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The Work of the Louisiana Supreme Court for the 1942-1943 Term: A Symposium

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I. CIVIL CODE AND RELATED SUBJECTS

A. PRESCRIPTION

Viator v. Heintz.[1] The signing of a judgment constitutes rendition of judgment and the ten year prescription on judgments does not begin to run until the signature of the judge has been inscribed.

Prescriptions of ten and thirty years were pleaded in *Buckley v. Catlett,*[2] and while nothing new on the subject is added to the principles established by Louisiana jurisprudence, the clarity of expression is helpful and certain statements are hence set forth. In regard to prescription of ten years acquirendi causa (Article 3478)[3] the court said: "In the mentioned series of conveyances, beginning with Charles A. Connella and ending with defendant, there was no act that recited a conveyance of the disputed Lot 4. Even if defendant has possessed such property during a period of 10 years, his possession was not under a deed translative of ownership; hence, the prescription of 10 years acquirendi causa is unavailing to him."[4]

Of prescription of thirty years liberandi causa (Article 3548)[5] the court said: " 'an owner of land does not lose his title by prescription by remaining out of possession for any length of time, unless some one else has been in possession long enough to acquire the title by prescription. The reason is that an owner has as much

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* This symposium has been contributed by the following: Prescription, Family Law, Expropriation, Successions, Landlord and Tenant, Property, Partnership, Contracts, Community Property, Particular Contracts, Mineral Rights—Harriet S. Daggett, Professor of Civil Law, Louisiana State University Law School; Torts—W. Frank Gladney, Member of the Baton Rouge Bar; Criminal Law and Procedure—Dale E. Bennett, Associate Professor of Law and Acting Dean, Louisiana State University Law School; Procedure—Ben R. Downing, Jr., Student, Louisiana State University Law School.

1. 201 La. 884, 10 So. (2d) 690 (1942).
2. 203 La. 54, 13 So. (2d) 384 (1943).
3. La. Civil Code of 1870.
4. Buckley v. Catlett, 203 La. 54, 60, 13 So. (2d) 384, 386 (1943).
5. La. Civil Code of 1870.

right to remain out of possession as he has to remain in possession of his property; the only risk of remaining out of possession being that some one else might be in possession long enough to acquire title by prescription.' "[6]

In regard to prescription of thirty years acquirendi causa, it was stated: "On this subject, it is well established in our jurisprudence that, for the purpose of claiming land under the prescription of 30 years, several successive possessors cannot be joined to show a continuous adverse possession, unless there is a privity of estate or contract between the occupants. The reason for this rule is that the several acts of adverse possession are construed as nothing more than a series of independent trespasses, and on the termination of each of those acts the possession returns by operation of law to the rightful owner of the immovable."[7]

Mere acquiescence on the part of the grantor did not establish a just title even if the grantor did intend to sell the lot in dispute; but even if it had, title was lost in certain foreclosure proceedings.

Plaintiff's ancestor in *Smith v. Southern Kraft Corporation*[8] had bought a twenty-acre tract from the Standard Lumber Company in 1903. This title was recorded. In 1906 the Standard Lumber Company gave a quitclaim deed to lands in which the disputed twenty acres were included to the Central Lumber Company, from which present defendants derived their title. When plaintiffs sued to be declared owners of the tract under their record title, defendants pleaded a prescriptive title of ten years. Good faith was proved by virtue of the quitclaim deed which might show in its no warranty clause a lack of faith in the title by the seller, but not in the buyer. Consideration other than the one dollar mentioned in the quitclaim deed was proved by other contracts between the two lumber companies, to which the quitclaim was collateral. The quitclaim deed was said to be a "just" title as it would have passed ownership if the vendor had owned the land which was "quitclaimed." The character of possession was then discussed. The twenty acres in question were part of a contiguous tract of two hundred and sixty acres and possession of part was said to be possession of the whole as mentioned in the title. The Central Lumber Company had constructed a tram railroad across the tract, about one-quarter mile from the twenty acres. Taxes

6. Buckley v. Catlett, 203 La. 54, 61, 13 So. (2d) 384, 386 (1943).
7. 203 La. 54, 61, 13 So. (2d) 384, 386 (1943).
8. 202 La. 1019, 13 So. (2d) 335 (1943).

were paid on the whole tract. What was left of the timber was cut from the twenty acres. Plaintiffs were aware of all these operations, yet made no claim until oil was discovered, while defendants and their authors had been in peaceful and uninterrupted possession which "renders inapplicable the principle of law that as between conflicting claimants from a common author the preference shall be given to him whose title is of the more ancient date."[9]

B. Family Law

The question to be determined in *Succession of Dotson*[10] was one of fact, i. e., whether there had been a valid marriage upon which claims to succession were predicated. In finding against the marriage the court observed "the lapse of forty years may affect the memory to such an extent that positive recollections, as to the happening of an event, will be rejected as faulty when they are incompatible with circumstantial evidence which points to a more reasonable conclusion." [11] Appellants had pleaded in the alternative that, if proof of the marriage failed to convince the court, the mother's "honest belief" that she was married to deceased should sustain the marriage as putative. The court said they had failed to find evidence of "honest belief." The chief justice concurred in the decree[12] but stated "that the court should reject as unsound the implication in the plaintiff's alternative demand that if Mary Seals honestly believed that she was married to Sherman Dotson the belief would give to their cohabitation the status of a putative marriage. A putative marriage is one which has been solemnized with the accustomed ceremonials but which is in fact illegal for some reason. The decision to the contrary in the *Succession of Marinoni*[13] ought to be overruled because it is in direct conflict with the decision rendered in *Succession of Cusimano*,[14] where it was said:

"As there was no marriage contracted by Mrs. DiGratta and Cusimano, even a void one, the status that existed between them cannot be deemed that of a putative marriage, possessing the effect, even as to Mrs. DiGratta (though it is possible she may have been in good faith), of a valid marriage, for it is only to the mar-

9. 202 La. 1019, 1036, 13 So. (2d) 335, 340.
10. 202 La. 77, 11 So. (2d) 488 (1942).
11. 202 La. 77, 87, 11 So. (2d) 488, 491.
12. 202 La. 77, 88, 11 So. (2d) 488, 491.
13. 183 La. 776, 164 So. 797 (1935).
14. 173 La. 539, 138 So. 95 (1931).

riage actually contracted, though null, that the law, where it was contracted in good faith, attaches to it the civil effects of a valid marriage. Civ. Code, Arts. 117, 118." [15]

The case of *State ex rel. Legendre v. Legendre*[16] is concerned with evidence to determine the comparative fitness of the father and mother in order to award custody of a daughter. Preponderation was in favor of the mother so the father's application for writ of habeas corpus, granted by the lower court, was dismissed. The parents seemed to be only voluntarily separated. The facts adduced were exceptionally tawdry.

Facts and figures are the content of *Butterworth v. Butterworth*,[17] that divorce alimony might be fixed for a wife and two children under well-settled provisions of the Code. Injected into plaintiff's story was the allegation that the former husband had deliberately severed his very lucrative connections with intent to deprive the plaintiff of a fair income and that the former husband was busy spending his money traipsing over the United States and Mexico with the co-respondent of his divorce suit. These bits of information were not regarded by the court as pertinent to the issue and no comments on "alimony strikers" were made. It was observed by the judge, however, that the wife and children were still able to maintain the standard of living "to which they were accustomed," not necessarily a criteria of alimony awards, so a mental note might have been made by the judge of the husband's apparent decision regarding more play and less work.

A divorced wife claimed back alimony in the *Succession of Mioton*,[18] and received judgment for part of the sum claimed. She was found to have agreed to an adjustment some time prior to the death of her one time husband and hence was held to be estopped to receive the larger sum claimed.

In *Jeanis v. Jeanis*,[19] the plaintiffs, sons of defendant, failed to prove that their father was in a senile condition and under the influence of his niece. Their motive in trying to interdict their father seemed clearly to be an attempt to prevent his partitioning property with view of giving them their mother's share, as they wished to keep the holdings intact.

15. 173 La. 539, 542, 138 So. 95, 96.
16. 201 La. 866, 10 So. (2d) 684 (1942).
17. 203 La. 465, 14 So. (2d) 59 (1943).
18. 201 La. 879, 10 So. (2d) 688 (1942).
19. 202 La. 717, 12 So. (2d) 691 (1943).

C. EXPROPRIATION

Housing Authority of New Orleans v. Persson[20] is concerned with a review of testimony on property value in expropriating certain lots. The housing authority appealed from the award as being too high, but the court did not disturb the sum arrived at by the jury of free holders. The court stated that rental values and location must be considered in finding market value said to be "the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy."[21]

The dispute in *Texas Pipe Line Company v. National Gasoline Company of Louisiana, Incorporated,*[22] was regarding the amount to be paid for a right of way for a high pressure gasoline pipe line. The court accepted the estimate of the jury of free holders under the customary reliance upon such a jury unless the award is indicative of prejudice in either direction. The value of the land expropriated was virtually destroyed for sale to home builders as was the land near the line—known to be dangerous. The jury awarded one-half of the estimated value of the land within a distance of fifty feet and the estimated value of the land occupied by the line. The estimate was a figure between the highest and lowest alleged appraisements and on the evidence appeared reasonable and fair.

Four cases, *New Orleans v. Larroux, New Orleans v. Cerevallo, New Orleans v. Cass,* and *New Orleans v. Heffle,*[23] were consolidated in order to arrive at a price per acre of land expropriated for an airport. The jury of free holders had awarded $500.00 per acre and in the light of all the evidence the amount appeared excessive and was reduced to $400.00 per acre.

D. SUCCESSIONS

Colonel Derby, father of plaintiff in the case *Derby v. De Saix Corporation,*[24] made a donation to certain trustees when he established in 1921 a trust in favor of his four children. In the act creating the trust it was stipulated that if the property of the trust should be bought by the third party then negotiating, the proceeds

20. 203 La. 255, 13 So. (2d) 853 (1943).
21. 203 La. 255, 259, 12 So. (2d) 853, 854 (1943).
22. 203 La. 787, 14 So. (2d) 636 (1943).
23. New Orleans v. Larroux, 203 La. 990, 14 So. (2d) 812 (1943); New Orleans v. Cerevallo, 203 La. 998, 14 So. (2d) 814 (1943); New Orleans v. Cass, 203 La. 997, 14 So.(2d) 814 (1943); New Orleans v. Heffle, 203 La. 996, 14 So. (2d) 814 (1943).
24. 201 La. 1060, 10 So. (2d) 896 (1942).

from the sale should constitute the property of the trust. The third party did buy the property but was unable to meet the notes and after foreclosure the plaintiff received his share of the property—the trust having expired. He contracted to sell to the defendant, who now refused to take title because it would be subject to attack by any forced heir born or adopted by the father of plaintiff. The court decided that defendant must carry out his contract to buy, as money and *not* this property had actually been donated under the stipulation in the trust. There was a return to the estate in value and hence not even this remote chance of attack against the property itself by a possible addition to the original list of forced heirs. *Scudder v. Howe*[25] furnished a parallel for this decision, as therein a similar difficulty was met by rescinding a donation of property—selling the property and then donating the proceeds therefrom.

An interesting case of first impression entitled *Succession of Rabouin*[26] settled the query, if any, that an annuity was *not* "insurance" and hence had to be reckoned with in computing the forced portion. The decision is supported by many decisions in other states of the Union in deciding whether annuities should fall into the insurance category. The Civil Code of Louisiana contains repeated references to "annuities" and evidently the basic idea was quite familiar to the redactors. It was urged in this litigation that the annuity in question did not conform to the definition and references in the Code to the device. The court pointed out that there was nothing to forbid the contract. The articles dealing with annuity under "Disposable Portion" were not discussed. The basic distinction was set out, i. e., that the purchase of the annuity contract by the deceased had been with funds of his estate, while death benefits under an insurance policy are never part of the estate as they do not vest until the death of the insured. The arguments against computing the residue of an investment such as an annuity in the forced portions are so weak as to appear almost frivolous.

It is rare that litigation arises over the usufruct of a child's share as provided in Article 2382 for the necessitous widow. Also, the creation of a usufruct by compromise as permitted by Article 540 is unusual. Both occur in *Hartford Accident & Indemnity Company v. Abdalla*,[27] the case being framed by suit for cancellation

25. 44 La. Ann. 1103, 11 So. 824 (1892).
26. 201 La. 227, 9 So. (2d) 529 (1942).
27. 203 La. 999, 14 So. (2d) 815 (1943).

of bond brought by the surety company. After the widow had filed suit demanding her usufruct of a child's share in usufruct from the succession, of her deceased husband, her three stepchildren and the tutor of her own minor child reached a compromise settlement with her for the usufruct of property valued at $5,500. She applied to plaintiff company for a bond and agreed with them that the bond when granted might be cancelled at any time. Now, the bonding company sues to cancel due to their fears of future loss because the three stepchildren had filed suit to extinguish the usufruct and claimed large damages because of alleged waste by the usufructuary. The defendant, widow, claimed that the usufruct was a legal one and the bond judicial and hence not subject to cancellation. The court found the usufruct to have been created by the compromise settlement—not by law—and the bond *not* to have been fixed by a judge. The bond was cancelled as provided in its execution and as justified by the filing of suit for damages against the widow.

The widow, in *Succession of Aymond*,[28] had signed an agreement with the heirs of deceased, children by a previous marriage, accepting some household furniture in full settlement of her claim against the estate for $1,000 under Article 3252. While fraud was not proved, the court found that she had signed this paper under the belief that the deceased had left the furniture and $100 while in fact he had an estate of around $2,000. The largest item was a postal savings certificate of which the widow knew nothing. The court found the agreement to be not a compromise but a contract of acceptance of a thing in payment of a sum due and that this contract was void because of her error—the motive being to take the furniture as she could get nothing else. The stated value of the furniture in the contract was $1,000 which was immaterial since that was not the "reality of the cause" or "the motive" for making the contract under Article 1824. The widow, proving her necessitous condition, received $700, since her own evaluation of the furniture was $300, though the testimony of a furniture dealer thought it worth even less.

Futch v. Holloway[29] was a suit to close a series of "irregular proceedings" wherein the tutor of a minor child was attempting to gain control of his daughter's property inherited from her mother, the divorced wife of the tutor, in the hands of the de-

28. 202 La. 469, 12 So. (2d) 233 (1943).
29. 202 La. 892, 13 So. (2d) 256 (1943).

ceased's executor. The court rendered a judgment instructing the executor to obtain a court order to sell such property of the succession as needed to pay debts, render a final account of his seven years of administration and turn over the property belonging to the minor to the tutor. The executor was a brother of the deceased and, since he appeared to be the only creditor of the succession, was continuing to control the minor's property by failing to pay debts and render a final account.

The case of *Succession of Berdon*[30] presents a most interesting application of the rules of testate distribution. Deceased left a widow, a sister, and three children of a deceased brother. The residuum of his estate was given to them in equal thirds. The trouble arose over the particular legacies. The codicil of his will revoked a particular legacy to the children and substituted another particular legacy, i. e., five hundred shares of Whitney National Bank stock. A particular legacy to his wife in the body of the will was also of five hundred shares of Whitney stock. More shares were included in particular legacies in the body of the will, bringing the total number of such shares finally bequeathed to twelve hundred while he never had owned but seven hundred seventy-five shares of Whitney stock. The widow pleaded that all of these particular legacies were valid and hence that the executor should purchase enough to make up the deficiency *or* pay in cash *or* distribute proportionately the seven hundred seventy-five shares. The children pleaded that the testator had contradicted himself and that his last bequest in the codicil should rule, as it indicated a tacit revocation of the first bequests. The trial judge so ruled, citing Article 1723, and held that the widow as the first particular legatee of this stock should lose to the other two legatees and thus receive but seventy-five shares. The supreme court in the ruling opinion took the position that there was no contradiction as the three bequests in question, while particular legacies, were *not* legacies of particular objects and that there could be no tacit revocation unless the last disposition was contrary to the former. It was pointed out that had there been twelve hundred shares in the estate, no question of payment of the three particular legacies would have arisen and that there was a *shortage in stock* and *not* a *contradiction in legacies of stock*. The court found no authority in the Code for purchasing more stock or making a legacy of money when stock had been specified. Article 1635 was invoked

30. 202 La. 607, 12 So. (2d) 654 (1943).

to decide that the seven hundred seventy-five shares must be distributed proportionately among the three legatees. The decision seems sound from an equitable standpoint, but the court's decision that Whitney Bank stock is not a particular object and the application of Article 1635 which seems clearly to indicate the proportionate method only so far as sums of money are concerned seems questionable. If the testator had made three separate bequests of a Chippendale table and had only two—a contradiction and resort to Article 1723 would seem clear. If he had had only five hundred shares of Whitney stock and had made two separate bequests of five hundred shares, the situation would seem clearer. If he had fifty shares of Whitney, fifty shares of T & T and had made bequests of each, they would seem particularized as to object. Just because an odd amount appeared it seems a doubtful precedent to consider as money all types of stock, bonds, etc. Suppose a testator said in his will "I want *A* to have my bonds" and in a codicil he said, "I want *B* to have my bonds" would that not be considered contradictory? With high respect to a brilliant justice, the writer humbly thinks him in error in this analysis.

The *Succession of Homan*[31] was decided on the same day and with the same author of the majority opinion as *Succession of Berdon.*[32] Hence, it would be logical to assume that on similar points, the attitude of mind should be the same. Having quickly disposed of the well-settled principle that any one of the several forms of will properly carried out is valid, whether the same form is followed in will *and* codicil or not, the court gave lengthy consideration to the issue of whether several bequests were cumulative or disjunctive. Testator left a will with three codicils. The second codicil gave to Dell, one of the defendants, thirty shares of "homestead stock" and to Edna, another defendant, twenty shares of "homestead stock." The third codicil gave to Dell thirty shares of "Security Homestead Stock" and to Edna twenty shares of "Guaranty Homestead Stock." The court found no revocation —no incompatibility—no contrary intention and hence a cumulation and Dell was awarded sixty shares and Edna forty shares—decedent having plenty of homestead stock to meet the bequests —*not* the case in *Succession of Berdon.* The decision treats stock as money quoting from *Dimitry v. Shreveport Mutual Building Association*[33] to the effect that "paid-up shares of stock in a build-

31. 202 La. 591, 12 So. (2d) 649 (1943).
32. 202 La. 607, 12 So. (2d) 654 (1943).
33. 167 La. 875, 120 So. 581 (1929).

ing or homestead association are merely deposits of sums of money at a fixed rate of interest subject to withdrawal at any time."[34] This could scarcely be said as to Whitney Bank stock—the subject in *Succession of Berdon*—though the principle involved must have influenced the decision on the point of "particular objects," not of importance in the case under discussion as there was enough to satisfy the bequests and the stock was homestead stock. The instant case overruled by name the cases of *Robouam's Heirs v. Robouam's Executor*[35] and *Succession of Mercer*[36] to which the chief justice *particularly* dissented. There was other phraseology in these two cases upon which they might have been distinguished under the interpretation rules but the majority of the court seemed to feel that they stood for the flat proposition that all double legacies of same amounts to the same legatees must be held to be repetitious and indicative of tacit revocation—not necessarily the case, certainly. The decision, however, is carefully reasoned and intellectually satisfying.

In *Succession of Torlage*[37] certain questions were asked Torlage as part of the ritual of masonic initiation. His answers were in writing and at the end of the questionnaire appear these words: "Signed at New Orleans, on this 21st day of the month of November A. D. 1938, W. T. Torlage." Then the applicant was asked to "write now, in good faith, your last will and testament, precisely as if you were about immediately to be engaged in battle, and expected to fall in the action." In compliance the writer set forth the following: " 'I hereby leave all I owne to my wife and that my request is that I be laid to rest with Masonic rights. Henry William Torlage.' "[38]

The wife offered this document in probate and the attack on its validity was made by the children of deceased by a first marriage. The court held the document invalid as an olographic will because the portion claimed to have been "a testament" was not dated and the writer did not intend the document as a will but only as part of the ritual and what his will "would be" if he had been in the circumstances described, etc. It does not appear how the paper came into the hands of the wife, all of which might have had a bearing on the intention of the testator who had writ-

34. Succession of Homan, 202 La. 591, 605, 12 So. (2d) 649, 653 (1943).
35. 12 La. 73 (1838).
36. 28 La. Ann. 564 (1876).
37. 202 La. 693, 12 So. (2d) 683 (1943).
38. 202 La. 693, 696, 12 So. (2d) 683, 684.

ten in very serious vein after having made solemn answers regarding his beliefs on First Cause, the state of his conscience, etc., and who might have intended the document as his will. He gave directions for his burial service. The circumstances under which a will were written are not ordinarily considered when the instrument's contents disclose the thought of death. The date did appear in the identical paper. The whole decision appears highly doubtful from the brief account at least and again impresses the student with the thought that the safeguards thrown around wills to insure the carrying out of wishes of the deceased as often appear rather to prevent as to guarantee the result. However, the opinion of the lower court was affirmed and the reviewer might well have rested upon the fact that first impressions of litigants and their sincerity are most significant in doubtful situations.

In *Succession of Wallis*,[39] the following clause of a will was declared invalid except for appointment of executor. "Regarding a memorial hall or room and the residue of my estate I have given full instructions to Trist Wood whom I make executor of my will."

This decision was within the clear words of the prohibitions of the Civil Code against verbal testaments and against giving an intermediary or agent the right to actually dispose[40] and was well supported by many previous judgments of the supreme court.

An interpretation of a will is involved in *Succession of Price*.[41] There were no forced heirs. The controversy arose over the following portions of the testament. The testatrix first stated that "all my debt, if any, shall be paid." Then followed a long list of bequests of $1,000.00 each to two generations of nieces and nephews. Afterwards came the following passage. " 'All the rest of my estate of whatever description and wheresoever situated I give and bequeath, One Half to my niece and namesake Anna Gay Butler Plater, or if she is not living, this one half of my estate is to be divided equally among her children, Richard C. Plater, Jr., and Louise Plater Hale.

" 'One fourth of my estate I give and bequeath to my great niece and namesake Margaret Price Weaver, if she survives me.

