

# The Work of the Louisiana Legislature for the 1976 Regular Session: A Student Symposium

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# THE WORK OF THE LOUISIANA LEGISLATURE FOR THE 1976 REGULAR SESSION

*A Student Symposium\**

## INTRODUCTION

“No man’s life, liberty, or property are safe while the legislature is in session.”<sup>1</sup> This aphorism, originally applied to the New York Assembly, indicates a popular attitude toward the legislative process and at the same time summarizes the plenary power of the legislature to scrutinize the fundamental issues touching the lives of all the state’s citizens.<sup>2</sup> That plenitude of power is subject only to state and federal constitutional limitations. Because the federal constitution serves as a grant of power to the federal government and reserves all power not so granted to the states, the state constitution thus becomes the limiting factor on the reserved powers which are vested in the legislature of the state.<sup>3</sup> It is because this power exists and is exercised in almost every area of public and private law that the annual work of the legislature should be carefully and intelligently scrutinized by the legal community. The function of this symposium is to assist the legal community in that task by examining the impact of the 1976 regular session legislation on various areas of law,<sup>4</sup> by offering an analysis of the laws enacted, and by suggesting potential problems which might arise in the administration and litigation of those laws.<sup>5</sup> In addition, those court

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\* The authors of the Legislative Symposium sections are as follows: *Kathleen A. Manning*: Torts, Employment and Labor Law, Insurance; *Malcolm S. Murchison*: Persons, Successions, Matrimonial Regimes, Property; *Judy F. Pierce*: Criminal Law, Civil Procedure, Pretrial Criminal Procedure, Criminal Trial Procedure, Post-conviction Procedure, Evidence; *Randall C. Songy*: Expropriation, State and Local Taxation, State and Local Government, *James C. Wear*: Administrative Law and Procedure, Security Devices, Trusts and Estate Planning, Corporations, Financial Institutions.

1. 1 Tucker 249 (N.Y. Sur. Ct. 1866).

2. *Hainkel v. Henry*, 313 So. 2d 577 (La. 1975). This principle articulated as a judicial standard in *Hainkel* is derived from the Manual for Style and Drafting of the Louisiana Constitutional Convention, which states “the legislature is empowered to enact any law not prohibited by the Constitution. . . .” *Journal of Proceedings of the Louisiana Constitutional Convention of 1973* at 769.

3. *Id.* U.S. CONST. amend. X.

4. The format adopted in this symposium is derived from that used in the annual symposium published in this Review entitled *The Work of the Louisiana Appellate Courts*.

5. The large number of Acts adopted by the legislature and limitations of time and space preclude an examination of all of the laws enacted or a hornbook

decisions and changes in the constitutional authority of the legislature and legislative processes having an impact on the legislature will be examined.

### LEGISLATIVE PROCEDURE

#### *Presiding Officers*

The House of Representatives retains its traditional leadership structure under the Louisiana Constitution of 1974; it continues to elect its Speaker from among its own membership as it has since 1812.<sup>6</sup> However, prior to the opening of the 1976 session a challenge was raised to the procedure of electing the presiding officer as provided by the statute enacted in 1972.<sup>7</sup> The Act in question provided for the election of the Speaker of the House by secret ballot, an action which would violate the provisions of Article 11, § 2 of the 1974 Constitution which requires that in "all elections by persons in representative capacity, voting shall be "viva-voce."<sup>8</sup> The theory on which this provision is based is that an individual should not be

examination of all of the substantive changes in the law. The following is a statistical breakdown of the legislature's action:

#### DISPOSITION OF LEGISLATIVE INSTRUMENTS 1976 REGULAR SESSION<sup>a</sup>

	Introduced <sup>d</sup>	Passed House of Origin	Passed Both Houses	Died in Conference	Signed by Governor	Vetoed by Governor
House Bills	1526	566	503	3	485	18 <sup>f</sup> #
House Joint Resolutions <sup>b</sup>	17	1	0	0	n/a	n/a
Senate Bills	808	315	230	1	225	5 <sup>f</sup>
Senate Joint Resolutions <sup>b</sup>	15	1	0	0	n/a	n/a
House Resolutions <sup>c</sup>	53	39 <sup>e</sup>	n/a	n/a	n/a	n/a
House Concurrent Resolutions <sup>c</sup>	270		208		n/a	n/a
Senate Resolutions <sup>c</sup>	27	23 <sup>e</sup>	n/a	n/a	n/a	n/a
Senate Concurrent Resolutions <sup>c</sup>	132		105		n/a	n/a

a) Data summarized in this table is taken from disposition tables compiled by the Louisiana Legislative Council and published in *Resumé, 1976 Louisiana Legislature*, iii-v.

b) Joint Resolutions are instruments which propose amendments to the constitution. They follow the same processes as bills [La. Const. art. III § 15(A)]. They are also included in the total bill counts for both houses.

c) Resolutions do not require the signature of the governor but are forwarded to him for informational purposes.

d) Introductions include all bills and resolutions including bills and resolutions reported by substitute.

e) Approval of simple resolutions by house of origin constitutes final adoption.

f) Does not include as vetoed House Bill No. 154 [Act No. 17], the General Appropriation Bill. Gubernatorial "line item veto" utilized 12 times in this bill. Veto sustained. [Suit challenging the constitutionality of the method employed in those vetoes currently pending *sub nom. Henry v. Edwards*].

g) All vetoes sustained either in session or by declaration of no necessity for a veto session as provided in La. Const. art. III, § 20(c).

6. LA. CONST. art. III, § 7(C).

7. LA. R.S. 24:501 (1972).

8. LA. CONST. art. XI, § 2.

held to account for his vote in elections for public office. But public officials acting in a public capacity are voting not as individuals, but as representatives of a constituency which has a right to know how they vote.<sup>9</sup> This theory militates in favor of a policy of public scrutiny and review.

Plaintiff in *Roland v. Poynter*<sup>10</sup> sought a declaratory judgment on the constitutionality of the Act and sought an injunction prohibiting the House from conducting its elections in violation of the constitutionally required "viva-voce" voting provisions. In the district court the Act properly was declared unconstitutional but the requested injunction was not granted with due respect to the doctrine of separation of powers.<sup>11</sup> Writs were denied in a memorandum decision.<sup>12</sup>

The Senate for the first time since 1845<sup>13</sup> elected its presiding officer from among its own membership, thus bringing to an end the system whereby the Lieutenant Governor served as ex officio President of the Senate.<sup>14</sup> This resulted from a change in the Constitution which was meant to accentuate the notion of the separation of powers by removing the Lieutenant Governor, a member of the executive branch, from his ex officio position as a legislative officer.<sup>15</sup>

### *Separation of Powers*

The problem of separation of powers was confronted by the Louisiana Supreme Court in *Guidry v. Roberts*<sup>16</sup> when a constitutional challenge was

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9. STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, vol. xx, day 62, pps. 23-50 [hereinafter cited as VERBATIM TRANSCRIPTS].

10. 330 So. 2d 311 (La. 1976).

11. See decision and judgment in *Roland v. Poynter*, 19th Judicial District, Docket No. 190575, *cert. denied*, 330 So.2d 311 (La. 1976). The Rules of the House were amended by House Resolution No. 18 to provide for viva-voce election of the Speaker.

12. LA. CONST. art. V, § 5(D) provides a right of appeal when "a law or ordinance has been declared unconstitutional . . . ." After decision in the trial court, defendants asked, in the alternative, for either writs or their appeal of right. The writ denial was accompanied by a memorandum decision indicating the validity of the district court decision: "There is no error in the judgment complained of." 330 So. 2d 311 (La. 1976). The Court apparently viewed the application in the alternative as a waiver of the appeal right.

13. LA. CONST. art. III, § 17 (1812) provided for election of the President of the Senate from among the members of that body. There was no office of Lieutenant Governor until the adoption of the Constitution of 1845.

14. LA. CONST. art. III, § 7(C); art. XIV, § 27.

15. VERBATIM TRANSCRIPTS at 40-47. That change was one of many designed to more clearly distinguish the roles and functions of the three branches of government and to strengthen local government independence. See LA. CONST. art. II, §§ 1 & 2; art. IV, § 13; art. V, § 22(B), § 30; art. VI, § 13.

16. 335 So. 2d 438 (La. 1976).

raised against the Louisiana Campaign Finance Disclosure Act.<sup>17</sup> While *Guidry* was pending on appeal, the United States Supreme Court rendered a decision in *Buckley v. Valeo*<sup>18</sup> declaring the Federal Elections Campaign Act<sup>19</sup> unconstitutional on the ground that it violated the separation of powers provisions of the United States Constitution.<sup>20</sup> A portion of the rationale of the United States Supreme Court was adopted by Justice Tate in *Guidry* in a discussion of unconstitutional encroachments of one branch in a field reserved to another.<sup>21</sup> In both cases the composition and powers of the enforcement commissions were at issue though their composition and powers were a distinguishing feature in the results reached. The federal commission was composed of both congressional and presidential appointees who had the authority to pursue violations of the act on their own initiative,<sup>22</sup> while the Louisiana Campaign Practices Committees, composed exclusively of legislative officers,<sup>23</sup> had no power to initiate actions.<sup>24</sup>

The United States Supreme Court found nothing offensive to the constitution in the congressionally dominated committee so long as its function was restricted to "functions relating to the flow of necessary information—receipt, dissemination and investigations."<sup>25</sup> Only when the committee's function moved into the realm of "execution of the laws" did it violate the constitutional prerogatives of the executive branch.<sup>26</sup> Because the Louisiana commission's primary function was to collect information and because it had no power to initiate prosecutions, the functions were sustained as non-violative of the constitutional principle of separation of powers.<sup>27</sup>

While this decision does little to console pure political science notions of the separation of powers, its ultimate result may be far-reaching in determining the limits of power in the three branches. The test articulated by the courts in *Buckley* and *Guidry* distinguishes the necessary informational

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17. LA. R.S. 18:1481-1493 (1975).

18. 96 S. Ct. 612 (1976).

19. 18 U.S.C.A. §§ 608-17.

20. 96 S. Ct. 612, 691.

21. 335 So. 2d 438, 446.

22. 96 S. Ct. at 676.

23. LA. R.S. 18:1482(12). The various committees are composed of some or all of the following legislative officials: the Clerk of the House of Representatives, the Secretary of the Senate, the Legislative Auditor, and the Director of the Louisiana Legislative Council.

24. A discussion of the portion of the Act declared unconstitutional may be found at note 21, *supra*.

25. 96 S. Ct. at 691.

26. *Id.*

27. 335 So. 2d 438, 446.

functions of each branch of government from those which involve the exercise of power by each branch. If applied, this test might result in the declaration of invalidity of a number of laws which provide for legislative participation on committees and commissions within the executive branch.<sup>28</sup> Despite some efforts to finally abolish legislative membership on various state boards, agencies, and commissions, some vestiges of this uniquely unitary system of government remain.

#### *Effective Date of Laws*

The general effective date of laws passed in the 1976 regular session is October 1, 1976<sup>29</sup> but an earlier or later effective date is now permitted by the constitution. The practice of providing for the immediate effectiveness of laws is a radical departure from the prior constitutional scheme which provided for a uniform effective date for laws except in those instances where there was "the necessity for the immediate passage of [the law] . . . certified by the Governor to the Legislature . . . ."<sup>30</sup> This rule, relaxed in the new constitution, has led to the establishment of a new procedure in which many laws now contain an effective date clause which provides that the law will be effective on signature by the governor or at the expiration of the time for his signature if not signed.<sup>31</sup>

This approach in providing effective dates has not been without difficulty as indicated by *Jones v. State of Louisiana*.<sup>32</sup> Plaintiff did not qualify for election to a newly created judgeship in the 19th Judicial District because of the limited time allowed for qualification after the judgeship bill had been passed by the legislature and signed into law by the Governor.<sup>33</sup> The bill was finally passed by the legislature, enrolled and signed by the presiding officers of the two houses and signed by the Governor on the same day, June 30; qualification for the new judgeships was set by the terms of the Act for the period from July 2 through July 5.<sup>34</sup> Jones contended that the Act violated the provisions of Article 4 of the Civil Code<sup>35</sup> in that it had not been properly promulgated prior to the opening of qualification period. This contention was correctly rejected by the Court of Appeal which distinguished the effective dates of laws, promulgation as used in Article 4 of the Code, and the required publication in the official journal of the state.<sup>36</sup>

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28. See especially LA. R.S. 39:311 (Supp. 1976).

29. LA. CONST. art. III, § 19.

30. LA. CONST. art. III, § 27 (1921).

31. See, e.g., La. Acts 1976, No. 247, § 4 which recites the standard language. Reference is made to LA. CONST. art. III, § 18.

32. 336 So. 2d 515 (La. App. 2d Cir.), cert. denied, 336 So. 2d 59 (La. 1976).

33. La. Acts 1976, No. 46.

34. La. Acts 1976, No. 46, § 16.

35. LA. CIV. CODE art. 4.

36. 336 So. 2d at 61.

The court, in recognizing the power of the legislature to provide either an earlier or later effective date for the laws it enacts, confirmed the system adopted under the provisions of the new constitution but it also highlighted the inherent weakness of the policy apparently adopted by the legislature.<sup>37</sup> While no one would presume to limit the legislature's power to provide for earlier effective dates by recourse to the provisions of Article 4 of the Civil Code, its policy basis requiring the promulgation is sound because "as laws can not be obligatory without being known, they must be promulgated."<sup>38</sup> Receipt and assignment of an Act number by the Secretary of State is effective promulgation, and by law the Act is then published in the official journal of the state.<sup>39</sup> The view which distinguishes promulgation from publication is the grossest of legal fictions and defeats the ends sought by Article 4 of the Civil Code. The mere act of receipt and assignment of an Act number is not effective in any real sense in promulgating the laws enacted by the legislature. In fact the intent of the constitutional convention in extending the general effective date of laws from twenty to sixty days following the end of the session was an attempt to provide adequate time for the proper promulgation and publication of the laws.<sup>40</sup> Use of the earlier effective date was viewed as an extraordinary device to be used in the sound discretion of the legislature. While Act 47 presents a legitimate use of that power, it may be argued that the device is becoming one of habit and not of necessity. Given the proper circumstances, such Acts may be invalidated as offensive to due process of law.<sup>41</sup>

### *Introduction of Bills*

The time for the introduction of bills during any session is limited to the

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37. *Id.* Here the court correctly has taken a portion of the Transcripts of Proceedings relative to the distinction between promulgation and publication, but the full debate should be read for the policy notion underlying LA. CONST. art. III, § 19.

38. LA. CIV. CODE art. 4.

39. LA. R.S. 43:87 (Supp. 1975). The publication of the acts of the 1976 regular session in the official journal of the state was completed prior to September 1, 1976, less than thirty days after final adjournment of the legislature.

40. XXIX VERBATIM TRANSCRIPTS at 96-102.

41. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). Elements of the test to be used by the courts in due process cases are summarized as: "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." *See also Lambert v. California*, 355 U.S. 225 (1957).

first fifteen days of the session; after the expiration of those days a super-majority record vote of two-thirds of the membership of both houses is required for the introduction of a bill.<sup>42</sup> This is a change from the prior constitution<sup>43</sup> and required some procedural device to protect the constitutional integrity of bills introduced after the first fifteen days of the session. To accomplish this, the legislature has revived a procedure from the now abolished odd-numbered year fiscal sessions in the use of "consent resolutions"<sup>44</sup> which seek the consent of the requisite number of members of both houses for the introduction of the attached bill. Thus by tracing the history of an Act, originally introduced beyond the permissible session limits, the Journals of the House and Senate support the observance of the constitutionally required forms.

A. Edward Hardin

## PRIVATE LAW

### PERSONS

#### SEPARATION, DIVORCE, AND ALIMONY

In *Fulmer v. Fulmer*<sup>1</sup> the Louisiana Supreme Court clearly recognized that whenever fault has been adjudicated in a separation proceeding the effect of that determination precludes further litigation of the wife's fault for alimony purposes under Civil Code article 160.<sup>2</sup> The main objection to the application of such an estoppel principle in alimony actions under article 160 is that the fault issue may not be fully litigated at the proceeding for separation because often both spouses desire a judicial separation in the

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42. LA. CONST. art. III, 2(A).

43. LA. CONST. art. III, 8 (1921).

44. See, e.g., House Concurrent Resolution No. 84, 1976 Regular Session. For the judicial history of consent resolutions, see *The Work of the Louisiana Appellate Courts for 1974-1975 Term—Legislative Process*, 36 LA. L. REV. 549, 552-53 (1976).

1. 301 So. 2d 622 (La. 1974).

2. Apparently even when the wife secures a separation based on fault other than abandonment, the adjudication of the husband's fault necessarily implies her own freedom from fault. See *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Persons*, 35 LA. L. REV. 259, 265 n.26 (1975). For a discussion of recent cases concerning this issue see *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Persons*, 35 LA. L. REV. 259, 263-65 (1975); *The Work of the Louisiana Appellate Courts for the 1972-73 Term—Persons*, 34 LA. L. REV. 201, 203-04 (1974).



manner least likely to result in accusations in a public forum.<sup>3</sup> It has been suggested that the source of the problem lies in Civil Code article 138(9) which requires the spouses to live apart for one year before obtaining a "no fault" separation.<sup>4</sup> Such a delay "induces many to seek what in reality is a collusive judgment based on fault."<sup>5</sup> The suggested remedy is not to relitigate the fault issue but rather for the legislature to shorten the period in which the spouses must live apart before a "no fault" separation can be granted.<sup>6</sup>

The 1976 legislature introduced a bill which would have served to implement the suggested solution by reducing the period of voluntary separation contained in Civil Code article 138(9) to three months.<sup>7</sup> The bill was tabled in the House,<sup>8</sup> however, and persons seeking divorces based on one party's fault will continue to be required, as a result of the *Fulmer* decision, to litigate fully the question of fault at the separation proceedings. The public policy of reconciliation fostered by Louisiana law certainly will suffer due to the legislature's failure to adopt this bill:<sup>9</sup> the confrontation where each spouse seeks to attribute the "fault" for the failure of their marriage to the other is obviously not conducive to those affections and emotions essential to a successful reunion.

The application of the jurisprudential doctrine of recrimination has long been used to deny a divorce or separation from bed and board where the

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3. See the dissent in *Broussard v. Broussard*, 275 So. 2d 410, 413 (La. App. 3d Cir. 1973). See also *The Work of the Louisiana Appellate Courts for the 1972-73 Term—Persons*, 34 LA. L. REV. 201, 203-04 (1974).

4. *Id.*

5. *Id.* at 203-04.

6. *Id.* at 204. The contention is that the reduction of the one year period would eliminate the need for collusion without resulting in a drastic change of Louisiana law or sacrificing the public policy favoring reconciliation since the one year interval between a judgment of separation and a judgment of divorce will still be required under LA. R.S. 9:302 (1950), as amended by La. Acts 1960, No. 31, § 1. See also *The Work of the Louisiana Appellate Courts for the 1974-75 Term—Persons*, 36 LA. L. REV. 335, 337 (1976); *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Persons*, 35 LA. L. REV. 259, 265 (1975), where it is suggested that the application of the doctrine of recrimination by the Louisiana courts further necessitates reducing the period for no-fault separation. For additional discussion of the doctrine of recrimination see the text accompanying note 9, *infra*.

7. La. H.B. 1389, § 1, 39th Reg. Sess., 1976. 1976 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 39th Reg. Sess. 381.

8. *Id.*

9. See the text at note 3, *supra*; and note 5, *supra*. LA. R.S. 9:302 (1950) provides a one year "cooling off" period after a judgment of separation before a judgment of divorce may be rendered. See also *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Persons*, 35 LA. L. REV. 259, 265 (1975).

fault of both spouses is found to be of like character and proportional degree.<sup>10</sup> The use of the doctrine leads to unrealistic and legislatively unsupportable results,<sup>11</sup> refusing spouses who have shown their inability to live together the logical alternative of separation.<sup>12</sup> Louisiana Civil Code article 141<sup>13</sup> was enacted to correct this judicially created problem<sup>14</sup> by mandating that a separation from bed and board be granted where mutual fault exists.<sup>15</sup>

Recent decisions have raised the question whether the husband has a right to alimony either after separation<sup>16</sup> or after divorce.<sup>17</sup> In *Whitt v. Vauthier*<sup>18</sup> the right of the wife to receive alimony under Civil Code article

10. *E.g.*, *Eals v. Swan*, 221 La. 329, 59 So. 2d 409 (1952); *Snell v. Aucoin*, 158 La. 767, 104 So. 709 (1925); *Fontenot v. Fontenot*, 327 So. 2d 678 (La. App. 1st Cir. 1976); *Schillaci v. Schillaci*, 310 So. 2d 179 (La. App. 4th Cir. 1975); *Maranto v. Maranto*, 297 So. 2d 704 (La. App. 1st Cir. 1974). For a discussion of the recent jurisprudence dealing with the doctrine of recrimination see *The Work of the Louisiana Appellate Courts for the 1974-75 Term—Persons*, 36 LA. L. REV. 335 (1976).

11. LA. CIV. CODE arts. 151-53; R. PASCAL, LA. FAMILY LAW COURSE 122 (1974) [hereinafter cited as PASCAL]: "The exception of mutuality of fault may be reasonable enough if the degree of seriousness of fault is about the same, even if not the same kind, as long as the common life is not intolerable for the spouses" (Emphasis added).

12. *The Work of the Louisiana Appellate Courts for the 1974-75 Term—Persons*, 36 LA. L. REV. 335, 337 (1976). It is suggested that the use of the doctrine of mutual fault should be an additional justification for the reduction of the no-fault separation period of one year found in Civil Code article 138(9). See also the text accompanying note 5, *supra*.

13. LA. CIV. CODE art. 141, as amended by La. Acts 1976, No. 495.

14. The problem is the obvious conflict between Civil Code article 138(1)-(8) and the jurisprudential doctrine of recrimination. Under the codal provisions one may seek a separation from bed and board when the other spouse is guilty of "fault." Under the doctrine of recrimination the legislative expression allowing a separation for "fault" is circumvented when the court finds both spouses to be equally at "fault" and refuses to grant a divorce.

15. La. Acts 1976, No. 495, adding LA. CIV. CODE art. 141. LA. CIV. CODE article 141 provides: "A separation from bed and board shall be granted although both spouses are mutually at fault in causing the separation. In such instances, alimony pendente lite may be allowed but permanent alimony shall not be allowed thereafter following divorce."

16. *Williams v. Williams*, 331 So. 2d 438 (La. 1976); *Gravel v. Gravel*, 331 So. 2d 580 (La. App. 3d Cir. 1976).

17. *Whitt v. Vauthier*, 316 So. 2d 202 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 558 (La. 1975). *Cf.* *Broussard v. Broussard*, 320 So. 2d 279 (La. App. 4th Cir. 1975).

18. 316 So. 2d 202 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 558 (La. 1975). *Cf.* *Favrot v. Barnes*, 332 So. 2d 873 (La. App. 4th Cir.), *cert. granted*, 334 So. 2d 436 (La. 1976); *Ward v. Ward*, 332 So. 2d 868 (La. App. 4th Cir.), *cert. granted*, 334 So. 2d 430 (La. 1976).

160 survived constitutional attack as a denial of equal protection due to the court's questionable finding that in the correct circumstances a husband does have the right to alimony after divorce.<sup>19</sup> Also, the Louisiana Supreme Court, in *Williams v. Williams*, has held that the right to alimony pendente lite granted to the wife in Civil Code article 148 does not deprive males of equal protection or due process under the federal or Louisiana constitution.<sup>20</sup> An implication of this decision is that a husband does not have a reciprocal right to alimony either before or after separation.<sup>21</sup> In summary, the husband in the correct circumstances may have a right to alimony after divorce under Civil Code article 160, but he is denied the right to alimony pendente lite of article 148.

In an apparent attempt to establish some type of uniformity, a bill was introduced seeking to amend Civil Code article 148 to allow either spouse not having sufficient income for his or her maintenance to seek alimony pendente lite.<sup>22</sup> The proposed amendment never left the House,<sup>23</sup> arguably indicating legislative approval of the previously discussed jurisprudence.<sup>24</sup>

#### PATERNITY

Upon the recommendation of the Louisiana State Law Institute, the legislature effected extensive changes in the presumption and disavowal of paternity of articles 184-192 of the Civil Code.<sup>25</sup> Previously, the presumption of paternity under Civil Code article 184 extended only to a child *conceived* during the marriage;<sup>26</sup> a child born capable of living within 180

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19. The Fourth Circuit's finding is questionable since it suggests that the Code Napoleon of 1804 has legal effect in Louisiana. 316 So. 2d at 205. The Code Napoleon was never enacted law in Louisiana. See A. YIANNPOULOS, LOUISIANA CIVIL LAW SYSTEM COURSE OUTLINES 53-55 (1971). See also PASCAL at 178.

20. *Williams v. Williams*, 331 So. 2d 438 (La. 1976).

21. *Id.* The court's reasoning was based on the finding that husbands and wives are not similarly situated under Louisiana's community property system and the legislative conferral of the right of claiming alimony pendente lite *only to wives* bears a fair and substantial relation to the legitimate objective of the article—"a fair and orderly termination of the community regime." 331 So. 2d at 441 (Emphasis added). *But see* PASCAL at 170.

22. La. H.B. 1458, § 1, 39th Reg. Sess., 1976; 1976 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 39th Reg. Sess. 396.

23. *Id.*

24. See the text accompanying notes 28-33, *supra*.

25. La. Acts 1976, No. 430 *amending* LA. CIV. CODE arts. 184-90, *repealing* LA. CIV. CODE arts. 191-92. For the full text of these articles as amended see Spaht & Shaw, *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59 n.64 (1976).

26. LA. CIV. CODE art. 184 (as it appeared prior to Act 430 of 1976) provided:

days of the marriage was not presumed to be the child of the husband, since it was presumed in that instance that conception had occurred outside the marriage.<sup>27</sup> The law still protected the child so conceived if the wife's husband failed to establish his non-paternity within a limited time.<sup>28</sup> Article 184 as amended now clearly states that "[t]he husband of the mother is presumed to be the father of all children *born or conceived* during the marriage."<sup>29</sup> The Civil Code was further amended to provide that a child born three hundred days or more after the dissolution of a marriage does not receive benefits of the presumption contained in article 184, while those children born less than three hundred days after dissolution are presumed to have been conceived during the marriage.<sup>30</sup>

Prior to the 1976 amendments the presumption created by article 184<sup>31</sup> was recognized as "the strongest presumption known in law."<sup>32</sup> While five situations listed in the Civil Code of 1870,<sup>33</sup> and possibly a sixth in the

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"The law considers the husband of the mother as the father of all children *conceived* during the marriage." (Emphasis added).

27. LA. CIV. CODE art. 186 (as it appeared prior to Act 430 of 1976) provided in part: "The child capable of living, which is born before the one hundred and eightieth day after the marriage is not presumed to be the child of the husband. . . ." See PASCAL at 213-14.

28. LA. CIV. CODE arts. 191-92 (as they appeared prior to Act 430 of 1976). Article 191 required that in those instances when the presumption of paternity ceased, the husband had to dispute the legitimacy of the child within six months if he was in the place where the child was born, or within six months after his return if he were absent; if the birth had been concealed from him he had to act within six months after the discovery of the fraud. Article 192 provided that if the husband died without having disputed the child's legitimacy but before the expiration of the periods established in article 191, his heirs should have six months to contest the legitimacy of the child. See also PASCAL at 213-14; *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Persons*, 35 LA. L. REV. 259, 262-63 (1975).

29. LA. CIV. CODE art. 184, as amended by La. Acts 1976, No. 430 (Emphasis added).

30. LA. CIV. CODE art. 185, as amended by La. Acts 1976, No. 430.

31. See note 26, *supra*.

32. *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952).

33. LA. CIV. CODE arts. 185-90 (as they appeared prior to Act 430 of 1976). The situations included: (1) for cause of adultery where the birth has been concealed from the father (art. 185); (2) where the child "capable of living" is born before the 180th day after the marriage (art. 186) unless the husband knew of the pregnancy before the marriage or was present and signed the registering of the birth (art. 190); (3) where the child is born 300 days after the dissolution of the marriage or (4) 300 days after sentence of separation from bed and board unless cohabitation is shown (art. 187); (5) where cohabitation has been physically impossible because of "remoteness" of the husband (art. 189).

Uniform Act on Blood Test to Determine Paternity,<sup>34</sup> allowed rebuttal of the presumption, Louisiana courts strictly applied these provisions as well as the time limits in articles 191-192<sup>35</sup> and found that the policy of the state is to protect the innocent child against attacks upon his legitimacy.<sup>36</sup>

Act 430 allows the husband to disavow the paternity of the child if he is able to show "by a preponderance of the evidence any facts which reasonably indicate that he is not the father."<sup>37</sup> Examples of such facts are blood test results, sterility, and remoteness which renders cohabitation at the time of conception unlikely.<sup>38</sup> The time limit within which the husband must bring a suit for disavowal of paternity is one hundred eighty days.<sup>39</sup>

There are two provisions of the Act which should be critically examined. First, article 186 provides that the mother's husband *will not* be presumed the father of the child if another man is so presumed.<sup>40</sup> Although

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34. LA. R.S. 9:396-98 (Supp. 1972). This Act authorizes the use of blood tests in any civil action in which paternity is an issue, sets forth procedural rules, and prescribes the effect to be given test results. In footnote dicta the Third Circuit in *Dugas v. Henson*, 307 So. 2d 650 n.4 (La. App. 3d Cir. 1976), stated that the legislature's intent in enacting this act was to provide an additional ground for disavowal, noting with approval the case of *Smith v. Smith*, 300 So. 2d 205 (La. App. 3d Cir. 1974), where the court indicated that the statute's passage did not result in the elimination of the procedural provisions of the code such as prescription or loss of the right to bring an action *en desaveu*. The *Dugas* court, however, did acknowledge a conflict may exist among the members of the Third Circuit as to the question of whether R.S. 9:396-98 actually creates a sixth ground for disavowal, citing *Brugman v. Prejean*, 288 So. 2d 702 (La. App. 3d Cir. 1974). For a discussion of the *Smith* and *Brugman* cases and the relationship of the Uniform Act to the procedural limits of the Civil Code applicable to a disavowal action see *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Persons*, 35 LA. L. REV. 259, 261-63 (1975).

35. See note 40, *supra*.

36. *E.g.*, *Tannehill v. Tannehill*, 261 La. 933, 261 So. 2d 619 (1972) (disavowal for sterility due to childhood disease barred by art. 185's prohibition against disavowal for "natural impotence"); *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952) (child born during marriage held to be the son of the legal husband of his mother despite testimony of the mother and the husband that they had never had any sexual relations whatsoever with each other); *George v. Bertrand*, 217 So. 2d 47 (La. App. 3d Cir.), *cert. denied*, 253 La. 647, 219 So. 2d 177 (1968), *cert. denied*, 396 U.S. 974 (1969) (child held to be son of mother and her legal husband even though mother was living with the child's acknowledged father at the time of the child's conception and birth and later married him).

37. La. Acts 1976, No. 430 amending LA. CIV. CODE art. 187.

38. Official Revision Comment to LA. CIV. CODE art. 187, *as amended* by La. Acts 1976, No. 430.

39. LA. CIV. CODE art. 189, *as amended* by La. Acts No. 430. In addition, La. Acts 1976, No. 430, § 2, *repealed* LA. CIV. CODE arts. 191 and 192 in their entirety; see note 37, *supra*.

