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The Work of the Louisiana Supreme Court for the 1937-1938 Term*

It is intended in this survey to examine the work of the highest appellate court of Louisiana during the last judicial year—from October 1937 to August 1938.[1] This will be done by furnishing statistical studies of the judicial business handled, together with a panoramic topical consideration of the more important developments in the jurisprudence during the period considered. In this manner, attention will be focused upon general trends in the progress of the law as evidenced in the decided cases, emphasis will be laid upon matters of importance and some discussion will be given to a variety of subjects of interest.

I. STATISTICAL SURVEY

The various tables prepared in the statistical survey reveal a number of interesting facts. During its 1937-1938 term, the Supreme Court disposed of 268 cases in written opinions.[2] The corresponding figures for each of the four preceding terms were: in 1933-34, 371 (an average of 53 cases per judge); in 1934-35, 341 (average of 48 cases per judge); in 1935-36, 268 (38 cases per judge); and in 1936-37, 252 (36 cases per judge). The fact that the number of cases disposed of annually has remained substantially the same in the past three terms after an abrupt drop from 48 to 38 cases per judge between the 1934-35 and 1935-36 terms, is largely reflected in and explained by the number of cases filed in the Supreme Court during each of the years mentioned above. In

* 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, Prescription, Insurance—Henry G. McMahon; Family Law, Successions, Mineral Rights—Harriet S. Daggett; Conventional Obligations—J. Denson Smith; Sale, Lease, Partnership, Banking and Negotiable Instruments—Paul M. Hebert; Torts and Workmen's Compensation, Public Law—Thomas A. Cowan; Criminal Law and Procedure—Jerome Hall; Bankruptcy—Ira S. Flory; Corporations—Dale E. Bennett.

1. This REVIEW will make a similar survey each year, and a survey of the work of the Louisiana Legislature will be made after each legislative session. Cf. Hebert and Lazarus, The Louisiana Legislation of 1938 (1938) 1 LOUISIANA LAW REVIEW 80.

2. This tabulation includes all cases for the 1937-38 term officially reported in Volumes 188, 189, and 190 of the Louisiana Reports.

1933-34 the total number of cases docketed in the Supreme Court, including applications for writs, was 538; in 1934-35, 525; in 1935-36, 493; in 1936-37, 494.[3]

These figures indicate that the Supreme Court, at the present time, is keeping abreast of its judicial business in that it disposes annually of a number of cases practically equivalent to the number of new matters docketed in the Court. Thus Table I shows that, with a total of 478 cases (including 213 writ applications) filed during the 1937-38 term, 459 cases (including 191 writ applications) were actually disposed of. This was an average of 65.6 matters per member of the Court.

During 1937-38, a total of 163 applications for rehearings were considered. Yet, despite the fact that rehearings were granted in only 13 instances (7.9%), a substantial portion of the Court's time must be devoted to their consideration (see Table VII).[4]

In view of the Supreme Court's heavy burden of reviewing both the law and the facts in all civil cases[5] and the additional constitutional mandate requiring at least two justices to read each record,[6] the disposition of such a large number of matters at each term is noteworthy—particularly so since the Court does not employ the memorandum opinion found so useful in other jurisdictions.[7]

3. The figures covering the number of cases filed in the Supreme Court are those furnished from the Office of the Clerk of the Supreme Court of Louisiana. The cooperation received from the Clerk and his assistants is here gratefully acknowledged.

4. In a few other jurisdictions congested dockets have been partially attributed to increase in the number of applications for rehearing. For discussion of this problem see Cook, The Rehearing Evil (1928) 14 Iowa L. Bull. 36. The large number of applications for rehearings does not present as serious a problem in Louisiana as it does in some other states because there is no oral argument on the application. Art. 913, La. Code of Practice of 1870.

5. La. Const. of 1921, Art. VII, § 10.

6. La. Const. of 1921, Art. VII, § 6.

7. For example, in Wisconsin, a Rule of Court provides: "In cases where the order or judgment is affirmed, opinions will not hereafter be written unless the questions involved be deemed by this court of such special importance or difficulty as to demand treatment in an opinion . . ." The Supreme Court of Wisconsin in 1934-35 disposed of 85 cases amounting to 23.1% of the cases before it in memorandum opinion. The Work of the Wisconsin Supreme Court for the August 1934, and January 1935, Terms (1935) 11 Wis. L. Rev. 5, 6, 8-9. The use of the memorandum opinion might easily be resorted to in Louisiana as a means of lightening the burden imposed on our appellate courts. But cf. La. Const. of 1921, Art. VII, § 1: " . . . The judges of all courts shall refer to the law and adduce the reasons on which every definitive judgment is founded." However, this latter provision should prove no obstacle to the adoption of the memorandum opinion in Louisiana in the light of (1) the accepted practice of using abbreviated opinions in cases closely connected with others decided with written opinions; and (2) the practice of not assigning detailed reasons when writs are denied, despite the provisions of La. Const. of 1921, Art. VII, § 2.

Of a total of 209 cases appealed from the District Courts throughout the State, 67% of the judgments were affirmed, 20% were reversed and 13% were modified or otherwise disposed of (see Table II). In 34 cases considering decisions of the Courts of Appeal on writs of review, only 26.5% were affirmed, 58.8% were reversed and 14.7% were modified or otherwise disposed of (see Tables II and III).

The classifications in Table IV are arbitrarily chosen for the purpose of topical analysis since many of the cases obviously involve more than one legal point. The tabulation is, therefore, based upon the main subject matter to which the decisions relate. It is especially significant that 18.7% of the cases deal with Criminal Law and Procedure. The next largest groups include: Procedure and Practice—12.7%; Divorce—6.4%; Succession matters—6.4%; Torts and Workmen's Compensation—6.4%; Mineral Rights—6.0%; Taxation—5.2%; Insurance—3.4%.

The bulk of the litigation reaching the Supreme Court is on appeal from the District Courts, such appeals accounting for 78% of the reported cases while only 12.7% were on writs of review to the Courts of Appeal (see Table V). The geographical analysis of appeals from the District Courts reveals that the parish of Orleans gave rise to 21.3% of the cases so appealed, the parish of Caddo provided 13.1%, East Baton Rouge parish sent 6%, and the other parishes supplied the remaining 59.6% (see Table VI).

TABLE I

VOLUME OF JUDICIAL BUSINESS

Cases disposed of with written opinions	268
Applications for writs considered	191
Applications for rehearings disposed of	163
Cases docketed during 1937-38 term (excluding writ applications)	265
Applications for writs filed during 1937-38 term	213
Total matters docketed during 1937-38 term	478
Total cases handled by the Court (excluding rehearing applications)	459
Grand total of matters handled (including rehearing applications)	622

TABLE II

DISPOSITION OF LITIGATION

	On Appeal from District Courts	On Appeal from City Courts	On Certiorari or Review from Appellate Courts	On Supervisory Writs to District Courts	On Certificate from Courts of Appeal	On Original Jurisdiction	TOTAL
Affirmed	140	2	9	..	..	..	151
Amended and affirmed.	11	..	2	..	..	..	13
Reversed and rendered.	29	..	9	..	..	..	38
Affirmed in part and reversed in part	2	..	1	..	..	..	3
Affirmed in part, reversed in part and remanded	1	..	1	..	..	..	2
Reversed and remanded	13	..	3	..	..	..	16
Remanded on motion	1	..	..	..	..	..	1
Reversed and judgment of lower court reinstated	..	..	8	..	..	..	8
Motion to dismiss appeals granted	3	..	..	..	..	..	3
Motion to dismiss appeals refused	7	..	..	..	..	..	7
Motion to dismiss writs of certiorari or review granted	..	..	1	..	..	..	1
Motion for re-entry of judgment granted	..	..	..	..	..	1	1
Transferred to Court of Appeals for lack of jurisdiction	2	..	..	..	..	..	2
Writs made peremptory	..	..	..	11	..	..	11
Writs made peremptory in part, recalled in part	..	..	..	1	..	..	1
Writs recalled	..	..	..	7	..	..	7
Certified questions answered	..	..	..	..	2	..	2
Petitions dismissed	..	..	..	..	..	1	1
TOTALS	209	2	34	19	2	2	268

TABLE III

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

	Parish of Orleans	First Circuit	Second Circuit	TOTAL
Affirmed	4	3	2	9
Amended and affirmed	..	1	1	2
Reversed and rendered	2	1	6	9
Reversed in part and affirmed in part	1	..	..	1
Affirmed in part, reversed in part and remanded	..	..	1	1
Reversed and remanded	..	1	2	3
Court of appeal reversed and lower court judgment reinstated	2	3	3	8
Writs dismissed	..	1	..	1
TOTALS	9	10	15	34

TABLE IV

TOPICAL ANALYSIS OF DECISIONS

Attorneys	2
Banking and Negotiable Instruments	5
Bankruptcy	2
Carriers	5
Constitutional Law	9
Conventional Obligations	9
Corporations	4
Courts	8
Criminal Law and Procedure	50
Divorce	17
Expropriation	1
Father and Child	1
Husband and Wife	2
Insane Persons	1
Insurance	10
Labor Law	1
Lease	2
Mineral Rights	16
Minors and Tutorship	2
Mortgages	5
Partnership	1
Pledge	2
Practice and Procedure	34
Prescription	9
Receivers and Receivership Procedure	3
Sale	9
Schools and School Districts	2
Statutes	4
Successions	17
Suretyship	2
Taxation	14
Torts and Workmen's Compensation	17
Trade Marks and Trade Names	1
Telegraphs and Telephones	1

TABLE V

JURISDICTIONAL ORIGIN OF CASES

Appeals from District Courts	209
Appeals from City Courts	2
On Writs of Review from Courts of Appeal	34
Questions certified by Courts of Appeal	2
On Supervisory Writs to District Courts	19
Petitions and Motions in Supreme Court	2
TOTAL	268

TABLE VI

GEOGRAPHICAL ANALYSIS OF APPEALS FROM DISTRICT COURTS

Parish	*No. of Cases*	*Parish*	*No. of Cases*
Arcadia	5	Natchitoches	2
Ascension	1	Ouachita	8
Beauregard	2	Orleans Criminal	5
Bienville	2	Orleans Civil	52
Bossier	2	Pointe Coupee	1
Caddo	35	Rapides	8
Calcasieu	4	Red River	1
Claiborne	3	Sabine	2
Concordia	2	St. Bernard	2
DeSoto	3	St. Helena	1
East Baton Rouge	16	St. John the Baptist	1
Evangeline	1	St. Landry	1
Franklin	1	St. Martin	1
Grant	1	St. Mary	2
Iberia	1	St. Tammany	1
Jackson	1	Tangipahoa	7
Jefferson	6	Terrebonne	3
Jefferson Davis	2	Union	2
Lafourche	2	Washington	2
LaSalle	2	Webster	4
Lincoln	3	West Carroll	1
Livingston	2	Winn	1
Madison	1		
Morehouse	3	TOTAL	209

TABLE VII

DISPOSITION OF APPLICATIONS FOR WRITS AND REHEARINGS

	Number	*Granted*	*Refused*
Applications for Rehearings	163	13	150
Applications for Writs	191	40	151
TOTALS	354	53	301

TABLE VIII

DISSENTS*

	With Opinion	Without Opinion	Concurrence in written dissenting opinion	TOTAL
O'Niell, C. J.	10	11	1	22
Fournet, J.	..	2	..	2
Higgins, J.	1	..	..	1
Land, J.	1	..	..	1
Odom, J.	2	14	1	17
Ponder, J.	1	..	..	1
Rogers, J.	..	2	..	2
TOTALS	15	29	2	46

* 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—33.

II. PROCEDURE

For the past decade the decisions of the Supreme Court have, on the whole, evidenced a marked trend towards a liberality of procedure. With but one possible exception, it will be seen that all of the cases involving adjective law decided during the past term show that the momentum of this movement has not diminished. While the majority of these decisions required little more than the application of rudimentary principles, at least two cases were of landmark importance.

COURTS. In *O'Brien v. Delta Air Corporation*,[1] it was again held that a court having territorial jurisdiction over the place where a contract of carriage was breached had jurisdiction *ratione personae* to try an action in damages therefor.

Three cases involved the exercise of the authority of Louisi-

1. 188 La. 911, 178 So. 489 (1938).

ana courts to restrain the prosecution, by Louisiana citizens, of transitory causes of action in the courts of other states. In two of these cases,[2] the court restrained a Louisiana citizen from suing other Louisiana citizens or corporations in the courts of Mississippi, where the purpose of such suits was to take advantage of the materially different substantive law of the latter state. In the third case,[3] however, the court refused to enjoin the prosecution of an action instituted by a Louisiana citizen in the Mississippi courts—the accident having occurred in the latter state, and the action being brought against a Louisiana corporation and its agent, who was a resident of Mississippi. All of the plaintiff's witnesses were citizens of Mississippi. The mere inconvenience to which the defendant Louisiana corporation was subject was held insufficient, in the face of the above facts, to justify any restraining of the Mississippi litigation.

EXCEPTIONS. The trite principle that the well pleaded allegations of the petition must be deemed admitted for the purposes of the trial of an exception of no cause of action was affirmed by two cases.[4] The similarly well settled rule that a vague petition is not ordinarily subject to the exception of no cause of action was also affirmed.[5]

Shreveport Long Leaf Lumber Co. v. Jones[6] involved exceptions which were more interesting than meritbrious. When the record in a former suit on the same subject matter disappeared from the files of the court, plaintiff instituted a new suit, and in the second petition recited that he took a nonsuit in the former action. All costs of the first suit were paid to defendant. The defendant's exception of *lis pendens* was properly held by the court to be frivolous. Defendant also moved unsuccessfully to recuse the judge-ad-hoc, alleging *inter alia* that since his appointment plaintiff's representatives and counsel had visited his office several times. Defendant also excepted to plaintiff's corporate capacity on the ground that, since there was no allegation of the payment of its corporation franchise tax, it lacked capacity to bring the suit. Since no statute prohibits a Louisiana corporation from using the courts unless it first pays its franchise tax, this excep-

2. Natalbany Lumber Co. v. McGraw, 188 La. 863, 178 So. 377 (1938); Daniels v. McGraw, 188 La. 874, 178 So. 380 (1938).

3. New Orleans Brewing Co. v. Cahall, 188 La. 749, 178 So. 339 (1937).

4. Ward v. Leche, 189 La. 113, 179 So. 52 (1938); Dusenbury v. Board of Com'rs, etc., 190 La. 694, 182 So. 719 (1938).

5. Brunson v. Mutual Life Ins. Co. of New York, 189 La. 743, 180 So. 506 (1938).

6. 188 La. 519, 177 So. 593 (1937).

tion was overruled. The nonpayment of this tax was held to be a matter personal to the state.

Two cases involved the nonjoinder of parties. In one,[7] the court held that in an action to enjoin a school board from executing a contract alleged to have been let illegally, the person to whom the contract was awarded was a necessary party defendant. The other, *Pierce v. Robertson*,[8] again applied the rule that all beneficiaries under Article 2315 of the Civil Code must join in any action to recover damages for wrongful death. In the event that a beneficiary would not join as co-plaintiff, the court held that he must be made a defendant and ordered to assert his rights as a plaintiff therein, or be precluded thereafter from asserting them.

One of the most important cases on cumulation of actions handed down in recent years was *Keel v. Rodessa Oil & Land Co.*[9] There, the plaintiff sought to recover an undivided one-third interest in immovable property. A petitory action against a defendant in possession was cumulated with an action to establish title brought against another defendant out of possession. Exceptions to the petition on the grounds that it had "improperly [cumulated] distinct causes of action and [had] improperly joined the parties defendant" were maintained by the trial court. Finding a community of jural interest between the two actions, the Supreme Court reversed the judgment appealed from, overruled the exceptions and remanded the case for trial. The decision is thoroughly harmonious with the trend of liberality of practice which our courts have been following during the past decade. It is unfortunate that the opinion perpetuated the myth that our procedure looks to the common law for rules relating to joinder.[10]

EXECUTORY PROCESS. The most important question presented in *Coreil v. Vidrine*[11] was whether appeal or injunction was the proper procedure to point out the lack of authentic evidence to support an order of foreclosure under executory process. The court, following a number of prior cases,[12] held that appeal was the proper remedy; and refused to consider the question when it was presented under a rule nisi for injunctive relief. Contrary

7. State ex rel. James H. Aitken & Sons v. Orleans Parish School Board, 190 La. 193, 182 So. 324 (1938).

8. 190 La. 377, 182 So. 544 (1938).

9. 189 La. 732, 180 So. 502 (1938).

10. On this point, see Flory and McMahon, The New Federal Rules and Louisiana Practice (1938) 1 LOUISIANA LAW REVIEW 45, 61 n. 120.

11. 188 La. 343, 177 So. 233 (1937).

12. Of the seventeen cases cited by the court (188 La. at 349-350, 177 So. at 235) in support of its position, the following are not in point: Wood &

rules have been announced by our Supreme Court on this subject at various times. Curiously enough, in the only case in which the conflicting authorities seemed to have been called to the attention of the court,[13] it held that injunction was the proper remedy in such cases. Three cogent reasons seem to require this rule.[14] It is unfortunate that the Supreme Court has again breathed life into the contrary view. In *Hibernia Bank & Trust Co. v. Lacoste*,[15] the court again held that a proceeding *via ordinaria* to enforce a mortgage, prosecuted against a curator ad hoc appointed to represent the nonresident mortgagor, was a proceeding *in rem*. When the plaintiff, which had proceeded to enforce the mortgage and obtain a personal judgment against the mortgagor, discovered that the latter was a nonresident, it was allowed to convert the proceeding into one purely *in rem* to enforce the mortgage, upon having an attorney at law appointed to represent the absent defendant.

REAL ACTIONS. A number of cases on this subject involve merely the application of rudimentary principles of civil law to

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Roane v. Wood, 32 La. Ann. 801 (1880); Miller, Lyon & Co. v. Cappel, 36 La. Ann. 264 (1884); Van Raalte v. Congregation of the Mission, 39 La. Ann. 617, 2 So. 190 (1887); Buck v. Massie, 109 La. 776, 33 So. 767 (1901); State ex rel. Pelletier v. Sommerville, Judge, 112 La. 1091, 36 So. 864 (1904). The following cases cover the point only by way of dictum: Durac v. Ferrari, 25 La. Ann. 80, 81 (1873); Montejo v. Gordy, 33 La. Ann. 1113, 1115 (1881). In addition to the pertinent cases cited by the court, Bank of Coushatta v. Burch, 177 La. 465, 148 So. 680 (1933) supports its position.

13. Jones v. Bouanchaud, 158 La. 27, 103 So. 393 (1925). Accord: Chambliss v. Atchison, 2 La. Ann. 488 (1847); Hackemuller v. Figueroa, 125 La. 307, 51 So. 207 (1910). See also, Calhoun v. Mechanics' & Traders' Bank, 30 La. Ann. 772, 780 (1878). Cf. Ricks v. Bernstein, 19 La. Ann. 141 (1867).

14. First—"a party desiring to bring before [a] court the question of the sufficiency of the evidence on which the order issued, and other questions besides, would be obliged to resort to an appeal for the one and an injunction for the other, thus involving that multiplicity which the law abhors." Calhoun v. Mechanics' & Traders' Bank, 30 La. Ann. 772, 780 (1878). Second—to require the defendant in executory process to post the necessary suspensive appeal bond would, in the vast majority of cases, result in the deprivation of the only remedy which a contrary view would permit. Third—the defendant in executory process should not only be permitted, but should be required, to seek the necessary relief from the trial court which committed the error before invoking the aid of the appellate courts. Cf. Ascension Red Cypress Co. v. New River Drainage District, 169 La. 606, 125 So. 730 (1930).

It is folly, in this day of busy judges, to ask, with Wyly, J.: "Why should the same judge who decided the evidence sufficient, and issued the fiat, grant an injunction and restrain it on the ground that the evidence he had just pronounced sufficient, is insufficient?" Naughton v. Dinkgrave, 25 La. Ann. 538, 539 (1873). Such an argument ignores the unfortunate actualities. The point is that trial judges seldom, if ever, examine minutely the evidence annexed to a petition for executory process to determine whether it is sufficient or authentic, unless some question thereof is raised by the defendant. In the very great majority of cases, the trial judge is not only willing, but anxious, to correct any error of oversight.

15. 190 La. 162, 182 So. 314 (1938).

the court's findings on issues of fact.[16] *Rudd v. Land Co.*[17] escapes this classification only because of one point decided. Plaintiff brought a jactitory action[18] and, in order to make specific allegations of the slanderous acts, incorporated an alleged tax sale to defendant and an alleged act of sale thereunder into his petition by reference. The answer denied the slander, alleged the validity of the acts and prayed for the rejection of plaintiff's demand. The court held that no question of title was presented under the issues framed by the pleadings. Since the plaintiff had proven possession of the property, defendant was ordered to institute a petitory action within 60 days.

Judge Westerfield is reputed once to have said, when considering an obviously inflated claim for damages, that the injunction "Ask and ye shall receive" had no application to such worldly affairs as lawsuits. *Cook v. Martin*[19] would lead one to suspect that it is applicable to litigation, but often with a result opposite to that intended by the person invoking it. Plaintiffs instituted a petitory action to be decreed owners of property once held by the community existing between their paternal grandparents. What purported to be an act of sale executed by the grandmother, after the death of her husband, was attacked as a forgery. In the alternative, plaintiffs demanded that (if the instrument attacked be held genuine) they be decreed the owners of their grandfather's half of the property. The court found the evidence insufficient to prove the act a forgery.[20] Further, it held that, by instituting the suit, plaintiffs had accepted their grandmother's succession unconditionally, and had thereby assumed her obligation of warranty of the whole title. Consequently, plaintiffs were held estopped from attacking the sale even to the extent of claiming the half which their grandfather had owned. The opinion induces one to believe that if plaintiffs had claimed only a half-interest in the property they might have recovered.

16. Duffourc v. Constantin (Jambon v. Same, Pitre v. Same), 189 La. 826, 181 So. 183 (1938); Foscue v. Mitchell, 190 La. 758, 182 So. 740 (1938).

17. 188 La. 490, 177 So. 583 (1937), reversing Rudd v. Land Co., 172 So. 804 (La. App. 1937).

18. For a discussion of the action of jactitation, see Comment (1938) 12 Tulane L. Rev. 254.

19. 188 La. 1063, 178 So. 881 (1938).

20. Some loose language in the opinion might lead the reader to believe that the court resolved this question against plaintiffs also because of the estoppel. Obviously, if the act of sale were spurious, the alleged vendor would not have warranted title to the property, and plaintiffs could never have assumed this obligation by accepting her succession. It was necessary for the court to decide the question of forgery only on the factual issue presented.

Certainly, they would have escaped the estoppel which the court maintained.[21]

SUCCESSION PROCEDURE. The loose manner in which many of the "accounts" filed in succession proceedings are drafted[22] was again productive of litigation. In *Succession of D'Hebecourt*,[23] it was held that an annual account which listed assets considerably less in amount than that shown on the inventory, which did not list certain assets shown thereon, and which failed to explain certain of the liabilities listed, did not comply with Article 1674 of the Civil Code. A judgment vacating a provisional homologation of such account was affirmed. *Succession of Prima*[24] found no authority in the courts to compel an heir to advance his proportion of the succession debts under penalty of having only his interest in the succession property sold. In *Succession of Giordano*,[25] the court again applied the rule that the maxim *"le mort saisit le vif"* had no application to irregular heirs, and that the latter may be sent into possession of the succession only after a contradictory proceeding against the presumptive heirs. A petition for possession brought by a natural child, which showed the existence of legitimate children of the deceased who were not made parties to the proceeding, was held subject to an exception of nonjoinder of parties defendant. *Succession of Strange*[26] presented a contest between two creditors of the deceased to be appointed administrator of his succession. Pointing out that the courts had no discretion in the matter, and that the creditor first applying for the administration (unless otherwise disqualified) had a prior right thereto, the trial judge was directed to make the appointment accordingly. No facts sufficient to disqualify the first applicant were found in his nonresidence in the parish in which the succession was opened, and in his being administrator of the succession of the wife of the deceased even though there might be some conflict of interest between the two successions.

RECEIVERSHIP PROCEDURE. In *Sklar Oil Corporation v. Stan-*

21. By suing to recover only the grandfather's interest in the property, plaintiffs could not have been held to have accepted their grandmother's succession thereby.

22. The "account" filed in the majority of succession proceedings today confuses the respective functions of the tableau of distribution and the account, properly speaking. On this subject, see Succession of Bofenschen, 29 La. Ann. 711, 712-713 (1877).

23. 189 La. 319, 179 So. 440 (1938).

24. 188 La. 319, 177 So. 62 (1937).

25. 188 La. 1057, 178 So. 627 (1938).

26. 188 La. 478, 177 So. 579 (1937).

dard Oil Co. of Louisiana,[27] the receiver had secured an order of court, after notice to all interested parties, to sell certain property belonging to the receivership free and clear of all liens and encumbrances. The sale made pursuant to this order was duly approved and confirmed by a judgment of court. The latter was held to be *res judicata* of all actions brought by the creditors to enforce their claims against the property sold, after the lapse of one year from the date thereof. The sale of the property, however, was held subject to the claims for royalty, which were not mentioned in the order authorizing the sale. *Receivership of Manteris No. 1 Well*[28] applied the established rule that claims for materials furnished and services rendered to the receivership prime the claims of creditors of the partnership incurred prior to the receivership. Certain creditors also contended that their claims for the reimbursement of funds alleged to belong to them which had come into the hands of the receiver were privileged. Since these creditors had acquiesced in a court order turning such funds over to the receiver, and since these funds had become mingled with other moneys belonging to the receivership, the claims were held not privileged.

APPELLATE JURISDICTION AND PROCEDURE. A statutory provision[29] forbids the dismissal of appeals prosecuted to an appellate court which has no jurisdiction over the subject matter of the cause. Such appeals must be transferred to the proper tribunals. Four instances presented the question of whether the cases should be so transferred. In *H. A. Bauman, Inc. v. Tilly,*[30] the court again applied the rule that the amount in controversy at the time of the submission of the case to the trial court determined the appellate court to which a suit for a moneyed judgment would go on appeal. Since the primary demand for a large amount had been abandoned prior to submission to the trial court, and the only contest concerned an alternative demand for $1,500, the cause was transferred to the proper Court of Appeal. The question of whether a claim for penalties sanctioned by statute would be included in determining the amount in controversy was presented for the first time in *Madison v. Prudential Ins. Co. of America.*[31] The court's affirmative answer to this question—on rehearing—ap-

27. 189 La. 1049, 181 So. 487 (1938).
28. 188 La. 893, 178 So. 386 (1938).
29. La. Act 56 of 1904, § 1, as amended by La. Act 19 of 1912, § 1 [Dart's Stats. (1932) § 1427].
30. 188 La. 531, 177 So. 657 (1937), reversing H. A. Bauman, Inc. v. Tilly, 175 So. 489 (La. App. 1937).
31. 190 La. 103, 181 So. 871 (1938).

pears to be correct.[32] The Supreme Court held that it had jurisdiction because the penalties must be included in determining the amount in dispute. In *A. M. Edwards Co. v. Hano*,[33] the court again had occasion to point out that the homestead exemption is lost irrevocably if it is not claimed prior to a judicial sale of the property under seizure. Consequently, when no such claim was urged in the trial court and the property had been sold, the Supreme Court did not have appellate jurisdiction over the cause on the theory that a homestead exemption was at issue. The case was transferred to the proper court of appeal.

