence must be determined according to the right which the parent would have had. The case

21. 192 La. 299, 187 So. 801 (1939).
22. 192 La. at 316, 187 So. at 806.

presents an equitable and proper application of Article 923 and achieves an ideal of social justice.

Settlement

The case of *Carbajal v. Bickmann*[23] is a prolongation of a dispute regarding the settlement of the succession of one Mrs. Seeger. The controversy has reached the Supreme Court in various phases for at least the fourth time. Mrs. Seeger, who died on March 8th, 1925, "left a will in which she provided for special legacies, consisting of two separate pieces of real estate in favor of her two daughters, Mrs. Manzella and Mrs. Bickmann respectively, as extra portions, free from collation."[24] The third daughter, plaintiff in this suit, questioned the validity of these bequests on several grounds and hence, in order to settle the matter, the three daughters entered into a written agreement stating the amounts each was to receive, the procedure to be followed, and other pertinent matters. Mrs. Manzella and Mrs. Bickmann breached the agreement by selling their undivided interests in certain of the properties. After much litigation, they are now claiming as defendants to Mrs. Carbajal's partition suit, under the agreements to which they themselves had failed to adhere. The partition was allowed, and their claims were rejected because it appeared that they had profited considerably and were now attempting to leave the third daughter, plaintiff, with practically nothing.

In *Re Buller's Estates*[25] is concerned with various questions arising in consolidated succession proceedings. The wife had one child by a previous marriage and one by Mr. Buller. During her second marriage, all of the property of Mr. Buller was transferred to her as a *dation en paiement.* In the settlement this payment was attacked by the child of the second marriage. The court found it to have been simulated, there having been no "existing debt" from Mr. Buller. It was found that Mrs. Buller died possessed of all separate funds she had ever had, allegedly used by Mr. Buller as a basis for the *dation.* As a conservatory measure, the movables had been sold by one of the heirs after agreement with the opposing heir and after an acceptance with benefit of inventory and institution of the attack on the giving in payment. The court held, however, that this did not constitute an uncon-

23. 192 La. 56, 187 So. 53 (1939).
24. 192 La. at 62, 187 So. at 55.
25. 192 La. 644, 188 So. 728 (1939).

ditional acceptance of Mr. Buller's estate estopping the plaintiff heir from denying the judicial acknowledgment of the *dation en paiement* by Mr. Buller in bankruptcy proceedings.

The *Succession of Marinoni*[26] sets forth another chapter in this prolonged and interesting settlement. The heirs of the universal legatee, sister of the deceased, attempted in this suit to take seizin of the decedent's estate from the testamentary executor. Since a suit was still pending to determine the claims of one Mrs. Lewis seeking to be recognized as the legitimate daughter and forced heir of the deceased, the court refused to grant the plaintiff seizin. The plaintiff also sought to have a child, referred to in the will as having been adopted, eliminated and to have the appointment of the widow as tutrix of this minor set aside. Exceptions of no cause of action and prematurity were filed in this connection and maintained by the court.

In *Burns v. Rivero*,[27] plaintiff sought to have a sale of realty to her set aside because only an undivided half interest was in her vendor. The latter had purchased the property during the community with funds earned in a business conducted by her. The court found that the children of defendant, vendor, had signed and recorded an instrument declaring the property to be the separate property of their mother. Since they were the only ones who could claim that their father's half of the property had been wrongfully sold, the title was held to be good because these children and their heirs were forever estopped from claiming an interest. The general question of heirs' estoppel is an involved one, by no means clear. The jurisprudence on the problem has extended over a long period and is not altogether consistent. The proper treatment of the problem requires more space than can be allotted in this brief resumé.

In *Succession of Hogh*,[28] forced heirs attempted to bring into the succession certain property standing in the name of their father's stepdaughter. They invoked Article 2239 giving the right to forced heirs to annul simulated contracts of those from whom they inherit. It appeared from the plaintiffs' petition that money and not real estate had been transferred by the father. Hence the plaintiffs were held to have shown no cause to lay claim to the property.

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26. 192 La. 751, 189 So. 124 (1939).
27. 192 La. 767, 189 So. 129 (1939).
28. 193 La. 260, 190 So. 399 (1939).

Trusts

The case of *H. C. Drew Manual T. School v. Calcasieu Nat. Bank*[29] disclosed that certain bonds belonging to plaintiff corporation had been pledged to secure a $10,000 note made payable to the defendants. The suit was for cancellation of the note and return of the collateral and was successful. Arrangements had been made to secure new capital for the failing bank. The note was given for stock in the corporation which was to take over the financially involved bank. The whole transaction was held void because it contravened Act 124 of 1882. This statute prohibits the pledging or encumbering of trust property by educational and charitable trusts. The plaintiff corporation was established under this act, as directed by the will of H. C. Drew.

Partition

In *Wyche v. Taylor*,[30] the court found that certain community property now owned jointly by divorced husband and wife, was *not* susceptible of division in kind and must be partitioned by licitation. The parties were held *not* to be bound by an unsigned agreement. The court emphasized the rule that judicial partition cannot be effected otherwise than by drawing of lots, or by sale and division of proceeds.

The case of *Cox v. Cox*[31] was concerned with partition of community property. The only question was one of ownership of 156 shares of stock. The court reviewed the testimony and found this item to be community property, since it was purchased with borrowed money by the husband after his marriage to the defendant. He purchased the property from his first wife in settlement of the first community.

Community Property

In *Succession of Lewis*,[32] the court found that proceeds of a life insurance policy taken out prior to the marriage of the deceased husband fell into his separate estate, the beneficiary having died before the insured. The premiums paid after the marriage were credited to the community. United States Adjusted Service Bonds were held to belong to the husband's separate estate since his service in the World War was rendered prior to his marriage though the certificate and bonds issued were re-

29. 192 La. 790, 189 So. 137 (1939).
30. 191 La. 891, 186 So. 602 (1939).
31. 193 La. 268, 190 So. 401 (1939).
32. 192 La. 734, 189 So. 118 (1939).

ceived after the marriage. The husband died intestate leaving a wife and brothers and sisters. The wife, of course, inherited the husband's share of the community,[33] and the brothers and sisters inherited equally his separate estate.[34] Costs were paid out of the movables and were prorated between the widow and collaterals.

E. Mineral Rights

Servitude

Prescription. The case of *State ex rel Bourgaux v. Fontenot,*[1] instances a proceeding to cancel a mineral reservation from the records for nonuse of the servitude. William McFarland sold land to Emile J. Bourgaux on August 24, 1907, and reserved the mineral rights. McFarland had acquired the land in full ownership during the existence of the community between himself and his wife. He died on October 29, 1915, leaving a widow who died in 1919 and many descendants, some of whom were minors and one of whom was interdicted subsequent to McFarland's death. Under the doctrine of *Sample v. Whitaker,*[2] and *Ford v. Williams,*[3] prescription would not have run because of the status of some of the co-owners. Plaintiffs asked for cancellation on the theory that the widow in community was vested of right in one-half of the servitude and held the other half in usufruct; that the minors held a naked title only and that it was the widow's duty to preserve the servitude by user. The minors' relief was said to be only against her for having failed to preserve the servitude under Article 590 of the Civil Code. The court disposed of this plea by the simple statement that the fact that Article 590 gives relief against the usufructuary for the loss of a servitude does "not change the law that 'Prescription does not run against minors and persons under interdiction. . . . '" The same point was urged in a supplemental brief in *Ford v. Williams*[4] with negative results. The decision does not purport, of course, to indicate the respective rights of naked owners and usufructuries of a mineral servitude but it inclines at least toward the view that a very different matter from ordinary usufruct is involved and must receive special treatment that the rights of both parties may be

33. Art. 915, La. Civil Code of 1870.
34. Art. 912, La. Civil Code of 1870.
1. 192 La. 95, 187 So. 66 (1939).
2. 172 La. 722, 135 So. 38 (1931).
3. 189 La. 229, 179 So. 298 (1938).
4. 189 La. 229, 179 So. 298 (1938).

protected.[5] The usufruct of a mineral servitude, a real right, presents a more involved problem than usufruct of the ordinary predial servitude and, under the logical assumption that the taking of oil and gas is really an alienation of the substance itself, certainly usufructuary and naked owner should concur in any disposition of the right.

The alternative demand of the relators pointed out a clause in the contract of sale stipulating that the vendee of the land might buy the mineral rights for $550. The contention was that this clause was a resolutory condition. The court held that if it were, it had prescribed in ten years.

The use by the court of the word *interrupted* in connection with the minor's protection rather than *suspended* is disturbing. The same thing, incidentally, is true of Act 64 of 1925. Of course, the term may have been inserted inadvertently and probably will have no effect when the distinction becomes important to the issue but if the well known very different results are to be expected, it is unfortunate that the word is not used in its ordinarily understood sense.

In *Cox v. Acme Land & Investment Co., Inc.*,[6] plaintiff, Cox, owned two tracts of land designated by the court as *A*, containing forty acres, and *B*, containing twenty acres. Cox created a servitude on tract *A* on September 21, 1922 by selling to one McFadin one-half of the mineral rights in the forty acres. This is the servitude in question which plaintiff maintains should be cancelled because of prescription of ten years nonuser. Defendant, who had acquired one-sixth of the mineral rights in this tract, maintained that the prescription had been interrupted by production and acknowledgment. The plea of interruption was grounded on the following facts. On February 5, 1924, Cox created a servitude on tract *B*, by selling one-fourth of the mineral rights in the twenty acres to one Cook, who sold one-sixth to Roy. On November 15, 1926, Cox, Roy, and six of the other ten mineral owners leased to the Woodley Petroleum Company for a primary term of five years the entire sixty acres comprising both tracts, *A* and *B*. This lease was *not* signed by four owners of interests in tract *A*. On April 4, 1937, a well was brought in on tract *B* by the Woodley Petroleum Company and production continued to date. Defendant contended that the lease to the Woodley Petroleum

5. See Daggett, Mineral Rights as They Affect the Community System (1938) 1 LOUISIANA LAW REVIEW 17, 30 et seq.

6. 192 La. 688, 188 So. 742 (1939).

Company was a joint lease which integrated the two servitudes originally created so that production on any part of the sixty acres would preserve the whole. The court applied the "intention test," well defined by previous jurisprudence[7] and found the lease *not* to be joint and hence not to constitute acknowledgment of a continuance of the life of the servitude upon which no production occurred. The court said:

> "The fact that the life of the Woodley lease was extended by production on *one of the servitudes covered* by the lease did *not* relieve the owners of the other servitude of their obligation to exercise their rights thereunder."[8]

A second lease signed by Cox dealing with tract *A* was also found not to be an acknowledgment of rights of the defendant, was not intended as such and was made *after* prescription on the servitude had run and hence had no effect.

Munn v. Wadley,[9] is the companion case to *Childs v. Porter-Wadley Lumber Co.*,[10] and the relationship is similiar to that between the *Sample v. Whitaker* cases. In the *Childs* case a landholder in good faith cleared his land of the original mineral reservation under the doctrine of *Sample v. Whitaker*[11] and *Sample v. Whitaker*[12] and Acts 161 of 1920 and 64 of 1924. In the present suit the defendants urged against a plaintiff landowner in bad faith that under the doctrine of *Sample v. Whitaker*[13] prescription had been suspended by virtue of the minority of one of the stockholders who had originally reserved, because when the corporation was dissolved the property vested in the stockholders. The case turned on the question of whether or not the mineral right, a real right, passed immediately to the stockholders, one of whom was a minor. Louisiana law governed since a transfer of title of realty in Louisiana was in question. The court held that title did not and could not pass without a written deed or judicial decree and that title remained "in the corporation, in liquidation, long after" the date of dissolution and in fact had never been transferred by deed. This doctrine was said to

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7. See Daggett, Mineral Rights in Louisiana (1939) 53 et seq.

8. Cox v. Acme Land & Investment Co., Inc., 192 La. 688, 701, 188 So. 742, 747 (1939) (italics supplied).

9. 192 La. 874, 189 So. 561 (1939). This case is also discussed in the section on Corporations, infra p. 127.

10. 190 La. 308, 182 So. 516 (1938).

11. 171 La. 949, 132 So. 511 (1930).

12. 174 La. 245, 140 So. 36 (1932).

13. 172 La. 722, 135 So. 38 (1931).

apply whether a corporation owed debts or not. That being the case, obviously the minority of a stockholder played no part. Acceptance of payments was held to have been *not* a waiver but a mere acknowledgment that the reservation was "yet in force" when the payments were made. It was *not* "an admission that the rights were not then subject to the prescription of ten years *liberandi causa.*" The plea that the reservation was a "mandate coupled with an interest" was disposed of by citation from *Childs v. Porter-Wadley Lumber Co.*,[14] which appeared in the following language:

> " 'We do not find any merit in the defense that the reservation of the minerals for thirty-five years, with the obligation on the part of the vendor to pay the vendee or assigns one-half of the net revenues derived from the sale of the minerals constituted a mandate coupled with an interest and therefore was imprescriptible.' "[15]

Reiteration of the settled doctrine that a mineral grant or reservation, a servitude, would prescribe in ten years of nonuser without suspension or interruption followed, with a clear expression that this legal result would ensue regardless of the term stipulated in the contract. In discussing the matter of the "mandate coupled with an interest," the following interesting statement appears:

> "Aside from the question whether this plea is consistent with the plea made in the answer to the suit, that the reservation constituted a mandate coupled with an interest, it would be a matter of no importance if the reservation should be termed a lease, or if it should be termed a mandate coupled with an interest."[16]

The use of the word *lease* in this sentence, while of no real value since the question was not in issue, is nevertheless worthy at lease of observation in connection with the unanswered problem of a maximum term for a mineral lease.

The case of *Wadley v. Gleason*[17] is an associate to that of *Munn v. Wadley*[18] decided on the same day. The additional question is one of estoppel. The plaintiff in this suit was the tutor of

14. 190 La. 308, 182 So. 516 (1938).
15. Munn v. Wadley, 192 La. 874, 883, 189 So. 561, 564 (1939).
16. 192 La. at 882, 189 So. at 563.
17. 192 La. 1052, 190 So. 127 (1939).
18. 192 La. 874, 189 So. 561 (1939).

the minor whose interest was adversely disposed of in the *Munn* case and the defendant, Gleason, was her undertutor. Both were stockholders in the corporation. Several petitions had been filed by the tutor, in which the undertutor concurred, asking for power to deal with the minor's mineral interests. These petitions were alleged by the plaintiff to indicate an acquiescence on the part of the defendant to the theory, held erroneous in the *Munn* case, that title vested in the stockholders of the corporation at the date of dissolution of the legal entity. The plea was that the defendant was thereby estopped to contend now that prescription had run against the mineral servitude of the corporation in favor of him, the landowner. The court found that the plea of estoppel was not well founded under the following test:

> "One of the essential elements of a plea of estoppel is that the party pleading it shall have been induced by the false representation of the party against whom it is pleaded to act in a way in which he would not have acted but for the false representation. . . . Besides, the false representation must be one of fact, not merely an error of law, in order to constitute an estoppel."[19]

Royalty

Vincent v. Bullock[20] arose as a slander of title suit to remove from the record a sale of a royalty interest by defendants, which had been reserved by plaintiffs in a sale of the land more than ten years previously. The suit was dismissed. The court held that a royalty interest of this nature was not a rent charge and not a servitude but a "real obligation which passed with the property into the hands of the owner" subject to the happening of the uncertain event, production, which must take place within ten years or the condition be considered as broken. While the reservation was made in perpetuity, the court's reasoning indicated that royalty was grounded upon and necessarily proceeded out of the right to explore which, under the law of servitude and prescription of real rights, could be retained without exercise for only ten years.[21] Many questions are opened by this decision. What would constitute "exercise" of the real right? The right to explore was sold with the land and hence obviously is not to be considered. The law governing suspensive conditional obligations

19. Wadley v. Gleason, 192 La. 1052, 1057, 190 So. 127, 129 (1939).

20. 192 La. 1, 187 So. 35 (1939). See Comment (1939) 1 LOUISIANA LAW REVIEW 416.

21. Art 3529, La. Civil Code of 1870.

offers many possibilities. The question of suspension by minority or otherwise is immediate together with many other problems, the solutions of which are awaited with great interest. If the judiciary develops this concept as carefully and surely as they did the doctrine of servitude, another satisfactory chapter will be added to the law of mineral rights in Louisiana. The decision may serve to check the wide speculative royalty dealing which is often without regard to landowners or producers of this valuable natural resource and which might tend to becloud and confuse the best interests of both.

Payment of Rent Royalty

In *Parker v. Ohio Oil Co.*,[22] an oil company continued to pay rent royalties to the father of plaintiffs as "tutor" after they had reached majority. Without first getting an accounting of tutorship from the father and having him discharged as tutor, the plaintiffs now sue for these royalties. This, they have a right to do. A "tacit mandate" may have continued between the father and children after their majority but defendants cannot rely upon this as defendants had the means of finding out the legal limitations of defendants' authority. There was no estoppel by mere silence or "standing by" of plaintiffs, as defendants were not "misled into doing that which [they] would not have done but for such silence."[23] They knew they were dealing with the father as tutor and could have examined the tutorship proceedings to discover the ages of the children had they wished to. The three year prescription on oil rent collections was applied, the judge being unable to regard the suit as one for an accounting.[24] This decision evidences again the strictness of the court in holding oil companies liable when payment has been made, but to the wrong party.

Lease

(a) *Cancellation.* The case of *Tooke v. Simplex Oil Co., Inc.*[25] was a suit for cancellation of a lease on the ground that production was not in a paying quantity. The court found that the plaintiffs by letters had demanded, as an apparent satisfaction of the lease contract, that the defendants begin drilling within thirty days, which they did. They expended $30,000 in develop-

22. 191 La. 896, 186 So. 604 (1939).
23. 191 La. at 910, 186 So. at 608.
24. Cf. Da Ponte v. Ogden, 161 La. 378, 108 So. 777 (1926).
25. 191 La. 726, 186 So. 83 (1939).

ment after the plaintiffs' demands were made. It was held that plaintiffs are now estopped from demanding cancellation.

The case of *Breard v. Pyramid Oil & Gas Co., Inc.*,[26] was an unsuccessful attempt to cancel a lease. Plaintiff had originally leased 520 acres under a contract which provided that, after discovery, defendant must drill at least one producing well to each eighty acres. The facts that complaint had been made that this provision was not being carried out and that the parties had entered into a supplemental agreement changing the original lease showed that there was no misunderstanding of the amendment to the original contract. The agreement as modified provided that the lease was to remain in effect "as long as oil or gas was produced in paying quantities from any part of the property." There was consideration for the second contract because two hundred and eighty acres of land covered in the original agreement was released and "certainty with reference to controverted rights"[27] was secured.[28]

After the original lease was signed the first lessee assigned part to a second corporation, the Junior Company. The supplemental agreement upon which the decision rested was signed with the two corporations. After that there was a reassignment by the Junior Company to the original lessee. Since production had ceased on the tract held by the Junior Company, plaintiff pleaded that even under the second agreement, production on the tract held by the original assignor would not hold the acreage on the originally assigned tract. The plaintiff maintained that the reassignment was simulated but was unable to prove it. There was no discussion of the distinction between sublease and assignment, the latter word being used. Admitting that the reassignment was not simulated, why the transfer should have reincorporated the acreage into the original lease does not appear. The principle is of interest under the doctrine of the line of cases holding that an assignment constitutes a new lease which must stand by itself under the production clause. The interpretation of the supplemental agreement with both companies might have produced this result, but if so, why the discussion regarding simulation? If the original assignment constituted a new lease under *Smith*

26. 191 La. 420, 185 So. 303 (1938).
27. 191 La. at 426, 185 So. at 305.
28. Citing Harris v. United Gas Public Service Co., 181 La. 983, 160 So. 785 (1935).

v. Sun Oil Co.,[29] why should a second disposition to the original assignor produce different results than if made to a third person?

(b) *Annulment.* The case of *Reiners v. Humble Oil & Refining Co.*,[30] was an action to annul a mineral lease made prior to interdiction on the ground that the lessor was insane. In the judgment of the lower court the proof failed to satisfy the test for notorious insanity laid down by the Civil Code and after a most careful and thorough analysis of the record the Supreme Court was of the same opnion.

(c) *Act No. 205 of 1938.* The case of *Allison v. Maroun*[31] is based on Act 205 of 1938. It was admitted to be a matter of general knowledge that this act was passed to vitiate the effect of the decision in *Gulf Refining Co. v. Glassell.*[32] The question was "whether an owner of a mineral lease may maintain an action for slander of title without having possession of the leased premises, but basing his right of action upon the possession held by the lessor."[33] The court held that while lease owners have under the statute the same rights in general to assert and defend their titles as have landowners, they have no *greater* rights and since a landowner not in possession could not bring this action, neither could a lease owner not in possession, since a lessor's possession does not inure to the lessee, though the converse is true. The court indicated that under the act, had the lessor been in possession of his "incorporeal immovable property," (the lease), he could have brought the action. Plaintiff was remitted for relief to Act 38 of 1908 which provides for situations where parties are not in actual possession of the real property.

(d) *Joint venture.* The case of *DeJean v. Whisenhunt*,[34] was an action by two plaintiffs to recover their portions of the profits made on a certain lease obtained by the defendant under an alleged joint venture. The court held that, since the case was governed by the law in effect prior to the adoption of Act 205 of 1938 classifying mineral leases as real property, the trial judge was correct in overruling the exception that oral evidence was not admissible. Furthermore, under the doctrine cited from *Emerson v. Shirley*,[35] proof of a joint venture might be made in

29. 165 La. 907, 116 So. 379 (1928).
30. 192 La. 415, 188 So. 47 (1939).
31. 193 La. 286, 190 So. 408 (1939).
32. 186 La. 190, 171 So. 846 (1936).
33. Allison v. Marous, 193 La. 286, 190 So. 408, 409 (1939).
34. 191 La. 608, 186 So. 43 (1938).
35. 188 La. 196, 175 So. 909 (1937).

any case by parol evidence if it was only collateral to the question of ownership and was not introduced for the purpose of establishing title. The factual question of the joint venture was established, and the plaintiffs were awarded their two-thirds of the profits.

Damages

The case of *Fite v. Miller*[36] was a suit for damages for breach of contract by failing to drill at defendant's expense for joint benefit, argued on an exception of no cause or right of action. This case is of particular interest as it clearly and satisfactorily lays down another important rule in the law of oil and gas. After a thorough review of the authorities of other states and a comparison of our law with the common law, a divided court held that a suit of this nature does disclose a cause of action. The case in fine was grounded on Article 2451 of the Revised Civil Code of 1870, and the measure of damages for breach was said to be

> ". . . the value of the uncertain hope which the plaintiff had, in consequence of the assurance that a well would be drilled in search of oil or gas on the leasehold. . . . We are not called upon now to lay down a formula for ascertaining the value of the uncertain hope which the plaintiff claims he was deprived of. The best criterion will be the amount that it would cost to drill the well to the depth specified."[37]

The court thus makes it clear that the value of the hope is the measure of damages. After indicating that this hope may best be measured in terms of the cost of drilling a well, the court suggests further that the terms of the particular contract to drill may be considered in arriving at this cost.