" '*After all these bequests heretofore bequeathed in this will are carried out and all indebtedness paid then I wish the balance of my estate* to be divided equally between all my nieces and

39. 203 La. 874, 14 So. (2d) 749 (1943).
40. Arts. 1573-1596, La. Civil Code of 1870.
41. 202 La. 842, 13 So. (2d) 240 (1943).

nephews, great nieces and nephews . . . .' "[42] The executors proposed to pay out of the residue, after the debts of *decedent* and the special bequests were paid the one-half of this residue to Mrs. Plater and one-fourth to Mrs. Price and then, out of the remaining one-fourth to pay taxes and other charges against the *succession*, thus leaving no balance to be further distributed to other nieces and nephews. Opponents insisted that the debts of both decedent and her succession and the special legacies be paid first and then the balance be divided into one-half and two-quarters and given to the designated legatees under universal title. After careful review of *all* parts of the testament in searching for the testator's intention and a full citation of pertinent Code articles and cases, the court decided with the executor.

At least four points of major interest occur in *Maddox v. Butchee*.[43] The will in question was written as follows:

> " 'March 3, 1941
>
> " 'At my Death I donate and bequeath all the property I then own to my husband Wesley Maddox after his death it is to go to my great niece Johnnie Tilley'
>
> " (Signed) 'Bella B. Maddox.' "[44]

(1) The court very properly declared this bequest to be a prohibited substitution under Article 1520, attempting to give full ownership for life to one person who must pass it to another designated by the original testator. A full and unbroken line of decision support this position. (2) Since a sale and repurchase of land by the deceased was shown to have been without consideration and a pure simulation, title remained in the separate estate of the deceased and never vested in the community between the deceased and her surviving husband. (3) There was no cause to set aside a partition due to failure to make an owner of one-half of the minerals a party to the suit since the judgment specifically protected the owner of the mineral rights, interpreted by the judge of the lower court as a servitude, though improperly termed a mineral royalty, between which, as the justice remarked, there is "a vast distinction." (4) The most interesting point, perhaps, is in regard to the matter of prescription of the right of a surviving

42. 202 La. 842, 846, 13 So. (2d) 240, 241.
43. 203 La. 299, 14 So. (2d) 4 (1943).
44. 203 La. 299, 306, 14 So. (2d) 4, 6.

spouse to claim the marital portion under Article 2382. The lower court had held this right to have prescribed because it had not been claimed within the three months after opening of succession according to Article 3275. The supreme court pointed out that this claim is neither that of a creditor nor a legatee under the words of Article 3275 but is a legal bounty to which Article 3275 does not apply. Cases were cited ruling that this claim may be made as an opposition to the final act of an administrator or after liquidation of the estate or "even after the property of the succession has been received by the heirs."[45] When, if ever, the right would prescribe was not stated. This claim was held to have been made in time in a suit to annul a judgment ordering sale by partition after heirs had been put into possession by judgment.

E. Landlord and Tenant

Selber Brothers, Incorporated v. Newstadt's Shoe Stores[46] again reached the supreme court on a plea of estoppel having previously been sent down after overruling an exception of no cause of action.[47] The contract in question was a lease with flat monthly rental plus a percentage over a stipulated nine months sales percentage. The court had previously declared that there was an implied obligation on part of lessee to conduct the business in a manner which would reasonably produce more than the flat rental. The lessee leased another building and during the latter part of the term of the lease in question sold only "odds and ends" so that the profits naturally fell from the previous level. This was found to have been a breach of the implied obligation and lessor was awarded the excess in line with profits of the same months of the preceding year. Estoppel was pleaded on the ground that lessor had cashed the checks for the minimum rent and had thus taken that sum in accord and satisfaction. The court found that *not* to be the case. The adjustment had continued all the while in regard to the claim for the additional amount and the checks were not sent or accepted on condition that they constituted a settlement of the part of the account in dispute.

The well-known principle that the movables of a third person are not subject to seizure under the lessor's privilege, giving this right to a lessor against his tenant—unless the property of the

45. 203 La. 299, 313, 14 So. (2d) 4, 8.
46. 203 La. 316, 14 So. (2d) 10 (1943).
47. 194 La. 654, 194 So. 579 (1940).

third person is found to be contained in a building upon the leased premises—was again applied in *Boone v. Brown.*[48] The chattel in question was a trailer, parked on a vacant lot rented by the tenant who had also rented the trailer from intervenor.

A lessor instituted summary ejectment proceedings under Act 200 of 1936 in *Meraux & Nunez, Incorporated v. Houck.*[49] The court patiently went over the many clauses of the written lease, digested the evidence of its modifications and affirmed the judgment ordering the lessee to vacate after receipt of the sum owed him by lessor for improvements.

F. PROPERTY

Board of Commissioners of Buras Levee District v. Perez, District Attorney; Board of Commissioners of Lake Borgne Levee District v. Same; Board of Commissioners of Grand Prairie Levee District v. Same.[50] Plaintiffs had employed special counsel under a resolution declaring a real need for such assistance and now seek to enjoin the district attorney from interfering with the duties of the specially employed counsel. The district attorney invoked the provisions of Act 125 of 1912 as amended by Act 182 of 1940 which forbids the employment by parish boards of special counsel to attend to any but very special assignments and where "a real necessity exists." The court was concerned with a review of voluminous evidence from which they found that there was no real necessity for employment of counsel.

In *Harrison v. Louisiana Highway Commission,*[51] the court affirmed judgment for damages to property caused by the building of a bridge which resulted in a narrowing of the street—necessitated a one-way traffic, etc. The appraisement of depreciation of property value was grounded on reduced rental values. Property owners were allowed five per cent per annum from date of judicial demand. The highway commission was charged with cost of taking testimony. The first attempt[52] to recover these damages resulted in a non-suit since the action was prematurely brought before completion of the bridge and prior to the time

48. 201 La. 917, 10 So. (2d) 701 (1942).
49. 202 La. 820, 13 So. (2d) 233 (1942).
50. 202 La. 655, 12 So. (2d) 670 (1943).
51. 202 La. 345, 11 So. (2d) 612 (1942).
52. Kuhn v. Louisiana Highway Commission, 174 La. 990, 142 So. 149 (1932).

when a non-speculative estimate of the damages could be determined.

Exceptions were overruled and the case remanded in *Keller v. Haas*.[53] Plaintiff was attempting to recover his three-fourths interest in certain land together with rentals that had accrued. Defendant claimed the property under a tax deed of 1915. The court observed in overruling the exceptions of no right and no cause of action that while "a co-owner cannot be compelled to redeem or re-acquire" his property and has an option in the matter, nevertheless, he cannot sleep on his rights awaiting the development of the property but must act within a reasonable time in seeking equity, the principle underlying his right. Since equitable considerations were involved "no hard and fast rule can be laid down," hence the merits must be inquired into. The court also stated the doctrine that where an individual is practically the sole owner of a corporation, the case here, "he may not use the screen of corporate entity to absolve himself from responsibility."[54]

G. Partnership

Another chapter of *McCann v. Todd*[55] was concluded by judicial distribution of the impounded receipts from the "contingent fee" in controversy. The plaintiff's plea of verbal contract on definite percentage basis was not proved nor was the defendant's plea of a quantum meruit understanding. A "joint venture" was said to have been undertaken and copious authority was cited for the proposition that in absence of special agreement the joint venturors should share equally. However, since one of the plaintiffs had claimed only thirty per cent, he could receive but that amount under Article 156 of the Code of Practice. The thirty-three and one-third per cent due this plaintiff but not asked for by him was split between the other two venturors. Justice Higgins agreed with the majority on the joint venture analysis but dissented firmly from the refusal to grant a rehearing for adjustment of the award which in the "gift" of the three and one-third per cent was in the teeth of the award in "joint venture" as well as the clear language of Article 155 of the Code of Practice which denies the awarding of *more* than *due* as strongly as does Article 156 the awarding of more than was asked.

53. 202 La. 486, 12 So. (2d) 238 (1943).
54. 202 La. 486, 492, 12 So. (2d) 238, 240.
55. 203 La. 631, 14 So. (2d) 469 (1943).

H. CONTRACTS

A son sued his mother in *Whitney National Bank of New Orleans v. Schwob*[56] to set aside a sale to her of his one-eighth interest in community property of his deceased father on the ground of his incapacity at the time. He also attempted to stop the bank's foreclosure on this property. The lower court found his sale to his mother void but saved the right of the bank as a mortgage creditor. The supreme court found his act of sale at sixteen invalid but, since his marriage fully emancipated him when he reached eighteen, prescription had run against his right to ask for rescission and the mortgage on the land by his mother to the bank was enforceable.

Thirty pages of the Southern Reporter evidence the full and careful consideration of the problem in *Baton Rouge Building Trades Council v. T. L. James & Company, Incorporated.*[57] The result is a five to four decision in favor of the plaintiff labor union with injunctive relief against further maintenance of an open shop. Labor and management with the assistance of the State Commissioner of Labor, after many conferences, had signed a paper purporting to indicate the lines of operation. In consideration of management's accession to the stipulation the union was to call off an impending strike. Management contended that the paper was not a contract but agenda to be used as a basis of continued negotiations. The majority of the court decided after thorough review of the mass of evidence that the parties had contracted, that the contract was breached by management, that there was authority in the court for relief, and that the specific performance asked for should be granted. Articles 1926 through 1929 together with a list of Louisiana cases of application as well as decisions from other jurisdictions were cited for authority. The dissenting justices took the view that through misunderstanding the minds of the parties had never met and hence there was no contract to be enforced.

Barraque v. Neff[58] was a suit upon a building contract of which the following excerpt was the essence: "[the contractor] shall remedy any defects due to faulty materials or workmanship which appear within a period of one year from the date of completion of the contract." Defects did appear within the year be-

56. 203 La. 175, 13 So. (2d) 782 (1943).
57. 201 La. 749, 10 So. (2d) 606 (1942).
58. 202 La. 360, 11 So. (2d) 697 (1942).

cause of the use of "super-rock" which absorbs moisture in this climate, if not waterproofed. The question became one of "whether the mistake of using super-rock, in the way in which it was used" was "attributable to the contractor or to the plaintiff." No architect had been employed. The building inspector was responsible only to see that the specifications were carried out and not in an advisory capacity. It was proved that the contractor had made the plans and urged the use of super-rock and hence he was held liable. Cases where an architect or the owner himself had made the plans and specifications were distinguished. The liability was the amount proved by the owner to have been spent in having the house brick veneered and refinished, said to be the only practical and permanent method of water-proofing. The amount claimed for the less attractive appearance of the house was said to have been off-set by the fact that the claimants now had a brick veneered instead of a stucco house.

Aside from procedural points discussed elsewhere in this journal and several minor issues, the case of *Boxwell v. Department of Highways*[59] is concerned with a most interesting problem of recovery or non on certain items of over $500 not advertised and let in accordance with Act 73 of 1926 as amended by Act 20 of 1935, fourth extra session,[60] and hence—under the terms of the statute—null and void. The problem was whether recovery should be allowed on a quantum meruit basis as there was no fraud and actual delivery of the goods to the state's representatives was proved. Authority was cited for the proposition that no recovery at all should be allowed as such a circumvention would allow the very thing prohibited in the interest of the public to prevent favoritism—exhorbitance—waste, etc. The situation was not fraught with evil in itself however—not malum per se. The civil law is firm on the subject of unjust enrichment which would have inured to the state's benefit. The court, consequently, took an equitable view and awarded the vendors of the goods their costs value without profit—as status quo could not be achieved as the materials had been consumed or incorporated.

Furlow v. Westover Realty Company[61] deals with a digest of many facts bearing upon interpretation and effect of a certain contract because of which plaintiff was attempting to recover attorney fees from defendant company. The summary is well

59. 203 La. 760, 14 So. (2d) 627 (1943).
60. Dart's Stats. (1939) §§ 6730-6737.
61. 203 La. 731, 14 So. (2d) 618 (1943).

achieved by the brief syllabus repeated here. "Where attorney was not a party to defendant's agreement to pay fees owed by another to attorney and attorney was to benefit from the agreement only upon complete performance thereof by the other who did not perform, attorney was not entitled to recover from defendant on the agreement."[62]

Act 298 of 1938[63] was applied in *Louisiana Delta Farms Company v. Davis*[64] to permit plaintiffs to regain possession of their properties occupied by persons who had breached their contracts to buy. These were bond for deed contracts so the ten years prescription of Article 3544 applied in suits to set aside sales of real estate for the non-payment of the purchase price was not ruling. Not even interest payments had been met so it could not be said that occupants' payments exceeded "a fair rental value for the property" pleaded to void the forfeiture clause of the contract.

The case of *Moran v. Bechtel*[65] is concerned with a review of evidence resulting in the decision that certain property was not included in a tax sale alleged to have contained it but was a "separate and distinct piece of land" and further that actual physical possession to satisfy the thirty-year prescription plea had not been satisfactorily proved. Having found a dedication by map and purchase in reliance thereon the court stated that the fact that the property had not been put to actual use by public authorities did not invalidate the dedication and take title out of the public. Moreover, mere payment of taxes by a private party did not preclude the city from claiming land previously dedicated when needed for streets. As the city had not been a party to certain previous suits pleaded as a res adjudicata to the present controversy and the issues involved had not been the same, the res adjudicata plea was held not to have been well founded.

Bourgeois v. Bourgeois[66] records an attempt by one set of children against another to set aside certain sales made by their father to the defendants on the ground of fraud and simulation. The opinion is necessarily concerned with evaluation of facts as revealed by the evidence, resulting in partial success for plaintiffs and finding a bona fide sale with consideration in another sale. The matter of lesion was not raised by the pleadings so was

62. Ibid.
63. Dart's Stats. (1939) §§ 6606.1-6606.8.
64. 202 La. 445, 12 So. (2d) 213 (1942).
65. 202 La. 380, 12 So. (2d) 1 (1942).
66. 202 La. 578, 12 So. (2d) 278 (1943).

not passed upon by the court and inheritance tax matters and accounting of disposal of the movables of the deceased were properly left to be settled in succession proceedings.

Plaintiffs in *Goldberg v. Martin*[67] had advanced money to a third party to enable him to make the cash down payment in purchasing a restaurant from defendant which the latter rebought very soon thereafter, realizing a large profit through the two deals. Plaintiffs claimed that the Bulk Sales Act was not complied with when Martin bought back the restaurant, no notices having been sent to them, etc. The court held that the Bulk Sales Act did apply under its broad terms "the transfer in bulk . . . shall be void as against the creditors of the transferor, unless made in conformity with the provisions of this Act." Defendant was held "liable as receiver for the value of the property ($12,000) transferred by the act" and judgment was given against him for the amounts loaned by plaintiffs to the first purchaser and subsequent vendor to defendant.

I. Community Property

As expected, the case of *Succession of Wiener*[68] naturally elicited a strong opinion upholding the decision of the lower court denying the right of the state to tax the inheritance of a father's half of the community upon the valuation of the whole community including the half belonging to the surviving widow. The problem was approached from various angles, all denying with full authority the right to tax one person on a basis of the value of property of another and supporting the theory of the presently vested interest of the wife's share in the community, thought to have been settled for tax purposes by the leading case of *Bender v. Pfaff*[69] together with other decisions of the United States Supreme Court of equal importance. Attorney for the United States appeared as amicus curiae in this case as the United States Revenue Act of 1942 includes the whole community in the taxable estate of a decedent and was of course the root of the issue as the state tax collector's duty under statute instructs him to collect at least eighty per cent of the estate tax payable to the United States. Under present conditions, it would appear highly doubtful that the United States Supreme Court as presently constituted will take the same view of this question as repeatedly

67. 203 La. 70, 13 So. (2d) 465 (1943).
68. 203 La. 649, 14 So. (2d) 475 (1943).
69. 282 U. S. 127, 51 S.Ct. 64, 75 L.Ed. 252 (1930).

expressed by their predecessors and by the Supreme Court of Louisiana on many occasions hence the urgent need for immediate legislation to protect in part and as far as possible against a probable decision adverse to Louisiana community property tax interests. That the authors of the congressional act of 1942 would deliberately invite or virtually demand a review of previous United States Supreme Court decisions in this subject by writing in the section of the revenue bill in question would indicate that hopes of reversal were entertained. The tax in this succession to the state alone on this eighty per cent would amount to almost twice its amount if levied on the whole community rather than on the half actually owned under Louisiana law by the decedent. The citizens of the nine community property states naturally await with anxious interest the test of the federal statute by federal courts.

Ferguson v. Hayes' Heirs[70] raised the question of the constitutionality of Section 34 of Act 140 of 1932[71] which makes certain shares of stock bought in the name of a wife her separate property. The question reached the court on a rule brought against collateral heirs to show cause why seventeen shares of stock in the Crowley Building and Loan Association should not be declared community property. The court again ruled that the section of the Louisiana Constitution of 1921[72] requiring each law to have but one object and that the title of the act shall state that object does not mean that the title must be "a complete index to every section of the statute"[73] but that a general statement is sufficient. Furthermore, Section 34, in question, was mentioned in the title. The constitutional prohibition on passage of special laws and on changing the law of descent or succession was also raised and Act 34 of 1932 was of course said to be of general application to all married women. Since the ninety-day period provided in the statute for attack on any purchase of stock by a married woman had run and the act was constitutional on all counts, the stock in litigation was held to have been the separate property of the deceased wife.

In *Cupples v. Harris*,[74] the following description was held insufficient to identify the property in question. " 'Sec. 29 Township

70. 202 La. 810, 13 So. (2d) 223 (1943).
71. Dart's Stats. (1939) § 744.2.
72. La. Const. of 1921, Art. III, § 16.
73. 202 La. 810, 817, 13 So. (2d) 223, 225.
74. 202 La. 336, 11 So. (2d) 609 (1942).

Ten N R 3 East North of Red River Land District, said interest being One Half of said Eighty (80) acres of land... .' "[75]

Furthermore, the rule of *Ford v. Edenborn*[76] and *Brewer v. Hill*[77] was relied upon to decide that property entered during the community but certified by the government after dissolution of the community was the separate property of the surviving spouse.

In *First National Bank of Abbeville v. Broussard*,[78] defendant, during the existence of the community, became an accommodation endorser on three notes. After dissolution of the community by death of his wife he received the three notes in return for a new note secured by mortgage on the property of the community. The bank now seeks to execute this mortgage and satisfy the obligation and the wife's heirs intervene. It was held that the defendant was without right to bind the heirs of his wife by mortgaging their share of the community property. The heirs had accepted the succession of defendant's wife unconditionally but were not made parties to the suit on the note. Right to sue the heirs was reserved by the majority opinion. Justice McCaleb concurred in the result but objected to the following statement found in the majority opinion: "From the facts in this case, it is readily seen that Ursin B. Broussard has changed the liability on the community obligation, as it existed at the time of his wife's death, from that of an accommodation endorser of the three notes to a primary obligation on his part as maker of the mortgage note, which he has attempted to secure by a special mortgage on the community property, an undivided one-half interest of which is owned by the intervenors as the heirs of Marie Rosa Broussard... ."[79] Justice McCaleb pointed out that the original notes provided that makers and endorsers bound themselves in solido. Hence, the execution of the new note did not make the debt more onerous, as the community was primarily responsible already, nor was the giving of a new note for the old one a novation under *Studebaker Brothers Manufacturing Company v. Endom*.[80]

The court stated in *Normand v. Davis*[81] that they could not "intelligently" pass upon the plea of estoppel with the documents and evidence before them and remanded the case, referring the

75. 202 La. 336, 341, 11 So. (2d) 609, 610.
76. 142 La. 927, 77 So. 851 (1918).
77. 178 La. 533, 152 So. 75 (1933).
78. 202 La. 315, 11 So. (2d) 602 (1942).
79. 202 La. 315, 320, 11 So. (2d) 602, 603.
80. 51 La. Ann. 1263, 26 So. 90, 72 Am. St. Rep. 489 (1899).
81. 202 La. 565, 12 So. (2d) 273 (1942).

plea of estoppel to the merits. Therefore, comment also may well be deferred until a new presentation is available in the reports.

J. Particular Contracts

In *Pease v. Getti*,[82] plaintiff gave a first mortgage to the Federal Land Bank and a second mortgage to the Farm Loan Association of which he was a member and of which defendant was secretary and treasurer. Defendant instituted foreclosure proceedings and after appearance of advertisement but before the sale entered into an agreement with a third person whereby defendant was to receive $3,000 over and above the amounts of the two mortgages and the third person was to get the land at the sale. All of this took place according to arrangement. Plaintiff now demands the $3,000 and the judgment, affirming that of the lower court, awarded him an accounting for the $3,000 note, which defendant had received in payment by assignment from the third party. The court reiterated the established principle that "where there is an agreement to stifle competition at judicial sales and where one of the parties to the agreement is a party to the proceedings, the sale may be annulled by the injured party."[83] The fact that plaintiff was present at the sale and theoretically at least could have protected himself did not relieve defendant of the duty of informing plaintiff of the third party's intention to bid particularly since they were not dealing at arms' length due to defendant's official position in the organization of which plaintiff was a member and the organization's supposed purpose to assist its members in their difficulties.

"Only a question of law is involved" said the court in the case of *Southern Enterprises, Incorporated v. Foster*.[84] A chattel mortgage had been recorded in the Parish of Rapides, the mortgagor's domicile, but the question of whether another recordation was necessary to affect third persons was at issue. The mortgagee signed the documents involved in Ouachita Parish and one of the subscribing witnesses appeared before a notary in Ouachita and proved the signatures of both parties. The chattel mortgage holder as against the lessor took the position that "it was not necessary for the mortgagee to sign the chattel mortgage; that the mortgage was valid without his signature; that it was created when the act of mortgage was signed by the mortgagor in the

82. 202 La. 698, 12 So. (2d) 684 (1942).
83. 202 La. 698, 714, 12 So. (2d) 684, 690.
84. 203 La. 133, 13 So. (2d) 491 (1943).