In several cases motions by the appellee to dismiss the appeal were disposed of through the application of elementary principles. *D'Angelo v. Nicolosi*[34] applied the rule that a motion to dismiss the appeal relating only to the regularity of bringing the appeal to the appellate court, and not to appellant's right to appeal, comes too late if filed more than three days after the expiration of the period allowed for filing the transcript. Appellee moved to dismiss on the ground that the transcript was not lodged in the appellate court within the original period allowed by the order of appeal, and that an extension of time therefor had issued improvidently. Since the motion was filed later than the third day after the expiration of the extended period for filing the record, it was held to come too late. *Dent v. Dent*[35] was disposed of through the application of the rule that days of grace are allowed only for the original period granted to file the transcript, and not for any extended period. In *Harding v. Hackney*[36] the order of appeal was signed by the trial judge in chambers; since no citation of appeal was prayed for or served on the appellee, under the pertinent code provision[37] the appeal was dismissed. In *Mason v. Red River Lumber Co.*,[38] the appellee sought to dismiss the appeal on the ground that the appellant had acquiesced in the judgment (dismissing his petition because it disclosed no cause of action)

32. The subject is discussed more fully, and the same conclusion reached, in Foundation Finance Co. v. Robbins, 144 So. 293 (La. App. 1932). Both of these decisions are in accord with the legislative interpretation. It was thought necessary to adopt a constitutional amendment to permit the City Courts of New Orleans to entertain jurisdiction of money demands not in excess of $300, "exclusive of penalties." Cf. La. Const. of 1921, Art. VII, § 91, prior to and after amendment pursuant to La. Act 197 of 1928.

33. 188 La. 632, 177 So. 691 (1937).

34. 188 La. 326, 177 So. 64 (1937).

35. 189 La. 888, 181 So. 435 (1938).

36. 189 La. 132, 179 So. 58 (1938).

37. Art. 573, La. Code of Practice of 1870, as amended by La. Act 49 of 1871.

38. 188 La. 686, 177 So. 801 (1937).

by thereafter filing an identical suit in the federal court. The court held that there was no acquiescence thereby in the judgment appealed from. However, it was held that the institution of the second action was an abandonment of any right of appeal in the first. In *Frost Lumber Industries v. Bryant*,[39] judgment was rendered against the defendants as prayed for, and only one appealed. The appellant and the plaintiff-appellee both moved to dismiss the appeal on the ground that it was abandoned. These motions were granted even though the nonappealing defendants had not consented thereto, the court holding that the latter were not concerned with the abandonment of the appeal. *Succession of Jones*[40] recognized the right of a litigant, suing *in forma pauperis*, to a suspensive appeal without bond when the dispute was over a fund in the custody of the court. Consequently, the unwarranted act of the trial judge in requiring the appellant to furnish bond in order to suspend the execution of the judgment appealed from was held not to render the appeal a devolutive one. And an administrator who distributed the succession assets in the face of such appeal was condemned individually and officially to pay the claim of the appellant which the Supreme Court recognized. *Brock v. Stassi*[41] applied the commonplace rule that when the order of appeal was executed more than ten days after the signing of the judgment, any appeal taken thereby was purely a devolutive one. Appellant's prior application for supervisory writs was held not to toll the running of the ten days allowed for suing out a suspensive appeal. *State ex rel. Knighton v. Derryberry*[42] held that an order vacating the judicial sequestration of the proceeds of oil extracted from the lands in controversy was an interlocutory order which might cause irreparable injury, and hence could be appealed from suspensively. But an order vacating a previous one requiring the defendants to account was held to be an interlocutory judgment from which no suspensive appeal could be taken because it could not cause irreparable injury.

Two cases were remanded for new trials because there were no stenographic notes of the evidence. In *Dreher v. Guaranty Bond & Finance Co.*,[43] the court stenographer who had reported the trial had left the state without transcribing his notes. *Williamson v. Enterprise Brick Co.*[44] held that it was the duty of the

39. 189 La. 227, 179 So. 297 (1938).
40. 189 La. 693, 180 So. 489 (1938).
41. 189 La. 88, 179 So. 44 (1938).
42. 188 La. 412, 177 So. 256 (1937).
43. 188 La. 421, 177 So. 259 (1937).
44. 190 La. 415, 182 So. 556 (1938).

clerk to take down the testimony in writing, or to have this done by a deputy or stenographer. The mere fact that plaintiff was suing *in forma pauperis* and could not pay the charges therefor was held to be no excuse for the nonperformance of this duty.

Gautreaux v. Harang[45] settled one question which has long been mooted by attorneys of the state. The court held that while it could grant an extension of time for filing a brief in support of an application for rehearing, it had no power to enlarge the time allowed for filing the application itself. Any "supplemental application" for rehearing, or any points urged in a brief, filed after the delay for applying for rehearing had expired, could not be noticed by the court. *Zylks v. Kaempfer*[46] filled another gap in our law of appellate procedure. The appellee died before the rendition of a judgment in her favor by the Supreme Court. Since this judgment was obviously invalid, her executors made themselves parties to the appeal and petitioned the court to render a judgment in their favor *nunc pro tunc,* otherwise identical with the original decree. Since no opposition thereto was filed by the appellant,[47] judgment was rendered accordingly.

In *Succession of Robinson,*[48] the court refused to dismiss the appeal because of a late payment of the Supreme Court filing fee, when the latter had been paid prior to argument. In *Gumbel v. New Orleans Terminal Co.,*[49] the court properly held that its decrees could not be annulled when final, on the ground that errors of law had been committed.

The Injunction Statute[50] prohibits the granting of a suspensive appeal from a judgment refusing an injunction. In *Knott v. Himel,*[51] this act was held to prevent a trial judge from issuing an injunctive order *ex proprio motu* and without bond, after sustaining an exception to the plaintiff's petition and rejecting his demands. The effect was held to be the same as if the judge *a quo* had granted a suspensive appeal.

SUPERVISORY JURISDICTION AND PROCEDURE. A constitutional

45. 190 La. 1060, 183 So. 349 (1938). This case is discussed further herein, infra, pp. 344 and 354.

46. 190 La. 839, 183 So. 174 (1938).

47. Even if the appellant had opposed the petition, the same result should have obtained. There is no necessity for a busy appellate court to try a case anew simply because of the death of a party, unless new issues are presented thereby.

48. 188 La. 742, 178 So. 337 (1938).

49. 190 La. 904, 183 So. 212 (1938).

50. La. Act 29 of 1924 [Dart's Stats. (1932) §§ 2078-2083].

51. 189 La. 323, 179 So. 441 (1938).

provision[52] requires the issuance of the writ of review as a matter of right whenever a decision rendered by one Court of Appeal conflicts with the jurisprudence of another or with that of the Supreme Court. This provision was invoked but once during the 1937-1938 term.[53] In *Rembert v. Fenner & Beane,*[54] the court held that when the intermediate appellate court had remanded a case for further trial on one particular point, the latter was not before the Supreme Court under a writ of review, since the matter had not yet been determined finally by the intermediate appellate court. *Laurent v. Unity Industrial Life Ins. Co.*[55] pointed out that the rule of court requiring an applicant for a writ of review to annex to his application certified copies of the opinion of the Court of Appeal and other portions of the record was adopted purely for the convenience of the Supreme Court. Noncompliance therewith by the applicant would not result in the recall of the writ after its issuance.

In *Cardino v. Scroggins,*[56] the defendant's prior application for supervisory writs had been denied on the ground that he had an adequate remedy by appeal. Thereafter the plaintiff sought to prevent the exercise of this remedy by reducing his claim below an appealable amount. The expedient proved unsuccessful because the Supreme Court granted defendant relief under a writ of certiorari issued to the trial court.

MISCELLANEOUS. Several cases involved procedural points which either cannot be classified conveniently, or constitute the sole decision on the subject. *Strange v. Albrecht*[57] held that it was not necessary, on the confirmation of a default, to prove the genuineness of the payee's blank endorsement of the instrument sued on. Pointing out that early cases to the contrary had been overruled by the Negotiable Instruments Law,[58] the court held the plaintiff to be a prima facie holder in due course, with the right to sue thereon in his own name.

Bogalusa Ice Co. v. Moffett[59] held *inter alia* that a judicial se-

52. La. Const. of 1921, Art. VII, § 11.

53. Geddes & Moss U. & E. Co. v. First National Life Ins. Co., 189 La. 891, 181 So. 436 (1938), aff'g 177 So. 818 (La. App. 1938). This case is discussed further herein, infra, p. 411.

54. 188 La. 385, 177 So. 247 (1937), aff'g Rembert v. Fenner & Beane, 175 So. 116 (La. App. 1937). This case is discussed further herein, infra, p. 351.

55. 189 La. 426, 179 So. 586 (1938). This case is discussed further herein, infra, p. 410.

56. 190 La. 53, 181 So. 810 (1938).

57. 190 La. 897, 183 So. 209 (1938).

58. La. Act 64 of 1904, §§ 24, 51, 59 [Dart's Stats. (1932) §§ 813, 840, 848].

59. 188 La. 598, 177 So. 679 (1937).

questration may be issued without bond, and that movable as well as immovable property might be sequestered when necessary. The rule that a temporary restraining order will not issue without bond except in those cases where the law requires no security was again applied.

In *Liquidation of Canal Bank & Trust Co.*,[60] the plaintiff of an action pending in a federal district court brought an ancillary proceeding in the state court to compel the state bank examiner to permit an examination of the books of a defunct bank. Since the federal court had jurisdiction over the bank examiner, and could compel discovery by him, the plaintiff was denied the relief prayed for.

In 1933 the Supreme Court had held that, although the formalities and requisites of law had been complied with, an attempted partition was invalid unless such an intention was disclosed by an express use of the term "partition."[61] The successful plaintiffs in this case were among the party defendants in *Rauschkolb v. Di Matteo*[62] and they reconvened, praying that the mortgage be decreed invalid insofar as their interest in the property was concerned. They asserted that since the mortgagor had no title to the interest which they claimed, such interest was not subject to the mortgage. On the question of their ownership of the property these defendants pleaded as *res judicata* the decree of the Supreme Court in the first case, which defense the trial court had maintained. In reversing this judgment, the Supreme Court held that the mortgagee, not having been a party to the first suit, was not bound by any judgment rendered therein. But for the fact that it overruled its prior decision, the court's language in differentiating *stare decisis* and *res judicata* might have indicated an acceptance of the common law judicial technique. Finding its former decision entirely too technical, the court held that the proceeding in question was a valid partition even though it was not labeled as such.

III. CIVIL CODE AND RELATED SUBJECTS

A. Family Law

Separation from Bed and Board, and Divorce

(a) *Jurisdiction.* Three cases appear in which the plea to the jurisdiction must have been urged as a matter of last resort,

60. 188 La. 1069, 178 So. 883 (1938).
61. Fradella v. Pumilia, 177 La. 47, 147 So. 496 (1933).
62. 190 La. 7, 181 So. 555 (1938).

since the issues were plain and well settled. In *Gennusa v. Gennusa*[1] the wife sued in Orleans parish for divorce under Act 31 of 1932,[2] the four-year act. The husband pleaded *res adjudicata* and divorce in his favor in St. Bernard parish. The wife answered that she and the husband were both residents of Orleans parish when the judgment was rendered but she did not bear the burden of proving that the district court of St. Bernard was without jurisdiction to render the judgment. The records of the husband's judgment did not show the court to have been without jurisdiction, and the petition showed a notation of service accepted and signed by the wife. The wife alleged that her signature was not a waiver to submit her person to the jurisdiction; but the court held otherwise. In *Parsley v. Parsley*[3] the husband submitted to the jurisdiction of a Texas court by appearing, filing answer, and defending a suit brought by his wife. The Texas divorce and order for the custody of the child was held to be entitled to full faith and credit in Louisiana under the doctrine of *Haddock v. Haddock.*[4] In *Plitt v. Plitt*[5] there was issued against the district judge of East Baton Rouge parish a writ of prohibition to proceed further in a suit for separation from bed and board on the ground that the court was without jurisdiction, either *ratione personae* or *materiae,* the last matrimonial domicile having been Atlanta (Georgia).

(b) *Cause.* Four cases were presented which should be a proper warning to erring wives. The decisions are sound and offer little of unusual interest but for two points, one of evidence and one of procedure. In the case of *Adranga v. Tardo,*[6] the wife sued for separation from bed and board on the grounds of public defamation and cruelty. The husband reconvened alleging the same things plus abandonment. The husband proved to the court that the wife and her relatives "abused, cursed and nagged him"[7] from the time of the marriage until four months later when she left, taking all of the furniture, leaving his clothes on the floor and locking the house! The judgment was for the husband. The trial judge said that the wife was "very pugnacious and bellicose"![8] In *Henderson v. Henderson*[9] the wife sued for separation from bed

1. 189 La. 137, 179 So. 60 (1938).
2. Dart's Stats. (1932) § 2202.
3. 189 La. 584, 180 So. 417 (1938).
4. 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867 (1906).
5. 190 La. 59, 181 So. 857 (1938).
6. 189 La. 678, 180 So. 484 (1938).
7. 189 La. at 680, 180 So. at 485.
8. Ibid.
9. 190 La. 836, 183 So. 173 (1938).

and board, alleging cruel treatment. The spouses had three girls, aged 11, 14 and 16 years. The wife gave no notice of her decision, moved the furniture and the car to another house, filed suit against the husband and let him come home unprepared to an empty house. The wife could not prove her allegations. The husband provided well according to his means, was quiet and agreeable. The wife was said to be of a nervous and excitable temperament and of a jealous disposition. No separation was granted. In *Mouille v. Schutten*[10] the wife sued for separation from bed and board on the ground of cruelty, asked for custody of the minor daughter, alimony and attorney's fees. There was a great deal of conflicting testimony. The husband proved, however, that the wife went out with men friends against his expressed wishes. This conduct was the real cause of the failure of the marriage. Separation was granted to the husband, giving him permanent custody of the child. The decision seemed wise and just. However, the admission of the testimony of one witness, while not relied upon, is subject to criticism as indicated in the dissenting opinion. A voluntary witness was allowed to testify to improper relations between himself and the wife. The dissenting justice said that "Such testimony is, in its very nature, and from the source from which it comes, utterly unworthy of belief. . . . A woman is defenseless against such testimony. . . . If such a witness does not refuse to divulge his secret, the judge ought to forbid him to divulge it. And the reason for that is that the testimony would be utterly worthless as evidence."[11] In *Landry v. Regira*[12] the wife sued for separation on the ground of cruel treatment, asked for custody of the children, alimony *pendente lite*, judicial sequestration of community property, and attorney's fees. The husband made a reconventional demand for absolute divorce on the grounds of adultery, which was proven. The husband was granted the divorce and given the custody of the children. The court said that the reconventional demand was connected with and incidental to the main demand. The abandonment cases were distinguished. No alimony was granted to the wife except *pendente lite* and a sum of the community property given her by the husband on parting was held enough to cover that. The major importance of this case lies in the procedural point involved which is discussed under the appropriate heading.[13]

10. 190 La. 841, 183 So. 191 (1938).
11. 190 La. at 869-870, 183 So. at 200.
12. 188 La. 950, 178 So. 502 (1938).
13. Supra p. 320.

(c) *Alimony.* These cases are of more than usual importance as several of them raise issues of peculiar social interest. *Gantz v. Wagner*[14] presented the case of an absolute divorce granted the wife in 1932. Subsequently, she obtained a rule against the husband directing him to show cause why she should not have alimony, and the rule was made absolute fixing alimony at $40.00 per month. The present proceeding was on a rule to show cause why the husband should not be adjudged in contempt for failure to pay certain installments and further, to increase the alimony to $60.00 per month. It was alleged that the wife and 14-year old daughter were in necessitous circumstances and that $40.00 per month was not enough. The husband was a city fireman, making $136.00 per month, and had to pay $10.00 per month from his salary to the Firemen's Retirement Fund. He had remarried and his second wife was a maid at the Charity Hospital earning $30.00 per month, the same amount that she had received before her marriage. The court stated that under Article 160 of the Civil Code the maximum of $42.00 per month should be allowed for the divorced wife. The child was entitled to an extra sum, so $50.00 was awarded *in toto.* The court arrived at this sum by adding the husband's earnings of $125.00 a month to the second wife's earnings of $30.00 per month, equaling $155.00. They concluded that $105.00 was enough to support the husband and his second wife. The economic and social aspects of a situation wherein the earnings of a second wife are included in order to compute the alimony award for a divorced wife are worthy of very serious consideration. In *Hulett v. Gilbert*[15] an award of $75.00 per month to a wife was held fair, when the husband's salary was $300.00 per month. The court stated that when a trial judge acts fairly and without abuse, his judgment for alimony is not ordinarily interfered with on appeal. In *Pitre v. Burlett*[16] suit for divorce was brought by the husband under the four-year act,[17] the parties having lived separate and apart for over 20 years. The wife left the domicile because of alleged unfaithfulness of the husband. The latter was not proved to the court's satisfaction though there was much testimony on the subject because of the claim for alimony by the wife under Act 27 of 1934 (2 E.S.),[18] permitting the granting of alimony in such a case when "the wife has not been

14. 188 La. 833, 178 So. 367 (1938).
15. 189 La. 877, 181 So. 431 (1938).
16. 190 La. 127, 182 So. 123 (1938).
17. La. Act 31 of 1932 [Dart's Stats. (1932) § 2202].
18. Art. 160, La. Civil Code of 1870, as last amended by La. Act 26 of 1934 (2 E.S.).

at fault." The court held that the wife was "not without fault" and hence awarded no alimony. Undoubtedly the statute permitting alimony in these cases serves a useful and just purpose, but it is most unfortunate that under the interpretation of the word "fault" it becomes necessary to wash all of the dirty domestic linen, a process otherwise obviated by the 7-year, 4-year, and 2-year acts.[19] Since these acts apparently contemplate what in reality might be a separation by mutual consent, to demonstrate actual fault or absence of fault on the part of the wife may be most difficult as well as sociably undesirable. Another case interpreting the same clause is now before the Supreme Court and it is hoped that the judicial art will mold a more favorable social process out of this well-intended act. In *Cotton v. Wright*[20] the wife procured a judgment for separation from bed and board for cruelty and excesses admitted by the husband. There was a reconciliation, another suit, and prayer for $200.00 per month alimony. From a judgment for separation and alimony of $19.85, the husband took a suspensive appeal. It was held that the husband had to pay alimony *pendente lite* whatever the merits of the case, as a husband has to support his wife as long as the marriage lasts. In *Wright v. Wright*[21] it was held that the prescription of ten years under Article 3547 of the Civil Code does not apply to an alimony judgment in favor of minor children against the father. It was very properly stated that not a debt, but a duty, exists in this situation and, hence, the judgment was not founded on debt, but was to enforce a "continuing legal duty." In *Glaser v. Doescher*[22] the wife obtained a separation from bed and board on January 16, 1933, with a $45.00 per month alimony award. The sum was reduced to $40.00 on May 2, 1934. Final divorce and $40.00 a month alimony were granted on February 26, 1937. On March 2, 1937 a rule to reduce the alimony to $20.00 per month was upheld by the Supreme Court. The child had come of age but was giving the wife no support and she had no property or income. The husband's income was hard to determine, but apparently more than $30.00 per month. He operated a little grocery store, employed help, and ran a small truck in connection with his business. In *Reichert v. Lloveras*[23] the wife brought suit for separation from bed and board for causes arising subsequent to a reconciliation

19. La. Acts 269 of 1916 (7 years), 31 of 1932 (4 years), 430 of 1938 (2 years), [Dart's Stats. (1932) § 2202].
20. 189 La. 686, 180 So. 487 (1938).
21. 189 La. 539, 179 So. 866 (1938).
22. 189 La. 518, 179 So. 840 (1938).
23. 188 La. 447, 177 So. 569 (1937).

after a judgment for separation from bed and board nearly ten years before. The wife also prayed for alimony *pendente lite*. The court held that the wife had a right to this type of alimony award. As an incident to the controversy, the court had occasion to mention that a property settlement from the original judgment for separation from bed and board stands as the sole remainder of that judgment under Louisiana jurisprudence. This principle seems incongruous, illogical and unfair, both as a legal principle and as a social doctrine in the best interests of the family.[24] In the case of *Snow v. Snow*[25] the court refused to modify a judgment for past due alimony because, under Article 548 of the Code of Practice, it becomes the *property* of the one in whose favor it has been granted. An interesting question is suggested by the discussion in regard to the personal nature of an alimony judgment and its validity under the full faith and credit clause of the United States Constitution, when substituted service has been used in the divorce proceedings.

(d) *Property Settlement after Divorce.* In *Rhodes v. Rhodes*[26] a wife obtained a judgment of divorce against her husband, decreeing a dissolution of the community and a partition of property. The judgment did not fix the manner in which the partition should be made. The present suit was filed by the wife with a view to partitioning the community by licitation and receiving an accounting from the husband. One of the contentions of the defendant was that the property could not be partitioned because of a mortgage. The court ruled that this defense was entirely without merit because of the specific provision of Article 1338 of the Civil Code. The husband further contended that because of the insolvency of the community, there could be no partition until a liquidation of the debts had been effected. This contention was also held to be invalid under the settled jurisprudence. Finally, the husband contended that since the wife accepted the community with benefit of inventory, she renounced the debts and, hence, had no interest or right to a partition by licitation. The court very properly stated that on the contrary, under Act 4 of 1882,[27] she does not repudiate the debts, but simply limits them to her one-half of the community property, thus relieving her from any personal liability beyond her community interest. The husband and wife became co-owners of the community property by virtue of

24. For a full discussion, see Comment, infra p. 422.
25. 188 La. 660, 177 So. 793 (1937).
26. 190 La. 370, 182 So. 541 (1938).
27. Dart's Stats. (1932) § 2213.

the dissolution of the marriage by divorce and either had a perfect right to a partition.

Annulment of Marriage

In *Rhodes v. Miller*[28] the husband secured a judgment by default for annulment of his second marriage. The second wife herein appealed devolutively, the delay for suspensive appeal having lapsed. The husband alleged that he married his second wife after she had been named as corespondent in his first wife's successful divorce suit for cause of adultery. The husband and his second wife were married in Chicago in order to avoid the effect of Article 161 of the Civil Code.[29] The second wife alleged that the husband could not plead his own turpitude; that he had not come into court with "clean hands"; that causes for annulment are specific and exclusive in Articles 110-118, and that this is not one of them, citing *Ryals v. Ryals*,[30] where annulment was refused when insanity was pleaded. The court stated that the decision on insanity was correct but that Article 161 does give a right to annul when coupled with Articles 93 and 113.[31] While the husband's hands were not clean, an estoppel could not be invoked to impair the force and effect of a prohibitory law. The marriage was annulled. The court stated that it was "not acting for the sake of the party, but for the public good."[32] There were apparently no children. Article 161 was taken from an article of the French

28. 189 La. 288, 179 So. 430 (1938).

29. Art. 161, La. Civil Code of 1870: "In case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage."

30. 130 La. 244, 57 So. 904 (1912).

31. Art. 93, La. Civil Code of 1870: "Persons legally married are, until a dissolution of marriage, incapable of contracting another, under the penalties established by the laws of this State."

Art. 113, La. Civil Code of 1870, as amended by La. Act. 426 of 1938: "Every marriage contracted under the other incapacities or nullities enumerated in the second chapter of this title may be impeached either by the married persons themselves, or by the person interested, or by the Attorney-General; however, marriages heretofore contracted between persons related within the prohibited degrees, either or both of whom were then or afterwards domiciled in this State, and were prohibited from intermarrying here, shall nevertheless be deemed valid in this State, where such marriages were celebrated in other States or countries under the laws of which they were not prohibited; but marriages hereafter contracted between persons, either or both of whom were domiciled in this State and are forbidden to intermarry shall not be deemed valid in this State, because contracted in another State or country where such marriages are not prohibited, if the parties after such marriage return to reside permanently in this State."

32. 189 La. at 300, 179 So. at 433 (1938).

Civil Code which was repealed in 1904.[33] The associated rule refusing to permit legitimation by marriage of adulterous illegitimate children has also been dropped in France.[34] It seems unfortunate and socially unprogressive to enforce the letter of Article 161, especially in favor of an admittedly guilty plaintiff, unless there was no method of circumventing the statute. It would have been simple enough in this situation to have refused annulment just as the earlier decisions softened the harsh letter of the law by insisting (although not specified in the article) that the co-respondent must be named in the divorce proceeding, thus effecting a wiser and more progressive social policy. The present court could have followed suit in further emasculating an outworn statute. In the same year, 1938, the court in *Succession of Elmer*,[35] upheld but for the légitime, a testamentary gift by a husband to his second wife of the whole of his estate despite the plea of his children that the donee had lived in open concubinage with their father prior to his first wife's (their mother's) death, citing the exception of Article 1481 in favor of those who afterwards marry.[36] These children would doubtless not be impressed with the high moral tone of the reasoning upon which the nullity of the marriage in the instant case was placed. The distrust of the law by the laity is easily understood when the confusion and contradiction of social policy evidenced are noted.

Husband and Wife

In *D. H. Holmes Co., Ltd. v. Morris and his wife*,[37] suit was brought on open account for purchases made by the wife in her own name without her husband's knowledge, and while she was living separate and apart from him. She bought a wrist watch for $150.00, a watch band for $100.00, five items of clothing totaling $22.09 and two lunches totaling $1.15. Judgment *in solido* was asked for against the husband and wife. There was no appeal from the judgment of the lower court for the clothing and lunches.

33. Art. 298, French Civil Code, repealed by Law of Dec. 15th, 1904.

34. Art. 331, French Civil Code, as amended by Laws of Nov. 7th, 1907, Dec. 30th, 1915, and April 25th, 1924, "make(s) provision for the legitimation of adulterine children on the marriage of their parents if they have been acknowledged by the parents before, or at the time of such marriage." Renton, The Retouchement of the Code Civil (1933) 20 Va. L. Rev. 188, 189.

35. 189 La. 1016, 181 So. 477 (1938).