During the development of the law of mineral rights, litigants have had great difficulty in obtaining damages due to the peculiar nature of the subject matter involved. If this clearly defined rule is adhered to, it may do much to protect valuable interests from persons who would take advantage of a situation which tended to promote the activities of speculators who could gamble with the potential assets of others with a minimum danger to themselves.

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36. 192 La. 229, 187 So. 650 (1939), noted in (1939) 2 LOUISIANA LAW REVIEW 198, and (1939) 13 Tulane L. Rev. 639. This case is also discussed in the section on Conventional Obligations, supra p. 55.

37. 192 La. at 250, 187 So. at 657.

In the case of *McCoy v. Arkansas Natural Gas Corporation*,[38] reaching the Supreme Court for the third time,[39] the plaintiffs were again disappointed. This suit was in tort and predicated upon the expression of the court in the second case of the series to the effect that damages might be estimated and awarded to an adjacent landowner by virtue of the fault of his neighbor in allowing gas to escape if it could be shown that the market value of the land or mineral rights had been impaired. A great deal of evidence was carefully reviewed, and the court found that there had been no fault. It was established that, while in the light of subsequent events better judgment might have been exercised, there was no neligence or lack of earnest effort to control the wild well.

The case of *Ferguson v. Britt*[40] was an action for damages for breach of contract by executing another lease to a third party before the first lease (to plaintiff) had been recorded. The defense was that there was no bad faith on defendant's part and that no damages were actually suffered by plaintiff. Plaintiff paid for the lease by draft which was never cashed. Plaintiff attempted to prove that he had sustained substantial losses because he could have obtained a high price for his lease but for defendant's act. This he could not prove "with that reasonable degree of certainty the law requires."[41] Since plaintiff sustained no loss and was not deprived of profit, the court awarded $300, the difference between the amount that plaintiff had paid for the lease and the amount the second lessee paid on the same day.

F. Prescription

An indispensable unit in every well-developed legal system is a scheme of prescription—by whatever names it may be called. This is necessary because people frequently fail to exercise the full measure of their rights and the law must carry out its function of eliminating uncertainty between conflicting interests. Thus through failure to exercise his rights a person may either lose a right of action to demand something or may forfeit his property to somebody else. Properly speaking, these two forms of prescription constitute a mode of extinguishing obligations and a

38. 191 La. 332, 185 So. 274 (1938).

39. Previous appearances of this case before the Supreme Court are reported in 175 La. 487, 143 So. 383 (1932) and 184 La. 101, 165 So. 632 (1936).

40. 191 La. 371, 185 So. 287 (1938).

41. 191 La. at 378, 185 So. at 289.

mode of acquiring property. The common denominator which brings the two together under the one heading of Prescription is the concept of inaction of the losing party.

Liberandi causa

In order to fix the time limit of inactivity beyond which a right of action is lost, a balance must be struck between the importance of the right and the societal interest in eliminating uncertainty. Of course, the latter force is the controlling one, and the result is expressed in the different time limits of the various liberative prescriptions. All cases are provided for either specifically or by general category.

Where there are no complications as to interruption or suspension of the running of the time, the matter is simply a calendar computation of the period of inactivity—starting from the moment when active exercise of the right became possible. However, another phase in which dispute may center is the preliminary identification or classification of the right in question. Thus, in *Hartman v. Greene*[1] where the plaintiff was suing the defendant for inducing a breach of contract, Chief Justice O'Niell properly classified the claim as one in tort and therefore barred by the prescription of one year. The plaintiff's contention that the cause of action was one in damages *ex contractu* was ruled out because the defendant had no contractual relationship with the plaintiff.

A similar issue about the identification of the cause of action was the basis for litigation (and dissent) in *Shepard Realty Co. v. United Shoe Stores Co.*[2] After making a twenty year lease, the lessee refused to take possession and never did occupy the premises alleging that the building was not delivered "in a tenantable condition" as stipulated in the contract. The defendant's plea of a three-year prescription under Article 3538 of the Civil Code[3] was sustained in the lower court, and on this point there was affirmance by the Supreme Court. The majority opinion accepted the claim as coming under "arrearages of rent charge[4]

1. 193 La. 234, 190 So. 390 (1939).
2. 193 La. 211, 190 So. 383 (1939).
3. Art. 3538, La. Civil Code of 1870: "The following actions are prescribed by three years: That for arrearages of rent charge, annuities and alimony, or of the hire of movables and immovables. . . ."
4. The present English text "arrearages of rent charge, annuities" is an inadequate and misleading translation of the original French as found in Art. 3503, La. Civil Code of 1825: *"arrérages de rentes perpétuelles ou*

. . . or of the hire of movables and immovables." The dissenting opinion of Justice Higgins considered the claim as one in damages for breach of contract and not an action to recover rent.

Another conflict as to the nature of the cause of action was settled in *Peterson v. Moresi*[5] where it was held that a suit for title to real estate was a real action and was not barred by the ten-year prescription of personal actions.[6]

In *Morris v. Foote*,[7] one of the grounds for contesting title to an adjudicated property was that the processes in the foreclosure proceeding had incorrectly been issued to and served on a tutrix instead of the plaintiffs through their tutrix.[8] The court held that this irregularity came within the terms of Article 3543 and that the liberative prescription of five years was applicable.[9]

An instance of a special statutory liberative prescription came up in the case of *Causey v. Opelousas-St. Landry Securities Co.*[10] The defendant held the property under a deed which purported to be "founded on a forfeiture for taxes" and he showed that the original vendee and successors in title had paid the taxes for ten years before and for three years after Act 185 of 1904. This met the requirements of the statute and the thirteen year prescription was upheld.

Acquirendi causa

Although the inactivity of a person is in itself a sufficient basis for liberative prescription, the requirements for acquisitive prescription are more extensive. As a mode of acquiring property for the new owner, there must be not only the negative loosening of the prior owner's ties through inactivity (for a certain length of time) but also some positive basis for the establishment of the property relationship in the new owner. This positive factor

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viagères." The same French text in the Civil Code of 1808, p. 488, 3.20.78, is more correctly translated as "the arrears due on life annuities."

In the present case the court avoided falling into an erroneous application of this part of the article by classifying the claim more specifically under the latter part of the same sentence of Article 3538, ". . . for arrearages . . . of the hire of movables and immovables." However, as indicated in Justice Higgins' dissent, the classification of the action as one to recover rent can very well be disputed.

5. 191 La. 932, 186 So. 737 (1939).

6. Art. 3544, La. Civil Code of 1870.

7. 192 La. 996, 189 So. 601 (1939).

8. La. Act 179 of 1918, § 1 (2) [Dart's Stats. (1939) § 1933 (2)].

9. This article was amended and the period reduced to two years by La. Act 231 of 1932. However, the facts of the present case occurred prior to the amendment.

10. 192 La. 677, 188 So. 739 (1939).

is called *possession,* and must be shown for the specified period of time.[11] Since the original owner's inactivity is only a negative incident of acquisitive prescription, the problems necessarily focus on the positive element of the present holder's possession.

Even when there is absolutely no color of right or title, it is necessary in order to acquire "possession" of property that there be not only a corporeal possession[12] of the thing but also the intention of possessing *as owner.*[13] Consequently, in *Walter v. Calcasieu Nat. Bank of Lake Charles*[14] it was pointed out that a pledgee cannot have the kind of possession that is necessary as a basis for acquisitive prescription. As long as a person has corporeal possession of a thing by reason of a situation which itself constitutes acknowledgment of somebody else's ownership, he can not acquire that thing by prescription.[15]

Acquisitive prescription, as a mode of acquiring property, is sometimes easier to prove than to establish title on the merits. Thus, in *Bremer v. Young,*[16] a jactitation suit was converted into a petitory action when the defendant set up a record title to the property, and the plaintiff established his ownership by means of showing a thirty year prescription. Tacking on a prior possession[17] by his mother was permitted on proof that she had really purchased for her son and had transferred the title to him a few years later.

Again, in *Continental Land & Fur Co. v. Lacoste,*[18] the simplest solution of a question of title in a petitory action was by use of the thirty year prescription. However, this was limited to those parts of the property which were actually possessed and clearly distinguishable from the surrounding marsh. Likewise, in *Smith v. King*[19] the defendant's perfect record title was attacked by one who claimed an interest emanating from an alleged community two generations back. Instead of trying to untangle

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11. Arts. 3441 et seq., 3473, 3474, 3475, 3479, 3487, 3488, 3500 et seq., 3506 et seq., La. Civil Code of 1870.

12. Although physical possession of a part of a large tract may suffice as a basis for civil possession of the rest, there can be no such civil possession of any part of the property which is in the physical possession of somebody else. Morris v. Hankins, 192 La. 504, 524, 188 So. 155, 162 (1939).

13. Arts. 3436, 3487 et seq., 3500 et seq., La. Civil Code of 1870. See also Arts. 3473-3475, 3479, 3487, La. Civil Code of 1870.

14. 192 La. 402, 188 So. 43 (1939).

15. Arts. 3489, 3490, 3520, La. Civil Code of 1870.

16. 192 La. 261, 187 So. 661 (1939).

17. Arts. 3493-3496, La. Civil Code of 1870.

18. 192 La. 561, 188 So. 700 (1939).

19. 192 La. 346, 188 So. 25 (1939).

the knotted facts for a decision on the merits, the court confirmed the defendant's title on the basis of a ten year prescription in good faith.

As distinguished from the longer term prescription in favor of one who *adversely* possesses as owner, there is the shorter term prescription in favor of one who believes and has reasonable basis to believe that he is possessing as true owner. To get the benefit of this, the possessor must produce a "just title" and prove his "good faith."[20] In *Garner v. Sims*,[21] through a complex set of facts and mineral transfers emanating from two different sources, the court found merit in the defendant's plea of a ten year prescription in good faith and maintained the claims acquired through him.

One of the essential elements of the shorter term acquisitive prescription is the possessor's "good faith" and even though the law creates a presumption in its favor[22] the issue is often the turning point in the case. Thus in *Coleman v. Pollock*[23] the plaintiff presented considerable evidence to impugn the defendant's good faith, but without success. The plaintiff contended that a recital in the deed of the vendor's married status was enough to destroy the vendee's good faith. The court dismissed this contention on the ground that it was fairly well established that "a purchaser is not required to examine thoroughly the title tendered him by the vendor in order to be in good faith."[24] However, the purchaser's good faith would seem to be open to question if he had actual knowledge of the vendor's married status.

The strength of the presumption of good faith is further demonstrated in the case of *Keller v. Summers*.[25] The defendant had acquired the property through the adjudicatee of a sheriff sale, and although an examination of the record would have disclosed a defect sufficient for annulment,[26] it was held that the failure to make this inquiry did not destroy the presumption of good faith.

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20. Arts 3478, 3479, 3480 et seq., 3483 et seq., La. Civil Code of 1870.
21. 191 La. 289, 185 So. 27 (1938).
22. Art. 3481, La. Civil Code of 1870.
23. 191 La. 813, 186 So. 346 (1939).
24. 191 La. at 822, 186 So. at 349. Cf. Arts. 503, 3451, 3480, 3481, 3484, La. Civil Code of 1870; New Orleans Auction Exchange v. Vincent, 168 La. 802, 123 So. 331 (1929); Nugent v. Urania Lumber Co., 16 La. App. 73, 78, 133 So. 420, 423 (1931).
25. 192 La. 103, 187 So. 69 (1939).
26. The sheriff sale did not bring enough money to pay off all the privileges and mortgages and could therefore have been annulled under Art. 684, La. Code of Practice of 1870.

III. TORTS AND WORKMEN'S COMPENSATION

Only two cases involving important points of tort law came before the Supreme Court during the last term: *Loprestie v. Roy Motors, Inc.*,[1] and *Squyres v. Baldwin.*[2]

In the *Loprestie* case the court applied the doctrine of *res ipsa loquitur* to an automobile rear end collision case. Here the plaintiffs alleged that the defendants' automobile had crashed into the rear of their car as it was proceeding on a straight roadway, in broad daylight, and with an unobstructed view ahead. No specific act of negligence on the part of the defendants was alleged by the plaintiffs. The trial judge sustained exceptions of no cause of action on the grounds (1) that in order to invoke the doctrine of *res ipsa loquitur,* the plaintiff should have *negatived* his own negligence, and (2) that he should also have alleged that the driver of the following car was guilty of negligence *"in terms."*[3]

The doctrine that the plaintiff must allege and prove absence of contributory negligence as a condition to recovery has little support.[4] Such a burden is a heavy one even in the ordinary negligence case. Where, however, the plaintiff is relying upon the doctrine of *res ipsa loquitur* the burden would be too great to carry. For in invoking the rule of *res ipsa loquitur* the plaintiff admits that he cannot prove the acts which constitute the defendant's alleged negligence, and insists that the burden of negativing negligence rests on the defendant. It would certainly have been anomalous, therefore, if the Supreme Court had sustained the trial judge on this first point. The result would be that the burden of negativing negligence would rest on the defendant even though the plaintiff had offered no evidence of negligence; while the burden of negativing contributory negligence would rest on the plaintiff even though the defendant in turn had offered no evidence of contributory negligence. In the *Loprestie* case the court disposed of this point by very briefly ruling that in this jurisdiction "it is not necessary to *negative* plaintiff's negligence in an action for personal injuries."

In disposing of the second contention, namely that the doctrine of *res ipsa loquitur* is not applicable to rear end collisions,

1. 191 La. 239, 185 So. 11 (1938).
2. 191 La. 249, 185 So. 14 (1938).
3. Loprestie v. Roy Motors, Inc., 191 La. 239, 244, 185 So. 11, 12 (1938).
4. Although at early common law the rule was different. See Harper, Law of Torts (1933) 300, § 135.

the court pointed out that in such cases the defendant is in a better position than the plaintiff to explain the accident, and that the situation itself bespeaks negligence. Hence, said the court, "a presumption of negligence arises from the fact itself of the accident."

The Court of Appeal for the First Circuit had decided in this case[5] that the mere allegation of a rear end collision did not suffice to satisfy the requirements of the doctrine of *res ipsa loquitur* since such an allegation failed to disclose circumstances from which the defendant's negligence could be reasonably inferred. In the opinion of that court, the allegation merely stated that a collision had occurred and no more. It quoted the well known rule that the occurrence of the accident does not raise the presumption in the absence of attendant circumstances which could justify the inference of negligence. However, the court could have regarded the meeting of the two cars as the "accident" and the fact that the collision was a rear end one on a straight highway, in broad daylight, etc., as the attendant circumstances from which the negligence of the rear driver could be inferred.[6]

In reversing this holding, the highest court definitely established the rule that a rear end collision may well raise a presumption that the collision happened as a result of the negligence of the rear driver where no other circumstance (such as darkness, fog, obstructed vision, or other factor) leaves room for an inference that the rear driver was not at fault.

The Court of Appeal stated that in its opinion *res ipsa loquitur* was a rule more of evidence than of substantive law and that considered from this standpoint "its application properly lies in the trial of the case rather than in a consideration of the pleadings."[7] It therefore affirmed the action of the trial court in sustaining an exception of no right or cause of action. However, if this rule were strictly applied, it is difficult to see how the doctrine could ever withstand an exception of no cause or right of action, since its only justification lies in those situations in

5. Morris v. Roy Motors, Inc., 181 So. 57 (La. App. 1938).

6. This was exactly the result arrived at on a similar state of facts by Justice Odom, then Judge of the Court of Appeal, Second Circuit, in Overstreet v. Ober, 14 La. App. 633, 636, 130 So. 648, 650 (1930), where he said: "The driver of the [rear] car says he saw the truck ahead of him. The mere fact that he ran into it is not sufficient proof of his negligence. But the fact that he did, coupled with the facts that the road was open, had no defect in it, and that he saw the truck ahead of him, called for an explanation by him."

7. Morris v. Roy Motors, Inc., 181 So. 57, 59 (La. App. 1938).

which the plaintiff pleader is unable to allege facts showing how the injury occurred. In fact, it is precisely in freeing the plaintiff from adverse judgment on the pleadings that the doctrine should have its greatest usefulnes.[8] Therefore, a broad application of the rule is always advisable in case of exceptions to the pleadings.

The Supreme Court stated that *res ipsa loquitur* creates a presumption of negligence. This raises the question of the effect of the doctrine in the trial of a case in which it has been held that *res ipsa loquitur* is properly applicable. The rule has two requirements: (1) Knowledge of the facts giving rise to the injury are peculiarly in the possession of the defendant; and (2) the injury is of a kind that ordinarily does not occur if due care has been exercised. These two requirements are quite different in nature and each must be kept in mind in determining the effect which should be given to a finding that the doctrine *res ipsa loquitur* is in order. Ordinarily it is said that the rule raises a presumption of negligence on the defendant's part or that the burden of proof shifts from the plaintiff to the defendant. What is the precise effect of the rule considered from its evidentiary aspect?

It is apparent that the rule can mean[9] either (a) that the full burden of proof has been shifted[10] and a *prima facie* case of negligence on the part of the defendant is made out,[11] so that if neither party does more, the judgment must be for the plaintiff; or (b) that the defendant must now come forward to impart his

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8. In Lykiardopoulo v. New Orleans & Carrollton R. R. Co., 127 La. 309, 53 So. 575 (1910), an exception on the ground of vagueness because of failure of plaintiff to allege acts constituting negligence in an explosion of defendant's boiler was successfully met by the doctrine of *res ipsa loquitur*.

9. In this connection see Harper, Law of Torts (1933) 181-186, § 77; Harper and Heckel, Effects of the Doctrine of Res Ipsa Loquitur (1928) 22 Ill. L. Rev. 724.

10. "Our conception of the law is that where the doctrine of res ipsa loquitur is applicable it simply shifts the burden of proof ordinarily borne by the plaintiff to the defendant." Porter, J., in Cavaretta v. Universal Film Exchanges, Inc., 182 So. 135, 141 (La. App. 1938). "The doctrine of 'res ipsa loquitur' does not create liability. Its sole effect is to create a presumption or inference of negligence, which shifts the burden of proof." Vargas v. Blue Seal Bottling Works, Ltd., 126 So. 707, 708 (La. App. 1930).

11. "The accident itself makes out a prima facie case, and the burden is on defendant to show absence of negligence." Lykiardopoulo v. New Orleans & Carrollton R. R. Co., 127 La. 309, 312, 53 So. 575, 576 (1910). The inference here is that when *res ipsa loquitur* applies, the burden on the defendant is not that of satisfactorily accounting for the accident but of showing freedom from fault. See East End Oil Co. v. Pennsylvania Torpedo Co., 190 Pa. 350, 42 Atl. 707 (1899).

peculiar knowledge[12] to the court, after which the case proceeds as an ordinary negligence case; or (c) the defendant must impart his knowledge and thereafter proceed, with the handicap that the court has taken judicial notice of circumstantial evidence of negligence on his part; but the burden of proving such negligence as entitles the plaintiff to recover remains with the plaintiff.[13]

If the question is one of making the defendant explain the knowledge which is peculiarly his, we have merely a procedural question of discovery before trial. This aspect of *res ipsa loquitur* is really not the gist of the rule. In point of fact, the essence of the doctrine is that the injury is one of a kind that ordinarily does not occur unless negligence exists, and the fact of the defendant's peculiar knowledge is adventitious. If defendant's peculiar knowledge were the important part of the rule, then the force of the rule should be spent when and if the defendant imparts what knowledge he possesses. This situation would satisfy the requirements of (b) above, and the case would be shorn of presumption of negligence.

I believe, however, that in *res ipsa* situations, the courts are attempting to classify cases on the basis of likelihood of harm rather than on the point of peculiar knowledge. I believe that here is an endeavor on the part of the courts to formulate a theory of risk, a doctrine which partakes of absolute liability since the plaintiff ordinarily need not prove the defendant's negligence. On the contrary, such negligence is presumed to exist (though rebuttal is possible).

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12. ". . . When . . . the facts causing the injury are peculiarly within the knowledge of defendant and not equally accessible to plaintiff, the burden is on defendant *to explain the cause of the accident,* if he desires to escape from the inference of negligence. . . . Since defendant has not seen fit to offer any explanation as to the cause of the fire . . . the plaintiff is entitled to a recovery. . . ." (Italics supplied.) Rogers, J., in Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447, 449 (1936). Suppose in the *Jones* case, the defendant had imparted all the knowledge it possessed of the accident. Would the case then have proceeded without any presumption against the defendant? See also Gomer v. Anding, 146 So. 704, 707 (La. App. 1933): ". . . The task then devolves upon the defendant to present an explanation to exculpate himself from the local presumption. . . ."

13. "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." Sweeney v. Erving, 228 U.S. 233, 240, 33 S. Ct. 416, 418, 57 L. Ed. 815 (1913).

It would serve the interests of clarity if the Louisiana courts were to indicate precisely what is the effect of a ruling that the doctrine of *res ipsa loquitur* is applicable. The cases are not clear on the point. If the burden of proof of negligence shifts whenever *res ipsa loquitur* is applicable, then there is no good reason why this presumption should not exist in all cases where the circumstances of injury are the same. Peculiar knowledge has nothing to do with negligence. There seem to be, therefore, only two logical choices for determining the effect of *res ipsa loquitur:* (1) when the defendant's peculiar knowledge is imparted the case should proceed as an ordinary case of negligence; or (2) regardless of peculiar knowledge, all fact situations creating an injury "which is of a kind that does not occur ordinarily when due care has been exercised" should create a presumption of negligence on the part of the defendant.

Squyres v. Baldwin[14] was a case which modified the well-known rule that the presence of unguarded railroad cars across a highway does not of itself constitute negligence. The circumstances of this case were such as to induce the court to hold that the exception rather than the rule should be applied. Here the defendant's train of fifteen cars was being shunted across a highway upon which plaintiff was riding by automobile during a heavy snowstorm at night. The cars were being shifted along a little-used private spur line. Visibility was exceedingly poor and the defendant's cars were cloaked in snow so as to present a dull gray appearance which harmonized with the surrounding countryside. The automobile in which the plaintiff rode as a guest was progressing at a rate of speed not in excess of 15 miles per hour. Although plaintiff's host was driving with his head protruding through the side window so as to aid his vision, he did not perceive the freight cars until it was too late to avoid a collision. The defendant contended, *inter alia,* that no negligence on its part had been alleged and proved.