40. LA. CIV. CODE art. 186, *as amended* by La. Acts 1976, No. 430.

not clearly revealed, the article apparently is intended to apply where the wife, married to her second husband, gives birth to a child less than three hundred days after the dissolution of her previous marriage. In that instance the husband of the first marriage is presumed father of the child.<sup>41</sup> This provision appears to be an unrealistic application of the presumption of paternity and will operate unfairly. It may effect results similar to decisions reported prior to 1975 which refused to acknowledge a child as the issue of his biological father.<sup>42</sup> Those decisions had been uniformly criticized as unrealistic.<sup>43</sup> In 1975 the Supreme Court reached a more realistic conclusion which allowed children, legitimated by the subsequent marriage of their parents, to inherit from their biological father even though they were presumed to be the children of their mother's first husband under article 184.<sup>44</sup> The court did not determine the effect of such a decision upon the children's presumed status as the legitimate issue of the mother's first husband or upon the right of the article 184 father to rebut the presumption of paternity.<sup>45</sup> Although the application of amended Civil Code article 186

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41. LA. CIV. CODE art. 185, as amended by La. Acts 1976, No. 430. See also text at notes 41-42, *supra*.

42. *George v. Bertrand*, 217 So. 2d 47 (La. App. 3d Cir. 1968), *cert. denied*, 253 La. 647, 219 So. 2d 177 (1969); *Succession of Barlow*, 197 So. 2d 682 (La. App. 4th Cir.), *cert. denied*, 250 La. 917, 199 So. 2d 921 (1967). In these cases children entitled to be legitimated by the marriage of their parents after their birth pursuant to Civil Code article 198 were deprived of the benefits of that article due to their mother's undissolved marriage years earlier to a man who had disappeared. These decisions were based on definitions provided in the Civil Code: "Children are either legitimate, illegitimate, or legitimated." Art. 178. "Illegitimate children are those born out of marriage. Illegitimate children may be legitimated in certain cases in the manner prescribed by law." Art. 180. The courts reasoned that since under the article 184 presumption of paternity the children were presumed to be the legitimate children of the husband of the prior undissolved marriage, the children were not born "out of marriage," not illegitimate, and therefore could not be legitimated by the marriage of their parents. The net result is to deny children so situated the right to inherit from their biological father.

43. Pascal, *Louisiana Succession and Related Laws and the Illegitimate*, 46 TUL. L. REV. 180 (1971); *The Work of the Louisiana Appellate Courts for the 1968-69 Term—Persons*, 30 LA. L. REV. 171 (1969); *The Work of the Louisiana Appellate Courts for the 1966-67 Term—Persons*, 28 LA. L. REV. 316 (1968); Note, 16 LOYOLA L. REV. 235 (1969).

44. *Succession of Mitchell*, 323 So. 2d 451 (La. 1975). There the court's decision that children born during an undissolved marriage could inherit from their parents pursuant to Civil Code article 198 was based on a 1948 amendment to article 198. The court determined that the legislative intent was to permit legitimation by subsequent marriage of the biological parents of all adulterous children, whether technically illegitimate or technically legitimate at birth.

45. *Id.* In the future it may be contended that the 1976 amendment to article 186 establishes the child as the legitimate issue of the first husband only, and as the latest

will prevent the possibility of a child being presumed to have two fathers,<sup>46</sup> it establishes a rule which in many instances will ignore the child's actual paternity.<sup>47</sup>

A second area of concern arises when the husband dies within the period allowed by Civil Code article 189<sup>48</sup> for bringing an action *en desaveu* without seeking to disavow the paternity of the child. Article 190 as amended provides that "an heir or *legatee* whose interest in the succession will be reduced shall have one year from the death or one year from the birth of the child, whichever period is longer, within which to bring such an action."<sup>49</sup> The granting of this power to a *legatee* should be questioned. Despite the amendments effected by this Act,<sup>50</sup> it is still Louisiana public policy to insure that the legitimacy of the child will be maintained whenever possible.<sup>51</sup> It therefore seems advisable that only the presumed father and his heirs should have the right to repudiate the presumption of articles 184-190. Since the Act does not limit the term "legatee," any individual given a minute portion of a presumed father's estate may attack the paternity of the child.

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expression of the legislative will, it precludes any legitimation under the provisions of article 198 and removes the question of whether a child can be both legitimate and legitimated.

46. LA. CIV. CODE art. 186, *as amended by* La. Acts 1976, No. 430. *See also* Succession of Mitchell, 323 So. 2d 451 (La. 1975). *See note 45, supra*.

47. This is true not only of the case of the child born to a woman who has lived separate and apart from her husband without a judgment of divorce and the biological father with whom the wife has lived and later married; but also where a divorce is granted under LA. R.S. 9:301 (divorce may be granted after proof of living apart two years) and LA. R.S. 9:302 (divorce may be granted one year after judgment of separation if reconciliation has not occurred) and the wife remarries within three hundred days. In such circumstances, where a child is born within three hundred days of the dissolution of the marriage, the evidence strongly suggests that someone other than the wife's first husband (more than likely her current spouse) is the father, but the presumption of the amended article is otherwise. Furthermore, a full term pregnancy generally is nine months or approximately two hundred seventy days. The three hundred day provision of article 185 requires a presumption that a child conceived within a month after dissolution (or later in the case of premature births) is the child of the wife's husband of the previous marriage. In nearly all instances the child's actual paternity will be contrary to that presumed by law.

48. LA. CIV. CODE art. 189, *as amended by* La. Acts 1976, No. 430.

49. LA. CIV. CODE art. 190, *as amended by* La. Acts 1976, No. 430 (Emphasis added).

50. La. Acts. 1976, No. 430, § 1.

51. LA. CIV. CODE arts. 238-45 and arts. 917-28 indicate a continued distinction between legitimates and illegitimates concerning rights to succession and to support from one's parents.

There are two instances when the right to disavow the paternity of a child is denied the husband under the new legislation. The first is found in a modified retention of former Civil Code article 190(1).<sup>52</sup> The law now provides that a man who marries a pregnant women with the knowledge that she is pregnant at the time of the marriage is denied the right to disavow the paternity of such a child born of the marriage *unless* another man is presumed the father. In such an instance the provisions of article 186 apply.<sup>53</sup> The legislation also denies the husband the right to disavow paternity when the child is born as the result of artificial insemination and the husband consented to the procedure.<sup>54</sup>

#### TUTORSHIP

Justice Barham, in the Appendix to *Griffith v. Roy*,<sup>55</sup> answered criticism of the judiciary's long-standing practice of permitting, without reference to the rules on removal of tutors,<sup>56</sup> suits for change of custody after an award in a separation or divorce judgment.<sup>57</sup> Although only dictum, the Appendix straightforwardly concludes that an award of custody in a separation or divorce proceeding neither appoints a tutor nor institutes the regime of tutorship unless the party who is awarded custody in the proceeding has also been appointed natural tutor.<sup>58</sup> The procedure for the change of custody is a civil proceeding for custody and not one for the removal of a tutor.<sup>59</sup>

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52. LA. CIV. CODE art. 190(1) (as it appeared prior to Act 430 of 1976) provided: "The husband cannot contest the legitimacy of the child born previous to the one hundred and eightieth day of the marriage, in the following cases: 1. If he was acquainted with the circumstances of his wife being pregnant previously to the marriage. . . ."

53. LA. CIV. CODE art. 188, *as amended* by La. Acts 1976, No. 430.

54. LA. CIV. CODE art. 186, *as amended* by La. Acts 1976, No. 430.

55. 263 La. 712, 728, 269 So. 2d 217, 223 (1972).

56. *See, e.g.*, *Fulco v. Fulco*, 259 La. 1122, 254 So. 2d 603 (1971); *Webb v. Webb*, 264 So. 2d 925 (La. App. 3d Cir. 1972).

57. Pascal, *Tutorship After Separation of the Parents*, 16 LA. B.J. 267 (1968); *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Persons*, 28 LA. L. REV. 312, 318-19. *See also* PASCAL at 171-72, 318-25. Professor Pascal's position is that Civil Code arts. 157, 246, and 250 establish tutorship as an essential element of every pronouncement of civil custody. The parent initially awarded custody under Civil Code art. 157 by that fact alone becomes tutor and can be deprived of custody only through a proceeding to remove the tutor.

58. 263 La. 712, 728, 269 So. 2d 217, 223.

59. *Id.* at 734, 269 So. 2d at 225. Justice Barham's conclusion was reached through an evaluation of the Civil Code and Code of Civil Procedure articles concerning the commencement of the tutorship regime. Although recognizing that the person awarded custody in a separation or divorce proceeding is of right the



A Senate bill proposing to amend article 4501 of the Code of Civil Procedure might have resolved this conflict by establishing that the spouse to whom custody is awarded upon divorce or separation "shall occupy the place of and have the powers of a tutor."<sup>60</sup> However, since the bill was withdrawn from the files of the Senate before any action was taken, a definitive legislative resolution of the problem has been postponed.<sup>61</sup>

The law concerning the appointment of a legal tutor has been improved and clarified by Act No. 429,<sup>62</sup> a recommendation of the Louisiana State Law Institute. Prior law mandated, in most instances, that preference be given to male relatives when the court appointed a legal tutor for a minor.<sup>63</sup> Those provisions were of questionable validity under Article I, § 3 of the Louisiana Constitution.<sup>64</sup> Civil Code article 263 now states that when the parent dying last has not appointed a tutor or if the tutor so appointed has not been confirmed or has been excused, a judge must appoint as the tutor *the person whose appointment is in the best interest of the minor* and must select that person from among the qualified ascendants in the direct line, collaterals by blood within the third degree, and the surviving spouse of the parent dying last.<sup>65</sup>

In lowering the age of majority to eighteen in 1972<sup>66</sup> the Louisiana

natural tutor of the minors, he classifies that right as an "inchoate" one, "exactly what the Civil Code Article 250 calls it, 'tutorship . . . of right', but no more than a 'right'. Natural tutorship has existence, as do all other tutorships, only after appointment of the tutor by a judicial tribunal as provided in the Code of Civil Procedure." *Id.* at 733-34, 269 So. 2d at 225.

60. La. S.B. 766, §1, 39th Reg. Sess., 1976; 1976 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 39th Reg. Sess. 715. It may be argued that under the language of the bill the spouse awarded custody would not be "appointed" tutor and therefore the rules applicable to the removal of the tutor need not be invoked to seek a change in custody.

61. *Id.*

62. La. Acts 1976, No. 429 *amending* LA. CIV. CODE art. 263, *repealing* LA. CIV. CODE arts. 264-69, and *amending* LA. CODE CIV. P. arts. 4065-67, 4234.

63. LA. CIV. CODE arts. 263-69 (as they appeared prior to Act 429 of 1976); LA. CODE CIV. P. arts. 4063, 4065-68 (as they appeared prior to Act 429 of 1976); for a general discussion of the law as it existed prior to Act No. 429 of 1976, *see* PASCAL at 314.

64. LA. CONST. art. I, § 3 provides in part: "No person shall be denied the equal protection of the laws. . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . . ."

65. LA. CIV. CODE art. 263, *as amended by* La. Acts 1976, No. 429 (Emphasis added).

66. La. Acts 1972, No. 346 *amending* LA. CIV. CODE arts. 373, 382, and 3478, *repealing* LA. CIV. CODE arts. 367, 385; La. Acts 1972, No. 347 *amending* LA. CODE CIV. P. arts. 3097, 3993.

legislature repealed Civil Code article 385<sup>67</sup> and amended Code of Civil Procedure article 3993.<sup>68</sup> As a result, the minimum age requirement for "judicial emancipation conferring majority"<sup>69</sup> was removed.<sup>70</sup> The only restrictions remaining were provided in Code of Civil Procedure article 3993 which requires the judge to find that there was "good reason" for the emancipation and that the minor was capable of managing his own affairs.<sup>71</sup> However, confusion existed as to whether a judge had the authority to grant such an emancipation. With the repeal of Civil Code article 385 there no longer existed any "substantive" law giving him that power; at the same time, however, the legislature amended, but did not repeal, the provisions of the Code of Civil Procedure applicable to the judicial emancipation conferring majority.<sup>72</sup> This action arguably indicated the legislature's intention to have "substantive" effect given that portion of the Code of Civil Procedure. Reenactment of Civil Code article 385 should eliminate this confusion.<sup>73</sup> A judge may now grant, under the provisions of Code of Civil Procedure articles 3991-94, judicial emancipation conferring majority upon a minor sixteen years of age or older<sup>74</sup> when there is "good reason" and the minor is found capable of managing his own affairs.<sup>75</sup>

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67. La. Acts 1972, No. 346. LA. CIV. CODE art. 385 (as it appeared prior to Act 346 of 1972) provided: "A minor over the age of eighteen years may be judicially emancipated and relieved of the disabilities which attach to minority as provided in Articles 3991 through 3994 of the Code of Civil Procedure."

68. La. Acts 1972, No. 347. LA. CODE CIV. P. art. 3993 (as it appeared prior to Act 347 of 1972) provided: "If the judge is satisfied that there is good reason for emancipation and that the minor is capable of managing his own affairs, he shall render a judgment of emancipation, which shall declare that the minor is fully emancipated and relieved of all the disabilities *with full power to perform all acts as fully as if he had reached the age of twenty-one*" (Emphasis added).

69. LA. CODE CIV. P. arts. 3991-94.

70. Prior to 1972, Civil Code art. 385 required the minor to be at least eighteen years of age; under Code of Civil Procedure art. 3993 the judgment declared him a major as if twenty-one years of age. See notes 67 and 68, *supra*.

71. LA. CODE CIV. P. art. 3993, *as amended by* La. Acts 1972, No. 347.

72. See note 68, *supra*.

73. La. Acts 1976, No. 155, *adding* LA. CIV. CODE art. 385.

74. LA. CIV. CODE art. 385, *as enacted by* La. Acts 1976, No. 155 provides: "A minor sixteen years of age or older may be judicially emancipated and relieved of the disabilities which attach to minority as provided in Articles 3991 through 3994 of the Louisiana Code of Civil Procedure."

75. LA. CODE CIV. P. art. 3993, *as amended by* La. Acts 1972, No. 347. See the text accompanying note 71, *supra*.

## PROPERTY

## PERSONAL SERVITUDES

The long-awaited revision of Book II, Title III of the Louisiana Civil Code—"Of Usufruct, Use and Habitation"<sup>1</sup>—prepared under the auspices of the Louisiana State Law Institute, was enacted in the 1976 regular session of the Louisiana legislature.<sup>2</sup> Since an extensive discussion of the Act is unfortunately precluded by space limitations, this paper will only discuss two modifications of particular interest.<sup>3</sup>

Drawing from former Civil Code article 646<sup>4</sup> the Act declares that there are two kinds of servitudes, personal and predial.<sup>5</sup> The Act defines a personal servitude as a charge on a thing for the benefit of a person,<sup>6</sup> and states that there are three types of personal servitudes: usufruct, habitation, and rights of use.<sup>7</sup> The obvious changes effected are the suppression of the personal servitude of "use" and the establishment of the new category of "rights of use."<sup>8</sup>

The removal of the detailed provisions referring to "use"<sup>9</sup> was a recognition that the personal servitude of use regulated in the 1870 Civil Code has little, if any, practical significance today.<sup>10</sup> Even so, the revision

1. LA. CIV. CODE arts. 533-645 (as they appeared prior to Act 103 of 1976).

2. La. Acts 1976, No. 103 *amending* LA. CIV. CODE arts. 533-645.

3. An excellent discussion of the provisions and background of Act 103 is found in Reporter A.N. Yiannopoulos' *Exposé des Motifs*. See La. Acts 1976, No. 103, § 1, *Exposé des Motifs* [hereinafter referred to as *Exposé des Motifs*]. Notice especially should be given to the definition of "fruits" provided in article 551 and the discussion in the *Exposé des Motifs*.

4. LA. CIV. CODE art. 646 (as it appeared prior to Act 431 of 1976) provided in part: "All servitudes which affect lands may be divided into two kinds, personal and real.

Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation. . . ." These provisions were removed from art. 646 by La. Acts 1976, No. 431, a companion to Act No. 103.

5. LA. CIV. CODE art. 533, *as amended* by La. Acts 1976, No. 103.

6. La. Acts 1976, No. 103 *amending* LA. CIV. CODE art. 534.

7. *Id.*

8. Compare LA. CIV. CODE art. 646 (as it appeared prior to Act 431 of 1976) with LA. CIV. CODE art. 534, *as amended* by La. Acts 1976, No. 103. Note that Act 103 of 1976 also changed the heading of Title III from "Of Usufruct, Use and Habitation" to "Personal Servitudes."

9. LA. CIV. CODE arts. 626-45 (as they appeared prior to Act 103 of 1976).

10. See *Exposé des Motifs*, *supra* note 3.

retains the concept of use by allowing an owner to establish a real right in favor of another for a limited portion of the fruits of his property.<sup>11</sup>

As noted above, the revision provides for a new kind of personal servitude—rights of use.<sup>12</sup> A rights of use servitude (or limited personal servitude) has been described as a real right that confers on a person limited advantages over an immovable belonging to another and constitutes an intermediate category between personal and predial servitudes.<sup>13</sup> Prior to 1976 the question whether an individual could create personal servitudes upon his property other than those of usufruct, use, and habitation had been left to the Louisiana judiciary.<sup>14</sup> In *Frost-Johnson Lumber Co. v. Salling's Heirs*<sup>15</sup> the Louisiana Supreme Court held that the owner of property may validly create other personal servitudes. Acknowledging the existence of a conflict in the Civil Code,<sup>16</sup> the court concluded that it could not “say that the law clearly prohibits the creation of a servitude upon lands in favor of a person *and his heirs* . . . hence the intention of the parties should govern such matters.”<sup>17</sup>

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11. LA. CIV. CODE art. 545, as amended by La. Acts 1976, No. 103, provides: “Usufruct may be established for a term or under a condition, and subject to any modification consistent with the nature of usufruct.

The rights and obligations of the usufructuary and of the naked owner may be modified by agreement unless modification is prohibited by law or by the grantor in the act establishing the usufruct.”

12. See text accompanying notes 5-8, *supra*.

13. A. YIANNPOULOS, PERSONAL SERVITUDES § 123 in 3 LOUISIANA CIVIL LAW TREATISE 404 (1968) [hereinafter referred to as PERSONAL SERVITUDES]. Professor Yiannopoulos notes that “rights of use” servitudes are an intermediate category between personal and predial servitudes since “[l]ike usufruct, use, and habitation, they are charges on property in favor of a person rather than an estate; like predial servitudes they are necessarily charges on an immovable belonging to another person and are confined to certain advantages of use or enjoyment.” *Id.* at 405.

14. See, e.g., *Mallet v. Thibault*, 212 La. 79, 31 So. 2d 601 (1947); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1920). LA. CIV. CODE art. 646 (as it appeared prior to Act 431 of 1976) declared that personal servitudes are of three sorts: usufruct, use, and habitation. LA. CIV. CODE art. 709 in part states that “[o]wners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such servitudes imply nothing contrary to public order.” These articles conflicted with the provisions of Civil Code arts. 607, 758, and 2013 which appeared to allow the existence of the right to establish a servitude in favor of a person and his heirs. See also PERSONAL SERVITUDES at 125, 406.

15. 150 La. 756, 91 So. 207 (1920).

16. See note 14, *supra*.

17. 150 La. 765, 91 So. 207, 245 (emphasis by the court). See also PERSONAL SERVITUDES at 125, 413.

The enactment of the rights of use provisions in the Civil Code<sup>18</sup> has given legislative approval to the *Frost-Johnson* decision and further definition to the limited personal servitude. The Code now provides that the rights of use personal servitude "confers in favor of a person a specified use of an estate less than full enjoyment,"<sup>19</sup> but limits the individual's freedom to contract rights of use only to those advantages that may become the object of a predial servitude.<sup>20</sup> Unless prohibited by law or contract, a rights of use servitude is transferable<sup>21</sup> and heritable,<sup>22</sup> may be granted in favor of legal entities as well as natural persons,<sup>23</sup> and is to be regulated by the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a rights of use servitude.<sup>24</sup>

#### RECLAMATION OF LAND LOST THROUGH EROSION

In 1936 the Louisiana Supreme Court recognized that where forces of nature such as subsidence and erosion had operated on the banks of a navigable body of water, submerged areas resulting therefrom become a portion of the bed and are therefore insusceptible of private ownership.<sup>25</sup> Although the Louisiana Constitution of 1974 forbids alienation by the legislature of the beds of navigable waterways there is an exception to allow riparian land owners to recover land lost through erosion.<sup>26</sup> Since this proviso appears not to be self-executing, the 1976 legislature amended La. R.S. 41:1131 to recognize the right of riparian land owners to reclaim land lost through erosion.<sup>27</sup> Such reclamation includes all oil, gas, and mineral

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18. LA. CIV. CODE arts. 639-45, as amended by La. Acts 1976, No. 103.

19. LA. CIV. CODE art. 639, as amended by La. Acts 1976, No. 103.

20. LA. CIV. CODE art. 640, as amended by La. Acts 1976, No. 103. Official Comment (b) to art. 640 provides: "The rights of passage, of aqueduct, or of light and view, may thus be stipulated in favor of a person rather than an estate. Further, fishing or hunting rights and the taking of certain fruits or products from an estate may likewise be stipulated in the form of a right of servitude."

21. LA. CIV. CODE art. 643, as amended by La. Acts 1976, No. 103.

22. LA. CIV. CODE art. 644, as amended by La. Acts 1976, No. 103.

23. LA. CIV. CODE art. 641, as amended by La. Acts 1976, No. 103.

24. LA. CIV. CODE art. 645, as amended by La. Acts 1976, No. 103.

25. *Miami Corporation v. State*, 186 La. 784, 806-07, 173 So. 315, 322 (1936). *Cf. Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974); *Stevens v. State Mineral Board*, 221 So. 2d 645 (La. App. 4th Cir. 1969) (concurring opinion). *See also* LA. CIV. CODE arts. 453, 509-11.

26. LA. CONST. art. IX, § 3.

27. La. Acts 1976, No. 180 amending LA. R.S. 41:1131 (1950). Section (F) of LA. R.S. 41:1131 notes the word "reclamation" refers to "the raising of land through filling or other physical works which elevate the surface of the theretofore submerged land as a minimum above the level of ordinary low water in the case of rivers or streams and above the level of ordinary high water in the case of bodies of water

rights<sup>28</sup> subject to any right-of-way, servitude or lease granted by the state while the reclaimed land was a part of the navigable water bottom.<sup>29</sup> The legislature also prescribed the procedures for seeking recovery of eroded land: the party must make application to the register of state lands, accompanied by a deed of ownership and/or a certified map or plat of survey defining the boundary between the lands belonging to the state and those of the riparian land owner and showing the exact extent of the land claimed to have been lost through erosion.<sup>30</sup>

#### LEASE OF NON-NAVIGABLE WATER BOTTOMS

The register of the state land office is now authorized to grant long-term leases for the use of the bottoms of any non-navigable waters owned by the state.<sup>31</sup> The register's authority can be exercised only when such a lease is deemed in the interest of the state<sup>32</sup> and approved by both the governor and the "local governing authority."<sup>33</sup> Such leases may be granted only to a public agency, political subdivision, municipality, public corporation, or "private person who is a riparian owner with respect to the water bottoms and air rights to be leased."<sup>34</sup> The statute specifically directs that nothing in its provisions is intended to "alter or abrogate" the state's claim to mineral rights in the leased area or to entitle the lessee to any part of the mineral rights in the leased areas.<sup>35</sup> Although not included in the chapter of Title 41 dealing with the lease of public lands<sup>36</sup> and therefore not subject to the advertisement and bid requirements of that chapter,<sup>37</sup> this new provision appears to have sufficient safeguards to ensure effective use and development of non-navigable water bottoms.<sup>38</sup>

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other than rivers and streams, to such heights as may be prescribed in regulations or forms adopted by the register to ensure reasonably permanent existence of the reclaimed lands."

28. LA. R.S. 41:1131(B) (1950), *as amended by* La. Acts 1976, No. 180.

29. LA. R.S. 41:1131(E) (1950), *as amended by* La. Acts 1976, No. 180.

30. LA. R.S. 41:1131(C) (1950), *as amended by* La. Acts 1976, No. 180.

31. LA. R.S. 41:91, *as amended by* La. Acts 1976, No. 263.

32. While the statute requires that the lease can be granted only when such action is deemed in the interest of the state the language used does not clearly establish who is to make that determination.

33. LA. R.S. 41:91, *as amended by* La. Acts 1976, No. 263.

34. *Id.*

35. *Id.*

36. LA. R.S. 41:1211-94 (1950).

37. LA. R.S. 41:1214 (1950).

38. See text accompanying note 33, *supra*.

## SUCCESSIONS

## STATUTORY WILLS

The passage of the Louisiana Statutory Wills Act<sup>1</sup> in 1952 has been acknowledged as providing a valuable supplement to the forms of wills found in the Louisiana Civil Code.<sup>2</sup> Designed to provide the testator a simplified means of executing a document of easily ascertainable authenticity,<sup>3</sup> the statutory will has widespread applicability since it is suitable for estate planning.<sup>4</sup>

Prior to the 1976 session of the legislature the statutory will was not available to the testator who did not know how to sign his name or was unable to read.<sup>5</sup> Thus, an individual with either of these disabilities, particularly a blind person, was relegated to the forms of testaments contained in the Civil Code.<sup>6</sup> Act 333 of 1976 has added a new section to R.S. 9:2442 which allows those individuals who are unable to read to execute a statutory will.<sup>7</sup>

However, the provisions of R.S. 9:2443 that prevent an individual who

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1. La. Acts 1952, No. 66, § 1, *as amended by* La. Acts 1964, No. 123, § 1 (codified as LA. R.S. 9:2442-44). For a general description of the original act see Comment, *The New Louisiana Wills Act*, 28 TUL. L. REV. 288 (1954).

2. L. OPPENHEIM, SUCCESSIONS AND DONATIONS § 110 in 10 LOUISIANA CIVIL LAW TREATISE 202 (1973) [hereinafter cited as OPPENHEIM]. The four codal forms of will are 1) the nuncupative will by public act, LA. CIV. CODE arts. 1578-80; 2) the nuncupative will by private act, LA. CIV. CODE arts. 1581-83; 3) the holographic will, LA. CIV. CODE arts. 1588, 1589; and 4) the mystic or sealed will, LA. CIV. CODE arts. 1584-87.

3. *See* Succession of Morgan, 257 La. 380, 242 So. 2d 551 (1970); Woodfork v. Sanders, 248 So. 2d 419 (La. App. 4th Cir. 1971).

4. OPPENHEIM at 203; Note, 45 TUL. L. REV. 205 (1970).

5. LA. R.S. 9:2443 (1950), *as amended by* La. Act 1964, No. 123, §1 provides: "Except as provided in R.S. 9:2442 with respect to a testator who is physically unable to sign his name, those who know not how or are not able to sign their names, and those who know not how or are not able to read, cannot make dispositions in the form of the will provided for in R.S. 9:2442, nor be attesting witnesses thereto."

6. LA. CIV. CODE arts. 1574-1604.

7. LA. R.S. 9:2442, *as amended by* La. Acts 1976, No. 333, § 1. Section B of R.S. 9:2442 now requires the will to be read in the presence of the testator, the notary, and three witnesses; the notary and/or the witnesses not reading aloud are required to follow the reading on copies of the will. After the reading the testator is required to indicate to the witnesses and notary that the instrument is his and to sign his name. The notary and witnesses then execute a declaration of what has transpired in the execution of the will by the testator.

is unable to read or sign his name from executing a statutory will or serving as an attesting witness were not amended or deleted. An apparent conflict therefore exists between a portion of amended R.S. 9:2442 and R.S. 9:2443.<sup>8</sup> Due to the section of Act 333 that provides for the repeal of prior conflicting legislation this supposed conflict may be resolved.<sup>9</sup> The apparent effect of the 1976 legislation is to suppress the conflicting portions of R.S. 9:2443 while preserving the requirement that attesting witnesses be able to read and sign their names.<sup>10</sup> It also appears that the failure to amend R.S. 9:2443 denies those persons who are unable to sign their names the right to execute a statutory will.<sup>11</sup> This prohibition, however, is of doubtful significance. Even a person who is unable to read can be taught to sign his name, and the prohibition against the execution of a statutory will by a person who is unable to read has been effectively removed.<sup>12</sup>

#### SMALL SUCCESSIONS

The Louisiana Code of Civil Procedure outlines the procedure to be followed in the probate of small successions, which were previously defined as successions with a gross value of two thousand dollars or less.<sup>13</sup> This streamlined procedure provides for lower court costs and determines when judicial proceedings are unnecessary to open such successions.<sup>14</sup> In addition, the Louisiana Inheritance Tax Statute prior to 1976 provided that where the property in a succession did not exceed two thousand dollars, the tax collector in his discretion could fix and collect the tax based on an affidavit filed by the succession representative, heirs, or legatees.<sup>15</sup> Unfortunately, inflation since 1960 (when the two thousand dollar restriction was

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8. Compare LA. R.S. 9:2442, as amended by La. Acts 1976, No. 333 with LA. R.S. 9:2443.

9. La. Acts 1976, No. 333, § 2.

10. LA. R.S. 9:2442(B), as amended by La. Acts 1976, No. 333, requires the attesting witnesses to follow the reading of the testament on copies of the will and sign a declaration that the will had been executed in compliance with the procedures prescribed in LA. R.S. 9:2442.

11. Compare LA. R.S. 9:2442, as amended by La. Acts 1976, No. 333 with LA. R.S. 9:2443. Both LA. R.S. 9:2442(A) & (B) require that the testator sign the instrument and that when he is not physically able to sign ". . . he must so declare or signify to the notary in the presence of the witnesses as well as declare and signify the cause that hinders him from signing, and shall then affix his mark in the place where his signature is required." See the text of LA. R.S. 9:2443 at note 5, *supra*.

12. See the text accompanying notes 7-10, *supra*.

13. LA. CODE CIV. P. arts. 3421-43. For a general discussion of these provisions see OPPENHEIM at 358.

14. LA. CODE CIV. P. arts. 3422, 3431.

15. LA. R.S. 47:2410 (1952).



established) has placed the small succession provisions beyond estates which could use them most effectively. With the passage of Act 187,<sup>16</sup> the Code of Civil Procedure now defines a small succession as one having a gross value of ten thousand dollars or less.<sup>17</sup> The inheritance tax law now permits the tax collector to fix and collect the inheritance tax upon an affidavit when a succession does not exceed that same amount.<sup>18</sup>

## TORTS

### PUNITIVE DAMAGES IN DEFAMATION ACTIONS

Largely as a result of extensive efforts by the governor, the 1976 legislature added Article 2315.1 to the Louisiana Civil Code providing for the recovery of punitive damages, as well as general and special ones, in defamation actions. Public or private plaintiffs are now eligible for such an award if it is proven that the defamatory statement was made "with knowledge of its falsity or with reckless disregard of whether it was false or not."<sup>1</sup>

Punitive damages in tort actions are not unknown in Louisiana. Nineteenth century cases awarded punitive damages to successful plaintiffs<sup>2</sup> while other cases, though not making such awards, also recognized the possibility of doing so if malice or bad motive were shown.<sup>3</sup> This view of punitive damages changed in 1917 with the case of *Vincent v. Morgan's Louisiana & Texas Railroad and Steamship Company*.<sup>4</sup> There, the court considered an award of punitive damages as a method of punishing the offender for the benefit of the community and saw no reason why an injured party should be allowed to combine such a criminal prosecution for the

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16. La. Acts 1976, No. 187 amending LA. CODE CIV. P. art. 3421 and LA. R.S. 47:2410.