36. Art. 1481, La. Civil Code of 1870: "Those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

"Those who afterwards marry are excepted from this rule."

37. 188 La. 431, 177 So. 417 (1937).

The Supreme Court gave judgment against the wife for the watch and band. The parties were living separate and apart by common consent and the husband was furnishing the wife with $25.00 per month. On the facts, the decision seemed fair, so far as property law is concerned, and definitely in line with the statutes making a distinction between the phrases "when living apart"[38] and "living separate and apart . . . by reason of fault."[39] Since the wife's earnings in a separate occupation would in this situation be her separate property according to the distinction made in *Houghton v. Hall*[40] and *Byrd v. Babin*,[41] certainly the community should not be bound by debts contracted by her. It is doubtful if the husband, under this set of facts, should have been held for the clothing and lunches though that was a matter of his individual liability to support the wife during the existence of the marriage. The latter question was not before the Supreme Court. In *Shannon v. Shannon*[42] the wife tried to upset a contract with the husband made when the spouses were contemplating judicial separation. She pointed out that she only got one-half of the community rightfully hers, and received nothing for her alimony rights, and hence that the contract was without consideration. There was no charge of fraud or error. The decision was on contract law and pleadings and stated that she could not change the instrument by her own proof without an allegation of fraud or error. The contract between the husband and wife was admitted with no reference to the Acts of 1926 or 1928.[43] The analysis on contract statutes made no reference to the particular laws of husband and wife. The soundness of the decision is questionable even on pure contract grounds, as the jurisprudence admits proof of lack of consideration. The Chief Justice dissented, stating that it was not necessary to plead the prohibitory law under Act 34 of 1902[44] providing that the husband must support the wife. The fact that this was his responsibility was a matter of public policy. In the Chief Justice's opinion the contract was null on its face.

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38. Art. 2334 (par. 3), La. Civil Code of 1870, as amended by La. Act 170 of 1912.

39. Art. 2334 (par. 4), La. Civil of Code of 1870, as amended by La. Act. 186 of 1920.

40. 177 La. 237, 148 So. 37 (1933).

41. 181 La. 466, 159 So. 718 (1935).

42. 188 La. 588, 177 So. 676 (1937).

43. La. Acts 132 of 1926 and 283 of 1928 [Dart's Stats. (1932) §§ 2169-2173]. These are the two latest so-called married women's emancipatory acts.

44. Dart's Crim. Stats. (1932) Art. 927.

Tutorship and Emancipation

In *Caskey v. United States Fidelity & Guaranty Co.*[45] the bondsman of a natural tutor, father of minors, was held for the unpaid price of property adjudicated to the father. The theory of the decision was that a failure to record an adjudication which would have operated as a legal mortgage was an act of maladministration. In *Webster's Tutorship*[46] the mother was made natural tutrix of a minor child. She later asked to be relieved of her duties and at her request, a bank was made tutor of the finances of the minor and the mother given the custody of the person. Subsequent to these appointments, the mother consented to the minor's emancipation, and the court emancipated him. The bank refused to turn over his property to him, contending that it had not been properly discharged. The court so held. It was stated that the bank was in reality the tutor under Act 45 of 1902.[47] The mother simply had care of the person of the minor and was not even a co-tutor, so the bank was not discharged by the emancipation proceedings (to which it had not consented) and consequently did not have to turn over the estate of $11,000 or more to the minor.

Interdiction

The *Interdiction of Scurto*[48] again instances the wisdom of the court in refusing to affirm a judgment of interdiction. A father and two brothers were attempting to secure the interdiction of a young woman, and the interdiction was granted apparently because she refused to answer questions on trial. The girl trusted only her sister, who was not a party to any of the proceedings. Two medical experts appointed by the court found the young woman sane and able to care for her person and property.

Duty of Support

The case of *Steib v. Owens*[49] presents an action by an aged mother to recover alimony from her three sons. Two of the defendants rightly excepted to the jurisdiction of the court *ratione personae*. The third son averred that he had offered his mother $7.00 per month, or a living with him, which she refused because of the smallness of the sum and incompatibility with her son's

45. 190 La. 997, 183 So. 242 (1938).
46. 188 La. 623, 177 So. 688 (1937).
47. La. Act 45 of 1902, § 1(6) [Dart's Stats. (1932) § 582(6)].
48. 188 La. 459, 177 So. 573 (1937).
49. 190 La. 517, 182 So. 660 (1938).

wife. The lower court awarded $5.00 per month. The Supreme Court raised the sum to $10.00 per month and stated that the son could not compel the mother to reside with him and his wife against her wishes. The two sons, without the jurisdiction, were sending the mother $10.00 a month each.

B. Conventional Obligations

Although no cases of any great moment dealing with the general law of contract were presented to the Supreme Court during the sessions being considered, not without importance was the case of *Baucum & Kimball v. Garrett Mercantile Co.*[50] There a seller of cotton defended an action for the recovery of a portion of the purchase price on the ground that the transaction was a wager. Several sales "on call" were made, the seller delivering the cotton to the buyer and the buyer advancing to the seller the future price listed for a future month agreed upon, less an agreed number of points off such price and a fixed additional amount per bale. Under the contract the seller could then "call" the price at any time prior to the agreed date. If the price of cotton had increased at the time the price was called, the seller profited by the difference, and if it had declined, the difference between the amount received and the then market price was to be repaid to the buyer. If the transaction had not been closed out in this fashion before the agreed date it could then be closed by the buyer with the necessary adjustment in price being made. However, if the future price for the month agreed upon increased before the agreed date the buyer would be obliged to pay to the seller an additional amount to cover the increase, and if, in the meantime, it declined the seller would be obliged to make a refund to the buyer to protect his margin. Finally, the seller might prevent the buyer's closing out the contract at the agreed date by paying the buyer an additional commission for transferring the contracts to a future date then to be agreed upon. The facts disclosed that seven transactions of this nature had occurred between the parties beginning in the year 1931 and that in each case the contracts had been transferred to May, 1935. In March, 1935, the price of cotton having declined severely, the buyer called on the seller for additional margin. The seller failed to respond and the buyer exercised the privilege of calling the price, thereby closing out the contract. The buyer then sued to recover the dif-

50. 188 La. 728, 178 So. 256 (1938).

ference due him. The court found none of the elements of a bet or wager but that the contract involved merely a present sale and delivery of cotton with the price ultimately to be paid to depend upon the market quotations on the agreed future date. It did not mention two contrary Texas cases which had been relied upon by the Court of Appeals, and felt that actual delivery of the cotton prevented the transaction from constituting merely a gamble on the future price of cotton. In view of the seller's ability to transfer the contracts at the expiration of the time originally agreed upon to a future date by paying an additional commission, the transactions in question seem to have gone beyond the simple sales at a price to be determined in the future which the Texas courts found invalid. Taken alone this portion of the transaction seems to constitute a mere wager. Legal support for it must therefore be found in the original "delivery." The result of the case seems to be that a single delivery could serve as a basis for future indefinite speculation based on the periodical payment of a "commission" to the buyer. Since "delivery" is treated as significant because it is considered as indicating that the parties are not merely gambling on the rise or fall of prices, the instant case seems to stretch its legal effect to the breaking point.[51] That the court did not consider this aspect of the case is to be regretted.

In *Crowell and Spencer Lumber Co. v. Hawkins*,[52] an action to recover for a deficiency in acreage, the court properly rejected a defense grounded on the theory that there was mutual error concerning the extent of the subject matter of the contract and that it should be reformed to express the true intent of the parties. Only the testimony of the vendor was offered to sustain the defense and this evidence was found insufficient to establish mutual error. Since the land was not of uniform value the court determined the amount to be recovered by accepting expert testimony concerning the value of the acreage in question at the time of the sale.

Bauman v. Michel[53] permitted a buyer to recover a ten per cent deposit from a real estate agent when the owner was unable

51. See Conner & Hare v. Robertson, 37 La. Ann. 814 (1885); Standard Milling Co. v. Flower, 46 La. Ann. 315, 15 So. 16 (1894); Stewart Bros. v. Beeson, 177 La. 543, 148 So. 703 (1933), cited by the court. Cf. Burney v. Blanks, 136 S.W. 806 (Tex. Civ. App. 1911), and Wolfe v. Andrews, 192 S.W. 266 (Tex. Civ. App. 1917), both of which were relied on by the Circuit Court in pronouncing the contract illegal, and H. Seay & Co. v. Moore, 261 S.W. 1013 (Tex. Comm. App. 1924).

52. 189 La. 18, 179 So. 21 (1938).

53. 190 La. 1, 181 So. 549 (1938).

to make title to the property as a consequence of his wife's declaration of a family home in keeping with Act 35 of 1921 (E.S.).[54] Although specific performance was prayed for in the alternative this was impossible by virtue of the wife's action. The buyer's attempt to show a solidary obligation between owner and agent for the return of the deposit failed under the provision of the agreement making the broker a depositary and in the absence of any provision imposing a solidary duty. Here the court relied on Article 2093 of the Civil Code which provides that an obligation *in solido* is never presumed.

The court concluded in *Williams v. De Soto Bank & Trust Co.*[55] that a reservation of right contained in a release given to one solidary judgment debtor upon a settlement of the claim against him, pending appeal from the decision of the lower court sustaining the exceptions of other defendant debtors, was sufficient to prevent a release of the other debtors *in solido,* notwithstanding that the creditor did not reserve its rights against the latter in the motion to dismiss the suit against the first debtor, after the previously mentioned compromise. In reaching this conclusion the court followed a rule now well settled by the cases that form is not sacramental in making such a reservation.

The principle that one cannot accept the benefit of a contract and then set up its unenforceability on the ground that it should have been in writing was applied in *Burk v. Livingston Parish School Board,*[56] where the plaintiff was seeking to recover for services as an architect rendered the Board. Earlier Louisiana cases were cited along with Articles 1816, 1965, and 2272 of the Civil Code.

An attempt by a subsequent creditor to have a sale from a father to his daughter declared a simulation failed in *Eureka Homestead Society v. Baccich*[57] on the defendant's showing an actual consideration for the transfer. The court declared that where a real consideration is shown its inadequacy is not open to question, but this expression perhaps does not mean that if the consideration given is not "serious" the transaction may not be attacked as a simulation.

In *Primus v. Feazel*[58] the plaintiffs sought to recover damages or the rental value of certain oil lands on the theory that

54. Dart's Stats. (1932) § 3806.
55. 189 La. 246, 179 So. 303 (1938).
56. 190 La. 504, 182 So. 656 (1938).
57. 190 La. 494, 182 So. 653 (1938).
58. 189 La. 932, 181 So. 449 (1938).

there had been a wrongful recordation of an oil and gas lease which was being held in escrow pending examination and approval of title. The court found that no damage had been sustained by the plaintiffs as a consequence of the recordation and that plaintiffs were not justified in attempting to ratify so as to recover the stipulated rental inasmuch as they had previously filed a repudiation of the lease.

Andrus v. Eunice Band Mill Co.,[59] a suit to recover a balance claimed on a timber contract, was decided against the plaintiff for lack of proof that any amount was owing.

An effort by a lessor to secure specific performance of an oil and gas lease and at the same time to have the court declare the lease forfeited, on the ground that defendant had failed to make a payment which fell due while the case was in litigation, failed in *Slaughter v. Watson.*[60] The court felt that the lessor's attempt to have the lease forfeited was inconsistent with his allegation that he was ready, able, and willing to deliver the lease.

C. Particular Contracts

Sales

The extensive oil development throughout Louisiana continues to increase the normal volume of litigation involving the validity of land titles. The result has been that a variety of problems calling into application principles of the law of sales were presented to the Supreme Court for consideration during last term. *Gautreaux v. Harang*[61] has caused widespread comment and attention. A notarial act in the usual form of a cash sale but containing the additional declaration that "this sale is made to secure a debt on said described property and that no Revenue Stamps are to be attached hereto," was construed to be a pledge of immovable property or the contract of antichresis.[62] In answer to defendant's contention that the transaction was intended to be a cash sale and not antichresis, the court held that because the instrument showed patently on its face that it was "to secure a debt on said described property" a contract of pledge resulted. Parol evidence was, therefore, not admissible to show a contrary intention. Article 3179 of the Civil Code provides:

"The creditor does not become owner of the pledged im-

59. 190 La. 141, 182 So. 127 (1938).
60. 190 La. 331, 182 So. 529 (1938).
61. 190 La. 1060, 183 So. 349 (1938). See Comment (1938) 13 Tulane L. Rev. 131.
62. Arts. 3133-3135, 3152, 3176-3181, La. Civil Code of 1870.

> movable by failure of payment at the stated time; any clause to the contrary is null, and in this case it is only lawful for him to sue his debtor before the court in order to obtain sentence against him, and to cause the objects which have been put in his hands in pledge to be seized and sold."

Since defendant had not complied with this provision plaintiff's unencumbered ownership of the property was recognized by the court. The criticism that the *Harang* case has evoked does not appear justified in the light of the authorities relied on by the court.[63] It would seem that the important consideration here involved was not what the parties intended but—What did they actually do? Under the parol evidence rule the unambiguous clause in the act justified the result reached but it is unfortunate that the instant decision will call into question the validity of numerous titles in which similar clauses have been inserted. *Conklin v. Caffall*[64] involved a distinction between an option to purchase and a contract of antichresis. The owners of a piece of property entered into an agreement with a second party whereby the former promised to transfer title if they were reimbursed the amount of certain existing indebtedness against the property within a period of three years. This was held to create an option to purchase within three years within the meaning of Article 2462 of the Civil Code. This could not be the contract of antichresis, the court held, because no relation of debtor and creditor existed between the parties to the agreement. It is essential to antichresis that the pledgor be debtor of the pledgee.[65] It was further decided that an extension of the three year option period could not be proved by parol evidence.[66]

In *Arkansas Improvement Co. v. Kansas City Southern Ry. Co.*,[67] the question raised was whether a certain act of sale amounted to a conveyance of title in full ownership or whether it purported merely to create a right of passage or servitude. The act (in the form of a common law deed with typical common law terminology) recited that the land had been "Remised, Released, and Quitclaimed" to the defendant Railway Company "for additional

63. Cf. Calderwood v. Calderwood, 23 La. Ann. 658 (1871). A problem analogous to the *Harang* case is to be found in the decisions construing a *vente à réméré* to be a mortgage or pignorative contract: Latiolais v. Breaux, 154 La. 1006, 98 So. 620 (1924) and see particularly, Provosty, J., dissenting in Marbury v. Colbert, 105 La. 467, 29 So. 871 (1901).

64. 189 La. 301, 179 So. 434 (1938).

65. Arts. 3176-3179, 3181, La. Civil Code of 1870.

66. Arts. 2275, 2276, 2462, La. Civil Code of 1870.

67. 189 La. 921, 181 So. 445 (1938).

right of way" and "for railroad purposes, forever." Such language was held not to limit the conveyance to a mere servitude. Since the intention of the parties did not clearly appear from the language of the instrument as a whole, the court resorted to extrinsic evidence showing that the vendors had abandoned the property and had failed to exercise rights of ownership for more than thirty years. While the expression "right of way" may be either a title in fee simple or a servitude (right of passage), the factors here present (for example, failure to pay taxes since the sale) indicated very strongly that the vendor "intended the grant to be one in fee and not merely one of servitude."[68] It should be noted that the question of adequacy of consideration raised in plaintiff's amended petition was not before the court for decision.[69]

One of the recent cases involving title to a portion of the Rodessa oil field was *Jackson v. Spearman*,[70] which presented for construction a notarial deed. The deed recited the appearance of "Hannah Jackson, wife of Thomas Jackson" as vendor, and also contained the following statement:

"I authorize *my wife* to sign the above. Thos. his x mark Jackson."

Through clerical error, the notary in taking the vendor's signature by mark, inserted

"Hanah her x mark *Johnson*" instead of "Hannah Jackson." It was held that this error, patent on the face of the act of sale, was not such a "defect of form" as would make the instrument a "private writing" instead of an authentic act.[71] Consequently, as an authentic act the instrument was full proof of the agreement it evidenced.[72] The fact that two reputable witnesses had signed the notarial sale sufficed to make it an authentic act and additional names affixed as witnesses were properly disregarded as surplusage.

Under the articles of the Civil Code, sales and contracts relating to immovable property do not affect third persons unless recorded in the manner provided by law.[73] From these provisions

68. Cf. Noel Estate, Inc. v. Kansas City Southern & Gulf Ry. Co., 187 La. 717, 175 So. 468 (1937); Bond v. T.&P. Ry. Co., 181 La. 763, 160 So. 406 (1935).

69. See Noel Estate, Inc. v. K.C.S.&G. Ry. Co., 187 La. 717, 175 So. 468 (1937) (recital of $1.00 consideration held inconsistent with an intention to convey full ownership of tract of land).

70. 188 La. 535, 177 So. 658 (1937).

71. See Art. 2235, La. Civil Code of 1870.

72. Arts. 2234, 2236, La. Civil Code of 1870.

73. Arts. 2246, 2264, 2266 and 2442, La. Civil Code of 1870.

it follows that one who purchases in reliance on the public records is protected.[74] *Jefferson v. Childers*[75] was decided in accordance with the above principles and the lessee of an oil and gas lease, obtained by a duly recorded cash deed from the record owner appearing to have a good title, was protected against a vendor who asserted the right to impeach the prior sale for fraud and nonpayment of the recited cash consideration.[76] In *Porterfield v. Parker*,[77] immovable property belonging to the community between plaintiffs' mother and stepfather was sold by the latter as head and master of the community. The act of sale was not recorded until after the death of plaintiffs' mother. It was held that such failure to record did not entitle the plaintiffs as heirs of their mother to recover an interest in the property since they were not "third parties" within the meaning of the codal article requiring recordation,[78] and the sale by their stepfather during the community operated to divest their mother's interest in the property.[79] Consequently there was nothing to pass to the plaintiffs as heirs.

The validity of a building restriction contained in an act of sale forbidding the use of the real property for commercial purposes and placing a minimum value upon residential construction was sustained in *Ouachita Home Site & Realty Co. v. Collie*.[80] The defendant in injunction proceedings, charged with violation of the restrictions, contended that the covenant would serve "to take property out of commerce perpetually, and to create a tenure of property unknown to our law." Relying upon the two leading Louisiana cases upholding similar restrictions[81] the court drew a distinction between the attempt perpetually to restrain the alienability of property[82] and "contracts for the use or nonuse of real

74. McDuffie v. Walker, 125 La. 152, 51 So. 100 (1910) (actual knowledge not equivalent to registry).

75. 189 La. 46, 179 So. 30 (1938).

76. The instant principle must not be confused with the right of an unpaid vendor to resolve a credit sale, appearing on the public records to be such, for non-payment of the purchase price. Art. 2561, La. Civil Code of 1870. Cf. Johnson v. Bloodworth, 12 La. Ann. 699 (1857); Templeman v. Pegues, 24 La. Ann. 537 (1872); Stevenson v. Brown, 32 La. Ann. 461 (1880); Ragsdale v. Ragsdale, 105 La. 405, 29 So. 906 (1911); and Schwing Lumber & Shingle Co. v. Arkansas Natural Gas Co., 166 La. 201, 116 So. 851 (1928).

77. 189 La. 720, 180 So. 498 (1938).

78. Art. 2442, La. Civil Code of 1870.

79. Art. 2404, La. Civil Code of 1870.

80. 189 La. 521, 179 So. 841 (1938).

81. Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); Hill v. Ross, Inc., 166 La. 581, 117 So. 725 (1928).

82. As in Female Orphan Society v. Young Men's Christian Association, 119 La. 278, 44 So. 15 (1907).

estate." Such restrictions on the use of real property are to be "likened to servitudes" under the provisions of Articles 709 and 728 of the Louisiana Civil Code and are properly enforceable by injunction.[83]

Article 2652 of the Civil Code permits a person against whom a litigious right has been transferred to obtain a release from the litigation "by paying to the transferee the real price of the transfer together with interest from its date." According to Article 2653 "a right is said to be litigious, whenever there exists a suit and contestation on the same." In *Smith v. Cook*,[84] while their action to establish title to real estate was pending in the Supreme Court, all the plaintiffs transferred certain mineral rights and one of the plaintiffs sold all his title and interest to the land in controversy. In an excellent opinion on rehearing, the court granted the defendant's motion to remand the case so as to permit him to avail himself of the provisions of Article 2652. The case establishes the rule that a defendant against whom only a portion of the thing in litigation has been transferred may invoke the codal provision and that the proper procedure when the transfer is effected pending appeal is by motion to remand.[85]

Article 2557 of the Civil Code gives to the buyer, when he is disquieted in his possession or when he has just reason to apprehend that he will be disturbed, a right to suspend payment of the price. By exception, he is denied this protection when he was informed of the danger of eviction before the sale. In *Culver v. Culver*,[86] pursuant to a judgment ordering a partition by licitation, property was adjudicated to a purchaser at a partition sale. During the pendency of the partition suit, the parties thereto had executed mineral leases and had conveyed the mineral rights to various transferees. These facts, through constructive knowledge of his agent, were known to the purchaser prior to adjudication. In this suit brought by the adjudicatee to recover the purchase money and to enjoin its distribution on the ground that the title

83. La. Act 326 of 1938 establishes a prescriptive period of two years from the commission of a violation of restrictions in title to real estate. For a discussion of this statute see Hebert and Lazarus, The Louisiana Legislation of 1938 (1938) 1 LOUISIANA LAW REVIEW 80, 112-114.

84. 189 La. 632, 180 So. 469 (1938).

85. Langston v. Shaw, 147 La. 644, 85 So. 624 (1920). It would seem that the motion to remand is imperative in this situation because after judgment the party cast could not invoke Article 2652. See Cucullu v. Hernandez, 103 U.S. 105, 26 L.Ed. 322 (1880) and authorities therein cited. But for an analogous case in which the motion to remand was improperly refused, see Gulf Refining Co. v. Glassell, 185 La. 143, 168 So. 755 (1936).

86. 188 La. 716, 178 So. 252 (1938).

was defective by virtue of the mineral leases, it was held that the purchaser was not entitled to a return of the purchase price paid since he was apprised of the adverse claims at the time of the purchase. The claimants to the mineral rights were not before the court and since it did not appear that the adjudicatee had yet been dispossessed by litigation, the instant case very properly applied Article 2557. The decision is in accord with earlier authorities.[87]

Lease

(a) *Immovable Property.* In *Williams v. James,*[88] the lessor of a filling station claimed an error in the description of a piece of property that had been leased and refused to deliver it. On the facts, this refusal was held not justified since there was no mistake in the thing intended and the property was easily identified. In rendering judgment for specific performance in favor of the plaintiff the court held that the term of the lease would be extended so as to begin with the date on which the lessee was permitted to take possession of the premises. This latter decision was based upon analogy to extensions granted under oil and gas leases.[89] Another filling station lease, involved in *Noel Estate, Inc. v. Louisiana Oil Refining Corporation,*[90] stipulated for a term of five years "or as long thereafter as may be required to sell such quantities of gasoline and oils, which at the rate of one cent (1c) per gallon for gasoline and fifteen cents (15c) per gallon for oils would pay to the lessee the sum of Five Thousand ($5,000) Dollars."[91] Almost nine years after the lease was executed the plaintiff (lessor) sued to cancel the contract alleging abandonment of the leased premises. Defendant's exception of no cause of action, based on plaintiff's failure to put defendant in default, was overruled in the Supreme Court. It was held that the quoted clause in the lease impliedly imposed a duty on the part of the lessee to use and occupy the property until $5,000.00 should be realized from the sale of gasoline and oils. The abandonment of the prem-

87. Bemiss v. Dwight, 3 La. Ann. 337 (1848); Bonnecaze v. Grannery, 5 La. Ann. 166 (1850); Municipality No. One v. Cordevoille & Lacroix, 19 La. 235 (1841); Bayley v. Denny, 26 La. Ann. 255 (1874). But cf. Jennings-Heywood Oil Syndicate v. Home Oil & Development Co., 113 La. 383, 37 So. 1 (1904).

88. 188 La. 884, 178 So. 384 (1938).

89. Cf. Gulf Refining Co. v. Hayne, 148 La. 340, 86 So. 891 (1921); Standard Oil Co. of La. v. Webb, 149 La. 245, 88 So. 808 (1921); Fomby v. Columbia County Development Co., 155 La. 705, 99 So. 537 (1924).

90. 188 La. 45, 175 So. 744 (1937).

91. 188 La. at 46-47, 175 So. at 745.

ises under these conditions constituted an active breach of the contract and therefore a putting in default was unnecessary.[92]

(b) *Charter party.* In *Poydras Fruit Co., Inc. v. Weinberger Banana Company, Inc.*,[93] the owner of a ship sued to recover its value from a charterer who had been in possession of the vessel when it was destroyed by fire. No allegations of negligence being contained in plaintiff's petition, the case turned largely on questions of burden of proof under Article 2723 of the Civil Code and presumptions of negligence applied in similar cases by the admiralty courts. With great clarity it was pointed out that under Louisiana law, unlike the rule of the French Civil Code, a lessee is liable for the destruction of leased property by fire only "when it is proved that the same has happened either by his own fault or neglect, or by that of his family."[94] French law places the burden of proof on the lessee to show absence of negligence when leased property is destroyed by fire, while Louisiana law places the burden on the lessor to show that the fire was occasioned by the lessee's negligence. On the particular facts involved, the court held that the circumstances surrounding the origin of the fire raised a strong presumption of fault or negligence on the part of a fireman in the charterer's employ and the loss was placed on the lessee because this presumption of negligence was not overcome by any other possible explanation of the fire's origin.

Partnership

In *Champagne v. Keen*[95] the articles of agreement contained a clause providing: "This partnership shall begin on June 1, 1928 and endure for ten years, as aforesaid, reserving to any partner at the expiration of any twelve months period, but at least ninety days previous to any such expiration [the right] of giving notice of dissolution to the partner in writing for such time."[96] After the death of one of the partners on June 6, 1935, his widow and heirs sold his share in the partnership to the surviving partner but they reserved the right to sue for and claim a share of the profits for a period of ninety (90) days after his death by virtue of the quoted clause. It was held that the partnership terminated by the

92. Arts. 1931, 1932, La. Civil Code of 1870. Cf. Temple v. Lindsay, 182 La. 22, 161 So. 8 (1935), and Pipes v. Payne, 156 La. 791, 101 So. 144 (1924), both of which were distinguished by the court from the instant case.

93. 189 La. 940, 181 So. 452 (1938).

94. Art. 2723, La. Civil Code of 1870; see also Art. 2721, La. Civil Code of 1870 and Arts. 1732, 1733, French Civil Code.

95. 189 La. 681, 180 So. 485 (1938).