Parish of Rapides where the mortgagor resided, and therefore that the recordation of the act in the Parish of Rapides was sufficient."[85] After discussing the jurisprudence making it clear that while the mortgagee does not have to sign the act of mortgage, he does have "to perform some affirmative act to indicate his acceptance." The lower court stated that affirmative acts were performed in the Parish of Ouachita and the mortgage was acknowledged before the notary in the Parish of Ouachita and hence under the law it had to be recorded in Ouachita in order to affect the lessor who was without actual notice. On the notice point the language of the opinion indicates that actual notice would bind the third person even in absence of recordation which seems at variance with the court of appeal view of the matter.[86]

Suit was brought to compel the recorder of mortgages to cancel the inscription on certain property. The court held in *Lacoste v. Hickey*[87] that the mortgage must be cancelled and no indemnity bond need be furnished to protect the recorder[88] as the following facts were sufficiently proved. These facts were "that the notes were given for a specific purpose; that their payment was anticipated as provided in the contract; that they were paid to the original holder who delivered them to the makers; that by their payment both notes and mortgage were extinguished; that the notes themselves were marked paid, and that they were actually destroyed by the makers."[89] Since the notes were destroyed by relators, necessitating the filing of this suit, costs were levied upon them.

Madison Lumber Company v. Helm[90] was "a suit by the furnisher of materials used in the repair and remodeling of a building to recover from the owner the value thereof, with recognition of the materialman's lien and privilege on the building and premises." Plaintiff insisted that the court had no power to review appellate decisions where only questions of fact were at issue and the chief justice dissented on that ground while the majority of the court took jurisdiction under the Constitution's words[91] "any case," while stating, however, that their custom was to refrain from so doing when questions of fact only were involved. The

85. 203 La. 133, 141, 13 So. (2d) 491, 493.
86. See Krivos v. Simmons, 134 So. 727 (La. App. 1931); Comment (1932) 7 Tulane L. Rev. 128.
87. 203 La. 794, 14 So.(2d) 639 (1943).
88. Art. 2279, La. Civil Code of 1870.
89. Lacoste v. Hickey, 203 La. 794, 801, 14 So. (2d) 639, 641 (1943).
90. 202 La. 1061, 13 So. (2d) 349 (1943).
91. La. Const. of 1921, Art. VII, § 11.

contractor had given the money paid him by the owner of the building to the materialman now attempting to collect from the owner, and the materialman had applied the sum to old debts of the contractor's instead of to the bill presently claimed. The court stated that while ordinarily the creditor may apply payment as he pleases if uninstructed by the debtor, he cannot do so if he knows that it would be in fraud of a third person. Futhermore, the court found that the debtor, contractor, had instructed the materialman to pay the account of materials furnished in this job whence he derived the funds rather than to the old debts. The lower court's judgment dismissing plaintiff's suit was affirmed.

Smith v. Bratsos (Allied Store Utilities Company, Intervenor)[92] recites another contest between a lessor and holder of chattel mortgage. The property in question was a refrigerator upon which the mortgage had been taken and recorded at time of purchase order and before the article was placed in the leased building. However, the serial numbers were inserted after the execution of the mortgage and were disregarded by the court in arriving at a decision on the question of proper description. The court referred to the case of *Union Building Corporation v. Burmeister*[93] and the excerpts cited therein from Jones on *Chattel Mortgages and Conditional Sales*[94] and held that the description without serial numbers was sufficient "with the aid of inquiries which it would suggest to identify the chattel." Oral evidence was admissible under the Jones comment to determine circumstances, etc. The fact that the lessee had violated a clause of the lease providing that no property upon which chattel mortgages were outstanding was to be placed on the leased premises was said to give cause for cancellation of the lease but not to affect the rights of the chattel mortgage holder.

The case seems to relax the strictness with which the courts have been applying the description clause in cases where the object has a serial number, as an automobile, for example. The chattel mortgage act being a graft upon the civil law has been very strictly interpreted and the common law rule of identification proved by outside evidence of circumstances, etc., has not been looked upon with favor in interpreting the "full description" clause of the Louisiana statute.[95]

92. 202 La. 493, 12 So. (2d) 245 (1942).
93. 186 La. 1027, 173 So. 752 (1937).
94. Jones, Chattel Mortgages and Conditional Sales (Bower's ed. 1933).
95. See Daggett, Louisiana Privileges and Chattel Mortgage (1942) 44 et seq.

K. Mineral Rights

Hunter Company v. McHugh[96] is concerned and at length with the question of constitutionality of the latest of conservation statutes, Act 157 of 1940,[97] which provides in addition to the usual well known regulations, for compulsory unitization for prevention of waste in the large sense including the idea of preservation of pressure to insure the possibility of maximum recovery. The principle of delegation of legislative powers to be exercised in conformity with a reasonably well defined pattern should be too well established and too deeply incorporated in our constitutional form of government to have deserved the time and space and copious review of authorities which the court was generous enough to give. The method, procedure, due process and scientific basis of the compulsory pooling act were rightly sustained, which is good news to those who looked with pride upon the progressive statute which had received much favorable comment from those who had an informed interest in modern large scale conservation of this so valuable resource. All of the justices were in accord in their approval of the statute, as seemingly would be any student of American constitutional law in its present stage of development. However, the justices were not in accord on the equally, if not more important, question of the use of this statutory weapon of conservation defense by the administrative authority. A clear and strong opinion on this question was written, which is very impressive, and which voices the idea that the statute was applied to an isolated situation and when there was no "necessity" for its invocation, since there was no waste in existence nor imminent as no new wells were planned nor could be drilled because of war scarcity of materials. Hence, in one justice's opinion the forcing of the complainant to pool and share returns at this time was arbitrary and an invalid administrative act. Complainant was held to be due reimbursement for his proper share of well cost, however, and on this point it might also be argued that simply because he happened to have been first to put his straw in the chocolate soda that he should not be permitted to draw all from the container because the war prevented his neighbor—joint owner of the underground pool—from being able to participate.

Certain agreements and amendments thereto were the sub-

96. 202 La. 97, 11 So. (2d) 495 (1942).
97. Dart's Stats. (Supp. 1941) §§ 4741.11-4741.31.

ject of interpretation and construction in *Niblett Farms, Incorporated v. Markley-Bankhead, Incorporated.*[98] The original agreements—geophysical and exploration contracts—granted options to make geophysical explorations, or rework an old well, or drill, or, if none of these things were done within three months, to pay $3,033.12. Later, other optionees were substituted for the first named party, the defendant. In deciding that the defendant owed nothing, the court said: "Clearly the defendant corporation's rights under the original contract were destroyed with the express consent of the plaintiff, and it follows necessarily that its obligations under that contract were likewise extinguished." An assignment was alleged but the court stated that the record did not disclose how the third party acquired the right to renew the contract and option to lease and hence no weight was given to this attempt to keep the defendant in the picture.

Plaintiff had purchased $6,735.96 worth of oil from defendant and so many lien and royalty claimants appeared for participation in this purchase money that plaintiff deposited the price in the registry of the court and instituted concursus proceedings in *Southport Petroleum Company of Delaware v. Fithian.*[99] The controversy resolved itself into the question of "whether or not Act 145 of 1934 gives a lien on the oil produced from the wells and the funds derived from its sale."[100] Having found that no lien was given by the 1934 act, the court went further and expressed the view that even under the amendment found in Act 100 of 1940[101] "it might be seriously questioned whether it was the intention of the Legislature to extend the lien to all the oil produced or to restrict it to the oil stored upon the leasehold."[102]

In *Realty Operators, Incorporated v. State Mineral Board,*[103] the mineral board was enjoined from leasing a body of fresh water known as Lake Hatch. After finding that the water was located within the area granted to plaintiff by patent, the court held that it did not matter whether the water was navigable or not, as the state had permitted the limit of six years after passage of Act 62 of 1912 to run and could not now attack the patent on any ground. Assuming that the lake was navigable in 1812 there was no restraint on the state's disposition of the bed of this

98. 202 La. 982, 13 So. (2d) 287 (1943).
99. 203 La. 49, 13 So. (2d) 382 (1943).
100. 203 La. 49, 52, 13 So. (2d) 382, 383.
101. Dart's Stats. (Supp. 1941) §§ 5101.1-5101.5.
102. 203 La. 49, 54, 13 So. (2d) 382, 384.
103. 202 La. 398, 12 So. (2d) 198 (1942).

fresh water lake unconnected with any arm of the sea until the adoption of the 1921 Constitution. The mineral board acting as the state's agent was obviously under the same restrictions as was the state.

State v. Erwin,[104] *Miami Corporation v. State*,[105] and *Amerada Petroleum Corporation v. State Mineral Board*[106] form one of the most interesting trilogies in our jurisprudence. *State v. Erwin* was concerned with submerged lands found in the so-called Calcasieu Lake, an expansion of Calcasieu River. The river entered and left the expansive body of water as a river and had a channel through the so-called lake. The court held that the body of water in question was a true lake to which Articles 509 and 510 of the Code dealing with accretion and dereliction of alluvion did not apply, as these articles mentioned rivers, streams, and running water but said nothing about *lakes*. Article 558 of the Code Napoleon dealing with lakes and ponds was discussed and the court observed that the failure to include this article with its companion articles—our 509 and 510—did not mean that the redactors of our Code intended the rules of 509 and 510 to be applied to *lakes* as the articles used the term rivers, streams, running water. Thus the submerged area of Grand "Lake" remained the property of private owners under a shore line boundary designation as of 1812, under the sea shore rule of Article 450, which incidentally also mentions "running water."

The *Miami Corporation* case was concerned again with submerged lands found in the so-called Grand *Lake*, an expansion of the Mermentau River. Again the river entered and left the expansive body of water as a river and had a channel through the so-called lake. The *Erwin* case was overruled and the submerged margin was held to belong to the state. The case was grounded on the public policy of necessity for obvious reasons of having the title to the bed of navigable water in the state. Justice O'Niell dissented strongly on the ground of inadvisability of changing a property rule so quickly and also on the ground that *State v. Erwin* was correctly decided under the Code. Justice Rogers, who had dissented in the *Erwin* case, again dissented mainly on need for stable rules of property. The new chapter, the *Amerada* case, was concerned not with submerged land but with *emerged* land on the shore of the arm of the so-called Grand

104. 173 La. 507, 138 So. 84 (1931).
105. 186 La. 784, 173 So. 315 (1936).
106. 203 La. 473, 14 So. (2d) 61 (1943).

Lake, an expansion of the Atchafalaya River. The river again entered and left the "lake" as a river and had a channel through it. The trial judge neatly avoided both the *Erwin* and the *Miami Corporation* cases as he was dealing with *emergence*—not submergence—and applied Article 509, dealing with accretion. It was conceded that if the body of water dealt with was a *lake* the article was not pertinent. After consulting the dictionaries and examining the natural facts the so-called Grand Lake was held *not* to be a lake in the legal sense but a stream as differentiated from a river because of the lack of well defined banks. The decision then is grounded on the finding that this arm of Grand Lake was a *river* or a "running stream, in the nature of a river" as stated by the chief justice in his concurring remarks, while adhering to his dissent in the *Miami Corporation* case. Under identical natural conditions, two expansions of rivers called lakes have been put in the legal *lake* class while one expansion of a river called a lake has been placed in the legal *river* class or "running stream in the nature of a river" class. Certainly the decision is highly satisfactory for, if the state under public policy or any other theory gains by submergence, private landowners should gain by emergence as a matter of fair play. We now have two classes—one of seashore and legal lakes—one of rivers and running streams in the nature of rivers. The matter of finding out which is which may continue to be difficult. "Running water" is not decisive as that term is included in the seashore article, 450, and so appears in both classes. Well defined banks are not requisite to a river if it has the other "in the nature of" characteristics. We have learned in previous cases that tides and salt do not necessarily make seashore. We may have learned that still water with no tides and no running flow is a lake. If we find no conditions like that, we may have only river and sea to deal with legally, which would be a relief. That the water was not still as indicated by the dictionary's version of *lake* was true in all three cases. In each situation the water was flowing or running but "running water" is included in the seashore article, which has been applied to *lakes* in previous decisions. The word stream indicated a lesser not a greater body than a *river*—according to Chief Justice O'Niell's discussion in his dissenting opinion in the *Miami Corporation* case. He says "the words which, in the Code Napoleon, are 'fleuve ou rivière,' are 'river or creek'; which, in article 509 of the Revised Civil Code, are changed to 'river or other stream.' That was an accurate translation, because the French word fleuve means large river; and the French word

rivière means 'stream' or a river of less magnitude than one which would be called fleuve." The chief justice continues with this statement: "What I have undertaken to demonstrate is that the care and discrimination with which the redactors and translators of these articles of the Codes selected their words leaves no doubt that they did not intend that the term 'river or other stream,' or 'running water,' should mean or include 'lake.' "[107] In connection with this last statement it should be recalled that the term "running water" appears in the seashore article which has been used to include lakes by some decisions.

The supreme court in the *Amerada* case after approving much of the trial judge's language states that "The trial judge was correct in holding that the body of water known as the arm of Grand Lake is a stream with running water. It may be that he did not go far enough in holding that, because it did not have well defined banks, it was not a river, although with this exception, it possesses all the characteristics of a river. In his holding, the trial judge overlooked the admission of the state, as contained in paragraph 6 of the agreed statement of facts, that the stream in question flowed between banks and its width between the banks at two separate and distinct points are given.

"The arm of Grand Lake is not and has never been stagnant, but has always consisted of running water. It is unmistakably a part of the Atchafalaya River by which its waters are solely supplied. It is not subject to the ebb and flow of the tide and through it the waters of the Atchafalaya River run to again form a distinct river at the Town of Patterson before reaching the gulf."

The matter of emergence and submergence, as caused by geological transitions and so urgently pleaded in the *Miami Corporation* case would seem to leave the issue of accretion and dereliction still to be answered, as the areas affected by these major disturbances seem usually to be much larger than just the portions covered by water and all to be rising or sinking at the same relative level so the shore lines could not be isolated for treatment in a *submerged* case at least and were not so isolated for determination in the *Miami Corporation* case even though the rate of erosionary action is said to be increased by the submerging process.

In *Deas v. Lane*,[108] the plaintiff was successful in having the

107. Miami Corp. v. State, 186 La. 784, 833, 173 So. 315, 331 (1936).
108. 202 La. 933, 13 So. (2d) 270 (1943).

defendant's one-quarter mineral interest declared extinguished by prescription of ten years non-user. The theory of defendant's pleas was new and interesting. Plaintiff sold land and reserved minerals and by acknowledgment these reservations took new life on August 16, 1920. Later plaintiff sold parts of his holdings to various persons, including defendant's donor, who bought in 1925. On September 5, 1930, plaintiff re-acquired the land and in 1933, in order to avoid a law suit and for other considerations, he confirmed title to certain fractional mineral holdings in several of the original purchasers. Defendant claimed that when plaintiff sold in 1925 the one-quarter interest in question, he warranted right to use it for ten years. The court cited Articles 2475, 2477, 2481, 2646, 2501, 2500, 2502, and declared that plaintiff had sold an incorporeal right, had *not* created a *new* servitude, had sold a right in existence at the time, and that no previous encumbrances or claims of third parties had defeated defendant's right but only his own failure to use it. The court said: "We know of no law, and we have not been referred to any, that obligates the seller of an incorporeal right to warrant that the right will not become lost subsequently by prescription. In fact, the vendor is not even precluded by his warranty from seeking to re-acquire by prescription the property he has sold."

The next plea of interest was that when the plaintiff, after re-acquiring the land, confirmed the holdings previously outstanding that he re-created for *all* previous holders as the servitude, being indivisible, could not be revived in part. The court stated that these contracts having been made after prescription had accrued were in reality conveyances of new rights to the parties to the contracts of whom defendant was of course not one. Suspension by minority was pleaded next but, since the father of the minor died after prescription had accrued, there was no merit in that attempt. The last defense—suspension because of obstacle to use—was tied in with the warranty idea discussed above so was also unsuccessful.

An interesting case grounded on *Fite v. Miller*[109] appears under title of *Fogle v. Feazel*[110] wherein suit was filed for damages—the amount which a well would have cost—for failure to drill a well on land not belonging to plaintiff, being part consideration for lease of plaintiff's land. The suit failed. It was dif-

109 192 La. 229, 187 So. 650 (1939).
110. 201 La. 899, 10 So. (2d) 695 (1942).

ferentiated by the court from *Fite v. Miller* on the ground that since plaintiff did not own the land, he could not have suffered a damage, even a loss of the prospect of enrichment. The court found further that the contract showed that the intention of the parties never contemplated any penalty for this breach other than nullification of the lease. There was no proof apparent leading to the idea that the stipulation had been made for another or that failure to answer the question of whether there was oil or not in the land of another had been detrimental to plaintiff in his own dealings or that such information was worth a real price to him for any reason. That being the case the well settled Louisiana rule on damages seems to have been followed. The fact per se that the land of another was to be drilled as consideration rather than land of the plaintiff might not have appeared, alone, to be a satisfactory mark of distinction from the *Fite v. Miller* doctrine, but under the evidence which disclosed *no damage,* the decision seems in line with the established rule.

The issues of the case of *Reed v. Feazel*[111] were identical with those of *Fogle v. Feazel* and were disposed of in like manner and without opinion.

The case of *Haas v. Cerami,*[112] characterized by the court as a "sequel of *Cerami v. Haas,*"[113] approved the holding in that case to the effect that the recordation of a letter, the offer, amounted to acceptance and that the letter and action formed a valid contract. The question was raised by the plea of res adjudicata. The court again refused to annul a sale of mineral rights on the ground of lesion as the value in unproven land is essentially speculative.

Plaintiff lost his suit for damages under a lease contract providing that oil wells should not be drilled within a certain number of feet of a residence in the case of *Morgan v. Echols*[114] because it was proved that plaintiff had given his consent to the location. Other alleged promises of defendant in regard to spot of location of tanks, etc., were shown to have been only conditional and facts of impracticability of adherence were in favor of defendant. Plaintiff *did* recover $1,009 for damages to his shrubs and trees under the specific terms—unmodified—of the lease. The amount was fixed by the testimony of an "expert horticulturist."

111. 201 La. 912, 10 So. (2d) 699 (1942).
112. 201 La. 612, 10 So. (2d) 61 (1942).
113. 195 La. 1048, 197 So. 752 (1940).
114. 201 La. 975, 10 So. (2d) 776 (1942).

Jackson v. Gulf Refining Company[115] is a mathematical analysis, no cases being cited except the two—*Succession of Tyson*[116] and *Jack v. United Gas Public Service*[117]—which furnished the factual situation out of which the present controversy arose. Plaintiff's claim for a one-twentieth interest in the land, including mineral rights, having been defended in the supreme court in a prior suit, is now brought against the defendants in that suit who failed to appeal from the adverse decision of the lower court, finally decided in favor of those defendants who *did* appeal. The court decided that the adverse final judgment against the plaintiff in the previous suit settled the matter and that the defendant in this case had no interest in appealing the previous case since the judgment was against their transferors, who would be held and the five per cent involved, had it been affirmed, was not enough to encroach upon the nine per cent interest of the present defendants since their transferors would still be left with plenty to satisfy the judgment without encroachment upon the holding of the present defendants. The present defendants had a right to the benefit of the reversal of judgment on appeal in any case as the first judgment was *not* an independent judgment against them.

The facts in *International Paper Company v. Louisiana Central Lumber Company*[118] were that defendant had sold mineral rights in 200,000 acres to the Louisiana Central Oil and Gas Company on May 25, 1926; that defendant had sold 10,000 acres of land to the Bastrop Pulp and Paper Company on May 25, 1926, but had reserved mineral rights; that the Bastrop Pulp and Paper Company had sold the land to plaintiff on December 9, 1927. The court decided that a landowner whose deed excludes mineral rights may not bring a jactitation suit against a party owning mineral rights under a recorded title and exercising those rights. "To order the defendant in this case to assert its claim to the mineral rights by way of a petitory action, or an action in revindication within a time to be fixed in the judgment, would compel the defendant to surrender its possession and to stop exercising the mineral rights, and to surrender to the plaintiff all of its producing oil wells—to the number exceeding 100 wells —which the defendant's lessees have drilled at an enormous cost."[119]

115. 201 La. 721, 10 So. (2d) 593 (1942).
116. 186 La. 516, 172 So. 772 (1937).
117. 196 La. 1, 198 So. 633 (1940).
118. 202 La. 621, 12 So. (2d) 659 (1943).
119. 202 La. 621, 634, 12 So. (2d) 659, 663.

The case of *Goree v. Sanders*[120] follows the doctrine of *Sample v. Whitaker*[121] in placing title of mineral rights in the good faith holder of land possessing for ten years—allowing no suspension of prescription in favor of a minor who inherited mineral rights after prescription had begun to run against his parent. The doctrine that if possession begins in good faith, it will not be adversely affected by subsequent knowledge was again followed as was the doctrine that recordation of an outstanding right will play no part in the "good faith" if the holder does not examine the record. Admission that there was an outstanding right was not acknowledgment sufficient to interrupt prescription as there was no intent to do so. Acceptance of benefits did not estop the acceptor from denying that there was express acknowledgment with intent to interrupt. All of these principles are familiar. The most interesting point was the matter of whether the possession of the land with its mineral rights intact had been continuous and undisturbed. The facts were that the plaintiff who had bought the land in the belief that no mineral rights were outstanding later learned of the existence of the servitude which was used and plaintiff participated in the benefits of production. Clearly his possession was disturbed during this period and prescription interrupted—both liberandi and acquirendi. However, the lease was finally abandoned and ten years had elapsed since abandonment. Certainly the second period was entered upon in bad faith, but the original purchase in good faith carried through for the acquirer as against those pleadings no liberation by virtue of suspension for a minor holder—despite the period of interruption of possession and the acceptance of benefits during production season.

Lum Chow v. Board of Commissioners for Lafourche Basin Levee District[122] reiterates the well established principle that "where one sells the property of another and later acquires title to the property, the title thus acquired inures to the benefit of his vendee." The same thing is true if an imperfect title is transferred which later is made whole.