17. LA. CODE CIV. P. art. 3421, as amended by La. Acts 1976, No. 187.

18. LA. R.S. 47:2410, as amended by La. Acts 1976, No. 187.

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1. La. Acts 1976, No. 217, adding LA. CIV. CODE art. 2315.1. The provision impliedly repeals LA. R.S. 45:1353 (1950) limiting awards against broadcasters to actual damages proved.

2. *Graham v. St. Charles Street R. Co.*, 47 La. Ann. 1656, 18 So. 707 (1895); *Burkett v. Lanata*, 15 La. Ann. 337 (1860); *Summers v. Baumgard*, 9 La. 161 (1835); *Block v. Roux*, 12 Orl. App. 313 (1915).

3. *Townsend v. Fontenot*, 42 La. Ann. 890, 8 So. 616 (1890); *Marin v. Scatterfield*, 41 La. Ann. 742, 6 So. 551 (1889); *Kee v. Smith*, 35 La. Ann. 518 (1883); *Perrine v. Planchard*, 15 La. Ann. 133 (1860); *Biggs v. D'Aquin*, 13 La. Ann. 21 (1858); *Stinson v. Buisson*, 17 La. 567 (1841).

4. 140 La. 1027, 74 So. 541 (1917).

community with his own civil damage action.<sup>5</sup> The court further supported its view by interpreting Civil Code Articles 2315 and 1934 as providing only for awards of actual compensatory damages.<sup>6</sup> Following *Vincent*, Louisiana jurisprudence has consistently held that punitive damages are not recoverable at civil law.<sup>7</sup> However, Louisiana courts have suggested that punitive damages would be allowable if there were a statute specifically authorizing them.<sup>8</sup> Act 217 apparently fills this statutory void.

The new article's fault standard, based on knowledge of falsity or reckless disregard for truth, is in line with recent United States Supreme Court cases dealing with defamation laws and thus appears to pass constitutional muster. In *New York Times Company v. Sullivan*<sup>9</sup> the Supreme Court sought to insure uninhibited debate on public issues by requiring that public officials prove actual malice (knowledge of falsity or reckless disregard for truth) before any damages for defamatory statements can be recovered.<sup>10</sup> Subsequent cases continued to favor fuller freedom for the speaker and evidenced the Court's concern about the chilling effect which the threat of damage awards might have on the exercise of free speech.<sup>11</sup> In testing the constitutionality of the new Louisiana provision, the case most pertinent is *Gertz v. Robert Welch, Inc.*<sup>12</sup> where the Court stated its present view of

5. *Id.* at 1039, 74 So. at 546.

6. *Id.* at 1039-50, 74 So. at 546-49.

7. *Moore v. Blanchard*, 216 La. 253, 43 So. 2d 599 (1949); *Layne Louisiana Co. v. Superior Oil*, 209 La. 1014, 26 So. 2d 20 (1946); *Sanders v. Times Picayune*, 168 La. 1125, 123 So. 804 (1929); *Spearman v. Toye Bros.*, 164 La. 677, 114 So. 591 (1927); *Janssen Catering Co. v. Abadie*, 157 La. 357, 102 So. 428 (1924); *Hanna v. Otis*, 151 La. 851, 92 So. 360 (1922); *Brian v. Harper*, 144 La. 585, 80 So. 885 (1919) (libel); *Howell v. Vicksburg, S. & P. Ry. Co.*, 144 La. 427, 80 So. 613 (1919); *Serio v. American Brewing*, 141 La. 290, 74 So. 998 (1917); *Walker v. Associated Press*, 191 So. 2d 727 (La. App. 2d Cir. 1966).

8. *Terry v. Butler*, 240 La. 398, 123 So. 2d 865 (1960); *McCoy v. Arkansas Natural Gas Co.* 175 La. 487, 143 So. 383, *cert. denied*, 287 U.S. 661 (1932); *Post v. Rodrigue*, 205 So. 2d 67 (La. App. 4th Cir. 1967); *Gugert v. New Orleans Independent Laundries*, 181 So. 653 (La. App. Or. Cir. 1938).

9. 376 U.S. 254 (1964).

10. Constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that the statement was false or with reckless disregard for its truth. *Id.* at 279-80. The concurring justices, Black, Goldberg, and Douglas, felt that the first amendment left the people and press completely free to criticize the official conduct of their leaders. *Id.* at 279, 305.

11. *Time, Inc. v. Firestone*, 96 S. Ct. 958 (1976); *see also Note*, 37 LA. L. REV. 247 (1976). *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

12. 418 U.S. 323 (1974). *See also Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L.

state defamation laws: "We hold that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood."<sup>13</sup> The Court added that the recovery of punitive damages may be proper so long as liability is based on a showing of actual malice. Louisiana's new provision incorporates this as the test of determining whether or not punitive damages are to be allowed.<sup>14</sup> Because *Gertz* linked the propriety of a punitive damage award to the *New York Times* actual malice standard and Act 217 effects the same result, there should be no constitutional defect in an award of punitive damages.<sup>15</sup> Recent federal cases are in accord.<sup>16</sup>

Attorney's fees are also recoverable under Act 217. The plaintiff may receive them if he meets the burden of proof necessary to recover punitive damages. Should the defendant prevail, he is entitled to recover his attorney's fee if it is determined that the plaintiff's action was frivolous.

Because of the potential for large damage awards, Act 217 provides that retractions or corrections made by the defendant must be considered in mitigating damages.<sup>17</sup> Since the basic purpose of a defamation action is to redress the damage caused by "invasion of the interest in reputation and good name,"<sup>18</sup> the plaintiff has an interest in requiring the defendant to admit the falsity of his statement. Allowing a retraction to mitigate damages encourages prompt correction of errors and to some degree minimizes their effect. Because a retraction may not be as widely read or given as much

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REV. 1349 (1975); Robertson, *Defamation & the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199 (1976); Note, 49 TUL. L. REV. 685 (1975).

13. 418 U.S. at 347.

14. *Id.* at 349-50.

15. Louisiana has managed to maintain its criminal defamation provisions, LA. R.S. 14:47-50 (Supp. 1968), despite constitutional attack. Although declared unconstitutional in their application to discussion of public officials in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the statutes were held to be susceptible of a limiting construction and so not unconstitutional *per se*. *Snyder v. Ware*, 314 F. Supp. 335 (W.D. La.), *aff'd per curiam*, 397 U.S. 589 (1970). Surely if a criminal penalty may be imposed so long as constitutional standards are met, punitive damages, a much less drastic remedy, may be awarded under the same conditions.

16. *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir.), *cert. denied*, 396 U.S. 1049 (1969), *reh. den.*, 397 U.S. 978 (1969).

17. Several states require that such effect be given to retraction efforts by the defendant that attempt to minimize the harm his statement has caused. *Eaton*, *supra* note 12, at 1439-43.

18. W. PROSSER, LAW OF TORTS 737-51 (4th ed. 1971) [hereinafter cited as PROSSER].

credence as the original statement, retraction has wisely been allowed only to lessen the damage award rather than to defeat it entirely.

Senate Bill 794, a related measure, would have required radio and television stations to retain for sixty days verbatim recordings of all news broadcasts, editorial comments or analyses made by their employees. This proposal would have aided the defamation plaintiff in proving the content and communication of any defamatory remarks so aired and afforded the defendant an opportunity to combat charges of defamation with evidence as concrete as that available to newspapers and magazines. The provision was not enacted, however.

#### PROPOSED CHANGES IN ARTICLE 2315

In the first hearing of *Callais v. Allstate Insurance Company*,<sup>19</sup> the Louisiana Supreme Court held that a child could recover the damages suffered as a result of the death of her parent even though the death was caused solely by the negligence of that parent. Article 2315, the court explained, affords recovery against *any* person whose negligent act causes the death which results in the damage; the child could, therefore, recover from her father's succession the damages she incurred when her father deprived her of love, affection, and support by negligently killing himself. This vast expansion of the wrongful death action created a substantial furor which prompted the supreme court to grant a rehearing.<sup>20</sup> Another response to the original decision was House Bill 817, not enacted, which would have placed limits on the wrongful death action. The bill would have allowed the beneficiaries named in Article 2315 to recover for wrongful death only when the deceased could have recovered his damages had he survived. This change would have prevented further decisions such as the original *Callais* opinion by clearly expressing the legislative intent to the contrary. The supreme court's decision on rehearing, however, eliminated the need for enacting this provision. In its reconsideration the court denied recovery by holding that the death was not a wrongful one because two parties—an actor who caused the death and a victim whose death created the action—were not involved.<sup>21</sup>

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19. 334 So. 2d 692 (La. 1976).

20. 334 So. 2d 699 (La. 1976) (on rehearing).

21. A death is not wrongful, the court explained, unless it involves an element of fault. Since there is no parental duty to protect a child against the risk of the parent's own death, there was no negligence or fault as to the daughter and hence there could be no liability. *Id.* at 701. See also Johnson, *Death on the Callais Coach: The Mystery of Wrongful Death and Survival Actions in Louisiana*, 37 LA. L. REV. 1 (1976).

A more far-reaching change was proposed by Senate Bill 261 which would have defined the terms "man," "person," and "another" in Article 2315 to include human beings from the moment of conception.<sup>22</sup> This proposal would have allowed the statutory beneficiaries to recover for the wrongful death of a fetus occurring at any stage of its development.

Prenatal injuries and deaths have created complex problems in tort actions because the unborn child is not considered a separate legal personality as it develops.<sup>23</sup> In Louisiana, a child born alive, or his parents if he should later die, may recover for the damage caused by prenatal injuries under the holding of *Cooper v. Blanck*.<sup>24</sup> In dicta, the court intimated that a wrongful death action would lie when a child is stillborn if the child was "viable" when injured.<sup>25</sup> However, the first case to squarely consider that question, *Youman v. McConnell & McConnell, Inc.*<sup>26</sup> refused to allow a wrongful death recovery. The *Youman* court felt constrained by Civil Code Article 28 which does not recognize the separate legal personality of a stillborn child<sup>27</sup> and only allowed the mother to recover for the pain and anxiety she suffered between the accident and the birth and not for the loss of the child as such. Subsequently another circuit court, in *Valence v. Louisiana Power and Light Company*,<sup>28</sup> expressed the view that it was not

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22. For a discussion of similar definitional changes made in the criminal laws, see *The Work of the Louisiana Legislature for the 1976 Regular Session—Criminal Law, infra* at 151.

23. Most jurisdictions allow a child born alive to maintain an action for his prenatal injuries. Should he die from the injuries after his birth, an action will lie for his wrongful death. Some courts have considered the child a person earlier in his development, however, and have allowed the parents of a child stillborn because of his injuries to bring an action for his wrongful death. PROSSER at 55. See also Comment, Tort Liability for Prenatal Injury, 24 TUL. L. REV. 435 (1950); Note, 12 LA. L. REV. 519 (1952) for Louisiana's position; Note, 6 LOYOLA L. REV. 157 (1952).

24. 39 So. 2d 352 (La. App. Orl. Cir. 1923) "We think it manifest that injury to a child at this period (8 months), is in contemplation of law injury to a living child for which the child, if it survives its birth, may maintain an action under Art. 2315." (Emphasis added.) The child was born prematurely and died 3 days later.

25. "If the child be killed at this period (8 months) we see no reason why the parents cannot maintain an action for the death." *Id.* at 360.

26. 7 La. App. 315 (2d Cir. 1927).

27. LA. CIV. CODE art. 28 provides: "Children born dead are considered as if they had never been born or conceived." Article 29, which provides that "children in the mother's womb are considered, in whatever relates to themselves, as if they were already born" would seem to refute the *Youman* argument that nothing which is in existence was injured. As the court in *Cooper* pointed out, an unborn child is an entity separate enough to have a right of action survive for injuries to its father during its gestation; surely the right of action for the child's prenatal injuries should survive for the father.

28. 50 So. 2d 847 (La. App. Orl. Cir. 1951).

Article 28's purpose to preclude recovery of damages under *any* circumstances if an unborn fetus is so injured that it cannot be born alive. Since the mother can recover for the fear of miscarriage she suffers following an accident,<sup>29</sup> the court reasoned, she should certainly be allowed to recover for the loss of her child if her fears are realized. The court in *Valence* held a wrongful death recovery could be allowed where there is "actionable negligence which causes such injury to a viable fetus as to prevent its being born alive."<sup>30</sup> Both the *Valence* and *Cooper* courts utilized the amorphous concept of viability in discussing the possibility of a wrongful death recovery. The new provision would have precluded any investigations into "viability" since the loss of any child conceived would have been a compensable injury.<sup>31</sup>

Without this new provision a tortfeasor injuring a fetus who is later born alive is liable in damages to the child, and, should the child die, the parents may recover for wrongful death and also bring a survival action. On the other hand, a tortfeasor causing a more severe injury which results in a stillbirth need only compensate the mother for the fear and anxiety she suffered before the birth, unless the *Valence* court's view<sup>32</sup> is adopted by the other circuits. Since this allows the more serious offender to acquit his responsibility to those injured more easily, the proposed change in Article 2315 would be a welcome one. However, a possibility exists that such a broad provision could conflict with the United States Supreme Court's decision recognizing a woman's qualified right to terminate her pregnancy.<sup>33</sup> The new definitions in Article 2315 read broadly could allow the

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29. See, e.g., *Bucklew v. Plunkett*, 242 So. 2d 372 (La. App. 2d Cir. 1970); *Warr v. Kemp*, 208 So. 2d 570 (La. App. 3d Cir. 1968); *Olivier v. Transcontinental Ins. Co.*, 93 So. 2d 701 (La. App. Orl. Cir. 1957); *Jordan v. Fidelity & Cas. Ins. Co.*, 90 So. 2d 529 (La. App. 2d Cir. 1956); *Youman v. McConnell & McConnell, Inc.*, 7 La. App. 315 (2d Cir. 1927).

30. *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847, 850 (La. App. Orl. Cir. 1951). The causal connection between the injury and the stillbirth must be clearly shown; recovery was denied Mrs. Valence because the medical evidence offered disputed the existence of any such causal relationship.

31. Presumably, adjustments in quantum could be made so that the amount of damages awarded would adequately compensate the actual expectation the mother has lost. Unfortunately, conception is also not a precise medical term. It is not nearly so uncertain as viability, however, so it seems a better choice as a starting point for liability.

32. See text at notes 28-31, *supra*.

33. *Roe v. Wade*, 410 U.S. 113 (1973). In the first trimester of pregnancy, the decision to terminate rests with the mother and her doctor. The state may impose reasonable regulations to protect the mother's health in the later stages of pregnancy and may even prohibit abortions not necessary to the mother's health after the child has become viable.

father of an aborted fetus to recover from the mother<sup>34</sup> and the doctor performing the procedure for the wrongful death of his expected child. The latest Supreme Court pronouncement in this field<sup>35</sup> specified that the state cannot give a husband or a minor's parents the right to veto an abortion. Presumably, neither can the state afford the spouse a damage remedy since it too could affect the mother's freedom to choose her own course of action. However, because the proposed Louisiana provision could be subject to a constitutional construction not limiting a woman's right to privacy and would effect a beneficial change in the law, it is unfortunate that the proposal was not enacted.

#### SHERIFF'S IMMUNITY FROM LIABILITY

In a recent incident at the state penitentiary, guards knew that certain armed inmates opposed the transfer of a fellow prisoner to another dormitory and that the transferring prisoner had been threatened. A quarrel ensued and an inmate was stabbed to death. The Louisiana Supreme Court, in *Breaux v. State*,<sup>36</sup> found that the guards should have anticipated the attack and taken reasonable precautions to prevent it; because they did not, the state was held liable for the death of the inmate. Earlier cases,<sup>37</sup> imposing a lesser standard of liability, had held that a penal institution was not an insurer of inmates against attacks by other inmates. Perhaps to prevent the application of the somewhat stricter *Breaux* standard to parish officials, House Bill 1213 was introduced. By its terms it would have relieved sheriffs, deputies, and their insurers of liability arising from any injury to an inmate which is either self-inflicted or the result of a battery by another inmate. This proposed limitation on liability was not enacted; therefore presumably the *Breaux* rationale could be extended to govern cases of sheriffs' liability to injured parish prison inmates in the same way that it governs cases involving inmates of the state prison.

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34. An intraspousal immunity is created by LA. R.S. 9:291 (Supp. 1965) which provides that a wife may sue her husband only in certain enumerated instances. This immunity has been held to be personal only so that the wife may sue her husband's insurer. *LeBlanc v. New Amsterdam Cas. Co.*, 202 La. 857, 13 So. 2d 245 (La. 1943). A husband has also been allowed to recover from his wife's insurer. *McHenry v. American Employers Ins.*, 18 So. 2d 840 (La. App. 2d Cir. 1944). The father of the unborn aborted child could, of course, sue the mother who was not his wife but proving his paternity might be extremely difficult.

35. *Planned Parenthood of Central Missouri v. Danforth*, 96 S. Ct. 2831 (1976). Noted at 37 LA. L. REV. — (1976).

36. 326 So. 2d 481 (La. 1976).

37. *Parker v. State*, 282 So. 2d 483 (La. 1973); *St. Julian v. State*, 98 So. 2d 284 (La. App. 1st Cir. 1957).

## HEALTH AND MALPRACTICE

*Consent Provisions*

Act 407 of 1976 sets forth the requirements which must be met if unwritten consent to medical treatment is to be valid.<sup>38</sup> When consent is oral, the explanation to the patient must include the same elements necessary for proper written consent: the nature and purpose of the procedures and the known serious risks to be encountered. An opportunity must be given to the patient to ask questions which must be answered satisfactorily in order for his consent to be truly informed.

The 1976 legislature also provided that those persons statutorily authorized to consent to medical procedures for others<sup>39</sup> may enter into binding medical arbitration agreements on behalf of those others without court approval.<sup>40</sup>

*Definition of Death*

Act 233 of 1976 provides two definitions of death. The first defines death as an "irreversible cessation of spontaneous respiratory and circulatory functions."<sup>41</sup> The adoption of such a definition has been mandated by the rapid advances in medical technology, especially with regard to the use of organs from deceased donors. Since organs must be transplanted soon after the donor's death, doctors must be able to pinpoint an exact moment of death after which they may legally remove the required organ. Where organs are to be used in transplants, the bill creates an additional safeguard by requiring that a second physician who is not a member of the transplant team concur in the pronouncement of death.

The second definition covers the circumstance where artificial methods of life support are maintaining respiration and circulation. Death will occur in such a situation only when a physician announces that, in his opinion based on standards of approved medical practice, there has been an "irreversible total cessation of brain function."<sup>42</sup> Once this has been

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38. LA R.S. 40:1299.40 (Supp. 1975) now provides guidelines for written consent. Act 407 adds a new section to the existing statute, providing for oral consent.

39. LA. R.S. 40:1299.53 (Supp. 1975) provides that the following persons may consent to treatment for others: any parent, adult or minor, for his minor child; any married person for his spouse; any person standing *in loco parentis* for the minor in his care; any adult for his minor sibling in the parents' absence; any grandparent for his minor grandchild in the absence of the child's parents.

40. La. Acts 1976, No. 269, adding LA. R.S. 40:1299.57 (Supp. 1976).

41. La. Acts 1976, No. 233, adding LA. R.S. 9:111 (Supp. 1976).

42. *Id.*



determined, the artificial methods would presumably be discontinued. This does not recognize a "right to die"<sup>43</sup> since the patient is legally dead because of the pronouncement before the artificial aid is removed. The provision does not address the question which would arise should it be possible for respiration and circulation to resume naturally once the artificial aid was disconnected.<sup>44</sup> Should this occur the patient would then be alive under the first definition though pronounced dead under the second.

### *Malpractice*

The medical malpractice package enacted in 1975<sup>45</sup> underwent a number of changes this year. Most of these, enacted by Act 183, were procedural statutes.<sup>46</sup> The one year prescriptive period for malpractice actions now applies to all persons, including minors and interdicts,<sup>47</sup> regardless of their disability. A noteworthy change effected in the malpractice system is the redefinition of the word "malpractice." Formerly the term encompassed "[A]ny tort or breach of contract based on health care or professional services rendered."<sup>48</sup> It is now limited to *unintentional* torts and breaches of contract;<sup>49</sup> intentional acts are not given the benefit of the malpractice system's protection. The new definition further includes "all legal responsibility of a health care provider arising from defects in blood, tissue, transplants, drugs and medicines, or from defects in or failures of

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43. See *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (recognizing that artificial methods may be discontinued in certain cases, allowing the patient to die if his body cannot itself maintain life).

44. Karen Quinlan remains "alive" two and one-half months after her artificial life support, a respirator, was disconnected. *Baton Rouge State Times*, Monday, August 16, 1976. At the time the artificial breathing apparatus was removed from Miss Quinlan, however, she did not meet the medical criteria of brain death; presumably a Louisiana patient would meet these criteria before such artificial aid could be withheld.

45. LA. R.S. 40:1299.41 *et seq.* (Supp. 1975). For a general discussion of the changes effected by the 1975 enactments see Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

46. Act 183 of 1976 amends many of the present malpractice statutes and makes provision for doctors and health care providers who intend to remain self-insured, changes the administration of the Patients' Compensation Fund designed to cover awards in excess of \$100,000, and effects minor changes in both the Residual Malpractices Insurance Authority and in the procedures of medical review panels.

47. LA. R.S. 9:5628, *as amended by* La. Acts 1976, No. 214.

48. LA. R.S. 40:1299.41(8) (as it appeared prior to Act 183 of 1976).

49. LA. R.S. 40:1299.41(8), *as amended by* La. Acts 1976, No. 183, § 1. The same definition is also found in LA. R.S. 40:1299.39A(5), *added by* La. Acts 1976, No. 66 and *amended by* La. Acts 1976, No. 660.

prosthetic devices, implanted in or used on or in the person of a patient.”<sup>50</sup> While appearing to broaden the liability of health care providers, the new definition does not necessarily have such an effect. Construed strictly, it merely includes those defects for which health care providers were previously held legally responsible within the definition of malpractice. Health care providers have been held liable for supplying defective products of this nature only when there was some negligence involved.<sup>51</sup> However, as an effect of the new definition, actions of this sort will now be considered malpractice actions and therefore subject to the malpractice system’s prescription rules and its limitations on liability.<sup>52</sup>

In response to an outcry from the physicians of the state’s charity hospitals, the legislature attempted to relieve those doctors of their heavy insurance burdens.<sup>53</sup> The first attempt was rushed through the legislative process and signed by the governor early in the session. This law, Act 66,<sup>54</sup> provided that no person rendering health care services for any state agency could be held liable for any act of malpractice; rather, suit was to be instituted against the state which would be liable for any damages awarded. As the session progressed, many legislators became convinced that a more carefully constructed program was required. Thus, Act 660<sup>55</sup> allows suit to be brought against a state-employed health care provider but limits his potential liability to \$500,000 and establishes a state fund to pay the expenses of defending claims and to satisfy judgments or compromises. The state’s medical personnel are therefore no longer required to carry insurance

50. LA. R.S. 40:1299.41(8), *as amended by* La. Acts 1976, No. 183, § 1.

51. In article 1764(B), the Civil Code provides that the implied warranties of merchantability and fitness are not applicable to sales of human blood, plasma, tissues or organs and that these are not products but are rather medical services. Courts have held that this statute extinguishes all causes of action relative to these services except for the negligence action. *See, e.g., Heirs of Fruge v. Blood Services*, 506 F.2d 841 (5th Cir. 1975); *Juneau v. Interstate Blood Bank*, 333 So. 2d 354 (La. App. 3d Cir. 1976). Doctors must take care that drugs are administered properly by denoting specific dosage instructions. *Norton v. Argonaut Ins. Co.*, 144 So. 2d 249 (La. App. 1st Cir. 1962).

52. No judgment exceeding \$500,000 may be rendered in a medical malpractice action. The health care provider is liable for the first \$100,000 and the excess is to be recovered from the Patients’ Compensation Fund. LA. R.S. 40:1299.42 (Supp. 1975).

53. The 1975 package was designed to remove the burden of heavy premiums from private physicians. An earlier attempt, LA. R.S. 40:1299.38 (Supp. 1975), designed to aid those employed by state agencies by providing insurance at no cost to them, proved insufficient to meet their need for greater protection against malpractice actions.

54. La. Acts 1976, No. 66, *adding* LA. R.S. 40:1299.39 (Supp. 1976).

55. La. Acts 1976, No. 660, *amending* LA. R.S. 40:1299.39 (Supp. 1976).

to cover potential malpractice liability and the injured victim is allowed to recover damages from the state up to the statutory ceiling.<sup>56</sup>

### *Res Ipsa Loquitur in Malpractice*

The tort doctrine of *res ipsa loquitur* has been applied in malpractice actions by the Louisiana courts when the facts suggest the defendant's negligence as the most plausible explanation of the injury.<sup>57</sup> Since use of this doctrine shifts the burden of proof to the health care provider to show that he is free of negligence,<sup>58</sup> it has been restricted to use only when there have been unusual or untoward occurrences during the time of medical supervision.<sup>59</sup> Proposals before the legislature this session would have limited application of *res ipsa loquitur* to specifically enumerated instances: a foreign substance unintentionally left in the body after surgery,<sup>60</sup> an explosion or fire caused by a substance used in the treatment,<sup>61</sup> an unintended burn suffered during medical care,<sup>62</sup> an injury suffered to a part of the body not directly involved in the treatment,<sup>63</sup> and a surgical procedure performed on the wrong patient or the wrong part of the patient's body. The provision would, of course, have eased a doctor's defense by decreasing the number of instances in which he could be called upon to carry the burden of proof. Its restrictiveness, however, would have prevented any further jurisprudential extensions of the doctrine and would have denied trial judges the flexibility needed to prevent unjust results.<sup>64</sup>

### *Reconventional Demands*

Two bills proposed the creation of a new cause of action for professionals beset by malpractice claims.<sup>65</sup> A professional forced to defend a

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56. For a discussion of the argument that such recovery limitations are unconstitutional, see *Medical Malpractice*, *supra* note 45, at 667-69.

57. *McCann v. Baton Rouge Gen. Hosp.*, 276 So. 2d 259 (La. 1973).

58. *Bryant v. St. Paul Fire & Marine Ins. Co.*, 272 So. 2d 448 (La. App. 2d Cir. 1973).

59. *McCann v. Baton Rouge Gen. Hosp.*, 276 So. 2d 259 (La. 1973); *Wells v. Woman's Hosp. Foundation*, 286 So. 2d 439 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 646 (1974).

60. *Grant v. Touro Infirmary*, 254 La. 204, 223 So. 2d 148 (1969); *Chappetta v. Ciaravella*, 311 So. 2d 563 (La. App. 4th Cir.), *cert. denied*, 313 So. 2d 841 (1975).

61. *Andrepoint v. Ochsner*, 84 So. 2d 63 (La. App. Or. Cir. 1955).

62. *Davis v. Southern Baptist Hosp.*, 293 So. 2d 238 (La. App. 4th Cir. 1974).

63. *McCann v. Baton Rouge Gen. Hosp.*, 276 So. 2d 259 (La. 1973); *Jacobs v. Beck*, 141 So. 2d 920 (La. App. 4th Cir. 1962).

64. For a discussion of the constitutionality of placing statutory restrictions on this tort doctrine see *Medical Malpractice*, *supra* note 45, at 679.

65. La. H.B. 657, 39th Reg. Sess., 1976; La. S.B. 277, 39th Reg. Sess., 1976. The

malpractice claim not based on probable cause would have been allowed to recover his attorney's fees and the damages occasioned by and expenses incurred in defending the frivolous suit. The claim could have been asserted either by reconventional demand or in an independent action brought by the professional following rejection of the original demand. To escape liability, the original plaintiff would have been required to prove that probable cause existed at the time his suit was brought. While such a provision would decrease the number of frivolous suits<sup>66</sup> against professionals, it might also have discouraged plaintiffs with legitimate claims who feared exposure to this potential liability.

### MATRIMONIAL REGIMES

In Louisiana married residents tacitly consent to the community of acquets or gains absent a contrary stipulation in a marriage contract.<sup>1</sup> The husband as "head and master" of the community controls and manages the community assets, subject to the wife's concurrence in only a few limited instances.<sup>2</sup>

When title to community property stands in the wife's name, her consent is required to sell or mortgage those assets.<sup>3</sup> In addition, prior to 1976, there were instances when the wife's consent was required before certain community property could be alienated by the husband, but only if affirmative steps had been taken to insure that her concurrence was necessary. Pursuant to Civil Code article 2334, the wife could declare that her consent was necessary before immovable property standing in both spouses' names could be leased, mortgaged, or sold by her husband.<sup>4</sup> Furthermore, if community immovable property had been authentically declared the "family home" by either spouse, the wife's consent was

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provisions were designed to apply to claims against any professional, not only health care providers.

66. The medical review panel procedure created in LA. R.S. 40:1299.47 (Supp. 1975) seems an adequate safeguard against frivolous claims against health care providers.

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1. LA. CIV. CODE arts. 2329, 2332, and 2399.

2. *E.g.*, LA. CIV. CODE art. 2404. Under this article the husband cannot donate any immovable or a fractional part of the movables of the community without the wife's consent unless it is to establish their children in marriage or in a trade or profession.

3. LA. CIV. CODE art. 2334 (as it appeared prior to Act No. 679 of 1976).

4. *Id.*

required before that property could be sold or mortgaged.<sup>5</sup>

With the advent of the women's rights movement, recent Supreme Court decisions,<sup>6</sup> and the proposed Equal Rights Amendment,<sup>7</sup> attention has focused on the fairness, constitutionality, and future reform of the entire Louisiana community property regime.<sup>8</sup> Most objections appear to stem from the fact that the community assets are included in the husband's patrimony<sup>9</sup> and evidence a dissatisfaction with the system's foundations.<sup>10</sup> The consensus among contemporary writers appears to be that the question no longer is how to defend Louisiana's community regime as it now exists, but rather how to reform it.<sup>11</sup>

The Louisiana State Law Institute has established a committee to prepare amendments to Louisiana's community property law. This committee, however, has yet to propose any extensive reform measures.<sup>12</sup> While awaiting reform proposals from the Law Institute, the 1976 legislature amended article 2334 of the Civil Code to require the wife's consent before

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5. LA. R.S. 9:2801-04 (1950) (as they appeared prior to Act No. 679 of 1976).

6. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security payments of benefits to widows, but not widowers; held unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (statute favoring dependents of male members over the dependents of female members of the armed services invalid under fifth amendment due process clause); *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho statutory preference for males to administer intestate's estate struck down as violative of the fourteenth amendment's equal protection clause).

7. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

8. See Bartke, *Community Property Law Reform in the U.S. and in Canada*, 50 TUL. L. REV. 213 (1976); Bilbe, *Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime*, 19 LOYOLA L. REV. 373 (1973). Pascal, *Updating Louisiana's Community of Gains*, 49 TUL. L. REV. 555 (1975); *Community Property: Symposium on Equal Rights*, 48 TUL. L. REV. 560 (1974).