96. 189 La. at 683, 180 So. at 486.

death of one of the partners under the Code provisions.[97] The stipulation relied on by plaintiffs applied only to a dissolution of the partnership during the lives of the partners and conferred no rights after dissolution of the firm by death. It is difficult to see how the argument advanced on behalf of the plaintiffs in this case could have been seriously urged before the court as the clause is, by its very terms, patently inapplicable.

Security Contracts

(a) *Pledge.* In the enforcement of the debt, Article 3165[98] requires a judicial sale of the property pledged unless a private sale has been authorized by the pledgor. *Rembert v. Fenner & Beane*[99] construed this code provision strictly where the pledge contract authorized the private sale of pledged securities whenever they afforded an insufficient margin to the broker who held them. Since the brokers sold these securities only because they did not care to continue the plaintiff's account any longer, and not because of any insufficiency of margin, they were held responsible for the damages suffered by the plaintiff in repurchasing like securities.

(b) *Continuing Guaranties.* In the two cases involving continuing guaranty contracts, the court was able to clear up ambiguities by ascertaining the intent of the parties from other language of the contract. In *Interstate Trust & Banking Co. v. Sabatier*[100] the defense was interposed that the contract was only a special guaranty personal to the plaintiff's transferor.[101] The court answered this argument by pointing out that the language whereby the defendants guaranteed payment of any indebtedness "owing to said bank, its successors and assigns" manifested the parties' intent that the contract was assignable. In *Reconstruction Finance Corporation v. Mickleberry*[102] the trial court had maintained an exception of no cause of action *inter alia* on the ground that the guaranty contract sued on was unenforceable since it was undated and several blanks therein had never been filled out. In reversing the judgment appealed from, the Supreme Court pointed out that a notation on the reverse of one of the two notes sued on identified the guaranty contract with the note; hence the

97. Arts. 2876, 2880, 2882, La. Civil Code of 1870.
98. La. Civil Code of 1870, as amended by La. Act 9 of 1872.
99. 188 La. 385, 177 So. 247 (1937).
100. 189 La. 199, 179 So. 80 (1938).
101. Cf. Citizens' Bank & Trust Co. v. Barthet, 177 La. 652, 148 So. 906 (1933).
102. 189 La. 105, 179 So. 49 (1938).

two should be read together and each construed with reference to the other. The defense that indorsements on the reverse of one of the notes showed its payment in full was rejected on the ground that such indorsements were not sufficiently clear to show payment conclusively. This and other contentions[103] were held to be matters of defense to be urged on the trial of the case on its merits. The final defense that the defendants were discharged by the release of one of the solidary guarantors was overruled, in view of a full reservation of all rights against the other guarantors contained in such release.

(c) *Suretyship.* In *Ocean Coffee Co. v. Employers Liability Assur. Corp.*[104] the receiver of a corporation whose affairs were being liquidated appropriated certain funds of the receivership, illegally advancing a portion thereof to his son-in-law and retaining the balance. Such sums were set up on the receivership books as accounts receivable due by the receiver and his son-in-law. In due course of administration, all accounts receivable were sold to plaintiff. The latter eventually brought this suit against the surety on the receiver's bond to recover the sums wrongfully appropriated. The court overruled the defense that the indebtedness could not be partially assigned without the surety's consent, pointing out that the entire indebtedness had been assigned to plaintiff. The further defense that the bond sued on was a special guaranty enforceable only by persons acting for the corporation was likewise overruled. The court held that the plaintiff stood in the shoes of the corporation and the payment of the purchase price of the accounts receivable had discharged neither the indebtedness nor the accessory suretyship.

Article 3061[105] provides that the surety is discharged by any act of the creditor which impairs the former's right of subrogation to the mortgages and privileges held by the latter. This doctrine was applied in *Brewer v. Forshee*[106] where the court held that the act of the creditor in selling some of the movables af-

103. Additionally, the defendants contended that the second note sued on was not mentioned in the guaranty contract and that this note was payable to a bank other than the one in whose favor the guaranty contract was executed. The guaranty was for the prompt payment of all debts which the maker of the note "may now or at any time, or times hereafter, owe, or be liable to pay." Although the opinion does not show this clearly it seems that the second note was held by the bank in whose favor the guaranty was executed at the time of its execution.

104. 189 La. 11, 179 So. 18 (1938).

105. La. Civil Code of 1870.

106. 189 La. 220, 179 So. 87 (1938).

fected by a chattel mortgage discharged the guarantor of notes secured thereby.

(d) *Mortgages.* In the parish of Orleans, the inscription of recordation of a mortgage can be cancelled upon the mere presentation to the recorder of a notary public's certificate that the indebtedness has been paid and the mortgage note cancelled.[107] Despite recent conclusive proof of this system's potentialities for fraud, the Legislature has failed to remedy the situation. *Zimmer v. Fryer*[108] was the fruit of this vicious system. Because it felt that the purchaser could have avoided the loss by requiring the production of the cancelled note to be paraphed for identification with the notary's release of mortgage,[109] the court held that he purchased the property subject to the illegally cancelled mortgage. A plea of discussion was properly overruled in view of its inapplicability to property affected by a special mortgage. Similarly, the purchaser's plea of estoppel was overruled because of his inability to prove knowledge by the mortgagee that he had bought and was improving the property. Finally, the court held that prescription of the mortgage note had been renounced by interest payments thereon by the maker.

(e) *Chattel Mortgages.* In the case of *In re Ruston Creamery*[110] the lessor competed with a chattel mortgagee for the proceeds of the sale of property affected by the privileges of both. The mortgage was recorded prior to the commencement of the lease, but at the time of recordation the property was in the leased premises under a previous lease. All rent due under the latter had been paid. The court applied the doctrine that the lessor's privilege does not attach prior to the beginning of the term of the lease, and held the lessor's privilege subordinate to that of the chattel mortgage.

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107. Art. 3374, La. Civil Code of 1870.

108. 190 La. 814, 183 So. 166 (1938).

109. Although the result of the case was undoubtedly correct, it would appear that this argument imposes an intolerable burden upon purchasers of property in Orleans parish. First, if the mortgage certificate shows no mortgages affecting the property, the purchaser would find it difficult to discover the existence of any which may have been cancelled fraudulently. Second, in some of the cases cleverly-forged facsimiles of the mortgage note have been cancelled and paraphed for identification with the release. Without the services of an expert it may be difficult for the prospective purchaser to discover the fraud. Apparently there are cases where even the maker of the note has not been able to determine which note was genuine and which was spurious. See Cassard v. Woolworth, 165 La. 571, 115 So. 755 (1928). The remedy lies, not in the imposition of intolerable burdens upon third persons, but, in the abolition of the vicious system which makes such fraud possible.

110. 190 La. 681, 182 So. 715 (1938).

(f) *Antichresis.* A pignorative contract seldom employed in Louisiana today is the pledge of immovable property. Despite its rarity, however, antichresis[111] played a leading role in one of the most important cases (insofar as the value of property involved is concerned) decided in recent years. As has been pointed out hereinabove,[112] *Gautreaux v. Harang*[113] held that the contract in controversy was one of antichresis rather than of sale. The defendants' demand for the reformation of the instrument, so as to have it decreed a sale, was denied on dual grounds. The action was held barred by the prescription of ten years; and the court further found that clear and definite proof of mutual error was lacking. All plaintiffs except an attorney had transferred to the latter a half interest in the property as a contingent fee for professional services to be rendered and costs to be expended. The nullity of this transfer, as the sale of a litigious right, was asserted by the defendants. Since, at the time of the transfer no litigation was pending, this contention was properly overruled. An instrument, executed by all plaintiffs except the attorney, purported to recognize the contract as a sale and further to quitclaim to defendants any rights to the property which such plaintiffs might have. This instrument was relied on confidently by defendants to defeat the claims of the plaintiffs executing it. The court, however, found that it had been procured through false representations, and refused to give the instrument any effect. Defendants were unable to render any accounting of the revenues of the property during the fourteen years in which they and their father had possession thereof. Because of this, the court rejected defendants' claim for judgment for the amount of principal and interest due on the debt, holding that the revenues of the property during this period would be presumed to have liquidated the indebtedness in full.

Criticism of the action of the court in *Gautreaux v. Harang* in excluding the testimony of the notary who drafted the instrument in controversy, offered for the alleged purpose of proving the intention of the parties, would not appear to be justified.[114]

111. For a short but excellent discussion of this subject, see Comment (1938) 13 Tulane L. Rev. 131.

112. Supra, p. 344.

113. 190 La. 1060, 183 So. 349 (1938). See Comment (1938) 13 Tulane L. Rev. 131.

114. Parol evidence is admissible to resolve the ambiguities of a written instrument. But here, in effect, the court held that the recorded act of mortgage was made part of the instrument in controversy by reference, and that when construed therewith the contract was not ambiguous. There is at least one analogy which justifies this application of the doctrine of "incorporation

Insofar as our jurisprudence is concerned, the most important question presented was whether the debt must be set forth expressly in the instrument evidencing the antichresis. The trial judge, looking only to the instrument itself and finding no definite indebtedness shown thereon, held that this essential of antichresis was lacking. He therefore held the contract to be a sale. The appellate court disagreed with the court *a qua*, finding that a definite indebtedness was shown by the instrument in controversy and the act of record to which it referred.[115] Impliedly, the *per curiam* opinion denying a rehearing recognized that the statement of a definite debt was an essential of antichresis. It found this essential, however, in the instrument under controversy and the recorded mortgage to which it referred.

(g) *Miscellaneous. Interstate Trust & Banking Co. v. Breckenridge*[116] presented for adjudication the question of whether certain instruments were participating certificates issued in connection with the deposit of securities, or whether they were moneyed obligations of a defunct securities company secured by a pledge of these securities. Since the instruments evidenced no obligation of the securities company to pay them, and as they were designated as such on their face, the court held them to be participating certificates.

D. Successions

Wills

(a) *Form.* A strict observance of the letter of the law on form of wills is presented in the case of *Soileau v. Ortego.*[117] Two of the witnesses to a testament (alleged to be valid as a nuncupative will under private act) were residents of another parish, leaving but three witnesses and the notary as witnesses from the parish where the testament was made. The court stated that the requirements

by reference." Art. 3306, La. Civil Code of 1870, requires a sufficient description of the property sought to be mortgaged to be stated in the act itself. Our courts have held, however, that where an insufficient description in the act of mortgage refers to a recorded act giving a full description of the property, the mortgage is valid. Baker v. Bank of Louisiana, 2 La. Ann. 371 (1847); Thornhill v. Burthe, 29 La. Ann. 639 (1877).

115. This conclusion was based on the theory of incorporation by reference. It would seem that on this point, under a different approach, the French courts would have gone much further than did the Supreme Court of Louisiana. Parol evidence would have been received to show the indebtedness, if there was present the commencement of proof in writing. 12 Planiol et Ripert, Traité Pratique de Droit Civil Français (1927) 282, nº 285; Art. 1347, French Civil Code. Certainly the instrument in controversy would have constituted such commencement of proof in writing.

116. 189 La. 1057, 181 So. 535 (1938).

117. 189 La. 713, 180 So. 496 (1938).

of Article 1581 of the Civil Code for a nuncupative testament under private signature were mandatory, and since the instrument under examination failed to meet them, it was invalid. In the *Succession of Patterson*[118] the alleged testatrix died on November 26, 1936; on March 18, 1937 a purported will was found. The document is set forth for examination by the reader:

"To my three nieces—
Nena H. Wadleigh
Pauline W. Markel
Maude W. Barton

I make a present of One Hundred shares of my First National Bank stock of Chicago, Illinois to be equally divided between them—which will not be included in my will—

Gertrude P. Patterson

Alexandria, Louisiana
February first
Nineteen hundred twenty six."

The court found that the above was not testamentary in either form or substance. Consequently, the succession was treated as intestate and an administrator in the person of a great nephew of the deceased was appointed.

(b) *Interpretation.* In the *Succession of Ferrara*[119] the original will in question was not set forth *in toto* and, consequently, perhaps a fair estimate of the court's interpretation cannot be reached. The court stated that "The only bequest made in the will was the bequest to the husband, Salvatore Ferrara, of the usufruct of whatever property the testatrix might own at the time of her death. She declared in the will: 'At the death of my husband my property belongs to my heirs.' "[120] The testatrix left no property except her share of the community, which the court held was not covered by the words of her testament. Just what else the testatrix could have meant seems hard to discover. Whatever sound underlying reasons the court may have had for the decision, the plain intention of the testatrix, as disclosed by the cited excerpt from the opinion, seems to have been entirely disregarded. In *Succession of Provost*[121] the first question decided by the court was one of interpretation of the will. A husband left his disposable portion, one-third of his property, to his wife. He

118. 188 La. 635, 177 So. 692 (1937).
119. 189 La. 590, 180 So. 418 (1938).
120. 189 La. at 594, 180 So. at 420.
121. 190 La. 30, 181 So. 802 (1938).

also left her a specific bequest of movables. Children of a previous marriage insisted that this bequest of movables was the only gift, although the testament used the words "included in this one-third." The bequest was very properly held to be one-third of the estate of the deceased. The second contention concerned an accounting between the community and the separate estate of the testator. Plaintiff failed to show that certain separate funds were actually used for the benefit of the community and furthermore, was unable to prove what part of certain funds belonged to the community and what to the separate estate. Plaintiff's demands were therefore rejected.

(c) *Marital Portion.* In *Succession of Tacon*[122] the court laid down the principles that a widow may claim either the marital portion or the $1,000 homestead, and that a succession does not have to be insolvent in order for her to elect the latter if she cares to, and finds it to her advantage. In *Succession of Tacon,*[123] presenting another phase of the same claim, the sole question was the correctness of an item charging the widow with the value of the occupancy of property belonging to the succession. This charge was not allowed as it was unsupported by the evidence. In *Taylor v. Taylor*[124] the plantiff, husband, was awarded the marital portion in imperfect usufruct. The deceased wife had died intestate leaving one adopted child. The contention was that since the deceased wife did not obtain delivery of her share of her mother's estate before her death, that the financial condition of the husband had not been changed, so as to leave him "poor" in the sense of having been suddenly bereaved of accustomed affluence. The court, recognizing the doctrine of *le mort saisit le vif,* declared that the inheritance of the wife's share of her mother's estate had actually been hers. There was additional proof that she had been receiving and spending the revenues sent by the administrator of her mother's estate. The marital fourth was awarded in imperfect usufruct, since the estate was in negotiable bonds. The court decided after careful deliberation and a full review of authorities, that the husband did not have to give security as his usufruct was a legal one and no issue of a previous marriage was left, but only an adopted child of the husband and wife. The cases of *Conner v. Administrators and Heirs of Con-*

122. 188 La. 510, 177 So. 590 (1937), noted in (1938) 12 Tulane L. Rev. 639.
123. 190 La. 158, 182 So. 133 (1938).
124. 189 La. 1084, 181 So. 543 (1938), noted in (1938) 13 Tulane L. Rev. 154.

ner[125] and *Waring v. Zunts*[126] were overruled insofar as they conflicted with the decision on the security point.

Miscellaneous

In the case of *Succession of Haydel*,[127] the testator left a will giving a piece of community property to his natural child. His interdicted wife's curatrix wished to set aside the will on the ground that the natural child was adulterine. The will was good under the plain terms of Article 1488. The only valid attack would have been one to reduce the amount of the legacy. Since the donation was not excessive for support, it was not subject to reduction. The judgment was, of course, excellent and followed the unmistakable language of the Civil Code.

The *Succession of Vance*[128] dealt simply with the matter of homologating an inventory, appraisals of land, and so forth. The lower court's judgment was wisely affirmed.

In *Perryman v. Trimble*[129] after the death of the lessor, the plaintiff lessee availed himself of Act 123 of 1922[130] and deposited his rent in court, as the children and widow in community were both claiming it. The children tried to prove that the mother had renounced the usufruct on the community property, but they failed in this proof, and the mother, of course, was awarded all the rent as a civil fruit of her usufruct.

The case of *Succession of Faust*[131] was a simple matter of reducing a remunerative donation to the estimated value of nursing services rendered. The gifts inter vivos in question were bonds given to two daughters by the mother. After a proper value was placed upon the services the rest of the gift had to be collated.

Tillery v. Fuller[132] was a petitory action. The case is largely concerned with a matter of proof in an unsuccessful attempt to rebut the presumption that property bought during coverture falls into the community. Application of familiar rules of prescription appear. The rule of suspension during minority was applied to Article 1030 of the Civil Code, giving 30 years within which an heir may elect to accept or reject a succession. If no acceptance is made within the period "his failure to accept will

125. 13 La. Ann. 157 (1858).
126. 16 La. Ann. 49 (1861).
127. 188 La. 646, 177 So. 695 (1937).
128. 189 La. 176, 179 So. 72 (1938).
129. 189 La. 398, 179 So. 577 (1938).
130. Dart's Stats. (1932) § 1556.
131. 189 La. 417, 179 So. 583 (1938).
132. 190 La. 586, 182 So. 683 (1938).

inure to the benefit of any co-heir or co-heirs who may have accepted, or of any heir next in degree who may have accepted, by going into possession of the estate."[133]

In *Jung v. Stewart*[134] the court held that a notary was confined to the ministerial duty of carrying out the court's judgment order for partition and should have limited himself to that alone. Plaintiffs were not precluded from demanding collation, as that matter had not been the issue and was not referred to in the judgment for partition. The notary's inclusion of the item of collation was beyond his province and of no effect.

In *Succession of Elmer*[135] the testator left everything to his second wife. His six children filed opposition to the account rendered by the widow, executrix. The case is a factual resumé of their claims and the calculation of the children's légitime. The plea that the second wife lived in open concubinage with the deceased prior to his first wife's death was unavailing under Article 1481 of the Civil Code, as the bequest was made to her after she was the wife of the testator.

E. Mineral Rights

The case of *Producers Oil & Gas Co., Inc. v. Continental Securities Corp.*[136] is a case of strict interpretation of the terms of a lease. Certain sand was penetrated which was productive of gas in the locality of the well, but production was not such as was required to keep the lease in force. There was a cessation of operations for more than thirty consecutive days, which was contrary to the operation clause of the lease. The case of *Clingman v. Devonian Oil Co.*[137] presented a question said to be identical with that of *Le Rosen v. North Central Texas Oil Co., Inc.*[138] The assignee of an oil and gas lease deposited the rental in a bank to the credit of the lessor and the lessor's wife. The court decided that this did not place the sum within the sole control of the lessor who as husband was head and master of the community, because the law allows a wife to draw against such an account without the husband's authority or consent. The Chief Justice dissented as he had in the *Le Rosen* case. The rule seems manifestly unfair to honest lessees. The money was available to the husband within

133. 190 La. at 664-665, 182 So. at 709.
134. 190 La. 91, 181 So. 867 (1938).
135. 189 La. 1016, 181 So. 477 (1938).
136. 188 La. 564, 177 So. 668 (1937).
137. 188 La. 310, 177 So. 59 (1937), noted in (1938) 12 Tulane L. Rev. 465.
138. 169 La. 973, 126 So. 442 (1930).

the terms provided and the mere fact that the wife could have withdrawn it, which she did not, is a small technicality upon which to base the lapse of a valuable right. In *United Gas Public Service Co. v. Mitchell*[139] an imperfect description in an assignment of lease was held not to bind a small tract included in the blanket clause of the original lease purporting to cover all contiguous lands of the lessor.

In *Andrus v. Tidewater Oil Co.*[140] a minors' lease was at issue. The defendant oil company contended that rentals were to be paid prior to February 12, 1935 within 12 months from the date the lease was executed. The plaintiffs contended that rentals were to be paid in advance of October 29, 1935 under the provisions of the lease. The order of the court granting the right to lease the minors' property showed that the lease was to be for a primary term of five years, beginning October 29, 1934. The court held, in protecting the minor from the least injury, that the dates set out in the order of court from which the lease got its binding force should rule.

The case of *Logan v. Tholl Oil Co.*[141] raised the question as to when a lease terminates because of cessation of production in paying quantities. The question, of course, is factual. After finding that four wells had been abandoned and that the remaining four were small pumpers, producing only about one-third of a barrel each and giving plaintiff slightly over $5.00 per month, it was held that the lease had ceased to produce in paying quantities within the meaning and terms of the contract. Damages were allowed only for attorney's fees in the amount of $500.00 with legal interest from judicial demand. The case of *Louisiana Canal Co. v. Heyd*[142] again raised the question of division of royalty. The court made it plain that from the mere fact of the parties joining in the same lease contract there does not arise a presumption that they intended to pool. The rule laid down is one of intention of the parties for which no hard and fast principle of interpretation can be given. The court was not guided by any knowledge of acts of the parties before the discovery of oil which would indicate the construction which they, themselves, had put upon the contract; but it decided, as a reasonable conclusion of intention, that the contract showed agreement to share ratably—in proportion to acreage—in royalties from oil produced from any part of the tract.

139. 188 La. 651, 177 So. 697 (1937).
140. 189 La. 142, 179 So. 61 (1938).
141. 189 La. 645, 180 So. 473 (1938).
142. 189 La. 903, 181 So. 439 (1938).

The settled question was again referred to that, where two adjacent tracts of land owned by different parties are covered by the same lease, development of any part keeps the lease alive as to the whole. The case of *Tomlinson v. Thurmon*[143] reiterated the doctrine that a mineral lease is an incorporeal right, that the sale of such a lease carries an implied warranty, and that the lessor is answerable for damage and loss sustained by the lessee in case of eviction, citing *Gulf Refining Co. v. Glassell.*[144] The court also restated the principle of *Roberson v. Pioneer Gas Co.*[145] that where a lessee transferred the lease without retaining an overriding royalty, an assignment and not a sublease resulted.

The case of *Kennedy v. Pelican Well Tool Supply Co.*[146] is a very important one in the annals. The issue was whether the signing of a lease by certain land owners and the defendant company, mineral right owner, was a joint lease which had the effect of interrupting the running of prescription against the mineral rights, under the authority of *Mulhern v. Hayne.*[147] Conceding the doctrine of the *Mulhern* case that a joint lease would have the effect of interrupting prescription, the court found that the lease in the instant case was not a joint lease. The lease was signed by the land owners without knowledge that the holder of the mineral rights would later be asked or permitted to sign the same lease. The court found that not a joint lease but separate leases had been confected which did not have the effect of acknowledgment and, hence, did not interrupt prescription.

The case of *Goldsmith v. McCoy*[148] presented a plea of acknowledgment to interrupt prescription of a mineral right by statements made in an unrecorded lease. The court found that the statements relied upon were mere acknowledgments of ownership and were unaccompanied by any statements of purpose or intention to interrupt the prescription then accruing. The case is very important for the fact that it may be said to settle the question of recordation of acknowledgment. The court clearly stated that any contract, whether intended to create or acknowledge an existing servitude, must be recorded in order to effect third parties in good faith.

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143. 189 La. 959, 181 So. 458 (1938).
144. 186 La. 190, 171 So. 846 (1936).
145. 173 La. 313, 137 So. 46 (1931).
146. 188 La. 811, 178 So. 359 (1938).
147. 171 La. 1003, 132 So. 659 (1931).
148. 190 La. 320, 182 So. 519 (1938).

In *Superior Oil Producing Co. v. Leckelt*[149] co-owners were held to have consented to a mineral lease by acquiescing in the payment of certain royalties. They consented to the receipt of benefits of the servitude and thereby consented to its use, which interrupted the running of prescription. The case of *English v. Blackman*[150] set forth with great clarity and full documentation the two rules involved, namely: that an acknowledgment alone of any variety will not interrupt prescription, but when coupled with a clear intent and purpose to have that effect the court will recognize the party's privilege to so deal with his right. The law being very "clear," all that the court had to do was to find out from the evidence the intent of the party against whom prescription was pleaded. Though the evidence was conflicting and the court recognized that " . . . financial interest does sometimes 'warp men from the living truth,' "[151] the landowner's corroborative testimony was believed that he did not have any "agreement" with regard to the lease, that he had never had any "consultation" with the adverse parties, that he did not know they intended to sign the lease later, and "emphatically" that no other names appeared as lessors in the document when he signed it. One "certain" fact appeared, that the parties did not sign the lease in the presence of one another. While obviously that fact can scarcely be said to be necessary or sacramental to the proof of a lease "joint" and with "intent" to interrupt, certainly it is a most persuasive one in the absence of other evidence of "clear intent." Estoppel was also pleaded in this case by virtue of accepted benefits but was unsuccessful.

The case of *Ford v. Williams*[152] reaffirmed the rule of *Sample v. Whitaker,*[153] holding that the minority of an heir to a mineral servitude suspends the prescription of ten years non-user of that right. The facts vary slightly. One Mading held a 1/64 interest in the mineral servitude as community property; his wife died leaving a five months' old child; the mineral interests which this child inherited from her mother, 1/128, was adjudicated later to the father by the district court. Thereafter, but still within the ten-year prescriptive period, the father died, leaving the minor as his sole heir. The petition for cancellation itself showed "that

149. 189 La. 972, 181 So. 462 (1938); See also Superior Oil Co. v. Leckelt, 189 La. 990, 181 So. 468 (1938).
150. 189 La. 255, 179 So. 306 (1938).
151. 189 La. at 264, 179 So. at 309 (1938).
152. 189 La. 229, 179 So. 298 (1938).
153. 172 La. 722, 135 So. 38 (1931).

there was never a continuous period of as much as ten years during which the minor . . . did not own an interest in the servitude."[154] The court held that prescription against the servitude as a whole and as to all parties holding an interest, was suspended during the period of five months and one day that the minor held an interest, from the date of her mother's death until the adjudication of her interest to her father; and that the prescription ran again during the term of her father's possession and was suspended again at his death, when his 1/64 interest vested in the minor. The mineral servitude was expressly declared to be a "heritable" servitude, which had been tacitly held in *Sample v. Whitaker*[155] and indicated in other decisions, notably, in the foundation servitude case of *Frost-Johnson Lumber Co. v. Salling's Heirs*.[156] A new and interesting theory was introduced in the instant case as counsel's second contention, to the effect that suspension for minority should not have resulted during the interim between the mother's death and adjudication of the minor's interest to the father, because during that term, the father held a usufruct of the minor's interest and the burden was upon him as usufructuary to exercise the servitude. This theory is well supported by the articles of the Civil Code. The court simply stated that "Conceding without holding that the father as usufructuary could have exercised the rights which counsel say he could, it does not follow that his failure to do so deprived his minor child of the benefit which the law gives her."[157]

The case of *Childs v. Porter-Wadley Lumber Co.*[158] illustrates the situation where prescription *began* to run against the minor. The minor was a stockholder in a corporation and at the dissolution of the corporation, a fractional interest in the mineral servitude vested in her. Suit for slander of title was brought by a possessor of the land whose deed of exchange contained no mention of an outstanding servitude. This possessor was in good faith though he obtained the property from his brother whose deed recited the mineral reservation which had also been registered in the parish conveyance records. Prescription began to run against the minor and her co-owners when the land was conveyed to plaintiff, but "could not accrue until she reached the age of twen-

154. 189 La. 229, 234, 179 So. 298, 299 (1938).
155. 172 La. 722, 135 So. 38 (1931).
156. 150 La. 756, 91 So. 207 (1922).
157. 189 La. 229, 240, 179 So. 298, 301 (1938).
158. 190 La. 308, 182 So. 516 (1938).

ty-two years."[159] When the minor became 22, however, the owner of the land had possessed it for only eight years, four months and eleven days. Even giving the defendant the benefit of the possibility that prescription did not begin to run against the minor until "the effective date of Act 64 of 1924,"[160] the suit was filed more than ten years from that time.