The court stated that the question here raised had never before been presented to it. It is a well settled law that the presence of railroad cars at a crossing is in itself sufficient warning to travelers.[15] It is not ordinarily necessary that the company post guards on the highway to ensure that travelers will exercise ordinary care to avoid collision. Nevertheless, if circumstances are such that not even reasonable precautions on the part

14. 191 La. 249, 185 So. 14 (1938).
15. See cases cited in the opinion, 191 La. at 257, 185 So. at 17.

of travelers will suffice to apprise them of danger, then the railroad company is under a duty to take affirmative steps to guard against collision.

Santana v. Item Co.[16] reaffirmed the rule that a newspaper is liable for defamation even in the absence of intention or negligence; provided injury be proved. In this case a student at Louisiana State University claimed that the defendant newspaper company had defamed him by reprinting a letter from the Reveille (the student newspaper) in which the plaintiff was supposed to have attacked the unwarlike spirit of his fellow students. In point of fact the plaintiff had not written the letter. The court was unable to see how the plaintiff had been injured by the report complained of since condemnation of unwarlikeness does not subject one to ridicule, contumely, or abuse in an American community. It did indicate, however, that the newspaper would have been liable if the matter in issue had been defamatory.

In *Edwards v. Derrick*[17] defendant was charged with the defamation of a political rival. He had accused the plaintiff of misappropriating public funds. As a matter of fact, the plaintiff had been exonerated by the grand jury and by the state auditors of this very accusation. In settling the damages, the court reckoned up the average damages in suits of a similiar nature and arrived at the figure of $500—not a very substantial amount unless we bear in mind the fact that political rivals are always allowed considerable latitude in discussing one another's character before the public.

In *Gray v. deBretton*[18] it was held that a sheriff is not liable on his bond for injuries resulting from the negligent operation of a vehicle by a deputy sheriff in conveying a prisoner to jail.

> "The purpose of an official bond is to provide indemnity against malfeasance, nonfeasance and misfeasance in public office. Such a bond can not be construed so to the operate as a policy of insurance in favor of the traveling public against damage in an automobile collision. The liability in this case, if any, is the liability of the deputy sheriff and of nobody else."[19]

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16. 192 La. 819, 189 So. 442 (1939).
17. 193 La. 331, 190 So. 571 (1939).
18. 192 La. 628, 188 So. 722 (1939).
19. Per Rogers, J., 192 La. at 639, 188 So. at 726.

Goodwin v. Terrell[20] and *Fogleman v. Interurban Transportation Co., Inc.*[21] raised only questions of fact, while *Hartman v. Greene,*[22] a suit for alleged inducement of breach of contract, was disposed of by the doctrine of prescription.

Workmen's Compensation

Higginbotham v. Public Belt R. R. Commission[23] raised the question of whether a maintenance man who had been employed by the defendant to work on the Huey P. Long Bridge at New Orleans was engaged in interstate commerce at the time of his injury and death. The workman had been taking soundings of piers to determine whether defects in the bridge existed. His work therefore related to maintenance and repair of the bridge. The plaintiff's widow sued under the state compensation act and the Railroad Commission defended on the ground that since the deceased employee had been engaged in interstate commerce, the action, if any, must be brought under the Federal Employers' Liability Act. The contention of the defendant was sustained.

It seems clear that the court arrived at a correct conclusion in holding that the employee had been engaged in interstate commerce at the time of his decease. Citations in the opinion abundantly establish this point.[24] Moreover, with this point settled, the state compensation act is clearly inapplicable to the case.[25]

This case illustrates the difficulties which the wholly outmoded second Federal Employers' Liability Act[26] create in the administration of workmen's compensation. Under that unfortunate act it is necessary for the workman to prove that at the time of the injury he was engaged in interstate commerce, a jurisdictional issue which not even thousands of cases on the point have served to settle. Moreover, this act requires the workman to allege and prove negligence[27] on the part of the employer and makes the contributory negligence of the employee effective to

20. 192 La. 267, 187 So. 663 (1939).
21. 192 La. 115, 187 So. 73 (1939).
22. 193 La. 234, 190 So. 390 (1939).
23. 192 La. 525, 188 So. 395 (1939).
24. 192 La. at 539-541, 188 So. at 399-340.
25. Boston & Maine R. Co. v. Armburg, 285 U.S. 234, 52 S. Ct. 336, 76 L. Ed. 729 (1932); Montgomery v. Terminal R. Ass'n of St. Louis, 335 Mo. 348, 73 S.W. (2d) 236 (1934), cert. denied 293 U.S. 602, 55 S. Ct. 118, 79 L. Ed. 694 (1934).
26. 35 Stat. 65 (1908), 45 U.S.C.A. §§ 51-59 (1928).
27. New Orleans & N.E. R.R. Co. v. Harris, 247 U.S. 367, 38 S. Ct. 535, 62 L. Ed. 1167 (1918).

diminish the damages recoverable.[28] The only aspect of a true workmen's compensation statute which this measure provides is that it deprives the employer of the defences of voluntary assumption of risk[29] and of the fellow servant rule.[30] In spite of the *Knickerbocker Ice Co.*[31] case, it seems likely that the Supreme Court of the United States now would welcome a federal statute which would permit the injured workman to rely upon the benefits of the state workmen's compensation laws.

The alternative would be a complete revamping of the second Federal Employers' Liability Act. This statute was enacted in 1908, prior to the development of workmen's compensation statutes. However, if this were done the question of interstate commerce would still remain to be determined in every fact issue not already adjudicated by an appellate court. The advantage of a new federal statute would be that having come late upon the scene it could incorporate all the improvements which three decades of the administration of the workmen's compensation statutes have found to be feasible.

In *Jefferson v. Lauri N. Truck Lines,*[32] after judgment had been paid by the defendant employer, the plaintiff physician sued for fees for expert medical testimony. The expert had been called by the trial judge ex proprio motu. The court held that the Employers' Liability Act interpreted in connection with the Code of Practice forbade suit for costs after judgment had been made final, and the physician was therefore left without redress. Justice Higgins dissented from this interpretation of the pertinent statutes. This situation illustrates once more[33] the inadvisability of subjecting such a continuing problem of administration as workmen's compensation to the exigencies of trial procedure. The flexibility and informality of commission administration are needful to a proper execution of such industrial problems.

In *Fouchaux v. Board of Commissioners of Port of New Orleans*[34] it was held that an employee of a lessee of a wharf and

28. 35 Stat. 65 (1908), 45 U.S.C.A. § 52 (1928).
29. 35 Stat. 66 (1908), 45 U.S.C.A. § 54 (1928).
30 Kanawha Ry. Co. v. Kerse, 239 U.S. 576, 36 S. Ct. 174, 60 L. Ed. 448 (1916).
31. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145 (1920).
32. 192 La. 29, 187 So. 44 (1939).
33. In this connection generally, see Mayer, Workmen's Compensation Law in Louisiana (1937) 135-142.
34. 193 La. 182, 190 So. 373 (1939).

elevator leased from the Board could not maintain an action under the Employers' Liability Act against the Board because of lack of privity of contract between the workman and the Board.

IV. CRIMINAL LAW AND PROCEDURE

Only two cases which may be fairly construed as involving the substantive ingredients of crime were before the Supreme Court last year. The most important of these is *State v. Gendusa,*[1] which was considered on appeal from a second trial. The indictment was for burglary under Section 850 of the Revised Statutes,[2] a capital offense. The court previously had held on the first appeal[3] that the indictment was fatally defective in that the prosecution had failed to charge the defendant with *breaking.* This defect was remedied in the new indictment. To support this ingredient of the offense the State introduced evidence that Gendusa opened an unlatched screen door which was kept closed by an ordinary spring. The Supreme Court affirmed the holding of the district court that this constituted sufficient *breaking* to satisfy the terms of the statute. Without purporting to criticize the correctness of this conclusion one is likely to be impressed by the fact that the seriousness of Gendusa's conduct did not arise from the opening of an unlatched screen door, but rather from his entering a defenseless dwelling at night with intent to steal, and particularly from his beating the sleeping occupants into a state of insensibility.[4]

Gendusa raised two interesting points regarding the effect of the Supreme Court's action on the first appeal. The indictment had been declared fatally defective as an insufficient statement of the capital offense of burglary as defined by Section 850 of the

1. 193 La. 59, 190 So. 332 (1939).

2. La. Rev. Stats. of 1870, § 850, as amended by La. Act 21 of 1926, § 1 [Dart's Crim. Stats. (1932) art. 818].

3. 190 La. 422, 182 So. 559 (1938). The first appeal of this case was discussed by Hall, The Work of the Louisiana Supreme Court for the 1937-1938 Term, Criminal Law and Procedure (1939) 1 LOUISIANA LAW REVIEW 371, 376-381.

4. Under the present statute the essentials of the crime are satisfied by an allegation and evidence that defendant was armed with a dangerous weapon, even though no assault was committed. La. Rev. Stats. of 1870, § 850, as amended by La. Act 21 of 1926 [Dart's Crim. Stats. (1932) art. 818].

La. Rev. Stats. of 1870, § 854, as amended by La. Act 20 of 1926, § 1 [Dart's Crim. Stats. (1932) art. 821], defining burglary of a less serious degree, requires a *breaking* only when the offense is committed in the daytime. It appears that the substantial, distinguishing feature between Sections 850 and 854 lies in the more serious menace to personal safety denounced by the former section.

Revised Statutes,[5] and the case had been remanded. On the present appeal the defendant contended that the court had tacitly admitted in the earlier decision that the first indictment adequately charged all facts necessary to constitute a violation of Section 854 of the Revised Statutes[6] (a less serious type of burglary, in which the entry, if at night, need not be attended by *breaking)*. From this the defendant concluded that the new trial was prescribed under Article 8 of the Code of Criminal Procedure. More than one year had elapsed between the commission of the crime and the filing of the second indictment. He contended that prescription had not been interrupted, since the indictment had not been annulled or set aside except as it attempted to charge a capital offense. He further argued that for the same reason the second trial placed him in double jeopardy. In answer to these contentions the court pointed out that when the defendant presented his motions to quash and in arrest of judgment on the first appeal he had urged that the indictment "fails to state or set out any offense known to the law." The court further stated that the purpose of remanding the case on the first appeal was not to enable a second prosecution on the invalid indictment.

The conclusion that the offense was not prescribed appears fair enough. However, it is difficult to understand how the sufficiency or insufficiency of the indictment could be affected by the defendant's contention on the previous appeal or the court's purpose in remanding the case. The fact remains that the indictment was inadequate under Section 850, Revised Statutes, but did sufficiently set forth the offense condemned by Section 854. A more direct solution might have been achieved through a judicial interpretation of the terms, "quashed, annulled or set aside," as they appear in the prescription article.

In *State v. McCranie,*[7] the requisites of intent and fraud in the crime of forgery were considered by the court. The offense, as defined by Section 833 of the Revised Statutes,[8] is not complete unless it was perpetrated with the intent to "injure or defraud any person." In practice, however, the mental requisities of forgery are usually satisfied if there is evidence indicating that some

5. La. Rev. Stats. of 1870, § 850, as amended by La. Act 21 of 1926, § 1 [Dart's Crim. Stats. (1932) art. 818].

6. La. Rev. Stats. of 1870, § 854, as amended by La. Act 20 of 1926, § 1 [Dart's Crim. Stats. (1932) art. 821].

7. 192 La. 163, 187 So. 278 (1939).

8. La. Rev. Stats. of 1870, § 833, as amended by La. Acts 67 of 1896 and 204 of 1918, § 1 [Dart's Crim. Stats. (1932) art. 936].

9. See the charge of the lower court approved in State v. Laborde, 120 La. 136, 45 So. 38 (1907).

person may suffer by receiving the paper as genuine.[9] The possibility of injury as indicated above is usually gathered solely from the nature of the instrument and the circumstances attendant on the defendant's conduct. It follows that "fraud," and "intent to defraud" are terms more properly descriptive of external facts than of the defendant's state of mind. Neither the wishes nor the motive of the accused are likely to be of any consequence in determining the existence of the crime; nor is the fact that loss did not follow the wrongful conduct a matter of any importance.

Article 284 of the Code of Criminal Procedure categorically provides that all objections to the indictment must be taken before arraignment. However, the consequences of non-observance of this requirement are not set forth, and the provision of the article is somewhat inconsistent with other parts of the Code. For example, Article 253 allows the court in its discretion to entertain a motion to quash after the commencement of the trial, and Article 265 permits the defendant at any time, with the consent of the court, to withdraw his plea of not guilty and substitute a demurrer or a motion to quash. The Supreme Court recently held in the case of *State v. Verdin*[10] that refusal to allow withdrawal and substitution after the trial has begun amounts to an abuse of discretion if the defect in the indictment is one of substance. A similar rule would probably prevail under Article 253 where the motion to quash is not attended by a withdrawal of the plea. It is interesting to note that this latter article makes elaborate provision for amendment and continuance of trial where the defect is one of form; and even if amendment is made to an error of substance, the trial may be allowed to proceed if it clearly appears from the whole proceedings that the accused has not been prejudiced or misled by the defect and his rights will be fully protected.[11] However, if the defendant proceeds

10. 192 La. 275, 187 So. 666 (1939).

11. Art. 253, La. Code of Crim. Proc. of 1928: "No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been empaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole pro-

under Article 265, it is not clear that these elastic provisions of Article 253 are available to the trial court. Certainly the latter article does not expressly contemplate the event of issue between State and defendant being withdrawn. It appears reasonable to assume that where complaint is made of a defect so serious that judgment could not properly be pronounced on a verdict responsive to the indictment, the motion to quash or the demurrer must be granted. But it does not necessarily follow that the defendant must be permitted to withdraw the plea of not guilty under Article 265. Amendment and continuance of the trial may often be advantageous where the error, even though one of substance, is such that the provisions and safeguards of Article 253 are applicable. It is believed that the two articles can easily be reconciled and construed in harmony with each other. Perhaps such a procedure might have been followed to advantage in the *Verdin* case. The indictment in that case failed to allege the time and place of the commission of the several breaches of the peace with which the defendant was charged. Furthermore, it appears that the motion was filed before any evidence had been introduced by the prosecution. It is not unlikely that an amendment of the indictment and a continuance would have adequately protected the defendant, and thus avoided the necessity of a new indictment and arraignment.

For obvious reasons a plea to the territorial jurisdiction of the court may be interposed at any time, and if the court sustains the plea, no further proceedings can be had before the same tribunal. In *State v. Nugent*[12] the Supreme Court correctly pointed out that Section 9, Article 1 (Bill of Rights) of the Constitution of 1921 guarantees that the defendant shall neither be convicted nor tried in any parish other than the one in which the crime was committed.

The manner of drawing the grand jury is set forth in Article 184 of the Code of Criminal Procedure. However, failure to con-

ceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by the proceedings with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this article shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

12. 191 La. 198, 184 So. 746 (1938).

form to the provisions of this article was held in *State v. Saba*[13] not to constitute a matter of jurisdiction. Hence an objection to the method of selecting the grand jury cannot be asserted on a motion in arrest of judgment. In the *Saba* case the slips on which the names of the grand jurors were written were emptied from their envelope into a cigar box from whence they were drawn by the sheriff. This procedure had been previously condemned by the Supreme Court and held sufficient ground to sustain a motion to quash.[14] In the earlier case the court had said:

> "We conclude that the defendant was indicted by an illegally impaneled grand jury and, consequently, in contemplation of law, there was no grand jury—hence, no indictment upon which a legal conviction could be predicated."[15]

This statement, accepted at its face value, doubtless lends support to the defendant's contention in the present case that his objection could be asserted at any time, even after verdict. However, the correctness of the court's conclusion in the *Saba* case is not open to serious question from the standpoint of efficient trial practice. The above quotation from the earlier decision must be regarded as an overstatement of the court's position.

In two cases objections were made to the fairness of trial. In *State v. Migues*[16] the question was somewhat pretermitted by the fact that the application for a new trial was not made until after verdict. The court held that the proper procedure for voicing objection is by motion for change of venue made before trial and not by motion for a new trial. In this case the fact which was alleged to have prevented a fair and impartial trial was the publication of the Lunacy Commission's report, the findings of which were adverse to the defendant's claim of insanity. He charged that this report created an adverse sentiment in the community. The court held that nothing in Article 267 of the Code of Criminal Procedure, as amended by Act 136 of 1932, prevents such publication. In the case of *State v. Price*[17] the defendant moved for a change of venue, alleging that he was a ranger whose duties included supervision of the dipping of cattle. He claimed that

13. 191 La. 1009, 187 So. 7 (1939).

14. State v. Kifer, 186 La. 674, 173 So. 169 (1937). In State v. Obey, 193 La. 176, 190 So. 371 (1939), the court reaffirmed a position previously taken that the signature of the foreman of the grand jury on the bill of indictment must affirmatively appear in the record.

15. State v. Kifer, 186 La. 674, 685, 173 So. 169, 172 (1937).

16. 191 La. 55, 184 So. 540 (1938).

17. 192 La. 615, 188 So. 718 (1939).

this practice was very unpopular in the community, and created sentiment so adverse that a fair trial was impossible. Forty-two witnesses were heard in determining the motion, half of whom were called by defendant and half by the State. Eighteen witnesses were of opinion that the defendant could secure a fair and impartial trial in Rapides Parish, while fourteen held the contrary view. Ten of the persons summoned declared that they had not heard the case discussed. This testimony obviously presented no situation which would warrant the Supreme Court in reversing the ruling of the trial court, which had refused a change of venue.

Complaint regarding the fairness of trial was made under rather novel circumstances in the case of *State v. O'Day*.[18] The defendant was tried and convicted of manslaughter. Thereafter a bill of information was filed for the purpose of having him sentenced as a triple offender under Act 15 of 1928.[19] Evidence of two prior convictions was set forth and the defendant was sentenced for a term of from forty to sixty years. He had previously been indicted and convicted in the Province of Alberta, Canada, for the offense of "theft of an automobile." This conviction was one of the items presented in the bill of information. On appeal, however, the Supreme Court held that the offense of "theft" as defined by Article 347 of the Dominion Criminal Code does not necessarily constitute a felony under the laws of Louisiana.[20] For this reason the judgment of conviction as a *third* offender was set aside. However, the judgment finding defendant guilty as a *second* offender was affirmed, and the case was remanded for imposition of sentence. On motion for rehearing the defendant urged that the admission of evidence of the Canadian offense was highly prejudicial and that the entire finding of the trial court was affected thereby. This, he asserted, deprived him of a fair trial. The court correctly dismissed the contention. The question of whether or not defendant had been previously convicted and sentenced for previous felonies was simply an inquiry of fact and no question of guilt or innocense of the earlier crime was involved.

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18. 191 La. 380, 185 So. 290 (1938).

19. Dart's Crim. Stats. (1932) arts. 709-711.

20. Only brief reference has been made above to this main point at issue in the *O'Day* case. The question is one of considerable difficulty and merits extended discussion. For this reason it has been considered in a Comment which appears at page 177 in this number of the LOUISIANA LAW REVIEW.

The Supreme Court has reaffirmed the position that the allowance of a new trial or a continuance rests largely in the sound discretion of the trial judge.[21] His findings will not be disturbed unless it is clearly shown that there has been an abuse of discretion. Where the motion for a new trial is based on allegedly newly discovered evidence the court must be convinced not only that the new testimony was unknown to the petitioner during the first trial but likewise that it could not have been discovered through the exercise of reasonable diligence by the defendant and his counsel. Thus, where witnesses in a trial for manslaughter were residents of the defendant's neighborhood and the defendant was unable to show that he could not have secured their presence on the initial trial, a new trial to make their testimony available was refused.[22] In practice the degree of diligence required of counsel will likely be influenced by the apparent value of the newly discovered evidence, and it is noteworthy that in the case under consideration the new testimony would probably have had no appreciable effect on the verdict.

Numerous irregularities in the selection, qualifications and conduct of the petit jury were urged during the past year as grounds for new trials. Without exception these efforts were unsuccessful, and in most instances the asserted defects were trivial. A new trial is not likely to be granted for irregularities relative to the conduct and sequestration of the jury unless it is apparent that there are substantial grounds inducing the court to believe that the fairness of the trial was thereby affected. Here again the ruling of the trial court is highly persuasive on appeal and notice is taken of all safeguards and correctives adopted to minimize the effect of the asserted irregularities. In *State v. Migues*[23] complaint was made of the refusal of the trial court to permit the defendant's counsel to examine each slip as it was drawn for the tales jury box. It was held, however, that the procedure was conducted under circumstances which adequately protected the defendant's interest. In *State v. Stephens*[24] one of the petit jurors had previously been convicted of unlawful possession of liquor in violation of the federal laws. This offense was declared to be merely a misdemeanor. It does not disqualify a juror under Article 172, Code of Criminal Procedure, which renders ineligible

21. State v. Longino, 191 La. 714, 186 So. 79 (1939); State v. Gray, 192 La. 1081, 190 So. 224 (1939).
22. State v. Gray, 192 La. 1081, 190 So. 224 (1939).
23. 191 La. 55, 184 So. 540 (1938).
24. 191 La. 111, 184 So. 559 (1938).

for jury service anyone who has been convicted at any time of any felony. The following circumstances were severally urged as violations of sequestration rules: the presence of an attending physician in a hotel room in which the jury was sequestered,[25] the attendance of a deputy sheriff who had not taken the oath of office,[26] and the presence of unsworn jurymen among the jurors before trial.[27]

According to the traditional English practice the officer in whose custody the jury was placed during the consideration of its verdict was required to take an oath that he would keep the jury "in some convenient and private place without meat, drink or fire (candlelight excepted) . . . ."[28] The extent to which this ancient requirement has been relaxed is well illustrated by the recent case of *State v. Price*.[29] Five pints of whiskey served free of charge to the jury during four days of deliberation was held not sufficient ground for a new trial where it appeared that the distribution among the jury seemed to have been "fair enough" and none of them drank to excess. However, the court condemned the practice of drinking intoxicants in the jury room. The question was one of little practical importance since the case was remanded on other grounds.