9. *Community Property Law Reform in the U.S. and in Canada*, *supra* note 8, at 222; *Updating Louisiana's Community of Gains*, *supra* note 8, at 562 where Professor Pascal notes that "women have objected that no disbursement of community funds can be made by the wife except as the husband's mandatary; that separate creditors of the wife may not enforce their rights against community assets; that nevertheless the husband may employ community funds and other assets as he pleases, even for his separate interests, subject to the necessity of the wife's consent in only a few instances; and that even the husband's separate creditors may enforce their rights against the community as long as the regime lasts."

10. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973). LA. CIV. CODE arts. 2334, 2404.

11. See note 8, *supra*.

12. The Law Institute did propose one bill concerning matrimonial regimes which passed the legislature. This is discussed in the text accompanying notes 13-46, *infra*.

the husband may sell or encumber community property in the name of the wife, immovable property in the name of both the husband and wife, or community immovable property declared the family home.<sup>13</sup> The husband, without the wife's consent, may alienate immovable property which is in the name of both spouses<sup>14</sup> or has been designated as the family home<sup>15</sup> when an authentic act declaring that the wife's consent is not necessary has been filed in the conveyance records of the parish where the property is situated. This action by the legislature does not radically reform the law, but merely automatically extends to the wife rights which she was previously able to claim by affirmative declaration.<sup>16</sup> Since few married women made such declarations, or even knew that they could, the changes by the legislature are praiseworthy. The amendments will result in a multiplication of situations requiring joint spousal participation in the management of the community. Third parties dealing with the marital partners will require compliance with these provisions to ensure the validity of contracts or conveyances.<sup>17</sup>

In 1976 the Louisiana legislature, acting upon the recommendation of the Law Institute, did enact legislation which may have a pronounced effect upon the relationship between the community and the separate creditors of each spouse.<sup>18</sup> To understand this legislation's implications, it is necessary

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13. La. Acts 1976, No. 679, § 1 *amending* LA. CIV. CODE art. 2334; La. Acts 1976, No. 679, § 2 *amending* LA. R.S. 9:2801-02; 2804 and LA. R.S. 35:11.

14. LA. CIV. CODE art. 2334, *as amended* by La. Acts 1976, No. 679. The declaration by the wife has to be by authentic act and recorded in the mortgage and conveyance records of the parish in which the property is situated. Such a declaration may be general to all such property or specify the property to which it shall or shall not apply; it may apply generally to property acquired in the future but may be withdrawn by the recording of a contrary declaration by the wife. Note that no change is made with respect to any community property standing in the wife's name. Today, as prior to 1976, the wife's written consent is required before the husband may affect such property. In addition the declaration provisions described in the text are unavailable with respect to property standing in the name of the wife.

15. LA. R.S. 9:2801, *as amended* by La. Acts 1976, No. 679. LA. R.S. 9:2801 now provides that where the owner of a parcel of land by authentic act declares that he is a married man and designates the property as a family home then that property may no longer be alienated by the husband alone except where the wife has recorded the declaration that her consent is not required as provided by article 2334 of the Civil Code.

16. See the text accompanying notes 3-5, *supra*.

17. In addition LA. R.S. 35:11 now requires notaries to include in the acts they pass not only the marital status of the parties but also a declaration by any married party that the affected property is or is not the family home.

18. La. Acts 1976, No. 444.

to first review recent developments concerning the rights of each spouse's separate creditors to satisfy the debts owed them from community assets.

In 1968, in *United States Fidelity and Guaranty Co. v. Green*,<sup>19</sup> the Louisiana Supreme Court held that the husband's antenuptial (and therefore separate) debts could not be satisfied from community property. The decision was based on Civil Code article 2403, which appears to say without restriction that the antenuptial debts of each spouse are to be paid out of the separate assets of the debtor spouse, and on a line of decisions which described the wife's interest in community assets as a present one-half ownership.<sup>20</sup> The court reasoned that to pay the husband's debts out of community property would be to permit the use of the wife's assets to satisfy the husband's obligations. Then, in 1973, the supreme court in *Crech v. Capitol Mack, Inc.*<sup>21</sup> permitted an antenuptial debt of the husband to be satisfied out of community property. Justice Barham's decision resorted to Spanish sources to demonstrate that Civil Code article 2403 was drafted specifically to regulate the rights and responsibilities between spouses and was never intended to establish the legal relations between a creditor and a husband. Therefore, Justice Barham concluded, the article was not to be read to preclude the husband's separate creditors from seeking satisfaction out of community assets.<sup>22</sup> Discussing those decisions indicating that the wife has a present ownership in the community, Justice Barham noted that all the property of a debtor is subject to the rights of his creditor and stated that the problem before the court was to determine which assets are included in the patrimony of each spouse under a community of acquets and gains.<sup>23</sup> The court concluded that the wife's interest in the community is an "imperfect ownership"<sup>24</sup> and noted that the husband's patrimony consists of his separate property and the community of acquets and gains.<sup>25</sup>

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19. 252 La. 227, 210 So. 2d 328 (1968).

20. The principal decision is *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926); see also *Fazzio v. Krieger*, 226 La. 511, 76 So. 2d 713 (1954).

21. 287 So. 2d 497 (La. 1973). For a general discussion of the case see Younger, *Louisiana Wives: Law Reform to Their Rescue*, 48 TUL. L. REV. 567, 576-80 (1974); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Matrimonial Regimes*, 35 LA. L. REV. 303 (1975); Note, 48 TUL. L. REV. 619 (1974).

22. 287 So. 2d 497, 506-07. The court noted that the *Green* decision had failed to consider Civil Code articles 3182 and 3183 which do establish creditors' rights against their debtors. *Id.* at 500.

23. *Id.* at 504.

24. This was based on the fact that under Civil Code articles 2404-23 the wife is given various options upon the dissolution of the marriage in regard to claiming or renouncing her one-half interest in the community.

25. The court recognized that under Civil Code article 2404 the husband as head and master of the community generally administers all things in the community "as if

Therefore, since the community is a part of the husband's patrimony, it is subject to his creditor's rights.<sup>26</sup> The opinion specifically overruled *Green, Phillips v. Phillips*,<sup>27</sup> and *Fazio v. Kreiger*<sup>28</sup> insofar as they declared the wife to own community assets in indivision with the husband before dissolution of the community.

Prior to 1975 only the husband's antenuptial debts could be satisfied from community assets;<sup>29</sup> after a woman married, her antenuptial creditors had no recourse except against her separate property.<sup>30</sup> Then in 1975 the Louisiana legislature enacted the Louisiana Equal Credit Opportunity Law (LECOL)<sup>31</sup> which allows a woman's antenuptial debts to be satisfied from community assets to the extent of her "earnings."<sup>32</sup> Therefore, while the husband's separate creditors are able to satisfy his separate obligations from all of the community's property, the wife's separate creditors are limited to those community assets which represent her earnings. If the wife is not a wage earner her creditors have no right to any of the community assets.<sup>33</sup>

The legislature, acting upon the recommendation of the Louisiana State Law Institute, enacted Civil Code article 2398 which provides:

Each spouse *owns a present undivided one-half share in the community property* subject to the management of the community by the husband in accordance with the rights and restrictions provided by law.<sup>34</sup>

Certainly *Creech* is overruled insofar as that decision held that the wife does not have a present interest in the community.<sup>35</sup> The Act does not specify, they were his own property" and as a result third parties "necessarily" view the husband's patrimony as including the assets and liabilities of the community. 287 So. 2d at 508.

26. *Id.* at 510.

27. 160 La. 813, 107 So. 584 (1926).

28. 226 La. 511, 76 So. 2d 713 (1954). This case indicates that the husband's antenuptial creditors were limited to only the husband's one-half interest in the community.

29. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973).

30. *Greenlee v. Penny*, 1 La. 241 (1830); *Flogny v. Hatch*, 12 Mart. (O.S.) 82 (La. 1822). Even the wages of a working woman are unavailable since Civil Code arts. 2334, 2402, and 2404 establish her earnings as community property subject to the husband's control. The exception is that the community is bound by the contracts executed by the wife as a public merchant. LA. CIV. CODE arts. 131, 786.

31. La. Acts 1975, No. 705.

32. LA. R.S. 9:3585 (Supp. 1976).

33. LA. R.S. 9:3516(15) (Supp. 1975) defines earnings as "compensation paid or payable to an individual or for his account for personal services rendered or to be rendered by him. . . ."

34. LA. CIV. CODE art. 2398, *as enacted by* La. Acts 1976, No. 444 (emphasis added).

35. The language used in article 2398 appears to follow that used in *Phillips v.*



however, the rights of each spouse's separate creditors who seek to satisfy their debts from the assets of the community. It appears that the real issue Justice Barham addressed in *Creech* was the inconsistency of permitting the husband's separate creditors to satisfy their claims out of community assets while existing decisions recognized the wife's right in the community as a present undivided one-half interest. Justice Barham was forced to overrule these decisions; otherwise the payment of the husband's antenuptial debts out of community assets would be use of the wife's property to satisfy the husband's obligations.<sup>36</sup> Therefore, the 1976 legislation overruling *Creech* may have removed the right of the husband's separate creditors to reach any community property.

It may be contended that the wife's separate creditors are now in a superior position to the husband's separate creditors. If the 1975 legislation permitting the wife's creditors to reach her "earnings" (which are a part of the community)<sup>37</sup> remains unaffected by the 1976 legislation it can be contended that the husband's separate creditors are discriminated against if they are unable to reach *any* of the community assets. In addition, the wife still may renounce the community upon the dissolution of the marriage,<sup>38</sup> thus exonerating herself and her heirs from the debts contracted during marriage. The husband has no such right and this right in the wife is inconsistent with the theory of present ownership which appears to be established by Civil Code article 2398.<sup>39</sup> If *Creech* has been legislatively overruled, one resolution of the resulting problems is to find that by this enactment the legislature intended to establish that each spouse's antenuptial creditors are to be limited to only one half of the community assets.<sup>40</sup> Such an interpretation would remove the possibility of discrimination and expand the rights of the wife's creditors.<sup>41</sup> Similar measures are recognized

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*Phillips*, 160 La. 813, 107 So. 584 (1926), which was overruled by *Creech*. In *Phillips* the court said that "the wife had not a mere expectancy but the absolute ownership of half of the community property subject to the husband's power of administration." *Id.*

36. Cf. LA. CIV. CODE arts. 2301-14. See also the text at notes 19-29, *supra*.

37. See note 30, *supra*.

38. LA. CIV. CODE art. 2410.

39. Cf. Note 48, TUL. L. REV. 618, 625 (1974).

40. Cf. *Fazzio v. Kreiger*, 226 La. 511, 76 So. 2d 713 (1954).

41. The wife may claim that under *Creech* she is discriminated against since her separate creditors are unable to reach the community assets while the husband's creditors are able to do so. The husband may claim, after the overruling of *Creech* by Civil Code article 2398, that he is discriminated against since L.A. R.S. 9:3584 permits the wife's separate creditors to reach a portion of the community, *i.e.*, her wages. See the text accompanying notes 30-34, *supra*.

as an integral part of the reform of a community property regime.<sup>42</sup> The wife's right to renounce the community might be rationalized as a right granted to counter the husband's rights as head and master of the community.<sup>43</sup> However, the right to renounce is of questionable constitutionality<sup>44</sup> and as noted above is inconsistent with the theory that the wife has a present undivided ownership interest.<sup>45</sup> Therefore, since the legislature did provide that all prior conflicting legislation was repealed,<sup>46</sup> there is a basis for contending that the wife no longer possesses that right.

The previous discussion illustrates that there must be a comprehensive reform of the Louisiana community property regime. Piecemeal legislation cannot make the system more responsive to today's needs. The resultant confusion in business transactions will demonstrate the need for extensive, thoughtfully prepared reform proposals in the next regular session of the legislature.

## SECURITY DEVICES

Often the purchaser of property agrees to assume payment of an existing obligation owed by the vendor to a third party.<sup>1</sup> In most cases the obligation which is assumed is itself secured by a mortgage or other privilege on the property sold. A problem exists in situations where a vendor sells two or more tracts of land, each subject to a mortgage securing his separate debts, and the vendee assumes the obligations secured by the mortgages. Although the vendee's payment of the debt secured by a mortgage on the first tract will extinguish the mortgage on that tract, the

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42. See *Community Property Law Reform in the U.S. and in Canada*, *supra* note 8, at 237.

43. Cf. *Williams v. Williams*, 331 So. 2d 438 (La. 1976). Such a contention is questionable in the light of the language of Civil Code article 2398. The article indicates that the husband is the "manager" of the community, not the head and master. This appears to be a restriction of the husband's powers under Civil Code article 2402. For the text of article 2398 see the text accompanying note 29, *supra*.

44. See note 6, *supra*.

45. See the text accompanying note 39, *supra*.

46. La. Acts 1976, No. 44, § 3.

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1. The courts have held in such cases that the creditor whose obligation is assumed may directly enforce the buyer's promise to pay the debt and the vendor's privilege securing it on the theory that the undertaking is in the nature of a *stipulation pour autrui* in favor of the creditor. See, e.g., *A.G. De L'isle v. Succession of Moss*, 34 La. Ann. 164, 168 (La. 1882).

vendee's promise to pay the obligation secured by the mortgage on the second tract is considered to be as much a part of the purchase price of the first tract as it is of the second if both were sold together.<sup>2</sup> Until both obligations are satisfied, the vendor enjoys a vendor's privilege to secure payment on the entire property including the first tract so that title to the first tract remains encumbered.<sup>3</sup>

Act 338<sup>4</sup> is intended to alleviate this problem by creating a presumption that the vendor's privilege on each piece of property is limited to that portion of indebtedness secured by a pre-existing mortgage on the property, unless the parties agree otherwise. Although the intent of the Act seems clear, it is worded ambiguously and is incomplete in that it does not clearly indicate whether a right of resolution still exists over the entire property. The right of resolution of a sale for nonpayment of the purchase price is an independent substantive remedy that is not dependent upon the existence of a vendor's privilege.<sup>5</sup> If the right of resolution is not divided, even after the payment of one of the mortgages, title to the property will still be encumbered.

Act 315<sup>6</sup> allows the parties to a mortgage of either movable or immovable property to designate a keeper or receiver to act in the case of a foreclosure or seizure. The parties to the mortgage may designate the person who is to serve as keeper by expressly naming him in the mortgage instrument or by describing the method by which he is to be selected.<sup>7</sup> If petitioned by the creditor, the court must direct the sheriff or other seizing officer to appoint as keeper of the seized property the person that the parties to the mortgage designated. If the parties have not designated a keeper and the sheriff for any reason wishes the court to appoint one, the court must direct the sheriff to appoint a keeper designated by the court.

The keeper or receiver has full powers of management and administration of the property and must perform his duties as a prudent administrator. All revenues received during his administration must be applied by the

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2. See *Citizens' Bank of Louisiana v. Succession of Cuny and Clement*, 38 La. Ann. 360 (La. 1886); LA. CIV. CODE art. 3249(1).

3. The fact that the vendor's privilege still exists is occasionally overlooked by title examiners who, upon finding that the mortgage on one tract is cancelled after payment, assume the property to be free of encumbrances.

4. La. Acts 1976, No. 338, adding LA. R.S. 9:5383 (Supp. 1976).

5. See *Sliman v. McBee*, 311 So. 2d 248, 253 (La. 1975); *Louis Werner Saw Mill Co. v. White*, 17 So. 2d 264, 266 (La. 1944).

6. La. Acts 1976, No. 315, adding LA. R.S. 9:5136-40.1 (Supp. 1976).

7. The parties to the mortgage are not restricted in whom they may choose to be keeper, except that the parties may not name a keeper other than the owner during his occupancy of the mortgaged property as his home. LA. R.S. 9:5136 (Supp. 1976).

keeper first to his costs in administering or preserving the property, and any balance must be applied to the debt secured by the mortgage. The keeper must render an accounting of his administration at such times as the court before which the proceedings are pending may direct. If the keeper, mortgagor, or mortgagee believes that some action beyond the ordinary course of administration is required to preserve or protect the property, or if the mortgagor or mortgagee believes that the keeper is acting beyond his authority, such party may apply to the court for instructions concerning the proper course that should be taken by the keeper.<sup>8</sup>

Act 359<sup>9</sup> changes the procedure for the garnishment of wages, salaries, and commissions. The Act requires the garnisher to serve upon the garnishee the citation, petition, garnishment interrogatories, notice of seizure, and a statement of sums due under the garnishment.<sup>10</sup>

## TRUSTS AND ESTATE PLANNING

In *T.L. James & Co., Inc. v. Montgomery*<sup>1</sup> the Louisiana Supreme Court held on rehearing that the death benefits of employee retirement and profit sharing plans were payable to the designated beneficiary even though the written designation was not in testamentary form.<sup>2</sup> The court recognized, however, that the beneficiary is accountable to any complaining forced heir or community spouse if the beneficiary's receipts of proceeds violates either the forced heir's legitime or the spouse's community ownership rights.

Act 494<sup>3</sup> is in accord with the rationale of *T.L. James* in providing that any designation form permitted by a deferred compensation plan<sup>4</sup> is valid

8. Such party may apply to the court before which the proceedings are pending, in a summary proceeding with notice to the mortgagor and mortgagee if they are not parties to the application, for instructions as to the proper course that should be taken by the keeper. LA. R.S. 9:5138; 5140 (Supp. 1976).

9. La. Acts 1976, No. 359 amending LA. R.S. 13:3923, 3927 (1950).

10. LA. R.S. 13:3923 (as it appeared prior to 1976) required that only a writ of garnishment or one set of interrogatories be served in a garnishment of wages. The statement of sums due under the garnishment may include principal, interest, court costs, and attorney's fees.

1. 332 So. 2d 834 (La. 1976).

2. The court had held on original hearing that the proceeds passed by intestacy since the designation form was not in testamentary form. *Id.* at 847.

3. La. Acts 1976, No. 494, adding LA. R.S. 23:651-53 (Supp. 1976).

4. La. Acts 1976, No. 494, adding LA. R.S. 23:651 (Supp. 1976) defines "plan"

for the purpose of naming a beneficiary. Such a designation will remain in effect until terminated as provided by the plan and need not be in any specific form, *e.g.*, testamentary or authentic.

The Official Revision Comments to Section 652 of Act 494 give sound policy reasons for validating the beneficiary designation form without requiring the written designation to be in testamentary form. Because many payrolls necessarily cross state lines, it is inconvenient if not impossible for the employer to design a form which meets the testamentary requirements of every applicable state. It seems unreasonable to require the designation to take testamentary form, especially when most employees die intestate and many who die testate make no mention of deferred compensation plan benefits in their wills. Moreover, the inclusion of plan benefits in the succession would subject the benefits to the expense and delays of administration, and to federal estate<sup>5</sup> and Louisiana inheritance taxes,<sup>6</sup> from which benefits payable to a named beneficiary other than the succession are presently exempt.

Act 204<sup>7</sup> adds a procedure for the transfer by a banking association of the contents of safety deposit boxes, money, or other property in the name of a deceased or in which the deceased has an interest. The association may deal with such property in accordance with its contract with the customer until it receives notice in writing of the customer's death. After receiving notice and upon proper authority<sup>8</sup> and obtaining a receipt, an association may transfer the deceased's property to the succession representative, the surviving spouse, heirs, or legatees of the deceased; however, no such transfer may be made until the inheritance tax due the state has been fixed and paid or until the collector of revenue approves the transfer.

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broadly to include "any arrangement, agreement, contract, plan, system or trust whereby a participant acquires an enforceable right to retirement income where payment is deferred until the termination of employment or thereafter. . . ." The Official Revision Comments of Section 651 indicate that the definition of "plan" does not include ordinary gratuities nor does it include benefits such as retirement bonuses which are customary, but to which a participant has no enforceable right.

5. INT. REV. CODE OF 1954, § 2039(C).

6. LA. R.S. 47:2404, *as amended by* La. Acts 1972, No. 512, § 1.

7. La. Acts 1976, No. 204, *adding* LA. R.S. 6:770-71 (Supp. 1976).

8. LA. R.S. 6:770(B), *as amended by* La. Acts 1976, No. 204, provides that the letters of the succession representative, or the judgment recognizing and putting the heirs in possession accompanied by letters of tutorship or curatorship of the heirs who are not *sui juris*, will constitute proper authority for making the transfer. The letters issued to the legal representative of an interdict or minor will constitute proper authority for making the transfer.

## CORPORATIONS

Several acts of interest pertaining to Louisiana corporation law were passed in the 1976 legislative session. Act 631<sup>1</sup> changes the procedure by which the secretary of state may revoke the franchise and articles of incorporation of a company which has failed to designate and maintain a registered office or agent for ninety consecutive days, or which has failed to file a franchise tax return and annual report for three consecutive years.<sup>2</sup> At least thirty days prior to his action, the secretary must inform the affected corporation of his intention by directing notice to its last designated registered agent.<sup>3</sup> The secretary must record notice of revocation in the clerk of court's office in the parish where the corporation maintains its registered office.<sup>4</sup> Act 631 also transfers to the attorney general three other causes of action previously available to the secretary of state to revoke a corporation's franchise and articles of incorporation.<sup>5</sup>

Act 686<sup>6</sup> adds a new chapter to the Louisiana Corporation Laws to provide for the organization of professional chiropractic corporations. The Act prohibits such corporations from engaging in any business other than

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1. La. Acts 1976, No. 631, *amending* LA. R.S. 12:163 (1950).

2. Previously, if a corporation failed to file *either* a franchise tax return *or* an annual report, the secretary of state was authorized to suspend its articles of incorporation and state franchise and to bring a subsequent action against the corporation for the revocation of the articles and franchise. LA. R.S. 12:163(a)(5) (1950). Under the new law, the secretary may make the revocation without a court proceeding, but only after he certifies that no annual report has been filed in his office during three consecutive years, and after the collector of revenue certifies that no tax is due or lien outstanding and that no franchise tax return has been filed by such corporation within the same three year period. The secretary also is authorized to revoke the franchise of a corporation which has failed to maintain a registered office or agent for ninety consecutive days upon the certificate by the collector of revenue that no tax is due or lien outstanding. LA. R.S. 12:163A (Supp. 1976).

3. Although Act 631 requires the secretary to give notice to the corporation of his intention to revoke the corporate franchise, no method is provided in the act for a corporation to rectify its violation of the act. Presumably, the corporation could apply for an injunction to halt the secretary's action.

4. In Orleans Parish notice also must be recorded in the office of the recorder of mortgages. LA. R.S. 12:163(C) (Supp. 1976).

5. Now the attorney general, rather than the secretary of state, may bring an action when the corporate franchise was procured through fraud practiced upon the state; or the corporation has continually abused authority conferred upon it; or the corporation should not have been formed or has been formed without substantial compliance with the conditions precedent to incorporation.

6. La. Acts 1976, No. 686, *adding* LA. R.S. 12:1051-65 (Supp. 1976).

chiropractic, but allows the holding of property for investment or for carrying on the chiropractic enterprise. A professional chiropractic corporation is restricted to issuing only common shares of stock, and only shareholders may be officers and directors.

In the event that a final disposition of a corporation has not been effected within one year from the date that dissolution is authorized, Act 312<sup>7</sup> requires the liquidator to prepare a report indicating the assets and liabilities of the corporation as of the date of authorization of dissolution, the disposition of any assets as of the date of the report, and the anticipated tax year in which a final accounting and distribution to the shareholders will be made. The report must be updated annually until the final disposition of assets and dismissal of the liquidator.

Act 460<sup>8</sup> allows a corporation to change the name of its registered agent or the location of its registered office by including the change in the corporation's annual report.<sup>9</sup> Notice of the change must be recorded both in the office of the recorder of mortgages of the parish in which the new registered office is located and the recorder's office in the parish from which the registered office is changed.

## FINANCIAL INSTITUTIONS

Act 44<sup>1</sup> provides that no person<sup>2</sup> may make a business take-over offer<sup>3</sup> of a target company<sup>4</sup> unless the offer conforms with the procedural requirements specified in the Act. The offeror is required to file a disclosure

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7. La. Acts 1976, No. 312, *adding* LA. R.S. 12:145(I) (Supp. 1976).

8. La. Acts 1976, No. 460, *adding* LA. R.S. 12:104(E) (Supp. 1976).

9. LA. R.S. 12:104B & C (1950) specify other procedures for a corporation to change the name of its registered agent or the location of its registered office.

1. La. Acts 1976, No. 44, *adding* LA. R.S. 51:1500-12 (Supp. 1976).

2. Person is defined as an individual, corporation, association, partnership, trust or other entity. La. Acts 1976, No. 44, *adding* LA. R.S. 51:1500(9) (Supp. 1976).

3. "Take-over offer" is defined as an offer to acquire or the actual acquisition of any equity security of a company in which the offeror after acquisition would be directly or indirectly a record or beneficial owner of more than five percent of any class of outstanding equity securities. La. Acts 1976, No. 44, *adding* LA. R.S. 51:1500(11) (Supp. 1976).

4. Acts 1976, No. 44, *adding* LA. R.S. 51:1500(12) (Supp. 1976) defines "target company" as "a corporation or other issuer of securities which is organized under the laws of this state or has its principal place of business or a substantial portion of the fair value of its total assets or more than fifty percent of its employees, in this state. . . ."

statement with the commissioner of financial institutions that must include such information as the identity and background of the offeror, the source and amount of funds used to acquire any equity security, the number of shares which the offeror presently owns of the target company, and any contracts or arrangements with any person with respect to equity security of the target company. No later than the date for filing the disclosure statement with the commissioner, the offeror must send a copy of the disclosure statement by certified mail to the target company at its principal office. The commissioner, offeror, target company, and any equity security owner of the target company may obtain injunctive relief whenever a person has engaged or is about to engage in a practice violating a provision of the Act. Criminal sanctions may be imposed,<sup>5</sup> and any offeror who does not comply with the Act is liable for damages to any person selling securities to him. Modeled after the Indiana statute on business take-over offers,<sup>6</sup> Act 44 is a thorough protective measure for companies and their shareholders confronted with a business take-over offer.

Act 498<sup>7</sup> contains changes concerning the management, organization and powers of state banking institutions. Every state banking association must be managed by a board of directors of not less than five nor more than thirty directors, regardless of the size of the bank's capital, surplus, and undivided profits.<sup>8</sup> No director of a banking association may be fined for missing a meeting of the board of directors.<sup>9</sup> Act 498 increases the amount of subscribed capital necessary for the lawful organization of a banking association or savings bank<sup>10</sup> and provides that immovable property held by

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5. Any offeror who fails to file a disclosure statement may be imprisoned for a period not to exceed one year or fined an amount not to exceed five thousand dollars, or both. Any person making a knowing misrepresentation of a material fact or who deliberately withholds information from the commissioner in connection with a business take-over offer may be imprisoned for a period not to exceed five years, or fined an amount not to exceed ten thousand dollars, or both. La. Acts 1976, No. 44 adding LA. R.S. 51:1508 (Supp. 1976).

6. IND. STAT. ANN. §§ 23-2-3-1 to 23-2-3-12 (1971).

7. La. Acts 1976, No. 498 amending LA. R.S. 6:2; 3; 6; 7; 16; 22; 37; 151; 234; 235; 238; 240; 241; 251; 254; 255; 259; 261; 328; 389(B); 390; and 400.

8. LA. R.S. 6:2(A), as amended by La. Acts 1976, No. 44 eliminates the right of banks to have five extra directors for each million or fraction thereof, of capital surplus and undivided profits exceeding two million.

9. A fine had been imposed by the State Bank Commissioner on a director who, without an acceptable excuse, failed to attend three consecutive regularly called meetings of the board of directors. La. Acts 1976, No. 498 amending LA. R.S. 6:2 (1950).

10. La. Acts 1976, No. 498 amending LA. R.S. 6:234 (1950) provides that no bank may be organized with less than three hundred thousand dollars subscribed capital



a bank for reasons other than the transaction of business can be held no longer than ten years.<sup>11</sup> Additionally, Act 498 requires banking associations and savings banks to disclose three additional liabilities in their quarterly reports submitted to the commissioner: notes and bills rediscounted, amounts due to persons not already included in the report, and liabilities on letters of credit, acceptance and guarantees. Act 453 also affects state banking institutions<sup>12</sup> by increasing to fifty percent the portion of direct obligations of the United States government includable in the required reserve fund of a banking association.

## PUBLIC LAW

### ADMINISTRATIVE LAW AND PROCEDURE

#### EXECUTIVE REORGANIZATION

Confronted with a sprawling executive branch exhibiting growth without concerted purpose or planning, the delegates to the 1973 Constitutional Convention recognized a need to reorganize the executive branch. The 1974 Louisiana Constitution thus included general guidelines<sup>1</sup> mandating that all departments, offices, and agencies of the executive branch, except for the offices of governor and lieutenant governor, be organized according to function within not more than twenty departments,<sup>2</sup> no later

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except that in incorporated municipalities of three thousand to thirty thousand population the lower limit is one hundred fifty thousand dollars, and in municipalities of less than three thousand population, the limit is one hundred thousand dollars. LA. R.S. 6:235, *as amended by* La. Acts 1976, No. 498 (Supp. 1976) designates similar requirements for the organization of savings banks.

11. La. Acts 1976, No. 498 *amending* LA. R.S. 6:240(4) (1950) increases from five to ten the number of years which banking associations or savings banks may hold immovable property not acquired for the transaction of their business.

12. La. Acts 1976, No. 453 *amending* LA. R.S. 6:249(E) (1974).

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1. LA. CONST. art. IV, § 1; art. XIV, § 6.

2. In organizing all departments, offices, and agencies of the executive branch according to function within departments, the Louisiana Constitution recites language similar to provisions contained in other state constitutions. *See, e.g.*, ALAS. CONST. art. III, § 22; COLO. CONST. art. IV, § 22; HAWAII CONST. art. IV, § 6; MICH. CONST. art. V, § 2; MO. CONST. art. IV, § 12; and N.J. CONST. art. V, § 4. Requiring that agencies be grouped according to function is intended to eliminate needless duplication of services, and providing that all agencies of the executive branch be

than December 31, 1977.<sup>3</sup>

In partial compliance with the provisions of the new Constitution, Act 720 of 1975<sup>4</sup> organized all executive agencies, exclusive of the offices of governor and lieutenant governor, into nineteen departments according to function. The Act also created the Joint Legislative Committee on Reorganization of the Executive Branch, gave it authority to make all necessary studies to fully effect the constitutional mandate and required it to report its findings to the legislature.<sup>5</sup> Changes suggested by this committee and amendments adopted during the legislative process are contained in Act 513 of 1976,<sup>6</sup> the Executive Reorganization Act.

Act 513 designates twenty executive departments, twelve of which are newly created, to incorporate particular agencies and to fulfill specified functions.<sup>7</sup> The remaining eight departments, which are currently under the control of statewide elected officials, are continued without alteration.<sup>8</sup> Eleven of the new departments are directly responsible to the governor while one, the Department of State Civil Service, continues to be an independent agency headed by the director of civil service.

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allocated to not more than twenty departments is a step toward ensuring agency accountability and responsibility.