The case of *Roy O. Martin Lumber Co. v. Hodge-Hunt Lumber Co.*[161] presents a case of donation to two minors of a 1/64 interest, each, in mineral rights. No use of the right was made during the ten year period and when cancellation was sued for, the plea of suspension because of the minors' interests was entered. The donor practically admitted that the gifts were made for the purpose of suspending prescription but the contention was made "that the motive of the donors is immaterial if they complied with the law and that one taking advantage of any provisions of the law which are favorable to him is entirely within his legal rights and is not guilty of any fraudulent or immoral conduct, citing, 'One cannot be guilty of fraud by doing what he has a legal right to do. A Court does not inquire into one's motives for doing a lawful act.' "[162] The Court considered the donation under all the circumstances to be a simulation and refused to grant a suspension. It said: "We are not confronted with a case where we are called on to protect a minor's interest but are confronted with a case wherein minors are interposed for the sole purpose of defeating the landowner of his rights and one where a corporation is seeking by manipulation and subterfuge to continue a servitude without developing or producing oil or making any effort to that end as was contemplated by the parties when the servitude was granted."[163] There seems to be no good reason why a bona fide donation inter vivos or mortis causa to a minor should not have the same effect as the legally inherited interest in the *Sample* case had, if it occurred at a time and under circumstances which were "not suspicious." The person of his donor, the amount of the donation and the purpose of the gift would obviously have to be considered.

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159. 190 La. 308, 317, 182 So. 516, 518 (1938).
160. 190 La. at 317, 182 So. at 518. (La. Act 64 of 1924 amended Art. 3478, La. Civil Code of 1870.)
161. 190 La. 84, 181 So. 865 (1938).
162. 190 La. at 88, 181 So. at 866.
163. 190 La. at 90, 181 So. at 867.

F. PRESCRIPTION

Liberandi causa. All actions to annul public sales affected only with relative nullities are prescribed in two years.[164] In *Phoenix Building & Homestead Ass'n v. Meraux*[165] plaintiff's action for specific performance of a contract to sell was resisted on the ground that plaintiff's title was defective. It was contended that a judicial sale constituting a link thereof was null because it was held on the Saturday following the date of sale scheduled by the advertisement. This defect was held to be a relative nullity, cured by the lapse of two years. In *Ernest Realty Co. v. Hunter Co.*[166] plaintiff's jactitory action was resisted by the plea of a superior title in defendant. The latter deraigned title through a judicial sale which plaintiff contended was null since the advertisement thereof was not published in a newspaper, but in a legal trade paper. Again the court applied the prescription, holding that this relative nullity[167] had been cured by the lapse of the prescriptive period. To plaintiff's argument that, under the doctrine *quae temporalia,* prescription could not be invoked against him, the court properly answered that since the action sought to improve rather than to preserve plaintiff's position, the maxim was not applicable.

Of the other two cases involving prescription *liberandi causa,* one applied the trite principle that prescription would not run against a creditor holding a pledge to secure the debt.[168] In the other, *McGuire v. Monroe Scrap Material Co.,*[169] the doctrine *contra non valentem* was extended.[170] It was held that prescription barring an action to recover the value of property wrongfully appropriated did not commence to run until the owner discovered the identity of the person wrongfully appropriating the property.

Acquirendi Causa. Of the seven cases involving this type of

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164. Art. 3543, La. Civil Code of 1870, as amended by La. Act 231 of 1932. The prescription is five years when minors or interdicts are affected.

165. 189 La. 819, 180 So. 648 (1938).

166. 189 La. 379, 179 So. 460 (1938).

167. Advertisement of the judicial sale in a legal trade paper instead of a newspaper was likewise held to be a relative nullity in Williams v. Burnham, 189 La. 376, 179 So. 459 (1938). There the judicial sale was held to have been ratified by the mortgagor's acceptance of a lease of the property from the adjudicatee.

168. Liberty Homestead v. Pasqua, 190 La. 25, 181 So. 801 (1938).

169. 189 La. 573, 180 So. 413 (1938).

170. The holding supra goes somewhat beyond the previous limits of the doctrine. Cf. Reynolds v. Batson, 11 La. Ann. 729, 730 (1856). See also, Comment (1938) 12 Tulane L. Rev. 244. But see, Jones v. Texas & P. Ry. Co., 125 La. 542, 547, 51 So. 582, 584, 136 Am. St. Rep. 339 (1910).

prescription, one[171] involved only factual issues. In *Hill v. Dees*[172] the court applied the general rule that one co-owner cannot prescribe against the title of another.[173] In *Crawford, Jenkins & Booth v. Wills* [174] it was held that where the owners of property did not go into possession until more than three years after a valid tax sale to another, their possession subsequently would not affect the title to the property unless it continued for 30 years.

A lesser corporeal possession is required of one asserting title to timber lands through the prescription of 10 years than would be necessary to acquire title to cultivated lands under an adverse possession of 30 years.[175] In *Zylks v. Kaempfer*[176] the prescription of 10 years was pleaded to an action to recover an undivided interest in a tract of land, the greater portion of which was wooded, and only a very small part of which was under cultivation. The court held the following sufficient to constitute the necessary corporeal possession: granting of rights of way for a railroad and public highways; sale of merchantable timber; and execution of a mineral lease thereon. The possession of defendant and her ancestors was held sufficient to acquire title by the prescription of 10 years where they possessed as owners and had no contractual relationships with the plaintiffs.

Article 3498[177] announces the general rule that possession of a portion of land by a person holding title thereto is presumed to be possession of the whole. *Feazel v. Peek*[178] applied the doctrine to the case where the defendant, under an ostensible title translative of ownership, in good faith took possession of a portion of the land involved with the intention of possessing the entire tract as owner, and the court held that he acquired a valid title to the entire tract under the prescription of 10 years. One difficulty with this doctrine of constructive possession is presented when two adverse claimants take corporeal possession of different portions of the property, each intending to possess the whole as owner. Ob-

171. Gibson v. Fitts, 189 La. 753, 180 So. 509 (1938).
172. 188 La. 708, 178 So. 250 (1938).
173. It is possible for one co-owner to prescribe against the title of another, but "his possession [must be] so clearly hostile and adverse to the rights of the other that notice will be given to the latter of the intent to henceforth hold *animo domini* all of the common property." Comment (1938) 12 Tulane L. Rev. 608, 620. See also, Liles v. Pitts, 145 La. 650, 82 So. 735 (1919).
174. 189 La. 366, 179 So. 455 (1938).
175. Comment (1938) 12 Tulane L. Rev. 608.
176. 189 La. 609, 180 So. 425 (1938).
177. La. Civil Code of 1870.
178. 189 La. 61, 179 So. 35 (1938).

viously, the presumption voiced by the code provision cannot result in both having possession of the whole simultaneously. *Ernest Realty Co. v. Hunter Co.*[179] applied one of the well settled exceptions to the rule. There, the defendant had a prior corporeal possession of the property, and it was held that plaintiff acquired possession only of such property as he had actually possessed and occupied, by enclosures and other vestiges of possession; and the burden of proving the extent of such actual possession was held to be on plaintiff.

Tyson v. Spearman,[180] presenting principally factual issues, involved the title to valuable oil lands in the Rodessa field. Plaintiffs sought to recover a half interest therein on the ground that they or their ancestors were five of the ten natural children of Louisa Tyson, a former owner of the property. Defendants had acquired the property from the other five irregular heirs. Finding that all of the defendants were chargeable with notice of sufficient facts to preclude them from relying upon the "estoppel" sanctioned by Article 1839,[181] and that there was no sufficient possession to prove the prescription of 10 years pleaded, the court overruled both defenses. The principle that the prescription of 10 years cannot be bottomed on an act of sale which effected a conventional partition was affirmed, the court pointing out that a partition was not translative of title but merely declaratory thereof.

IV. Torts and Workmen's Compensation

Torts

Negligence, and libel and slander make up the cases disposed of by the Supreme Court in the field of torts during the past term.

Negligence. The negligence cases involve automobile or railroad collisions. Nothing new is brought to light in them. *Aaron v. Martin*[1] tends to restrict the doctrine that negligence of a driver may not be imputed to the guest. Here the guest in the automobile was held contributorily negligent for failure to warn the driver of an impending collision with a train. The court disavowed adherence to the doctrine that a guest in an automobile may have the negligence of the driver imputed to him. But if

179. 189 La. 379, 179 So. 460 (1938).
180. 190 La. 871, 183 So. 201 (1938).
181. La. Civil Code of 1870.
1. 188 La. 371, 177 So. 242 (1937).

failure to warn is held to be independent contributory negligence, the doctrine of imputability is hardly needed in many cases.

The doctrine of "last clear chance" came before the court in two cases. In *Jackson v. Cook*[2] it was held that a motorist, who failed to keep a proper lookout, was liable for striking a drunken pedestrian who was negligently on the highway. In *Russo v. Texas & Pacific Railway Company*[3] failure of a locomotive engineer to keep a sharp lookout, thus not noticing a pedestrian walking down the track, was held to subject the railroad to liability on the doctrine of last clear chance. These two cases clearly indicate that the Louisiana court does not look with favor upon the limitation of liability to "discovered peril" but extends it to perils which should be discovered.

Louisiana Power and Light Co. v. Saia[4] held that the defendants have the right to raise the issue of contributory negligence by exceptions of no right or cause of action where plaintiffs' only reason for failing to see a parked unlighted truck and trailer was that "it was quite dark." The doctrine that a motorist is held to have seen an object which, by the exercise of ordinary care he would have seen in time to avoid running into, served to bring the plaintiff to grief here. To drive at a greater speed than that which will permit one to stop within the range of vision is negligence.

A non-resident defendant claimed that substituted service was inefficacious where the injury occurred on a side road, since the statute refers to public highways. Strangely enough, this contention was successful in the trial court. Upon appeal, the ruling was reversed by the Supreme Court. *Galloway v. Wyatt Sheet Metal & Boiler Works.*[5]

Libel and Slander and Malicious Prosecution.[6] A minister of the gospel, while riding on a bus, was seized with an apoplectic fit. Though conscious, he was unable to make any sign. When the bus reached the terminal and the plaintiff failed to leave, the employees of the defendant assumed he was drunk and deposited him on a bench in the waiting room. Shortly thereafter the plaintiff was discovered prone on the floor. The ticket seller of the de-

2. 189 La. 860, 181 So. 195 (1938).
3. 189 La. 1042, 181 So. 485 (1938).
4. 188 La. 358, 177 So. 238 (1938).
5. 189 La. 837, 181 So. 187 (1938).
6. In Calavartenos v. Southeastern Raw Fur Merchants of La., 189 La. 94, 179 So. 46 (1938), it was held that the evidence was insufficient to show that the plaintiff acted maliciously and in bad faith in bringing the suit.

fendant, likewise assuming that the plaintiff was drunk, telephoned the police that a drunken man was lying on the waiting room floor. The police took him to headquarters, booked him on a charge of drunkenness, threw him on a cot in a cell, from which he slipped to the floor, and left him there for 24 hours. The plaintiff asked damages from the defendant for suffering due to neglect and to his treatment at the hands of the police, and for slander to his name and reputation.

It was held that the defendant's servants were responsible for the inhuman treatment which the plaintiff received in the bus station and in the jail. For injury to his reputation, although it was shown that none of the plaintiff's parishioners believed the defamatory statements, the court awarded him what it called nominal damages, in the amount of $1000.00. *Searcy v. Interurban Transportation Co.*[7]

The opinion does not discuss the problem of proximate or concurrent causation. If it had, this phase of the case would have been a distinct contribution to the tort jurisprudence of the state. It is apparent that the court was revolted by the inhuman treatment accorded one who, while in a helpless condition, was allowed to remain 24 hours without medical attention. The bus company's defense that its servants thought in good faith that the man was drunk, was unavailing. The moral to be drawn from the decision is obvious: since dead drunkenness and apoplexy are conditions hard to differentiate, it is the part of wisdom, if not of humanity, for common carriers to accord everyone so disabled the benefit of prompt medical attention.

In *Lewis v. Louisiana Weekly Pub. Co.*[8] a newspaper was held liable for defamatory statements concerning an employment agency. In *Wisemore v. First National Life Insurance Co.*[9] an insurance company was held liable on the doctrine of *respondeat superior* for slanderous statements of its agent concerning an agent of a rival company. There was evidence that the defamatory remarks were made in the presence of third parties whom the plaintiff was soliciting for business and whom the defendant's agent had called upon for the purpose of "getting them to keep in force their insurance contracts which they already had with the defendant company."

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7. 189 La. 183, 179 So. 75 (1938).
8. 189 La. 281, 179 So. 315 (1938).
9. 190 La. 1011, 183 So. 247 (1938), noted infra p. 449.

The majority of the court felt that these remarks were made not only in the *course* of the employment but also within its *scope*. Mr. Justice Odom in dissenting, took a narrower view of the case. To his mind, the defamation was not within the *scope* of the employment.

Workmen's Compensation

Easily the most important decision on Workmen's Compensation during the last term was the case of *Harris v. Southern Carbon Co.*[10] Here the court held, in interpreting section 20 of Act 20 of 1914 as amended,[11] that after final judgment awarding a specific sum for partial disability, the injured workman may sue anew for increased disability resulting from spread of infection. Three judges dissented, Mr. Justice Land remarking that the courts had no mandate to rewrite the compensation statute.

It was agreed by all that had this been an ordinary law suit, the doctrine of *res judicata* would have barred the plaintiff. The majority of the court, doubtless realizing that the plea of *res judicata* is an anomaly in the administration of continuing remedial statutes such as Workmen's Compensation Acts, felt impelled to deny the defense. The case is a good illustration of one of the chief difficulties with judicial administration of Workmen's Compensation. Constant supervision and flexible control are requisite to adequate administration of such matters. Courts are tempted to depart from their proper functions and to torture their procedure unduly when faced with problems of this sort.

In *Rogers v. Mengel Co.*[12] it was held that a logger injured while warming himself at a fire prior to returning home after learning that there would be no work that day because of inclement weather was held to have been injured in the course of employment. In *Stieffel v. Valentine Sugars, Inc.*[13] the court ruled that seasonal employment of short duration, prompted by employers' sympathy, does not prevent an injured employee from recovering for total and permanent disability.

Jones v. Husicker[14] held that under the head of medical expenses an injured workman may not recover for fees charged by physicians for testifying as expert witnesses; *Nevils v. Valentine*

10. 189 La. 992, 181 So. 469 (1938).
11. By La. Act 85 of 1926, § 1 [Dart's Stats. (1932) § 4410].
12. 189 La. 723, 180 So. 499 (1938).
13. 188 La. 1091, 179 So. 6 (1938).
14. 188 La. 468, 177 So. 576 (1938).

Sugar Co.[15] was a ruling that the evidence sustained the lower court's finding that the workman was a malingerer; and *Osborne v. McWilliams Dredging Co.*[16] decided that supplemental pleading showed that the injury occurred in the scope of employment.

Finally, in *Rogers v. City of Hammond*[17] it was held that a workman who wishes to dismiss a suit may do so regardless of the desire of his counsel to pursue an appeal. Apparently a lawyer has no vested interest in a workmen's compensation case.

V. CRIMINAL LAW AND PROCEDURE

Fifty criminal cases were decided during the judicial year 1937-1938—almost one-fifth of all the cases considered by the court. Of these, 33 were affirmed; in 17 the Supreme Court reversed, remanded, or otherwise set aside the decision of the district court.[1] These figures indicate that there is one chance in

15. 188 La. 498, 177 So. 586 (1938).
16. 189 La. 670, 180 So. 481 (1938).
17. 190 La. 1005, 183 So. 245 (1938).

1. The lower court rulings were set aside for the following reasons: failure properly to give notice of meeting to two jury commissioners, State v. Milton, 188 La. 423, 177 So. 260 (1937); a grand juror was disqualified because a felony charge initiated in 1905 was still on file, State v. Gunter, 188 La. 314, 177 So. 60 (1937); failure of indictment to allege an essential element, State v. Gendusa, 190 La. 422, 182 So. 559 (1938); finding that the accused, tried in a district court, was under 17 when the "offense" was committed, State v. Connally, 190 La. 175, 182 So. 318 (1938); invalidity of a liquor ordinance, State v. Reed, 188 La. 402, 177 So. 252 (1937), State v. Leatherman, 188 La. 411, 177 So. 255 (1937), State v. Lawrence, 188 La. 410, 177 So. 255 (1937), State v. Weil, 188 La. 430, 177 So. 369 (1937), State v. Wactor, 189 La. 535, 179 So. 865 (1938); unconstitutionality of a local statute prohibiting trapping, State v. Tabor, 189 La. 253, 179 So. 306 (1938); State v. Clement, 188 La. 923, 178 So. 493 (1938); jury's viewing scene of crime in absence of accused, State v. Pepper, 189 La. 795, 180 So. 640 (1938); transcript incomplete, State v. Pepper, 189 La. 802, 180 So. 642 (1938); for prescription, accused must be fugitive from Louisiana justice, not from that of another state, State v. Berryhill, 188 La. 550, 177 So. 663 (1937); habeas corpus dismissed because accused had waived defects in indictment, State v. Chicola, 188 La. 694, 177 So. 804 (1937); father's letter concerning custody of his child was not libelous, State v. Lambert, 188 La. 968, 178 So. 508 (1938); a juror, charged with perjury on his voir dire, should have been permitted to show that he voted for conviction, State v. Serpas, 188 La. 1074, 179 So. 1 (1938).

The above recital is hardly an adequate index of the variety of issues presented by the criminal jurisprudence of the past year. The most important problems will be discussed in the text in some detail. As a very general characterization, it may be stated that the decisions deal with questions of procedure, evidence, pleading, administration, interpretation of statutes, substantive law, and constitutionality. Most important in this last field is State v. Pierre, 189 La. 764, 180 So. 630 (1938), involving the question whether negroes were improperly excluded from the juries. The United States Supreme Court has granted certiorari in this case, 59 S.Ct. 100 (1938). The same issue was ineffectively raised in State v. Walker, 189 La. 241, 179 So. 302 (1938), and in State v. Dierlamm, 189 La. 544, 180 So. 135 (1938) where the accused was a white man.

three of having a district court judgment in a criminal case reversed on appeal. This seems high.[2] But it cannot be inferred that the trial courts are correspondingly incompetent. A reading of the cases suggests rather that the criminal law of Louisiana, especially that part of it dealing with pleading, procedure and evidence, is in an uncertain and at times a very confusing condition. In some instances it is also apparent that, although the problem arises as a procedural one, the root of the difficulty is in the substantive law.

One of the most important problems dealt with in the year's jurisprudence has to do with aggravated assaults and batteries. The issues are revealed in three cases.

In *State v. Antoine*[3] the charge was "cutting with a dangerous weapon with intent to murder," and the defendant was convicted of "cutting with a dangerous weapon with intent to kill." Counsel for defendant had moved that the jury be instructed to return one of the following verdicts: "(1) Guilty as charged, or (2) guilty of cutting with a dangerous weapon with intent to kill, or (3) guilty of cutting with a dangerous weapon with intent to kill and wounding less than mayhem, or (4) guilty of assault with a dangerous weapon, or (5) guilty of assault and battery, or (6) not guilty."[4] The court charged only (1), (2) and (6), and rejected the others on the ground that they were not responsive. This judgment was affirmed.

As to instruction (3) (less than mayhem), the court's opinion seeks support by reference to assertions in prior jurisprudence to the effect that a charge under section 794 of the Revised Statutes[5] is not included in section 791.[6] The most recent case thus referred to, *State v. Mitchell*,[7] is a similar decision which in turn refers to *State v. Murdoch*[8] and *State v. Jacques*.[9] The *Murdoch* case would have been eminently worth studying for it reveals a sharp cleavage in decision, a remarkably well reasoned opinion by Mr. Jus-

2. However four of the reversals dealt with a Rapides ordinance which was declared invalid. State v. Reed, 188 La. 402, 177 So. 252 (1937), State v. Lawrence, 188 La. 410, 177 So. 255 (1937), State v. Leatherman, 188 La. 411, 177 So. 255 (1937), State v. Weil, 188 La. 430, 177 So. 369 (1937).

3. 189 La. 619, 180 So. 465 (1938).

4. 189 La. at 623, 180 So. at 466.

5. La. Rev. Stat. of 1870, § 794, as amended by La. Act 17 of 1888 [Dart's Crim. Stats. (1932) Art. 768].

6. La. Rev. Stat. of 1870, § 791, as amended by La. Act 43 of 1890 [Dart's Crim. Stats. (1932) Art. 764].

7. 153 La. 585, 96 So. 130 (1923).

8. 35 La. Ann. 729 (1883).

9. 45 La. Ann. 1451, 14 So. 213 (1893).

tice Manning, and the fact that *State v. Delaney*[10] is a case presenting precisely the same facts as in the instant one (stabbing, etc.). There is an assertion in the majority opinion in the *Murdoch* case that "the nature of the wound, which is of the essence of the latter offense [mayhem], is not directly or indirectly put at issue"[11] (in the major charge). It may be possible to support this view by drawing a particularly fine distinction (between mayhem and other batteries) which would seem to have hardly any application in the trial of actual cases. Indeed it is a moot question whether such a distinction is theoretically maintainable since the location and nature of the wound would be relevant to proof of the criminal intent. The facts regarding the wound having been presented to the jury, only the court's instruction on the definition of mayhem would be required to support a verdict as to the latter. Wihout pressing this view unduly, it may be suggested that reexamination of the jurisprudence was possible.

As to instruction (4) (assault with a dangerous weapon), the court asserted that an indictment which denounces "cutting" does not include a charge of "assault." This assertion would find readier acceptance if the reverse of the instant case were involved (that is, if the charge had been for "assault," and the verdict for "cutting") for the aggravated cutting offenses are uniformly more serious than the aggravated assault offenses. By like token, it is difficult to follow the court's holding in this regard. The question at bottom is, broadly, the relationship of criminal battery to criminal assault; and the various statutes, confusing as they are in the aggregate, do apparently reveal this one principle of differentiation. Tort law rather clearly supports the view upheld in the instant case; but in the criminal law, there is abundant doctrine to require at least examination into the question whether battery does not necessarily include assault. As to instruction (5) (assault and battery), this is ignored in the opinion because counsel did not press it. Yet clearly it is involved in the principles discussed above.

Related problems are raised in *State v. Dent*[12] where the indictment charged that the defendant "did . . . assault with a dangerous weapon with intent to murder." Defendant's motion to quash, on the ground that no crime was charged, was granted; whereupon the State was permitted to substitute "strike," for "as-

10. 28 La. Ann. 434 (1876).
11. State v. Murdoch, 35 La. Ann. 729, 731 (1883).
12. 189 La. 159, 179 So. 67 (1938).

sault." On trial before another judge, the amended indictment was quashed, and the State appealed. This ruling was affirmed, the Supreme Court pointing out that sections 791 and 792 of the Revised Statutes[13] not only charged distinct and separate crimes, but also that a verdict responsive to one of them could not be responsive to the other.[14]

It is clear from the above cases that there is considerable confusion in the substantive law of aggravated assaults. "Intent to kill" is differentiated from "intent to murder"; "striking" is differentiated from "assault" (which, of course, is necessary for certain purposes); and partially repealing legislation[15] has increased the existing difficulties. Confusion in the substantive law leads to unfortunate consequences in procedural law; we have noted the courts' difficulties in determining the responsiveness of various verdicts. Yet in the problem here involved, the solution is relatively simple; or perhaps, one had better say the solution ought to be simple, for, under existing Louisiana law, a number of unusual difficulties need to be overcome.

As regards the various assaults, and the responsiveness of verdicts, two simple propositions apply: in the substantive law, "striking with intent to murder" is at one extreme, while simple "assault" is at the other. The substantive law should make clear the series of gradations between these two. As for responsiveness, the major includes the minor cognate offense. Such a term as "mayhem" can be interpreted to accord with these principles; better yet, it might be omitted from the substantive law and replaced by language that does not conjure up ancient connotations.

The burden of the writer's comments on *State v. Antoine*[16] was *not* that the court's decision cannot be supported, but that there was sufficient vagueness and uncertainty in the jurisprudence to have permitted re-examination of the problem on its merits; and that the objectives which ought to be attained and the principles underlying the problem might well have suggested another conclusion. The courts, whether they will or not, do perform a legislative function as they extend the jurisprudence step by step.

13. La. Rev. Stats. of 1870, § 791, as amended by La. Act 43 of 1890, § 1 [Dart's Crim. Stats. (1932) Art. 764]; La. Rev. Stats. of 1870, § 792, as amended by La. Act 59 of 1896 and La. Act 9 of 1912 [Dart's Crim. Stats. (1932) Art. 766].

14. State v. Broxton, 188 La. 456, 177 So. 572 (1937), involved La. Rev. Stats. of 1870, § 793 [Dart's Crim. Stats. (1932) Art. 767].

15. See Annotations in Dart's Crim. Stats. (1932) Art. 767.

16. 189 La. 619, 180 So. 465 (1938), cited supra note 3.

There are other, perhaps more serious consequences that flow from the *Antoine* case because the rule now definitely established imposes rigid limitations on the responsiveness of verdicts for these lesser cognate offenses. In the *Antoine* case, a conviction was upheld, but does that mean that the State will be the future beneficiary of the ruling? By no means. For let us now consider, in the light of the Louisiana jurisprudence of criminal procedure, in just what position the district attorneys are placed.

We may assume that a desirable system of prosecution would permit one trial of a defendant or group of defendants for a single act or transaction. It would therefore permit the allegation of various charges in one indictment, each of which fitted all or part of the alleged criminal act or transaction. Finally, it would permit flexibility as to responsiveness; and in this, as in all particulars in the attainment of the above objectives, there is no need to sacrifice any of an accused person's rights. Criminal law should continue to guard these rights as zealously as ever, but this paramount issue should not be used to becloud the problem or to hamper the accomplishment of common efficiency through the elimination of unnecessary technicality that prevents attainment of proper goals.