The high degree of latitude allowed the trial judge in the conduct of trial is exemplified in *State v. Williams*.[30] In this case the judge allowed twenty-eight hours to elapse from the time when the arguments were closed until the time when he delivered his charge to the jury. During this period the jurymen were allowed to separate, and one of them served on the jury in another case. The Supreme Court pointed out that separation is permissible under Article 394 of the Code of Criminal Procedure. It further decided that the period of twenty-eight hours, although unusual, was not excessive in view of the fact that the trial judge was of opinion that he required this time to prepare his instructions. The Supreme Court, apparently motivated by absence of precedent, held that service by a juror on another case in the interim was not sufficient ground to warrant setting aside the verdict, unless the defendant could show that he suffered a disadvantage thereby. The wisdom of this conclusion is open to

25. State v. Migues, 191 La. 55, 184 So. 540 (1938).
26. State v. Odom, 192 La. 257, 187 So. 659 (1939).
27. State v. Longino, 191 La. 714, 186 So. 79 (1939).
28. 2 Bishop, New Criminal Procedure (2 ed. 1913) 846, § 991.
29. 192 La. 615, 188 So. 718 (1939).
30. 192 La. 713, 189 So. 112 (1939).

question. The defendant usually will be unable to show specifically that his interest was adversely affected by such procedure. It appears that the possibility of injury is a general one and grows out of the fact that concentration and disputation on a foreign set of facts tends to dim the memory of the juryman and becloud his impressions of the earlier trial. It is imperative that the jury should not only be isolated from corrupt and subversive influences but likewise should be shielded from situations which would tend to confuse the facts presented on trial. Both policies appear to underlie the elaborate sequestration provisions which are found in all jurisdictions.

Failure to meet the technical prerequisities to appeal pretermitted consideration of the merits of several cases. Shortcomings in the bills of exceptions resulted in the denial of appeal in at least two instances.[31] In the case of *State v. Kennedy*[32] failure to apply for a new trial in the district court as required by Article 559, Code of Criminal Procedure, precluded the defendant from making such motion on appeal.

In *State v. Verdin*[33] the defendant acquiesced in the judgment of the trial court and paid his fine while his appeal to the Supreme Court was pending. These facts were urged by the State on re-hearing in an effort to persuade the Supreme Court to set aside its prior judgment which had reversed conviction. The defendant filed *ex parte* affidavits tending to show that he had requested the district judge to suspend the operation of the sentence until the Supreme Court should have an opportunity to pass on pending applications for certain writs. He alleged that this request was refused and that the defendant paid his fine, not in acquiescence in the judgment, but rather to avoid serving a jail sentence which was not recallable. The Supreme Court refused to pass on this issue, and remanded the case for the purpose of having the record completed regularly and the issue determined. In *State v. Scruggs*[34] the defendant and his wife were indicted for larceny of goods of the value of more than $100. However, they were convicted of larceny of goods valued at less than $100. Pending appeal the defendant broke jail and escaped, whereupon

31. State v. Odom, 192 La. 257, 187 So. 659 (1939). Bills of exception were prepared but were not signed by the trial judge. State v. Carlson, 192 La. 501, 188 So. 155 (1939). Testimony complained of was copied in the record and exceptions were taken on trial, but no formal bill was prepared. Cf. State v. Taylor, 192 La. 653, 188 So. 731 (1939).

32. 192 La. 846, 189 So. 450 (1939).

33. 192 La. 275, 187 So. 666 (1939), noted in (1939) 39 Col. L. Rev. 1244.

34. 192 La. 297, 187 So. 673 (1939).

the Attorney General filed a motion to dismiss the appeal. The motion was granted. The court resorted to the well-known rule that if a person convicted of a criminal offense breaks jail and escapes, his appeal will be dismissed. However, Chief Justice O'Niell, in a dissenting opinion, asserted that the sentence was an absolute nullity, and that if the defendants were apprehended they could not be compelled to serve imprisonment on an invalid conviction and sentence.

The district court has no criminal jurisdiction over juveniles under seventeen years of age except for capital crimes and assault with intent to rape.[35] This limitation raises difficult problems where the defendant, a juvenile, is charged with murder. Complications arise from the fact that the jury may properly return either of three verdicts: guilty as charged, guilty of murder without capital punishment, or guilty of manslaughter. If the latter verdict is pronounced, the defendant cannot be sentenced, but must be turned over to the juvenile court. How should the jurymen be instructed, so that their verdict will be in proper form and yet will not be affected by knowledge that a return of manslaughter will deprive the district court of jurisdiction to proceed to sentence? Formerly the procedure was to instruct the jury that if it should find the defendant guilty of manslaughter and further find that the defendant was under the age of seventeen years at the time the crime was committed, it, the jury, should report these findings and return no verdict.[36] There are two major vices in this instruction. First, it imposes on the jury the determination of a jurisdictional fact, which is properly a function of the court. Second, it suggests that a verdict of manslaughter returned against the juvenile will be a nullity. Under this instruction the jury may likely find the defendant guilty of murder in order to prevent an escape from punishment. For these reasons the Supreme Court in the recent case of *State v. Bedford*[37] has revised the procedure. No distinction between adult and juvenile defendants is now permissible in the general instructions, and the jury must be apprised of the three verdicts available in a murder trial. If a verdict of manslaughter is returned, the trial judge shall then determine through a special proceeding whether the defendant was under the age of seventeen years at the time of the killing. This marks a definite im-

35. La. Const. of 1921, Art. VII, § 52; La. Act 83 of 1921 (E.S.), § 5 [Dart's Stats. (1939) § 1683].

36. State v. West, 173 La. 974, 139 So. 304 (1932).

37. 193 La. 104, 190 So. 347 (1939).

provement over the old procedure and eliminates the difficulties referred to above.

In the case of *State ex rel. Clayton v. Jones*[38] the court was confronted with the problem of determining whether or not the finding of the trial judge that the accused was over the age of seventeen years is a conclusive finding and precludes further inquiry into the question through resort to a writ of habeas corpus after the defendant has been convicted and imprisoned. The Supreme Court declared that a quesion of jurisdiction can be raised on motion in arrest of judgment, on appeal, or by petition for writ of habeas corpus.

The result achieved by the decision is proper under the facts as presented and accords with the solicitous regard which the court manifests toward delinquent juveniles. Unfortunately, however, the broad rule announced is likely to encourage attempts to use the writ of habeas corpus for the purpose of reopening criminal litigation after it has properly been put at rest by final court determination. The court made no attempt to distinguish an absence of jurisdiction from those situations where the existence of jurisdiction depends on a controverted issue of fact which must be determined and *is* determined by the court before rendering judgment. In the latter instance the court is vested with power to find the facts on which its jurisdiction depends, and in that sense it exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it determines that it cannot go further. An erroneous finding of fact is subject to correction through the usual channels of appeal; but should the question be subject to further inquiry in an independent proceeding instituted after avenues for appeal have been abandoned or are closed? The conclusion of law reached in the instant case is opposed to the rule which generally prevails in other jurisdictions.[39]

Several decisions relative to evidence in criminal proceedings were handed down during the past year. In two cases the court considered the admissibility in a criminal trial of evidence

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38. 192 La. 671, 188 So. 737 (1939).

39. Toy Toy v. Hopkins, 212 U.S. 542, 29 S. Ct. 416, 53 L. Ed. 644 (1909). See also cases cited in 15 C. J. "Courts" § 173, n. 83.

Art. 137 (1), La. Code of Crim. Proc. of 1928, provides that the writ of habeas corpus is available where the court ordering defendant confined "has exceeded its jurisdiction." However, it is doubtful that this situation obtains under the facts of the present case.

A more detailed consideration of this problem will be made in the January issue of the LOUISIANA LAW REVIEW.

of prior offenses. In the case of *State v. McCranie*,[40] the defendant was indicted for forging the endorsement on a check payable to his employer. The prosecution succeeded in introducing evidence of several prior forgeries of endorsements which were alleged to have been made under circumstances similar to those in the case at trial. The evidence was held admissible as tending to prove intent to defraud, a system, and guilty knowledge. The Supreme Court supported its conclusion by referring to Articles 445, 446 of the Code of Criminal Procedure. The same problem received detailed consideration in the case of *State v. Rives*.[41] The defendant was tried for larceny of cows belonging to *W*. He objected to the introduction of testimony which tended to show that several months before the commission of this offense he had solicited certain persons to aid in the theft of cows belonging to *N*. The per curiam of the trial judge assigned as reasons for the admission of the evidence, that the earlier solicitations showed method and intention and also that they indicated that defendant had "a mind bent on doing mischief." The Supreme Court reversed this ruling and remanded the case.

Odom, J., prepared the opinion, in which he reviewed most of the decisions of Louisiana pertinent to the problem. Evidence of the earlier offenses was not admissible to show method, he stated, because no attempt had been made by the State to reveal any particular method employed by defendant in committing the crime with which he was charged. He further ruled that the evidence was not admissible to show intent. This element of the crime of larceny is usually established by the facts and circumstances surrounding the particular case under investigation. Only when the evidence might reasonably permit an inference that the defendant acted in good faith or perhaps through a mistake as to ownership is it permissible to show previous offenses of a similar nature. Any effort to show that defendant had "a mind bent on doing mischief" resolves itself into an attack on the defendant's general character. No such attack can be made by the prosecution until the defendant has placed his character in issue. The following quotation from the opinion is noteworthy:[42]

> "A reading of the cases shows that in each instance where testimony of the commission of extraneous offenses by the accused was admitted, the separate offense had a direct bear-

40. 192 La. 163, 187 So. 278 (1939).
41. 193 La. 186, 190 So. 374 (1939).
42. 190 So. at 381.

ing upon or some connection with, or threw some light upon, the issue before the jury. There is no doubt that, for the purpose of showing intent, the State may, under some circumstances, introduce testimony tending to show that the prisoner had committed other like crimes. But, for the testimony to be relevant, it must be shown that the extraneous crimes bear some relation to the main charge."

The court dismissed the contention that Articles 445 and 446 of the Code of Criminal Procedure were intended to facilitate the introduction of evidence of prior offenses. These articles only affirm the general principles applied by all courts.

The elaborate network of restrictions which make up the hearsay rule and its exceptions operated to give the defendant a new trial in *State v. Price*.[43] The State succeeded in introducing a dying declaration in a prosecution for manslaughter. The deceased had been shot and was taken to his home across the street. Immediately he asked for his friend, *C*, and stated to him that "he didn't believe he could make it, couldn't make it." He then made his declaration in which he charged that the defendant had shot him. Thirty or forty minutes later he repeated the statement to another person, *L*, and requested that he be taken to a hospital several miles away where he died a few days later. The Supreme Court held that the admission of the deceased's statement implicating defendant was reversible error. The fact that the deceased asked to be taken to a distant hospital indicated that he did not contemplate imminent death, said the court. In order for the statement to be admissible the declarant must contemplate the *immediate* prospect of death. It is not enough that he has abandoned hope of recovery. The ruling in this case can hardly be termed a liberal one, even in a department of law where a highly cautious attitude prevails. It is difficult to understand how the request of the deceased that he be taken to a hospital could affect the solemnity of his declaration to *C* made at least forty minutes earlier.

The case of *State v. McKee*[44] involved a conspiracy to rob and murder. The trial court admitted the testimony of one conspirator to the effect that he and the defendant purchased an automobile with their undivided portion of the spoils of the crime. This ruling was affirmed on appeal. The court announced the

43. 192 La. 615, 188 So. 718 (1939).
44. 193 La. 39, 190 So. 325 (1939).

familiar rule that the conspiracy continues until the spoils have been divided, if a division of the loot is contemplated by the conspiracy. So long as the conspiracy continues the statements of one conspirator are admissible against the others. Furthermore, the evidence of the purchase of the car was admissible in corroboration of the testimony of the conspirator who implicated defendant in the confederation. Chief Justice O'Niell rendered a special concurring opinion in which he rested the admissibility of the evidence solely on the ground of corroboration.

V. PUBLIC LAW

A. Constitutional Law

The only case which raised an important issue of constitutional law before the Supreme Court during the last term was *Hibernia Mortgage Co. v. Greco.*[1] In this case the defendant, Greco, had purchased certain real estate, giving in payment part cash and a promissory note secured by a mortgage and vendor's lien on the property. The note was then acquired by the plaintiff mortgage company. Thereafter Greco sold the property to the defendant Toga Realty Company, a corporation, which assumed the payment of the promissory note. Four years later the legislature enacted a statute levying a franchise tax on corporations doing business in Louisiana and providing that the lien of such tax should be a first lien on all corporation property. Thus, the tax lien was subsequent in time to the vendor's lien. The Hibernia Mortgage Company then obtained the property by sheriff's sale. Thereupon the mortgage company obtained a rule on the state to show cause why the mortgage and vendor's lien should not be declared superior to the state's tax lien. The mortgage company contended that a holding that the subsequently obtained tax lien was prior in law to its vendor's lien would be unconstitutional as an impairment of the obligations of a contract. It was held that the statute was constitutional and that the state's lien was superior.

The court admitted that a state statute is unconstitutional if it destroys or directly impairs the remedy for the enforcement of an obligation of a contract, but stated that the fundamental purpose of the present act was the collection of the state's revenue and that its effect on private obligations was merely indirect or collateral and therefore not open to constitutional objection.

1. 191 La. 658, 186 So. 60 (1939).

Moreover, the court pointed out that the contract in question was an obligation between private parties and that as such the contract had been entered into with reference to the inherent taxing power of the state. Therefore, the fact that the tax statute was passed subsequently to the origin of the contract was immaterial.

The court was careful to distinguish this case from the long line of decisions which holds that a state may not impair the obligation of its own contracts by subsequent operation of its taxing power.[2] These cases hold that the solemn undertaking of a state in the exercise of its power to borrow money is in effect a commitment of the state not to derogate from this obligation by the exercise of some other sovereign power. It is interesting to note that these decisions in effect hold that the exercise of one sovereign power may bar or render ineffectual the exercise of another power. The situation is strikingly similar to that before the Supreme Court of the United States in one of the celebrated *gold clause* cases. *Perry v. United States*[3] ruled that the federal government could not invalidate its own obligation to redeem certain certificates in gold.[4] It will also be recalled that in another one of these cases the abrogation of the gold clauses in private obligations was sustained.[5]

The holding of the *Hibernia Mortgage Company* case seems to be directly contrary to a dictum in the case of *Domenech v. Lee*,[6] decided by the United States Circuit Court of Appeals for the First Circuit. In that case it was held that a Puerto Rican statute making certain work relief premiums prior liens on employers' property could not be construed as making such liens superior to the lien of mortgages executed previously to the effective date of the statute. The court felt that a contrary decision would be an unconstitutional impairment of the obligations of a contract. In this connection the court said, "we are of the opinion that this provision of the act [of 1928] is not to be construed as giving a prior and superior lien over the intervenor's mortgage upon the real estate, for to give it that effect would be

2. Cited in the court's opinion and discussed at length. 191 La. at 666-675, 186 So. at 62-66.

3. 294 U.S. 330, 55 S. Ct. 432, 79 L. Ed. 912, 95 A.L.R. 1335 (1935).

4. It will be remembered, however, that that case was disposed of in favor of the government since the petitioner failed to prove damage.

5. Norman v. B. & O. R. Co., 294 U.S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A.L.R. 1352 (1935).

6. 66 F. (2d) 31, 35 (C.C.A. 1st, 1933), cert. denied, 290 U.S. 708, 54 S. Ct. 207, 78 L. Ed. 608 (1933).

to impair the obligations of the contract created by the mortgage given to the [intervenor] in 1926."

Perhaps the plaintiff could have contended that the statute deprived it of its property without due process of law. Certain other priority of lien cases have held that the due process clause is applicable.[7]

In a *per curiam* decision on an application for re-hearing in the *Hibernia Mortgage Company* case the court made it clear that its decision was restricted to the facts of the instant case in which the proceeding was by way of an ordinary suit against the original mortgagor and the corporation which had bought the mortgaged property and had assumed the debt. It expressed no opinion on the question whether "a holder of a mortgage, with a stipulation that the mortgagor shall not alienate or hypothecate the mortgaged property to the prejudice of the mortgagee, may protect himself in a situation like this by availing himself of the pact de non alienando; that is, by bringing an action quasi in rem, as by an executory proceeding against only the original mortgagor and the mortgaged property."[8]

In *Graham Mfg. Co. v. Rolland,*[9] a foreign corporation having no branch office in the state and employing only traveling salesmen to solicit orders was held not subject to a license tax on corporations doing business within the state. The statute which sets forth the requirements for a foreign corporation to do business within the state[10] makes a special exemption for corporations which engage only in interstate or foreign commerce. Moreover, the Constitution of the United States under the commerce clause forbids the licensing of businesses of this character which are deemed to be engaged in purely interstate commerce.[11]

In *State v. Board of Pharmacy of Louisiana,*[12] the relator asked for a writ of mandamus and in the alternative for a mandatory injunction to the State Board of Pharmacy compelling it to renew his license to practice the profession of pharmacy

7. Fisher v. Wineman, 125 Mich. 642, 84 N.W. 1111, 52 L.R. A. 192 (1901); Pacific Spruce Corp. v. Oregon Portland Cement Co., 133 Ore. 223, 286 Pac. 520, 289 Pac. 489, 72 A.L.R. 1507 (1930).

8. 191 La. 658, 676-677, 186 So. 60, 66 (1939).

9. 191 La. 757, 186 So. 93 (1939).

10. La. Act 267 of 1914, § 24 [Dart's Stats. (1939) § 1247].

11. Robbins v. Shelby County, 120 U.S. 489, 7 S. Ct. 592, 30 L. Ed. 694 (1887).

12. 192 La. 551, 188 So. 697 (1939).

upon the payment of one dollar.[12a] He claimed that Act 305 of 1936 fixing the fee at five dollars was unconstitutional.

The position of the relator was somewhat obscure. By submitting the fee of one dollar the relator admitted that the collection of a fee in some amount was constitutional. The court held that the amount of five dollars per annum did not appear excessive. The relator's main contention seemed to be that the challenged act of 1936 provided that four-fifths of the amount of the fee should be placed in a special fund "to be used only for the necessary expenses of inspection, enforcement and statistical research by representatives of the State Board of Pharmacy or its duly authorized agency."[13]

It is clear, as the court pointed out, that that provision of the act is a police measure and is not intended to raise revenue; therefore the claim of the relator that his property had been taken without due process of law and that a burden which should be borne by the general public had been saddled on him was not well founded.

A case which incidentally raised a point of constitutional law was *Barret v. First Nat. Bank of Shreveport.*[14] Here the court sustained a statute which provided that the prescriptive period for a bank's liability for payment of a forged check should be one year after notice to depositor that vouchers representing payments are ready for delivery, or if such notice is not given, then one year after return of such voucher. The plaintiff had argued that this was an unconstitutional discrimination between the depositors to whom delivery of vouchers has been made and those who have been merely notified that vouchers are ready for delivery.

Three cases[15] raised the objection that the titles of certain statutes in question failed to meet the requirements of Article 3, section 16 of the Louisiana Constitution of 1921 which provides that "every law enacted by the legislature shall embrace but one object, and shall have a title indicative of such object." The court indicated that it intended to follow a principle of liberal con-

12a. As provided for by the original "Pharmacy Act," La. Act 66 of 1888, as amended.

13. 192 La. at 558, 188 So. at 699.

14. 191 La. 945, 186 So. 741 (1939), noted in (1939) 1 LOUISIANA LAW REVIEW 835.

15. State v. Board of Pharmacy of Louisiana, 192 La. 551, 188 So. 697 (1939); State v. Martin, 192 La. 704, 189 So. 109 (1939); Jackson v. Hart, 192 La. 1068, 190 So. 220 (1939).

struction in passing upon constitutional objections of this sort. It moreover stated in *State v. Martin*[16] and in *Jackson v. Hart*[17] that the *means* adopted to enforce a law is not an *object* of the law and therefore need not be included in the title of the law.

B. Eminent Domain

Parish of Jefferson v. Texas Co.[1] involved an expropriation case which raised the issue of the nature of the title which the Parish of Jefferson took in certain condemnation proceedings. In 1919 Congress authorized the construction of a canal known as the Dupre Cut in Jefferson Parish on condition that no expenses should be incurred by the United States for acquiring any lands or easements necessary for the improvement thereof. The Parish of Jefferson obtained a judgment expropriating an eighty-acre strip of the marsh land of the heirs of one Samuel Davis. In accordance with the judgment of expropriation the parish paid the sum of $2.00 per acre for the land taken. Thereafter by notarial act of donation the parish transferred perpetual use of the land to the United States. The defendants held leases claimed by the heirs of the original owner of the land and the parish brought suit to remove clouds on its title. The dispute centered on the nature of the title which the parish took by the condemnation proceedings and the nature of the title which it donated to the United States for use in connection with the canal. Interests of the United States, of Jefferson Parish and of the heirs of the original owner and their leases were therefore involved.

The issue can be stated in the form of a dilemma such as often appeared in the old text books of logic. If we concede the right of the Louisiana courts to pass on this suit notwithstanding the absence of the United States as a necessary party, the Texas Company's claims might be put as follows:

> By the expropriation proceedings Jefferson Parish attempted to take either (1) full ownership, or (2) a servitude. If the parish attempted to take full ownership then the title taken over and above a servitude was a taking of property for a private use and was unconstitutional; and if the parish be held to have taken full ownership then it donated full ownership to the United States, in which case it could not maintain a suit to remove clouds from its alleged title. If the parish took merely a servitude, then by the act of donation

16. 192 La. 704, 189 So. 109 (1939).
17. 192 La. 1068, 190 So. 220 (1939).
1. 192 La. 934, 189 So. 580 (1939).

it gave to the United States all that it took and the right to the use of the lands in ways that do not interfere with the operation of the canal remained in the heirs of the original owner and in their lessees. In either event, therefore, the parish can not maintain its suit.

The court, by a majority of four justices held that the judgment of expropriation gave to the parish full ownership; that such judgment was *res judicata* as against the heirs of the original owner and their privities; and that the act of donation conferred on the United States merely a servitude. Three justices dissented, with Justice Odom declaring that the parish had intended to take only what was necessary for the operation of the canal, to wit, a servitude; that it had donated the servitude to the United States; and that the remaining interests in the land were in the defendants.

The case is now before the Supreme Court of the United States on certiorari.

C. Taxation

An extremely important decision clarifying the Industrial Exemption provision of Paragraph 10 of Section 4 of Article X of the Constitution, as amended by Act 68 of 1936, was *Mattingly v. Vial.*[1] That law exempts from taxation new industries or any addition to any existing industry upon such terms as the Governor shall deem to the best interests of the state. In this case the State had entered into a contract exempting Mattingly from ad valorem taxes and from special taxes on all property used in connection with Mattingly's milk plant on condition that Mattingly should make certain additions to his existing plant. Thereafter the state levied taxes on the real estate upon which the plant was situated and on certain articles of merchandise held on the property for future use in the operation of the plant.

It was held that these taxes were valid. The court laid down the important principle that the object of the Industrial Exemption law was to relieve manufacturers of new or additional tax burdens incident to the erection of new plants or of new additions to old plants; and that these exemptions should be strictly construed. The court pointed out that it was not the intention of the Constitution to permit plant owners to escape taxation on property not strictly to be viewed as new plant or new additions

1. 193 La. 1, 190 So. 313 (1939).

to old plant. Merchandise temporarily on the premises likewise could not be viewed as additions to plant.