The case of *McDonald v. Richard*[123] is perhaps the most interesting of the group of the period assembled here. The facts were that on June 25, 1929, the Morely Cypress Company sold to Dr. J. A. Richard an undivided half interest in 640 acres of land

120. 203 La. 859, 14 So. (2d) 744 (1943).
121. 171 La. 949, 132 So. 511 (1930).
122. 203 La. 268, 13 So. (2d) 857 (1943).
123. 203 La. 155, 13 So. (2d) 712 (1943).

and reserved all of the mineral rights in the land. During the life of the Morely Cypress Company's servitude Dr. Richard made three separate sales of mineral rights. Later, but within the ten year period, Dr. Richard sold his undivided interest in the land and plaintiff herein finally acquired a one-quarter undivided interest in the land and had title when the Morely Cypress Company's mineral servitude expired for non-user. Plaintiff's suit is to assert ownership in one-quarter of the minerals as against Dr. Richard's mineral rights vendees. He was successful in his claim as the court maintained that Dr. Richard had simply sold something that he did not own, which was the situation apparently under the doctrine of *White v. Hodges.*[124] The opinion by Chief Justice O'Niell discusses the reversionary interest cases at length and makes very clear the proposition that the public policy and law of servitude is not to be evaded by the sale of a "series of mineral rights," with the stipulation or understanding that each servitude thus imposed upon the land would take effect only when and if the previously imposed servitude or servitudes should become extinguished by the liberative prescription of ten years."[125] While this case is not decided on the issue of a reversionary interest, as it was *not* so considered, the opinion nevertheless uses such strong language in the discussion that it can hardly be doubtful that if and when a reversionary interest *is* sold or reserved that prescription will begin to run on the date of sale and *not* upon the date of reversion. *Gailey v. McFarlain*[126] was again honored wherein it was indicated that such an interest does exist and may be sold though it was not conveyed by the seller in that case. Apparently then the court continues to recognize the theory of reversionary interest and the interest as a valuable right which may be dealt with, but judging from all the cases it had best be labelled or may fall into another category as of a thing sold while not owned. Suppose Dr. Richard had labelled the subject matter of his sale *reversionary interest in minerals* rather than mineral rights, which he did not have in 1936 but expected to have in 1939. Presumably this mineral interest would then have vested in these vendees in 1939 and their right to use them would have continued until 1946 regardless of who owned the land unless the theory of reversionary interests is to be cast out entirely in favor of the principles applying to sale of a thing not owned.

124. 201 La. 1, 9 So. (2d) 433 (1942).
125. McDonald v. Richard, 203 La. 155, 164, 13 So. (2d) 712, 715 (1943).
126. 194 La. 150, 193 So. 570 (1940).

Sabatier v. Canal Oil Company, Incorporated,[127] is a suit to cancel a mineral lease. Failure to properly develop the property and failure of adequate consideration because of small production were alleged. In the alternative it was pleaded that the lease was void because of a potestative condition and authorization for perpetual holding. The facts were that the lessee had drilled nine wells in six years, including offset wells to prevent drainage from an adjoining field and those findings disposed of the primary pleas under well established jurisprudence as well as practical business. The jurisprudence is also well established that whether the condition was potestative or not—and the court did not here decide—the execution of the terms of the contract cure the original defect. The fact that the lease in question had no specific primary term was cared for by the definite requirements for drilling successive wells within stated periods on penalty of forfeiture. The trial judge had set a primary term which was properly declared error. The parallel of timber cases was not exact, because of the impossibility of estimating underground oil stores or setting a reasonable time for their removal.

Gennuso v. Magnolia Petroleum Company[128] recites another attempted cancellation of an oil lease for failure to develop the property with "reasonable diligence." The facts disclosed that the maximum production allowed by the order of the Louisiana Conservation Commission had been taken consistently and that the producer had expended over seventy thousand dollars on the lease, which had yielded nearly $86,000 worth of oil of which over $10,000 worth had been received by the rent royalty owners. Furthermore, on authority of a well-trained geologist, the drilling of more shallow wells or of deep wells would have been bad judgment in the face of the scientific information at hand. The court's decision was obviously against cancellation.

II. TORTS

Venue of suits for trespass against realty, in contrast to the concept of actions in tort as "transitory actions," is an interesting high light of recent tort decisions by our supreme court.

We note for discussion several slander of title cases which apparently may be held to be suits in jactitation of title without necessarily being petitory actions.

127. 202 La. 639, 12 So. (2d) 665 (1942).
128. 203 La. 559, 14 So. (2d) 445 (1943).

Abatement of nuisances is involved in the interpretation in one case of a traffic ordinance and in another case of the procedure for obtaining temporary restraining orders from the court.

Among automobile damage suits, the supreme court has broadened the basis of recovery by decreeing a limitation on the doctrine of contributory negligence, but it has also affirmed that negligence is never presumed merely from the happening of an accident.

Of interest to laymen, and to newspaper publishers, in particular, are two cases setting up a severe limitation of the doctrine of qualified privilege, respecting fair comment and criticism of public officials and men in public life. Our court will not only require that statements disclose true facts, but the burden of proving their truth is on the defendant.

Actions by the state against a former sheriff and his surety for alleged shortages in the sheriff's salary fund are not barred by two year prescription in favor of the sheriff.

Venue of Action for Trespass Against Realty

The suit of a drainage district against the city of New Orleans alleging a trespass by the municipality upon the district's realty and real servitudes, though the alleged acts were ultra vires, was properly brought in the district court of the parish where the property was situated.[1] The municipality's contention that this was a suit to recover compensation for appropriation of realty and real servitudes and that it should be brought in the parish where the municipality was located and domiciled was overruled by the court. The court cited with approval the case of *Brown v. Louisiana & Northwest Railroad Company*,[2] from which case the court quoted: "in all matters relating to real servitude, the judge of the place where the property is situated has cognizance of the case. Code of Practice, Art. 165, Par. 8."

Tort—A Transitory Action

A married woman domiciled in Texas who was injured in an automobile accident in Louisiana can maintain an action for damages in Louisiana in her own right, notwithstanding that in

1. Fourth Jefferson Drainage Dist. v. New Orleans, 203 La. 670, 14 So. (2d) 482 (1943).
2. 118 La. 87, 42 So. 656 (1906).

Texas her right of action was community property and recoverable only by her husband.[3]

In tort cases, our supreme court has resolved the conflict of laws question by holding that the law of the place where the wrong was committed is paramount. The law of the domicil will be recognized only in exceptional circumstances for reasons of comity and where the law of the domicil is not inimical to public policy of the forum.

Articles 2334 and 2402 of the Revised Civil Code of Louisiana, giving a married woman right to claim damages for her personal injuries as her separate property and in her own name, are not exclusively for the benefit of women domiciled in Louisiana.

Slander of Title

In the first reported case the defendants continued prospecting for oil and gas on the land involved at intervals of six months or less from 1929 until large production was obtained in 1940. Plaintiff had had undisputed possession of the timber and surface rights during the same period but had made no attempt to take possession of, or to exercise control over, the right to prospect for oil, gas, or other minerals. The court held that suit in jactitation is not necessarily a petitory action but rather an action to establish right of possession instead of an absolute title. Therefore, as the plaintiff had elected to limit its suit to a jactitation suit and declined to put at issue the title to mineral rights in the land, the judgment of dismissal was affirmed.[4]

In another case the defendants, acting in legal bad faith in cutting and removing timber from plaintiff's property, were held liable in damages for the full manufactured value of the timber, less the cost of manufacture only.[5]

Tax sales in face of continued possession by a tax debtor for forty-five years after tax sale are invalid. Therefore, an action of jactitation of title in the name of the tax debtor still in possession was successfully maintained against defendant's claim of tax title.[6]

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3. Matney v. Blue Ribbon, Inc., 202 La. 505, 12 So. (2d) 253 (1942).

4. International Paper Co. v. Louisiana Central Lumber Co., 202 La. 621, 12 So. (2d) 659 (1943).

5. Brunning v. R. W. Hillcoat Co., Lester v. Same, 203 La. 279, 13 So. (2d) 861 (1943), citing St. Paul v. Louisiana Cypress Lumber Co., Ltd., 116 La. 585, 40 So. 906 (1906); State v. F. B. Williams Cypress Co., Ltd., 131 La. 62, 58 So. 1033 (1912); Hickman v. Hill, Harris & Co., 168 La. 881, 123 So. 606 (1929).

6. Schwing Lumber and Shingle Co., Inc. v. Board of Com'rs for Atchafalaya Basin Levee Dist., 202 La. 477, 12 So. (2d) 235 (1943), citing South Lou-

It is interesting that the court points out again, as it did in a former case, that " 'no matter in whose name the property has been assessed, the owner of record at the time of the advertisement and sale for taxes is to be regarded as the delinquent tax debtor within the meaning of the constitutional provision requiring notice to be given to the delinquent before making the sale, and where notice of delinquency was not given to the record owner, the tax sale is void.' "[7]

In one other case,[8] the supreme court has reiterated that a suit purporting to be for libel and slander of plaintiff's title to real estate may be a suit in jactitation to protect possession rather than a strict possessory action.

Abatement of Nuisances

A trial court in the city of New Orleans had granted a preliminary injunction in a suit by adjacent property owners, prohibiting the operation of a restaurant with parking space provided on adjoining vacant lots. The right to injunctive relief was based upon the terms of a municipal ordinance which forbids the opening or maintaining of a driveway across a sidewalk within one hundred fifty feet of the nearest property line of the intersection of any two avenues having double roadways and neutral grounds and being protected by a traffic light or traffic officer, where such driveways serve establishments dispensing liquid or solid refreshments to customers in drive-in vehicles for such purpose.[9] The supreme court ordered the preliminary injunction dissolved and the suit dismissed, holding that the plaintiff (the neighboring property owner) had no cause of action under the cited ordinance for the reason that the ordinance governing such driveways was a traffic ordinance and not a zoning ordinance. The court called attention to the wording in the title and in the text of the ordinance in which its purpose is declared to be to relieve traffic congestion, to reduce the number of traffic accidents, and to promote the public welfare. The court also found from the

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isiana Land Co. v. Norgress, 120 La. 168, 45 So. 49 (1907); Millver v. Albert Hanson Lumber Co., 130 La. 662, 58 So. 502 (1912); Dupuy v. Joly, 197 La. 19, 200 So. 806 (1941); Kees v. Louisiana Central Lumber Co., 183 La. 111, 162 So. 817 (1935); Baldwin v. Arkansas-Louisiana Pipe Line Co., 185 La. 1051, 171 So. 442 (1936).

7. Martin v. Serice, 200 La. 556, 560, 8 So. (2d) 538, 539 (1942).

8. Realty Operators, Inc. v. State Mineral Board, 202 La. 398, 12 So. (2d) 198 (1942).

9. State ex rel. Szodomka v. Gruber, 201 La. 1068, 10 So. (2d) 899 (1942).

record that the defendant's business as conducted was not of itself a public nuisance.[10]

The court further discouraged suits to regulate the use of private property by dismissing the suit of certain citizens to abate a gambling nuisance.[11] In this case the plaintiff was unsuccessful in obtaining a temporary restraining order from the trial court and his petition for writs was denied because of his failure to file his suit formally in the clerk's office before presenting it to the judge for his action as required by statute.[12]

Contributory Negligence—Error in Extremis

The defense of defendant truck driver and of his insurer was the contributory negligence of the driver of the plaintiff's Greyhound passenger bus. It had been conceded that, in the emergency caused by the defendant suddenly cutting out of his traffic lane head-on in front of the plaintiff's driver, the plaintiff bus driver had suddenly driven abruptly off the paved right-of-way to the far side of the wide unpaved embankment. The resulting collision would have been averted, according to the defendant's theory, if the bus driver had merely applied his brakes and remained on the pavement in his own line of traffic.

The court denied the plea and concluded that a motorist who, by the negligence of another, is suddenly placed in an emergency and compelled to act instantly to avoid injury, is not guilty of negligence if he makes such choice as a person of ordinary prudence placed in the same position might make. This is true even though he does not make the wisest choice and one that would be required in exercise of ordinary care but for the emergency.[13]

The court also sustained the general rule that a driver has the right to presume that drivers of vehicles approaching from the opposite direction will obey the law of the road and will remain on their proper side of the highway.

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10. The court distinguished the *Szodomka* case above from the cases of City of New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798, 40 A.L.R. 1136 (1924) and State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929). The doctrine of those decisions is not applicable to a traffic ordinance, enacted only for the protection of the public generally, and not for the special benefit of the property owners or residents in a defined area.

11. Christina v. O'Dwyer, 203 La. 103, 13 So. (2d) 481 (1943).

12. The custom of presenting petition for temporary injunction to the judge prior to filing petition could not prevail over positive law requiring such petition to be filed before being acted on by the court. La. Act 192 of 1920, § 5 (1), (10) as amended by La. Act 120 of 1940 [Dart's Crim. Stats. (1943) §§ 1026, 1033].

13. La. Act 21 of 1932, § 3, rule 7(c).

Res Ipsa Loquitur

In the case of a fatal fall from a moving ambulance, the court held that, where the happening of an accident with its attendant circumstances may justify the inference of negligence, it is fundamental that negligence is never presumed from the happening of an accident.[14] The accident must be one which ordinarily could not happen except through defects in the car, or fault in operation, or both.

The instant case was predicated on the theory that the door of the ambulance in which plaintiff was riding, or its lock, was defective and that the door swung open because of such defects or because of negligent operation of the car. The court found that the accident happened at a place where the road was smooth and straight and while the ambulance was being driven at a speed that was not excessive. There was nothing wrong with the door of the ambulance or its lock and the ambulance was not driven in such a way as to cause the door to swing open. The door could not open except by some person turning its handle. The factual situation set forth in this case was such as to render the doctrine of res ipsa loquitur inapplicable.

It is the duty of the plaintiff to prove negligence affirmatively, and it is only where the circumstances leave no room for a different presumption that the rule of res ipsa loquitur applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked.[15]

Privilege of Publication of Defamatory Matter

Two cases decided by the court during the past term are perhaps the most important in recent years on the subject of qualified privilege enjoyed by the press respecting comment on and criticism of public officers and men in public life.

In one case, suit was brought by a member of a levee board against the Plaquemines Gazette for damages resulting from the publication of a newspaper article containing statements of fact which were alleged by the plaintiff to be false. It was held that the trial court erred in maintaining the defendant's objection of no right or cause of action.

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14. Morales v. Employers Liability Assur. Corp., 202 La. 755, 12 So.(2d) 804 (1943).

15. Citing Quass v. Milwaukee Gaslight Co., 168 Wis. 575, 170 N.W. 942 (1919); Klein v. Beeten, 169 Wis. 385, 172 N.W. 736, 5 A.L.R. 1237 (1919).

Judge McCaleb, speaking for the court, says:

"It is clear to us that the article complained of by the plaintiff defames his character for it declares, in no uncertain language, that he was derelict in his duty by deserting his post in an hour of peril. Charges that a public officer neglected to perform duties incumbent upon him are actionable and, if they are false, malice will be presumed. . . .

"While it is firmly established that the conduct of persons in public life is open to fair criticism and comment, this privilege does not extend to charges of misconduct or neglect of duty which are alleged to be false. In 110 A.L.R. 412, the majority rule respecting false criticism of the acts of public officers is stated thus:

" 'In the majority of jurisdictions the rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, does not apply to a false statement of fact. In these jurisdictions, a defamatory statement of fact concerning one in public life, or who is a candidate for office, if false, is as actionable as would be such a statement concerning one in private life.'

"Louisiana is one of the States which adhere to the majority rule."[16]

In the second case,[17] the court also found that the privilege does not extend to the publication of false statements of fact concerning public officers. The right accorded extends only to fair comment and not to falsity in the assertion of facts.

In The Law of Journalism, by R. W. Jones, it is stated:

"Anything of public interest and importance may be fairly commented on and fairly criticized. The comment and

16. Cadro v. Plaquemines Gazette, Inc., 202 La. 1, 6, 11 So.(2d) 10, 11 (1942). See Levert v. Daily States Pub. Co., 123 La. 594, 49 So. 206, 23 L.R.A. (N.S.) 726, 131 Am. St. Rep. 356 (1909); Smith v. Lyons, 142 La. 975, 77 So. 896, L.R.A. 1918E (1917); Otero v. Ewing, 162 La. 453, 110 So. 648, 56 A.L.R. 249 (1926); Otero v. Ewing, 165 La. 398, 115 So. 633 (1927).

17. Martin v. Markley, 202 La. 291, 11 So.(2d) 593 (1942). In the words of the court, "the comment made by the defendant, that the acts of the plaintiffs in connection with the killing of Nace Harris are 'a blot on law and justice', is fully justified provided that the facts upon which the conclusion is founded are true. But since the facts stated in defendant's letter, that, as an eye witness to the tragedy, she saw the fatal shot fired while Nace Harris was in a helpless state and had assumed an attitude of surrender, are defamatory per se, the burden rested upon her to prove to the satisfaction of the court the truth of these facts in order for her to claim the asserted privilege of fair comment." (202 La. at 303, 11 So.(2d) at 597.)

> criticism may be adverse, but must be fair. In order to be fair the facts involved must warrant the comment or criticism made, and so truth is involved in the defense."[18]

While the court held that it would be justified in affirming the judgment of the trial court in plaintiff's favor, it actually remanded the case to give the defendent opportunity to show the truth of the statements contained in her letter in view of the fact that defense counsel had sincerely, though erroneously, believed that the burden was upon the plaintiff to show the falsity of statements of fact in the letter.[19] It is interesting to notice that Chief Justice O'Niell dissented, being of the opinion that defendant's plea of vagueness was well founded and that she was entitled to know what part of her narrative was claimed to be untrue by plaintiff.

Action Against Sheriff

It may not be surprising, but it is interesting to find that the state of Louisiana is without authority to institute suit on a cause of action belonging to a political subdivision that possesses the right to sue for its own account.

However, allegations of liability in a suit[20] in the name of a state against a former sheriff and his surety for alleged shortages or mishandling of funds in the sheriff's salary fund will be maintained to the extent of the state's interest, such interest being fixed by statute. It was not necessary to state this interest with particularity since the statute fixing this interest will be read into the petition.[21] The two-year prescription in favor of a sheriff was held to be no bar to such a suit which alleged "malfeasance."

Such a suit could not be brought by the state through its Crime Commission because the statute creating that agency is unconstitutional. It is held that the statute authorizing suit in behalf

18. Jones, The Law of Journalism (1940) 99.

19. In 36 C.J., Verbo Libel & Slander (1924) 1283, § 289, in discussing the question of false statements of fact with reference to privileged communications it is declared: "But there is a distinction between an ordinary privileged communication and the so-called privilege of fair comment or criticism. What the interest of private citizens in public matters requires is freedom of discussion rather than of statement. What is privileged, if that is the proper term, is the criticism of comment, not the statement of facts on which it is based. Generally speaking, comment or criticism must be founded on truth. While ordinarily it does not consist of the assertion of facts, an allegation of fact may be justified by its being an inference from other facts truly stated. The right to comment or criticize does not extend to, or justify, allegations of fact of defamatory character."

20. State ex rel. Jones v. Doucet, 203 La. 743, 14 So.(2d) 622 (1943).

21. La. Act 156 of 1920, § 5 [Dart's Stats. (1939) § 7509].

of the state by the attorney general, or district attorney, in the name of the governor, authorizes action in the name of the state on relation of the governor.[22]

III. CRIMINAL LAW AND PROCEDURE

A. Criminal Law

One of the primary purposes of the 1942 Louisiana Criminal Code[1] was to simplify the criminal law by eliminating many of those technical distinctions which Louisiana had inherited from the common law.[2] A number of the 1942-1943 supreme court decisions, dealing with crimes committed before the enactment of the new Criminal Code, illustrate the need for such simplification. In summarizing those decisions, the writer will indicate how the particular case would fit into our new law of crimes, and also how far the opinions are indicative of future judicial interpretation of pertinent articles of the 1942 Criminal Code.

Theft—Embezzlement, Larceny, or Obtaining by False Pretenses?

In *State v. Doucet*[3] and *State v. Savoy*[4] the defendants, sheriff and parish assessor, respectively, were charged with the embezzlement of money from their salary funds. These funds had been deposited with the parish treasurer, subject to expenditure upon orders from defendants. Defense counsel demurred to the indictments, urging that the salary funds in question were not entrusted to the possession of the defendants and that the misappropriation could not, therefore, constitute the crime of embezzlement as charged. The district court and three of the supreme court justices subscribed to this view. Mr. Justice Higgins, one of the three dissenters, indicated that the charge should have been either larceny or obtaining property by false pretenses.[5] The majority opinion, upholding the sufficiency of the indictments, was predicated on the view that the defendants

22. La. Rev. Stats. of 1870, § 3539 [Dart's Stats. (1939) § 7466].

1. La. Act 43 of 1942 [Dart's Code of Crim. Law and Proc. (1943) §§ 740.1—740.144].

2. Section 33 of the Louisiana Crimes Act of 1805 specifically adopted common law definitions for the crimes denounced therein. Subsequently, additional statutory crimes were superimposed in hit-or-miss fashion, and this did not tend to clarify the picture.

3. 204 La. 79, 14 So. (2d) 917 (1943).

4. 204 La. 99, 14 So. (2d) 924 (1943).

5. State v. Doucet, 204 La. 79, 14 So. (2d) 917, 920 (1943).

should be considered as being in legal possession of the money in their respective salary funds. Thus, the misappropriation would constitute embezzlement.

The 1942 Criminal Code eliminates the necessity of such hair-line decisions by merging these formerly separate, though substantially identical, offenses in the single crime of *theft.*[6] This crime covers any case where an offender takes, misappropriates, or obtains by false pretenses—the common element being the fact that he has deprived the lawful owner of his property.

Theft—Embezzlement of Public Funds

The two cases of *State v. Manouvrier*[7] furnish another illustration of the technical difficulties inherent in the former embezzlement laws. Manouvrier, St. Landry Parish Treasurer, had been indicted for public embezzlement.[8] He had misappropriated part of a sum of money withdrawn from the general parish account for use in paying convention expenses of members of the policy jury. The first ground urged in support of a motion to quash the indictment was that it failed to show how much of the money alleged to have been embezzled came from state taxing bodies and how much came from parish funds. Defense counsel alleged that embezzlement of state funds and embezzlement of parish and local funds were separate and distinct offenses, since the latter had been specially designated under a separate section of the revised statutes. The supreme court overruled this contention, taking the view that the special provision in the Revised Statutes of 1870 concerning the embezzlement of parish funds did not create a separate offense, but merely enlarged the crime of public embezzlement so as to include misappropriations by parish and municipal officials.