These objectives were clearly in the minds of those who drafted the Code of Criminal Procedure. This is apparent from Article 218, interpreted in relation to prior jurisprudence, especially *State v. Hataway*[17] which held that "the rule that two or more crimes, if committed in one transaction, may be charged in one indictment, is subject to the qualification that the two or more crimes so charged 'are subject to the same mode of trial and nature of punishment.' "[18]

Clearly Article 218 extended beyond that rule, for the mode of trial was not retained as a limitation on the joinder of offenses. The steps by which this article was declared to be unconstitutional,[19] then partially reinstated[20] to re-introduce the rule of the *Hataway* case, were completely determined by Act 153 of 1932 which repealed Article 218. Interestingly enough, in two cases following this repeal[21] the rule in the *Hataway* decision has apparently been revived. Because this latter course brings the juris-

17. 153 La. 751, 96 So. 556 (1923).
18. 153 La. at 755, 96 So. at 557.
19. State v. Jacques, 171 La. 994, 132 So. 657 (1931).
20. State v. White, 172 La. 1045, 136 So. 47 (1931).
21. State v. Mansfield, 178 La. 393, 151 So. 631 (1933); State v. Turner, 178 La. 927, 152 So. 567 (1934).

prudence squarely in conflict with Article 217, it is clear that the repeal of Article 218 was an incomplete job. The Code of Criminal Procedure needs clear amendment on the very important question of joinder of offenses. While this broader question cannot be discussed here, it is necessary to perceive the cumulative effect of the limitations on joinder of offenses brought about by the repeal of Article 218 and on responsiveness of verdict produced by the *Antoine* and similar cases.

What is the resulting position of the district attorney? The dependence of the mode of trial upon the gravity of the penalty, and the wide range of such sanctions, places serious limitations on the joinder of various assaults and batteries. If he charges either an aggravated battery or an aggravated assault, then he faces rigorous restrictions as to possible verdicts. He is placed in a position where his procedure is inefficient from its very inception, and where the best he can expect—saving luck—is a battle in the uncertain arena of double jeopardy. Yet the objectives that ought to be realized are everywhere recognized as proper and laudable. They have been pointed out above; and while the problem in its totality is one of considerable complexity, there is every reason to believe that most of the difficulties can be removed.

Among other cases decided during the past judicial year involving, incidentally, questions of substantive law, the most important is *State v. Gendusa.*[22] Defendant was charged with burglary under section 850 of the Revised Statutes, a capital offense.[23] The indictment omitted the allegation of a "breaking." The defendant's motion to quash was overruled, as were his motions in arrest and for new trial. He was convicted and sentenced to death. On appeal, this conviction was reversed and the case remanded, with Mr. Justice Higgins strongly dissenting. His opinion discloses a degree of ambiguity in the substantive law, and it must be conceded that the criminal statute involved (§ 850) is poorly drawn. The legislature might profitably re-examine the various types of burglary not only with a view to improved expression but also as regards the policy concerning "breaking." If that element is retained for the maximum offense, it may still be questioned whether there should be such disparity in penalties as now exists between section 850 and the next most serious type of burglary.

22. 190 La. 422, 182 So. 559 (1938).

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

For the purpose immediately in hand, the position of the court as regards verdicts on substantially defective indictments is of major interest. In effect the court holds that Article 557 (which provides broadly that no conviction shall be set aside for error unless there is a miscarriage of justice) must be read in connection with, and is, indeed, superseded in part by Article 418 (which provides that the omission of any essential averment from an indictment "constitutes an incurable defect"). In a lengthy review of the jurisprudence, upon rehearing, the court maintained its original view that the allegation of a "breaking" was essential, and that its omission was not cured by the verdict.

In its opinion[24] the court did not consider Article 253,[25] with the result that the application of that very important provision remains obscure and in part nullified. In its survey of cases, the court does not distinguish those in which objection to the indictment was timely from those where the defense omitted to demur or move to quash. Yet it is clear from Articles 284 and 253 that this is a matter of first importance. On that basis, it is possible to classify the *Gendusa* case with *State v. Pinsonat*,[26] *State v. Mor-*

24. In the *Gendusa* case, a motion to quash was made; hence Art. 253 was not applicable. But the opinion goes far beyond the facts, and may well be the most important decision on the general problem of incurability of an essentially defective indictment. See Art. 253, La. Code of Crim. Proc. of 1928, in note 25, infra.

25. 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 indictmnt and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been empanelled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings 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."

26. 188 La. 334, 177 So. 67 (1937).

ris,[27] and *State v. Gunter*[28] as properly decided because in each of these cases Articles 284 and 253 were observed.[29]

This leaves for special consideration *State v. Williams*[30] and *State v. McDonald*.[31] In the former case, the defendant was charged with operating a "gambling" game. At the conclusion of the evidence, the State was permitted to amend the information by substituting "banking" for "gambling," thus bringing the charge within a penal statute. The trial court submitted that the defendant had not been injured because evidence of "banking" had been introduced, that defendant did not move for a continuance, and that Article 253 required the amendment as made. The Supreme Court reversed the decision. Article 253 was not analyzed, and because the trial was upon an information which did not allege an offense, it was held that "therefore it was prejudicial error to convict him of the offense charged in the amended information, without a hearing thereon."[32] Presumably, in this case, the only manner of prejudice could be by way of surprise. Yet evidence of "banking" was introduced, and was contested by the defendant, who did not request any continuance. It does not seem unwarranted to conclude that the decision assumed what was to be proved (that there *was* prejudicial error) and that it did not carefully consider Article 253 in the light of its clear objectives.

The *Williams* conviction was for a misdemeanor. Of major importance is the *McDonald* case where the charge was burglary, and the sentence was to hard labor. The indictment charged that defendant broke and entered "The American Hat Company." Defendant's motion to arrest judgment on the ground that no shop, store, other building, and so on, had been alleged, was overruled. The conviction was set aside on the ground that the information was fatally defective, that is, it could not be cured by the verdict. The court relied on the *Williams* case, discussed above,

27. 185 La. 1037, 171 So. 437 (1936).

28. 188 La. 314, 177 So. 60 (1937).

29. These cases suggest that district attorneys might lean more definitely in the direction of acceding to the motion to quash where at least a clear doubt has been raised (as in the *Gendusa* case), for by such an attitude held by them and the trial judges who must take such a view, costly errors as have occurred might be avoided.

30. 173 La. 1, 136 So. 68 (1931).

31. 178 La. 612, 152 So. 308 (1934). The third case relied upon was State v. Jackson, 43 La. Ann. 183, 8 So. 440 (1891); it will be argued in the text that the Code of Criminal Procedure sought to prevent the very situation here presented.

32. State v. Williams, 173 La. 1, 8, 136 So. 68, 70 (1931).

and on the *Jackson*[33] case decided in 1891, where no motion to quash had been made. Obviously, if the Code changed the prior jurisprudence, the *Jackson* case cannot be invoked; the *Williams* case, as pointed out, did not analyze the points at issue. Hence the *McDonald* case is the only one of weight on the position taken, and this has unfortunately been re-enforced by dicta in the *Gendusa* case.

Article 284 was stressed in the *McDonald* case. The language of that article seems plainly to have enlarged the prior statute, for it provides that "*every* objection . . ." whereas section 1064 of the Revised Statutes provided that "every objection . . . for any *formal* defect . . . shall be taken by demurrer . . ." In spite of this clear language, the court in the *McDonald* case restricted Article 284 to *formal* defects. In the first place, the court supports its view to some extent by a rather strained interpretation of the wording of this article (whereas an eye to the *purpose* of Article 284 might well have led to the opposite view). Secondly, the court restricted Article 284 to formal defects because

> " . . . if it had been intended by the adoption of the Code to deprive an accused person of the right to quash the proceedings by motion in arrest of judgment, because of his failure to demur or to file a motion to quash in limine, there would not have been put into the Code those articles under title 26, which relate to 'The motion in arrest of judgment.' "
>
> "If it had been intended to cut an accused party off from availing himself of the benefits of the motion in arrest merely because he failed to demur or object to the indictment in limine where the indictment is substantially defective, the inclusion in the Code of those provisions relating to motions in arrest was a vain and useless formality, tending only to confuse."[34]

Is that conclusion sound? One can determine the purpose of Article 284 only in the light of the prior jurisprudence and of the differences in the statutes prevailing at the respective times. The evil of the prior jurisprudence was the product of a long development in the common law. It permitted a defendant to stand by, observe a substantially defective declaration or indictment, and then by motion after verdict, upset the entire proceedings. In recent years, most states have sought to avoid that evil by insisting

33. State v. Jackson, 43 La. Ann. 183, 8 So. 440 (1891).
34. State v. McDonald, 178 La. 612, 622-623, 623-624, 152 So. 308, 311 (1934).

that objecion to pleadings be made at the outset. The evil sought to be avoided is clear; the purpose of such provisions as Article 284 is correspondingly clear.

The surprising fact about the *McDonald* case is that Article 253 *was not even mentioned.* It is difficult to understand such omission because Article 284 simply states the rule categorically; Article 253 elaborates the consequences in detail. Article 253 confers the broadest powers of amendment; it provides for continuance where the defendant has been surprised; for a new jury, if necessary; and it states specifically: " . . . nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection . . . be made prior to the commencement of the trial . . ."

Returning to the court's assertion in the *McDonald* case that Article 284 must be confined to formal defects, or be a "useless formality," we see the alternative hypothesis, namely, that Articles 284 and 253 require *all* objections to indictments to be urged prior to trial; that *if the objection is taken in such timely fashion,* then the defendant may again raise objections to *substantial* defects by motion in arrest. There is nothing whatever in Articles 517 and 518 which makes it impossible to apply the above limitation upon their operation, that is, that a demurrer or motion to quash must have preceded. It is true that the Code does not expressly assert that, but it is equally true that it does not expressly assert the opposite. The advantages of pursuing the first interpretation are numerous and apparent. How else give effect to the specific language in Articles 284 and 253 which so clearly extend beyond the older statute and jurisprudence? The interpretation here recommended does give them effect. It also gives effect to Articles 517 and 518.[35]

The obvious conclusion is that it was sought on the one hand to avoid the evil of sharp procedure because of defects in pleading, and on the other hand, to give the trial judge ample opportunity to correct mistakes of pleading. This latter is done by the Code, by provision for arresting judgment. Assuredly it is preferable to give limited application—but important application nonetheless—to Articles 517 and 518 than it is to ignore the plain language of Articles 284 and 253.

35. Art. 418, La. Code of Crim. Proc. of 1928 complicates the problem somewhat; and it would be helpful if the Code had related this article to the others discussed. As it stands, it can be interpreted to mean simply that a (proper) motion is required as regards substantial defects whereas formal ones that go unnoticed are cured by the verdict.

On the other hand, there is no doubt that serious questions remain to be settled. Just how far can the above principles be allowed to operate without unfairness? How defective can pleadings be permitted to be? Some limitations on Article 253 seem to be needed, and it is not possible to do more here than suggest the broad lines of issue. The problem is dismissed in the *Gendusa* case with a sweeping assertion that "to convict a person of a capital crime under an indictment from which an essential averment is omitted constitutes a substantial violation of a constitutional right."[36] In one possible and extreme interpretation, that proposition may be valid. But is it valid under the limitations prescribed by Article 253 where provision is made for continuance and discharge of the jury? And the rules as to admissibility of evidence provide an additional check. Consequently, it is difficult to see why the canons as to notice, time for preparation, and fair trial may not be preserved within the framework of a procedure which is designed to prevent taking undue advantage of technical defects. In the *McDonald* case, Justices Rogers and Brunot (who wrote the opinion in the *Williams* case) dissented. And in his concurring opinion in *State v. Wall,* Chief Justice O'Niell wrote:

> "In such a case it would be a failure in the administering of justice to set free a defendant whose guilt has been proved in every essential element of the crime charged, after he has silently taken his chance of being forever acquitted of the crime charged. It was to prevent such a failure in the administering of justice that the provisions of article 253 of the Code of Criminal Procedure were adopted."[37]

Accordingly, since all the discussion in the *Gendusa* opinion, insofar as it bears upon failure to demur or move to quash, is dicta, it is possible to re-examine the question with hope of revision.

Many questions of evidence arose in the cases, and among these, admissibility is perhaps the most commonly involved. And most important here was the question of admission of evidence of ill-repute of, or prior threats made by, the deceased in cases of self defense.

Article 482 of the Code of Criminal Procedure provides:

> "In the absence of proof of hostile demonstration or of overt act on the part of the person slain or injured, evidence

36. State v. Gendusa, 190 La. 422, 446, 182 So. 559, 567 (1938).
37. State v. Wall, 189 La. 653, 669, 180 So. 476, 481 (1938).

of his dangerous character or of his threats against accused is not admissible."

Two cases discuss the issues in detail. In *State v. Thornhill*[38] the defendant, a police officer, testified that the deceased advanced upon him despite his order to stop, that he "threw his hands in his pockets," at which time the defendant shot him once, that he then "came out with his gun," and so forth. All of this was denied by bystanders. The court found that the defendant was thoroughly impeached as to his testimony that the deceased drew a pistol. Hence, evidence of an altercation thirty minutes before the shooting and of ill-repute was not admitted. This decision was upheld by the Supreme Court with Chief Justice O'Niell writing a distinguished dissenting opinion.

The position of the Chief Justice is that

"... a person on trial for murder or manslaughter, who pleads that he did the killing in self-defense, should be allowed to introduce evidence of previous threats on the part of the deceased, or of the dangerous character of the deceased, whenever there has been introduced any evidence at all from which the jury might decide that the deceased made a hostile demonstration against the defendant at the moment of the killing."[39]

His reason is that once *some* evidence is introduced, a question of fact arises which goes to the issue (was the accused the aggressor?) and that it should accordingly go to the jury along with evidence of prior threats or ill-repute of the deceased, since the latter bear upon the question at issue. The learned Justice argues that the majority ruling requires the defendant to prove that the deceased was the aggressor without giving him the benefit of the total relevant situation. But Article 482 requires *proof* of an overt act before *evidence* of prior threats is admissible. Chief Justice O'Niell accordingly argues that "proof" and "evidence" in that context are synonymous, but reliance upon Webster, the sole authority adduced, lends little weight to this argument. If Article 482 were so construed, it could be entirely nullified in its purpose to place some fair limitation upon the admissibility of evidence of prior threats, since the defendant could always testify. Hence, "proof" as used in Article 482 probably means evidence that carries some persuasion. But how much evidence, or what degree of persuasion required, is not stated. The opinion

38. 188 La. 762, 178 So. 343 (1938).
39. 188 La. at 794, 178 So. at 354.

stresses "reasonable ground," and the indications are that some doubt must be raised. In any event, the criticism of the Chief Justice would still be relevant, though not necessarily acceptable.

The same issues were raised in *State v. Stracner*[40] but under facts much more favorable to the accused, and hence to Chief Justice O'Niell's position. Here the defendant testified to various aggressive acts on the part of the deceased including actual battery, and a 13-year old boy testified that the deceased had a knife in his hand. All of this evidence was contradicted, and the court did not credit it. A further point of importance results from the court's holding that "an overt act is a hostile demonstration of such character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or of suffering great bodily harm."[41] The additional difficulty which this raises results from use of the term "reasonable person." For it is left in doubt as to whether the facts that previous threats were made and that the deceased was a person of vicious character, will be considered by the judge in determining whether the defendant acted reasonably. If such threats are not to be considered for the purpose of determining reasonableness of the defendant's belief that the act was overt, a real hardship is imposed. Yet the usual qualifying words "in the situation of the defendant" are not employed. Certainly it would seem that so far as the trial judge is concerned, for the purpose of deciding whether the defendant reasonably believed an overt act was being made, prior threats should be heard. There is some indication to suggest that they were heard. If the trial judge does go into the entire fact-situation, including prior threats, and if on that basis he uses the standard of a reasonable person in the position of the defendant to determine whether an overt act was made, then some benefit is derived by the defendant as regards proof of dangerous aggression at the time of the homicide.

As for the major issue, it is apparent that it concerns a question of policy rather than one of law. Simply because the trial judge passes upon the question to determine admissibility, does not mean that he is not deciding a question of fact, even though those facts and his ruling are reviewable. But it is not uncommon for judges to exercise such a fact-finding function in jury cases. If one adheres to the prevailing view that juries should be protected from certain types of misleading or inflammatory evidence,

40. 190 La. 457, 182 So. 571 (1938).
41. 190 La. at 470, 182 So. at 575.

then the limitation suggested seems reasonable. But the opposite view is quite defensible, and it has been urged to the extent of arguing that no relevant evidence whatever should be kept from the jury. No more is here suggested than that (1) the underlying problem is one of policy and (2) that the existing law (both code and jurisprudence) might well be clarified as to (a) the definition of overt act and (b) the nature of evidence or degree of persuasion required on the part of the trial judge.

An important problem in the administration of any code of procedure concerns the determination of which provisions must be strictly followed, which may be departed from—and to what extent. Three cases in last year's decisions reveal the nature of the difficulties encountered. In *State v. Milton*[42] the defendant was convicted of murder and sentenced to be hanged. He had moved unsuccessfully to quash the entire jury array on the ground that only three members of the jury commission (together with the clerk) had officiated. Notice had been sent the other two commissioners on the day of the meeting, and there was doubt whether it had been received. Article 176 of the Code states that three members and the clerk constitute a quorum provided all the members shall have been notified. The verdict was set aside with no consideration given to Article 557.[43]

In *State v. Thornhill*,[44] after the entire jury had been selected and sworn, the prosecution was permitted to challenge a juror peremptorily—despite Article 358. The court quoted Article 557 and found that no injury had been done to the defendant.

In *State v. Butler*[45] the defendant was charged with assault by wilful shooting, tried by a jury of five, and convicted as charged. After four jurors had been accepted and sworn, defendant's counsel noticed that the sheriff was calling the jurors from the list instead of drawing their names by lot from the box. The Supreme Court held that the names should have been drawn by lot and that "there is merit in the argument, that serious injustice

42. 188 La. 423, 177 So. 260 (1937).

43. Art. 557, La. Code of Crim. Proc. of 1928: "No judgment shall be set aside, or a new trial granted by any appellate court of this State, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

44. 188 La. 762, 178 So. 343 (1938), cited supra note 38.

45. 190 La. 383, 182 So. 546 (1938).

may result, either to the State or to a defendant, from the practice of permitting the sheriff to call the names of the jurors from the list . . ."[46] Yet it found that defendant had suffered no injury.[47]

In *State v. Gunter*[48] the defendant was convicted of manslaughter. He had moved to quash the indictment on the ground that one of the grand jurors had a felony charge pending against him—disqualifying him under Article 172. This grand juror had been convicted of a felony in 1905. The conviction had been set aside and the case remanded. It had rested on the dead docket for thirty-three years until it was nolle prossed when defendant moved to quash the indictment. The grand juror had lived in Rapides parish all those years and had exercised all rights of citizenship. Article 8 of the Code of Criminal Procedure directs the district attorney to nolle prosse a felony charge when six years have elapsed from the finding of the indictment. The Supreme Court held that the grand juror was disqualified, reversed the conviction and declared the indictment void.

It will be noted in the above cases that where the penalty is severe, there seems to be a tendency to apply Article 557 more readily than otherwise. Yet such commendable motivation does not result in a clearer understanding of this article. What is needed is an analysis of the different types of mandate in order to determine from the nature of the various situations, purposes and policies, which provisions must be strictly applied regardless of lack of proof of injury, and which ones may be departed from unless there is injury.

Finally, perhaps a few remarks may be permitted regarding the form of the opinions. Some of them would be a credit to the jurisprudence of any state. But many of the opinions suffer from lack of analysis of the various principles involved. There is a tendency to settle issues by reference to authority, when that authority itself was not the outcome of a reasoned discourse or where it rests upon quite different facts. And it seems to be the custom to discuss each and every point raised in the Bill of Exceptions regardless of its merit, with the result that the opinions are disjointed and, so far as future adjudication is concerned, much less helpful than they might be. Lawyers, of course, like to

46. 190 La. at 389, 182 So. at 548.
47. Another reason for affirming the judgment was that defendant accepted the first four jurors, though his challenges were not exhausted.
48. 188 La. 314, 177 So. 60 (1937).

have each point passed upon; but the court owes a duty not only in the case before it, but also as regards the construction of a sound jurisprudence. A very brief disposition of points of little or no merit would permit more detailed and carefully written analysis of the fundamental issues. Certainly it would seem that this would greatly improve the jurisprudence—which, so far as criminal law and procedure are concerned, is much to be desired.

VI. PUBLIC LAW

A. Constitutional Law

Of the many statutes whose constitutionality was challenged in the Supreme Court during the last term, only one was invalidated. This was a relatively minor act that imposed certain restrictions upon trapping.[1] And the legislation here was set aside not because of any lack of power in the legislature but because the act, being a "local or special law," had not been preceded by proper publication.

Most of the major constitutional guaranties were under review; due process, equal protection of the laws, obligation of contracts, right to pursue a lawful calling, and many of the various safeguards available to the accused in a criminal prosecution. In addition, many specific provisions of the Louisiana Constitution were invoked. It is indeed noteworthy that in all these instances, save one, the large number of statutes under attack survived.

Price Fixing. Without doubt, the most important constitutional issue considered by the Supreme Court during the past term was raised in the case of *Board of Barber Examiners of Louisiana v. Parker.*[2] This decision established the right of the State to fix minimum prices for barbering services. Act 48 of 1936,[3] after a long declaration of policy affirming the close connection between barbershop prices and the public health, proceeded in section 12 to charge the Board of Barber Examiners with the duty of approving and establishing minimum price agreements submitted by any organized groups of at least 75 per cent of the barbers of each Judicial District.

Before promulgating such agreements, the Board was di-

1. La. Act 130 of 1936 [Dart's Stats. (Supp. 1937) §§ 2974.1-2974.3], held unconstitutional in State v. Clement, 188 La. 923, 178 So. 493 (1938) and in State v. Tabor, 189 La. 253, 179 So. 306 (1938).

2. 190 La. 214, 182 So. 485 (1938), noted in (1938) 1 Louisiana Law Review 218, and in (1938) 13 Tulane L. Rev. 144.

3. Dart's Stats. (Supp. 1938) §§ 9389.1-9389.15.

rected to satisfy itself that the prices agreed upon were such as would best "enable the barbers to furnish modern and healthful services and appliances so as to minimize the danger to the public health incident to such work." The assumption upon which the statute is based, therefore, is that under-paid barbers menace public health and safety because they are not "well-nourished, strong and healthy persons" and because they cannot purchase the "sanitary products so necessary in the operation of their business." Presumably, the moral is that an under-nourished barber wields a shaky razor; and that cleanliness, while next to godliness, is not without its relation to finances.

On original hearing, the court decided that the statute was an unconstitutional invasion of liberty of contract and a denial of due process of law. On rehearing, the statute was declared constitutional. In its declaration of policy the act purports to regulate prices, not in the interests of economic well-being, but solely for the protection of public health. This lengthy legislative declaration of policy, or "wailing preamble" as it is often called, moved the Chief Justice to make the following remarks:

> "The profuse protestations . . . in the preamble or first section of this statute,—which is quoted at length in the prevailing opinion in this case,—demonstrate to my mind that the author of the statute realized how hard it would be to convince the courts that the real purpose of the statute was to protect the public health or promote the general welfare. And so I say, with great respect, that the preamble, or first section, of this statute, 'doth protest too much, methinks.' "[4]

It is difficult to understand why legislatures should be compelled to insert extended declarations of policy in statutes whose constitutionality is in doubt. Such preambles, in theory at least, are totally unnecessary since the legislation must stand or fall on the constitutional power of the legislature quite apart from the avowed motive which induced enactment. The canon of constitutional construction which enjoins the court to sustain a statute, if any provision of the fundamental document is strong enough to support it, should be sufficient. It is the business of counsel to bring to the attention of the court, in the course of actual litigation and in a proper case, such evidences of constitutionality as suggest themselves. It is not desirable that the legislature make a bogus "legislative" finding of facts as a preliminary to law-

4. 190 La. at 304, 182 So. at 514.

making. Such legislative fact-finding is neither necessary nor proper. In point of fact, it is highly doubtful whether "wailing preambles" do any good. Both the NIRA[5] and the Bituminous Coal Conservation Act[6] contained these superfluous obeisances to supposed judicial truculence—in vain.

The preamble thus necessitated a narrow consideration of the case. It was felt that the only inquiry properly before the court was the relation of barbering prices to *public health.* The more important question as to whether the legislature could have set minimum prices in the interests of economic advantage, as a means of restricting unfair or ruinous competition, was therefore not in issue. It is unfortunate that this was so, because the outcome of the decision, while significant in itself as countenancing price-fixing, does not encompass the general right of the legislature to fix prices in an endeavor to ameliorate economic conditions which have only a problematical and not a direct bearing upon public health or safety.

Those justices who voted to uphold the barber statute relied heavily on the celebrated case of *Nebbia v. New York*[7] which sustained a statute regulating prices of milk. It will be recalled that in the *Nebbia* case, the Supreme Court of the United States departed from the old limitation which restricted price-fixing to "businesses affected with a public interest." Price-fixing was there regarded as a legitimate means of effecting general legislative purposes regardless of the nature of the business regulated.

The barber case, therefore, takes its place among a whole host of decisions upholding price-fixing statutes as health measures[8]—most of them obvious camouflages for out-and-out price regulation of private business. It would have been well if this issue could have been fought out in the open, so to speak. The health fiction resorted to in the barber legislation is certainly disingenuous in the last degree. If the legislature had seen fit to risk a trial of strength on the point of regulating barber prices as a means of assuring a decent livelihood to barbers, the decision would have

5. Act of June 16, 1933, c. 90, 48 Stat. 196 (1933), 15 U.S.C.A. § 701 (Supp. 1938), Title I of which was invalidated by Schechter Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935).

6. Act of Aug. 30, 1935, c. 824, 49 Stat. 991 (1935), 15 U.S.C.A. §§ 801-827 (Supp. 1935), invalidated by Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1935). This act was repealed by Act of April 26, 1937, c. 127, § 20 (a), 50 Stat. 90 (1937).

7. 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934).

8. See collection of cases in Note, (1938) 1 LOUISIANA LAW REVIEW 218; Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934).

been momentous as a prototype of one of the main constitutional issues involved in the federal Fair Labor Standards Act.[9]

The dissent of the Chief Justice, eminently readable as always, centers about a general distrust of price-fixing. The sentiment which constrained him to write his dissent is perhaps best expressed in the words of Justice Roberts in the majority opinion in the *Nebbia* case: "The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself."[10]

Slum Clearance. In *State ex. rel. Porterie v. Housing Authority of New Orleans*[11] the constitutionality of Act 275 of 1936[12] was upheld. This statute provided for the creation of slum clearance authorities in cities whose population exceeds 20,000. All powers normally incident to such bodies politic were granted to the Authorities.