In preparing the regular assessment roll in 1935 a parish assessor failed to extend thereon a special school tax against the taxable property of the taxpayer. In 1936, the omission was discovered and a supplementary tax roll was prepared in accordance with Section 12 of Act 170 of 1898, as amended, which indicates the procedure for the back assessment of property omitted or "erroneously assessed." The taxpayer contended that the term "assessment" in the act referred only to the listing of property by description sufficient to identify it and did not include the levy of taxes, nor the extension of taxes already levied. The court held that the term "assessment" was a generic one used synonymously with the whole statutory method of imposing the tax, and as thus interpreted, the term "erroneously assessed" was applicable to the property in question. *Louisiana Central Lbr. Co. v. Catahoula Parish School Bd.*[2]

Morris v. Hankins[3] held that a tax sale in which the property is not described with such reasonable certainty as to make it susceptible of identification cannot be brought within the curative sections of Article 233 of the Constitution of 1898 which provides a three year prescriptive period for defective tax sales. This constitutional provision is similar to that contained in Section 11 of Article 10 of the Constitution of 1921.

State v. El Rito Transp. Co., Inc.[4] held that a franchise tax upon the gross receipts of the intrastate business of a shipping line which plied the Mississippi between New Orleans and Burwell is not a burden upon interstate commerce. Nor is it contrary to the Enabling Act[5] admitting Louisiana to statehood which provided that the Mississippi and navigable rivers leading into it or into the Gulf of Mexico should be common highways free of tax. The court pointed out that the tax was not on the privilege to use the Mississippi River but was a tax upon the gross receipts of the purely intrastate business done, the tax being levied only after the gross receipts had been reduced to possession. The court likewise held that the taxes here sued for, being due and payable prior to the passage of Act 182 of 1938, were not exempted by the provisions of that statute even though taxes of this nature

2. 191 La. 470, 185 So. 885 (1939).
3. 192 La. 504, 188 So. 155 (1939).
4. 193 La. 548, 190 So. 803 (1939).
5. 2 Stat. 642 (1811).

due subsequent to the act would be exempt. The court found in the act no intention, express or implied, to make its exemption retroactive and decided against the taxpayer on the familiar principle that tax exemptions are to be strictly construed. The court did not discuss the cases of *Cooper v. Mintz & Goldblum*[6] and *Fournet & Sierra Inc. v. Grosjean*[7] in which the state had unsuccessfully attempted to collect "luxury taxes" after repeal of the tax. These decisions rested on the ground that the repealing act did not contain a clause saving the right to prosecute claims arising out of the tax statute.

State v. Grace[8] decided that Act 161 of 1934 as amended by Act 140 of 1935 (4 E.S.) did not permit redemption of tax property where the property had been donated to the Pontchartrain Levee District. This decision in effect holds that the redemption statutes do not apply to those cases in which land has been transferred to a subdivision of the state and has been absolutely vested in the subdivision. The Chief Justice and Justices Land and Odom dissented.

In *State v. Owin*[9] a license tax on retail dealers was held applicable to a defendant, ninety per cent of whose purchases in gold and silver were sold to the United States. The defendant's contention that he was a wholesale dealer was rejected since the court took judicial notice of the fact that the United States was not a dealer, but a consumer, of gold and silver.

Where a subsidiary corporation receives and uses gasoline, the subsidiary is liable for a dealers' tax and a suit against a parent corporation for the amount of the tax must be dismissed. The court in this case recognized the separate corporate existence of the subsidiary despite the attempt on the part of the state to show its substantial identity with the parent because of interlocking directorates, identical general executive officers, and substantially complete ownership of the stock of the subsidiary by the parent. *State v. Gulf, Mobile & N. R. Co.*[10]

D. Municipal Corporations

The subject of municipal corporations is a growing field of the law. In the era since the World War, the increase in federal and state governmental activities has been so phenomenal that

6. 192 La. 1016, 190 So. 115 (1939).
7. 191 La. 186, 184 So. 719 (1938).
8. 191 La. 15, 184 So. 527 (1938), noted in (1939) 1 Louisiana Law Review 626.
9. 191 La. 617, 186 So. 46 (1939).
10. 191 La. 163, 184 So. 711 (1939).

one is apt to overlook a corresponding growth in the activities of the lesser political entities. But just as surely as state and federal action continue to impinge at an accelerated rate upon the lives of the citizens, so do the village, the town, the district, and the parish or county parallel this activity with an increase in the functions of local government. We are witnessing an age of public service by local public administrators, and the law which directs and governs their activities has grown with them.

Suits to determine legality of municipal bond issues are a species of litigation that is *sui generis*. Since these suits result in a kind of declaratory judgment they are a source of great convenience to the political entities, to the bond issuers, and to bondholders. Municipal financing is greatly facilitated by this device. Nevertheless, certain possible dangers exist in the practice. Aided by the thirty day prescriptive period for challenging the validity of refunding bonds (Const. Art. XIV, §14g) and the sixty day period for contesting bond issue elections (Const. Art. XIV, §14 (n)) municipalities now find the legality of bond issues a thing easy to establish. Conversely, dissatisfied taxpayers discover that the issues are difficult to attack. This, added to the fact that the legal issues are usually framed with an eye to purchasers' requirements, that the points urged are not contested with the energy of those motivated by genuinely adverse interests, that legal issues settled by many previous decisions may be raised at will in the bond suit, thus retarding the growth of a jurisprudence of municipal corporations, all combine to raise a doubt that such suits are an unmixed blessing from the point of view of the public interest. In *Sammons v. City of Lafayette*[1] and in *Lapeyronnie v. Police Jury of Parish of Jefferson*[2] refunding bond suits were admitted to have been brought more than thirty days after the issuance of the bonds had been authorized. This admission disposed of the most important aspects of the cases. The same result was reached in *Henning v. Town of Sulphur*[3] where the parties stipulated that "more than sixty days had elapsed between the promulgation of the returns of each of the bond elections and the date that this suit was filed."

In *State ex rel. Maestri v. Cave, Com'r of Public Finance,*[4] all the manifold legal issues of an ordinance authorizing the

1. 191 La. 444, 185 So. 463 (1938).
2. 192 La. 775, 189 So. 132 (1939).
3. 191 La. 979, 186 So. 845 (1939).
4. 193 La. 419, 190 So. 631 (1939).

issuance of certain refunding paving certificates were resolved in favor of the legality of the ordinance.

The parish of Tangipahoa signed notes in payment for paving work, part of which included the courthouse square at Amite. After the work was completed, the plaintiff, a holder in due course, sued on the notes. The parish defended on the grounds (1) that the parish had not provided for payment of the notes and (2) that the note holder could not enforce a lien against the courthouse square. The Supreme Court decided against the parish on the first point on the basis of the doctrine of estoppel and against the note holder on the second point on the ground that the lien on the courthouse square could not be enforced since the square was public property. *Turfitt v. Police Jury of Tangipahoa Parish.*[5]

In *Harrison v. Louisiana Highway Commission*[6] suits by property owners for injuries alleged to have been caused as a result of the construction of a bridge at Shreveport by the State Highway Commission were dismissed as to the City of Shreveport notwithstanding the enactment of an ordinance by the city authorizing the State to construct the bridge. The familiar principle of law that a municipality is subject to the will of the legislature and cannot be held liable for injuries arising from performance by the State of what might otherwise have been a municipal enterprise disposed of this aspect of the case.

Smith v. Police Jury of St. Tammany Parish[7] held that a police jury is not liable for injuries resulting from the defective construction of a bridge, since in the building of the bridge the police jury acted as an instrumentality of the state and shared its sovereign irresponsibility for damages resulting from negligence.

A contractor who after having completed a public works project deposits a bond in an amount exceeding by one-fourth all statutory liens arising out of the work is entitled to full payment of the contract price notwithstanding the provisions of Act 224 of 1918, as amended by Act 271 of 1926. Those provisions of law declare that if the authority having any public work done under a contract should make payments to the contractor after notice of claims for labor or materials, such payments "shall make said authority liable for the amount of such claim." The court

5. 191 La. 635, 186 So. 52 (1939).
6. 191 La. 839, 186 So. 354 (1939).
7. 192 La. 214, 187 So. 553 (1939).

stated that although the Act of 1926 did not specify that the posting of bond by the contractors would release the authority, nevertheless "the inference that that is the effect of the giving of such a bond by the contractor is inescapable." *Pitmann Bros. Constr. Co. v. First Sewerage Dist. of Lake Charles.*[8]

An ordinance of the city of Shreveport requiring all operators of public transfer service to post an indemnity bond in the amount of $5,000 for each vehicle so used, was upheld as a constitutional exercise of the municipality's police power. *City of Shreveport v. Breazeale.*[9]

VI. COMMERCIAL LAW

A. Banking and Negotiable Instruments

Removal of Directors of Homestead and Saving Associations

In *Riviore v. Masling*[1] the Supreme Court for a second time in the same case[2] held that Act 140 of 1932[3] did not vest in the board of directors of a Homestead and Saving Association the authority to remove one of their members for failure to take oath that he owned in his own right the amount of stock required for a board member under that statute. The court pointed out that this authority of removal for noncompliance with the requirements of the act was vested in the Supervisor of Homestead and Building Loan Associations. Since the first decision in 1935[4] the state legislature, through remedial legislation has changed the original act, so that now the board of directors exercise those powers withheld from them under the 1932 statute by the instant decision.[5]

Set Off of Deposits in Liquidating Banks

A much litigated question was again raised in *Brock v. Black, Rogers and Co.*[6] The action was brought by an insolvent bank against a lessee for rent. The court, following a well established line of jurisprudence, held that the defendant could not set off his deposits in the bank, since the rent had accrued after the

8. 193 La. 307, 190 So. 563 (1939).
9. 191 La. 1088, 187 So. 33 (1939).
1. 191 La. 282, 185 So. 25 (1938).
2. Rivoire v. Masling, 182 La. 731, 162 So. 580 (1935).
3. La. Act 140 of 1932, § 37 [Dart's Stats. (1939) § 744.5].
4. Rivoire v. Masling, 182 La. 731, 162 So. 580 (1935).
5. La. Act 337 of 1938, § 6, amending La. Act 140 of 1932, § 37 [Dart's Stats. (1939) § 744.5]. See Hebert and Lazarus, Louisiana Legislation of 1938 (1938) I Louisiana Law Review 80, 125.
6. 192 La. 49, 187 So. 51 (1939).

bank had been placed in liquidation.[7] It further held that such a set off would not be permissible, irrespective of whether the liquidation was of a solvent or insolvent bank.

Recovery of Overpayments by Liquidator

In the same decision[8] the liquidator was permitted to recover from the defendant depositor on a claim for overpayment in the distribution of the bank's assets. The defendant attempted to invoke Article 1846 of the Civil Code[9] which provides that money paid through error of law cannot be recovered if there existed a natural obligation to pay it. In disposing of this contention, the court said that there might be some basis for the defendant's argument if the controversy were between the bank and its depositor, but that "there was neither a moral nor a natural obligation"[10] on the liquidator's part to overpay the defendant any more than there would be to overpay any other depositor.

Method of Providing Penalties Against Borrowers in Credit Unions

In the case of *Post Office Employees' Credit Union of New Orleans, La. v. Morris,*[11] a credit union organized under Act 40 of 1924,[12] brought suit against a delinquent borrower to recover penalties prescribed by the board of directors, which were fixed in the by-laws and approved by the State Bank Commissioner. The defendant contended that the penalties claimed by the credit union could not be collected, since they were not provided for in the charter as required by the statute. Construing section 1 of the Act as a whole, the court upheld this contention and declared that it was necessary for the charter of the credit union to either expressly enumerate the charges that would be levied against the debtors, or expressly confer this authority upon the board of directors. This decision is unquestionably sound, in view of the fact that statutes of this type should be strictly construed.[13]

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7. People's Bank in Liquidation v. Mississippi & Lafourche Drainage Dist., 141 La. 1009, 76 So. 179 (1917); Brock v. Pan American Petroleum Corp., 186 La. 607, 173 So. 121 (1937); In re Liquidation of Hibernia Bank & Trust Co., 189 La. 813, 180 So. 646 (1938). Contra: Beatty v. Scudday, 10 La. Ann. 404 (1855).

8. Brock v. Black, Rogers & Co., Ltd., 192 La. 49, 187 So. 51 (1939).

9. Art. 1846, La. Civil Code of 1870.

10. 192 La. 49, 187 So. 51, 53 (1939).

11. 192 La. 891, 189 So. 566 (1939).

12. La. Act 40 of 1924, § 1 [Dart's Stats. (1939) § 745].

13. Liquidators of Prudential Savings and Homestead Society v. Langermann, 156 La. 76, 100 So. 55 (1924).

Letters of Credit—Liability of Buyers

In *Vivacqua Irmaos, S.A. v. Hickerson,*[14] goods ultimately intended for defendant, Hickerson, had been invoiced and consigned to the Interstate Trust & Banking Co., in accordance with a letter of credit previously issued to the plaintiff, Vivacqua Irmaos, S.A., on the request of defendant. Simultaneously with the shipment of goods, plaintiff drew a draft on the Interstate Bank and attached the bill of lading. In accordance with the custom prevailing among importers, the bill of lading was turned over to defendant who, upon selling the goods, sent the bank a check for an amount sufficient to pay the draft. On the due date of the draft the bank was insolvent and unable to pay. This suit was instituted against defendant to recover the price of the goods. The court, in refusing the relief prayed for, emphasized the fact that the goods had been invoiced and consigned to the bank; and took the view that by so doing the plaintiff did not intend a sale to the defendant, but contemplated a sale only to the bank, which in turn was to sell the goods to the defendant. Judge Rogers concluded that no contractual relationship whatsoever existed between the plantiff and the defendant, and that the defendant was not a guarantor of the solvency of the bank.[15] It is very likely that this decision will be limited to the special facts found by the court. In such transactions the goods are normally consigned directly to the purchaser with the bill of lading sent to the bank as security; and it has been uniformly held by the courts in other states that both the bank accepting the draft and the buyer are primarily liable for payment of the debt.[16] Thus payment to the bank would not release the buyer of his obligation to the seller in case the bank failed to pay as agreed.

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14. 193 La. 495, 190 So. 657 (1939).

15. Rogers, J., declared: "The coffee was invoiced and consigned to the Interstate Bank. The defendant never received any coffee from plaintiff. The only coffee he received was from the Interstate Bank in which the title to the coffee vested. . . . Since the plaintiff was not willing to sell its coffee solely on the credit of defendant, but only on the credit of the Interstate Bank, the argument that plaintiff required that defendant would in effect guarantee the solvency of the bank is not convincing, nor do we think that any such guaranty was within the contemplation of the contracting parties." (190 So. at 659.)

16. Border Nat. Bank of Eagle Pass, Texas v. American Nat. Bank of San Francisco, Cal., 282 Fed. 73 (C.C.A. 5th, 1922), cert. denied 260 U.S. 701, 43 S. Ct. 96, 67 L. Ed. 471 (1922); Greenough v. Munroe, 53 F. (2d) 362, 80 A.L.R. 797 (C.C.A. 2nd, 1931); Scribner v. Rutherford, 65 Iowa 551, 22 N.W. 670 (1885); Nowell v. Equitable Trust Co., 249 Mass. 585, 144 N.E. 749 (1924); Bassett v. Leslie, 123 N.Y. 396, 25 N.E. 386 (1890).

Depositor's Duty to Notify Bank of Forgeries

Act 163 of 1934, Section 1,[17] provides that a bank cannot be held liable for the payment of forged or altered checks unless the depositor has notified the bank of the forgery or alteration within one year after the return of the paid vouchers or notice that the vouchers are ready for delivery. In *Wm. M. Barrett, Inc. v. First National Bank of Shreveport*[18] this statute was held constitutional,[19] and the plaintiff's suit against the drawee bank to recover the amount of a series of checks with the drawer's signature and the payees' indorsements cleverly forged was held to be barred by failure to give the required notice. The court correctly held that the statute was applicable to those checks on which both the drawer's signature and the payee's indorsement were forged.[20]

Bills and Notes—Effect of Acceleration Provisions

The question as to who is a bona fide holder in due course, for value and before maturity, was raised in *Brock v. First State Bank & Trust Co.*[21] In that case the defendants, maker and guarantors of the note sued upon, contended that the plaintiff had not acquired the note before maturity. They relied upon a clause in the mortgage given as additional security for the note, which stated that although the note was to mature seven years after date, it would also become due and exigible in the event that the interest payable thereon became delinquent for a period of twelve months. Such delinquency was alleged to have occurred in 1931, prior to plaintiff's acquiring the note. Justice Higgins, without any discussion of the point, overruled the defendant's contention, and held that the twelve months' nonpayment of interest had not accelerated the maturity of the note. Thus plaintiff was considered a holder in due course for value and before maturity, and he held the note free from any equities which might exist between the original parties.

There has been considerable conflict in other jurisdictions as to the effect of acceleration clauses upon the maturity of notes.[22] Earlier Louisiana decisions had followed the majority view that

17. Dart's Stats. (1939) § 675.1.

18. 191 La. 945, 186 So. 741 (1939), noted in (1939) 1 LOUISIANA LAW REVIEW 835.

19. The trial court had held the act unconstitutional on the ground that its object was not sufficiently indicated by its title.

20. Note (1939) 1 LOUISIANA LAW REVIEW 835, 841.

21. 192 La. 77, 187 So. 60 (1939).

22. See Note in 34 A.L.R. 848 (1925).

such provisions contained in a mortgage securing a note entered into and became a part of the note.[23] Thus the fact that the acceleration clause in the *Brock* case was inserted in the mortgage, rather than in the note itself, would have very little effect on the decision. Again, according to the more modern view, supported by the clear weight of authority, a note containing an acceleration clause for nonpayment of interest does not automatically mature after default; but, such default gives the payee or holder the option of accelerating the maturity if he so desires.[24] Thus, in holding that the note had not automatically matured by virtue of the maker's defaults, the Louisiana court was following a well beaten path of jurisprudence.

Maturity of Demand Note

In *Reconstruction Finance Corp. v. Holloway*[25] the court held that a demand note negotiated within a few days after its date, had been "negotiated within a reasonable time,"[26] and the purchaser became a holder in due course. Thus the plaintiff, the Reconstruction Finance Corporation, to whom the notes had been pledged by such holder in due course had all the rights of said holder against prior parties, and took them free from the defense that the makers had signed solely for the accommodation of another and had received no consideration.

There is considerable confusion in the decided cases as to what is "an unreasonable length of time" in the negotiation of demand paper. Various factors and circumstances, such as the form of the note, the local custom or usage, the locality of the parties, and the payment of interest, must be taken into consid-

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23. Heirs of Williams v. Douglas, 47 La. Ann. 1277, 17 So. 805 (1895); Robson v. Beasley, 118 La. 738, 43 So. 391 (1907); McIntyre v. Andrews, 17 F. (2d) 865 (C.C.A. 7th, 1927); Miles v. Hamilton, 106 Kan. 804, 189 Pac. 926 (1920); Durham v. Rasco, 30 N.M. 16, 227 Pac. 599 (1924).

24. Moline Plow Co. v. Webb, 141 U.S. 616, 12 S. Ct. 100, 35 L. Ed. 879 (1891). See also Chafee, Acceleration Provisions in Time Paper (1919) 32 Harv. L. Rev. 747, 761.

There is a minority view relying mainly upon a literal interpretation of the agreement between the parties, which holds that, upon default, the note immediately becomes overdue and a subsequent purchaser is not a holder in due course. Hodge v. Wallace, 129 Wis. 84, 108 N.W. 212, 116 Am. St. Rep. 938 (1906).

25. 191 La. 583, 186 So. 35 (1938).

26. Section 53 of the Negotiable Instruments Law (§ 53 of La. Act 64 of 1904 [Dart's Stats. (1939) § 842]) provides, "Where an instrument payable on demand is negotiated *an unreasonable length of time* after its issue, the holder is not deemed a holder in due course." (Italics supplied.)

eration in deciding the individual case.[27] In ordinary cases the courts have held that a period of time longer than four months was an "unreasonable length of time" and prevented the transferee from being a holder in due course.[28] There is considerable confusion in cases where the demand note has been transferred within a period of from one to four months after its issuance.[29] The courts have been almost uniform in holding that a negotiation of a demand note within thirty days is a transfer before maturity.[30] The few decisons which have not lined up with the above generalization have been based largely on special fact findings of the court.[31]

Right of Debtor of Insolvent Bank to Set Off a Deposit

In the case of *Reconstruction Finance Corporation v. Tangipahoa Parish School Board*,[32] the Tangipahoa Bank & Trust Com-

27. Brock v. Citizens Bank & Trust Co., 187 La. 1078, 175 So. 673 (1937); Kintyre Farmers' Co-op. Elevator Co. v. Midland Nat. Bank, 2 F. (2d) 348 (C.C.A. 8th, 1924), cert. denied 266 U.S. 635, 45 S. Ct. 226, 69 L. Ed. 480 (1925); First Nat. Bank of Aspen v. Mineral Farm Consolidated Min. Co., 17 Colo. App. 452, 68 Pac. 981 (1902); Franklin Bank v. St. Louis Car Co., 321 Mo. 199, 9 S.W. (2d) 901, 60 A.L.R. 639 (1928).

28. Negotiations were held to be *after* maturity in the following cases: American Nat. Bank v. Patterson, 145 La. 995, 83 So. 218 (1919) (seven months); Parker v. Tuttle, 44 Me. 459 (1858) (four months); Brophy Grocery Co. v. Wilson, 45 Mont. 489, 124 Pac. 510 (1912) (five months); Grossman v. Checila, 127 Misc. 151, 215 N.Y. Supp. 353 (1926) (one year); State & City Bank & Trust Co. v. Hedrick, 198 N.C. 374, 151 S.E. 723 (1930) (six months).

29. The following decisions treated the transfer as *after* maturity: Kerby v. Wade, 101 Ark. 543, 142 S.W. 1121 (1912) (two months); Stevens v. Bruce, 21 Mass. 193 (1838) (three months); Losee v. Dunkin, 7 Johns. 70, 5 Am. Dec. 245 (N.Y. 1810) (two and one-half months); Camp v. Scott, 14 Vt. 387 (1842) (two months). The transfer was considered as *before* maturity in: Bank of St. John v. Hibernia Bank & Trust Co., 189 La. 1, 179 So. 15 (1938) (ninety-three days); First Nat. Bank of Aspen v. Mineral Farm Consolidated Min. Co., 17 Colo. App. 452, 68 Pac. 981 (1902) (three months); Weber v. Hirsch, 163 N.Y. Supp. 1086 (1917) (three months); Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S.E. 979 (1917) (sixty-eight days).