An even more difficult question was raised by defense counsel's second argument that the offense charged was not public embezzlement since the money misappropriated had become the private property of the police jurors as a donation for convention expenses. If this were true the crime would be embezzlement of private funds[9] rather than public embezzlement as

6. La. Crim. Code, Art. 67.

7. 203 La. 541, 14 So. (2d) 439 (1943); and 203 La. 556, 14 So. (2d) 444 (1943).

8. The indictment was brought under Section 903 (embezzlement of public money) and Section 904 (embezzlement of parish or city funds) of the La. Rev. Stats. of 1870 [Dart's Crim. Stats. (1932) §§ 912-913].

9. La. Act 165 of 1918, § 1 [Dart's Crim. Stats. (1932) § 914].

charged. The supreme court took the view that this defense did not go to the sufficiency of the indictment, but presented a question of fact which should be decided at the trial of the case. On the face of the indictment, the funds were public money at the time of the misappropriation.

The crime of *theft*, as defined in Article 67 of the 1942 Louisiana Criminal Code, comprehends all misappropriations, whether by public officials or by private fiduciaries.[10] Thus the much litigated distinction between "public" and "private" embezzlement[11] is eliminated.

Theft—Necessity of Asportation

It is a generally accepted requirement of the common law crime of larceny that there must be some asportation or carrying away of the object stolen. The requirement has always been very liberally applied. Thus, the mere upending of a bale of linen with intent to steal the same[12] and pulling a package from the front to the rear of a wagon with intent to steal it[13] have been deemed sufficient to meet the asportation requirement. There has been considerable conflict as to whether the asportation must be by the thief himself or may be accomplished through the act of an innocent third party. This question had never been decided in Louisiana until the recent case of *State v. Laborde*.[14] In that case defendant was charged with larceny of a heifer. He had twice sold the heifer which belonged to another and was grazing on a free range. The second purchaser, in good faith, and unaccompanied by the defendant, carried the heifer away. The Louisiana court held that the defendant could not be found guilty of cattle stealing[15] because there had been no asportation of the heifer by him. The instant decision is a fine practical illustration of the unsoundness of the view adopted. The mere fact that the purchaser, rather than the defendant, hauled the heifer away should not preclude defendant's criminal liability.

10. The term "anything of value," used in describing the offense, is defined in La. Crim. Code, Art. 2, to include, "any conceivable thing of the slightest value . . . public or private."

11. See State v. Palmer, 32 La. Ann. 565 (1880); State v. O'Kean, 35 La. Ann. 901, 903 (1883); State v. Smith, 47 La. Ann. 432, 435, 16 So. 938, 940 (1895); State v. Stringer, 162 La. 925, 928, 111 So. 330, 331 (1927).

12. Cherry's case, 1 Leach C.L. (4 ed.) 236 note (1781).

13. Rex v. Coslet, 1 Leach C.C. 236 (1782).

14. 202 La. 59, 11 So. (2d) 404 (1942), noted in (1943) 5 LOUISIANA LAW REVIEW 323, 324: See footnotes 14-19 for other cases involving asportation by means of an innocent agent.

15. La. Act 64 of 1910 [Dart's Crim. Stats. (1932) § 1057].

His action in selling the heifer was clearly unlawful, and the owner was deprived of his animal just as effectively as if defendant had himself seized it on the range and made delivery to the innocent purchaser.

Mr. Justice Higgins' opinion emphasized the fact that common law larceny requires both a taking and an asportation of the stolen property, and distinguished a Texas statute[16] where the words "carry away" were not included in the definition of theft. Giving full effect to the probable implications of this distinction, it is suggested that the offender would have been guilty of "Theft" if his crime had been committed subsequent to the enactment of the 1942 Criminal Code. The theft article[17] merely requires "the *misappropriation or taking* of anything of value which belongs to another." (Italics supplied.) While elimination of the asportation element was not specifically intended by the draftsmen of the theft article,[18] it is a logical construction of the phraseology employed, and achieves a very desirable result.

Theft—Penalty

The defendant in *State v. Gable*[19] had been convicted of stealing property of the value of thirty-five dollars. The offense was committed in November, 1941, but had not been tried until after the effective date of the 1942 Louisiana Criminal Code. The court properly held that the old larceny statute was applicable[20] and, that since it provided for imprisonment "with or without hard labor," the offense had been properly tried by a jury of five. The opinion stated by way of dictum that, even assuming the applicability of Article 67 of the Louisiana Criminal Code, the offense was still a felony triable by a five man jury. The defendant had argued that since Article 67 provided that theft in the amount of between twenty and one hundred dollars was punishable either by a fine, or by imprisonment with or without hard labor, or both, that the offense had been reduced to a misdemeanor and should be tried by a judge. Mr. Justice Hamiter pointed out that the test of a felony, as set out in Article 2 of the Louisiana Criminal Code, is whether the offender *may be* sen-

16. Art. 77, Texas Penal Code of 1895, interpreted in Hartman v. State, 85 Tex. Crim. Rep. 582, 213 S.W. 936 (1919).

17. La. Crim. Code, Art. 67.

18. See Comment to Art. 67 of La. Crim. Code, p. 72 [Dart's Code of Crim. Law and Proc. (1943) Arts. 740-767, at 512].

19. 202 La. 770, 12 So.(2d) 809 (1943).

20. La. Act 107 of 1902, § 5 (repealed upon the enactment of the 1942 Criminal Code).

tenced to imprisonment at hard labor. The possible punishment by a fine did not preclude the sentence of imprisonment at hard labor, but was merely an alternative method of punishment.

Contributing to Delinquency of Minors

In *State v. Scallan*,[21] a parent had been convicted of contributing to the delinquency of his thirteen year old daughter by allowing her to go to a night club where drinking, fighting and debauchery were common. He appealed, urging that the child had not been adjudged delinquent, nor was there any substantial proof of actual delinqency. In sustaining the conviction, the supreme court emphasized the language of the statute which defined the crime so as to include any parent who should permit his minor child "to enter any place where the morals of such child may be corrupted, endangered or depraved, or may likely be impaired."[22] Actual corruption or impairment of the child's morals, so as to cause him (or her) to become delinquent, was not an essential element of the offense. It may be anticipated that this same logical construction will be applied to Article 92 of the Louisiana Criminal Code. The offender in the principal case would be found guilty of contributing to the delinquency of juveniles under clauses (2) and (3) of that article.[23]

Public Bribery

State v. Sheffield[24] presented a question as to the interpretation of the word "officer" in the public bribery statute.[25] It was argued that a policeman of the city of Shreveport was not a municipal officer, but was merely an employee of the city. In holding that a policeman was "an officer," and within the intendment of the public bribery statute, the supreme court relied upon the specific language of the legislative act which gave the city council the power to appoint the police force with "as many

21. 201 La. 1026, 10 So. (2d) 885 (1942), noted in (1943) 5 LOUISIANA LAW REVIEW 332.

22. La. Act 139 of 1916 [Dart's Crim. Stats. (1932) § 929].

23. "Art. 92. *Contributing to the Delinquency of Juveniles* is the intentional enticing, aiding, or permitting, by anyone over the age of seventeen, of any child under the age of seventeen to: (1) . . .

"(2) Associate with any vicious or disreputable persons, or frequent places where the same may be found; or

"(3) Visit any place where spirituous or intoxicating liquors are the principal commodity sold or given away; or . . . ."

24. 201 La. 1055, 10 So. (2d) 894 (1942), noted in (1943) 5 LOUISIANA LAW REVIEW 327.

25. La. Act 59 of 1878, as amended by La. Act 162 of 1920 [Dart's Crim. Stats. (1932) § 795].

officers as may be necessary."[26] The instant decision was a nice illustration of the sort of borderline cases which sometimes make the distinction between a public "officer" and an "employee" a difficult one to draw.[27] The Louisiana Criminal Code, in common with many modern statutes,[28] has found a solution to this problem by enlarging the scope of the crime of public bribery[29] so as to include both public "officers" and "employees."

B. Criminal Procedure

Venue

State v. International Paper Company[1] was a prosecution for polluting waters and killing fish in a bayou forming the boundary between Bossier and Webster Parishes. The defendant operated a paper mill in Webster Parish from which poisonous chemicals were discharged. These waste materials were run into a settling basin on the defendant's property, and from thence into a creek which carried the waste water directly to the bayou which was one mile distant. The Louisiana Supreme Court held that prosecution had properly been brought in Bossier Parish, on the theory that the crime was committed at the point where waste materials entered into the bayou. Chief Justice O'Niell emphasized the provisions of Article 14 of the Louisiana Code of Criminal Procedure, which extends the jurisdiction of parish courts to the center of any river, bayou or lake which forms the parish boundary, and of Article 15 which gives either parish jurisdiction where an offense is committed within one hundred feet of the boundary line. He definitely indicated, by way of dictum, that prosecution might also be had in Webster Parish. No mention was made of Section 988 of the Revised Statutes of 1870 to the effect that where a crime is begun in one parish and completed in another the offender may be tried in either of the parishes. Applying this provision to the facts of the case at bar, we have a crime begun in Webster Parish and completed in Bossier Parish, with each parish being a proper place for prosecution of the offender. In such case the recent amendment to

26. State v. Sheffield, 201 La. 1055, 1059, 10 So. (2d) 894, 896 (1942).

27. See State v. Sheffield, 201 La. 1055, 10 So. (2d) 894 (1942), noted in (1943) 5 Louisiana Law Review 327, 328, for a discussion of the jurisprudence in point.

28. Accord: Tex. Ann. Pen. Code (Vernon, 1938) Art. 161; Md. Ann. Code (Flack, 1939) Art. 27, § 27; Ohio Gen. Code Ann. (Page, 1939) § 12823.

29. La. Crim. Code, Art. 118.

1. 201 La. 870, 10 So. (2d) 685 (1942).

Article 13 of the Code of Criminal Procedure[2] would also be helpful.

In *State v. Kavanaugh*[3] the crime of swindling an aged widow out of valuable stock which she had inherited was found to have been committed in the parish where the property was obtained. The gist of such an offense is the obtaining of the property, and it is immaterial where the fraudulent pretense is uttered.

Jurisdiction and Venue—Maritime Offenses

The case of *State v. Farroba*[4] raised a nice problem as to the jurisdiction of this state over acts committed in the adjoining waters of the Gulf of Mexico. Five defendants had been prosecuted for shrimping in Louisiana waters without having resided in this state consistently for two years. The trial court had overruled the defendant's plea of lack of jurisdiction and venue. The defendant, however, had failed to except, choosing to rely on his claim that the shrimping statute was unconstitutional.[5] On a rehearing the supreme court again considered the original claim that the alleged wrongful acts had been committed outside the territorial limits of St. Mary's Parish and of the state of Louisiana, and concluded that the trial court had been without jurisdiction.

Mr. Justice Higgins, speaking for the court, declared that failure of the defendants to except to the trial court's ruling on this issue did not prevent consideration of the issue, since the lack of jurisdiction was *patent on the face of the record.* He refused to decide the issue raised as to the constitutionality of Act 55 of 1938 which operated to extend the territorial limits of Louisiana twenty-seven miles out into the adjoining waters of the Gulf of Mexico. On this point it may well be argued that Louisiana cannot by such a statute "lift itself by its boot straps" and extend its boundaries beyond those fixed when the Louisiana territory was ceded by Spain to France and when the state of

2. La. Act 147 of 1942: "Art. 13 . . . provided that where the several acts constituting a crime shall have been committed in more than one parish, the offender may be tried in any parish where a substantial element of the crime has been committed." See Comment (1942) 4 LOUISIANA LAW REVIEW 321.

3. 203 La. 1, 13 So. (2d) 366 (1943).

4. 201 La. 259, 9 So. (2d) 539 (1942).

5. The prosecution was brought under La. Act 5 of 1932, § 4, as amended by La. Act 314 of 1940, § 3. On the first hearing of the case the majority of the court upheld the trial court's ruling that this statute was unconstitutional in that it drew an improper distinction between those who had resided in Louisiana on June 1, 1940, and other fishermen. However, on a rehearing the principal point discussed was the matter of venue and jurisdiction.

Louisiana was admitted to the Union.[6] The court's holding of lack of jurisdiction was based principally upon a statement of fact that the offense took place somewhere between the shore of St. Mary's Parish, the line "being estimated" at twenty-five miles distant. Justice Higgins declared that this statement left the exact place where the crime was committed doubtful and that it might well have been that the shrimping was carried on more than twenty-seven miles from the Louisiana shore line and therefore clearly outside of our territorial jurisdiction.[7] He also raised the venue question as to just how the parish boundary lines should be extended out into the waters of the Gulf of Mexico in determining the limits of St. Mary's Parish.

Bail—Juvenile Proceedings

Article I, Section 12, of the Louisiana Constitution provides that "all persons" shall be bailable by sufficient sureties except those "charged with a capital offense, where the proof is evident or the presumption great." In *State v. Franklin*[8] the court held that this provision was applicable to juvenile delinquency proceedings, and affirmed a writ of mandamus ordering the juvenile judge to admit a juvenile offender to bail. In holding that such offenders have the same right to bail pending trial as adult offenders, Mr. Justice Ponder, who delivered the opinion in the case, declared that special juvenile tribunals "were established with the view of showing more consideration to the juvenile and were not designed to deprive him of any of his constitutional rights."[9]

A prior decision in *State v. Clark*[10] had held that a juvenile offender does not have the same right to *bail pending appeal* as

6. 2 U.S. Stats. 641 (1811).

7. Cf. State v. Rabb, 130 La. 370, 372, 57 So. 1008, 1009 (1912). In that case the defendant was charged with unlawfully operating a banking game on an excursion boat called the "Belle of the Bends" which was operated on the Mississippi River. The question was whether this was within the jurisdiction of the State of Louisiana or within the exclusive admiralty and maritime jurisdiction of the United States. Rather than decide this difficult problem of constitutional and statutory interpretation, Mr. Justice Monroe declared "for aught that appears, save in defendant's pleadings, the 'Belle of the Bends' may be a gambling house in the heart of the city of New Orleans. And, as in the absence of any showing to the contrary, we are bound to presume the existence of the facts necessary to the jurisdiction exercised by the trial court, there is no basis upon which the legal proposition presented by defendant can be considered." It will be noted that in the *Rabb* case the ambiguity and uncertainty was resolved in favor of the trial court's jurisdiction.

8. 202 La. 439, 12 So. (2d) 211 (1943).

9. 202 La. at 443, 12 So. (2d) at 213.

10. 186 La. 655, 173 So. 137 (1937).

does the adult offender.[11] This distinction between the right of juvenile and adult offenders to bail pending appeal was based on a special constitutional provision[12] to the effect that appeal from a judgment in the juvenile court shall not suspend such judgment. (Appeal has the effect of suspending the judgment appealed from in ordinary criminal cases.) This special provision as to the effect of appeals in juvenile cases had been construed as prevailing over the general constitutional right to bail. The *Clark* case was properly distinguished from the case at bar, which involved the right to bail *pending trial.*

Prescription

Article 8 of the Code of Criminal Procedure[13] provides that all, except a few stated offenses, prescribe within one year "after the offense shall have been made known to the judge, district attorney or Grand Jury having jurisdiction." It has been construed as sufficient that the district attorney had knowledge of facts from which he should have known of the crime.[14] However, the supreme court has recently held[15] that where the victim of a swindle delayed filing charges upon the offender's promise to return the goods fraudulently obtained, the prescriptive period did not run. It is official knowledge and not knowledge of the victim which initiates the prescriptive period.

The prescription article also provides that "in felony cases when three years elapse from the date of finding an indictment, or filing an information, . . . it shall be the duty of the district attorney to enter a nolle prosequi if the accused has not been tried." In *State v. Theard*[16] an information for embezzlement had been filed in August, 1936, but a plea of present insanity had been upheld and the court had ordered the defendant committed to an institution for the insane. In March, 1943, defendant moved the lower court to nolle prosequi the bill of information on the ground that the three year prescriptive period had elapsed without his being brought to trial. The lower court's refusal to nolle prosequi was affirmed by the supreme court, which pointed out that the purpose of this provision was "to enforce the right of

11. An adult offender is given a right to bail pending appeal, where a minimum sentence of less than five years has been imposed. La. Const. of 1921, Art. I, § 12, as amended by La. Act 189 of 1936, § 1.
12. La. Const. of 1921, Art. VII, § 96.
13. As amended by La. Act 47 of 1942, § 1.
14. State v. Oliver, 196 La. 659, 199 So. 793 (1941).
15. State v. Kavanaugh, 203 La. 1, 13 So. (2d) 366 (1943).
16. 203 La. 1026, 14 So. (2d) 824 (1943).

an accused to a speedy trial and to prevent the oppression of citizens by suspending criminal prosecutions over them for an indefinite time as well as to prevent delays in the administration of justice by imposing on judicial tribunals an obligation of proceeding with reasonable dispatch in the trial of criminal accusations."[17]

The court also declared that any other interpretation would be in conflict with Article 267 of the Code of Criminal Procedure which expressly prohibits the trial of an accused who has been adjudged insane, until he is sufficiently able to understand the proceedings against him and to assist in his defense. The provision in Article 8, being of a general nature, would not be construed as effecting an implied repeal of the more specific provision found in Article 267. The plain logic of the thing clearly supports the court's position that the three year prescriptive period does not run during such time as the defendant is mentally incapable of standing trial.

Insanity at the Time of the Crime—Triable Only by Jury

A distinction is recognized between the plea of present insanity and the plea of insanity at the time of the crime. Where an offender charged with a felony pleads insanity at the time of the crime (inability to distinguish right from wrong) the defense involves a question of fact as to guilt or innocence and must be tried by a jury.[18] The question of present insanity, however, raises only a question of the defendant's fitness to stand a trial. This question may be properly disposed of by the trial judge.[19] In *State v. Sample*,[20] the accused, charged with murder, had entered a plea of insanity at the time of commission of the alleged offense and a plea of present insanity. The trial judge had upheld both pleas and ordered him confined to the State Hospital for the Insane. The defendant subsequently urged that he had regained his sanity and was ready to stand trial, but the district judge refused to order a hearing to determine whether the defendant was presently able to understand the proceedings against him and to assist in his defense thereof. The supreme court issued a writ of mandamus ordering the district judge to hold a hearing as to the defendant's present mental condition, as provided for in Article 267 of the Code of Criminal Procedure.

17. 203 La. at 1030, 14 So. (2d) at 825.
18. State v. Lange, 168 La. 958, 123 So. 639 (1929).
19. Art. 267, La. Code of Crim. Proc. of 1928.
20. 203 La. 841, 14 So. (2d) 678 (1943), noted in (1943) 18 Tulane L.Rev. 329.

The court pointed out that the trial court's original ruling on the issue of insanity at the time of the commission of the alleged offense was null and void. The issue presented was one affecting guilt or innocence which could only be decided by a jury. As a result, the only valid part of the original order was the defendant's commitment to the State Hospital for the Insane on the ground of present insanity. This is a matter which is reviewable, if the defendant's mental condition should change and he should subsequently become capable of standing trial.

Short Form Indictment for Theft

Probably the most significant forward step taken in the 1942 Louisiana Criminal Code[21] is found in the *theft* article[22] which combines all the various and sundry stealing crimes in one offense. The technical distinctions between larceny, embezzlement, and obtaining property by false pretenses were largely a result of historical accident, rather than any substantial differences between those crimes.[23] The principal and common element of these various offenses is that the offender has wrongfully taken or obtained something belonging to another. Thus the new theft article includes *all* cases where one person takes or misappropriates another's property. In order that this change might be fully effective in eliminating the technical distinction between the various stealing crimes, Article 235 of the Code of Criminal Procedure was amended[24] to provide a short form indictment

21. La. Act 43 of 1942 [Dart's Code of Crim. Law and Proc. (1943) §§ 740.1-740.144].

22. La. Crim. Code, Art. 67.

23. Bennett, The Louisiana Criminal Code (1942) 5 LOUISIANA LAW REVIEW 6, 37: "It is well known that the separate crime of embezzlement arose out of the inadequacies of the crime of larceny. Larceny was formerly a capital offense and as such was strictly limited in scope. With a lessening of the penalty for larceny, the old restrictions remained. Thus early courts indulged in such familiar fictions as the doctrine of 'breaking the bulk' to catch the bailee who turned thief; or as the doctrine of 'constructive possession' to catch the servant who stole his master's goods. When these devices failed the legislatures stepped in and created the separate, but very similar, crime of embezzlement. The distinction between 'larceny by trick' and obtaining property by false pretenses, depending upon whether the owner intended to part with 'possession' or 'property' in the goods, is also largely a product of historical accident. Then, too, when none of the above crimes seemed to fit, ingenuous district attorneys might insert a count for violation of the 'confidence game' statute. The above sketchy summary gives only a partial picture of the confusion as to the stealing crimes. Distinctions had been heaped upon distinctions, and then any number of special statutory classifications superimposed; and only partial relief had been secured by liberal procedural rules as to responsible verdicts." (See Art. 246, La. Code of Crim. Proc. of 1928.)

24. La. Act 147 of 1942 amended Art. 235 of the La. Code of Crim. Proc. of 1928 so as to synchronize the short forms of indictment with the new Louisiana Criminal Code.

for *theft* as follows: "Theft—A.B. committed a theft of one horse of a value of one hundred dollars (describe property the subject of theft and state its value)." It is no longer necessary for the district attorney, when drawing up an information or indictment, to make the sometimes difficult and technical choice between the formerly separate crimes of larceny, embezzlement, obtaining by false pretenses and the confidence game.[25] The crime charged is "Theft," and if defense counsel needs further and more specific facts he may request a bill of particulars.

In *State v. Kendrick*[26] the indictment purported to charge the defendants with theft, but, for some reason or other, the simplified form was not used. In reviewing the sufficiency of the indictment, the Louisiana Supreme Court took the view that Article 227 of the Code of Criminal Procedure, which authorized the phrasing of an indictment in the exact language of the statute, had no applicability to crimes like "Theft," where several formerly separate offenses have now been cumulated in the one offense. Where the short form authorized by Article 235 is not used, the indictment must clearly and specifically show the nature of the type of theft charged. The language of the indictment of the case at bar did not sufficiently show the precise nature of the offense charged.

It would appear from the *Kendrick* decision that the safest and most logical practice in charging the crime of theft is to use the short form indictment provided in amended Article 235 of the Code of Criminal Procedure.