The present suit was a test case brought by the Attorney General to determine the constitutionality of the act. This device, precluding the possibility of a constitutional set-back for the enterprises perhaps in a late stage of their development, has all the advantage of declaratory judgment proceedings. Its defect is that the occasions upon which it can be utilized are of course severely limited.[13]

It would be risking little to say that all the constitutional issues likely to arise from the Slum Clearance Act were set at rest by this decision.[14] The relator was astute to bring to the attention of the court every conceivable objection to the statute, and all of them were resolved against him. It was held, in the main, that slum clearance was such a public purpose or public use as would justify the expenditure of public funds and the expropriation of public property; that the bonds, notes and other

9. Act of June 25, 1938, c. 676, 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201-219 (Supp. 1938).

10. 291 U.S. at 532, 54 S.Ct. at 514, 78 L.Ed. at 954, 89 A.L.R. at 1480.

11. 190 La. 710, 182 So. 725 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 221.

12. The Housing Authorities Law [Dart's Stats. (Supp. 1938) §§ 6280.1-6280.28].

13. Flory and McMahon, The New Federal Rules and Louisiana Practice (1938) 1 LOUISIANA LAW REVIEW 45, 74.

14. In this connection, however, it might be asked why the case was not carried to the Supreme Court of the United States.

obligations of the Authorities might be exempted from taxation; that no unconstitutional delegation of legislative or judicial powers had been attempted by the act; that the act was properly passed, approved, and promulgated; that the act was not invalid as local or special legislation, and did not include more than the one object which is embraced in its title.

In holding that private property may be expropriated for slum clearance, the court rejected the limitation that such property must be taken for actual use of the general public. The public advantage flowing from slum eradication, and from adequate and sanitary dwellings for actual or potential slum residents was deemed sufficient to constitute a public use. It may be argued that the existence of urban slums in Louisiana is not widespread; but it is undeniable that where they do exist, they constitute a grave social menace.

Freedom of Contract. An ordinance of the City of Shreveport declared uninvited visits to private residences by peddlers, solicitors or itinerant merchants a nuisance and punishable as a misdemeanor. Certain vendors of products in daily use were exempt. The court found that the ordinance was within the legislative power of the city and was free from formal invalidity. *City of Shreveport v. Cunningham.*[15] On the constitutional issues of the case, it was held that discriminating against hawkers and peddlers was not arbitrary class legislation and that declaring their activities a nuisance did not deny them liberty of contract.

There is no doubt that itinerant hawkers and peddlers may be treated as a "class" for regulatory purposes without a denial of equal protection of the laws. The authorities cited by the court amply sustain this proposition. On the principal constitutional point of the case, liberty of contract, or perhaps more specifically, the right to pursue a lawful calling, the opinion is less satisfactory. No authorities, save a former decision of the court on a collateral matter,[16] are referred to. The business of door-to-door peddling, while doubtless annoying at times, is generally regarded as a legitimate occupation. In some instances, the ramifications of the industry are nationwide, and while its proper regulation is imperative, its total suppression is a serious matter. One should not overlook the fact that itinerant solicitors are often subjected

15. 190 La. 481, 182 So. 649 (1938), noted infra p. 455.

16. City of New Orleans v. Schick, 167 La. 674, 120 So. 47 (1929) (ordinance requiring report to chief of police when moving household and personal effects upheld).

to local harassment not so much because they are "solicitors" as because they are "itinerant." Local businessmen view them with a hostile eye, but it is precisely to prevent unjust discrimination that the right to pursue a lawful calling is protected by the constitutions of the state and the nation. Nonetheless, the United States Circuit Court of Appeals for the Tenth Circuit[17] had before it an ordinance whose main provision is identical with that of the Shreveport ordinance. The court held that the prohibition was a police measure directed in the interests of public safety. The ordinance was upheld on all counts.

Obligation of Contracts. One of the many shifts in governmental reorganization gave rise to the case of *Higginbotham v. City of Baton Rouge.*[18] Here the appellant, on Jan. 10, 1935, was elected Commissioner of Public Parks and Streets for the city of Baton Rouge, for a term ending November, 1936, at a salary of $5,000.00 per annum. The legislature abolished the office and provided that the incumbent should be employed by the city until the next general election.[19] A city ordinance gave the appellant employment under these terms. Later the legislature repealed the provision relative to the employment of the appellant,[20] and the city terminated his employment. The appellant contended, *inter alia,* that this was repugnant to the Constitutions of the United States and of the State of Louisiana as an impairment of the obligation of a contract. The decision was for the City, the court holding that the office was governmental and that the employment under it by the appellant was the tenure of a public office, not a private contract of employment.

On December 5, 1938 the Supreme Court of the United States in preliminary consideration of an appeal in this case noted probable jurisdiction.[21] At the present writing, the case is on the docket of that court for hearing.[22]

Civil Service. Interested citizens and taxpayers attacked the constitutionality of Act 22 of the Second Extra Session of 1934,[23] which purported to create a State Civil Service. The gist of the complaint was that the statute did not in fact establish a civil service system in the usual intendment of that term because,

17. Town of Green River v. Fuller Brush Co., 65 F. (2d) 112 (C.C.A. 10th, 1933).
18. 190 La. 821, 183 So. 168 (1938).
19. La. Act 13 of 1934 (3 E.S.) § 4 (1) [Dart's Stats. (Supp. 1938) § 5451.4].
20. La. Act 1 of 1935 (1 E.S.) § 1 [Dart's Stats. (Supp. 1938) § 5451.4].
21. Dec. 5, 1938, Docket No. 462 (1938), C.C.H. 1750.
22. 59 S. Ct. 245 (1938).
23. Dart's Stats. (Supp. 1938) §§ 9443.1-9443.17.

among other things, it creates no merit system, provides for no competitive examinations, and erects no safeguard against arbitrary action by the appointing officers. The title of the Act, it was claimed, is therefore not indicative of its object, contrary to Article III, section 16 of the Constitution of 1921. The court upheld the statute on the ground that it related to civil service in its "enlarged sense." Mr. Justice Odom, in dissenting, seemed to feel that the sense of the term civil service had been "enlarged" for the occasion. *Ward v. Leche.*[24]

State Debt. In two cases of importance to the state's financial arrangements, it was held that proposed bond issues were without taint of illegality. In the first case,[25] the court held that certain bonds offered for sale by the Board of Liquidation of State Debt did not constitute an increase of the public debt inasmuch as the obligations in question were *refunding* bonds. In the second case,[26] the court sustained the validity of bonds issued to finance the building program of the Louisiana State Board of Education.

Dedication. In *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*[27] the Supreme Court held that a dedication of public ways under a statute vests title in the public in full ownership and does not merely create a servitude. Hence an act[28] which provided that unused ways be deemed abandoned and that title to the land pass to contiguous owners, did not deprive the dedicator of property without due process of law.

Formal Validity of Statutes. The usual quota of cases challenging the formal validity of statutes came before the court at the last term.[29] As a rule, such objections are parasitic. They seldom form the sole basis of a constitutional attack, but are generally urged in connection with other more weighty matters. Correspondingly, it does not often happen that mere informality suffices to strike down a statute. If informality is found, it is generally discovered in company with other constitutional infirmities. The

24. 189 La. 113, 179 So. 52 (1938).

25. State ex rel. Porterie, Atty. Gen. v. Board of Liquidation of State Debt, 190 La. 520, 182 So. 661 (1938).

26. State ex rel. Porterie, Atty. Gen. v. Louisiana State Board of Education, 190 La. 565, 182 So. 676 (1938).

27. 190 La. 957, 183 So. 229 (1938).

28. La. Act 151 of 1910 [Dart's Stats. (1932) § 5856].

29. State v. Hill, 188 La. 444, 177 So. 421 (1937); State v. McBrayer, 188 La. 567, 177 So. 669 (1937); State v. O'Brien, 188 La. 584, 177 So. 674 (1937); Ward v. Leche, 189 La. 113, 179 So. 52 (1938); City of Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938); State ex rel. Porterie v. Housing Authority of New Orleans, 190 La. 710, 182 So. 725 (1938); Arkansas-Louisiana Gas Co. v. Parker Oil Co., 190 La. 957, 183 So. 229 (1938).

defense of statutory informality was sustained in two cases[30] which invalidated Act 130 of 1936 prohibiting certain types of trapping on lands situated less than 150 miles from the Gulf of Mexico. The act here was held to be a "local or special law" which had not been preceded by proper publication.

Criminal Cases. In a number of criminal cases,[31] unconstitutional action, whether under a statute or not, was charged. It was uniformly held that the conduct attacked was not unconstitutional.

B. Taxation

People continue to pay taxes reluctantly. Tax litigation, therefore, occupies much of the attention of the Supreme Court. A simplified and understandable system of taxation, whether state or national, is perhaps a pipe dream. Yet it does seem that some order could be introduced into the confusion of tax statutes, tax regulations, methods of assessment, collection, suits, and finally, that *bête-noir* of the conveyancer—the tax sale. Tax litigation is generally a matter of statutory construction and when statutes accumulate, the occasions for ambiguity multiply. The tax cases before the court during the last term amply illustrate this truism.

A tax case which attracted much attention by reason of the assiduity with which it was fought out was *State v. Standard Oil Co. of La.*[32] Its manifold issues arose out of the practice whereby the oil companies subject to the severance tax deducted from the amount of oil taxable, a 2 per cent allowance for loss in transporting the oil from the well to the refinery. The state contended that the tax covered 100 per cent of the oil severed from the well. The oil company countered with the defense that executive and administrative construction of the statute, long prior to and during the alleged taxable period, settled the meaning of the statute otherwise.

In preliminary proceedings the Oil Company unsuccessfully entered the following defenses: the summary tax statute is unconstitutional in that it deprives the taxpayer of opportunity to

30. State v. Clement, 188 La. 923, 178 So. 493 (1938); State v. Tabor, 189 La. 253, 179 So. 306 (1938).

31. State v. Cass, 188 La. 606, 177 So. 682 (1937); State v. Berry, 188 La. 612, 177 So. 684 (1937); State v. Pierre, 189 La. 764, 180 So. 630 (1938), Cert. granted, 59 S. Ct. 100 (1938); State v. Connally, 190 La. 175, 182 So. 318 (1938); State v. Gendusa, 190 La. 422, 182 So. 559 (1938).

32. 188 La. 978, 178 So. 601 (1938).

make an adequate defense, in that it unfairly casts the burden of proof upon the taxpayer, and in that it takes from him the right of devolutive appeal; the state invoked the wrong remedial statute; and the three year period of limitation applied to the claim. The defendant did not neglect the time-tried defenses that the statute was an unlawful delegation of legislative and judicial power; that a severance tax on a purchaser of oil was a taking of property without due process in violation of the Constitution of the State and of the United States; and that the equal protection clauses of both Constitutions had been flouted.

It was apparent, however, that contemporaneous administrative construction was the principal defense relied on in this complicated law suit. It is not difficult to agree with the Chief Justice (whose dissent was directed solely to this point) that the practice of deducting two per cent was known to and acquiesced in by the legislative and executive branches of the government, and that the doctrine of contemporaneous construction in the interpretation of an ambiguous statute should govern the case. To be sure, to the majority of the court the language of the act was not susceptible of double meaning, and indeed a reading of the terms of the statute supports that stand. There is undoubtedly need for legal procedure by which the hardship resulting from an erroneous construction of a statute by administrative ruling or practice should be eliminated. An administrative ruling which resolves a statutory doubt in favor of a private party puts him in an equivocal position. It would be inhuman to expect him to spurn the advantage; on the other hand, if he accepts it he may be faced with a law-suit in the inconvenient future. The alternative, a suit to test the construction of a statute every time ambiguity seems possible, would stop the wheels of government. This difficulty has been partially met by a constitutional amendment,[33] adopted in 1938, establishing a prescriptive period of three years for such taxes and licenses.[34]

In a later case against the same defendant, the doctrine of contemporaneous administrative construction was used by the court in favor of the taxpayer. *State v. Standard Oil Co. of La.*[35] The statute permitted a three per cent deduction, for lossage, on the total taxable gallonage *received* by the dealer. An adminis-

33. La. Const. of 1921, Art. VII, § 59.1, as amended in accordance with proposal in La. Act 200 of 1938.

34. Hebert and Lazarus, The Louisiana Legislation of 1938 (1938) 1 LOUISIANA LAW REVIEW 80, 118.

35. 190 La. 338, 182 So. 531 (1938).

trative ruling decided that this meant a flat deduction of three per cent of total sales, regardless of actual losses. The majority of the court felt that the doctrine of contemporaneous construction should govern the matter in any event. But they went further, and held that the administrative construction was correct. Mr. Justice Higgins, while agreeing that contemporaneous construction in effect estopped the collection of the tax, could not refrain from pointing out that the legislature or the Supervisor of Public Accounts hardly contemplated the situation in which gasoline and oil dealers of the state retain $300,000.00 annually which they collect as taxes from consumers without any showing of the amount of actual loss suffered.

Tax Titles. A number of cases attacking the validity of tax titles or procedure for redemption of property occupied the attention of the court. One sometimes wonders whether such property is not in effect inalienable within the relevant periods of prescription, because of the excessively complicated nature of tax sales. Simplification of tax sales appears to be an imperative demand.

In *Gayle v. Slicer*[36] the court held that erroneous description in the assessment of property, the subject of a tax sale, does not invalidate the sale where the land can be identified by evidence within the assessment.

In *Crawford, Jenkins & Booth v. Wills*[37] the defendants, long in actual possession of the land, were surprised to learn of a prior valid tax sale to another. *Laughlin v. Hayes*[38] represents an unsuccessful effort to set aside a tax sale by an offer of redemption to the purchaser which would have been effective had not prescription intervened. *Tillery v. Fuller*[39] and *Johnson v. Chapman*[40] were complicated proceedings involving tax titles.

Of some interest is the holding in *State v. City of New Orleans*[41] which ruled that redemption of property adjudicated to the city must proceed according to Act 170 of 1898, section 62, as amended by Act 175 of 1934.[42] The city cannot be compelled to accept tender of back taxes.

Assessments. A disgruntled land owner attacked the consti-

36. 188 La. 940, 178 So. 498 (1938).
37. 188 La. 366, 179 So. 455 (1938).
38. 189 La. 707, 180 So. 494 (1938).
39. 190 La. 586, 182 So. 683 (1938). See also at p. 358, supra.
40. 190 La. 1034, 183 So. 285 (1938).
41. 190 La. 208, 182 So. 329 (1938).
42. Dart's Stats. (Supp. 1938) § 8466.

tutionality of both front foot rule and square foot rule for fixing paving assessments. Needless to say, the attack was unsuccessful. It does seem, however, that legislative ingenuity could devise some more equitable method of levying assessments than those rough and ready mechanical rules. *Hagmann v. City of New Orleans.*[43] *Hinkle v. McGuire*[44] represents an unsuccessful suit to subject certain property to a lien for street paving.

Licenses. Echoes of the current agitation for abolition of intergovernmental immunity from taxation[45] were heard in two cases. In *State v. Whitney National Bank*[46] the defendant national bank operated buildings having fourteen, seven, four and two stories respectively. It used for banking purposes four stories of the 14-story building and one story of each of the others. The court dismissed without scruple the fantastic claim that all four buildings should be entirely exempt from license tax even on the portion not used for banking purposes since the bank was authorized by federal law to provide for future expansion. In *State v. Oberle*[47] a customhouse broker, licensed by the Federal Treasury Department, was held not to be an agent or instrumentality of the federal government so as to be exempt from a state occupational tax.[48]

The perennial Chain Store License Tax fight entered what appears to be its last round in *State v. Great Atlantic & Pacific Tea Co.*[49] Here the taxpayer assailed as unconstitutional the attempt of the state to collect interest and attorneys' fees under the Chain Store License Tax, particularly because prior to the due date of the tax the taxpayer had challenged its constitutionality in the federal courts. It was held that the tax was constitutionally levied, and that it was collectible for the period of the pendency of the suit in the federal courts. The abundant reference in the opinion to federal jurisprudence fully sustains these rulings. On October 24, 1938, the Supreme Court of the United States denied certiorari.[50]

A series of miscellaneous tax cases are the following: *State v. DeSoto Securities Co., Inc.*[51] held that a corporation liquidating

43. 190 La. 796, 182 So. 753 (1938).
44. 190 La. 397, 182 So. 551 (1938).
45. See Helvering v. Gerhardt, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 224.
46. 189 La. 221, 179 So. 84 (1938).
47. 190 La. 1053, 183 So. 347 (1938).
48. La. Act 15 of 1934 (3 E.S.) § 17 [Dart's Stats. (Supp. 1938) § 8604].
49. 190 La. 925, 183 So. 219 (1938).
50. 305 U.S. (Preliminary Print) xxii, 59 S.Ct. 108 (1938).
51. 189 La. 285, 179 So. 316 (1938).

its business is not subject to a license tax levied on those "engaged in business"—a conclusion which should startle no one; *State v. Burton Swartz Cypress Co.*[52] ruled that a domestic corporation, almost all of whose funds are invested in a foreign corporation, must pay a license tax[53] based on its entire capital stock, surplus and undivided profits since the statutory exemptions apply only to corporations which (1) do business, in whole or in part, outside of the state, or (2) are parent corporations whose subsidiaries have paid the tax; *State v. Levy,*[54] held that the proprietor of the shoe repair department in a department store was not to be exempt from the same occupational license tax as a person engaged in mechanical pursuit, despite the fact that at times he repairs shoes; and *State v. Succession of Brewer,*[55] held that the proceeds of a life insurance policy payable to the estate are not exempt from inheritance tax.

C. Public Utilities

An important and novel point in public utilities law was raised by four cases, later consolidated under the title of *Bradford v. Louisiana Public Service Commission.*[56] The Commission had granted to the Herrin Motor Lines, Inc. a certificate to operate as a motor carrier between Baton Rouge and New Orleans. Plaintiff, representing competitive interests, claimed that the certificate of convenience and necessity should not have been granted to the Herrin Lines until the existing franchise holders were given an opportunity to provide the additional service which the granting of the new certificate presumed to exist. The court refused to read section 4 of Act 292 of 1926[57] as requiring that this be done. Without reliance on other authority, the court held that the construction of the statute advanced by the plaintiff was self-contradictory. In addition, it might be said that the statutory inference claimed by the plaintiff would lead to a virtual monopoly in existing franchise holders when the market for transport service is growing, as is evidently the case at present between Baton Rouge and New Orleans. Competitors would thus be admitted only at

52. 190 La. 947, 183 So. 226 (1938).
53. Under La. Act 8 of 1932, § 1 (4) [Dart's Stats. (1932) § 8722].
54. 190 La. 511, 182 So. 659 (1938).
55. 190 La. 810, 182 So. 820 (1938).
56. 189 La. 327, 179 So. 442 (1938). The other three cases are Bradford v. Louisiana Public Service Commission, 189 La. 339, 179 So. 446 (1938); Yazoo & Mississippi Valley R. R. v. Louisiana Public Service Commission, 189 La. 340, 179 So. 447 (1938); Id., 189 La. 341, 179 So. 447 (1938).
57. Dart's Stats. (1932) § 5313.

the will of the existing franchise holders who would have the right to forestall competition by agreeing to furnish additional service at the Commission's instance.

VII. COMMERCIAL LAW

A. Banking and Negotiable Instruments

In the case of *In re Interstate Trust & Banking Co.*,[1] with more than seventy lawyers entering appearances, the Supreme Court had before it for consideration some 69 claims for preferences in the distribution of funds of a defunct New Orleans bank. The appealed claims represented the sizeable remnant of an original total of 98 oppositions to the distribution proposed by the State Bank Commissioner. The court, in one sweep, disposed of 64 of the oppositions by construing the statute regulating the filing of claims by persons other than depositors to mean that any such claim not filed within the time fixed by the State Bank Commissioner should be barred by limitation.[2] This statute merely provided for publication of notice to creditors to file claims within a time to be fixed by the Bank Commissioner and contained no express provision as to barring the claim.[3] It was held to be "the intention of the Legislature . . . that all claimants other than depositors should be required to file and prove their claims within a fixed period of time"[4] and consequently the failure to comply with the requirement barred such claimants from asserting their claims although the statute lacked a positive provision to this effect. From this ruling the Chief Justice dissented, concurring with the trial judge that the court should not pronounce a forfeiture which the Legislature has not expressly created.

With the bulk of the claims for preferences thus disposed of, the remaining five oppositions were denied for assigned reasons. A New Orleans coffee importer caused the Interstate Trust & Banking Company to issue an irrevocable letter of credit in favor of a Brazilian coffee exporter who was authorized to draw drafts covering the purchase price of coffee. It was agreed that the New Orleans importer was to provide the Bank with funds to meet any draft drawn against the letter of credit at least one day prior to

1. 188 La. 211, 176 So. 1 (1937).
2. Of the 64 claims disposed of in this manner only 6 had been allowed as preferred claims by the trial court after exhaustive consideration of each separate opposition.
3. La. Act 300 of 1910, § 4 [Dart's Stats. (1932) § 700].
4. 188 La. 211, 227, 176 So. 1, 6 (1937).

the maturity of the draft. After sale of the coffee, by check drawn on the Interstate Bank, the importer prepaid by more than two months the amount of the outstanding draft issued against the letter of credit. It was held that neither the importer nor the exporter was entitled to a preference in the distribution.[5] The court refused to grant an equitable lien on the basis of trust relationship and further held that Act 63 of 1926[6] does not accord a lien or privilege in this situation.[7] Similarly, the holder of a draft drawn against a letter of credit under the circumstances outlined above was denied a preference and was classed only as an ordinary creditor of the Bank.[8]

In the *Opposition of Hattiesburg Grocery Company,*[9] the court again repudiated the *Jones County* case[10] and, affirming the *Pan American Life Insurance Co.* case,[11] held that the opponent Grocery Company, which had issued bonds payable at the Interstate Bank, was not entitled to a preference under Act 63 of 1926 for sinking funds on deposit with the Bank as "paying agent." The vigor with which the Chief Justice expressed his dissent from the overruling of the *Jones County* case suggests that this problem will probably receive further attention from the court.

A depositor had received credit in its account on March 1, 1933 for two checks drawn on other New Orleans banks. A privilege was asserted on the ground that the checks were not collected until March 3, 1933 on which date the bank had resumed the 100 per cent status as to deposits made on that date and, in the alternative, opponent asserted a privilege under Act 63 of 1926.[12] Although the checks passed through the New Orleans Clearing House under rules and deposit slip stipulations which would have

5. In re Interstate Trust & Banking Co. (Opposition of Hickerson and Ornstein) 188 La. 211, 234, 176 So. 1, 8 (1937).

6. Dart's Stats. (1932) §§ 648-651.

7. Equitable liens are held not to exist in Louisiana because liens and privileges are *stricti juris* and are provided by statute only. See Daugherty v. Canal Bank & Trust Co., 180 La. 1003, 158 So. 366 (1935); Young v. Teutonia Bank & Trust Co., 134 La. 879, 64 So. 806 (1914).

8. In re Interstate Trust & Banking Co. (Opposition of N. V. Nederlandshe Koloniale Handelvereening) 188 La. 211, 239, 176 So. 1, 10 (1937).

9. 188 La. at 243, 176 So. at 11.

10. In re Liquidation of Hibernia Bank & Trust Company (Jones County, Intervener) 181 La. 335, 159 So. 576 (1935). For an exhaustive discussion of the soundness of this case see O'Niell, C.J., dissenting in In re Interstate Trust & Banking Co., 188 La. 211, 255, 176 So. 1, 16 (1937).

11. In re Hibernia Bank & Trust Company (Pan American Life Insurance Company, Intervener) 185 La. 448, 169 So. 464 (1936) (overruled the *Jones County* case).

12. In re Interstate Trust & Banking Co. (Opposition of State Agricultural Credit Corporation, Inc.) 188 La. 211, 245, 176 So. 1, 12 (1937).

permitted appropriate adjustments on March 2, 1933 if the item had not been finally paid, the court held: "The deposit was absolute and not conditional and the deposit became effective as of March 1, 1933."[13] Opponent, therefore, assumed the status of a general creditor by virtue of a deposit completed on March 1, 1933 and there was no agency for collection within the provisions of Act 63 of 1926.[14]

Another case arising out of the liquidation of the Interstate Trust & Banking Company was that of *Compania Exportadora De Cafe, S. A. v. Banco Nacional De Mexico.*[15] Two drafts drawn by the plaintiff payable to its own order were discounted on February 1, 1933 with the Interstate Bank prior to the banking holiday. The Interstate Bank was directed by the plaintiff to remit the proceeds of the drafts to the defendant bank with which plaintiff maintained an account as depositor. Unknown to the plaintiff, there existed an agreement between the defendant depositary bank and the Interstate Bank whereby the latter was authorized to credit defendant's account in such transactions instead of making a direct remittance. Pursuant to this agreement, as had been done in other instances, the Interstate Bank notified the plaintiff that remittance had been made to defendant bank although in effect it had merely credited the account of the defendant depositary bank without actually making remittance. After the banking holiday the Interstate Bank operated on a restricted basis and was later placed in liquidation and the defendant therefore refused to honor the credit asserted by the plaintiff on the ground that the proceeds had not been received by the defendant and that immediate notice of credit had not been sent. In the plaintiff's action, as depositor, to recover the amount of these two items, it was held that the transaction between the plaintiff and defendant was such as to create the relationship of creditor and debtor respectively, and that the action of the intermediary Interstate Bank, in crediting defendant's account pursuant to the agreement with the defendant consummated the deposit.

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13. 188 La. at 251, 176 So. at 14.

14. See In re Liquidation of Canal Bank & Trust Company (Intervention of Clark & Company) 181 La. 856, 160 So. 609 (1935) and In re Liquidation of Hibernia Bank & Trust Co. (Intervention of Progressive Investment Company, Inc.) 182 La. 856, 162 So. 644 (1935), also holding that where a check is indorsed without restriction and deposited with a stipulation in the deposit slip that the bank is acting as agent and reserves the right to charge the check back if unpaid, the giving of an immediate though conditional credit, creates the relation of debtor and creditor and the depositor is not a privileged creditor of the bank for the amount of the check so deposited.

15. 188 La. 875, 178 So. 381 (1938).

Although, as a general proposition, it is clear that a bank is not liable for the amount of a credit given for a deposit when in fact no deposit is actually made with the depositary bank,[16] yet the decision reached in the *Compania* case seems entirely sound in the light of the facts found by the court. Under the circumstances of this case, the entries that were made appeared sufficient to create simultaneously the relation of depositor and bank between plaintiff and defendant and a similar relationship between the defendant and the Interstate Bank so that the loss occasioned by the latter's closing should be borne by the defendant bank and not by the plaintiff.