30. Brock v. Citizens Bank & Trust Co., 187 La. 1078, 175 So. 673 (1937) (twenty-five days); Seymour & Co. v. Artz, 5 La. App. 556 (1927) (two days); Kintyre Farmers' Co-op. Elevator Co. v. Midland Nat. Bank, 2 F. (2d) 348 (C.C.A. 8th, 1924), cert. denied 266 U.S. 635, 45 S. Ct. 226, 69 L. Ed. 480 (1925) (thirty days); Anderson v. Elem, 111 Kan. 713, 208 Pac. 573 (1922) (twenty-four days); City Nat. Bank v. Roberts, 266 Mass. 239, 165 N.E. 470 (1929) (two days); Merrill Trust Co. v. Brown, 122 Me. 101, 119 Atl. 109 (1922) (one day).

31. Thus, in Louisiana Mortgage Corp. v. Pickens, 182 So. 385 (La. App. 1938), the pledgee of a note was held to be a holder in due course, notwithstanding the fact that the note had been executed six years previously. The court assumed, from the fact that semi-annual interest was provided for in the mortgage securing the note, and from payments that had been made on the principal, that "it was the intention of the parties that the maker was to pay the note in installments." (182 So. at 388.) Accord: McLean v. Bryer, 24 R.I. 599, 54 Atl. 373 (1903), where interest was paid monthly, before and after transfer, for eighteen months.

32. 192 La. 1059, 190 So. 217 (1939).

pany bought all the assets of the closed banks in which the school funds were deposited. The school board accepted in settlement of its frozen deposits twenty (20%) per cent in cash and eighty (80%) per cent in certificates payable in 17, 29, 41, and 53 months from December 19, 1932. On January 17, 1933, the school board borrowed a sum of money from the Tanpigahoa Bank and gave as security the certificates of indebtedness issued to them in the transaction of December 1932. The Reconstruction Finance Corporation, having advanced funds to the Tangipahoa Bank, received as security the matured notes of the defendant, with the attached and pledged deferred certificates of deposit. Later, the Tanpigahoa Bank went into liquidation, paying only thirteen (13%) per cent to the depositors. The plaintiff, Reconstruction Finance Corporation, instituted this suit to recover the sum represented by the notes. The defendant, school board, contended that the money received and represented by the notes was not borrowed, but merely payment of their frozen deposits in the closed banks, whose assets had been taken over by the Tanpigahoa Bank. The court refused to adopt defendant's interpretation of the transaction, holding that to do so would be to effect a preference over the other depositors of the insolvent Tanpigahoa Bank.

The Louisiana courts have always been careful to disallow any plea of compensation which would result in giving a depositor of an insolvent bank, who is likewise a borrower, a privilege or benefit not enjoyed by other depositors.[33] This rule peculiar to Louisiana jurisprudence,[34] is apparently based on the assumption that upon the insolvency of a bank, the general depositors immediately acquire certain definite rights within the meaning of Article 2215,[35] which would be abridged by allowing a plea of compensation.

B. Bankruptcy

Alimony not Affected by Discharge

In *Parker v. Parker*[1] the court followed the clear mandate

33. People's Bank in Liquidation v. Mississippi & Lafourche Drainage Dist., 141 La. 1009, 76 So. 179 (1917); Brock v. Pan American Petroleum Corporation, 186 La. 607, 173 So. 121 (1937). See also Comment (1933) 8 Tulane L. Rev. 423.

34. Other jurisdictions do not recognize such a limitation on the corresponding right of set-off. 82 A.L.R. 665 (1933).

35. "Compensation can not take place to the prejudice of the rights acquired by a third person. . . ." Art. 2215, La. Civil Code of 1870.

1. 191 La. 559, 186 So. 27 (1938).

of section 17, subsection a(2) of the Federal Bankruptcy Act,[2] and held that a divorced husband's discharge in bankruptcy did not release him from liability for alimony due or to become due for the maintenance and support of his wife and minor children.[3]

C. Corporations

Ownership of Corporate Property on Voluntary Dissolution

The case of *Munn v. Wadley*[1] raised the question as to when the property of a dissolved corporation vests in its shareholders. A foreign corporation had transferred all its real estate to the plaintiff's predecessor in title, reserving mineral rights for thirty-five years. Immediately thereafter the corporation had been dissolved in a voluntary proceeding, conducted out of court, in the state of its domicile. More than nineteen years later, three former stockholders of the dissolved corporation filed an affidavit setting forth that one of their number had not reached majority until 1931; and that since she owned an undivided interest, the ten year prescriptive period could not run against the reservation of mineral rights in the property held by the plaintiff. The present suit for slander of title, brought against the stockholders named in the affidavit, was based on the theory that the mineral rights in question had never been transferred to the shareholders, and that the corporate right had been barred by prescription. In deciding in favor of the plaintiff, the court held that title to the property of a dissolved corporation does not automatically pass to the stockholders but must be formally transferred by the corporation acting through its liquidator or pass to them by virtue of a judicial decree. Chief Justice O'Niell relied largely on the analogous case of *Screwmen's Benevolent Association of Louisi-*

2. 30 Stat. 550 as amended by 42 Stat. 354, 11 U.S.C.A. § 35 (1927). The court pointed out (191 La. at 566, 186 So. at 30) that "This provision was originally enacted in the amendment to the Bankruptcy Act of Feb. 5, 1903 (32 Stat. 797, 798, Chap. 487) and has been maintained therein ever since." The amendment in 1903 was apparently a codification of existing law, for in the cases of Dunbar v. Dunbar, 190 U.S. 340, 23 S. Ct. 757, 47 L. Ed. 1084 (1903) and Wetmore v. Markoe, 196 U.S. 68, 25 S. Ct. 172, 49 L. Ed. 390 (1904), the Supreme Court held that alimony was not a "debt" within the meaning of Section 63a of the Bankruptcy Act, and thus was not affected by a discharge of the bankrupt, not being a provable claim.

3. Accord: Schlessinger v. Schlessinger, 39 Colo. 44, 88 Pac. 970 (1907); Cederberg v. Gunstrom, 193 Minn. 421, 258 N.W. 574 (1935); In re Williams, 208 N.Y. 32, 101 N.E. 853 (1913); Egbers v. Northern Pac. Ry. Co., 98 Wash. 531, 167 Pac. 1073 (1917).

1. 192 La. 874, 189 So. 561 (1939). See also section on Mineral Rights, supra, p. 75.

ana v. Monteleone,[2] where the Louisiana Supreme Court had held that a corporation whose charter had expired continued to own its property until actual distribution pursuant to law.

Fully Performed Ultra Vires Contracts

In *Reimann v. New Orleans Public Service, Inc.,*[3] the New Orleans Public Service, Inc. entered into a contract with the Fairmont Realty Corporation, Inc., whereby the public service company agreed to extend its gas mains to serve a subdivision being developed by the realty company. This contract had been fully performed, and the realty company had received full benefits thereunder. The liquidators of the realty corporation, alleging that the contract was ultra vires as to both parties, brought suit to annul the agreement and recover payments made to the public service company. The court refused the relief sought, completely rejecting the plaintiff's argument based on the ultra vires nature of the contract. In so doing it followed a rule, well established in Louisiana[4] and other jurisdictions,[5] that if an ultra vires contract has been fully performed on both sides, neither party can maintain an action to set aside the agreement.

Treasury Shares Subject to Franchise Tax

The necessity of strict and immediate compliance with the requirements of Section 45[6] of the Louisiana Business Corporation Act, where a reduction of the corporation's capital stock is intended, was forcibly illustrated in the case of *State v. Stewart Brothers Cotton Co., Inc.*[7] The defendant, a domestic corporation, had authorized and issued outstanding capital stock of $1,000,000.00, represented by 10,000 shares of a par value of $100.00 per share. The stock was owned equally by three brothers in portions of 3333 1/3 shares each. In 1929 one of the brothers died, and an

2. 168 La. 664, 123 So. 116 (1929). Accord: Bailey v. Porter-Wadley Lumber Co., 28 F. Supp. 25, 28 (D.C. La. 1939); In re St. Vincent De Paul Benevolent Ass'n of New Orleans, 175 So. 140 (La. App. 1937).

3. 191 La. 1079, 187 So. 30 (1939).

4. Edwards v. Fairbanks & Gilman, 27 La. Ann. 449 (1875) (the completed purchase of property, although an ultra vires act, transferred title to the purchaser); Cook v. Ruston Oil Mills Fertilizer Co., Ltd., 170 La. 10, 127 So. 347 (1930) (agreement to indemnify contractor's surety could not be rescinded as ultra vires after all the benefits of the contract had been accepted); City Savings Bank & Trust Co. v. Shreveport Brick Co., Inc., 172 La. 471, 134 So. 397 (1931) (a corporation was held bound by notes given in connection with a fully completed loan); Sharfenstein & Sons, Inc. v. Item Co., Ltd., 174 La. 794, 141 So. 463 (1932) (a continuing ultra vires contract which had been acquiesced in for several years was held binding on the corporation).

5. Ballantine, Private Corporations (1927) 252, § 72.

6. La. Act 250 of 1928, § 45 [Dart's Stats. (1939) § 1125].

7. 193 La. 16, 190 So. 317 (1939).

amicable agreement was reached whereby the estate of the deceased brother was to receive one-third of the corporation's assets in exchange for the decedent's stock. The 3333 1/3 shares thus purchased were delivered to the corporation; and, pursuant to Section 23, II, of the Business Corporation Act,[8] became "treasury shares" which could be disposed of either by sale to the public or by a reduction of the capital stock. Although a cancellation of the purchased shares and reduction of the corporate stock was intended, an amendment of the articles providing for the reduction of the capital stock was not prepared and filed until late in 1935. The corporate Franchise Tax paid during the years 1933, 1934 and 1935 had been based upon the par value of the remaining stock held by the two shareholders (6666 2/3 shares) plus the current surplus (which after the purchase of the deceased brother's shares ranged between $104,883.66 and $164,004.99 for the three years in question).

The State of Louisiana brought suit to recover additional franchise taxes, penalties and attorneys' fees, alleging that during those years the outstanding capital stock of the corporation amounted to $1,000,000.00. Justice Higgins, in an opinion containing an excellent discussion of Sections 23 and 45 of the Louisiana Business Corporation Act, held that the shares purchased from the deceased brother were still "issued and outstanding capital stock within the meaning of the Franchise Tax Law," until they were "formally retired or cancelled, as required by law for the reduction of capital stock."[9] Justice Higgins definitely stated that Section 45 of the Louisiana Business Corporation Act provided "the only legal method by which the capital stock of a corporation may be either increased or decreased."[10] Chief Justice O'Niell was impressed by the equities of the negligent corporation and filed a vigorous dissenting opinion.[11] He argued that the stock which had been purchased for the purpose of retirement could not be classed as "outstanding" stock because such treasury shares did not con-

8. La. Act 250 of 1928, § 23, II [Dart's Stats. (1939) § 1103].

9. 193 La. 16, 190 So. 317, 322 (1939).

10. 190 So. at 321.

11. 190 So. at 324, 325. O'Niell, C. J., concluded: "The neglect of the two remaining shareholders to amend the charter of the corporation, and thereby to give evidence of the reduction of its capital stock, is not a just cause for computing the corporation's franchise tax on outstanding capital stock or surplus which the corporation, in fact, did not have."

stitute an actual "present liability of the corporation."[12] While recognizing the merit of the Chief Justice's position, the writer suggests that the majority opinion is a correct interpretation of Sections 23 and 45. Section 45, IX, expressly sets out the procedure to be followed where it is desired to cancel the purchased shares and reduce the capital stock. Thus, subjective intent to retire is not decisive of the inquiry. The instant decision, in holding that treasury shares are "outstanding" for the purpose of taxation until they are formally retired, is in accord with the clear weight of authority in other jurisdictions that have similar statutory requirements.[13]

Conveyance of All Corporate Assets—Creditor's Rights

Section 41 of the Business Corporation Act[14] authorizes a corporation to make a voluntary transfer of all its assets, but expressly provides that such conveyance shall not be in fraud of corporate creditors, or of minority or non-voting shareholders.[15] In *Walter v. Caffall*[16] a debtor corporation transferred all its assets to a newly organized corporation. The only consideration received was stock in the new company, which also assumed to pay all obligations of its predecessor with stocks, bonds or promissory notes. The court found that there was not a single dollar of new capital in the new company, which was simply a reincarnation of the old company "in a new dress";[17] and looked upon the transfer as a part of a series of transactions, extending over a period of twelve years for the purpose of holding at bay and harassing the plaintiff and other non-assenting creditors. For this reason it held that the purported transfer should be set aside

12. The same courts that have declared that treasury shares are not outstanding in the sense of *"constituting a present liability of the corporation,"* have held them *"outstanding for franchise tax purposes,"* until formally retired. Borg v. International Silver Co., 11 F. (2d) 147 (C.C.A. 2nd, 1925).

13. Borg v. International Silver Co., 11 F. (2d) 147 (C.C.A. 2nd, 1925); Porter v. Plymouth Gold Mining Co., 29 Mont. 347, 74 Pac. 938 (1904); Knickerbocker Importation Co. v. State Board of Assessors, 74 N.J. Law 61, 65 Atl. 913 (1907); Goldstein-Fineburg Co. v. State Board of Assessors, 83 N.J. Law 61, 83 Atl. 773 (1912).

The recent case of Kemp v. Levinger, 162 Va. 685, 174 S.E. 820, 826 (1934), clearly expresses the majority view in the following excerpt: "The question has frequently arisen whether or not treasury stock, that is, stock which was actually issued but subsequently reacquired by the corporation, should be included in the term 'outstanding' quoad the corporation and the state. In such cases, unless the stock has been formally retired, for the purpose of taxation it is usually held to be outstanding."

14. La. Act 250 of 1928, § 41 [Dart's Stats. (1939) § 1121].

15. La. Act 250 of 1928, § 41, III [Dart's Stats. (1939) § 1121].

16. 192 La. 447, 188 So. 137 (1939).

17. 192 La. at 463, 188 So. at 142.

as a simulation, and any property in the hands of a new company should be seized and sold to satisfy the indebtedness of the old corporation, as if no transfer had taken place. The case is in accord with prior Louisiana decisions[18] and the clear language of Section 41, III, of the Business Corporation Act.

Fiduciary Relation of Directors in Purchase of Property

In the case of *Lawrence v. Sutton-Zwolle Oil Company,*[19] plaintiff, Lawrence, assigned certain oil leases to Sutton, Boudreau, and Stone who constituted the entire board of directors of the Sutton Oil Company. These leases were then assigned to the Zwolle Oil Company, which was organized by the three above individuals who again served as the entire board of directors. Funds necessary to carry out the deal had been advanced by the Sutton Company. The plaintiff sues to secure a cancellation of the assignment of the leases to Sutton, Boudreau and Stone, and the subsequent re-assignment of the same to the Zwolle Company; and to have the Sutton Company decreed to be the holder of the leases. A shareholder in the Sutton Company intervened and joined the plaintiff in his demands. The court decided in favor of the defendant.

The court's disposition of the case is clearly sound; for even assuming that the Sutton Company might be entitled to the leases, it was not seeking to assert any such right.[20] However, Justice Fournet predicated the decision on the much broader ground that the evidence did not establsh any duty on the part of Sutton, Boudreau and Stone to acquire the leases for the benefit of the Sutton Company.[21] In so deciding he relied on the following quotation from Fletcher on *Corporations*:[22]

> "... whether in any case an officer of a corporation is duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the

18. The court relied (192 La. at 465, 188 So. at 142) on the leading case of Alliance Trust Co. v. Streater, 182 La. 102, 161 So. 168 (1935), and authorities cited therein.

19. 193 La. 117, 190 So. 351 (1939).

20. Some thirty stockholders of the Sutton Company had intervened alleging "that after hearing the evidence of the case they were convinced that it was to the best interest of the stockholders of the Sutton Company to have the Sabine leases developed by the Zwolle Company and prayed that the intervention of Menuet be disallowed and dismissed." (190 So. at 354.)

21. 190 So. at 357.

22. Fletcher, Cyclopedia Corporations (Perm. ed., 1931) 175, § 861. (Italics supplied.) See also Comment (1939) 39 Col. L. Rev. 219, for a fine discussion of the cases where a director avails himself of corporate opportunities.

> corporation has an *interest, actual or in expectancy,* in the property, or whether the purchase of the property by the officer or director may *hinder or defeat the plans and purpose of the corporation* in carrying on or development of the legitimate business for which it was created."

An analysis of the actual decision will best clarify this rule. It has been held that a mere negotiation or desire for the purchase or lease of property would not create such an expectancy in favor of the corporation so as to bar acquisition of the property personally by its officers.[23] But where it has been shown that the corporation has expended money and effort in an attempt to acquire the property, the courts have recognized an expectancy.[24] It is well settled that the corporate tenant, in possession under a lease, has an expectancy of renewal, even though it may have no legal right of renewal as against the lessor.[25] Where a director bought a contract obligating the corporation to pay royalties on patented articles it manufactured, the court held that an interest "adverse to that of the corporation" had been acquired.[26] Again, when the directors of a corporation with a prospering and expanding business organized a rival corporation, they were required to account to shareholders of the original corporation for the prospective profits thus diverted.[27] In the instant case, the mere acquisition of the leases by directors Sutton, Boudreau and Stone, did not constitute a wrong. Add, however, the fact that funds of the Sutton Company were used in carrying out the deal, and it appears that the Sutton Company might well have asserted that there was a breach of the directors' fiduciary relation when the leases were not acquired for that corporation.[28]

Suit Against Dominant Corporation on Subsidiary's Obligation

In *State v. Gulf, Mobile & N. R. Co.*,[29] the State instituted suit against the defendant for taxes alleged to be due under the

23. Colorado & Utah Coal Co. v. Harris, 97 Colo. 309, 49 P. (2d) 429 (1935); Pioneer Oil and Gas Co. v. Anderson, 168 Miss. 334, 151 So. 161 (1933); Tierney v. United Pocahontas Coal Co., 85 W.Va. 545, 102 S.E. 249 (1920).

24. DeBardeleben v. Bessemer Land & Improvement Co., 140 Ala. 621, 37 So. 511 (1904).

25. Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199 (1900); Robinson v. Jewett, 116 N.Y. 40, 22 N.E. 224 (1889).

26. Farwell v. Pyle-National Electric Headlight Co., 289 Ill. 157, 124 N.E. 449 (1919). It was also suggested that the corporation was entitled to the opportunity to purchase the patent contract, being financially able to do so.

27. Coleman v. Hanger, 210 Ky. 309, 275 S.W. 784 (1925).

28. Comment (1939) 39 Col. L. Rev. 219, 227-229.

29. 191 La. 163, 184 So. 711 (1938).

State Motor Fuel Tax Law.[30] The defendant contended that the tax was not owed by them, but by the New Orleans Great Northern Railroad Company. The facts set out by the defendant showed that the N. O. G. N. R. Co. was a corporation with 95% of its stock owned by the defendant company, and operated under practically the same managerial personnel as the defendant company. The gasoline in question had been consigned to the N. O. G. N. R. Company upon the order of the defendant corporation, which paid for the gasoline but was later reimbursed by the N. O. G. N. R. Company. Upon these facts being brought out by the defendant, the State contended that even though the defendant corporation was not actually the importer, it should be held liable by virtue of domination and control of the purchasing corporation. District Judge Ott in a well written decision, which was adopted in full by the Supreme Court, held that the allegations of the State's petition would not support evidence of liability on such a ground, and that the State had not alleged or given any notice, in its pleadings, of an intention to hold defendant liable because of its ownership and control of the N. O. G. N. R. Corporation. However, the court indicated that the State might be able to redraft its pleading and recover from the defendant, if enforcement of the obligation was not available and effective against the subsidiary.[31] Judge Ott declared, "It is now the policy of the courts, where the occasion requires, to look beyond the mere technical separate entity of corporations where one corporation, by stock control of another, with interlocking directors, and having the same general executive officers, operates the other corporation as a mere agency or instrumentality of the dominant corporation in the furtherance of business of the dominant corporation, and as a part of one system."[32] Thus the Louisiana court clearly points the way to holding a parent corporation for the obligations of its completely controlled subsidiary, where necessary to prevent fraud or evasion of legal responsibility.

30. La. Act 6 of (E.S.) 1928, § 2, as amended by La. Act 34 of 1934, § 3, as amended by La. Act 413 of 1938, § 1 [Dart's Stats. (1939) § 8807].

31. In November, 1932, the N. O. G. N. *Railroad* Company was placed in the hands of a receiver, the president of the defendant corporation, and continued to operate as before. About July, 1933, all its property was acquired by a holding company, N. O. G. N. *Railway* Company, organized by and composed of stockholders of the defendant. The holding corporation then leased all the property acquired from the N. O. G. N. *Railroad* Company to the defendant corporation, who has operated the road until the present.

32. State v. Gulf, Mobile & N. R. Co., 191 La. 163, 182, 184 So. 711, 717 (1938).

D. INSURANCE

FIRE INSURANCE. The standard fire policy in force in Louisiana contains two provisions[1] intended to foreclose any claim of forfeiture because of the death of the insured subsequent to the issuance of the policy but prior to loss sustained thereunder. The converse question of the validity of a policy issued in the name, but subsequent to the death, of the insured was presented in *Dutton v. Harmonia Ins. Co. of Buffalo, N. Y.*[2] Two reasons seemed to the court sufficient to resolve this issue in favor of the validity of the policy, under the peculiar facts of the case. First, the insurer had failed to prove that the death of the insured prior to the issuance of the policy had increased the physical or moral hazard, as required by the Anti-Technicality Statute.[3] Secondly, by treating the policy as valid and adjusting a prior loss thereunder, as well as by making an ineffectual effort to cancel it subsequently, the defendant insurance company was held to have waived any possible right which it may have had to treat the contract as unenforceable from its inception.

Carbajal v. Bickmann[4] was a partition proceeding in which *inter alia* plaintiff rendered to defendants, her co-owners, an account of her administration of certain property of which plaintiff had had possession under an invalid adjudication. During such possession plaintiff had procured fire insurance policies on the improvements on the property, in all of which contracts she was named as the insured. Under the theory that this coverage afforded protection to all owners of the property, the plaintiff, as *negotiorum gestor,* was decreed entitled to charge her co-owners their proportionate share of the premiums paid.

LIFE INSURANCE. In common with the majority of other states, Louisiana has a statute[5] providing that the policy and documents attached thereto constitute the entire contract of insurance; and that no statement shall be used by the insurer as a defense unless it be in writing and indorsed upon or attached to the policy when

1. "This entire policy, unless otherwise provided by agreement and endorsed hereon or added hereto, shall be void . . . if any change, other than by death of the insured takes place in the interest, title or possession of the subject of insurance. . . . Where ever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured. . . ."