3. On its face Article IV, Section 6 of the 1974 Louisiana Constitution purports to set an inviolable deadline for reorganizing the executive branch. This "mandate" imposed on the legislature seems unenforceable, however. It is highly doubtful that a writ of mandamus could issue requiring the legislature to perform its assigned task of reorganizing the executive department. The "mandatory" deadline was not intended to be a court-enforceable duty imposed by the constitution on the legislature. See STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, Vol. XXIX, Day 89, p. 38 [hereinafter cited as VERBATIM TRANSCRIPTS].

4. La. Acts 1975, No. 720, *adding* LA. R.S. 36:1-960 (Supp. 1975).

5. La. Acts 1975, No. 720, *adding* LA. R.S. 36:931-37 (Supp. 1975).

6. La. Acts 1976, No. 513 *amending* LA. R.S. 36:1-960 (Supp. 1975).

7. The twelve newly created departments are: (1) Department of Commerce, (2) Department of Corrections, (3) Department of Culture, Recreation and Tourism, (4) Department of Health and Human Resources, (5) Department of Labor, (6) Department of Natural Resources, (7) Department of Public Safety, (8) Department of Revenue and Taxation, (9) Department of Transportation and Development, (10) Department of Urban and Community Affairs, (11) Department of Wildlife and Fisheries, and (12) Department of State Civil Service. LA. CONST. art. X, Part I created the Department of State Civil Service while the other eleven departments are created by Act 513.

8. La. Acts 1976, No. 513 *amending* LA. R.S. 36:154 (Supp. 1975). The eight departments headed by elected officials are: (1) Department of Agriculture, (2) Department of Education, (3) Department of Elections, (4) Department of Insurance, (5) Department of Justice, (6) Department of Public Service, (7) Department of State, and (8) Department of the Treasury.

Each of the eleven departments responsible to the governor has a similar structure, consisting of a secretary, a deputy secretary, an undersecretary, and a varying number of assistant secretaries. The secretary of each department is appointed by the governor, serves at his discretion, and is the chief administrative officer responsible for department policy.<sup>9</sup> The secretary must appoint a deputy secretary to carry out assigned duties and to serve as acting secretary in the secretary's absence.<sup>10</sup> Unlike Act 720 of 1975, Act 513 confers on the governor the authority to appoint the undersecretary, who is responsible for the management and financial functions of the department,<sup>11</sup> and the assistant secretaries,<sup>12</sup> who are to head each office within the department except for the office of management and finance.<sup>13</sup> All appointments are subject to confirmation by the Senate.

Recognizing the difficulties inherent in the consolidation of a multitude of agencies into a limited number of departments, Act 513 specifies several distinct methods of transferring agencies to the various departments. Some agencies "continue to be composed and selected as provided by law," thereby retaining substantial authority to operate independently of the secretary, undersecretary, and any assistant secretaries.<sup>14</sup> A second method of transfer for other specific agencies requires all agency powers, duties, and functions to be placed under the administration and control of the secretary of the department to which the agency is transferred.<sup>15</sup> Another transfer method provides that the functions and duties of each agency will vest in the secretary, with the transferred agency serving the secretary in an

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9. Included in the secretary's enumerated duties is the duty to provide for the ongoing merger and consolidation of the agencies and functions transferred to his department and to submit a report thereon to the governor and the legislature. La. Acts 1976, No. 513 *amending* LA. R.S. 36:154 (Supp. 1975).

10. *See, e.g.*, LA. R.S. 36:401 (Supp. 1976) which provides that the deputy secretary for the Department of Public Safety shall also serve as the head of the office of state police.

11. Although the secretary has authority to assign additional duties to the undersecretary, he cannot change the management functions assigned to the position by law. LA. R.S. 36:405 (Supp. 1976).

12. *See, e.g.*, LA. R.S. 36:406 (Supp. 1976). Several exceptions exist to the general rule that the governor will appoint the assistant secretary of each office. LA. R.S. 36:207(A) (Supp. 1975), *as amended by* La. Acts 1976, No. 513; LA. R.S. 36:107, *added by* La. Acts 1976, No. 513; LA. R.S. 36:357(A) (Supp. 1975), *as amended by* La. Acts 1976, No. 513.

13. In the Department of Public Safety, the office of state police as well as the office of management and finance will not be headed by an assistant secretary. La. Acts 1976, No. 513 *amending* LA. R.S. 36:407 (Supp. 1975).

14. LA. R.S. 36:801-10 (Supp. 1975), *as amended by* La. Acts 1976, No. 513.

15. LA. R.S. 36:851-56 (Supp. 1975), *as amended by* La. Acts 1976, No. 513.

advisory capacity in regard to agency policies.<sup>16</sup> Act 513 abolishes sixty-eight agencies, committees, and commissions;<sup>17</sup> however, the abolishment is in name only since the employees and functions of the agencies are transferred to one of the twelve departments.<sup>18</sup>

Perhaps the most important difference between Act 720 of 1975 and Act 513 is the change in management structure within the departments responsible to the governor. Although both Acts provide for the appointment of the secretaries by the governor, Act 720 gave the secretary the authority to appoint his subordinates—the deputy secretary, undersecretary, and assistant secretaries—whereas, Act 513 provides that the secretary's only direct appointment is the deputy secretary. Act 513 offers an inferior management structure compared to the 1975 reorganization act:<sup>19</sup> the secretary remains the chief administrative officer of the department under Act 513, but his authority is limited since he must supervise key management personnel whom he can neither hire nor fire.<sup>20</sup> Although the additional appointments afford the governor more flexibility, the numerous appointments also mean that the governor will not be able to divest himself of continued involvement in the affairs of the departments.<sup>21</sup>

An area remaining for future consideration in Louisiana's executive reorganization is the determination of which state officers should be appointed by the governor and which should be elected. The delegates to the 1973 Constitutional Convention, after emotional debate,<sup>22</sup> finally agreed that the governor, lieutenant governor, and seven of the department heads

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16. LA. R.S. 36:901-08 (Supp. 1975), *as amended* by La. Acts 1976, No. 513.

17. La. Acts 1976, No. 513, *adding* LA. R.S. 36:921 (Supp. 1976).

18. LA. R.S. 36:921-26 (Supp. 1976), *added* by La. Acts 1976, No. 513. *See* Volume 24, *Public Affairs Research Council of Louisiana, Inc., Legislative Bulletin* No. 3, p.2 (June 4, 1976). *But see* LA. R.S. 36:559(E) (The powers of the local affairs advisory committee are transferred to the Governor's Committee on Intergovernmental Relations.).

19. A comprehensive reorganization of state administrative agencies is designed to provide efficient and responsive state government, but the management structure provided in Act 513 makes the intended goals of executive reorganization more difficult to achieve. The lines of authority are overlapping and the assignment of responsibility and accountability are made more difficult since the undersecretary and assistant secretaries are answerable both to the secretary and to the governor.

20. *Public Affairs Research Council of Louisiana, Inc., Legislative Bulletin*, Vol. 24, No. 3, p. 3 (June 4, 1976).

21. *Id.* Allowing the governor to appoint the secretary of each department would give the governor sufficient control over department operations without requiring him to appoint an assistant secretary for every office within each department and the undersecretary of each department.

22. *See* VII VERBATIM TRANSCRIPTS at 23-24, 31.

were to be elective rather than appointive officials.<sup>23</sup> Article IV, Section 20 was adopted, however, stating that after the first election of state officials under the 1974 Constitution, the legislature by two-thirds vote may provide for the appointment, in lieu of election, of the superintendent of education and the commissioners of elections, agriculture, and insurance. A fundamental principle of effective governmental organization requires that top administrative officials be appointed by and be responsible to the chief executive officer of the state, the governor,<sup>24</sup> who is the only officer in Louisiana charged with the responsibility of seeing that the laws are faithfully executed. For this reason, the legislature should follow the nationwide trend of gradually reducing the number of elected state administrative officials<sup>25</sup> and provide for the governor's appointment of the superintendent of education and the commissioners of elections, agriculture, and insurance. The legislature may not make the offices of the secretary of state, attorney general, and treasurer appointive without amending the constitution.<sup>26</sup>

Act 513 continues the Joint Legislative Committee on Reorganization of the Executive Branch to undertake all necessary studies and to propose legislation in order to accomplish executive reorganization.<sup>27</sup> Hopefully, through this committee's recommendations and careful legislative deliberation, Louisiana will complete, within the constitutional time limit, a systematic and comprehensive reorganization of state administrative agencies that will help create a more efficient executive branch. As demands and circumstances change, the organizational structure of the executive branch should be reexamined to ensure responsiveness to Louisiana's needs.

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23. LA. CONST. art. IV, § 3 provides that the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, and commissioner of elections are to be elected for a term of four years.

24. The Council of State Governments, *Reorganizing State Government* 107 (1950).

25. *Id.*, quoting from the Legislative Committee for Reorganization of State Government, *Possible Improvements in Governmental Organization in Idaho*, p. 16 (1949).

26. Providing that these officers should be elected conforms with Louisiana's political and constitutional history as well as accepted practice in other states.

27. LA. R.S. 36:931-37 (Supp. 1976), added by La. Acts 1976, No. 513. The committee must complete its study and determine its recommendations to the legislature no later than March 7, 1977, and submit to each member of the legislature and to the governor, no later than March 21, 1977, the complete results of its study.

## ZERO-BASE BUDGETING

With state spending continuing to increase<sup>28</sup> and the largest source of state revenue, the severance tax, expected to decline, the Louisiana legislature has expressed concern over the cost and efficiency of state government. Act 146<sup>29</sup> amends the state budget laws to provide for zero-base budgeting and uses the Senate Finance Committee, the House Appropriations Committee, and the Legislative Budget Committee as a joint committee to supply legislative oversight<sup>30</sup> of the budget process. Act 277<sup>31</sup> contains a "sunset" provision<sup>32</sup> providing for the termination of all statutory entities at graduated time intervals with a procedure for their re-creation after a zero-base budget review and evaluation. Both acts are intended to attain substantially the same goal as executive reorganization: to create an executive branch which is efficient and responsive to the needs of the state.

Zero-base budgeting is a comprehensive approach in which spending for each unit must be justified from a zero base without any reference to previous spending.<sup>33</sup> Under the incremental budgeting approach which had been used in Louisiana, only changes from the current budget were examined in preparing the new budget. Incremental budgeting assumes that what has occurred in the past is still valid; consequently, only a small portion of the total budget is closely examined. Zero-base budgeting reverses this assumption:<sup>34</sup> each agency must analyze and justify its entire appropriations request, current as well as proposed activities.<sup>35</sup>

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28. State spending has more than doubled from 1.529 billion dollars in the 1969-1970 fiscal year to 3.129 billion in the 1975-1976 fiscal year. State of Louisiana Financial Statement, Louisiana Division of Administration.

29. La. Acts 1976, No. 146, adding L.A. R.S. 24:141, 39:43.1, 39:44.1, 39:45.1.

30. The implementation of zero-base budgeting in Louisiana represents a radical departure from the state's present budget policies. Legislative oversight of zero-base budgeting is designed to assist legislators in obtaining information necessary to correct problems and to otherwise assure compliance with legislative policy and intent.

31. La. Acts 1976, No. 277.

32. "Sunset" laws require government agencies and programs to justify their existence periodically or face extinction. Colorado pioneered the sunset movement and sunset measures were introduced this spring in California, Florida, Illinois, and other states. In Congress, sunset legislation proposes that federal government programs, grouped by functional areas, come up for renewal every five years. See *State Judiciary News*, Vol. 2, No. 4 (June 4, 1976).

33. *Public Affairs Research Council of Louisiana, Inc., Legislative Bulletin*, Vol. 24, No. 3, p. 4 (June 4, 1976).

34. 122 CONG. REC. 1134 (daily ed. Feb. 3, 1976).

35. *Hearings on S. 2925 Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations*, 94th Cong., 2d Sess. Testimony of Stephen L. Neal, (D. N. Cal.) 55 (1976).

Acts 146 and 277 provide different yet compatible programs for the implementation of zero-base budgeting in Louisiana. Act 146 requires that the executive budget present a complete financial plan for the ensuing year. The budget must contain, *inter alia*, a budget message signed by the governor; a detailed statement identifying all substantial aspects of agency activities, including a priority ranking of these activities and a statement concerning the effect of funding each activity at seventy percent of its current level;<sup>36</sup> and a presentation of the measurements used to determine standards of performance.<sup>37</sup> To provide for the orderly implementation of zero-base budgeting, 10% of all units in the executive budget must be submitted on a zero base in the 1977-78 fiscal year,<sup>38</sup> 50% in the next fiscal year, and thereafter, the entire executive budget must be prepared on a zero base.

Act 277 mandates that all legislative authority for the existence of each statutory entity<sup>39</sup> shall cease according to a schedule extending from July 1, 1979 to July 1, 1982.<sup>40</sup> Two years prior to the scheduled termination of any entity, the standing committee or committees having jurisdiction must conduct a zero-base budget review, recommend an appropriate budget level,<sup>41</sup> and submit a report of its findings to both houses of the legislature. A bill may be introduced authorizing the re-creation of any entity in the year prior to that entity's scheduled termination; however, any statute that creates or re-creates a statutory entity after the effective date of Act 277 must contain a termination date for that entity no more than four years from the date that the entity is created or re-created.

By examining each budget in its entirety, zero-base budgeting can be

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36. One study indicates that the statement of the effect of funding the budget unit at 70 percent of its current level is threatening to agency personnel since to submit a cost figure on such reduced operations encourages the legislature to reduce an appropriation. LaFaver, *Zero-Base Budgeting in New Mexico*, 47 STATE GOVERNMENT 108, 111 (1974).

37. La. Acts 1976, No. 146, adding LA. R.S. 39:43.1A (Supp. 1976).

38. The executive budget office must determine which agencies will submit their budget requests on a zero base. At least one constitutional agency, one agency with multiple means of financing, and one agency with complex program structure must be selected by the executive budget office in the 1977-78 fiscal year.

39. The term "statutory entity" is defined broadly to include "any office, department, agency, board, commission, institution, division, officer or other person or functional group created and continued in existence by statute or legislative resolution to which state funds are appropriated." La. Acts 1976, No. 277.

40. La. Acts 1976, No. 277, § 2.

41. La. Acts 1976, No. 277, § 4. The committees conducting the zero-base budget review must give notice to the statutory entity of its termination date and of the budget review at the time they begin the review.

an effective tool in determining what resources are available and how these resources should be allocated among the various state agencies. Many private corporations and a few state and local governments<sup>42</sup> employ zero-base budgeting, and at least one bill is currently pending in Congress to implement zero-base budgeting at the federal level.<sup>43</sup> The major disadvantage of zero-base budgeting which has prevented its widespread employment is the increased paperwork resulting from an agency having to justify annually its entire budget proposal. No budgeting system is ideal, however, and despite the added demands placed on state agencies, zero-base budgeting should offer a superior budgeting technique to the incremental approach which has failed to provide the information needed to effectively evaluate state operations. Provided state agencies are able to supply accurate cost information,<sup>44</sup> the implementation of zero-base budgeting can help make Louisiana government more productive and accountable. If the workload placed on state agencies proves to be excessive, the legislature may wish to require a comprehensive zero-base budget review less often than annually.<sup>45</sup>

#### LEGISLATIVE OVERVIEW

Legislative overview of the executive branch of government is an area in which most state legislatures, including Louisiana's, have performed poorly.<sup>46</sup> In order to hold executive agencies accountable for their conduct of public policy, Act 279<sup>47</sup> provides a detailed procedure whereby the legislature may review the exercise of rulemaking authority by state

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42. See, e.g., LaFaver, *Zero-Base Budgeting in New Mexico*, 47 STATE GOVERNMENT 108 (1974).

43. S. 2925, 94th Cong., 2d Sess. (1976).

44. The detailed cost information required for the submission of a zero-base budget will be difficult to supply for many agencies. One study indicates that historic cost and performance data are seldom available for the budget unit, and therefore, estimates usually must be used with the understanding that pertinent data will begin to be compiled for future use. LaFaver, *supra* note 36, at 108.

45. S. 2925, 94th Cong., 2d Sess. (1976), originally provided for a zero-base review and evaluation every four years. Requiring that state budget units submit a zero-base budget review less frequently may be advantageous for Louisiana due to the state's short legislative session. Possibly none but the most pressing budget issues may be considered during the short legislative session, so that state employees will have worked to develop materials that were not used. If zero-base budgets were submitted less frequently, perhaps both the budget unit employees and the state legislators would be inclined to give them greater attention.

46. See Tucker, *Legislative Overview: Progress in Florida*, 49 STATE GOVERNMENT 115, 116 (1976).

47. La. Acts 1976, No. 279 amending LA. R.S. 49:953; 954.1; 967 and adding LA. R.S. 49:968 (Supp. 1976).



agencies. Act 279 requires that an agency, prior to the adoption, amendment, or repeal of any rule, submit to the appropriate standing committees a report relative to the rule change. After the agency submits its report, the committees may meet to review the proposed change<sup>48</sup> and may submit their recommendation to the agency which proposed the change. Thirty days prior to the beginning of each regular session, agencies which have proposed rule changes during the previous year must submit updated reports to the appropriate standing committees, including statements of actions taken and summaries of all data, views, and arguments received by the agency concerning the rule changes.<sup>49</sup> No later than the second legislative day of each regular session, standing committees to which rule changes have been referred may submit to the legislature a report containing summaries of all committee action and any recommendations for statutory changes concerning the agency.<sup>50</sup>

#### LOUISIANA ADMINISTRATIVE PROCEDURE ACT

Act 524<sup>51</sup> provides that confidential or privileged records and documents in an agency's possession must not be made available for adjudication proceedings of that agency, and may not be subject to subpoena by any person or other state or federal agency.<sup>52</sup> Any disclosure in violation of the Act's prohibition will be a waiver of governmental immunity from suit for damage resulting from such disclosure.

Act 279 eliminates the special exemptions formerly given to the State Bond Commission and the Atchafalaya Basin Division from the Louisiana Administrative Procedure Act.<sup>53</sup> The 1974 amendment<sup>54</sup> to the Louisiana Administrative Procedure Act redefined the term "agency" intending to bring the State Bond Commission and the Atchafalaya Basin Division within the scope of the Act; but, prior to Act 279, doubts remained whether

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48. LA. R.S. 49:968D (Supp. 1976), *added by* La. Acts 1976, No. 279.

49. LA. R.S. 49:968H (Supp. 1976), *added by* La. Acts 1976, No. 279.

50. For a discussion of legislative overview of the executive rule-making process in other states, see Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799, 806 (1965).

51. La. Acts 1976, No. 524, *adding* LA. R.S. 49:956(8) (Supp. 1976).

52. The privileged records or documents may only include any private contracts, geological and geophysical information and data, trade secrets, and commercial or financial data, which are obtained by an agency through a voluntary agreement.

53. These exemptions were formerly given by LA. R.S. 49:951-67 (Supp. 1967). The Louisiana Administrative Procedure Act was adopted to replace the myriad of rules governing agency procedure with a uniform and comprehensive system.

54. LA. R.S. 49:951(2) (Supp. 1967), *as amended by* La. Acts 1974, No. 284.

the exemptions might still apply.<sup>55</sup>

#### LOUISIANA PUBLIC SERVICE COMMISSION

Under Article IV of the Louisiana Constitution, the Louisiana Public Service Commission must, within twelve months after a common carrier or public utility files a proposed rate increase, render a full decision on the proposed rate change.<sup>56</sup> If the decision is delayed beyond that date, the proposed increase may be put into effect pending final action by a court of last resort, but only if and as provided by legislation, and subject to protective bond requirements.<sup>57</sup> Act 151<sup>58</sup> permits a common carrier or public utility to implement a proposed rate increase subject to protective bond or security requirements<sup>59</sup> whenever the Louisiana Public Service Commission fails to render a full decision within twelve months after the effective filing date. The rates, which become effective on the filing of the prescribed bond or security, may be continued in effect until final determination of the validity of the increase by the commission, or if appealed, by the court.<sup>60</sup>

The Louisiana Supreme Court in *South Central Bell Telephone Co. v. Louisiana Public Service Commission*<sup>61</sup> held that mandamus is the proper remedy to compel the commission to perform its constitutionally imposed duty of rendering a decision upon a proposed rate increase by South Central Bell. The court also held that the trial court, absent enabling legislation, did not have the authority to order a rate increase even though the commission had made no decision on the rate increase within the required twelve month period. Act 151 provides the enabling legislation required by the constitution<sup>62</sup> so that common carriers and public utilities now may implement proposed rate increases, subject to protective bond or security requirements, whenever the Public Service Commission fails timely to render a decision.

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55. See Comment, *Louisiana's "New" Administrative Procedure Act*, 35 LA. L. REV. 629, 633-35 (1975).

56. LA. CONST. art. IV, § 21(D)(2).

57. *Id.* § 21(D)(3).

58. La. Acts 1976, No. 151, adding LA. R.S. 45:1163.2 (Supp. 1976).

59. LA. R.S. 45:1163.1(A)(5), added by La. Acts 1976, No. 151. The common carrier or public utility must file with the commission a protective bond or security to assure full refund. The protective bond is in the amount that the common carrier or public utility certifies to the commission it will receive within the twelve month period following the effective filing date of the bond.

60. LA. R.S. 45:1163.1(C) (1976), added by La. Acts 1976, No. 151.

61. 334 So. 2d 189 (La. 1976).

62. See note 56, *supra*.

## DAIRY STABILIZATION BOARD

Act 695<sup>63</sup> limits the powers of the Dairy Stabilization Board by prohibiting the board from regulating or establishing the wholesale or retail prices of dairy products.<sup>64</sup> The board is still empowered, however, to prohibit unfair methods of competition, as well as unfair, deceptive and disruptive trade acts or practices with respect to the sale of milk and milk products, and is directed to promulgate rules and regulations to define with specificity prohibited acts and practices.

Regulation in the form of milk price fixing is commonly justified as necessary to assure the local producer a minimum price, thereby benefitting the public interest by insuring a sufficient supply of milk for the state. The Louisiana Supreme Court has upheld price regulation of milk as a proper exercise of state police power,<sup>65</sup> and the Sherman Act exempts the practice from its proscription as a valid exercise of the state's sovereignty.<sup>66</sup> Although the state may regulate milk prices, price regulation has been criticized as increasing the price of milk to the consumer in an attempt to protect small dairies which cannot compete with modern means of production and distribution. Studies tend to indicate that state control of milk prices has acted as a trade barrier, preventing or retarding the use of new dairy technologies and methods that competitive markets have adopted.<sup>67</sup> By eliminating the Dairy Stabilization Board's power to regulate wholesale dairy prices but still directing the board to prevent disruptive trade practices, Act 695 balances competing interests by allowing competition while offering some protection to small dairies.<sup>68</sup> With the passage of Act 695, Louisiana still should be insured an adequate supply of milk and milk products, with the possibility that milk prices will decrease in the absence of wholesale price regulation.

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63. La. Acts 1976, No. 695 amending LA. R.S. 40:931.5; 931.6; 931.8; 931.10 F; 931.10 G; and 931.13 (1974).

64. LA. R.S. 40:931.5 (1974), as amended by La. Acts 1976, No. 695, prohibits price regulation of dairy product sales by retailers but does not prohibit price regulation at the wholesale level.

65. *Schwegmann Bros. Giant Super Mkts. v. McCrory*, 112 So. 2d 606, 617 (La. 1959).

66. See *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 791 (1975).

67. *Louisiana Legislation of 1962—Public Law Ass'n*, 23 LA. L. REV. 70, 76 (1962).

68. Support existed for abolishing the Dairy Stabilization Board altogether, but the Act as finally adopted leaves the Board intact while eliminating its power to fix wholesale milk prices.

## EXPROPRIATION

Until recently, a judicially created estoppel known as the *St. Julien* doctrine, allowed entities with the power of expropriation to acquire servitudes by unopposed use or possession.<sup>1</sup> Under this doctrine, if a property owner had "consented" or "acquiesced" in the use or possession of his land by such an entity, he was not permitted to reclaim his property free from the servitude, but was restricted to his right of compensation.<sup>2</sup> This doctrine allowed expropriating entities to acquire a servitude by simply obtaining the oral or written consent of the apparent landowner.<sup>3</sup> This procedure was especially valuable to those expropriating entities which could not use a "quick-taking" procedure to expropriate<sup>4</sup> because it usually eliminated the great time and expense of title searches and formal expropriation procedures.

The Louisiana Supreme Court, in *Lake v. Louisiana Power & Light Co.*,<sup>5</sup> specifically overruled *St. Julien* and the cases relying thereon, holding that the doctrine created by these cases violated Civil Code article 766 which prohibits acquisition of servitudes not both continuous and apparent, except by title.<sup>6</sup> This case would require the expropriating entity, in order to avoid a later order to remove its facilities and pay damages for trespass, to examine

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1. The doctrine is named after the parent case, *St. Julien v. Morgan's La. & Tex. Ry. Co.*, 35 La. Ann. 924 (1883).

2. *A.K. Roy, Inc. v. Board of Comm'rs of Ponchartrain Levee Dist.*, 238 La. 926, 117 So. 2d 60 (1960); *St. Julien v. Morgan's La. & Tex. Ry. Co.*, 35 La. Ann. 924 (1883); Comment, *Expropriation—A Survey of Louisiana Law*, 18 LA. L. REV. 509, 533-36 (1958).

3. See Sutherland, *Acquisition of Apparent Servitudes*, 24 LA. B.J. 31, 36 (1976).

4. "Quick-taking" refers to an expropriation procedure by which an ex parte order prior to judgment transfers ownership provided that the taker deposits with the court funds equal to the taker's appraisal of the property right acquired. Article I, § 4 of the constitution allows the legislature to provide a quick-taking procedure for the state and its political subdivisions, but not for private entities with the power to expropriate. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 17-18 (1974). Presently, the only entity legislatively provided with such a procedure is the Department of Highways. LA. R.S. 48:441-60 (Supp. 1976).

5. 330 So. 2d 914 (La. 1976).

6. Since this was the basis of the decision, it would seem that the *St. Julien* doctrine, if constitutional, would still apply to the acquisition of continuous and apparent servitudes. However, the category of continuous servitudes was severely restricted by *Nash v. Whitten*, 326 So. 2d 856 (La. 1976), and the *Lake* case, so that most servitudes to be expropriated will not be continuous and apparent. There are

title to each tract of land it crosses to find the record owner. If there were a cloud on the title or the record owner could not be located, formal expropriation would be necessary.

The legislature reacted to the *Lake* decision by passing Act 504 which provides that if the state or a political corporation or subdivision has actually, in good faith believing it had authority to do so, taken possession of privately owned immovable property of another, and constructed facilities upon, under or over such property with the consent or acquiescence of the owner of the property, such owner shall be deemed to have waived his right to contest the necessity for the taking and to receive just compensation prior to the taking, but he shall be entitled to bring an action for such compensation . . . to be determined as of the time of the taking of the property. . . .<sup>7</sup>

Similar language is used to delineate the rights of the parties when a private corporation with the power of expropriation has done the taking, with the exception that the landowner is entitled to bring an action for judicial determination of whether the taking was for a public and necessary purpose.<sup>8</sup> Therefore, private corporations must be careful when using the procedure allowed by this Act to ensure that the purpose for the taking is "public and necessary" to protect against a later order to remove their facilities and to respond in damages for trespass. This will be difficult in light of the fact that the "public and necessary purpose" requirement was created by the 1974 Constitution and there is yet little authority for determining its meaning.<sup>9</sup>

The Act requires the expropriating entity to be "in good faith believing it had authority to take possession." Since the *Lake* decision conditions authority to take possession upon valid title, the Act read literally seems to require the entity to believe that it has valid title, and thus to check title to each tract of land it crosses. However, the purpose of the Act was probably essentially to reinstate the *St. Julien* doctrine within the constitutional restrictions of Article I, § 4. Viewed in this light, the phrase should be interpreted as only a general good faith requirement which would be satisfied by acquiring the consent of the apparent owner of the land.

The expropriating entity must also have constructed facilities upon,

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also serious questions as to the validity of a *St. Julien* doctrine under the present Louisiana constitution.

7. La. Acts 1976, No. 504, amending LA. R.S. 19:14 (Supp. 1976).

8. The reason for the difference is article I, § 4 of the constitution, which makes the validity of the purpose of a private taking a judicial question.

9. For some guidance, see Hargrave, *supra*, note 4, at 17.

under, or over the property before the Act applies. Apparently if the landowner objects to the taking during the early stages of possession before any facilities are constructed,<sup>10</sup> he is entitled to recover his land free of the servitude, regardless of his prior acquiescence or oral consent.

In the *Lake* case, the plaintiff argued that the *St. Julien* doctrine violated federal and state constitutional provisions, but the court, while noting that the arguments were persuasive, decided the case on other grounds.<sup>11</sup> Act 504 may come under similar constitutional attack. At first glance, it seems to violate the state constitutional requirement of prior payment.<sup>12</sup> The Act provides that the landowner waives this right, and this waiver will probably be upheld in the case of consent by the owner. But in the case of acquiescence, the waiver provision could be held unconstitutional if "acquiescence" is construed liberally against the landowner.<sup>13</sup> However, even in this instance, the prior payment requirement could be met by construing the Act to mean that the expropriating entity does not actually acquire the interest in the land until payment is made.

The Act may also be tested against the constitutional requirement that the taking be for a public purpose.<sup>14</sup> The Act provides that the landowner waives the right to contest the taking on this ground, and again there seem to be no problems with this in the case of consent. But if "acquiescence" is construed liberally against the landowner, this provision may take away his opportunity to protect his interest in the land and thus violate due process.<sup>15</sup>

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10. He may have to "object" by filing suit for an injunction against the expropriating entity in order to keep from "acquiescing." See text at note 16, *infra*.

11. 330 So. 2d 914, 917 (La. 1976).

12. The requirement of prior payment was expressly stated in article I, § 2 and article IV, § 15 of the 1921 constitution, and is continued by article I, § 4, of the 1974 constitution, as seen by the language ". . . with just compensation paid to the owner or into court for his benefit" (emphasis added). The reason for including the emphasized phrase was to allow the state to take property through quick-taking procedures on the payment of just compensation into court (for the benefit of the landowner) without violating the prior compensation requirement. Thus if the requirement was not meant to be continued, there would have been no purpose in including the emphasized phrase.

13. This could be done by either requiring the landowner to take extraordinary actions or to take action within a very short period of time in order to keep from acquiescing. See text at notes 15 and 16, *infra*.

14. This attack could only arise against the state and a political corporation or subdivision, because the question of whether the taking was for a "public and necessary" purpose in the case of private entities with the power to expropriate is not waived by the landowner under this Act. See text at note 8, *supra*.

15. For the due process requirements in expropriation cases, see M. DAKIN & M. KLEIN, *EMINENT DOMAIN IN LOUISIANA* 31 (1970).

The only guidance in construing "acquiescence" is the jurisprudence under the *St. Julien* doctrine, which indicated that if the landowner did not file suit for an injunction against the expropriating entity within a very short time after it took possession, he had acquiesced.<sup>16</sup> If under this concept of acquiescence the landowner is given a reasonable time<sup>17</sup> within which to file the suit before he is deemed to have acquiesced, the provisions of the Act should be upheld against a due process attack.