In *Williams v. DeSoto Bank & Trust Co.*[17] it was decided that the liquidation and dissolution of a bank under the applicable banking regulatory statute,[18] terminated its legal existence and released such bank by operation of law from further liability as guarantor to the plaintiffs. Under these circumstances plaintiff need not make any express reservation of his rights as against such bank in order to hold other co-debtors *in solido* liable.

The intervention of D. H. Holmes Co., Ltd., *In re Liquidation of the Hibernia Bank & Trust Co.*,[19] raises for consideration the extent of the application of the issues of the *Wainer* case[20] and poses the problem of the status of facultative compensation in the civil law of Louisiana.[21] The D. H. Holmes Company contended that its note for $100,000.00 dated March 13, 1933 payable on June 12, 1933, should be declared extinguished by compensation by virtue of a deposit to its credit on the books of the Hibernia Bank.[22] Since the note in question matured after May 20, 1933 (the date on which the State Bank Commissioner took over the assets of the Hibernia Bank for liquidation) the doctrine of facultative compensation, approved in the *Wainer* case, was invoked by reason of a letter written by the Holmes Company on April 3, 1933, requesting that the note be offset against its frozen account. It was contended that the letter of April 3rd operated as a waiver of a term in favor of the debtor under Article 2053 of the Civil Code; that by bringing about the maturity of the obligation the obsta-

16. See American Nat. Ins. Co. v. Marine Bank & Trust Co., 167 La. 153, 118 So. 871 (1928).

17. 189 La. 245, 179 So. 303 (1938).

18. La. Act 300 of 1910 [Dart's Stats. (1932) §§ 697-706].

19. In re Liquidation of Hibernia Bank & Trust Co. (In re Intervention of D. H. Holmes Co., Ltd.) 189 La. 813, 180 So. 646 (1938).

20. In re Canal Bank & Trust Co. (Intervention of Wainer) 178 La. 961, 152 So. 578 (1934).

21. See Comment (1934) 8 Tulane L. Rev. 423.

22. Arts. 2207, 2208, 2209, La. Civil Code of 1870.

cle to compensation was removed and the obligations were "equally liquidated and demandable" within the meaning of Article 2208 of the Civil Code. The court rejected these contentions, taking the view that intervenor's rights became fixed from the time that the bank went into liquidation. Facultative compensation was not allowed, because it was held that the term stipulated in negotiable instruments is in favor of both debtor and creditor.

It is interesting to note that this decision made no attempt to distinguish the *Wainer* case and did not refer to the absence of a finding of "insolvency" which was stressed in the *Wainer* case and was equally absent in the Holmes Intervention. The case is illustrative of the tendency of the court to eliminate preferential treatment in the settlement of the affairs of banks in liquidation. This obvious trend suggests that the doctrine of the *Wainer* case may possibly receive still further limitations in its application and a bold prophet might even predict the ultimate triumph of the full implications of *People's Bank in Liquidation v. Mississippi & Lafourche Drainage District.*[23]

In *Brock v. Citizens State Bank & Trust Co.*[24] the Supreme Court reversed two decisions of the Court of Appeal, Second Circuit,[25] and refused to grant a privilege on the assets of a defunct bank to secure the payment of moneys deposited by the bank as the financial tutor of two minors. Act 63 of 1926 was construed as not applying to any situation other than an agency for collection.[26] The additional factors present in this case, showing that the bank had failed to invest the minor's funds properly, and that the bank as financial tutor had originally received the money in the form of checks, did not bring the case within the application of the statute. The claims of the minors were consequently listed as ordinary claims. The court considered that the instant case was covered by the earlier re-examinations of the statute in the *Pan American Life Insurance Co.* case[27] and in *In re Liquidation*

23. 141 La. 1009, 76 So. 179 (1917). The court has consistently refused to overrule the *People's Bank* case. In the *Wainer* case O'Niell, C. J., concurred in the result but stated that the *People's Bank* case should be overruled. See also Brock v. Pan American Petroleum Corporation, 186 La. 607, 173 So. 121 (1937).

24. 190 La. 572, 182 So. 679 (1938).

25. 172 So. 546 (La. App. 1937); 180 So. 650 (La. App. 1938).

26. For a criticism of the policy involved in La. Act 63 of 1926, see Townsend, The Bank Collection Code of the American Bankers' Association (1934) 8 Tulane L. Rev. 376, 378.

27. In re Hibernia Bank & Trust Co. (Pan American Life Insurance Co., Intervener), 185 La. 448, 169 So. 464 (1936), overruling In re Liquidation of Hibernia Bank & Trust Co. (Jones County, Intervener), 181 La. 335, 159 So. 576 (1935).

of the Interstate Trust & Savings Bank.[28] The case further illustrates the general policy of protecting the general depositors through eliminating claims of "equitable liens" on the assets of insolvent banks.

Only one case of importance involving interpretation of the Negotiable Instruments Law was considered by the court. In *Bank of St. John v. Hibernia Bank & Trust Co.*[29] the plaintiff executed two demand notes for $10,000 each dated August 31, 1932 and September 29, 1932 respectively. Both notes were pledged to the Reconstruction Finance Corporation as collateral security for loans made to the Hibernia Bank. The first note was pledged 93 days after its execution and the second 25 days after its execution. It was held that this constituted negotiation of demand paper within a "reasonable time" under the "facts and circumstances of the case," so that the transferee was to be considered as a holder in due course of the notes at the time the Hibernia Bank went into liquidation. The instant decision is an unquestionably sound interpretation of the applicable statutory provisions.[30]

B. Bankruptcy

Only two controversies arising out of bankruptcy proceedings came before the court during the last term. In *Plauche v. Streater Investment Corporation*[31] a trustee in bankruptcy brought a plenary suit, based on provisions of the Bankruptcy Act,[32] against a "family corporation" owned by the bankrupt. The trustee was seeking to obtain possession of realty transferred to the corporation by the bankrupt in return for stock. To this suit a plea of *res judicata* was sustained because of a prior Supreme Court decision in the action of a judgment creditor against the bankrupt debtor and the same corporate defendant.[33] In the earlier case, mortgages executed by the bankrupt before the sale to the corporation and mortgages executed by the corporation after the sale, all in favor of innocent parties, were recognized as valid incumbrances against the property. Accordingly, the court had declined to place

28. 188 La. 211, 176 So. 1 (1937).

29. 189 La. 2, 179 So. 15 (1938).

30. La. Act 64 of 1904 (Uniform Negotiable Instruments Law) §§ 53, 193, 59 [Dart's Stats. (1932) §§ 842, 983, 848].

31. 189 La. 785, 180 So. 637 (1938).

32. The Bankruptcy Act, § 70(a5), 30 Stat. 565 (1898) as amended by 44 Stat. 667 (1926), 11 U.S.C.A. § 110(a5) (Supp. 1937). [The entire Bankruptcy Act was amended by the Chandler Act, 52 Stat. 840 (1938), 11 U.S.C.A. §§ 1-1103 (Supp. 1938).]

33. Alliance Trust Company, Ltd. v. Streater and Streater Investment Corporation, 182 La. 102, 161 So. 168 (1935).

the property in the bankrupt's name, but did authorize its seizure and sale for satisfaction of rights of judgment creditors, subject however, to the innocent mortgage creditors' rights. The instant case, interpreting the earlier decision, held that the prior rejection of the revocatory action was *res judicata* to the trustee's suit. *Bass v. Bishop*[34] was a suit brought by a trustee in bankruptcy to set aside a mortgage executed by the bankrupt. It was alleged that a mortgage executed by the bankrupt while insolvent, a few days prior to the bankruptcy petition, was fraudulent and constituted an attempt to grant an unfair preference to one of his creditors over others, that the consideration was grossly inadequate, and that the mortgagee knew that the bankrupt was insolvent. The court held that the petition stated a cause of action.[35]

C. Corporations

With the present policy of encouraging various industries to locate in Louisiana, and the increase in the number of corporate charters, it has naturally followed that corporate transactions involving potential litigation have increased in number and importance. The fact that only seven cases presenting questions of corporation law have been decided by the Supreme Court during the 1937-38 term, stands as a mute testimonial to the clarity and careful draftsmanship of the Louisiana Business Corporations Law of 1928 and other related statutes.

In the case of *Allardyce v. Abrahams*[36] a corporation had executed a note secured by a mortgage note payable to the corporation. When the creditor demanded payment the president and general manager paid the balance due out of his personal funds and received the corporate note and collateral note. The trial court's finding of fact, sustained by the evidence, was that the officer intended a purchase of the corporate obligation rather than a gratuitous payment of the debt, and that he acted in entire good faith and in the interest of the corporation. After suggesting that "It was optional with the corporation if its officers felt that it was injured or damaged, to request that the transaction be set aside as being voidable,"[37] the court very properly held that the corpora-

34. 190 La. 392, 182 So. 549 (1938).

35. Arts. 3359, 3360, La. Civil Code of 1870; Rev. Stats. of 1870, § 1808 [Dart's Stats. (1932) § 2118]; The Bankruptcy Act, §§ 60(b) [30 Stat. 562 (1898), as amended by 44 Stat. 666 (1926)], 67(e) [30 Stat. 564 (1898), as amended by 48 Stat. 924 (1934)], 11 U.S.C.A. §§ 96(b), 107(e) (Supp. 1937).

36. 190 La. 686, 182 So. 717 (1938).

37. 190 La. at 693, 182 So. at 719.

tion could not keep the benefit of the transaction and reject the burdens. Thus it could not have the transaction set aside without tendering or offering to reimburse the officer for the money paid out of his personal funds to the corporate creditor.

The facts in the instant case show that the corporation was protected rather than damaged by the purchase of its note. The purchasing officer stood to gain nothing, except to protect his subordinate interest as an officer, and probably a substantial shareholder, by helping the corporation out of financial difficulty with an insistent creditor. Thus there was certainly no breach of the officer's fiduciary relation to the corporation and the transaction was entirely valid,[38] rather than voidable as suggested by way of dictum by the court.[39]

Section 39 of the 1928 Business Corporations Law[40] imposes the mandatory duty on certain officials to make an annual report to the Secretary of State containing information therein required; and also upon the request of any shareholder of record, to send him a properly verified copy of such report. If such report is not furnished within fifteen days after request, the shareholder may recover $50.00 from the officers for every day of delay. In *Tichenor v. Tichenor*[41] a shareholder sued the president of a corporation to recover $4,500.00 in penalties under Section 39. The president had sent a report containing all necessary information but through oversight had failed to sign or verify the report as required by the statute. The shareholder had obviously refrained from pointing out the defect in order to recover the penalties. In affirming the lower court's judgment for the president, the court declared that Section 39 was enacted "primarily to protect the investing public" and not "to penalize an officer who, acting in good faith, mailed an honest and accurate report, but through oversight failed to sign or verify the same."[42] The decision was a logical application of the doctrine that "statutes imposing penalties must be strictly construed and every doubt must be resolved against the imposition of the penalty."[43]

In *State ex rel Equitable Securities Corporation of Nashville*

38. Stevens v. Laub, 38 Wyo. 182, 265 Pac. 453 (1928) (directors allowed to sue on corporate note they had acquired by paying the creditor); Scott v. Norton Hardware Co., 54 F. (2d) 1047 (C.C.A. 4th, 1932) (directors subrogated to rights of creditors paid).

39. 190 La. 686, 693, 182 So. 717, 719 (1938).

40. La. Act 250 of 1928, § 39 [Dart's Stats. (1932) § 1119].

41. 190 La. 77, 181 So. 863 (1938).

42. 190 La. at 83, 181 So. at 865.

43. 190 La. at 83, 181 So. at 864-865.

v. Conway, Secretary of State,[44] a mandamus was issued to compel the Secretary of State to issue a certificate to do business in Louisiana to a Tennessee corporation, the "Equitable Securities Corporation." It was held that by adding the term "of Nashville" to its name, the petitioning corporation had met the requirements of the Louisiana statute[45] and had sufficiently *distinguished* itself from the "Equitable Securities Company, Inc.," a domestic corporation already doing business in the state. Courts in other jurisdictions have held that the duty of issuing the certificate is discretionary rather than ministerial, and that where the designated officer has concluded that the name in question is not sufficiently distinguished the court should not interfere except on a showing of arbitrary abuse of discretion.[46] In the instant case the court may have felt that the withholding of the certificate was arbitrary in view of the fact, stressed in the decision, that the two corporations were not competitors and that no injury to the domestic corporation could be presumed.[47] Again, it appears from the language of the court that the Louisiana statute is being interpreted as imposing a purely ministerial duty, with the result that the court may substitute its judgment for that of the Secretary of State on the question of whether the names are sufficiently distinguished.

Suit was brought in *R. J. Brown Company v. Grosjean*[48] by a foreign corporation which maintained no local office but had, over the period of a year, purchased 442,501 gallons of petroleum products in the state and sold the same to 48 different Louisiana purchasers. The plaintiff corporation was held to have transacted "a substantial part of its ordinary business" within the state,[49] and was therefore precluded from bringing suit by Act 8

44. 189 La. 272, 179 So. 312 (1938).

45. La. Act 120 of 1920, § 1 (amending and re-enacting La. Act 267 of 1914, § 23) [Dart's Stats. (1932) § 1246]. The statute expressly forbids the issuance of a certificate to do business to a foreign corporation with a name deceptively similar to that of a corporation already authorized, unless such foreign corporation shall add some term to properly distinguish its name.

46. Horowitz v. Beamish, 323 Pa. 273, 185 Atl. 760 (1936) (mandamus refused where the Secretary of State had refused to issue a certificate to the "Keystone State Moving Picture Operators' Ass'n" on the ground that the name was deceptively similar to "Keystone Theatrical Stage Employees and Motion Picture Machine Operators Union, Inc."); Brooks Clothing of California, Ltd. v. Flynn, 232 App. Div. 346, 250 N. Y. Supp. 69 (1931).

47. The necessity of probable injury was stressed in Central Mutual Auto Ins. Co. v. Central Mutual Ins. Co., 275 Mich. 554, 267 N.W. 733 (1936).

48. 189 La. 778, 180 So. 634 (1938).

49. Cf. Norm Advertising, Inc. v. Parker, 172 So. 586 (La. App. 1937) where a foreign corporation merely had traveling agents who solicited orders which were forwarded to the New York office for acceptance and the neces-

of the Third Extra Session of 1935.[50] This statute denies a foreign corporation "doing business in this state" the right to sue in any Louisiana court unless it has duly qualified to do business in the state, and has paid all taxes, excises and licenses due the state.

In *Shreveport Long Leaf Lumber Co. v. Jones*[51] it was held that a domestic corporation could bring suit on a note without alleging payment of its franchise tax. The court declared that the act levying an annual franchise tax on all corporations did not state or intimate "that the payment of the tax is a condition precedent to the corporation's engaging or continuing to engage in business," but was "a revenue act pure and simple."[52]

General Motors Truck Co. v. Caddo Transfer & Warehouse Co., Inc.[53] deals with the compensation of a corporate receiver. Where $1,000.00 had already been allowed, the claim for an additional fee of $1,500.00, out of a fund of $14,523.65 which he proposed to distribute, was rejected because of his mismanagement and neglect of the receivership affairs.

Act 159 of 1898, Section 10[54] provides that when, "on the application of any party at interest," it is made to appear that the property cannot be so administered as to pay the debts and restore possession to the corporation, the receivership may be ordered dissolved, the corporate property sold and the assets distributed. The court held in *In re Geo. D. Geddes Undertaking & Embalming Co., Ltd.*[55] that a stockholder-creditor had a sufficient "interest" to appeal from a judgment dismissing a rule to sell and distribute the corporate assets, even though the funds realized would probably be completely absorbed by claims prior in rank and no pecuniary gain would accrue to him.

An interesting question, relating to the administration of a corporation's affairs by trustees for the benefit of creditors, was presented in *Vincent v. Farmers Bank & Trust Co.*[56] The Iota Rice Milling Company was heavily indebted. When its mill was destroyed by fire, it entered into an agreement with its creditors, whereby trustees were appointed to administer the affairs of the company and pay its debts. The agreement expressly provided

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sary materials were mailed to the Louisiana contracting party, was held not to be "doing business" in the state.

50. Dart's Stats. (Supp. 1937) § 1247.1.
51. 188 La. 519, 177 So. 593 (1937).
52. 188 La. at 526, 177 So. at 595.
53. 189 La. 529, 17 So. 843 (1938).
54. Dart's Stats. (1932) § 1218.
55. 188 La. 366, 177 So. 240 (1937).
56. 189 La. 1073, 181 So. 540 (1938).

that the trustees, in paying out moneys collected, should only pay secured creditors in proportion to the part of their debts which was *unsecured*; and that no distribution should be made until such unsecured amounts were definitely ascertained. The trustees collected $100,000 insurance money for loss of the building and machinery. Banking conditions were uncertain, so rather than run the risk that the money would be frozen in the bank, they immediately distributed dividends of 50 per cent and 15 per cent to *all* creditors, including a payment to the defendant of $6,500.00. The defendant, whose claim of $10,000.00 was secured by a pledge of warehouse receipts on certain rice in the mill, subsequently received a payment of over $4,000.00 in an interpleader proceeding instituted by the companies which had insured the rice. The trustees then brought this action to recover their overpayment to defendant. (His dividend had been based upon the entire $10,000.00 debt, rather than upon the unsecured portion thereof.) Judgment for the plaintiff was affirmed on the theory that the dividends were declared by the trustees as "mere tentative payments," and that such procedure was justified by the unsettled banking conditions. The court emphasized the fact that the defendant was a party to the agreement, and also relied on the general provisions of the Civil Code which obligate a party to return money received through mistake.[57]

D. Insurance

Fire Insurance. The Anti-Technicality Statute[58] provides that no policy of fire insurance shall be avoided for breach of any representation, warranty or condition unless such breach increase either the moral or physical hazard. In *Brough v. Presidential Fire & Marine Ins. Co.*[59] the insurance in controversy covered a building which the insured had built on ground being purchased under a bond for deed. The insurer contended that the policy had been avoided by breach of the condition requiring the building to be on land owned by the insured in fee simple. The court held that the insurer had failed to prove any increased hazard by the breach of the condition, and properly rendered judgment for the insured.

Life Insurance. Two cases involved the proceeds of life insurance policies payable to the estate of the insured. In *State v.*

57. Arts. 2301, 2302, La. Civil Code of 1870.
58. La. Act 222 of 1928, § 1 [Dart's Stats. (1932) § 4191].
59. 189 La. 880, 181 So. 432 (1938), noted in (1938) 13 Tulane L. Rev. 148.

Succession of Brewer[60] the court again held that such proceeds were subject to the inheritance tax. *Michiels v. Succession of Gladden*[61] was a case involving the statute[62] which exempted life insurance proceeds from the payment of debts. The court here recognized that an insured's right to dispose by will of the proceeds of life insurance payable to his estate carried with it the right to direct his executors to apply such proceeds to the payment of his debts.

In *Giuffria v. Metropolitan Life Ins. Co.*[63] the insured sought to change the beneficiary of a policy while on his death bed. The proper form was executed, delivered to the insurer and actually received at its home office one day prior to the insured's death. The policy provision relating to change of beneficiary required the surrender of the original policy. This was not complied with until a day before the insured's death purely because of the original beneficiary's failure to deliver it timely to the insured.[64] In a suit by the substituted beneficiary against the insurer, the latter deposited the proceeds of the policy in court and impleaded both beneficiaries. The court held the attempted change of beneficiary ineffective and decreed the proceeds to belong to the original beneficiary. Every other American jurisdiction which has had occasion to consider these questions has always held contrary to this case.[65]

A statute[66] provides 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 is-

60. 190 La. 810, 182 So. 820 (1938).

61. 190 La. 917, 183 So. 217 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 239.

62. La. Act 189 of 1914, § 1, as amended by La. Acts 95 of 1934, § 1, and 155 of 1934, § 2 [Dart's Stats. (Supp. 1938) § 4105].

63. 188 La. 837, 178 So. 368 (1937).

64. The policy was held by the local office of the insurer as security for a policy loan. Realizing that the insured might desire to change beneficiaries, the original beneficiary paid this loan to secure possession of the policy. When the insured requested the policy, she unduly delayed compliance, so that the policy was delivered to the insured only two days before his death. The day before his death it was surrendered to the local agent of the company, but because of his death was never forwarded to the home office.

65. See the host of cases cited in Vance on Insurance (2 ed. 1930) 573-574; 2 Couch on Insurance (1929) 912-915, § 324; 7 Cooley's Briefs on Insurance (2 ed. 1928) 6448 et seq. In a few of the states where the distinction between law and equity still exists, the attempted change of beneficiary might be deemed ineffective in an action at law . But in all jurisdictions except Louisiana, where the question was presented in an equity interpleader proceeding, the substituted beneficiary would be allowed to recover.

66. La. Act 52 of 1906 as amended by La. Act 227 of 1916, § 2 [Dart's Stats. (1932) § 4113].

sued. In *Laurent v. Unity Industrial Life Ins. Co.*[67] the insured was an agent who had become indebted to the defendant insurer for premiums collected and not remitted. In part payment of this debt, it was alleged that the insured orally agreed to cancel the policy and apply the accumulated reserve to this indebtedness. It was admitted that this accumulated reserve (but for its application by the insured to his indebtedness) would have been sufficient to carry the policy until the insured's death. Evidence in support of this defense of cancellation was excluded by the court under authority of the act referred to above. The dissenting opinion of Mr. Chief Justice O'Niell pointed out the inapplicability of the statute to the facts of the case.[68] The effects of this unfortunate decision will be far-reaching.[69]

Brunson v. Mutual Life Ins. Co. of New York[70] presented the question of the right of a beneficiary to recover double indemnity under a policy affording such coverage for death resulting from bodily injury effected solely through external, violent and accidental means. The trial court had held that an allegation that the insured came to his death "through unexpected and accidental complications from the extractions" of several teeth did not state a cause of action for double indemnity benefits. The Supreme Court, finding this allegation sufficient, reversed the judgment appealed from and remanded the case for trial. In *Madison v. Prudential Ins. Co. of America*[71] the insurer appealed from a judgment condemning it to pay an attorney permanent and total disability benefits, and further imposing penalties upon it for its refusal to comply amicably with its policy obligations. Two contentions were advanced by the defendant to defeat recovery: (1) the disability was not permanent since it appeared that the in-

67. 189 La. 426, 179 So. 586 (1938), noted in (1938) 13 Tulane L. Rev. 150.

68. The object of this statute was to suppress the practice of making documents not annexed to the policy, and of which the insured usually knew absolutely nothing, a part of the contract by reference. It was never intended to prevent *subsequent* modification of the contract by mutual agreement of insured and insurer.

69. For instance, it is certain to question the efficacy of one of the devices which insurance companies have employed in good faith to aid their distressed policyholders. When an insured is financially unable to meet the premium payments on a policy, the insurer commonly permits him to reduce the coverage and use the reserve thereby rendered available to carry the reduced coverage for some little time. While the agreement to reduce the coverage is always in writing, and usually annexed to the original policy, it cannot be "attached to the policy when issued." It is always possible, of course, for the courts to protect the insurer in such cases through the application of some doctrine of laches or equitable estoppel.

70. 189 La. 743, 180 So. 506 (1938).

71. 190 La. 103, 181 So. 871 (1937).

sured might recover eventually; and (2) the disability was not total since the attorney could perform some slight professional duties. Under well settled principles of insurance law both contentions were rejected. The judgment appealed from was amended, however, by striking all penalties therefrom. The insurer was held to have defended the action in good faith.

Prior to 1934, if an industrial insurer issued a policy without requiring a medical examination of the insured, it was barred from invoking a forfeiture on any ground which might have been discovered by the due diligence of its agents.[72] A statute of 1934[73] qualified this rule by permitting an industrial insurer to assert a forfeiture for fradulent answers to questions propounded by a written application. In *Geddes & Moss U. & E. Co. v. First National Life Ins. Co.*[74] the policy in controversy had been issued prior to 1934, but the insured died in 1936. The question presented was whether the 1934 statute applied retrospectively so as to permit the insurer to avoid the policy for the insured's fraud in falsely stating in the written application that she was in sound health at the time. On dual grounds, the court found it unnecessary to determine whether the statute was remedial legislation. It was held that, conceding *arguendo* the statute to be a remedial one, it disclosed a legislative intent to be applied only prospectively. Further, the court found that a retrospective application of the 1934 act would impair the obligation of the insured's contract.

MISCELLANEOUS. *Parks v. Hall*[75] presented for interpretation the "omnibus clause" of a casualty insurance policy which covered the operation of an automobile by any person with the "permission of assured." The insured had directed his chauffeur to take the car to be washed and greased, to thereafter inquire about some packages at the express office and then return the car to the insured's residence. The wash rack at the garage being in use, the chauffeur picked up a friend of his and two women and drove

72. La. Act 97 of 1908, § 1, as amended by La. Act 195 of 1932, § 1 [Dart's Stats. (1932) § 4118].

73. La. Act 160 of 1934 [Dart's Stats. (Supp. 1938) §§ 4134.1-4134.3]. The question presented would be foreclosed, in any case involving a policy issued subsequent to the effective date of the 1938 statutes, by La. Act 144 of 1936, § 1, as amended by La. Act 140 of 1938, § 1 [Dart's Stats. (Supp. 1938) § 4134.4]. This act, as amended, provides that industrial life insurance policies are incontestable after one year, except for nonpayment of premiums.

74. 189 La. 891, 181 So. 436 (1938), affirming Geddes & Moss U. & E. Co. v. First National Life Ins. Co., 177 So. 818 (La. App. 1938), noted in (1938) 12 Tulane L. Rev. 469.

75. Parks v. Hall (two cases), Hall v. Hall, Carbons Consolidated v. Same,

some distance out of town with them to collect some money due the friend. On the return trip to the garage the accident in controversy occurred. The evidence showed that the insured, although knowing of the previous personal use of the auto by the chauffeur, had never objected thereto. The court found that the chauffeur was using the car with the "permission of assured" within the intendment of the omnibus clause, and held the casualty insurer liable.

Turner v. Metropolitan Life Ins. Co.[76] presented several factual issues as to whether an employee insured under a group life policy was totally and permanently disabled. All such issues were resolved by the court in favor of the insured. One question of law was presented. The policy required the insured to furnish "due proof" of his disability to the insurer, but failed to impose any time limit therefor. In view of the late discovery by the insured of his true condition, the submission of proof thereof two years after the accident was held sufficient.

189 La. 849, 181 So. 191 (1938). These decisions reversed Parks v. Hall, 179 So. 868 (La. App. 1937); Id., 179 So. 877 (La. App. 1937); Hall v. Hall, 179 So. 877 (La. App. 1937); Carbons Consolidated v. Hall, 179 So. 878 (La. App. 1937). See Note (1938) 13 Tulane L. Rev. 146.

76. 189 La. 342, 179 So. 448 (1938).