2. 191 La. 72, 184 So. 546 (1938).

3. La. Act 222 of 1928, § 1 [Dart's Stats. (1939) § 4191].

4. 192 La. 56, 187 So. 53 (1939).

5. La. Act 52 of 1906, § 1, as amended by La. Act 227 of 1916, § 2 [Dart's Stats. (1939) § 4113].

issued. In 1938, in *Laurent v. Unity Industrial Life Ins. Co.*,[6] the Supreme Court held that this act precluded an insurer from proving that the reserve on the policy had been applied by the insured prior to his death to an indebtedness due the insurer. Apparently, the decision in the *Laurent* case would prevent an insurer from making any effective disposition of the reserve on a policy except for extended insurance.

The natural consequence of such an unfortunate decision was presented to the court in *Oppenheimer v. Prudential Ins. Co. of America.*[7] The precise question presented was whether, in the computation of extended insurance, the insurer might deduct from the reserve the amount of a policy loan made to the insured prior to his death. Mr. Chief Justice O'Niell, who had dissented vigorously in the *Laurent* case, was the organ of an undivided court which resolved this issue in favor of the insurer. Stating candidly his own inability to differentiate the two cases, the learned Chief Justice recorded the opinion of his colleagues that while the statute was controlling in the *Laurent* case, it had no application to the case at bar. The principal case has gone far in rectifying the error made in the *Laurent* case, but just how far no one can determine presently. Complete clarification of this phase of insurance law can only come with an express overruling of the *Laurent* case.

MISCELLANEOUS. In *Arkansas Fuel Oil Co. v. National Surety Corporation*[8] plaintiff sued its predecessor's branch manager and the surety on the latter's bond. The claim was predicated upon an alleged embezzlement by another of its predecessor's employees. Under the agreement between the predecessor and its branch manager, the latter would be held accountable only for shortages in stocks, equipment or funds, stolen during the existence of the contract by his or the company's employees. The defaulting employee had been in the employ of the predecessor oil company both before and after the execution of the contract between the company and its branch manager. Since the petition did not allege that any certain or definite goods or stock were embezzled during the existence of the contract, it was held not to state a cause of action as against either defendant.

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6. 189 La. 426, 179 So. 586 (1938), noted in (1938) 13 Tulane L. Rev. 150, and criticized in The Work of the Louisiana Supreme Court for the 1937-1938 Term (1938) 1 LOUISIANA LAW REVIEW 314, 409, 410.

7. 193 La. 170, 190 So. 369 (1939).

8. 191 La. 115, 184 So. 560 (1938).

Many automobile casualty insurance policies provide that the coverage does not extend to an accident sustained while the auto is being operated by a person in violation of any state or federal law as to age. *Phillips v. New Amsterdam Casualty Co.*[9] upheld the validity of such a provision.

Jiles v. Venus Community Center Benev. Mut. Aid Ass'n[10] presented, in the main, factual issues as to whether the defendant had breached its contract to furnish medical attention to plaintiffs' son. The plaintiffs alleged that their child had died as a result of the defendant's failure to provide timely medical treatment, and the factual issues were resolved in their favor. The only interesting question was whether plaintiffs could recover damages for mental anguish unaccompanied by any other injury. The court applied the well settled civil law rule obtaining in the field of delicts, and awarded plaintiffs a judgment of $350 for this mental anguish.

Questions of fact only were presented in *Williamson v. Mutual Life Ins. Co. of New York.*[11] Weighing all of the testimony adduced, the court reached the conclusion that the insured had not become permanently and totally disabled and hence was not entitled to recover disability benefits under his policy.

VII. PROCEDURE

Only a few of the many decisions of the Supreme Court in the field of civil procedure during the past term were of more than ordinary importance. The remainder presented interesting applications of more or less rudimentary principles of adjective law to the varied facts of the cases.

COURTS. A 1934 statute[1] creates a privilege on the oil well, the lease on which the well is brought in and the drilling equipment employed, in favor of anyone performing labor, rendering services or furnishing materials in connection with the drilling. One section of this act provides that "any suit under this Act" may be brought either in the parish where the well is situated or in the parish where defendant is domiciled, at plaintiff's option. In *Rhodes v. Chrysanthou*[2] the plaintiff brought suit for $22,750 as

9. 193 La. 314, 190 So. 565 (1939).
10. 191 La. 803, 186 So. 342 (1939).
11. 192 La. 338, 188 So. 22 (1939).
1. La. Act 145 of 1934 [Dart's Stats. (1939) §§ 5101.1-5101.5].
2. 191 La. 774, 186 So. 333 (1939).

the balance claimed to be due on a contract for the drilling of an oil well in Iberia Parish. A personal judgment against the four defendants was sought, but as an incident thereto plaintiff prayed for enforcement of his privilege on the well, lease and drilling equipment, and obtained a provisional seizure of this property. Defendants timely excepted to this suit brought in Iberia Parish on the ground that they were domiciled in New Orleans, and that hence the trial court lacked jurisdiction *ratione personae* to render a personal judgment against them. On appeal the court affirmed the judgment of the trial court maintaining this exception and dismissing plaintiff's suit except insofar as it affected the property subject to the privilege. The only suit which could be brought under the act was one for the enforcement of the lien created. Hence the statutory venue provision was deemed insufficient to confer jurisdiction *ratione personae* to entertain the personal action. The language of the act was held not to indicate a legislative exception to the general rule that every person must be sued at his own domicile.

FORMA PAUPERIS. The statute[3] which permits indigent persons to prosecute and defend actions in Louisiana courts without paying costs or furnishing security therefor extends the privilege to "a citizen of this state or . . . an alien . . . domiciled in this state for three years." Local jurisprudence has not as yet offered any satisfactory interpretation of the phrase "citizen of this state."[4] *Lee v. Memphis Natural Gas Co.*[5] clarifies the situation somewhat with the holding that a person who resides in Louisiana with the intention of remaining here permanently is a citizen of the state within the intendment of the statute. The opinion does not disclose whether plaintiff was a citizen of the United States, but it seems safe to conclude that the court implied this requirement.

The forma pauperis statute also provides that each party to compromised litigation is liable for the unpaid costs accrued prior to the compromise. In *Jackson v. Hart*[6] the constitutionality of this provision was challenged. A defendant had been ruled into court by the clerk and constable to show cause why he should not pay the costs the plaintiff incurred prior to a compromise. The trial court's judgment was reversed by the Orleans Court of

3. La. Act 156 of 1912, as amended by La. Acts 260 of 1918, 165 of 1934, and 421 of 1938 [Dart's Stats. (1939) §§ 1400-1404].

4. On this point, see Cadwallader, Civil Suits in Forma Pauperis (1939) 1 LOUISIANA LAW REVIEW 787, 788 et seq.

5. 192 La. 157, 187 So. 276 (1939).

6. 192 La. 1068, 190 So. 220 (1939).

Appeal,[7] which held the statutory provision violative of the constitutional injunction that every law "shall embrace but one object, and shall have a title indicative of such object."[8] Under a writ of review the Supreme Court reversed the judgment of the intermediate appellate court. The statutory provision was held germane and incidental to the object of the legislation, whose title offered a sufficient indication of its contents.

In the remaining case on this subject,[9] a laborer earning $30 monthly, and having a dependent wife and child, was held entitled to the benefits of the statute.

EXCEPTIONS, RULES AND MOTIONS. In *McFarland v. Brotherhood of Locomotive Firemen and Enginemen*[10] plaintiff's action to enforce seniority rights was met with an exception to the service of citation. The defendant voluntary association had not appointed an agent in Louisiana for the service of process, but the plaintiff contended that the defendant was brought into court by citation served upon the heads of the local lodge and local division of the association. Since neither the local lodge nor local division had any jurisdiction over the subject matter of the suit, this service was held ineffective. There being no other manner in which process could be served, the suit was dismissed. Another declinatory exception was filed in *Geter v. Young*[11] where the defendant pleaded *lis pendens* in a suit to recover damages for assault and battery. The same claim had been incorporated into a reconventional demand filed by Geter to Young's action to recover rent. Since the reconventional demand had been dismissed by the Court of Appeal prior to institution of the present action, the exception of *lis pendens* was overruled.

The rule permitting cumulation of actions which are neither inconsistent nor mutually exclusive[12] was invoked in *Brandin Slate Co. v. Bennett.*[13] The joinder of demands against the defendant to enforce his liability both as a member of a commercial partnership and also as the guarantor of the firm's obligation, was held proper. The exception of nonjoinder of indispensable parties was maintained in *Succession of Stafford*[14] where plaintiff had

7. Jackson v. Hart, 186 So. 747 (La. App. 1939).
8. La. Const. of 1921, Art. III, § 16.
9. Scott v. Shreveport Rys. Co., 192 La. 495, 188 So. 152 (1939).
10. 193 La. 337, 190 So. 573 (1939).
11. 192 La. 922, 189 So. 577 (1939).
12. Art. 151, La. Code of Practice of 1870.
13. 193 La. 89, 190 So. 342 (1939). The points of substantive law involved in this case are discussed supra, pp. 62, 63.
14. 191 La. 855, 186 So. 360 (1939).

named as parties defendant the special legatees under a will sought to be annulled. Since these defendants had never been brought into court by service of process, the exception was maintained.

The exceptions of no right, and no cause, of action figured prominently in a number of cases decided during the past term. In *Succession of Thompson*[15] the executrix' tableau of distribution was opposed because it failed to list the opponent's claim for money loaned decedent. This account showed an interruption of prescription because of alleged payments made by the deceased during his lifetime. To this opposition the executrix filed exceptions of no right, and no cause, of action, and prescription. All exceptions were leveled at the failure of the opposition to allege the existence of written evidence of the interruption of prescription, and were based upon the rule that parol evidence is incompetent to prove such interruption as against a party deceased. The trial judge maintained the exceptions of no right, and no cause, of action,[16] and dismissed the opposition. Under the exercise of its supervisory jurisdiction[17] a majority of the Supreme Court overruled these two exceptions, vacated the trial court's judgment and remanded the case for further trial. This decision was based upon dual grounds: (1) the issue of prescription cannot be raised through the exceptions of no right, and no cause, of action; (2) since it is not necessary for the pleader to allege his evidence, the objection to parol evidence could not be raised through the exceptions maintained by the trial judge.

Under Louisiana practice the exceptions of no right, and no cause, of action are filed together ordinarily. At times the line of demarcation between the respective functions of the two exceptions becomes vague and shadowy[18] and so the double-barrelled remedy is employed to escape the unfortunate effect of a bad guess as to which would lie. The exception of no cause of action is triable only on the face of the petition;[19] while under the ex-

15. 191 La. 480, 186 So. 1 (1938).

16. Chief Justice O'Niell dissented, taking the position that for all practical purposes there was filed only one exception founded upon the proposition that since the claim was prescribed the opposition disclosed no cause of action. Consequently, he was of the opinion that the trial court's judgment disposed of the prescription issue and was correct.

17. This question is discussed infra, p. 148.

18. On this point, see Duplain v. Wiltz, 174 So. 652 (La. App. 1937), noted in (1938) 12 Tulane L. Rev. 315; McMahon, The Exception of No Cause of Action in Louisiana (1934) 9 Tulane L. Rev. 17, 23; McMahon, Parties Litigant in Louisiana—III (1937) 11 Tulane L. Rev. 527, 533.

19. Succession of Thompson, 191 La. 480, 186 So. 1 (1938); Higginbotham

ception of no right of action evidence may be admitted at its trial.[20] In *Phillips v. New Amsterdam Casualty Co.*[21] plaintiff contended that the exception of no right of action would not lie and the lower court erred in admitting evidence on the trial of the exception of no cause of action. Timely objection to this evidence had not been made by plaintiff, so the judgment of the trial judge maintaining the exception of no cause of action was affirmed.

One case[22] differentiated the functions of the exceptions of vagueness and no cause of action by invoking the settled rule that the objection to the uncertainty of plaintiff's allegations cannot be raised through the exception of no cause of action. *Bates v. Prudential Ins. Co. of America*[23] confuses the rules relating to the two exceptions. No cause of action based upon an insufficiency of material allegations was stated to be in reality an exception of vagueness which was waived by a filing after issue joined. The result reached by the court is clearly correct,[24] but its language is believed to be unfortunate.[25]

A peremptory exception may be pleaded for the first time in the appellate court,[26] but a plea of the unconstitutionality of a statute made for the first time on appeal will not be considered. In *Causey v. Opelousas-St. Landry Securities Co.*[27] plaintiff unsuccessfully sought to escape this latter rule on the ground that a plea of unconstitutionality is really a peremptory exception pleadable at any state of the proceeding. The court might well

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v. Public Belt Railroad Commission, 192 La. 525, 188 So. 395 (1938); Markham v. Lacaze, 192 La. 285, 187 So. 669 (1939).

20. The cases on this point are reviewed in Duplain v. Wiltz, 174 So. 652 (La. App. 1937), noted (1938) 12 Tulane L. Rev. 315. A contrary statement is made in the original opinion in Higginbotham v. Public Belt Railroad Commission, 192 La. 525, 188 So. 395 (1938), but the court necessarily overruled itself on this point on rehearing. Markham v. Lacaze, 192 La. 285, 187 So. 669 (1939) is illustrative of a line of cases apparently *contra* but which may be reconciled easily. When no evidence *is* introduced on the trial of the exception of no right of action, the allegations of the petition must be deemed true for the purposes of this trial.

21. 193 La. 314, 190 So. 565 (1939).

22. Moore v. Moore, 192 La. 239, 187 So. 670 (1939).

23. 192 La. 1029, 190 So. 120 (1939).

24. The decisions relied on by the court clearly support the proposition that the petition may be amended after the maintaining of an exception of no cause of action levelled at an insufficiency of material allegations.

25. The rule of the case, intended to further the liberality of pleading, will not attain its objective. Instead of filing an exception of no cause of action levelled at an insufficiency of allegations, on the trial defendant will object to evidence not supported by allegations in the petition. Then the trial court will either have to permit amendment or maintain the objection and nonsuit the plaintiff.

26. Arts 346, 902, La. Code of Practice of 1870.

27. 192 La. 677, 188 So. 739 (1939).

have rested its decision on the ground that exceptions are not available to a plaintiff.[28]

Exceptions of *res judicata* were maintained in two[29] cases decided by the Supreme Court during the past term. As both decisions rest upon their own respective facts and no doctrine of consequence was announced, no useful purpose will be served by a discussion of either.

Rules to strike pleadings were likewise involved in two other cases. In one[30] the rule was employed successfully to strike out a supplemental petition changing the issue after answer filed. In *Cox v. Cox*[31] the rule was discharged. There, plaintiff filed suit to be decreed the owner of 156 shares of the capital stock of George M. Cox, Inc. and for the cancellation of a stock certificate evidencing ownership of such stock in the defendant, his former wife. The certificate was alleged to be invalid on the ground that plaintiff's signature thereon was a forgery, or, if not a forgery, that such signature was obtained through the false and fraudulent misrepresentations of defendant. The latter moved to strike the allegations of misrepresentation from the petition because of their inconsistency with the claim of forgery. The court found that defendant had possession of the certificate and all the books and records of the corporation. Consequently the rule was discharged because of the wide latitude allowed a pleader where he has no knowledge as to which of two sets of facts are correct.

The effect of the filing of a motion to discontinue was considered in *Succession of Jones*.[32] After executing a compromise agreement, plaintiff signed a motion to discontinue the cause, which was duly filed by defendants but not acted upon by the trial judge. Subsequently plaintiff ruled defendants into court to show cause why the compromise agreement and motion to discontinue should not be decreed void because of fraud in their procurement. The trial judge took the view that the case was dismissed upon the filing of the motion. On appeal the Supreme Court reversed his judgment, holding that plaintiff was entitled to a trial of her rule. The action was held not to be dismissed automatically by the mere filing of the motion.

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28. Possibly except when the defendant files a reconventional demand. Cf. Woodward-Wight & Co. v. Haas, 149 So. 161 (La. App. 1933).

29. Carbajal v. Bickman, 192 La. 56, 187 So. 53 (1939); Succession of Fitzgerald, 192 La. 726, 189 So. 116 (1939).

30. In re Buller's Estate, 192 La. 644, 188 So. 728 (1939).

31. 193 La. 268, 190 So. 401 (1939).

32. 193 La. 360, 190 So. 581 (1939).

Schutzman v. Dobrowolski[33] presented an issue as to whether the suit should have been dismissed because of its abandonment by plaintiff. No action towards its prosecution had been taken for five years since plaintiff had moved for a default. However, less than five years had elapsed since defendants filed their answer to avoid the confirmation by plaintiff of his default. Since the filing of the answer was under stress of the necessity created by plaintiff, it was held to be a step taken by plaintiff in the prosecution of the suit. Defendants' motion to dismiss because of abandonment was overruled. The position taken by the court seems specious, but it is well supported by prior jurisprudence.

PRODUCTION OF EVIDENCE. Ever since Louisiana adopted the rule permitting parties to litigation to give testimony in the case, interrogatories on facts and articles have been considered obsolescent to a large extent. Of late this remedy appears to possess a reviving popularity, and in the past term seven cases[34] decided by the Supreme Court involved these interrogatories. The growing use of this cumbersome procedure would seem to indicate a crying need for the adoption of an adequate discovery statute in Louisiana.

Under the pertinent Code provision,[35] answers to interrogatories on facts and articles may be rebutted. In *Scurto v. Le Blanc*[36] it was pointed out that this rule does not obtain where parol evidence is prohibited and the answers are sought as a substitute for written proof. *Fontenot v. Ludeau*[37] presented the converse situation—where parol evidence is admissible. The failure of a party to answer an interrogatory was held not to be a judicial confession of the fact putting an end to the case. Only a rebuttable presumption was said to result therefrom. It was held permissible for the party to overthrow such presumption by the introduction of parol evidence on the trial of the case.

TRIAL. The rule in Louisiana that the pleadings are enlarged by evidence unobjected to was invoked in *Hope v. Madison.*[38]

33. 191 La. 791, 186 So. 338 (1939), noted in (1939) 13 Tulane L. Rev. 637. Another aspect of the case is discussed supra, p. 66.

34. Scurto v. LeBlanc, 191 La. 136, 184 So. 567 (1938); Fontenot v. Ludeau, 191 La. 540, 186 So. 21 (1938); Deshotels v. Ludeau, 191 La. 554, 186 So. 26 (1938); Fontenot v. Ludeau, 191 La. 555, 186 So. 26 (1938); McDaniel v. Ludeau, 191 La. 556, 186 So. 26 (1938); Fontenot v. Ludeau, 191 La. 557, 186 So. 27 (1938); Tate v. Ludeau, 191 La. 558, 186 So. 27 (1938).

35. Art. 354, La. Code of Practice of 1870.

36. 191 La. 136, 184 So. 567 (1938).

37. 191 La. 540, 186 So. 21 (1938).

38. 192 La. 593, 188 So. 711 (1939).

One well recognized exception to this principle is that if the evidence is admissible on some point raised by the pleadings, and hence could not be excluded, no such enlargement results. Under the facts of the case, it was held that the exception, rather than the general rule, applied.

A code provision[39] announces the general rule[40] that a merchant's books are not admissible as evidence in his favor. In *Love v. Woodard*[41] the defendant's bookkeeper testified to certain materials sold plaintiff's husband, using defendant's books to refresh his memory. This testimony was received without objection, but when the books were offered in evidence it was contended that they were inadmissible because of the general rule announced above. The trial court's overruling of this objection was held not to be prejudicial, in view of the plaintiff's failure to object to the testimony of the bookkeeper.

It seems settled that where the plaintiff's failure to prove his case results from defective pleadings, or from an excusable failure to supply evidence which may be available on the trial of a second suit, the judgment rendered should be one of nonsuit only. *State v. Gulf, Mobile & N. R. Co.*[42] reiterates this principle of a liberal procedure. Various questions relating to the taxing of fees of expert witnesses were presented in *McCoy v. Arkansas Natural Gas Corporation.*[43] Defendant was held not entitled to recover fees of experts who were regularly in its employ. Subpoenas for expert witnesses were not thought to be a condition precedent to the right to tax their fees as costs. The code limitation[44] of the recovery of witnesses' fees and expenses to not more than six witnesses was held inapplicable to expert testimony.

In cases involving more than $100, a note of evidence is not indispensable to the confirmation of a default in the district courts.[45] For different reasons, the same rule obtains as to default

39. Art. 2248, La. Civil Code of 1870.

40. For the exceptions to this rule, see Shea v. Sewerage & Water Board of New Orleans, 124 La. 299, 50 So. 166 (1909).

41. 193 La. 251, 190 So. 396 (1939).

42. 191 La. 163, 184 So. 711 (1938).

43. 193 La. 238, 190 So. 391 (1939).

44. Art. 472, La. Code of Practice of 1870. La. Act 19 of 1884, § 1 [Dart's Stats. (1939) § 1990] governs the fees of expert witnesses.

45. Ordinarily, the clerk is not required to reduce the testimony of witnesses to writing unless requested to do so by one of the litigants. Art. 601, La. Code of Practice of 1870. The testimony must be transcribed, however, in probate cases. Art. 1042, La. Code of Practice of 1870. When an appeal is taken in default cases a statement of fact must be prepared by plaintiff's counsel, or by the trial judge on the refusal of counsel to do so. If the latter cannot or will not draft such a statement, the case may be remanded for

judgments rendered by justices of the peace.[46] *Stetson v. Webber*[47] presented the question of whether a note of evidence is a condition precedent to the validity of a default judgment rendered in the district court where the latter had jurisdiction concurrent with that of the justice of the peace. Because of the rigid requirement of the controlling statutory provision,[48] the question was answered in the affirmative. A judgment rendered by default, where no such note of evidence had been taken by the clerk, was held invalid. The result, though justified by the applicable positive law, appears unnecessarily technical and wholly undesirable.

APPEALS, AND APPELLATE JURISDICTION AND PROCEDURE. The right of the plaintiff to appeal from an order rendered by a state trial judge, permitting the removal of the cause to the Federal District Court, was reiterated in *Rhodes v. Sinclair Refining Co.*[49] After the appeal had been sued out, the federal judge remanded the cause to the state court, and the defendant filed its answer therein. The question having become moot, the appeal was dismissed at appellee's costs.

The constitutionality of the luxury tax statute[50] had been challenged in *Fournet & Sierra, Inc. v. Grosjean.*[51] Plaintiff appealed from a judgment refusing to enjoin the Attorney General and the Collector of Revenue from proceeding against it under the statute. Pending the appeal, the statute had been repealed without any reservation of rights to continue the prosecution of actions thereunder. Consequently the appeal was held to present only moot issues.