Act 391 makes several changes in the Department of Highways Quick-Taking statutes.<sup>18</sup> Previously, if the defendant had failed to file his answer timely, the court, on ex parte motion of the department, was to render judgment for the department fixing just compensation as the amount deposited in the registry of the court and to award that sum to the defendant.<sup>19</sup> The Act provides that if the defendant has failed to file his answer timely, the department must notify him of the pendency of the proceedings by certified mail. If an answer is not filed within ten days after mailing of the notice, the court will render judgment for the department as stated above.<sup>20</sup> Also, in order to introduce evidence on "special benefits"<sup>21</sup> the department must now specially plead them, unless the defendant pleads severance damages, in which case the department has the opportunity to plead special benefits twenty days prior to trial.<sup>22</sup>

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16. See, e.g., *Gray v. Department of Highways*, 250 La. 1045, 202 So. 2d 24 (1967); *Williams v. Department of Highways*, 92 So. 2d 98 (La. App. 1st Cir. 1957).

17. Perhaps the time within which the landowner must file suit for injunction before he will be deemed to have acquiesced will be held to be any time before the expropriating entity constructs facilities on, under, or over the land, since the provisions of the Act do not seem to apply before that time. See text at note 10, *supra*.

18. La. Acts 1976, No. 391 amending LA. R.S. 48:441-60 (Supp. 1976). See also note 4, *supra*.

19. LA. R.S. 48:452 (as it appeared prior to Act 391 of 1976).

20. LA. R.S. 48:452 (Supp. 1976), as amended by La. Acts 1976, No. 391.

21. "Special benefits" are any increases in value to the remainder of the landowner's property due to the expropriation or facilities constructed on the expropriated property. LA. R.S. 48:453(B) (Supp. 1974).

22. LA. R.S. 48:456.1 (Supp. 1976), as amended by La. Acts 1976, No. 391. The Act also puts a \$500 limit on the bond or other security which a landowner must post in order to have a jury trial on the question of just compensation, La. Acts 1976, No. 391 amending LA. R.S. 48:451.3 (Supp. 1976), and reverses the order of the presentation of evidence, allowing the defendant to present his evidence of value first. La. Acts 1976, No. 391 amending LA. R.S. 48:453(D) (Supp. 1976).

## CRIMINAL LAW

## DEFINITION OF PERSON

In *State v. Gyles*,<sup>1</sup> the Louisiana Supreme Court, interpreting a Louisiana murder statute,<sup>2</sup> followed common law authorities in defining the term "human being."<sup>3</sup> The court found that striking a pregnant woman, thereby causing stillbirth, was not punishable as the murder of a human being under Louisiana law.<sup>4</sup>

La. Acts 1976, No. 256, amending LA. R.S. 14:2(7) (1950), however, casts doubt upon the continued use in Louisiana of the common law definition of "human beings," *i.e.* "those who have been born and who thus have an existence independent of their mothers . . . ."<sup>5</sup> Act 256 amends the definition of "person" in LA. R.S. 14:2(7) (1950) by providing in pertinent part: "'Person' includes a human being from the moment of conception . . . ." This change may have a marked effect upon the interpretation of many Louisiana criminal statutes dealing with crimes against the "person."<sup>6</sup> It could be argued that Act 256 has no effect upon the crime of murder since the Louisiana murder statutes refer to human beings rather than to persons. It is suggested, however, that Act 256 indirectly defines human being as well as person by referring to a "human being from the moment of conception . . . ." The Act thus, by implication, recognizes that a fetus is a human being from the moment it is conceived and is included in the definition of person.

## COMMITMENT OF JUVENILES

La. Acts 1976, No. 443, amending LA. R.S. 15:901 (Supp. 1976), removes two ambiguities from the law concerning commitment of juveniles to the Department of Corrections. LA. R.S. 15:901 (1950) (as it appeared prior to Act 443 of 1976) explicitly prohibited a statement in an order of commitment of a juvenile that "the child is delinquent or

1. 313 So. 2d 799 (La. 1975).

2. LA. R.S. 14:30.1 (Supp. 1973) (as it appeared prior to La. Acts 1976, No. 657).

3. Justice Barham presented a thorough list of common law authorities as well as a history of Louisiana views on the term "human being." 313 So. 2d at 800-01.

4. *Id.* at 801.

5. *Id.* at 800-01. See also *People v. Chavez*, 176 P.2d 92 (Cal. 1947) (finding a viable fetus which had entered the birth process to be a human being); *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970) (refusing to extend the *Chavez* rule to a fetus which had not entered the birth process).

6. See LA. R.S. 14:29-50. See also *Roe v. Wade*, 410 U.S. 113, 150, 163-65 (1973) (dealing with states' interest in the matter of abortion); *Planned Parenthood v. Danforth*, 96 S. Ct. 2831 (1976); Note, 37 LA. L. REV. 270 (1976).



dependent . . . ." In *State v. Brecheen*,<sup>7</sup> the court found that this prohibition related only to the decree of commitment itself and had no effect on the requirement of adjudication of delinquency.<sup>8</sup> Act 443 removes any possibility of an opposite conclusion by requiring that the commitment order "state that the child has been adjudicated delinquent . . . ."

Act 443 also provides that a juvenile may be held until age twenty-one. LA. R.S. 15:901 (1950) (as it appeared prior to Act 443 of 1976) provided that the juvenile could be held "in no case beyond the majority of the child." Louisiana appellate courts have disagreed as to how juvenile court jurisdiction was affected by the 1972 amendment to Civil Code article 37 which set the age of majority at eighteen years.<sup>9</sup> Other provisions have been amended to avoid the problem;<sup>10</sup> fortunately, Act 443 has furthered this progress.

#### LABOR-RELATED LEGISLATION

The area of criminal law did not remain untouched by the Louisiana legislature's reaction to recent labor violence in Louisiana. Along with the "Right to Work" law,<sup>11</sup> the legislature passed three acts which originally were intended to remove labor activity exceptions from the crimes of disturbing the peace<sup>12</sup> and obstructing public passages.<sup>13</sup>

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7. 256 So. 2d 793 (La. App. 1st Cir. 1971), *cert. denied*, 262 La. 1175, 266 So. 2d 450 (1972).

8. *Id.* at 795. (The adjudication of delinquency is essential because it "vests the juvenile court with the jurisdiction over the juvenile.")

9. Compare *In re Pittman*, 315 So. 2d 62 (La. App. 4th Cir.), *cert. denied*, 316 So. 2d 398 (La. 1975) (finding LA. CIV. CODE art. 37 has no effect on LA. R.S. 13:1580(2) (1950) (as it appeared prior to Act 155 of 1974) with *In re Braswell*, 294 So. 2d 896 (La. App. 2d Cir.), *cert. denied*, 296 So. 2d 836 (La. 1974) (finding LA. CIV. CODE art. 37 requires release of a juvenile at age eighteen because LA. R.S. 13:1580(2) (1950) (as it appeared prior to Act 155 of 1974) stated that commitment could not extend beyond majority).

10. LA. R.S. 15:1572 (1950), *as amended by* La. Acts 1975, No. 355; LA. R.S. 15:1580(2) (1950), *as amended by* La. Acts 1974, No. 155.

11. La. Acts 1976, No. 97, *adding* LA. R.S. 23:981-87 (Supp. 1976). See *The Work of the Louisiana Legislature for the 1976 Regular Session—Employment and Labor Law*, *infra* at 178.

12. La. Acts 1976, No. 497, *repealing* LA. R.S. 14:103(B) (1950); La. Acts 1976, No. 489, *repealing* LA. R.S. 14:103.1 (Supp. 1960). The originally proposed version, La. H.B. 544, Reg. Sess. (1976), suggested a mere amendment of the law, removing the labor exception. The unconstitutionality of the law as a whole, however, has been recognized by both the United States Supreme Court and the Louisiana Supreme Court. See *Cox v. Louisiana*, 379 U.S. 536 (1965); *State v. Harrison*, 280 So. 2d 215 (La. 1973).

13. La. Acts 1976, No. 488, *amending* LA. R.S. 14:100.1 (Supp. 1960).

## ISSUING WORTHLESS CHECKS

La. Acts 1976, No. 651, *amending* LA. R.S. 14:71 (1950), makes several changes in the definition of the crime of issuing worthless checks. Act 651 adds the phrase "whether the exchange is contemporaneous or not" to the definition.<sup>14</sup> This new provision should allow conviction when there is a short lapse of time between delivery of value and issuance of the check, a situation which in the past has barred conviction<sup>15</sup> because the language of the statute did not cover payment of an antecedent debt.<sup>16</sup>

Act 651 also adds: "This provision shall not apply to payments on installment contracts or open accounts." Though the refusal to apply the law to payments on credit accounts has been referred to as "settled law,"<sup>17</sup> the express provision is needed in order to avoid confusion in the previously discussed situation of a short lapse of time between delivery of value and issuance of the check.

Finally, Act 651 simplifies the state's evidentiary burden in proving intent. LA. R.S. 14:71 (1950) (as it appeared prior to Act 651 of 1976) provided that nonpayment after ten days from receipt by the issuer of written notice of nonpayment was "presumptive evidence of his intent to defraud." Act 651 provides that this presumption is created when written notice of nonpayment is "deposited by certified mail . . . addressed to the issuer thereof either at the address last shown on the instrument or the last known address for such person shown on the records of the bank upon which the instrument is drawn . . ." Thus the obvious difficulty of proving receipt of notice is now circumvented.<sup>18</sup>

## CONTRIBUTING TO THE DELINQUENCY OF JUVENILES

La. Acts 1976, No. 121, *amending* LA. R.S. 14:92 (1950), resolves two ambiguities relative to the crime of contributing to the delinquency of juveniles. In 1968, the Louisiana legislature passed two acts, Nos. 647 and

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14. La. Acts 1976, No. 651, *amending* LA. R.S. 14:71 (1950), states, *inter alia*: "Issuing worthless checks is the issuing, in exchange for anything of value, whether the exchange is contemporaneous or not, with intent to defraud, of any check, draft or order for the payment of money upon any bank or other depository, knowing at the time of the issuing that the offender has not sufficient credit. . . ."

15. See *State v. McLean*, 216 La. 670, 44 So. 2d 698 (1950) (defendant issued a worthless check for bananas delivered three days earlier).

16. *Id.* at 674, 676, 44 So. 2d at 699-700.

17. *Blue Bonnet Creamery, Inc. v. Gulf Milk Assoc., Inc.*, 172 So. 2d 133, 137 (La. App. 1st Cir. 1965).

18. For examples of other evidence proving intent, see *State v. Smith*, 262 La. 39, 262 So. 2d 362 (1972).

486, *amending* LA. R.S. 14:92, which added an additional ground of contributing to the delinquency of juveniles and established the penalty therefor. Unfortunately, the two acts conflicted. Act 647 provided for the new ground of "enticing, aiding or permitting" a juvenile to "[a]bsent himself from home" and further provided that any prison sentence imposed for contributing to the delinquency of a juvenile would be "with or without hard labor." Act 486, on the other hand, provided for the new ground of "enticing, aiding or permitting" a juvenile to "[a]bsent himself or *remain away*" from home and further provided that any prison sentence be served in the parish prison.<sup>19</sup>

Act 121 of 1976 resolves these conflicts by adopting the Act 486 version of the new ground<sup>20</sup> and by providing for new penalties.<sup>21</sup> It is interesting to note that now the penalty for contributing to the delinquency of juveniles is greater if the conviction is based on sexual misconduct than if it is based on any other ground.<sup>22</sup>

#### PLACE OF LAWFUL DETAINMENT

La. Acts 1976, No. 345, *adding* subsection C to LA. R.S. 14:110 (1950), expands the concept of place of lawful detainment relative to the crime of escape. Subsection C (added by Act 345) states that "a person shall be deemed to be in the lawful custody . . . of the Department of Corrections . . . when he is in a rehabilitation unit, work release program or any other program under the control of . . . the Department of Corrections." In *State v. Williams*,<sup>23</sup> the Louisiana Supreme Court found that, although one committed to the Louisiana Training Institute is under the "custody" of the Department of Corrections, the Institute "is not a 'place of lawful detention' within the meaning of the short indictment form set forth in C.Cr.P. art. 465."<sup>24</sup> Therefore, the defendant could not be found guilty of simple escape from the Louisiana Training Institute.

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19. Emphasis added.

20. The original version, La. H.B. 547, Reg. Sess. (1976), proposed a different method of reaching the same result. This bill would have repealed Act 647 of 1968. In effect, such action would have left the Act 486 version as the only law on the subject. However, such a method may have created difficulties in determining the intent of the legislature: did the legislature intend to repeal the entire ground or only to repeal a conflicting act? The method actually used is the more direct and thus preferable approach.

21. La. Acts 1976, No. 121, *amending* LA. R.S. 14:92 (Supp. 1976).

22. LA. R.S. 14:92(D) (1950), *as amended* by La. Acts 1976, No. 121.

23. 301 So. 2d 327 (La. 1974).

24. *Id.* at 328.

One conceivable consequence of Act 345 is that it is now possible for one confined in a reformatory such as the Louisiana Training Institute, since these institutions are under the control of the Department of Corrections, to be convicted of escape and to be subject to the jurisdiction of the appropriate criminal district court. Although Act 345 merely defines "lawful custody," it may be argued that the effect of the Act would be to include the Louisiana Training Institute within the concept of a place of lawful detention. It should be noted that the purpose of the Act, as defined by the legislature, is "to further define place of lawful detainment and place of lawful custody. . . ."

#### JUSTIFIABLE HOMICIDE

La. Acts 1976, No. 655, adding LA. R.S. 14:20(3) (Supp. 1976), represents a major change in the theory of self-defense. Act 655 adds a third category of justifiable homicide:

A homicide is justifiable:

(3) When committed against a person whom one reasonably believes to be likely to use any unlawful force against a person present in a dwelling while committing or attempting to commit a burglary of such dwelling. The homicide shall be justifiable even though the person does not retreat from the encounter when it appears that he would have been able to do so.<sup>25</sup>

Under LA. R.S. 14:20 (1950) (as it appeared prior to Act 655 of 1976), Louisiana courts consistently applied the test of reasonable fear of danger to life or of great bodily harm in determining the justifiable nature of a homicide.<sup>26</sup> Unlike LA. R.S. 14:20 (1) and (2), Act 655 makes no mention

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25. Due to the use of the word "person" in referring to both the burglar and the occupant of the home, the meaning of Act 655 is somewhat ambiguous. Obviously, however, upon close examination, the first and third uses of the word "person" refer to the burglar and the second use of the word "person" refers to the occupant of the home.

26. *State v. Lane*, 292 So. 2d 711, 715 (La. 1974) ("The material issue in a plea of self-defense is whether it appears to a reasonable person, not one obsessed with unnatural fear, that his life is in danger or that he is in danger of great bodily harm."); *State v. Rowland*, 246 La. 729, 735-36, 167 So. 2d 346, 348 (1964) ("[I]n order to be justified in taking the life of another . . . the party accused must not only have a present and reasonable belief he is in imminent danger of losing his life, or receiving great bodily harm, but he must also reasonably believe it is necessary to kill in order to save himself."); *State v. Ciaccio*, 163 La. 563, 572, 112 So. 486, 489 (1927) ("To justify the killing, it must appear that the life of the accused was in danger, or that his person was in danger of receiving great bodily harm, and the circumstances must be such as would lead a reasonable person to that conclusion.").

of either fear of danger to life or fear of great bodily harm, but rather refers simply to a reasonable belief that the person is "likely to use unlawful force . . . ."

Furthermore, Act 655 specifically states that ability to retreat does not bar the defense. Though the possibility of retreat is not mentioned in the prior law, it is one factor which the jury has heretofore been allowed to consider regarding the necessity of the killing.<sup>27</sup> Thus, Act 655 marks a change in both the substance and the underlying value judgment of the doctrine of self-defense.

## INSURANCE

### CHANGES EFFECTED

Act 203 of 1976<sup>1</sup> provides that where membership in an organization is a condition precedent to insurance coverage, the policy may be cancelled for failure of the policy holder to maintain membership in the organization. The procedure required for such cancellation is the same as the general cancellation procedure<sup>2</sup> except that it requires fifteen days notice while the general procedure requires only five.

### PROPOSALS OF INTEREST

House Bill 873 failed to pass the legislature, but it presented an interesting example of artful legislative drafting. Its title purported merely to require that all insurance policies make provision for the bankruptcy or insolvency of the insured. In reality, by reenacting an amended version of Section 655 of Title 22 of the Revised Statutes, the bill would have abolished the direct action now allowed against insurers. Such a major change in the Louisiana insurance law certainly deserves mention in the title of the bill, designed to provide an easy subject matter reference to the proposal.<sup>3</sup>

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27. See *State v. Collins*, 306 So. 2d 662, 663 (La. 1975) ("The possibility of retreat . . . is one of the factors here present for jury determination as to whether the defendant had the requisite reasonable belief that it was necessary to kill in self-defense."). See also *State v. Patterson*, 295 So. 2d 792 (La. 1974); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Criminal Law*, 35 LA. L. REV. 402, 410 (1975).

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1. La. Acts 1976, No. 203, adding LA. R.S. 22:636.3 (Supp. 1976).  
 2. LA. R.S. 22:636, as amended by La. Acts 1958, No. 125.  
 3. The state constitution requires only that: "Every bill shall contain a brief

Two bills were introduced in the House to effect changes in the law relative to funeral insurance policies. The law presently allows issuance of such policies if the value of the funeral is stated in dollars and the services to be furnished are specified.<sup>4</sup> Should the beneficiary choose not to avail himself of the benefit provided, he is entitled to receive 75% of the face value of the policy as a cash settlement.<sup>5</sup> The recent case of *Wilson v. Reliable Life Insurance Company*<sup>6</sup> provides a cogent example of the abuses prevalent under the existing system. The decedent insured paid more than \$700 in premiums to receive a funeral benefit of one hundred fifty dollars from which her beneficiary received only a seventy-five percent cash settlement. The bills provided a choice of possible remedies: either a complete prohibition of funeral insurance<sup>7</sup> or a requirement that any cash payment be in 100% of the policy's face amount.<sup>8</sup> Neither change was enacted.

Also of interest was a bill designed to prevent "stacking" of uninsured motorist coverages,<sup>9</sup> which has been allowed by the Louisiana courts.<sup>10</sup> This proposal, however, failed to gain the approval of the Senate where it was introduced and therefore the jurisprudential developments in this area remain viable.

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title indicative of its object." LA. CONST. art. III, § 15A. Hence the bill's title is technically constitutional in spite of the fact that the title is misleading.

4. LA. R.S. 22:253, as amended by La. Acts 1972, No. 246, § 1.

5. LA. R.S. 22:253B, as amended by La. Acts 1972, No. 246, § 1.

6. 333 So. 2d 680 (La. App. 2d Cir. 1976).

7. La. H.B. 1062, 39th Reg. Sess., 1976.

8. La. H.B. 1063, 39th Reg. Sess., 1976.

9. La. S.B. 34, 39th Reg. Sess., 1976. If the injury results when the insured is a passenger in another's car, his own coverage would be used only as excess insurance to apply to damages over the limits of liability of the other policy. In the situation where two coverages are applicable to the accident, damage would be limited to the higher of the policy limits and prorated between the insurers.

10. *Barbin v. United States Fidelity & Guar. Co.*, 315 So. 2d 754 (La. 1975); *Nicholson v. Casualty Reciprocal Exch.*, 332 So. 2d 906 (La. App. 2d Cir. 1976); *Stutton v. Langley*, 330 So. 2d 321 (La. App. 2d Cir. 1976); *Seaton v. Kelly*, 327 So. 2d 512 (La. App. 3d Cir. 1976); *Raggio v. Volkswagen Ins. Co.*, 327 So. 2d 505 (La. App. 3d Cir. 1976); *Bourgeois v. Government Employers Ins. Co.*, 316 So. 2d 804 (La. App. 1st Cir. 1975); Note, 35 LA. L. REV. 616 (1975); Note, 33 LA. L. REV. 145 (1972).

## STATE AND LOCAL TAXATION

## AD VALOREM TAXATION

Article VII, § 18 of the Louisiana Constitution provides for a restructuring of the ad valorem taxation system in this state, which will take effect January 1, 1978.<sup>1</sup> The change was prompted by the decision of *Levy v. Parker*<sup>2</sup> and *Bussie v. Long*,<sup>3</sup> which held that the administration of the present ad valorem taxation system violated the equal protection and due process clauses of the fourteenth amendment because there was no uniformity of assessment of property of the same class throughout the state nor within the parishes.<sup>4</sup> Under § 18, property in the same class throughout the state must be assessed at the same percentage of fair market value: land and improvements for residential purposes are to be assessed at 10%, and other property is to be assessed at 15%. However, bona fide agricultural, horticultural, marsh, and timber lands are to be assessed at 10% of use value rather than fair market value. The constitution also requires that "fair market value and use value of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the state."<sup>5</sup> Legislation enacted in 1976 establishes the criteria for reassessment necessary under the new tax system.<sup>6</sup>

Act 702 fixes the procedure and eligibility requirements for determining use value of bona fide agricultural, horticultural, marsh and timber lands.<sup>7</sup> The purpose of assessing these lands based on use value rather than

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1. LA. CONST. art. XIV, § 13.

2. 346 F. Supp. 897 (E.D. La. 1972).

3. 286 So. 2d 689 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 354 (La. 1974).

4. The court order in the *Bussie* case ordered the Louisiana Tax Commission to secure equality and uniformity of assessment practices by January 1, 1976. Apparently, this order is being suspended because of the new tax system provided for in the constitution. Doc. No. 121,082 (La. Dist. Ct., 19th Jud. Dist., March 15, 1973), as modified by the appellate court decision, 286 So. 2d 689, 706 (La. App. 1st Cir. 1973).

5. LA. CONST. art. VII, § 18(D).

6. La. Acts 1976, Nos. 702-05. In order to implement the new tax system the legislature gave the Louisiana Tax Commission \$500,000, and the assessors \$3,000,000. La. Acts 1976, No. 701.

7. The Act defines use value of bona fide agricultural, horticultural, and timber lands as "the highest value of such land when used by a prudent agricultural, horticultural or timber operator for the sole purpose of continuing the operation, as a commercial agricultural, horticultural or timber enterprise, of an existing bona fide agricultural, horticultural or timber use." Use value of bona fide marsh lands is defined as "the highest value of such land for the sole purpose of continuing the

market value is to encourage continued use of lands near urban areas for farm, marsh, and timber production.<sup>8</sup> In order to be eligible for use value assessment, the land must meet the definition of either bona fide agricultural, horticultural, marsh or timber land specified by Section 2 of the Act,<sup>9</sup> and

- (A) [b]e at least ten acres in size, or have produced an average gross annual income of at least two thousand dollars in one or more of the designated classifications for the four preceding years, and
- (B) the landowner [must have] signed an agreement that the land will be devoted to one or more of the designated uses as defined in Section 2 of the Act.<sup>10</sup>

The landowner is required to file an application for use value assessment with the assessor certifying that his property meets one of the definitions in Section 2.<sup>11</sup> Applications must be filed once every four years, except that in the event of a sale of the property, the purchaser must submit a new application within 60 days of the date of sale.<sup>12</sup>

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traditional use of the marsh lands for hunting, fishing, trapping or various types of aquaculture by a prudent manager of marsh lands." La. Acts 1976, No. 702, § 1.

8. The market value of these lands located near urban areas will be much greater than the value of the land used as an agricultural, horticultural, marsh, or timber operation; thus, taxing them on the basis of market value may create a tax burden great enough to force the land into another use.

9. "Section 2. Definitions

A. Bona fide agricultural land is land devoted to the production for sale, in reasonable commercial quantities, of plants and animals, or their products, useful to man, and agricultural land under a contract with a state or federal agency restricting its use for agricultural production. B. Bona fide horticultural land is land devoted to the production for sale, in reasonable commercial quantities, of fruits, vegetables, flowers or ornamental plants, and horticultural land under a contract with a state or federal agency restricting its use for horticultural production. C. Bona fide marsh land is wetland other than bona fide agricultural, horticultural or timber land. D. Bona fide timberland is land stocked by forest trees of any size and specie, or formerly having such tree cover within the last three years and not currently developed or being used for nonforest purposes, and devoted to the production, in reasonable commercial quantities, of timber and timber products, and timberland under a contract with a state or federal agency restricting its use for timber production."

10. La. Acts 1976, No. 702, § 3. The latter two requirements do not apply to marsh lands. *Id.* Although the Act uses the term "agreement," what is probably meant is that the landowner must sign a *statement* that the land will be devoted to one or more of the designated uses.

11. *Id.* at § 4(A).

12. *Id.* at § 4(B). Although this section does require submission of a new application when the property is sold, the only time a penalty for failure to do so will apply is when the purchaser converts the land to a use not eligible for use value assessment. In this case, the penalty of § 6 will apply (see text at note 29, *infra*).



For agricultural and horticultural land, use value is to be determined by using the formula: Use Value = Net Income divided by Capitalization Rate.<sup>13</sup> In determining the net income factor to be used in this formula, the Louisiana Tax Commission first computes an average of the net income per acre of every major agricultural commodity in Louisiana for the four preceding years.<sup>14</sup> This average is then multiplied by the percentage of land area used in the production of that commodity in Louisiana to determine a weighted average of the net income per acre of average farmland, regardless of the commodity produced. Land is divided into four classifications according to land quality,<sup>15</sup> and the tax commission must prepare a table showing the range of productivity of the land within each classification. From these factors, the weighted average and productivity, the tax commission will provide assessors with a table which will show the upper and lower limits of the net income per acre for each classification of land.<sup>16</sup> Within these limits, the assessors are allowed to take into consideration the circumstances of each tract of land in arriving at the particular net income factor.<sup>17</sup> The capitalization rate to be used in the formula is the Federal Reserve Rediscount Rate on the preceding January 1 plus 3½%, but in no event shall the capitalization rate be less than 10%.<sup>18</sup> Determined in this manner, the capitalization rate has very little relationship to a true interest rate as determined by the market place, but this method of determination was probably adopted for its simplicity.

For timberland the same formula is used, but the factors are determined differently.<sup>19</sup> Timberland is divided into four classifications according to productive capacity.<sup>20</sup> The tax commission must publish a table showing the

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13. *Id.* at § 7(A)(1).

14. However, if the net income for the past four years of a certain commodity is negative, the factor entered for this commodity shall be zero. *Id.* at § 7(A)(2)(c).

15. Section 7(A)(2)(a) provides that, "In defining classifications of land, the first four classifications of the U.S. Soil Conservation Service shall be used, with such modifications as may be required by special circumstances, provided that all land historically subject to regular and periodic flooding may be classified as Class IV land."

16. Section 7(C)(1) provides that in applying the formula to determine use value, the assessors must utilize the use value table (and the capitalization rate) provided by the Louisiana Tax Commission.

17. The details of the procedure to determine the net income factor to be used in the formula are not easily discernible from the provisions of the Act. The writer was aided by information and sources supplied by the Louisiana Farm Bureau Federation.

18. La. Acts 1976, No. 702, § 7(A)(3).

19. *Id.* at § 7(C)(1).

20. Class I—timberland capable of producing more than 120 cubic feet of timber

average net income for each classification of timberland, determined by taking the average of the gross return for the previous four year period less the management cost.<sup>21</sup> The tax commission is also given the authority to set the capitalization rate, provided that it shall not be less than 10%.<sup>22</sup>

For marsh land, no such formula is used and the assessor has complete discretion to determine its use value, taking into consideration the following factors:<sup>23</sup>

- (1) income derived from the traditional use of such marsh land;
- (2) physical and economic risks;
- (3) prevailing interest rates;
- (4) liquidity of investments;
- (5) federal and state regulations governing use of such marsh land.

Whether the property tax obligation of a landowner qualifying for use value assessment will be higher or lower than under the present tax system will depend on the past assessment practices of the assessor in his parish. The effect of use value assessment for those who qualify is to keep their property tax obligation lower than it would be under a market value assessment, especially if the land is near an urban area.<sup>24</sup>

If land having a use value assessment ceases to meet the eligibility requirements of the Act, the owner is obligated to notify the assessor within 60 days following the effective date of loss of eligibility.<sup>25</sup> The assessor then must reassess the property immediately, and the assessment will be effec-

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per acre per annum. Class II—timberland capable of producing more than 85 but less than 120 cubic feet of timber per acre per annum. Class III—timberland capable of producing less than 85 cubic feet of timber per acre per annum. Class IV—timberland capable of producing less than 85 cubic feet of timber per acre per annum and subject to periodic overflow from natural or artificial water courses, and which is otherwise considered to be swampland. *Id.* at § 7(C)(2)(a).

21. *Id.* at § 7(C)(2). Gross return is determined by multiplying the annual cubic feet of growth per acre for timber in each of the four classifications (as determined by the U.S. Forest Periodic Survey) by the value per cubic foot of timber stumpage (as derived from severance tax returns). *Id.* at § 7(C)(2)(c).

22. In setting the capitalization rate, the commission must take into consideration the following factors: (1) physical and economic risk; (2) effect of relative marketability of timberlands on liquidity of investments; (3) competition with other investments and prevailing interest rates; and (4) any other factors which may be appropriate. *Id.* at § 7(C)(3).

23. The following list is a paraphrase of the factors found in § 7(B) of Act 702.

24. The use value and market value of some land will be equal because the land's most valuable use will be agricultural, horticultural, marsh or timber production. In this case, the tax obligation will be the same under either type of assessment.

25. La. Acts 1976, No. 702, § 5(A). For the penalty for failure to so notify the assessor, see text at note 29, *infra*.

tive the following year.<sup>26</sup> A presumption of loss of eligibility is created by sale of the land for a price "four times greater than its use value."<sup>27</sup> The purchaser can rebut this presumption by showing either that the sales price paid includes other things of value which are susceptible of appraisal, such as standing crops or timber, improvements, or equipment, or that the land actually meets the requirements of eligibility.<sup>28</sup> If the landowner fails timely to notify the assessor of loss of eligibility, or if he obtains a use value assessment by means of a false certification in his application, he is liable for a penalty equal to five times the difference between the tax under a market value assessment and the tax under a use value assessment for each year that the assessment was obtained by these illegal means.<sup>29</sup>

The Act discourages conversion of property taxed under the use value system to any other use by providing that land so converted is subject to deferred taxes for that year and for the immediately preceding four tax years.<sup>30</sup> The amount of the deferred tax for any one year is the difference between the tax on a use value assessment and the tax on a current fair market value assessment.<sup>31</sup> This provision will especially tend to discourage the conversion to other uses of land near urban areas, or any other land for which there is a significant difference between its fair market value and use value.

On its face, Act 702 seems to meet the requirements of article VII, § 18 and *Bussie v. Long*.<sup>32</sup> Both require that property be valued according to criteria which must apply uniformly throughout the state, and the Act complies by providing the formula for calculating use value and by requiring the Louisiana Tax Commission to supply most of the figures to be used in the formula. However, both the constitution and *Bussie* also require that the Act be implemented uniformly. Were assessors to fail in fact to assess uniformly, the result would be an unconstitutional system. Even though the Act provides uniform criteria, it is questionable whether the

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26. *Id.*

27. *Id.* at § 5(B). Reading this provision strictly, it would seem that the presumption would apply only if the price is four times the use value and not if the price is five or six times the use value. Obviously, the legislature intended it to read "a price greater than four times its use value."

28. *Id.*

29. *Id.* at § 6(A).

30. *Id.* at § 4(D). But if the land was converted because of the sale or transfer of a servitude or easement to any entity having the right of expropriation, it shall not be subject to deferred taxes. *Id.* at § 4(G).

31. *Id.* at § 4(D).