An even more serious problem is presented by the cases of *State v. Hebert*[27] and *State v. Morgan*[28] where the respective offenses of indecent behavior with juveniles[29] and disturbing the peace[30] were charged. It was held that since these were offenses which could be committed in more than one way, the informations were defective in not stating the specific manner in which the offenses were committed; and that an information couched in the language of the statute was insufficient. It appears that a completely satisfactory solution of this problem may be had only by amending Article 235 of the Code of Crim-

25. See discussion of State v. Doucet and State v. Savoy, p. 554, supra.
26. 203 La. 63, 13 So. (2d) 387 (1943).
27. 17 So. (2d) 3 (La. 1944).
28. 204 La. 499, 15 So. (2d) 866 (1943).
29. La. Crim. Code, Art. 81.
30. La. Crim. Code, Art. 103.

inal Procedure so as to provide short form indictments for all offenses denounced in the Criminal Code.

Indictment—Bill of Particulars

State v. Sheffield[31] applied the rule of Article 288 of the Code of Criminal Procedure that the accused is not entitled to a bill of particulars as a matter of right and that the trial judge has a very wide discretion in ruling on a motion to require the district attorney to furnish additional data regarding the particulars of the offense charged. In that case defendant was indicted for obtaining money upon a promise to improperly influence the official action of a municipal officer.[32] The trial judge had refused to require the district attorney to furnish a bill of particulars setting out the name and title of the municipal officer sought to be influenced. In upholding the lower court's ruling, Justice Ponder relied on Article 288 and prior Louisiana jurisprudence for the well settled proposition that "the matter of furnishing a bill of particulars rests largely within the discretion of the trial judge, and his ruling will not be disturbed unless there is manifest error, and particularly in the absence of a clear showing that the defendant was prejudiced."[33]

Indictments—Cumulation of Thefts

In cases of embezzlement Article 225 of the Code of Criminal Procedure authorized the charging, in one indictment and in one count, the aggregate amount embezzled by an employee during the entire time of his holding office; and further provided that this aggregate amount should determine the grade of the offense charged. Since this provision amounted to substance rather than procedure insofar as it attempted to authorize cumulation of several embezzlements to determine the grade of the crime, it was to that extent unconstitutional.[34] In 1940, Article 225 was re-enacted as substantive law in order to validate the article insofar as it affected substance rather than procedure.

A problem as to the scope and application of this new statute arose in *State v. Doucet*.[35] In that case a sheriff had been indicted for the embezzlement of public funds, an ungraded

31. 201 La. 1055, 10 So. (2d) 894 (1942).
32. La. Act 59 of 1878, as amended by La. Act 162 of 1920 [Dart's Crim. Stats. (1932) § 795]. Under the Criminal Code (La. Act 43 of 1942), the crime would have been *Public Bribery* (Article 118).
33. 201 La. 1055, 1058, 10 So. (2d) 894, 895 (1942).
34. State v. Rodosta, 173 La. 623, 138 So. 124 (1931).
35. 202 La. 1074, 13 So. (2d) 353 (1943).

offense.[36] The various embezzlements were accumulated in one count as provided in the re-enacted Article 225. Defense counsel filed a motion to quash, arguing that Article 225 was not applicable to the ungraded crime of embezzlement by public officers, but only applied to the general embezzlement statute which was graded. While the trial judge did not quash the indictment, he did agree with defense counsel's argument that Article 225 was not applicable to the ungraded offense charged, and ordered a severance so that the various embezzlements would be charged in separate counts. On appeal the majority of the Louisiana Supreme Court annulled the order requiring a severance, holding that Article 225 was applicable and that the entire amount embezzled might be cumulated in one count. The court pointed out that the amount embezzled would be material in determining the fine which might be imposed. Justices Fournet, Ponder, and Higgins dissented. The question will be an academic one in the future. Article 67 of the 1942 Criminal Code covers all sorts of misappropriations, whether public or private, and especially provides that the offense shall be graded, as were the old general larceny and embezzlement statutes, according to the amount misappropriated or taken. The last paragraph of this article also provides that:

> "When there has been misappropriation or taking by a number of distinct acts of the offender, the aggregate of the amount of the misappropriations or takings shall determine the grade of the offense."

It will be noted that this is even a little more liberal than was the substantive statute enacted to achieve the same purpose in 1940, since it does not require that the misappropriations or takings be from the same person or that they be limited to a six months' period.

Service of Indictment and Jury Lists on Defendant

All rules of criminal procedure, unfortunately, are not to be found in the Code of Criminal Procedure of 1928. Prior rules, not covered or expressly repealed, are still effective.[37] The requirement of Section 992 of the old Revised Statutes[38] that the defendant must be served a copy of the indictment and list of

36. La. Rev. Stats. of 1870, §§ 903-904 [Dart's Crim. Stats. (1932) §§ 912-913].

37. Comment (1931) 6 Tulane L. Rev. 135-136.

38. Dart's Code of Crim. Law and Proc. (1943) § 602.

petit jurors at least two days prior to the trial was held applicable in *State v. McKinney*[39] despite the fact that it was not included in the Code of Criminal Procedure. The court took the view that the mere omission of the section did not make it contrary to or in conflict with the Code; ignoring the fact that the requirements of publication of the jury list in the paper and that the indictment must be read to the defendant at the arraignment before trial, provided adequate protection for the accused. It might logically have been presumed that the provision in question was purposely omitted. In the recent case of *State v. Hoover*[40] failure to comply with the requirements of Section 992 of the Revised Statutes was again urged as the basis of an appeal. However, the state pointed out that this provision was inapplicable since the crime (shooting with intent to kill) was not a capital offense or one "punishable with imprisonment at hard labor for seven years or upward." Thus, technicality was overcome by technicality and the conviction appealed from affirmed.

Motion to Quash Jury Venire

In *State v. Livaudais*,[41] the district attorney applied to the supreme court for peremptory writs of mandamus and prohibition, seeking to set aside the order of the trial judge quashing the grand jury and petit jury venires. The trial judge had quashed jury venires prepared by a jury commission appointed by his predecessor who was of a different political faction. He assigned as his reasons therefor that the venire lists had been prepared in the unfavorable atmosphere "of a bitter political strife in progress at the time," and that the venire men were not evenly divided between the various wards in the parish. Relying heavily upon the provision in Article 203 of the Code of Criminal Procedure that no jury venire shall be set aside because of any *"defect or irregularity in the manner of selecting the jury, or in the composition, summoning or proceedings of the Jury Commission, unless some fraud has been practiced or some great wrong committed that would work irreparable injury,"* the supreme court set aside the order quashing the jury venire and directed the trial judge to proceed with the impanelling of grand and petit juries from the venire lists prepared by the jury commission. On the facts, as we glean them from the supreme

39. 171 La. 549, 131 So. 667 (1930).
40. 203 La. 181, 13 So. (2d) 784 (1943).
41. 201 La. 1083, 11 So. (2d) 1 (1942).

court's opinion, the case very properly came within the meaning and intendment of Article 203. However, it might have been decided differently if it had been shown to the satisfaction of the supreme court that the jury venire was made up entirely of henchmen of one political faction. It would, however, require very strong and specific proof to substantiate such a holding.

Improper Selection of Jury Venire—Waiver of Objection

In *State v. Wilson*[42] a negro, convicted of rape of a white woman and sentenced to death, appealed from the conviction. He relied upon the trial judge's refusal to quash the indictment. The motion to quash, if filed in proper time would have been sustained, for the evidence of a systematic exclusion of negroes from the general venire and grand jury was unmistakable.[43] However, the trial judge ruled that the motion came too late, since it was filed forty-five days after completion of the term of the grand jury returning the indictment. Article 202 of the Code of Criminal Procedure was controlling. It provides that all objections to the manner of selecting any juror, jury or the general venire must be urged "before the expiration of the third judicial day *of the term for which said jury shall have been drawn,* or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."[44]

It was argued by defense counsel, and this view was supported by Chief Justice O'Niell's able dissenting opinion, that Article 202 was inapplicable since the indictment in the case at bar had not been found until after the expiration of the third judicial day of the grand jury term, counting from the beginning of the term. Such a view, while supported by a strict, literal construction of the language of Article 202, and by a considerable number of prior judicial statements, would have rendered Article 202 totally inapplicable in a large number of cases. The majority of the court (Chief Justice O'Niell being the only dissenter) dealt somewhat liberally with the language of the statute. Mr. Justice Higgins, writing for the court, declared that it was the legislative intent to allow the motion to quash the indictment for irregularity in the drawing of the grand jury or jury venire "until *three judicial days after the expiration of the term*

42. 204 La. 24, 14 So. (2d) 873 (1943).
43. Pierre v. Louisiana, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).
44. Italics supplied.

of the grand jury, which returned the indictment, have elapsed, or before entering the trial of the case in the event the trial is started sooner."[45] (Italics supplied.) The majority opinion achieves a desirable practical result, and is probably in line with the real intent of the draftsmen of the Code of Criminal Procedure. At the same time it comes very close to judicial legislation.[46]

Excusing Jurors for Cause

Under Article 345 of the Code of Criminal Procedure "it is within the sound discretion of the judge to excuse for cause jurors of the regular venire."[47] In *State v. Hoover*[48] the prospective juror excused was a second cousin of the defendant who was charged with shooting with intent to kill. While the juror had said that he believed he could decide fairly and impartially, he also said that he was not certain what influence his relationship to the defendant might have on him, and that sitting on the case might prove embarrassing. Applying Article 345, the supreme court held that no abuse of discretion had been shown and that the discharge of the juror did not constitute a reversible error. The natural inference might follow that if the juror had been capriciously discharged, as where the discharge was merely as a favor to the juror, it might constitute an *abuse* of discretion and be grounds for reversal. The general idea that the trial court exercised sound discretion in excusing jurors for cause must be synchronized with the oft-stated maxim that " 'The law gives to the accused the right to object to an obnoxious juror, but does not give him the right of selection. Hence the rejection of a juror by a judge, even if erroneous, affords no legal ground for complaint.' "[49] This was nicely done in the somewhat recent case of *State v. Dallao.*[50] In that case the court reiterated the general rule that the right of a defendant "is that of eliminating

45. 204 La. 24, 14 So. (2d) 873, 882 (1943).

46. Chief Justice O'Niell summarizes the theory of his dissent very clearly when he declares: "The trial judge made the 'third judicial day' limitation upon the defendant's right to object to the manner of selecting or drawing the jury venire applicable to the defendant's case by giving the article a meaning which, in my humble opinion, the phraseology does not justify. I cannot see how the phrase 'the third judicial day of the term' can mean 'the third judicial day' *after the expiration of the term.*" 204 La. 24, 14 So. (2d) 873, 886.

47. The causes for discharging jurors are specified in Articles 350 through 352.

48. 203 La. 181, 13 So. (2d) 784 (1943).

49. State v. Thompson, 116 La. 829, 833, 41 So. 107, 108 (1906).

50. 187 La. 392, 175 So. 4 (1937).

incompetent jurors, not of selecting jurors of his choice";[51] but definitely indicated that the defendant would have a right to complain of the excusing of jurors without proper cause if it resulted in his being tried by an incompetent or partial jury.

Failure to Swear Jury—Method of Objection

In *State v. Hoover*[52] defendant moved for a new trial alleging that the jury which convicted him had never been properly sworn. Two of the jurors stated that "they did not remember whether or not they had been properly sworn." Also, one of the defendant's attorneys took the witness stand and testified that the oath had not been administered to the first juror accepted. On the other hand, the court reporter and the trial judge's per curiam verified the statement in the official minutes that the "jury was duly sworn." The supreme court concluded that the evidence did not substantiate defendant's contention; and, also declared that such an objection came too late, if raised for the first time after verdict by a motion for a new trial. Mr. Justice Fournet pointed out that "The guarantee under our constitution, Article 1, § 9, of a fair and impartial trial does not contemplate that an accused can take advantage of technical errors committed during the course of his trial while he sat idly by, without some showing that the errors were prejudicial to his cause."[53] Such objections must be raised at the time, and exception duly taken to adverse rulings.

The court also held that a motion in arrest of judgment would not lie, since there was no "substantial defect patent upon the face of the record," and ascertainable without an examination of the evidence.[54]

Jury—Revocation of Waiver

In lesser felonies triable by a bobtail (five man) jury, the defendant may waive his constitutional right for a jury trial and elect to be tried by the judge alone.[55] In *State v. Williams*[56] the defendant charged with theft and receiving stolen things, arraigned without benefit of counsel, had entered a plea of not guilty and elected to be tried by the judge without a jury. Sub-

51. 187 La. at 411, 175 So. at 11.
52. 203 La. 181, 13 So. (2d) 784 (1943).
53. 203 La. at 191, 13 So. (2d) at 787.
54. Arts. 517 and 518, La. Code of Crim. Proc. of 1928.
55. Art. 259, La. Code of Crim. Proc. of 1928.
56. 202 La. 374, 11 So. (2d) 701 (1942).

sequently, upon securing counsel, defendant sought to withdraw the waiver and avail himself of a jury trial. The supreme court reaffirmed the holding in an earlier case that, " 'Whenever the court is convinced that the waiver has been unadvisedly made, and proper and timely application is made to withdraw it, it would be the duty of the court to permit the revocation, and to restore to the accused his constitutional right.' "[57] In the instant case defendant's motion to withdraw his waiver for a jury trial had been filed promptly upon his securing the benefit of counsel, and the court did not feel that a resultant four to six weeks postponement of the trial until the next jury term was a sufficient reason to deny the motion. The court very properly distinguished the case of *State v. Robinson*[58] where the motion to withdraw the waiver of a jury had not been made until after conviction by the judge trying the case.

New Trial—Credibility of Newly Discovered Evidence

Article 511 of the Code of Criminal Procedure limits the right of accused to a new trial for newly discovered evidence to cases where such evidence "is so material that it ought to produce a different result than the verdict reached"; and, it has been repeatedly held that the trial judge is vested with a wide discretion in granting or refusing a new trial on this ground.[59]

In *State v. Saba*[60] the newly discovered evidence, if true, would certainly have called for a new trial;[61] but, the trial judge viewed the proffered testimony as untrustworthy and suspicious, and so refused to order a new trial. On appeal, the supreme court upheld the trial court's ruling as a proper exercise of judicial discretion. Chief Justice O'Niell filed a lone dissent, arguing that the weight and credibility of the newly discovered testimony should have been submitted to a jury by the granting of a new trial. Then, if such testimony was an obvious falsity, the new witnesses would be subject to prosecution for the serious offense of perjury; but, if the new evidence were true, the defendant

57. 202 La. at 379, 11 So. (2d) at 703.

58. 43 La. Ann. 383, 8 So. 937 (1891).

59. State v. Hunt, 4 La. Ann. 438 (1849); State v. Washington, 36 La. Ann. 341 (1884); State v. Pouncey, 182 La. 511, 162 So. 60 (1935).

60. 203 La. 881, 14 So. (2d) 751 (1943), noted in (1943) 5 LOUISIANA LAW REVIEW 474.

61. The defendant had been convicted of simple kidnapping in picking up and forcibly carrying a negro girl outside the city limits where she was criminally assaulted. The new evidence was to the effect that eye witnesses had seen the negro girl accost the defendant and his companions and ask them for a date.

should be freed and the veracity of his benefactors vindicated. This view, however, is out of line with the general principle that the propriety of and necessity for granting a new trial is a matter within the sound discretion of the trial judge. He hears all the evidence at the trial of the case, and is best able to evaluate the materiality and credibility of the newly offered evidence. If trial courts were to follow Chief Justice O'Niell's dissenting opinion to its logical conclusion, the administration of justice would be frequently impeded by unnecessary delay and expense incidental to new trials based upon patently unreliable newly discovered (or manufactured) evidence.

Appeal—Trial Court's Ruling on Sufficiency of Evidence

Article 509 of the Code of Criminal Procedure provides that a new trial ought to be granted "whenever the verdict is contrary to the law and the evidence"; it has been held that, pursuant to this mandate the trial judge can set aside a verdict if he feels that the jury was wrong and entertains a reasonable doubt as to the defendant's guilt.[62]

The trial court has a wide discretion in this matter and his ruling on this question of fact is not reviewable,[63] since the supreme court's appellate jurisdiction in criminal cases is limited to questions of law.[64] In *State v. Martinez*[65] the defendant had been convicted of the crime of possessing intoxicating liquor for sale in a prohibition parish. He argued, on a motion for a new trial, that the conviction was contrary to the law and the evidence, having been based largely upon circumstances which he felt were adequately explained. In affirming the conviction and sentence the supreme court stressed the fact that it was without jurisdiction to pass upon questions of fact relating to guilt or innocence. The court did indicate, however, that it might set aside a conviction if there was "no evidence at all tending to prove" a particular essential fact. Chief Justice O'Niell succinctly declares "The line drawn between an insufficiency of evidence and a total lack of evidence of the fact or facts required to prove the guilt of the party accused."[66] Similarly the court refused to examine the record for the purpose of ascertaining whether the evidence was sufficient to sustain two other convictions for

62. State v. Daspit, 167 La. 53, 118 So. 690 (1928).
63. State v. Carter, 197 La. 155, 1 So. (2d) 62 (1941).
64. La. Const. of 1921, Art. VII, § 10.
65. 201 La. 949, 10 So. (2d) 712 (1942).
66. 201 La. at 953, 10 So. (2d) at 713.

operating a blind tiger in prohibition territory.[67] In *State v. Dow*,[68] where there was some evidence to support a conviction of theft, the supreme court refused to inquire into its sufficiency. However, where there was *no evidence* on some essential element of the offense, a question of law arises which the supreme court may decide.[69]

Appeal—Necessity of Motion for New Trial

Article 559 of the Louisiana Code of Criminal Procedure expressly declares that "no new trial can be granted on appeal unless a motion for same has been made and refused in the lower court." However, in capital cases the Louisiana Supreme Court has not seen fit to apply this provision rigidly. In *State v. Richard*,[70] a murder case, bills of exception had been filed urging that no overt act had been shown and that the conviction was based upon hearsay. The supreme court considered these bills on appeal, despite the fact that the defendant had failed to move for a new trial in the district court. Mr. Justice Rogers stressed the serious nature of the case and pointed out that, while the supreme court might have properly dismissed the bills of exception, the result would have been to deprive the defendant of his right to appeal because his attorney inadvertently failed to file a motion for a new trial. It is presumed, however, that the supreme court will not condone the departures from the procedure expressly set out in Article 559, except in capital cases.

Appellate Jurisdiction—Misdemeanor Cases

The supreme court's appellate jurisdiction in misdemeanor cases, as set out in Section 10 of Article VII of the Louisiana Constitution, is limited to convictions where the offender has been sentenced to serve more than six months in jail or fined in excess of $300. Even where a lesser fine or sentence of imprisonment has been imposed, however, the supreme court has appellate jurisdiction if a local ordinance has been declared unconstitutional or when a fine imposed by such an ordinance is contested.[71] In *State v. Schimpf*,[72] the defendants had been convicted

67. State v. Moody, 201 La. 1042, 10 So. (2d) 890 (1942); State v. Drew, 202 La. 8, 11 So. (2d) 12 (1942).

68. 203 La. 707, 14 So. (2d) 610 (1943).

69. State v. Laborde, 202 La. 59, 11 So. (2d) 404 (1942).

70. 203 La. 722, 14 So. (2d) 615 (1943).

71. This provision for appellate jurisdiction is also found in La. Const. of 1921, Art. VII, § 10, par. 6.

72. 203 La. 839, 14 So. (2d) 677 (1943).

under a state statute[73] making it a crime to sell intoxicating liquors for beverage purposes in a parish where sale of such liquor was prohibited by law. The sentences imposed were not sufficient to give appellate jurisdiction, but they relied upon the fact that the validity of the police jury ordinance prohibiting the sale of intoxicants had been attacked. In dismissing the appeal the supreme court pointed out that defendants had been prosecuted and convicted under a state statute, and not under the police jury ordinance in question. Chief Justice O'Niell dissented on the ground that a question of the constitutionality or legality of the parish ordinance prohibiting the sale of intoxicating liquors was a fundamental issue in the case. Much might be said on either side regarding this nice question of constitutional interpretation, but neither the majority opinion nor the dissenting chose to analyze the language of Section 10, Article VII, in any great detail. The writer is inclined to agree with Chief Justice O'Niell, for the validity of the convictions would ultimately be based upon the legality of the parish ordinance prohibiting the possession and sale of intoxicating liquors.

Sentencing Under the Old Indeterminate Sentence Provision

The case of *State v. Broussard*[74] provides another illustration of the difficulties which arose under the old indeterminate sentence provision in Article 529 of the Louisiana Code of Criminal Procedure. Broussard had been convicted of carnal knowledge (of a juvenile) and sentenced on July 7, 1942, to serve five years at hard labor. He brought habeas corpus proceedings, questioning the legality of his sentence and contending that the trial judge should have given an indeterminate sentence, instead of a fixed or straight sentence. The Louisiana Supreme Court set aside the sentence and remanded the case in order that an indeterminate sentence might be imposed. If the proceedings had been had after the effective date of Act 46 of 1942, the sentence imposed would have been entirely proper; for Article 529 of the Code of Criminal Procedure was amended by that statute so as to require specifically that *all* sentences be determinate ones.

Under the old indeterminate sentence provision in Article 529 of the Code of Criminal Procedure, the judge was required to impose an "indeterminate sentence" for all crimes except those

73. La. Act. 15 of 1934 [Dart's Code of Crim. Law and Proc. (1943) §§ 1362.1-1362.32].

74. 201 La. 839, 10 So. (2d) 636 (1942); 202 La. 458, 12 So. (2d) 218 (1942).

for which the maximum penalty did not exceed one year, and certain enumerated offenses. Then, after the offender had served the minimum time of his sentence he could apply for parole. Much confusion resulted in interpreting those specified offenses for which an indeterminate sentence was not to be imposed. The *Broussard* case was a typical example of this. The trial judge had taken the erroneous view that the crime of carnal knowledge was "statutory rape" and, therefore, excepted from the benefits of the indeterminate sentence provision as included in the crime of "rape." Similarly, sentencing judges had experienced considerable difficulty as to the excepted crimes of "arson" and "burglary." There were a number of statutes dealing with these crimes, and it was not clear as to whether some of the lesser arson and burglary crimes were to be excepted from the benefits of the indeterminate sentence with its ultimate possibility of parole. As a result of such misunderstandings as to the scope of the indeterminate sentence law a considerable number of prisoners were incarcerated in the state penitentiary under flat sentences for crimes which called for indeterminate sentences.[75] The amendment to Article 529, in conjunction with the new parole law, which was also enacted in 1942,[76] eliminates these uncertainties and provides a logical pattern for sentencing and parole. Article 529 now provides that *all* sentences imposed by the court shall be determinate ones. This amended article is to be read in connection with the provision of the new parole statute to the effect that every prisoner is entitled to apply for parole after he has served one-third of the sentence imposed.