The state constitution[52] confers upon the Supreme Court appellate jurisdiction in civil suits "where the amount in dispute

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further trial. Arts. 602, 603, La. Code of Practice of 1870; Francis v. Barbazon, 10 La. App. 55, 120 So. 427 (1929); Williamson v. Enterprise Brick Co., 178 So. 197 (La. App. 1938).

46. Cf. Art. 1085, La. Code of Pratice of 1870, as amended by La. Act 102 of 1898. On appeal, the case is tried *de novo*. Art. 1129, La. Code of Practice of 1870.

47. 192 La. 148, 187 So. 83 (1939).

48. "The clerk, in rendering judgments . . . in confirmation of defaults before him, shall make a note of all documents offered in evidence, and shall reduce, or cause to be reduced, to writing the oral evidence offered. . . ." La. Act 223 of 1928, § 11, as amended by La. Act 222 of 1932 [Dart's Stats. (1939) § 1494].

49. 191 La. 189, 184 So. 720 (1938).

50. La. Act 75 of 1936, repealed by La. Act 2 of 1938 [Dart's Stats. (1939) §§ 8648.4-8648.25].

51. 191 La. 186, 184 So. 719 (1938).

52. La. Const. of 1921, Art. VII, § 10 (3).

. . . shall exceed two thousand dollars exclusive of interest."[53] A number of decisions involved the determination of this jurisdictional amount. In one case,[54] where it was sought to annul a tax sale of immovables, the value thereof was held to be the amount involved. *Falgout v. Johnson*[55] applied the settled rule that in a petitory action the value of the real estate is to be considered as the amount in dispute. The mere fact that this value had been fixed at less than $2,000 in a judgment constituting one link of plaintiff's title was held not to prevent the appellate court from finding that its value was in excess of the jurisdictional amount. In a third case,[56] brought to recover earnest money deposited on a contract, the amount of this money, and not the value of the contract, was held to control the jurisdiction. In a fourth decision,[57] plaintiff sued for $2,115.80 on a fire insurance policy, and defendant disputed the insured's right to recover anything. A mortgage on the property involved amounted to $1,298.36, which plaintiff admitted the mortgagee might recover if it intervened. Since no intervention was filed by the mortgage creditor, it was held that the Supreme Court had jurisdiction.

Each new term of court presents questions involving the timeliness of filing motions to dismiss the appeal. It is now settled that if the latter are levelled at any defect, error or irregularity in the order of appeal, or in the appeal bond, which does not strike at the right to appeal, these motions must be filed within three days after the return day. What "strikes at the right to appeal" is a question which has caused considerable difficulty. In *Esparros v. Vicknair*[58] the failure of the trial judge to fix the amount of the suspensive appeal bond was held not to be a jurisdictional defect. Hence the irregularity was considered waived when no motion to dismiss was filed within three days. In *Succession of Vatter*[59] the motion to dismiss the appeal was granted even though it was filed more than three days after the return day. There the appeal was prosecuted by the executors in their official capacities, from a judgment disallowing a claim presented by one of them individually. Since the objection was levelled at

53. Workmen's compensation and personal injury cases are excluded from this constitutional grant of jurisdiction. La. Const. of 1921, Art. VII, § 10 (3).

54. Baker v. Duson, 192 La. 391, 188 So. 40 (1939).

55. 191 La. 823, 186 So. 349 (1939).

56. Richardson v. Charles Kirsch & Co., 191 La. 991, 187 So. 1 (1939).

57. Dutton v. Harmonia Ins. Co. of Buffalo, N.Y., 191 La. 72, 184 So. 546 (1938).

58. 191 La. 193, 184 So. 745 (1938).

59. 191 La. 875, 186 So. 597 (1938).

the right to appeal, the motion was granted despite the fact that it was filed more than three days after the return day.

A few cases presented questions concerning the procedure for taking appeals. Perhaps the most interesting one is *Hunter v. Forrest*,[60] where the appeal was granted by the court after it had been requested in a letter written to the trial judge by counsel. The request was read by the clerk in open court and an order of appeal was granted immediately. The motion to dismiss the appeal on the ground that no motion had been made therefor in open court was overruled. In *Hunt v. Hunt*[61] the appeal was granted in chambers; but since no citation of appeal had been issued or prayed for, the appeal was dismissed. In another case,[62] the motion was levelled at the failure to have citation of appeal issued after the order for an appeal was signed in chambers. It was admitted that counsel for the appellee had agreed orally to dispense with the formality of a citation. Because of this oral waiver, the motion to dismiss the appeal was overruled.

A judgment appointing an administrator must be executed provisionally, despite any appeal therefrom.[63] In *Succession of Heinig*[64] the appellee sought to dismiss a "suspensive" appeal from such a judgment, but the appeal was allowed to stand as a devolutive one only.

In two cases it was contended that the appeal had been abandoned. In the first,[65] the mere filing of a second suit on the same subject matter in the Federal District Court was held not to constitute an abandonment of the appeal taken from an adverse judgment in the first suit. In the second case[66] the Supreme Court applied the general rule[67] that the appeal is abandoned when the transcript is not filed in the appellate court within three days of the return day.

In *Succession of Gravolet*[68] documentary evidence not introduced in the court below was pressed upon the Supreme Court.

60. 193 La. 179, 190 So. 372 (1939).
61. 191 La. 362, 185 So. 284 (1938).
62. Police Jury of Parish of St. James v. Borne, 192 La. 1041, 190 So. 124 (1939).
63. Arts. 580, 1059, La. Code of Practice of 1870.
64. 192 La. 388, 188 So. 39 (1939).
65. Hope v. Madison, 191 La. 1075, 187 So. 28 (1939).
66. Maurer v. Haefner, 192 La. 929, 189 So. 579 (1939).
67. The rule applies only when the appeal has been prosecuted to the extent that the appellant has filed the appeal bond in the trial court. Vacuum Oil Co. v. Cockrell, 177 La. 623, 148 So. 898 (1933), and cases cited therein.
68. 191 La. 599, 186 So. 41 (1939).

No consideration was given to this new evidence.[69] The proper procedure in such cases is illustrated by the decision rendered in another cause,[70] where the case was remanded for the purpose of receiving newly-discovered evidence.

Elchinger v. Lacroix,[71] differentiating the effect of the remand of a cause for further proceedings from that of the new trial, is an extremely important decision. It was pointed out that in the remand for further proceedings the effect is to permit merely the introduction of evidence on the points reserved by the appellate court's opinion; while the effect of the granting of a new trial is to throw the entire case open for submission of evidence.

ENFORCEMENT OF JUDGMENTS. In *Richardson v. Helis*[72] plaintiff sought to make a California judgment executory in Louisiana. Under California law, a judgment is barred by the limitation of five years, unless supplementary proceedings are taken to revive it. The running of limitations, however, is tolled by the absence of the judgment debtor from the state. No supplementary proceedings to revive the judgment had been instituted in California, but the debtor had left that state prior to rendition of the decree and had never returned. Since the judgment was still exigible in the state in which it was rendered, it was held enforceable in Louisiana under the full faith and credit clause of the federal Constitution.

CONSERVATORY WRITS. In *Ludwig v. Calloway*[73] the assets of a commercial partnership were sequestered judicially to preserve them pending the liquidation of the firm. The case is of interest primarily because of its holding that movables, as well as immovables, may be sequested by the judge *ex mero motu*, and without bond. No re-examination of the question was attempted by the majority of the judges, prior jurisprudence[74] supporting the position being relied on. Mr. Chief Justice O'Niell dissented,

69. Under the provisions of Art. 895, La. Code of Practice of 1870. The Supreme Court has original jurisdiction for the determination of questions of fact affecting its own appellate jurisdiction. La. Const. of 1921, Art. VII, § 10 (2). This jurisdiction is rarely exercised, however. The court usually remands the cause to the trial court for the purpose of securing the necessary evidence. Cf. Harnischfeger Sales Corporation v. Sternberg Co., 177 La. 373, 148 So. 440 (1933).

70. Intravia v. Dixie Homestead Ass'n, 192 La. 1087, 190 So. 226 (1939).

71. 192 La. 908, 189 So. 572 (1939).

72. 192 La. 856, 189 So. 454 (1939).

73. 191 La. 1000, 187 So. 4 (1939).

74. Schwan v. Schwan, 52 La. Ann. 1183, 27 So. 678 (1900); Bogalusa Ice Co. v. Moffett, 188 La. 598, 177 So. 679 (1937).

pointing out that the only pertinent code provision[75] expressly limited the remedy to immovables. The rule that conservatory writs are harsh remedies which can be invoked only when granted by the strict letter of the law is too trite to require citation. Judicial sequestration, where the writ issues without bond, may be the harshest of all. The decision of the majority of the judges appears to be questionable.

In *George M. Cox, Inc. v. Eddy*[76] plaintiff corporation sued for injunctive relief to hold certain stock in statu quo pending the outcome of a suit between a divorced husband and wife. In the latter litigation the ownership of the majority of the stock of the plaintiff corporation was at issue. Because of this, defendants argued that the real question presented was the title to offices in a private corporation, and that since quo warranto was available, injunction would not lie. Finding that more than this question was involved, the court granted the injunctive relief prayed for.

SUPERVISORY JURISDICTION AND PROCEDURE. The most important decision on this subject handed down by the Supreme Court during the past term was *Succession of Thompson*,[77] which created the necessary precedent for a broadened exercise of the court's supervisory jurisdiction. As a general rule, supervisory writs will not issue when there exists an adequate remedy by appeal.[78] One recognized exception to this rule obtains in cases where a trial court is usurping jurisdiction.[79] But in the principal case the supervisory jurisdiction was invoked in order to control the trial judge's rulings on exceptions of no right, and no cause, of action, and prescription. The majority opinion gives no indication that the court was aware of this broadening of the exercise of its supervisory jurisdiction; but the question must have been considered, for the dissenting opinion of Mr. Chief Justice O'Niell observes that the case should have come up on appeal and not under an application for writs. Just what are the limits of this broadened exercise of supervisory jurisdiction cannot be determined at the present time. Its unfortunate effect may be observed from the case itself.[80]

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75. Art. 274, La. Code of Practice of 1870.
76. 192 La. 802, 189 So. 283 (1939).
77. 191 La. 480, 186 So. 1 (1938).
78. Noe v. Maestri, 193 La. 382, 190 So. 588 (1939).
79. Iberia, St. M. & E. R. Co. v. Morgan's L. & T. R. & S. S. Co., 129 La. 492, 56 So. 417 (1911); Gretna v. Bailey, 140 La. 363, 72 So. 996 (1916); Stewart v. Litchenberg, 148 La. 195, 86 So. 734 (1920); American Surety Co. of New York v. Brim, 175 La. 959, 144 So. 727 (1932); Plitt v. Plitt, 190 La. 59, 181 So. 857 (1938).
80. If the opponent had been forced to appeal, the executrix might have

Mandamus was issued in two other cases. In one,[81] the trial judge was forced to grant a writ of *subpoena duces tecum* which he had previously refused to issue. In the other,[82] the Supreme Court required the consolidation of similar actions arising out of the same transaction and presenting the same factual issues. *Noe v. Maestri*[83] held that mandamus could not be employed to compel a trial judge to issue an injunction unless it was his mandatory duty to grant the injunctive relief.

REAL ACTIONS. Four cases involved the procedure applicable to the action of jactitation. In *Sherburne v. Iberville Land Co.*[84] the court pointed out that after the rendition of judgment requiring defendant to institute a petitory action within a given delay, it was not necessary that the latter action be commenced in another suit. Defendant may file a supplemental answer in the original suit, making the necessary allegations therein as to his ownership of the property. This rule is entirely different from the one that governs the possessory action, where defendant must institute a new suit if he wishes to put the title of the property at issue.[85] Consequently, in two cases[86] where the defendants presented the issue of title in their answers, it was necessary for the court to determine whether the actions were possessory or jactitory. In both, the actions were held to be jactitory; hence the court permitted the question of title to be presented in this manner. In the fourth case,[87] one of the defendants was an absentee represented by a *curator-ad-hoc*. Since the latter could not and did not put the title of the property at issue, the only judgment which could be rendered against the absentee was one requiring him to institute a petitory action within a reasonable delay fixed by the court.

In *Tyson v. York*[88] the ancestor of the defendants in the petitory action acquired property owned by himself and the plaintiffs jointly. The suit was instituted more than seven years after such

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answered the appeal and thus raised the issue of prescription. The entire litigation might have ended there. This possibility was precluded by the invocation of the supervisory jurisdiction of the court.

81. State v. Meraux, 191 La. 202, 184 So. 825 (1938).

82. Riggin v. Watson-Aven Ice Cream Co., 192 La. 469, 188 So. 144 (1939).

83. 193 La. 382, 190 So. 588 (1939).

84. 192 La. 1091, 190 So. 227 (1939).

85. Art. 55, La. Code of Practice of 1870, as amended by La. Act 202 of 1920.

86. Crowell & Spencer Lumber Co. v. Burns, 191 La. 733, 186 So. 85 (1939); Board of Trustees of Ruston Circuit v. Rudy, 192 La. 200, 187 So. 549 (1939).

87. Ludeau v. Jacob, 192 La. 902, 189 So. 570 (1939).

88. 192 La. 373, 188 So. 33 (1939).

tax sale, and laches of the plaintiffs was pleaded as a bar to the action. There had never been any renunciation of ownership by plaintiffs, and no rights of third parties had intervened. Consequently, it was held that plaintiffs were guilty of no laches which prevented them from enforcing their interest in the property. In *Esparros v. Vicknair*[89] the defendants resisted plaintiff's petitory action on the ground that they had acquired a prescriptive title to the property. Since the area of the land claimed to be possessed by the defendants adversely could not be determined, the cause was remanded for further proceedings.

In *State v. Austermell*[90] the judgment specifically ordered the cancellation of a notice of *lis pendens* filed by defendant. This decree was held to cancel a second notice of *lis pendens* filed by Austermell, although not specifically referred to by the judgment.

EXECUTORY PROCESS. The cases on this subject decided by the Supreme Court during the past term all raised questions as to the validity of judicial sales of immovables made in the enforcement of mortgages. In *Morris v. Foster*[91] it was argued that failure of the sheriff to serve the notice of demand and notice of seizure, upon the defendant had vitiated the sale. A further ground of invalidity asserted was that the property did not bring an amount sufficient to clear the paving liens affecting the property and which primed the mortgage. All of these defects were held to be mere irregularities barred by the prescription of five years.[92] The code requirement[93] that the property must bring an amount sufficient to clear all superior privileges and mortgages was held inapplicable to paving liens. The failure to observe the same code requirement was invoked as a ground of nullity of the sale in *Markham v. Lacaze*.[94] Since the plaintiff's petition negatived the existence of *valid* superior privileges and mortgages, an exception of no cause of action was maintained.

In *Williams v. Simpson*[95] the adjudicatees failed to pay the price for which the property was sold to them, and acknowledged

89. 192 La. 383, 188 So. 37 (1939).
90. 191 La. 308, 185 So. 34 (1938).
91. 192 La. 996, 189 So. 601 (1939).
92. Under Art. 3543, La. Civil Code of 1870. Under a recent amendment this prescription has been reduced to two years, except where minors or interdicted persons are affected. La. Act 231 of 1932, amending and re-enacting Art. 3543, La. Civil Code of 1870.
93. Art. 684, La. Code of Practice of 1870.
94. 192 La. 285, 187 So. 669 (1939).
95. 192 La. 1022, 190 So. 117 (1939).

their inability to do so. Upon the instructions of the mortgagee, the sheriff changed his records so as to show an adjudication to him, and a deed was issued in his name. Realizing the invalidity of this procedure, the mortgagee subsequently instructed the sheriff to resell the property, and at this second sale it was adjudicated to the mortgage creditor. Since the original seizure had been released after the first sale and the sheriff failed to make another prior to the second adjudication, the latter was held invalid.

SUCCESSION PROCEDURE. In *Succession of Dancie*,[96] the widow of the decedent's son applied for letters of administration on the estate. The right to be appointed administratrix was claimed on the ground that she was the sole instituted heir of her husband, the latter having inherited an interest in the succession of decedent prior to his death. This application for letters of administration was opposed by the remaining children of decedent, the principal ground relied on being the contention that the Civil District Court for the Parish of Orleans had no jurisdiction to probate the will of the applicant's husband. Consequently, it was argued that the probate thereof was null and the will itself without effect. After going exhaustively into the testimony, the court concluded that applicant's husband had acquired a domicile in New Orleans prior to his death, and hence the court possessed the jurisdiction to probate his will. A judgment ordering letters of administration to issue to applicant was affirmed.

The decision in *Succession of Tyler*[97] appears to have settled the right of the executor named in a will to appeal from a judgment annulling the testament. A most ingenious argument was advanced by the opponents of the will to deny the executrix in the principal case the right of appeal. Since the code[98] requires that a judgment appointing an administrator be executed provisionally notwithstanding an appeal, it was argued that upon the annulment of the will and appointment of an administrator, the executrix became *functus officio* and could not prosecute the appeal. The court, however, pointed out that the executrix was under the duty of maintaining the will if possible, and consequently possessed the right to prosecute an appeal from a judgment annulling the testament.

96. 191 La. 518, 186 So. 14 (1939), noted in (1939) 13 Tulane L. Rev. 473.
97. 192 La. 365, 188 So. 31 (1939).
98. Art. 1059, La. Code of Practice of 1870.

VIII. MISCELLANEOUS

Elections

Two cases worthy of comment are *State ex rel Todd v. Mills*[1] and *Sealy v. Iberia Parish School Board.*[2] In the *Mills* case the plaintiff sought to contest the validity of an election in which he was a candidate, on the grounds that by "incorrect and irregular counts, tabulations and returns"[3] it appeared that his opponent had received more votes than he did. An exception of no cause of action alleged that the petition failed to set forth specifically and in detail the grounds upon which the contest was based and the irregularities or frauds of which complaint was made, as provided by law.[4] The court properly maintained the exception not only on the grounds that the petition failed to state a cause of action in that it merely set forth conclusions of the pleader,[5] but also on the well settled principle that the returns of an election are presumed to be correct and will not be inquired into by the courts in the absence of specific allegations of fraud or misconduct.

In the *Sealy* case, which was a suit to contest the legality of an election authorizing a bond issue, the court had occasion to reiterate the rule that under the Constitution[6] such actions must be brought within sixty days after the promulgation of the result of the election; thereafter, the legality of the bonds and of the taxes necessary to pay same is conclusively presumed.[7] Accordingly, where the suit was filed after a delay of eighty-four days, the defendant's exception of prescription was properly maintained.

Colleges and Universities

In *City of New Orleans v. Administrators of Tulane Educational Fund*[8] a statute vesting authority in the administrators to sell, lease or otherwise dispose of the property transferred to them by the State in 1884, "in the case the board . . . should deem it for the interest of the institution, to remove the University . . .

1. 191 La. 1, 184 So. 350 (1938).
2. 191 La. 223, 185 So. 6 (1938).
3. 191 La. 1, 4, 184 So. 350 (1938).
4. La. Act 97 of 1922, § 27, as amended by La. Act 8 of 1934 (2 E.S.) and La. Act 28 of 1935 (2 E.S.) [Dart's Stats. (1939) § 2677].
5. See La. Act 27 of 1926 [Dart's Stats. (1939) § 1483]; Succession of Stafford, 191 La. 855, 860, 186 So. 360, 361 (1939).
6. La. Const. of 1921, Art. 14, § 14 n.
7. La. Const. of 1921, Art. 14, § 14 n; Hardin v. Police Jury of Vernon Parish, 155 La. 899, 99 So. 690 (1924); Chiara v. Lafourche-Terrebonne Drainage District, 159 La. 422, 105 So. 418 (1925).
8. 193 La. 297, 190 So. 560 (1939).

to some more suitable location . . ."[9] was held to sufficiently authorize the sale to the City of New Orleans of an 18 foot strip of land to widen the adjacent street. By so holding, the court obviated the necessity of deciding the question as to whether a poll of the members of the Legislature constituted sufficient legislative sanction to comply with the requirement of the original transfer.[10]

Highways—Dedication

The dedication to the Louisiana Highway Commission of a right of way for the construction and maintenance of a roadway, was held to grant only a servitude since it was expressly understood between the parties that "this dedication and transfer . . . is made for and shall be solely used for the construction and maintenances of a public road . . . and for no other purpose."[11] Thus a suit by the original grantor to force the defendant to remove a restaurant and bar built partly on the shoulder of the road and partly on the plaintiff's property was successful. Defendant's contention that the building was partly on the right of way granted to the Commission and that the Commission was not complaining was rejected. The court held that since the Commission was without right or authority to use the right of way for any purpose other than that specified in the act of dedication, it could not authorize the defendant nor anyone else to do so.

Public Lands

A controversy as to the State's right to certain lands in Vermilion Parish was settled adversely to it in the case of *Louisiana Furs, Inc. v. State*.[12] Several claimants traced their title to the original grantee who purchased all the property in question from the State in 1883. The present action was one to fix boundaries and the State came in to attack the original transfer. It appears that all this property is situated in two adjacent townships but due to an error by the surveyor in locating the dividing line, the area of one of the townships was actually less than that stated in the plats, and there was a corresponding overplus of acreage in the other. The State contended that it was entitled to this overplus. However, since both the original grants were parts of the

9. La. Act 94 of 1890.

10. La. Act 43 of 1884, § 2 [Dart's Stats. (1939) § 2577]: ". . . the property, so transferred, may not be sold or disposed of, except under Legislative sanction."

11. Jones Island Realty Co. v. Middendorf, 191 La. 456, 185 So. 881 (1939).

12. 191 La. 964, 186 So. 840 (1939).

same transaction there was no error in the total acreage and the State's claim was dismissed.

Schools and School Districts

State ex rel Kundert v. Jefferson Parish School Board[13] was a suit by a teacher, who had been discharged in violation of the Teachers' Tenure Law,[14] to compel the defendant school board to reinstate her. The Board's defense, that the plaintiff had failed to make timely demand for her reinstatement and therefore was guilty of laches,[15] was rejected by the court on the grounds that although suit had been filed eight months after her wrongful discharge, she had promptly taken steps to obtain amicable settlement.

A similar defense was also rejected in *Andrews v. Union Parish School Board*[16] where the plaintiff brought suit for reinstatement forty-seven days after her wrongful discharge.

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13. 191 La. 102, 184 So. 555 (1938).

14. La. Act 100 of 1922, § 48, as amended by La. Act 58 of 1936, § 1 [Dart's Stats. (1939) § 2267].

15. Cf. Calamari v. Orleans Parish School Board, 189 La. 488, 179 So. 830 (1938); McMurray v. Orleans Parish School Board, 189 La. 502, 179 So. 834 (1938), where no action was taken by the plaintiffs seeking reinstatement until after the expiration of an unreasonable time.

16. 191 La. 90, 184 So. 552 (1938).