32. See text at note 4, *supra*.

criteria alone give enough guidance to the assessors to be considered a basis for uniform assessment.<sup>33</sup> Therefore, tax commission regulations will have to be specific enough to provide this guidance.

Act 705 prescribes a uniform method of appraisal for all property, except bona fide agricultural, horticultural, marsh and timber land, to be used by each assessor in determining fair market value. The fair market value of real and personal property is to be determined by the following generally recognized appraisal procedures: the market approach, the cost approach, and/or the income approach;<sup>34</sup> and these criteria are to apply uniformly throughout the state.<sup>35</sup> In order to meet the uniformity tests of *Bussie*<sup>36</sup> while using three different appraisal techniques, the Act requires the Louisiana Tax Commission to adopt, and the assessors to follow, uniform guidelines, procedures, rules and regulations necessary to implement these criteria.<sup>37</sup> Whether uniformity will result will be determined by the strictness of the commission's rules and regulations and by how closely they are followed by the assessors. The Act provides that all property must be reassessed in 1978, and that real property must be appraised at least once every four years and personal property every year thereafter.<sup>38</sup>

In gathering appraisal data, each assessor is required to send statutorily prescribed forms to the taxpayer for completion and return.<sup>39</sup> Separate forms are prescribed for residential property, apartment property, commercial and investment property, and vacant land.<sup>40</sup> They contain detailed inquiries but do not require the landowner to estimate the value of his property. Forms for use in reporting personal property must be approved and adopted by the Louisiana Tax Commission.<sup>41</sup> All returned forms are

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33. The assessors are given some discretion by the Act, and if they are given no guidance in how to exercise this discretion, they may exercise it arbitrarily, resulting in non-uniform assessments.

34. La. Acts 1976, No. 705, § 3(C). The Act defines fair market value as the "price for property which would be agreed upon between a willing and informed buyer and a willing and informed seller under usual and ordinary circumstances; it shall be the highest price estimated in terms of money which property will bring if exposed on the open market."

35. *Id.* at § 3(A).

36. See text at note 4, *supra*.

37. La. Acts 1976, No. 705, §§ 3(A) & (B). Any manuals used by an assessor shall be subject to approval by the tax commission. *Id.* at § 3(B).

38. *Id.* at § 11. This meets the requirements of LA. CONST. art. VII, § 18(f) and art. XIV, § 13.

39. La. Acts 1976, No. 705, § 4.

40. *Id.* at § 5.

41. *Id.* at § 6.

confidential and exempt from the public records statutes, but are admissible in evidence and subject to discovery in judicial or administrative proceedings according to the general law relating to the production and discovery of evidence.<sup>42</sup> If the property owner fails to file a report timely, he waives his right to contest the determination of fair market value by the assessor.<sup>43</sup> There is also a penalty of 10% of the tax due for filing a fraudulent report.<sup>44</sup>

In addition to requiring submission of these forms by the property owner, the Act gives the assessor the right to require additional data pertaining to the appraisal and to inspect the property.<sup>45</sup> Furthermore, acts of sale or other acts transferring property must contain the total sales price, the amount of any mortgages on the property, the correct names and addresses of the vendor and vendee, and the municipal address of the property, should one be available.<sup>46</sup> The requirement that the *total* sales price be included was enacted to allow the assessor to use this information in appraising the property. Thus, an agreement between the parties to state a low sales price in the act of sale and to put the actual price in a counterletter would seem prohibited. The Act offers no guidance on the enforcement of this requirement<sup>47</sup> or on whose duty it is to ensure that the total price is included in the act of sale. However, a side effect of this provision may be to make such counterletters unenforceable, since the obligation would have no *lawful* cause and the party attempting to enforce it would not be entering court with "clean hands."

The constitution requires the Louisiana Tax Commission, rather than the assessors, to appraise and assess public service properties,<sup>48</sup> and Act 703 establishes the procedure to be used.<sup>49</sup> The Act requires that all public

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42. *Id.* at § 7.

43. *Id.* at § 9.

44. *Id.* at § 10.

45. *Id.* at § 5.

46. *Id.* at § 8.

47. Perhaps the penalty of 10% of the tax due, provided in § 10 of the Act, will be extended to this violation, although strictly it only applies when the property owner files a false *report* with intent to defraud the assessing authority.

48. LA. CONST. art. VII, § 18(d).

49. La. Acts 1976, No. 703, *adding* LA. R.S. 47:1851-58 (Supp. 1976), and *repealing* LA. R.S. 47:1976, 1979-86 (Supp. 1976). The Act defines public service properties as "property owned or used but not otherwise assessed in this state in the operation of each airline, electric membership corporation, electric power company, express company, gas company, pipeline company, railroad company, telegraph company, telephone company and water company. For each barge line, towing company or private car company, only the major movable property owned or used but not otherwise assessed in this state in interstate or interparish operations shall be considered as public service property."

service properties of the same nature and kind be appraised in the same manner.<sup>50</sup> As required by the constitution, land is to be assessed at 10% of fair market value and other properties at 15% of fair market value.<sup>51</sup> Other provisions of the Act are substantially similar to the previous statutes.<sup>52</sup>

Act 704 of 1976 provides for the assessment of bank stock and the criteria for determining its fair market value.<sup>53</sup> In accordance with article VII, § 18 of the Louisiana Constitution, the Act amends La. R.S. 47:1967 to provide that all bank stock be assessed at 15% of its market valuation.<sup>54</sup> Previously, the assessment rates were 30% for stock in state and national banks, and 10% for stock in federal joint stock land banks organized under the Farm Loan Act of 1916.<sup>55</sup>

The Act also changes the procedure for determining the value of bank stock. Previously, stock was appraised according to statements of the bank to the Comptroller of Currency for banks created under federal laws, and to the state bank commissioner for banks created under state laws.<sup>56</sup> The assessment was determined by applying the appropriate percentage and then allowing deductions for (1) value of preferred stock owned by the United States, and (2) 50% of the assessed value of the real estate owned by the bank or a subsidiary corporation.<sup>57</sup>

The Act provides that the value of bank stock is the stockholder equity capital, determined by adding paid-in common stock, surplus, undivided profits, and all reserves (excluding those reserves for loan losses as allowed by the United States Internal Revenue Service).<sup>58</sup> To determine the fair market value of the stock, stockholder equity capital serves as a four-time factor (80%), and annual net earnings of the bank serves as a one-time factor (20%).<sup>59</sup> To compute the 20% factor, the earnings are to be capitalized by

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50. La. Acts 1976, No. 703, adding LA. R.S. 47:1853(B).

51. LA. R.S. 47:1854 (Supp. 1976), as amended by La. Acts 1976, No. 703.

52. See LA. R.S. 47:1976, 1979-86 (Supp. 1975) (as they appeared prior to Act 703 of 1976).

53. The shareholders are ultimately liable for this tax, but LA. R.S. 47:1971 (1950) provides that the bank must pay the tax to the assessor and the bank then is entitled to collect the amount thus paid from the shareholders.

54. La. Acts 1976, No. 704 amending LA. R.S. 47:1967(b) (Supp. 1976).

55. LA. R.S. 47:1967 (Supp. 1966) (as it appeared prior to Act 704 of 1976).

56. *Id.*

57. *Id.*

58. La. Acts 1976, No. 704 amending LA. R.S. 47:1967(c) (Supp. 1976). Borrowed money and the value of the preferred stock issued by any such bank and actually owned by the United States of America or any agency thereof are not to be construed as equity capital. *Id.*

59. LA. R.S. 47:1967(D) (Supp. 1976), as amended by La. Acts 1976, No. 704.

multiplying the annual net earnings of the bank by the average price earnings ratio for all banks in the United States as published by a nationally recognized bond and securities ratings firm.<sup>60</sup> The assessment is 15% of the value determined by use of the above formula, with a subsequent deduction of 50% of the assessed value of real estate, improvements, buildings, furniture, and fixtures owned by the bank (or a separate corporation if all the capital stock is owned by the bank).<sup>61</sup>

The taxation system prescribed by these four acts seems to provide a vehicle by which the constitutional requirements of article VII, § 18 and *Bussie v. Long* can be met. It must be remembered, however, that the present statutory scheme was not held unconstitutional on its face, but only in its application.<sup>62</sup> Similarly, the ultimate constitutionality of this taxation scheme will be determined by the way that the tax commission and the assessors carry out the duties and authority given them by these acts.

The legislature increased the homestead exemption from \$3000 to \$5000 under the authority of article VII, § 20(A)(2) of the constitution.<sup>63</sup> Since article VII, § 18 requires land and improvements for residential purposes to be assessed at 10% of their fair market value, a homestead worth \$50,000 will be exempt from property taxation.<sup>64</sup> In order to prevent reduction of local revenues, the Act provides that the increase will become effective on January 1, 1978 and allows the governing authority of each local governmental entity to adjust its property tax millages for the calendar year 1978 so that the revenue collected in 1978 will be the same as that collected in 1977.<sup>65</sup> This statutory millage increase may violate the constitu-

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Negative earnings are not considered, and earnings loss may not be carried forward or backward. *Id.*

60. LA. R.S. 47:1967(D) (Supp. 1976), *as amended by* La. Acts 1976, No. 704. The tax commission is required to compute the above formula by using the statements of the bank made to the Comptroller of the Currency for United States banks and to the commissioner of financial institutions for state banks. LA. R.S. 47:1967(E) (Supp. 1976), *as amended by* La. Acts 1976, No. 704.

61. LA. R.S. 47:1967(F) (Supp. 1976), *as amended by* La. Acts 1976, No. 704. The value of preferred stock owned by the United States is no longer allowed as a deduction (see text at note 57, *supra*), but it is not considered as a part of equity capital in applying the formula (see note 58, *supra*).

62. *Bussie v. Long*, 286 So. 2d 689 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 354 (La. 1974).

63. La. Acts 1976, No. 387 *amending* LA. R.S. 47:1703 (Supp. 1976).

64. Homes worth \$50,000 which are subject to municipal property taxes may still have to pay some tax because the homestead exemption does not apply to most of these taxes. LA. CONST. art. VII, § 20(A)(5).

65. La. Acts 1976, No. 387, § 2.

tional limits on the millage that local governments may levy, found in article VI, §§ 26 and 27,<sup>66</sup> unless it can be considered part of the constitutional roll-up and roll-back of millages provided in article VII, § 23, which is an exception to these constitutional limits.<sup>67</sup> Since this increase was authorized by article VII, § 20 and is being implemented in the same year as the other property tax reforms, a literal reading of § 23 would include this increase within its provisions.<sup>68</sup> However, it can be forcefully argued that the authorization to increase the homestead exemption was intended by the Constitutional Convention to be exercised only if continued inflation rendered the \$3000 exemption insubstantial.<sup>69</sup> From this, the argument would follow that the convention did not intend that the authorization be exercised this quickly, and that this millage increase is not authorized by § 23.

#### SALES TAX

Act 153 amends La. R.S. 47:315 to allow a sales tax refund to dealers for some credit sales in which the purchaser fails to pay. The amount of the refund will be the amount of sales tax previously paid on the unpaid balance of the account due on the sale, and will be allowed if the unpaid balance "has been found to be bad in accordance with Section 166 of the United States Internal Revenue Code and has actually been charged off for federal income tax purposes."<sup>70</sup> This seems to create two separate requirements, but the Act does not specify who must find the debt to be bad; presumably it could be the Louisiana Department of Revenue or the Internal Revenue Service. If the balance is later recovered, it must be reported as a new sale, and sales tax must be paid on the amount recovered.<sup>71</sup> The Act provides that

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66. Section 26 provides that the millage limitation on parish ad valorem taxes is four mills on the dollar, except in Orleans and Jackson parishes, where the limits are seven and five mills respectively. Section 27 provides that the millage limitation on municipal ad valorem taxes is seven mills on the dollar, but if the municipality is exempt from the payment of parish taxes or maintains its own public schools, the limit is ten mills on the dollar. These limits may be increased when approved by a majority of the voters.

67. Article VII, § 23 reads: ". . . the total amount of ad valorem taxes collected by any taxing authority *in the year in which Sections 18 and 20 of this Article are implemented* shall not be increased or decreased, *because of their provisions*, above or below ad valorem taxes collected by that taxing authority in the year preceding implementation." (Emphasis added).

68. See emphasized language in note 67, *supra*.

69. See STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS October 19, 1973 at 38-9, 109-10; October 20, 1973 at 4.

70. LA. R.S. 47:315(B) (Supp. 1976), *as amended* by La. Acts 1976, No. 153.

71. LA. R.S. 47:315(B) (Supp. 1976), *as added* by La. Acts 1976, No. 153.



it will apply only to the state sales tax and not to taxes levied by local taxing authorities,<sup>72</sup> and that the refund applies only to debts incurred on or after January 1, 1976.<sup>73</sup>

## STATE AND LOCAL GOVERNMENT

### IN GENERAL

Pursuant to the mandate of article X, § 25 of the Louisiana Constitution, the legislature has provided for the removal by suit of public officers for conviction of a felony.<sup>1</sup> However, Act 628 does not fully satisfy the mandate of § 25, which requires legislation for the removal by suit of public officers for conviction *or commission* of a felony, malfeasance, and gross misconduct while in office.<sup>2</sup> It is unclear whether § 25 requires legislative action to create the cause of action of removal by suit, or creates the cause of action itself and requires legislative action only to establish a procedure for its enforcement. The latter view is supported by the argument that the grounds for removal by suit are taken from article X, § 24 on impeachment, which has separate subsections creating the action and providing the enforcement procedure. Thus, the § 25 phrase "For the causes enumerated in Paragraph (A) of Section 24" may be interpreted as creating the cause of action for each of these grounds.<sup>3</sup> If this view is accepted, a cause of action for removal by suit exists for the grounds of commission of a felony, malfeasance, or gross misconduct, despite their omission from Act 628. Since the legislature has not provided a procedure for these grounds, it may be argued that the procedure provided in Act 628 or some other procedure should be judicially adopted. However, it can also be argued that § 25 requires legislation to create the cause of action. If the Constitutional Convention had intended that the constitution create the cause of action, it

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72. La. Acts 1976, No. 153, *adding* LA. R.S. 47:315(B) (Supp. 1976).

73. La. Acts 1976, No. 153, *adding* LA. R.S. 47:315(C) (Supp. 1976). Last year the legislature passed a similar bill, House Bill 22, which the governor vetoed. It differed from Act 153 in that House Bill 22 tied the eligibility for the refund to whether the dealer had charged the debt off on his books rather than on his income tax return; also, House Bill 22 had no provision exempting local sales tax from its provisions.

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1. La. Acts 1976, No. 628, *adding* LA. R.S. 42:1411-12 (Supp. 1976).

2. LA. CONST. art. X, § 25, read in conjunction with LA. CONST. art. X, § 24(A).

3. *Cf.* STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS July 28, 1973 at 79-80.

could easily have specified this by dividing § 25 into subsections, as it did § 24. Although § 25 requires the legislature to enact legislation for removal by suit for all four grounds, Act 628 does not thereby violate this section because legislation for removal for the other grounds may be enacted later. Given this interpretation, the only means of removal for commission of a felony absent a conviction, malfeasance, or gross misconduct are a recall election<sup>4</sup> or impeachment.<sup>5</sup>

The Act applies to all public officers, except the governor, lieutenant governor, and judges of the courts of record,<sup>6</sup> and provides that upon conviction of a felony they shall be removed by judgment of the district court of their domicile.<sup>7</sup> It seems to require the felony to have been committed during the term of office although it is questionable whether this was intended or is even desirable.<sup>8</sup> If the district of the officer to be removed is wholly within the jurisdiction of a district attorney, then that district attorney must institute the suit.<sup>9</sup> The attorney general must institute the suit against any other officer and also against any district attorney.<sup>10</sup> Suits against the attorney general must be brought at the place where he discharges his official duties by the district attorney of that district.<sup>11</sup> The Act appears to require the district attorney or attorney general to bring such suits rather than permitting the exercise of prosecutorial discretion.<sup>12</sup> If it is

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4. LA. R.S. 42:341-57 (Supp. 1975). Removal by recall election applies to all public officers except judges of the courts of record.

5. LA. CONST. art. X, § 24. Only state and district public officers are subject to impeachment.

6. La. Acts 1976, No. 628, adding LA. R.S. 42:1411 (Supp. 1976). These exceptions are required by LA. CONST. art. X, § 25.

7. La. Acts 1976, No. 628, adding LA. R.S. 42:1412 (Supp. 1976).

8. "Any public officer . . . shall be liable to removal from office for conviction, during his term of office, of a felony *while in such office*." La. Acts 1976, No. 628, adding LA. R.S. 42:1411 (Supp. 1976) (emphasis added). The policy behind removal from office for conviction of a felony seems to be that the people do not want convicted felons in office, rather than simply not wanting them to commit felonies while in office. The emphasized phrase was taken from art. X, § 24 and seems there only to modify the cause of gross misconduct rather than all four causes. However, the legislature may have thought that it modified all four causes and thus included it in the Act.

9. LA. R.S. 42:1412 (Supp. 1976), as added by La. Acts 1976, No. 628.

10. *Id.*

11. In each of the above situations, suit must be brought within 30 days after the conviction is final and all appellate remedies have been exhausted. *Id.*

12. If interpreted in this manner, the statute could possibly violate article V, § 26(B) of the constitution, which states that the district attorney "shall have charge of every criminal prosecution by the state in his district." See *Guidry v. Roberts*, 335 So. 2d 438 (La. 1976). However, the bringing of a suit to remove a public officer probably will not be considered a "criminal prosecution."

so construed, and the district attorney or attorney general fails to bring suit, a citizen should be able to bring a mandamus proceeding to force him to institute suit.<sup>13</sup>

The legislature amended the open meetings laws<sup>14</sup> to make it more difficult for any public body, except the legislature, to call executive sessions.<sup>15</sup> Act 665 provides that public bodies may hold meetings closed to the public for the following reasons *only*:<sup>16</sup>

- (1) discussions of the character, professional competence, or physical or mental health of a single individual (for personnel matters);<sup>17</sup>
- (2) strategy sessions or negotiations with respect to collective bargaining or litigation;<sup>18</sup>
- (3) discussion regarding security personnel, plans, or devices;
- (4) investigative proceedings regarding allegations of misconduct;
- (5) meetings of the State Mineral Board at which confidential records or matters are discussed;
- (6) cases of extraordinary emergency, which are limited to natural disaster, threat of epidemic, civil disturbances, suppression of insurrections, repelling of invasions, or other matters of similar magnitude; or
- (7) any other matters now provided for or as may be provided for by the legislature.

The first five exceptions have valid purposes and seem to be sufficiently limited in scope to prevent abuse. The language in the sixth exception regarding "other matters of similar magnitude" could be misused by public bodies, but should not if construed in *pari materiae* with the enumerated emergencies, as seemingly required by the Act.<sup>19</sup>

13. LA. CODE CIV. P. arts. 3861-66.

14. Sometimes called "sunshine laws."

15. La. Acts 1976, No. 665 *amending* LA. R.S. 42:4.1-10 (Supp. 1976).

16. The following list is a paraphrase of the reasons found in Act 665.

17. However, the individual may require that such discussion be held at an open meeting. La. Acts 1976, No. 665, *adding* LA. R.S. 42:6.1(A)(1) (Supp. 1976).

18. This exception is limited to those instances when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body. La. Acts 1976, No. 665, *adding* LA. R.S. 42:6.1(A)(2) (Supp. 1976).

19. The Act provides, "It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. *Toward this end, the provisions of R.S. 42:4.1 through R.S. 42:10 shall be construed liberally.*" La. Acts 1976, No. 665, *adding* LA. R.S. 42:4.1 (Supp. 1976) (emphasis added).

Under previous legislation a closed meeting could be called for virtually any reason whenever a majority of the members of the public body voted to call it.<sup>20</sup> Act 665 states that before a closed meeting may be called, the public body must approve the call by two-thirds of the voting members present at an open meeting for which proper notice has been given.<sup>21</sup> Public bodies must give written public notice of all meetings no later than 24 hours before the meeting, with the exception of cases of extraordinary emergency,<sup>22</sup> and keep minutes of all open meetings, which are to be public records.<sup>23</sup>

As under the previous legislation, no final or binding action may be taken at a closed meeting.<sup>24</sup> If a public body violates this provision, the action taken is not void,<sup>25</sup> but the officials of the public body become subject to the penalties provided in the Act.<sup>26</sup> The penalty provisions of the previous statutes only applied to the presiding officer,<sup>27</sup> but Act 665 extends them to every official attending any meeting required by law to be open to the public.<sup>28</sup> This should make public bodies more responsive to the open meetings laws. However, it must be remembered that because these are criminal penalties, they must be enforced by the district attorney, who may be hesitant to enforce them strictly.

Act 665 also contains a section specifying how the Act is to be enforced. The district attorney of competent jurisdiction can bring criminal actions under the Act only through a grand jury indictment.<sup>29</sup> Citizens are given the right to sue to require compliance with the Act, but not to require

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20. LA. R.S. 42:6 (as it appeared prior to Act 665 of 1976).

21. La. Acts 1976, No. 665 amending LA. R.S. 42:6 (Supp. 1976).

22. LA. R.S. 42:7 (Supp. 1976), as amended by La. Acts 1976, No. 665. In cases of extraordinary emergencies, the public body shall give such notice as it deems appropriate and circumstances permit. *Id.*

23. LA. R.S. 42:7.1 (Supp. 1976), as added by La. Acts 1976, No. 665.

24. LA. R.S. 42:6 (Supp. 1976), as amended by La. Acts 1976, No. 665.

25. This is made clear by the fact that the bill as introduced had a provision which voided any final action taken at a closed meeting (La. S.B. 591, § 8.1 of Title 42 as provided in the bill), but the provision was deleted by the conference committee.

26. La. Acts 1976, No. 665 amending LA. R.S. 42:9 (Supp. 1976). The penalty for first conviction is a fine not less than \$100 and not more than \$1000 or imprisonment for not more than seven days. For any subsequent conviction, the penalty is a fine of not less than \$250 and not more than \$2000 or imprisonment for not more than 30 days, or both.

27. LA. R.S. 42:9 (as it appeared prior to Act 665 of 1976).

28. La. Acts 1976, No. 665 amending LA. R.S. 42:9 (Supp. 1976).

29. La. Acts 1976, No. 665, adding LA. R.S. 42:10 (Supp. 1976). This provision may violate the district attorney's constitutional power to control the initiation of prosecution, as construed in *Guidry v. Roberts*, 335 So. 2d 438 (La. 1976).

the district attorney to bring a criminal action.<sup>30</sup>

Act 292 requires each public body, at least seven days prior to its purchase or sale of land, to enter in its official record the name of any elected state or local official, or appointed official or employee of the public body making the purchase or sale, known to have a pecuniary interest in the purchase or sale.<sup>31</sup> The described elected and appointed officials who know of their pecuniary interest in the purchase or sale must notify the participating public body of the extent of their interest at least five days prior to the purchase or sale.<sup>32</sup>

There is no penalty for failure to comply with these requirements nor is merchantability of title to the land affected thereby.<sup>33</sup> But the Act also provides that any elected or appointed official is prohibited from voting on the purchase or sale of land if he has a pecuniary interest therein, and that voting on such a transaction will constitute malfeasance in office.<sup>34</sup>

#### LOCAL GOVERNMENT

Act 689 establishes a new method of funding the sheriff's department of each parish, except Orleans, beginning with fiscal year 1977-78.<sup>35</sup> Presently, sheriffs' departments are funded by commissions taken by the sheriffs on taxes which they collect, with most of the revenue coming from the commission on property taxes.<sup>36</sup> Act 689 creates special districts known as law enforcement districts, with boundaries coterminous with parish boundaries, which have the power to levy property taxes to fund the sheriff's office.<sup>37</sup> The commission on property taxes is abolished and

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30. LA. R.S. 42:10 (Supp. 1976), *as added by* La. Acts 1976, No. 665. The court must order payment of court costs to a successful plaintiff in such a citizen's suit. *Id.*

31. La. Acts 1976, No. 292, *adding* LA. R.S. 38:2211.1 (Supp. 1976). This section does not apply to the purchase of land through expropriation proceedings. For the purposes of this section, the purchase or sale of land includes, but is not limited to, the purchase or sale of mineral rights, timber rights, and the letting or acquiring of a leasehold interest or any other interest in land. "Pecuniary interest" means any interest in the consideration given for the land. *Id.*

32. LA. R.S. 38:2211.1(C) (Supp. 1976), *as added by* La. Acts 1976, No. 292.

33. LA. R.S. 38:2211.1(G) (Supp. 1976), *as added by* La. Acts 1976, No. 292.

34. La. Acts 1976, No. 292, *adding* LA. R.S. 38:2211.1(0) (Supp. 1976).

35. La. Acts 1976, No. 689, *adding* LA. R.S. 33:9001-08 (Supp. 1976).

36. LA. R.S. 33:1423(E) (as it appeared prior to Act 689 of 1976).

37. La. Acts 1976, No. 689, *adding* LA. R.S. 33:9001-02 (Supp. 1976). Although art. VI, § 19 of the constitution also allows the legislature to authorize special districts to incur debt and issue bonds, they did not confer these powers on the law enforcement districts. (The original bill, House Bill 1285, did have a provision granting these powers to the district but was amended to delete that grant.). The sheriff will be the ex officio chief executive officer of the district. LA. R.S. 33:9001 (Supp. 1976). *as added by* La. Acts 1976, No. 689.

instead the sheriff is allowed compensation for the actual cost of collecting property taxes for other tax-recipient bodies.<sup>38</sup> In addition, each law enforcement district shall levy, without a vote of the people, a tax on the assessed valuation of all property appearing on the tax rolls in an amount that, when added to the compensation for actual costs of tax collection, will produce for the district in the initial year the same revenue as produced by the commission in the previous fiscal year.<sup>39</sup> Therefore, the district may impose additional millages only when approved by a majority of those voting in an election held for that purpose.<sup>40</sup> Thus the funding of the sheriffs' departments will be controlled by their constituency rather than by the legislature. Authorizing a special district to levy a tax without a vote of the people seems to be valid under article VI, § 19, especially in this case where the taxpayers' ultimate tax burden will not be increased. There will be no increase because the Act provides for a mandatory reduction of ad valorem tax millages of the other tax-recipient bodies of the parish so that the total amount of ad valorem taxes received by them is not increased by the reduction of the sheriff's commission provided for in the Act.<sup>41</sup>

The question of how the expenditures of the sheriff's department were to be made public was a very controversial issue. The compromise reached requires the sheriff to publish a budget estimate in the official newspaper of the parish.<sup>42</sup> Another important provision of the Act makes sheriffs'

38. La. Acts 1976, No. 689, § 3; LA. R.S. 33:9004 (Supp. 1976), *as added by* La. Acts 1976, No. 689. The sheriff is to determine what the actual cost of collection is, but this determination may be reviewed by the legislative auditor upon the written request of the parish governing authority or school board within the parish.

39. LA. R.S. 33:9003-04 (Supp. 1976), *as added by* La. Acts 1976, No. 689.

40. LA. R.S. 33:9003 (Supp. 1976), *as added by* La. Acts 1976, No. 689.

41. La. Acts 1976, No. 689, *adding* LA. R.S. 33:905 (Supp. 1976). However, this section adds, ". . . nothing herein shall prohibit a taxing authority from collecting, in the year in which the special district is created or in any subsequent year a larger dollar amount of ad valorem taxes by:

- (a) levying additional or increased millages as provided by law;
- (b) putting additional property on the tax rolls; or
- (c) increases in the fair market or use value of the property."

It also provides that the rollback shall not apply to millages required to be levied for the payment of general obligation bonds.

This Act may indirectly increase the taxpayers' tax burden without their vote because a local governing authority whose millage before was equal to the constitutional limit will have to decrease this millage because of the Act, and it may thereafter increase the millage to the constitutional limit without a vote of the people.

42. LA. R.S. 33:9006 (Supp. 1976), *as added by* La. Acts 1976, No. 689. The original bill required the sheriff to furnish the clerk of court with a budget, the form and contents of which were to be prescribed by the legislative auditor. Thereafter, the sheriff was required to schedule a public hearing on the budget, and was allowed to

departments subject to the public bid laws of the state for the first time.<sup>43</sup>

In order to make the "pill" easier for the sheriffs to swallow, each received an increase in salary of \$6000 per year and an increase in expense allowance from 5% to 10% of his salary.<sup>44</sup>

Act 639 eliminates the limit on the amount and duration of the special taxes that political subdivisions of the state can levy for the construction and maintenance of public improvements.<sup>45</sup> This tax was previously limited to five mills on the dollar per year for any one purpose, and twenty-five mills on the dollar in any year for all purposes, with a ten-year duration limitation on any such tax.<sup>46</sup> Act 639 provides that a political subdivision may levy this tax without limitations, provided that the rate, purpose, and duration be approved by the voters.

Several parishes and municipalities have long had ordinances which allowed businesses dispensing alcoholic beverages to stay open into the early morning hours on Sunday, even though state statutes prohibited engaging in business on Sunday.<sup>47</sup> Act 149 grants the governing authority of each parish and municipality the authority to pass ordinances allowing Sunday openings, and also operates retroactively, thus validating the ordinances previously adopted.<sup>48</sup>

Act 372 allows the governing authority of a parish or municipality to compromise or settle any claim against it *before* suit is filed.<sup>49</sup> Previously, the statute authorizing such settlements only mentioned the settling of "suits."<sup>50</sup> The former requirement that the district or city attorney concur in the decision to settle suits is extended to pre-suit settlements. A further limitation on the pre-suit settlement is that ten days must have elapsed after the publication of the proposed settlement in the official journal of the appropriate political subdivision.

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revise the budget with the clerk of court after this hearing. La. H.B. 1285, 39th Reg. Session, 1976.

43. La. Acts 1976, No. 689, adding LA. R.S. 33:9907 (Supp. 1976).

44. LA. R.S. 33:1421 (Supp. 1976), as amended by La. Acts 1976, No. 689.

45. La. Acts 1976, No. 639, adding LA. R.S. 39:801 (Supp. 1976).

46. LA. R.S. 39:801 (as it appeared prior to Act 639 of 1976). Before this amendment, the language of § 801 tracked the language of art. X, § 10 of the 1921 Constitution. The current constitutional authorization for these special taxes, art. VI, § 32, authorizes such taxes without mention of any limitations. Thus, perhaps the limitations of § 801 were invalidated by this constitutional provision and this Act is merely to update the statute.

47. LA. R.S. 51:191-92 (1950).

48. La. Acts 1976, No. 149, adding LA. R.S. 51:195 (Supp. 1976).

49. La. Acts 1976, No. 372, adding LA. R.S. 13:5109(c) (Supp. 1976).

50. LA. R.S. 13:5109(A) (Supp. 1975).

## ELECTIONS

The legislature, pursuant to the mandate of article XI, § 1 of the constitution, enacted an election code which provides for permanent registration of voters and for the conduct of all elections.<sup>51</sup> Act 697 amends the entirety of Title 18 of the Revised Statutes, except for Chapter 8, dealing with political contributions, and Chapter 9, dealing with the Registrars of Voters Employees' Retirement System.<sup>52</sup> The election code must be approved by the United States Attorney General,<sup>53</sup> and if so approved, will become effective on January 1, 1978.<sup>54</sup>

The Election Campaign Finance Disclosure Act was amended by the legislature in an attempt to validate its enforcement provisions and to correct some of the administrative problems encountered in its first year of operation.<sup>55</sup> The Louisiana Supreme Court, in *Guidry v. Roberts*,<sup>56</sup> held that the section of the 1975 Act providing that the district attorney could enforce the Act only on the basis of information forwarded by a supervisory committee contravened article V, § 26(B) of the constitution, which states that the district attorney "shall have charge of every criminal prosecution by the state in his district." The court interpreted this phrase to mean that the district attorney has exclusive power over the initiation of prosecutions for state criminal offenses in his district, and since the enforcement provision of the 1975 Act limited this power, it was unconstitutional.<sup>57</sup> Act 386 amends the enforcement provision to provide that the initiation of actions by the

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51. La. Acts 1976, No. 697 amending LA. R.S. 18:1-1466 (Supp. 1976).