Sentencing Procedure

A very unusual sentencing procedure was followed in *State v. Rider*.[77] The defendant had entered pleas of guilty upon three separate criminal charges and had thrown himself upon the mercy of the court. The trial judge immediately sentenced him to serve from six to eighteen months upon the first charge of perjury, and "deferred" sentence upon the other two charges of procuring others to commit perjury. Ten days after his incarceration upon the sentence for perjury, defendant was released

75. See Wilson, Making the Punishment Fit the Criminal (1942) 5 LOUISIANA LAW REVIEW 53, 66, where the writer discusses the old indeterminate sentence law and points out that according to state penitentiary records of April 30, 1940, forty-six prisoners were incarcerated under flat sentences for crimes which required indeterminate sentences.

76. La. Act 44 of 1942 [Dart's Code of Crim. Law and Proc. (1943) §§ 725.1-725.14 n.].

77. 201 La. 733, 10 So. (2d) 601 (1942).

and permitted to return to his home. Approximately two years later he was again brought before the court which ordered him to finish his original perjury sentence, with credit for the ten days actually served; and the deferred sentences for procuring perjury were renewed with defendant being ordered to serve sentences of six months to two years "to run consecutively with the first sentence."

Defense counsel argued that the first perjury sentence could not be recalled because the eighteen months period of that sentence had already elapsed. The supreme court very properly held that "the expiration of the time without imprisonment is in no sense an execution of the sentence. The sentence imposed upon relator in this case not having been executed, it was proper for the court, if it saw fit, to recall relator to the bar and order that the sentence imposed upon him be executed."[78]

Defendant Rider's attorneys also objected to the court's belated imposition of sentence upon the two charges of procuring perjury, the sentences being imposed after a lapse of two years from conviction. Here Article 521 of the Code of Criminal Procedure was controlling. It provides that accused has a right to insist that the court deliberate at least twenty-four hours before imposing sentence; but it also expressly stipulates that the trial court shall have an absolute discretion, and "not subject to the review of any other court or judge," to grant a longer delay between conviction and sentence. Thus the two year delay, while very unusual and certainly not commendable judicial practice, was clearly authorized by law.

A number of errors in the sentences were treated as ministerial and cured by a consideration of the entire record on appeal. The sentences imposed for conviction on the second and third charges were for perjury, while defendant had actually been convicted of procuring others to commit perjury. The supreme court held that while the sentences must be responsive to the verdict, the error was not fatal since a reading of the record clearly showed the real offense and the term of the sentence imposed was appropriate. The three sentences also failed to clearly indicate whether they were to be served consecutively or concurrently, but the supreme court held that the ambiguity did not vitiate the sentences in view of the fact that the trial judge had the inherent power at any time to order the record amended to correct the mistake and clarify the matter.

78. 201 La. at 743, 10 So. (2d) at 604.

Method of Execution

Act 14 of 1940[79] substituted more humane electrocution for the traditional "hanging by the neck until he is dead" method of executing capital offenders. In the much litigated *Henry*[80] and *Burks*[81] cases defense counsel, grasping at the proverbial last straw, sought to interpret this statute so as to effect legislative reprieve for these two convicted murderers. In *Henry v. Reid*[82] Mrs. Henry had been sentenced to suffer death "in manner provided by law." When, after several appeals and consequent delays, the time for execution arrived, the new electrocution law was in effect and the governor very properly issued a warrant for her execution by that method. The supreme court held that the warrant had been issued "in the manner provided by law," and went on to point out that the sentence need not go further and specify the exact mode of execution. In *State v. Burks*[83] the sentence had been more specific and stated that Burks should suffer the death penalty by being "hanged by the neck until dead" in conformity with the execution law in effect at that time. Pending final disposition of the case on appeal, the new statute went into effect and the trial court amended the sentence so as to make it conform with the then lawful method of inflicting capital punishment by electrocution. In sustaining the trial court's action, the supreme court again pointed out that it was not necessary for the sentencing judge to refer to the method of executing the penalty. The important part of the sentence was that the offender should suffer the penalty of death as punishment for the crime committed.

Habitual Offender Statute—Foreign Convictions

The Louisiana Habitual Offender statute[84] defines a multiple offender so as to include the person who has been previously convicted under the law of any other state "of a crime which, if committed within this state, would be a felony." *State v.*

79. An act amending Arts. 569 and 570 of the La. Code of Crim. Proc. of 1928.

80. Henry v. Reid, 201 La. 857, 10 So. (2d) 681 (1942). See also State v. Henry, 196 La. 217, 198 So. 910 (1940), discussed in The Work of the Louisiana Supreme Court for the 1940-1941 Term (1942) 4 LOUISIANA LAW REVIEW 271, 279.

81. State v. Burks, 202 La. 167, 11 So. (2d) 518 (1942).

82. 201 La. 857, 10 So. (2d) 681 (1942). Accord: Iles v. Flournoy, 202 La. 20, 11 So. (2d) 16 (1942).

83. 202 La. 167, 11 So. (2d) 518 (1942).

84. La. Act 15 of 1928, repealed and re-enacted by La. Act 45 of 1942 [Dart's Code of Crim. Law and Proc. (1943) §§ 709.1-709.5].

Vaccaro[85] established the logical interpretation that the foreign conviction must be for such an offense as would have been a felony under Louisiana law. In *State v. Johnson*[86] decided just one year later, the court held that a New York conviction of larceny in the sum of one hundred dollars, which was a misdemeanor by the laws of New York but which would have been a felony if committed in Louisiana, did not render the offender a habitual criminal when he was subsequently convicted of another felony in this state. It was held that the word "crime," used in relation to offenses committed elsewhere, should be interpreted to mean a foreign felony and not to include a misdemeanor. The net result of this decision is that the prior foreign conviction must be for an offense which would have been a felony if committed in Louisiana (*Vaccaro* decision) and which was also a felony by the law of the state where it was committed (*Johnson* case). While no foreign decision in point can be cited, it is submitted that the court's interpretation of the word "crime" in the *Johnson* decision places a unique and unintended restriction upon the Louisiana habitual offender statute. A natural reading of that statute indicates that the legislature intended to judge the foreign offense according to Louisiana standards. The court's interpretation of the word "crime" is also out of line with the natural interpretation of that word and with prior Louisiana jurisprudence.[87]

IV. PROCEDURE

The Petition

One of the most important cases decided by the supreme court during the past year in the field of procedure was *Johnston v. Burton*.[1] This case held that both the administrator and the heirs are necessary parties defendant in a partition proceeding brought against a succession; and that any judgment obtained when the proceeding is directed solely against the administrator is an absolute nullity. The court took notice of the recognized

85. 200 La. 475, 8 So. (2d) 299 (1942), discussed in The Work of the Louisiana Supreme Court for the 1941-1942 Term (1943) 5 LOUISIANA LAW REVIEW 193, 258.

86. 202 La. 926, 13 So. (2d) 268 (1943), noted in (1943) 5 LOUISIANA LAW REVIEW 471.

87. State v. Dickerson, 139 La. 147, 152, 71 So. 347, 349 (1916) states that "A crime is: 'An act or omission which is prohibited by law as injurious to the public and punished by the state.'" Accord: State v. Heuchert, 42 La. Ann. 270, 7 So. 329 (1890); State v. Bischoff, 146 La. 748, 749, 84 So. 41, 52 (1920). Article 7 of the Louisiana Criminal Code of 1942 states that "a crime is that conduct which is defined as criminal in this Code, or in other acts of the legislature or in the constitution of this State."

1. 202 La. 152, 11 So.(2d) 513 (1942).

rule that real actions may be brought against the administrator of an in intestate succession alone, but stated that a suit for partition is an exception to this rule.[2]

In the case of *In re Nunez*[3] disbarment proceedings were brought. The defendant filed exceptions of no right and no cause of action. In sustaining the defendant's exceptions the well settled rule was followed that all records, exhibits, or documents annexed to and incorporated in a petition control the allegations of fact founded thereon.[4]

In re Phoenix Building and Homestead Association[5] was a case in which the homologation of two creditors' claims was sought to be nullified. The court refused the relief prayed for, stating that it is too well recognized to cite authorities that mere conclusions of the pleader, not supported by any facts, fails to state a cause of action.[6]

In *State ex rel. Jones, Governor v. Saucier*[7] it was held that a suit brought against a sheriff for taxes or fees collected, but not turned over to the state or parish treasuries, must be brought in the name of the governor of the state; but any other suits prosecuted against a sheriff for embezzled funds must be brought in the name of the party injured thereby.

Gilmore v. Rachl[8] involved a petition filed in forma pauperis. The plaintiff and her husband owned two lots of ground and a house valued at $1100, on which there was a mortgage for $860. Her husband was earning $137.50 a month. This included all of their assets, against which they owed numerous debts. The trial court refused her petition, holding that her financial condition was not such as would qualify her to file suit under the act providing for such procedure.[9] In reversing the trial court, the supreme court followed the rule previously announced in *Fils v.*

2. With the exception of the old case of Veazy v. Trahan, 26 La. Ann. 606 (1874), the jurisprudence had held that the heirs were necessary parties defendant in a partition suit only when an *executor* was involved. In the principal case the court stated that the rule was just as applicable to an administrator as an executor, basing their reasoning primarily upon Article 1320 of the Civil Code.

3. 203 La. 847, 14 So.(2d) 680 (1943).

4. Accord: Alliance Trust Co. v. Paggi-Streater Co., 173 La. 356, 137 So. 60 (1931); Claiborne v. Lezina, 175 La. 635, 144 So. 131 (1932).

5. 203 La. 565, 14 So.(2d) 447 (1943).

6. Accord: Haas v. Johnson, 203 La. 697, 14 So.(2d) 607 (1943).

7. 203 La. 954, 14 So.(2d) 775 (1943).

8. 202 La. 652, 12 So.(2d) 669 (1943).

9. La. Act 156 of 1912, as amended by La. Acts 260 of 1918, 165 of 1934, and 421 of 1938 [Dart's Stats. (1939) §§ 1400-1402].

Iberia, St. M. & E. R. Co.,[10] namely, that to file suit in forma pauperis a person does not have to be absolutely destitute. The only requirement is that he is not able to post a bond for the court costs, or is not able to pay them as they accrue.

Exceptions, Rules, and Motions

During the past year only five cases were passed on by the supreme court which involved questions concerning declinatory exceptions. The first of these, *Baton Rouge Building Trades Council v. T. L. James and Company, Incorporated*,[11] was a suit for specific performance. The defendants, being a partnership, filed an exception to the jurisdiction *ratione materiae* and *ratione personae*, when only one of the partners was served with citation. In disposing of the exception the court followed the trite rule that an appearance for any purpose other than to allege want of citation cures any defective citation and gives the court jurisdiction to proceed. By dicta, the court said that even if the exceptor's appearance was not a general one, the exception *ratione personae* must fail, because service on one of the partners is sufficient to bring the partnership into court. The exception *ratione materiae* was not passed on, since it was not pressed by the defendant.

Two of the remaining four cases involved the exceptions to jurisdiction *ratione personae* and *ratione materiae*. In *Fourth Jefferson Drainage District v. City of New Orleans*,[12] the plaintiff brought suit for trespass, alleging confiscation of certain real property in Jefferson Parish by representatives of the defendant. Defendant excepted to the court's jurisdiction *ratione personae*, showing that though it was domiciled in Orleans Parish, suit had been brought in Jefferson Parish. In overruling the exception, the court applied Section 8 of Article 165 of the Code of Practice, in holding that a suit for trespass on real property may be brought either at defendant's domicile or where the property is located, as the plaintiff may desire. The defendant, being a corporation, tried to allege that the above article was not applicable to a corporation, but this contention was quickly overruled.[13] *Pic v. Mente & Company, Incorporated*,[14] involved the exception *ratione materiae*. In sustaining the exception, the recognized rule was followed that a party cannot give a court jurisdiction *ratione*

10. 145 La. 544, 554, 82 So. 697, 700 (1919).
11. 201 La. 749, 10 So.(2d) 606 (1942).
12. 203 La. 670, 14 So.(2d) 482 (1943).
13. O'Niell, Chief Justice, dissenting, but not handing down reasons.
14. 201 La. 237, 9 So.(2d) 532 (1942).

materiae when it lacks jurisdiction over the total amount involved, by splitting his cause of action into two separate suits.[15]

In the last case to involve a declinatory exception[16] the plaintiff filed the exception of recusation, alleging that the judge had participated in the illegalities for which the defendant was on trial. The facts showed a clear cut case of interest on the judge's part and therefore the exception was sustained under authority of Section 1 of Article 338 of the Code of Practice. The defendant contended that this article was open to a defendant only, but the court correctly held that it was open to either the plaintiff or the defendant in a case.[17]

Only one case[18] involved a question concerning the dilatory exceptions (properly speaking). In that case the exception of inconsistency, or improper accumulation of actions, was involved. Since plaintiff had pleaded his several inconsistent demands in the alternative only, the well recognized rule was followed that such procedure is not objectionable and will not form the basis for such an exception.[19]

Five cases dealt with the peremptory exception. Two of these[20] dealt with the exceptions of no right and no cause of action and applied the general rule that for the purposes of the trial of these exceptions all allegations of fact set out in the petition must be taken as true. However, the court correctly pointed out that only allegations of fact, as distinguished from the pleader's mere conclusions, are accepted as true for this purpose.[21]

The three other cases dealing with peremptory exceptions all involved the exceptions of res judicata. In *Bullis v. Town of Jackson,*[22] the plaintiff obtained a judgment against the defendant city for $300. He failed in his attempt to enforce it against the city by mandamus proceedings. Then he sought to obtain a

15. Arts. 91, 156, La. Code of Practice of 1870. Kearney v. Fenerty, 185 La. 862, 171 So. 57 (1936).

16. State ex rel. Riddle v. Jeansonne, 203 La. 85, 13 So.(2d) 470 (1943).

17. The fifth case to involve a declinatory exception, Martin-Owsley, Inc. v. Philip Freitag, Inc., 202 La. 554, 12 So.(2d) 270 (1943), followed Article 358 of the Code of Practice, and held that the filing of an exception to citation, without answering to the merits does not join issue. Therefore the plaintiff may thereafter amend his petition even when it changes the substance of his demand.

18. Boxwell v. Department of Highways, 203 La. 760, 14 So.(2d) 627 (1943).

19. Accord: Haas v. McCain, 161 La. 114, 108 So. 305 (1926); Mentz v. Village of Mamou, 165 La. 1070, 116 So. 561 (1928).

20. In re Nunez, 203 La. 847, 14 So.(2d) 680 (1943); State ex rel. Jones, Governor v. Saucier, 203 La. 954, 14 So.(2d) 775 (1943).

21. Accord: Federal Land Bank of New Orleans v. Mulhern, 180 La. 627, 157 So. 370, 95 A.L.R. 948 (1934).

22. 203 La. 289, 14 So.(2d) 1 (1943).

writ of garnishment against an account which the defendant had in a bank in that city. The defendant pleaded res judicata to the proceedings, which was upheld by the trial court. The district court's holding was reversed by the supreme court, however, since the four requirements of res judicata[23] were not present. The court followed the well settled rule that the requirements for res judicata are *stricti juris* and must in all cases be adhered to. Thus the defendants in the mandamus proceeding and the garnishment proceeding not being the same person, one of the necessary elements was missing. In *Moran v. Bechtel*,[24] the exception of res judicata was overruled for the same reason, except that in this case the cause of action in the two suits was not the same. *In re Phoenix Building & Homestead Association*[25] involved an attack on the homologation of two creditor's claims in a liquidation account. The plaintiff contended that the homologation of the account did not give the claims the effect of res judicata, because it was done under authority of Act 44 of the Second Extra Session of 1934[26] and amounted to no more than an ex parte order. The court correctly held that judgments homologating accounts are final and have the effect of things adjudged, the above act constituting no exception.

Two cases involved motions. In the first,[27] plaintiff brought suit on seven promissory notes. The defendant denied indebtedness to the plaintiff, but failed to allege facts to substantiate his denial. He further failed to deny several of the paragraphs in the plaintiff's petition. The plaintiff moved for a judgment on the pleadings, which was granted. The court followed the rule under the Pleading and Practice Act[28] that all material allegations not specifically denied are admitted. Therefore, the defendant having failed to deny any of the plaintiff's material allegations, and having failed to allege facts to substantiate his denial of indebtedness, plaintiff was entitled to a judgment on the pleadings.

In the second case,[29] the plaintiff filed a motion to strike[30] certain allegations in the defendant's answer, which was sus-

23. Art. 2286, La. Civil Code of 1870.
24. 202 La. 380, 12 So.(2d) 1 (1942).
25. 203 La. 565, 14 So.(2d) 447 (1943).
26. Dart's Stats. (1939) §§ 744.34, 744.35.
27. Haas v. Johnson, 203 La. 697, 14 So.(2d) 606 (1943).
28. La. Act 300 of 1914 [Dart's Stats. (1939) § 1483].
29. Central Savings Bank & Trust Co. v Oilfield Supply and Scrap Material Co., 202 La. 787, 12 So.(2d) 819 (1943).
30. This pleading, although usually referred to as "a motion to strike," is, in reality, a rule and not a motion under the Louisiana conception of a motion as being ex parte.

tained by the trial court. He then moved for a judgment on the pleadings, and it was granted. The supreme court reversed the trial court, however, and held that a motion to strike is foreign to our procedure and unauthorized. *Babst v. Hartz*[31] and *Stanley, Attorney General v. Jones*[32] were cited as authority for the decision. A review of the jurisprudence is necessary to show the trend which finally evolved into this decision. In *Welsh v. Barrow*[33] and *Babst v. Hartz*,[34] it was held that a motion to strike will fail as to *pertinent matter* in the answer. In *Vicknair v. Terracina*,[35] which arose as late as 1927, a motion to strike was upheld by our supreme court since the matter striken was impertinent. Then in *State ex rel. Sutton v. Caldwell, Mayor*,[36] the court said that a motion to strike is not authorized under our system of pleading and practice, and the better practice is either to move for a judgment on the pleadings or to object to the introduction of any evidence to support any allegation which might be irrelevant. But the court did not say that such a motion was forbidden in Louisiana. It followed the "pertinent test" established by the above mentioned cases.[37] *Perez, District Attorney v. Meraux, District Judge*[38] was the first case to hold that such a motion would not be allowed in Louisiana regardless of irrelevancy of the matter sought to be stricken and *Stanley, Attorney General v. Jones*[39] affrmed that case. The principal case follows these last two cases and seems to have settled once and for all that in no case is a motion to strike permissible in Louisiana. After overruling the motion to strike in this case, the judgment on the pleadings was also reversed under the rule that all well pleaded allegations are accepted as true in passing on such a motion.

The Answer and Incidental Demands

One case[40] involved the question of whether the filing of a third opposition joins issue. The court in that case held that the filing of a third opposition does not join issue, and therefore the

31. 161 La. 472, 108 So. 871 (1926).
32. 197 La. 627, 2 So.(2d) 45 (1941).
33. 9 Rob. 535 (La. 1845).
34. Central Savings Bank & Trust Co. v. Oilfield Supply and Scrap Material Co., 202 La. 787, 12 So.(2d) 819 (1943).
35. 164 La. 117, 113 So. 787 (1927).
36. 195 La. 507, 197 So. 214 (1940).
37. McMahon, The Exception of No Cause of Action in Louisiana (1934) 9 Tulane L. Rev. 17, 31-32.
38. 195 La. 987, 197 So. 683 (1940).
39. 197 La. 627, 2 So.(2d) 45 (1941).
40. Martin-Owsley v. Philip Freitag, Inc., 202 La. 554, 12 So.(2d) 270 (1943).

plaintiff has an absolute right thereafter to file his amended petition, whether it changes his cause of action or not.[41]

In *Cason v. Cecil*,[42] one Aymond filed a third opposition and prayed to be paid out of the proceeds of the sale. The court ordered the sheriff to hold enough of the proceeds to pay his claim. The sheriff, however, held only enough to pay the third person the amount due him on the day of the sale, and turned the remainder over to the plaintiff in the case. Upon being awarded attorney fees and costs, plus the indebtedness due him, the third party brought suit against the sheriff to recover the full amount awarded him by the court. In holding the sheriff liable the supreme court said that when the court orders a sheriff to hold enough out of the proceeds of a sale to pay a third opponent's claim, he is personally liable to that person if he does not hold enough to pay his claim in full, which includes attorney fees and costs if awarded to him.[43]

Haas v. Johnson[44] applied the well settled rule that a defendant who does not deny in his answer his signature on a document annexed to and declared on in the petition, admits its genuineness.[45]

The Trial

In *Stanley, Attorney General v. Jones*[46] the trite rule was followed that evidence admitted without objections, when it was not admissible for any purpose under the pleadings, has the effect of enlarging the pleadings and is considered as if formal plea of it had been made in the petition. The recognized rule that the presumption is against a litigant who fails to produce evidence within his reach was also applied.[47]

Modification of Judgments in Trial Courts

In the case of *Foster v. Kaplan Rice Mill, Incorporated*,[48] the plaintiff was ordered to amend his petition by June 8, 1942, or be non-suited. He did not comply with the order, and on June 13,

41. Art. 419, La. Code of Practice of 1870. Self v. Great Atlantic and Pacific Tea Co., 178 La. 240, 151 So. 193 (1933).
42. 201 La. 890, 10 So.(2d) 692 (1942).
43. Art. 401, La. Code of Practice of 1870. Cf. Walmsley v. Theus, 107 La. 417, 31 So. 869 (1901).
44. 203 La. 697, 14 So.(2d) 606 (1943).
45. Art. 324, La. Code of Practice of 1870. Art. 2244, La. Civil Code of 1870. Cabral v. Victor & Provost, Inc., 181 La. 139, 158 So. 821 (1934).
46. 201 La. 549, 9 So.(2d) 678 (1942).
47. Cf. Crescent City Ice Co. v. Erman, 36 La. Ann. 841 (1884).
48. 203 La. 245, 13 So.(2d) 850 (1943).

1942, the defendant obtained, and the judge signed, an order dismissing plaintiff's suit as in the case of non-suit. On June 16, 1942, plaintiff moved for and obtained a new trial. The defendant then appealed from the order granting the new trial, alleging that the three days within which a party may move for a new trial had elapsed when plaintiff applied for it. In overruling the defendant's contention the court followed the general rule that the delay within which a party may move for a new trial starts running only from the day that the judgment was actually signed by the judge.[49]

Appeals and Appellate Procedure

This was the most fertile field of activity in Louisiana procedure during the past year.

Five cases involve questions concerning the prosecution of appeals. Two of these involved the question of whether appeals should be dismissed on technicalities. In both, Louisiana's liberal rule was followed; namely, that appeals are favored at law and will be dismissed only when the grounds urged for the dismissal are free from any doubt.[50] In the first of these two cases[51] the appellee sought to have the appeal dismissed because it was made by motion and not signed in open court. The judge had signed it in a room adjoining the court room, but while the court was in session. The appellee's prayer for dismissal was refused. In the second case[52] the transcript did not state affirmatively that the motion for appeal and the order granting it had been made and signed in open court. The appellee sought to have it dismissed on this ground. In refusing the dismissal the court held that the fact the court was in session and that action on the motion was taken in the same term of court as rendered the judgment appealed from, the presumption was that the motion was made and signed in open court.[53]

The other three cases involving the prosecution of appeals were all concerned with appeal bonds. *Dickerson v. Hudson*[54] applied the recognized rule that an appeal will be dismissed unless it is obtained and the appeal bond filed (when one is required)

49. Accord: Viator v. Heintz, 201 La. 884, 10 So.(2d) 690 (1942).
50. Police Jury of Parish of St. James v. Borne, 192 La. 1041, 190 So. 124 (1939).
51. McCann v. Todd, 201 La. 953, 10 So.(2d) 769 (1942).
52. Labarre v. Rateau, 203 La. 802, 14 So.(2d) 642 (1943).
53. Art. 573, La. Code of Practice of 1870. Gardiner v. Erskine, 170 La. 214, 127 So. 604 (1930).
54. 201 La. 915, 10 So.(2d) 700 (1942).

within one year after the signing of the judgment.[55] In *Maddox v. Butchee*,[56] appellee sought to have the appeal bond dismissed because appellant had not signed it as principal, and because of certain omissions in the bond. In refusing the motion to dismiss the court said that as to appellant's failure to sign the bond as principal, there was no error, because he was already personally bound for the debt involved.[57] And as to the omissions in the bond, Act 284 of 1928[58] specifically provides that the appellant must be given four days within which to correct them before the appeal can be dismissed. *Vienne v. Chalona*[59] and *McCain v. Todd*[60] followed the rule that only where there are two separate and distinct judgments rendered is it necessary to appeal from both judgments separately and file two appeal bonds.[61]

In one case during the past year,[62] the rule was followed that prescription begins to run only when a judgment is actually signed by the judge, not when it is rendered from the bench.[63]

Three cases raised the question of whether an appeal lay to the supreme court from the decree complained of. In the first[64] the court held that no appeal lies from an order granting a new trial, when the application therefor was made within three judicial days after the judgment was signed. The second case[65] was a consolidation of two cases that had been brought to recover back salaries from the state. The claim involved in each case was $1,500. In dismissing the appeal for lack of jurisdictional amount the recognized rule was followed that the jurisdiction of the court

55. Art. 593, La. Code of Practice of 1870.
56. 201 La. 876, 10 So.(2d) 687 (1942).
57. Accord: Fontini v. Pine Grove Land Co., 167 La. 137, 118 So. 865 (1927).
58. Dart's Stats. (1939) § 1923.
59. 203 La. 450, 14 So.(2d) 54 (1943).
60. 201 La. 953, 10 So.(2d) 769 (1942).
61. In *Vienna v. Chalona*, two parties brought one suit for personal injuries received when defendant's car collided with theirs. Two judgments were signed, but only one appeal was taken, and only one appeal bond was filed. In reversing the court of appeal for the first circuit the supreme court held that there was only one law suit, and therefore only one appeal and one appeal bond was necessary, even though there were two plaintiffs and two separate judgments rendered. Justice Rogers dissented from the majority opinion. His dissent was based on the assumption that there were two lawsuits involved, not one. Therefore, two judgments being rendered, two appeals and two appeal bonds would be necessary to bring the entire case before the supreme court.
62. Viator v. Heintz, 201 La. 884, 10 So.(2d) 690 (1942).
63. The court in the above case said by dicta, however, that when the judgment is a money judgment and is rendered by the court of appeal, prescription starts to run from the date the judgment is rendered, not from the day it is signed.
64. Foster v. Kaplan Rice Mill, Inc., 203 La. 245, 13 So.(2d) 850 (1943).
65. State ex rel. Nunez v. Baynard, State Auditor, 203 La. 711, 14 So.(2d) 611 (1943).

is not determined by the aggregate of all the claims consolidated, but rather by the amount in dispute in each case. The appellant raised an interesting point in this case. He contended that even if the jurisdictional amount was not involved, the supreme court had jurisdiction because a legislative act had been declared unconstitutional. The court dismissed this contention by holding that to declare the governor's veto null and void was not to declare a legislative act null and void, and therefore the supreme court was without authority to review the case. The appeal was then transferred to the proper intermediate court under the applicable statutory authority.[66] The third case on this subject was *Wall v. Close, Director of Finance*,[67] in which the supreme court held that it was not an interference with the district court's original jurisdiction to grant a suspensive appeal when the appellant was entitled to it of right, and the district court had refused to grant it.

In *Edwards v. Hayes*[68] the well settled rule in Louisiana was followed that our courts are without authority to render declaratory judgments. Therefore any question which has become moot cannot be considered on appeal, and anything said concerning it is pure dicta.[69]

State ex rel. Jones, Governor v. Edwards[70] and *Acosta v. Nunez*[71] applied the general rule that an appellate court is without jurisdiction to consider any question which has not been passed on by the court of original jurisdiction, with the exception of a few special cases provided for by our constitution,[72] none of which were involved here. Therefore anything an appellate court might say pertaining to such a matter is *obiter dicta*.[73]

In *Lowell v. Fitzpatrick*[74] appellee answered the appeal by praying that he be allowed to file a newly discovered document which was very relevant to the case. It was apparent that the document would have an important effect on the decision of the case, and that the appellant would desire to rebut it with the evidence if he could. Therefore, the case was remanded to the dis-

66. La. Act 56 of 1904, as amended by La. Act 19 of 1912 [Dart's Stats. (1939) § 1427].
67. 201 La. 986, 10 So.(2d) 779 (1942).
68. 203 La. 433, 14 So.(2d) 48 (1943).
69. Accord: Chaffe v. City of Minden, 170 La. 266, 127 So. 623 (1930).
70. 203 La. 1039, 14 So.(2d) 829 (1943).
71. 203 La. 275, 13 So.(2d) 860 (1943).
72. La. Const. of 1921, Art. VII, § 10(2).
73. Cf. Wilkinson v. Macheca, 158 La. 183, 103 So. 733 (1925).
74. 202 La. 545, 12 So.(2d) 267 (1943).

trict court, as the supreme court can receive no new evidence discovered since the judgment below.[75] The same procedure was followed in the case of *Normand v. Davis*.[76]

In the only other case to involve appeals and appellate procedure[77] the appellant prayed that a sale be set aside because of lesion. In his original petition, however, he had prayed that the sale be decreed a simulation. In refusing to consider his new prayer, the supreme court recognized the fact that it could not go beyond the pleadings and grant a relief different from the one prayed for in the trial court.

Supervisory Jurisdiction and Procedure

In *First National Bank Building Company v. Dickson & Denny*[78] the trial court affirmed the plaintiff's exception of no cause of action to the defendant's reconventional demand. The defendant then notified the trial judge that he was going to apply to the supreme court to review the decree under its supervisory jurisdiction, and asked that the proceedings be suspended until the supreme court ruled on the matter. The trial court refused to stay the proceedings. The defendant then applied for, and the supreme court granted, the writs of mandamus, certiorari, and prohibition. The defendant contended that the proceedings had after he notified the trial court of his application for the writs were void. In denying his contention the court held that mere notice to the court of one's intention to apply for supervisory writs will not be sufficient to stay proceedings. It followed the well settled rule that only when the writs are *granted* and *served* on the judge are all subsequent acts of the trial court void.[79] The court in this case also recognized the rule that mandamus, prohibition, and certiorari will lie even where an appeal also lies, if an appeal would not afford adequate relief.[80]

The case of *State ex rel. Conerly v. Tangipahoa Parish School Board*[81] held that no evidence can be considered under writs of prohibition, certiorari, or mandamus. It affirmed the recognized rule that only a review of the regularity of the proceedings and

75. Art. 894, La. Code of Practice of 1870.
76. 202 La. 565, 12 So.(2d) 273 (1942).
77. Bourgeois v. Bourgeois, 202 La. 578, 12 So.(2d) 278 (1943).
78. 202 La. 970, 13 So.(2d) 283 (1943).
79. Art. 863, La. Code of Practice of 1870.
80. Accord: State ex rel. Ruddock Orleans Cypress Co. v. Knop, 147 La. 1057, 86 So. 493 (1920).
81. 202 La. 1052, 13 So.(2d) 346 (1943).

the jurisdiction of the court below can be had under the supervisory writs.[82]

The only other case to involve the supervisory writs was the case of *Wilson v. Wilson*.[83] There the plaintiff asked for, and was denied, a suspensive appeal from the district court's decision concerning the custody of her minor child. She then applied to the supreme court to mandamus the judge to grant the suspensive appeal. In refusing her request the court held that in no such case was the aggrieved party entitled to a suspensive appeal of right—that when a devolutive appeal would not grant adequate relief the only remedy open is to apply to the supreme court for review under its supervisory jurisdiction.

Enforcement of Judgments

During the past year only one case arose which dealt with the enforcement of judgments. In that case[84] the plaintiff sought to enforce his judgment by garnishment proceedings, and the garnishee contended that he had waived it by not obtaining a judgment against the defendant and the garnishee at the same time. The court correctly overruled this contention[85] and held that garnishment proceedings are new suits and must be dealt with accordingly.[86]

Conservative Writs

Bolding v. Veith[87] involved a petitory action in which the court judicially sequestered the property in dispute. The defendant proceeded by rule to have the order vacated, but failed. He then applied to the supreme court for writs of certiorari, prohibition, and mandamus, which were granted with a stay order. In ordering the sequestration vacated, the court followed the letter of Article 274 of the Code of Practice, which states that judicial sequestration can be granted only where one party has no more apparent right to the property involved than the other.[88]

82. For an apparent exception to the above rule, see Hattier v. Martinez, 197 La. 121, 1 So.(2d) 51 (1941), where the facts were held reviewable under supervisory writs when one of the parents was adjudged in contempt for violating a decree involving the custody of her minor child.

83. 202 La. 520, 12 So.(2d) 258 (1943).

84. Bullis v. Town of Jackson, 203 La. 289, 14 So.(2d) 1 (1943).

85. Accord: Sturges v. Kendall, 2 La. Ann. 565 (1847).

86. Accord: Chalmette Petroleum Corp. v. Myrtle Grove Syrup Co., 175 La. 969, 144 So. 730 (1932).

87. 202 La. 1011, 13 So.(2d) 332 (1943).

88. In this case it was clear that the defendant showed a far greater right to the property. He had possessed peacefully, as owner, for eight years prior to the suit.

Martin-Owsley, Incorporated v. Philip Freitag, Inc.,[89] affirmed the well settled rule that a writ of attachment issued on improper citation cannot be corrected by other process. Plaintiff's only remedy is to start anew. He must file a new petition and "apply to the court for an alias writ, which can issue only upon making a new oath, securing a new order, and making a new bond."[90] This case also recognized the rule that a defendant cannot champion the rights of an intervenor and make a defense open only to him.

In *Wall v. Close, Director of Finance*,[91] the plaintiff applied for and obtained a temporary injunction under Act 29 of 1924.[92] The defendant then obtained a suspensive appeal from the order granting the injunction. The court correctly held that a suspensive appeal from an order granting a temporary injunction is no different from any other suspensive appeal. The enforcement of the injunction is stayed until the appeal is passed on by the appellate court.[93]

Extraordinary Writs

Mandamus, the most commonly used extraordinary writ, was involved in only two cases decided by the supreme court at its last term. In the first[94] relator sought a writ of mandamus to direct a judge to proceed with the trial of his case. Stated as tersely as possible, the facts were that the supreme court had ordered Honorable Henry L. Himel to hold court in the Twenty-Fifth Judicial District until further notice. This case was heard by him by authority of the above order. Before he could render a decision, however, the governor of the state appointed a judge to fill the vacant judgeship. In rendering the writ of mandamus peremptory the court held that the appointment did not oust the judge of jurisdiction to decide this case; that having been appointed by judicial order, his jurisdiction could be divested only by equally competent authority, not by inference or collateral pro-

89. 202 La. 554, 12 So.(2d) 270 (1943).

90. Pugh v. Flannery, 151 La. 1063, 1069, 92 So. 699, 702 (1922). Accord: Bass v. Baskowitz, 170 La. 779, 129 So. 201 (1930).

91. 201 La. 986, 10 So.(2d) 779 (1942).

92. Dart's Stats. (1939) §§ 2078-2083.

93. Contra: Keegan v. Board of Commissioners, 154 La. 639, 98 So. 50 (1923). Note, however, that this case was decided one year before the injunction statute involved in the principal case was passed. Compare Frank Melat, Consolidated v. Cooper, 149 So. 468 (La. App. 1933), holding that when the temporary injunction is dissolved by a final judgment on the merits, it remains in full force pending a suspensive appeal.

94. Folse v. St. Bernard Parish Police Jury, 201 La. 1048, 10 So.(2d) 892 (1942).

ceedings.[95] In the second case to involve mandamus,[96] relator sought to be reinstated as an officer in respondent corporation. Here again the recognized rule was followed that a relator must always exhaust his remedies provided for in the corporation before he can resort to mandamus for reinstatement.

State ex rel. Davis v. Bankston[97] involved quo warranto proceedings, in which relator alleged that the respondents had been illegally elected as officers of the Dairy Farmers' Protective League, Incorporated. The court dismissed the proceedings, however, holding that the cause of action had abated, since the terms of office of all three respondents had expired at this time.[98]

Real Actions

This field of procedure produced four cases, none of which shed any new light on the subject. In *Pierce v. Hunter*[99] the plaintiff instituted a petitory action and the defendant set up ten years prescription *acquirendi causa*. The court recognized that a quitclaim deed could be the foundation of ten years good faith prescription,[100] but dismissed defendant's plea because the deed on its face was not translative of the property involved.[101]

Bolding v. Veith,[102] mentioned previously under conservative writs, applied the elementary rule that a party who has possessed as owner for a period of one year can be dislodged only by a petitory action.

The case of *Realty Operators, Incorporated v. State Mineral Board*[103] involved an action in jactitation, in which the defendant claimed title to the land in question. In rendering a judgment for the plaintiff the recognized rule in such actions was applied once again; namely, that an action in jactitation is transformed into a petitory action when the defendant alleges title in himself. Thus he can recover only through the strength of his own title, not through any defects that may exist in the plaintiff's title.

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95. Accord: Duson, Curator v. Dupré, 32 La. Ann. 896 (1880).

96. State ex rel. Willis v. General Longshore Workmen, Inc., 202 La. 277, 11 So.(2d) 589 (1942).

97. 202 La. 920, 13 So.(2d) 266 (1943).

98. The court intimated, by dicta, that had the proceedings been instituted against the corporation instead of the three officers thereof, the suit would not have abated, since it was the method of election that was contested.

99. 202 La. 900, 13 So.(2d) 259 (1943).

100. Perkins v. Wisner, 171 La. 898, 132 So. 493 (1930); Dupuy v. Joly, 197 La. 19, 200 So. 806 (1941).

101. Art. 3474, et seq., La. Civil Code of 1870.

102. 202 La. 1011, 13 So.(2d) 332 (1943).

103. 202 La. 398, 12 So.(2d) 198 (1943).

In the only other case to involve a real action,[104] the court's past jurisprudence was followed to the effect that an owner of a servitude (mineral rights, in this case) is not a necessary party to a petitory action against the owner of the land. Therefore the court held that he was not obliged to join in an appeal from an adverse judgment in such an action, in order to reap the benefit of a reversal on appeal.

Succession Procedure

Succession of Lanata[105] was a very interesting case from the standpoint of procedure. Here the testamentary executor was recognized and confirmed by the probate court, obtained letters of administration, and proceeded to administer the succession. Two months thereafter the court, *ex proprio motu,* issued an order removing him as executor and appointing the Hibernia National Bank as administrator pro tempore and ad interim. Later the appointment of the Hibernia Bank was revoked and the executor reinstated, whereupon the Hibernia Bank proceeded by rule to have respondent's reinstatement revoked. In affirming the executor's reinstatement the court applied the general rule that administrators can be removed only by petition and citation in a direct action brought for such a purpose, and held that this rule was likewise applicable to executors. Therefore, although the Hibernia Bank had been illegally removed as administrator pro tempore and ad interim, they had never been validly appointed. The original order removing the executor had been absolutely null and void since made *ex proprio motu* by the court.[106]

Concursus Proceedings

Only one case involved concursus proceedings. In that case[107] a fund representing a one-eighth royalty interest was deposited in the registry of the court. One of the claimants, the state mineral board, then filed exception to the court's jurisdiction *ratione materiae,* alleging that concursus proceedings can be brought only at the domicile of the interpleader. In this case the fund had been

104. Jackson v. Gulf Refining Co., 201 La. 721, 10 So.(2d) 593 (1942).

105. 203 La. 981, 14 So.(2d) 785 (1943).

106. For an apparent exception to the rule that administrators and executors can only be removed by suits commenced with petition and citation and conducted in the usual form, see Succession of Feray, 31 La. Ann. 727 (1879). Here the executor was removed by operation of the law when he failed to post security for an amount due a creditor of the succession within thirty days after ordered by the court to do so.

107. Amerada Petroleum Corp. v. State Mineral Board, 203 La. 473, 14 So.(2d) 61 (1943).

deposited in the registry of the court that had jurisdiction over the property involved. In affirming the district court's decision overruling the exception, the supreme court held that when a concursus proceeding is brought to distribute the proceeds from an oil or gas well, it may be properly brought at the domicile of the interpleader or the parish in which the well is located.

Miscellaneous

One case involved an appeal from a civil service committee order[108] (as provided for by Act 253 of 1940[109]) removing from office a member of a municipal police department. No points of procedure, noteworthy of mention, were involved, however.

In *Bourgeois v. Bourgeois*[110] the plaintiff sought to have a sale of property declared a simulation. The court denied the prayer, however, holding that "evidence which merely casts suspicion is insufficient to set the sale aside."[111]

Hartford Accident & Indemnity Company v. Abdalla[112] presented an interesting case from the standpoint of judicial bonds. Here the plaintiff sought to have an indemnity bond, in which the defendant was named as principal, cancelled. The bond had been given by the defendant as security for the usufruct which she held on her minor child's share of his deceased father's estate. She defended on the ground that the bond was a judicial bond, and therefore could not be cancelled. The court stated that such a usufruct, *when created by the operation of the law,* is a legal usufruct and any bond that may be given as security therefor is a judicial bond, not subject to cancellation. But since the usufruct in this case was established, and the amount of the bond determined, by a compromise outside of court between the defendant and her deceased husband's major children, the bond

108. Pettit v. Reitzell, 202 La. 12, 11 So.(2d) 13 (1942). Defendant was tried and removed from office as chief of police of Monroe, Louisiana, and appealed to the district court of that parish. The district court reversed the Civil Service Commission and reinstated him in office. On certiorari the supreme court reversed the district court, holding that appeals from such decisions are limited to the determination of whether the accused was removed in good faith and for just cause; and that the grounds on which the appeal is based must be stated in the appellant's petition. Therefore, since the appellant had failed to set out any facts in his petition from which it might be determined that the commission had not dismissed him in good faith and for just cause, the district court was without authority to try the appeal.

109. Dart's Stats. (1939) §§ 6282.1-6282.26.

110. 202 La. 578, 12 So.(2d) 278 (1943).

111. 202 La. 578, 590, 12 So.(2d) 278, 282 (1943).

112. 203 La. 999, 14 So.(2d) 815 (1943).

given was only a contractual bond and could be cancelled for just cause shown.

In the case of *Johnston v. Burton*[113] a sale made to effect a partition of some real estate was sought to be rescinded inter alia on the ground that the court that had ordered the sale lacked jurisdiction over part of the property involved. The defendant admitted that the sale was void as to the property located outside the jurisdiction of the court, since it was not contiguous with the property over which the court did have jurisdiction. But defendant strongly contended that the sale was valid as to the property lying within the jurisdiction. Since the property had been sold in globo, the court held, however, that the whole sale was void. A different result would have undoubtedly been reached had the sale of the property not been made in globo.

The last case to be considered from the past year's jurisprudence is the case of *State v. Coco*.[114] There the defendant was convicted of shooting with the intent to kill, and appealed, alleging reversible error in the jury's failure to state "with a dangerous weapon" in its verdict. In affirming the lower court's decision the supreme court held that a gun is presumed to be a dangerous weapon, and therefore the omission was a harmless one.[115]

113. 202 La. 152, 11 So.(2d) 513 (1942).
114. 203 La. 424, 14 So.(2d) 45 (1943).
115. Cf. State v. Curry, 174 La. 287, 140 So. 480 (1932), distinguished in principal case, where it was held reversible error when the phrase "with a dangerous weapon" was omitted from the verdict.