52. These chapters were designated Chapters 11 and 12, respectively.

53. Voting Rights Act, § 5; 42 U.S.C. § 1973c (Supp. 1975).

54. La. Acts 1976, No. 697, § 4. There are several changes made by the Act, but space limitations prevent their full discussion. Some of the more important changes are: (1) the extension of the open election system to the elections of U.S. senators and representatives, La. Acts 1976, No. 697 amending LA. R.S. 18:1271 (Supp. 1976); (2) the transfer of the power to qualify candidates from political party committees to the secretary of state, for statewide candidates, and to either the clerk of court or the president or secretary of the parish board of election supervisors, for local and municipal candidates. La. Acts 1976, No. 697 amending LA. R.S. 18:462 (Supp. 1976); (3) the removal of the requirement that the name of a candidate who is unopposed be placed on the ballot. La. Acts 1976, No. 697 amending LA. R.S. 18:511(B), 512(B) (Supp. 1976).

55. La. Acts 1976, No. 386 amending LA. R.S. 18:1481-93 (Supp. 1976). There were also some substantive changes made, including: (1) deletion of the provision prohibiting candidates from paying to appear or speak at a fair or festival; (2) allowing corporate contributions to be made by an executive officer designated by the corporation rather than solely from the board of directors; and (3) closing a loophole on contributions in the form of purchases of tickets to testimonials.

56. 335 So. 2d 438 (La. 1976).

57. *Id.* at 446.



district attorney shall be only on the basis of information forwarded by the supervisory committee, “. . . and on the basis of such information as may be gathered by the district attorney otherwise if information concerning the complaint has been forwarded to such official by the supervisory committee.”<sup>58</sup> Unless the supreme court reverses *Guidry*, this enforcement provision should also be held unconstitutional because the supervisory committee can still prevent the district attorney from enforcing the Act by not forwarding any information to him, thus infringing upon his exclusive power to institute state criminal proceedings.<sup>59</sup>

However, in the *Guidry* case, the supreme court also held that the enforcement provision is severable from the rest of the Act.<sup>60</sup> Thus, all other provisions of the Act are valid,<sup>61</sup> and the criminal provisions will be enforceable by the district attorney even though no information is forwarded to him by the supervisory committee.

#### EDUCATION

Act 688 is a specific grant of authority to teachers and school principals to use corporal punishment in a reasonable manner against any pupil to maintain discipline and order.<sup>62</sup> Although a 1975 Act contains broad language which could be interpreted as authorizing the use of reasonable corporal punishment,<sup>63</sup> Act 688 dispels any doubt. The local school board is

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58. La. Acts 1976, No. 386 amending LA. R.S. 18:1492(B)(1) (Supp. 1976).

59. A forceful argument can be made that article V, § 26(B) only gives the district attorney complete control over the prosecution *once it is initiated*, and not complete control over the initiation of prosecution. For example, the constitution gives the grand jury complete control over initiation of prosecution for capital crimes and crimes punishable by life imprisonment (art. I, § 15). Also, the debates of the Constitutional Convention on article V, § 26(B) indicate that the delegates meant not to change existing law, which in some instances allowed the legislature to provide for the initiation of prosecution by other means. However, this argument was presented to the supreme court on application for rehearing of the *Guidry* case, and the court denied the application for rehearing.

60. 335 So. 2d 438, 439 (La. 1976).

61. The plaintiff in *Guidry* challenged several other provisions of the 1975 Act, and the supreme court held all of these constitutional.

62. La. Acts 1976, No. 688 amending LA. R.S. 17:223 (Supp. 1976). Whether the procedural due process guidelines for the use of corporal punishment enunciated in *Baker v. Owen*, 395 F. Supp. 294 (M.D. N.C.), *aff'd mem.*, 423 U.S. 907 (1975), (*e.g.*, that it be used only in the presence of another school official; that it not be used as a first line of punishment for misbehavior) still apply was put in doubt by the recent case of *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976). See Comment, *Corporal Punishment of Students*, 36 LA. L. REV. 984 (1976).

63. LA. R.S. 17:416.1 (Supp. 1975) provides that: “teachers, principals, and

required to defend any teacher or principal sued for using corporal punishment and to indemnify him for any recovery against him in such suit, except when his acts are malicious, and willfully and deliberately intended to cause bodily harm.<sup>64</sup>

Act 455 transfers to the Department of Education many of the powers given last year to the State Board of Elementary and Secondary Education.<sup>65</sup> A recent opinion of the attorney general concludes that this legislation is violative of article VIII, §§ 2 and 3 of the constitution.<sup>66</sup> The opinion states that article VIII, § 2 "clearly provides specifically that the Superintendent shall be the administrative head of the Department of Education and shall implement the policies of BESE [Board of Elementary and Secondary Education] and the laws affecting schools under its jurisdiction."<sup>67</sup> While this is true, the opinion fails to mention another sentence of § 2 which states, ". . . other powers, functions, duties, and responsibilities of the superintendent shall be provided by law." Thus, the legislature is authorized to give the superintendent other powers beyond those stated in § 2, as long as they do not conflict with powers given by the constitution to the board.

Article VIII, § 3 provides that the board

. . . shall supervise and control the public elementary and secondary schools, vocational-technical training, and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, *all as provided by law* (emphasis added).

The key to the interpretation of § 3 is determining the meaning of the phrase

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administrators . . . may . . . employ other reasonable disciplinary and corrective measures to maintain order in the schools."

64. Act 688 allows the use of reasonable corporal punishment "subject to the provisions of LA. R.S. 17:416.1," which requires the school boards to so indemnify and defend the teachers, principals and administrators.

65. The powers transferred include: (1) the power to approve public elementary and secondary schools for state funding; (2) the authority to prepare a minimum foundation program and a formula for equitable allocation of minimum foundation funds to city and parish school systems, and to submit them to the legislature for approval; (3) the authority to receive, administer, and distribute federal funds; and (4) the authority to provide staff services for the board. The Act also requires the board to obtain the approval of the superintendent of education, the administrative head of the department, before entering into almost any contract or agreement. La. Acts 1976, No. 455 amending LA. R.S. 17:6, 7, 10, 22 (Supp. 1976).

66. LA. OP. ATT'Y GEN., No. 76-950 (July 29, 1976). The attorney general also issued two opinions on the pertinent constitutional provisions before the Act was passed. 1974-75 LA. OP. ATT'Y GEN. 239 (June 13, 1975); 1974-75 LA. OP. ATT'Y GEN. 240 (Feb. 3, 1975).

67. LA. OP. ATT'Y GEN., No. 76-950 (July 29, 1976).

“all as provided by law.”<sup>68</sup> The attorney general’s opinion is based on the premise that the phrase means that the legislature has the authority to specify in detail the general powers enumerated in § 3, but not the authority to limit or delete them. However, a careful examination of the form of the entire constitution supports the opposite conclusion. Throughout the constitution, whenever a power is granted which was not meant to be controlled by the legislature, the grant is absolute.<sup>69</sup> Such a grant does not prohibit the legislature from specifying the details of the power so granted. Since expressly conditioning the grant would serve no purpose if it were intended to mean only that the legislature could specify the powers granted, it is logical to conclude that such a phrase would only be included if the intention were to allow the legislature to limit or delete the enumerated powers as well. Also, the phrase “as provided by law” is consistently used in the constitution behind grants of power which were obviously meant to be completely controlled by the legislature.<sup>70</sup>

When the constitution is interpreted in this manner, there seems to be no question of the validity of Act 455, since the constitution authorizes the legislature to give the superintendent additional power and does not prohibit the legislature from limiting the powers of the board.

## EMPLOYMENT AND LABOR LAW

### RIGHT TO WORK

The most hotly debated and emotionally charged issue of the 1976 legislative session was the right to work provision prohibiting requirement of union membership as a condition of employment.<sup>1</sup> Various methods of

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68. In interpreting a state constitution, one must remember that it is not a grant of power to the legislature, but a limitation on such power. Thus legislative action cannot be invalidated as contrary to the state’s constitution unless there is a particular constitutional provision that limits the power of the legislature to act in all the respects assailed. *Hainkel v. Henry*, 313 So. 2d 577 (La. 1976).

69. LA. CONST. art. IV, §§ 7, 8, 9, 12, 21(B); art. V, §§ 26(B), 27; art. VIII, § 5(A).

70. *Id.* The most frequent example of this is the grant “. . . he shall have other powers and duties as provided by law.”

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1. For full discussions of the desirability of such provisions see Borron, *The Case for the Right to Work Act*, 15 LA. L. REV. 66 (1954); Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344 (1976); Dodd, *The Case Against the So-Called Right to Work Act*, 15 LA. L. REV. 74 (1954); Kuhn, *Right to Work Laws—Symbols or Substance?*, 14 IND. & LAB. REL. REV. 587 (1961); Pulsipher, *The*

enactment, ranging from declarations of public policy<sup>2</sup> to proposed constitutional amendments,<sup>3</sup> were introduced. The proposal finally adopted prohibits agreements, understandings, or practices which require an employee to become or remain a member of a labor organization or to pay dues or fees to such an organization as a condition of his employment.<sup>4</sup> Violations of the Act are punishable by a possible criminal penalty of 90 days imprisonment or a maximum \$1,000 fine.<sup>5</sup> Civil remedies in the nature of injunctions and damages are also available.<sup>6</sup>

The constitutional validity of the new right to work law appears unquestionable. In general, states may legislate against what they find to be injurious practices in their internal and business affairs if the enactments do not conflict with federal provisions.<sup>7</sup> The right to enact right to work laws is specifically reserved to the states in the National Labor Relations Act,<sup>8</sup> and, additionally, the United States Supreme Court has repeatedly upheld similar laws passed in other states.<sup>9</sup>

Louisiana's first right to work legislation, enacted in 1954, was basically similar to the present provision.<sup>10</sup> However, the former law

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*Union Shop: A Legitimate Form of Coercion in a Free-Market Economy*, 19 IND. & LAB. REL. REV. 529 (1966).

2. La. H.B. 641, 39th Reg. Sess., 1976; La. H.B. 1190, 39th Reg. Sess., 1976.

3. La. H.B. 103-05, 39th Reg. Sess., 1976; La. S.B. 68, 69, 75, 39th Reg. Sess., 1976. There was considerable support for providing the right to work law in the form of a constitutional amendment. This would have allowed the voters to make the ultimate decision as to whether the provision should become law and would also have prevented right to work battles from becoming a regular item on the session agenda. Senate Bill 69 did pass the Senate with the requisite two-thirds majority but on the last night of the session the House tabled this proposal.

4. La. Acts 1976, No. 97, adding LA. R.S. 23:981-87 (Supp. 1976).

5. La. Acts 1976, No. 97, adding LA. R.S. 23:985 (Supp. 1976).

6. La. Acts 1976, No. 97, adding LA. R.S. 23:986 (Supp. 1976).

7. See *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

8. 29 U.S.C. § 164(b) (1947) provides: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

9. *E.g.*, *Plumbers Union v. Graham*, 345 U.S. 192 (1953) (upholding Virginia's statute); *AFL v. American Sash & Door*, 335 U.S. 538 (1949) (upholding Arizona's constitutional amendment); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding a North Carolina statute and a Nebraska constitutional amendment).

10. La. Acts. 1954, No. 252, repealed by La. Acts 1956, No. 16, § 1 and No. 397, § 11.

contained a clause prohibiting lockouts, strikes or picketings designed to induce violations of the act. This picketing clause led to an unsound decision by the Louisiana Supreme Court which enjoined peaceful picketing designed to have a union recognized as the sole bargaining representative of all the company's employees.<sup>11</sup> The court reasoned that the non-union employees' rights would be abridged if the union acted as their bargaining agent, giving too broad a scope to the right to work law. Picketing to persuade an employer to provide a union shop in violation of a state's right to work law has also since been held to lie exclusively within the domain of federal law.<sup>12</sup> Had the former law not been repealed in 1956 it might have fallen under federal preemption, at least insofar as its picketing provision. The other major difference between the former provision and the present enactment is that the former provided no criminal penalties, only civil remedies.

#### NON-COMPETITION AGREEMENTS

Clauses in employment contracts restraining an employee from engaging in a competing business following termination of his relationship with his employer have not been favored in this state because of the Louisiana courts' emphasis on an individual's freedom to improve his employment situation.<sup>13</sup> Some courts have distinguished promises made by the employee not to solicit business from his former employer's customers from broader promises not to compete.<sup>14</sup> These courts validated the former promises by reasoning that contractual provisions which merely restrict the employee's activity as to certain particulars of the employer's business should be respected. An attempt to codify this jurisprudence by statutorily allowing restrictions on the enticement of a former employer's clients and customers<sup>15</sup> failed during the recent legislative session.

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11. *Piegt v. Amalgamated Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). *See also* Note, 16 LA. L. REV. 187 (1955).

12. *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963).

13. *Orkin Exterminating Co. v. Foti*, 302 So. 2d 593 (La. 1972); *National Motor Club of La. v. Conque*, 173 So. 2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So. 2d 110 (1965); Comment, *Agreements Not to Compete*, 33 LA. L. REV. 94, 103-06 (1973).

14. *See Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 221 La. 677, 60 So. 2d 83 (1952). *See also* *Bookkeepers Business Serv. v. Davis*, 208 So. 2d 1 (La. App. 4th Cir. 1968); *Delta Finance Co. v. Graves*, 180 So. 2d 85 (La. App. 2d Cir. 1965); *contra* *National Motor Club of La. v. Conque*, 173 So. 2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So. 2d 110 (1965).

15. House Bill 809 was designed to add a new paragraph to LA. R.S. 23:921 (1950), which was amended by La. Acts 1962, No. 104, §§ 1, 2.

## EMPLOYMENT DISCRIMINATION

Following the lead of the federal government's attempt to prevent future employment discrimination and redress past discriminatory practices, legislators introduced two bills designed to achieve these goals on the state level. House Bill 188 would have created a state procedure administered by the Health and Human Resources Administration to enforce anti-discrimination provisions similar to those contained in Title 7 of the Civil Rights Act of 1964.<sup>16</sup> Under Title 7 procedures, the federal Equal Employment Opportunity Commission will defer to a state fair employment practices commission such as the one House Bill 188 would have created,<sup>17</sup> thus allowing the first attempts at conciliation and settlement of employee grievances to be made at the state level. Resort to the EEOC and its procedures would not have been removed by the proposal, only delayed.<sup>18</sup> Employees could still have received federal consideration of their claims had they desired it, after utilizing the state's mechanism. The proposal would have been more comprehensive than the federal scheme because in addition to the federal categories of race, sex, religion, and ancestral origin, the Louisiana provision included the criteria of age<sup>19</sup> and physical handicaps.

The Senate also considered a bill relating to employment discrimination that was much narrower than the House proposal. Senate Bill 87 would have prohibited age discrimination by employers, employment agencies, and labor organizations, tracking the federal age discrimination provisions defining unfair employer practices.<sup>20</sup> The only method of enforcement provided, however, would have been a civil action for legal or equitable relief; no enforcing agency would have been designated.

## WORKMEN'S COMPENSATION

*Third Party Tort Suits*

Under workmen's compensation systems, employees theoretically relinquish their remedies in tort against their employers<sup>21</sup> in order to secure a

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16. 42 U.S.C. §§ 2000e-2000e-15 (1964).

17. 42 U.S.C. §§ 2000e-5 (Supp. 1972); 2000e-7 (1964).

18. The complainant must allow the state agency 60 days for processing of his claim before resorting to the EEOC for relief. 42 U.S.C. § 2000e-5(c) (1972).

19. The federal government provides for age discrimination grievances under a separate statute, 29 U.S.C. §§ 621-34 (1967).

20. 29 U.S.C. §§ 621-34 (1967).

21. LA. R.S. 23:1032 (1950). This exclusivity also protects principal employers under LA. R.S. 23:1061 (1950) who carry out their businesses through contractors. Employers who subcontract their work are made liable for compensation benefits to

guaranteed compensation without having to prove that the employer was at fault.<sup>22</sup> In Louisiana, as in most systems, the employee retains his right to bring a tort suit against anyone other than his employer who was responsible for the accident.<sup>23</sup> Louisiana courts have experienced difficulty in determining the limits of the category of third parties amenable to suit in tort. It has been held that executive officers,<sup>24</sup> employees who are also stockholders,<sup>25</sup> and partners<sup>26</sup> may be sued in tort if their negligence contributes to the industrial accident. This jurisprudence has been criticized because, as a practical consequence, employers have been required to carry liability insurance to cover the negligence of their official personnel in addition to their company's compensation insurance.<sup>27</sup> This has caused an undermining of the policy of the compensation act<sup>28</sup> because the employer must satisfy tort judgments rendered against those for whom he is responsible.

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prevent evasion of the system; once liable for compensation they become immune from tort liability. W. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 121 (1951) [hereinafter cited as MALONE]. See also *Duhon v. Texaco, Inc.*, 490 F.2d 91 (5th Cir. 1974); *Etienne v. Home Indem. Co.*, 307 So. 2d 654 (La. App. 3d Cir. 1975); *Wynn v. v. Fidelity & Cas. Co.*, 85 So. 2d 315 (La. App. 2d Cir. 1956).

22. A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.10 (1972) [hereinafter cited as LARSON].

23. LARSON at § 72.10; MALONE at § 366.

24. *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973); *Chaney v. Brupbacher*, 242 So. 2d 627 (La. App. 4th Cir. 1970); *Adams v. Fidelity & Cas. Co.*, 107 So. 2d 496 (La. App. 1st Cir. 1958).

25. *Rogers v. Highlands Ins. Co.*, 270 So. 2d 277 (La. App. 3d Cir. 1972) (dicta); *Boudreaux v. Falco*, 215 So. 2d 538 (La. App. 1st Cir. 1968).

26. Partners have presented an especially complex problem because of the reluctance of courts to recognize the partnership as a separate entity for which the partners may work as employees. A number of cases have held that partners are immune from third party suits because they are considered employers unless they are shown specifically to be earning separate wages as employees. *Obiol v. Industrial Outdoor Displays*, 288 So. 2d 425 (La. App. 4th Cir.), cert. denied, 293 So. 2d 166 (1974); *Bersuder v. New Orleans Pub. Serv., Inc.*, 273 So. 2d 46 (La. App. 4th Cir. 1973); *Cockerham v. Consolidated Underwriters*, 262 So. 2d 119 (La. App. 2d Cir.), cert. denied, 262 La. 315, 263 So. 2d 49 (1972); *Leger v. Townsend*, 257 So. 2d 761 (La. App. 3d Cir.), cert. denied, 261 La. 464, 259 So. 2d 914 (1972). The recent case of *Cooley v. Slocum*, 326 So. 2d 49 (La. 1976), removed the previous uncertainty by holding that a partnership is an independent "person" at civil law, separate from the partners who compose it so that the partner's liability for his own fault is an obligation owed by him individually, independent of the partnership's liability.

27. MALONE at § 366; Comment, *Workmen's Compensation—Executive Officer Liability*, 33 LA. L. REV. 325, 333 (1973).

28. A third party tortfeasor cannot circumvent an employer's immunity from tort actions and obtain contribution or indemnity from the employer when the accident is the result of concurrent negligence. *Gros v. Steen Prod. Serv., Inc.*, 197

To prevent this circumvention of the basic compensation design, the 1976 legislature made compensation the exclusive remedy of the employee against "his employer, or any principal or any officer, director, stockholder, partner, or employee."<sup>29</sup> The tort immunity does not cover these parties, however, when they are not engaged in the normal course and scope of their employment at the time of the injury.<sup>30</sup> Neither the employer nor any of the other parties is relieved of any civil or criminal liability resulting from an intentional act.

Although the new provision decreases the avenues of relief open to injured employees, the increased benefits made possible by the 1975 workmen's compensation amendments<sup>31</sup> might be sufficient to provide for employees so that the additional tort remedies formerly allowed by the courts are no longer necessary.

### *Double Compensation Benefits*

Perhaps as a response to the legislation limiting the availability of tort suits by an injured employee,<sup>32</sup> the House and Senate considered, but did not pass, bills which would have increased available compensation benefits. The proposals<sup>33</sup> would have required that the employer pay double the weekly benefits due to an employee if an injury resulted from the employer's violation of a safety rule, his failure to provide a safety device, or some gross negligence on the part of a supervisory employee. Such a provision would undoubtedly have encouraged stricter compliance with safety rules and supplying of safety devices to employees. However, a

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So. 2d 356 (La. App. 4th Cir. 1967); *Hebert v. Blankenship*, 187 So. 2d 798 (La. App. 3d Cir. 1966). These holdings provide strong support for limiting the class of third parties amenable to suit since executives who are insured by their employers are in effect receiving an indemnity from them contrary to the basic Louisiana scheme.

29. LA. R.S. 23:1032, *as amended by* La. Acts 1976, No. 147, § 1.

30. LA. R.S. 23:1032, *as amended by* La. Acts 1976, No. 147, § 1. The named parties remain liable for fines and penalties imposed by other statutes. A partner may not take advantage of this immunity, however, if the partnership of which he is a member was formed for the purpose of evading any of the workmen's compensation laws.

31. LA. R.S. 23:1202, *as amended by* La. Acts 1975, No. 583, § 5 increased the maximum and minimum benefits to \$85 and \$25 per week respectively after September 1, 1975, \$95 and \$30 per week after September 1, 1976, and to sixty-six and two-thirds percent and twenty percent of a computed average weekly wage after September 1, 1977. Comment, *1975 Amendments to the Louisiana Workmen's Compensation Act*, 36 LA. L. REV. 1018 (1976).

32. See text at notes 29-31, *supra*.

33. La. H.B. 650, 39th Reg. Sess., 1976; La. S.B. 647, 39th Reg. Sess., 1976.



modicum of fault would have been injected into the basically "no-fault"<sup>34</sup> workmen's compensation system, since the amount of compensation due would have depended on whether or not the employer was negligent.<sup>35</sup> Some degree of the predictability now provided by the maximum benefit provisions<sup>36</sup> would also have been lost, perhaps affecting the computation of insurance premiums. Nonetheless, if such a provision is passed in the future, the onus of providing benefits would remain with the employer who is best able to pass the costs to the ultimate consumer of his product<sup>37</sup> and the injured worker would receive more adequate compensation for his injuries.

### *Waiver of Compensation Coverage*

Corporate officers and members of partnerships create special problems under a workmen's compensation system because their managerial functions cause them to appear to be employers rather than employees. Nevertheless, most compensation schemes cover corporate officers when they are acting in the course and scope of their employment unless they own a controlling share of the corporate stock.<sup>38</sup> The Louisiana statute presently provides that executive officers of other than non-profit or municipal corporations shall be considered employees within the scheme.<sup>39</sup> Louisiana courts have held that a partner may be an employee of his partnership for purposes of collecting workmen's compensation benefits if he is clearly acting as an employee when injured.<sup>40</sup>

With the passage of Act 177 of 1976,<sup>41</sup> the legislature provided that

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34. LA. R.S. 23:1031 (1950), which establishes the employee's right of action, requires only an injury from an accident arising out of and in the course of employment with no mention of a fault requirement. This accords with the basic principles of compensation systems. LARSON at § 1.10. Some inquiry is now made into the fault of the employee with regard to the defenses available to the employer without any damage to the system. See LA. R.S. 23:1081 (1950). The proposed statute might have had a similar *de minimis* effect.

35. Gross negligence by a supervisory employee would also have imposed this double liability on the employer.

36. LA. R.S. 23:1202, *as amended* by La. Acts 1975, No. 583, § 5.

37. MALONE at § 32 states this as the basic compensation principle: to impose accident costs on those who use the products of the work causing the accident. *Id.*

38. LARSON at § 54.10.

39. LA. R.S. 23:1044, *as amended* by La. Acts 1958, No. 306, § 1.

40. *Trappey v. Lumbermen's Mut. Cas. Co.*, 229 La. 632, 86 So. 2d 515 (1956); *DeSoto v. Tusa Bros. Inc.*, 273 So. 2d 739 (La. App. 4th Cir.), *cert. denied*, 277 So. 2d 442 (1973); *Carpenter v. New Amsterdam Cas. Co.*, 159 So. 2d 757 (La. App. 3d Cir.), *cert. denied*, 245 La. 797, 161 So. 2d 276 (1964). See also note 26, *supra*, for recent clarifications of the status of partners.

41. La. Acts 1976, No. 177 *amending* LA. R.S. 23:1035 (Supp. 1975).

partners and the top officers of a corporation<sup>42</sup> owning at least 10% of the corporate stock may elect not to be covered by the compensation scheme by executing a written agreement to that effect. This allows officials who, in theory at least, are more nearly employers to relinquish the employee status granted them. Act 295 specifically exempts officials of non-profit or charitable corporations from employee status if they receive no remuneration for their work.<sup>43</sup> These two provisions, by keeping these officials from collecting benefits under certain conditions, will make it necessary for employers to carry additional insurance to meet the potential threat of tort suits by these parties.

### *Recovery of Travel Expenses*

Act 400 of 1976<sup>44</sup> codifies the existing jurisprudence relative to the recovery of travel expenses incurred by an injured employee in his attempts to obtain medical care. The courts have repeatedly held that these travel costs, if proven, are a legitimate part of the medical expenses<sup>45</sup> for which the employer is liable. However, the jurisprudence has not used any uniform method for computing these expenses.<sup>46</sup> The new provision requires that the mileage allowance be determined in accordance with the United States Internal Revenue Service standard rates for computing mileage deductions.<sup>47</sup>

### *Second Injury Fund*

Minor changes were made in the administration of the newly created second injury fund.<sup>48</sup> The time limit for filing claims for reimbursement was

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42. The president, vice-president, secretary, and treasurer may make such an agreement with their employing corporation.

43. La. Acts 1976, No. 295, § 1, *adding* LA. R.S. 23:1046 (Supp. 1976).

44. La. Acts 1976, No. 400 *amending* LA. R.S. 23:1203 (Supp. 1975).

45. *Pennywell v. Crawford*, 262 So. 2d 830 (La. App. 2d Cir. 1972); *Southall v. Kingsville Timber Co.*, 168 So. 2d 424 (La. App. 3d Cir. 1964); *Murry v. Southern Pulpwood Co.*, 136 So. 2d 165 (La. App. 3d Cir. 1962).

46. For examples of awards made and settlements reached, see *Jack v. Fidelity & Cas. Co. of New York*, 326 So. 2d 584 (La. App. 3d Cir. 1976) (15c per mile); *Bananno v. Employers Mut. Liab. Ins. Co.*, 299 So. 2d 923 (La. App. 3d Cir. 1974) (7c per mile); *Burgess v. Southern Cas. Ins. Co.*, 203 So. 2d 434 (La. App. 3d Cir. 1967) (10c per mile); *Dugas v. Houston Contracting Co.*, 191 So. 2d 178 (La. App. 3d Cir. 1966) (\$35 awarded); *Walters v. General Accident & Fire Assurance Co.*, 119 So. 2d 550 (La. App. 1st Cir. 1960) (5c per mile for some trips; 40c per trip for others).

47. The present deduction allowed under INT. REV. CODE OF 1954, § 213 is 7c per mile. PRENTICE-HALL FEDERAL TAX HANDBOOK 266 (1976).

48. LA. R.S. 23:1378 (Supp. 1974).

extended by Act 298<sup>49</sup> from 10 days to 180 days following the first payment of benefits after the second injury. Act 299<sup>50</sup> provides that an employer may receive reimbursement when the second injury has caused the worker's death and the employer is thereby liable for death benefits. The employer's liability in such a situation<sup>51</sup> is now limited to 175 weeks, and he will be reimbursed from the second injury fund for any amounts paid in excess of that time period. Additionally, spinal fusions or surgical disc removals have been included as new permanent, partial disabilities.<sup>52</sup> This allows an employee to register these with the second injury fund thereby benefitting his future employers in the event he receives a second compensable injury.

### *Employee's Right to Medical Report*

An injured employee must submit to a physical examination following an accident<sup>53</sup> or face the penalty of suspension of his right to compensation.<sup>54</sup> Should the employer have that examination made, he must provide the employee with a copy of the medical report.<sup>55</sup> The 1976 legislature further expanded the employee's rights to medical reports by requiring that the employee may demand a written report of *any* examination, even a pre-employment physical, which he undergoes at his employer's request.<sup>56</sup> An employer failing to comply with such a demand within thirty days without just cause will be liable to the employee for a \$250 civil penalty.

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49. La. Acts 1976, No. 298 *amending* LA. R.S. 23:1378 (Supp. 1975).

50. La. Acts 1976, No. 299 *amending* LA. R.S. 23:1378 (Supp. 1975).

51. The death must have been the result of the combination of the two compensable injuries or one which would not have occurred but for the pre-existing permanent partial disability of the employee.

52. La. Acts 1976, No. 299, § 2 *amending* LA. R.S. 23:1378 (Supp. 1975).

53. LA. R.S. 23:1121 (1950).

54. LA. R.S. 23:1124 (1950).

55. LA. R.S. 23:1122 (1950). *See also* Dow v. Stanolind Oil & Gas Co., 9 So. 2d 828 (La. App. 1st Cir. 1942) (as a correlative of his right to require an exam, employer owes employee a duty to inform him of results).

56. La. Acts 1976, No. 243, § 1, *adding* LA. R.S. 23:1125 (Supp. 1976).

## PROCEDURE

### CIVIL PROCEDURE

#### CIVIL DISCOVERY

La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. arts. 1421-1474, makes several major changes in the law of discovery.<sup>1</sup> Act 574 broadens the scope of civil discovery in Louisiana, though it is not as liberal as similar provisions of the Federal Rules of Civil Procedure.<sup>2</sup> The changes made in civil discovery involve three main subjects: information known to persons participating in civil proceedings, information contained in insurance policies, and the mechanics of discovery.

One may discover the writings of a party, his attorney, or an expert witness made in preparation for trial upon a showing of unfair prejudice or "undue hardship" if its discovery is denied.<sup>3</sup> Even without such a showing, both a party and a non-party may obtain a copy of a statement which he

1. The changes made by Act 574 are too numerous to be discussed in detail in this article. Therefore, this discussion will be limited to changes which are of major importance.

2. Compare FED. R. CIV. P. 26(b)(4) (allowing discovery of expert opinion) with LA. CODE CIV. P. art. 1425, *as amended by* La. Acts 1976, No. 574 (limiting discovery of expert knowledge to facts only). The original version of Act 574, La. H.B. 904, Reg. Sess. (1976), allowed discovery of expert opinion. See also C. WRIGHT, LAW OF FEDERAL COURTS 365 (1970) (distinguishing between fact and work product) [hereinafter cited as WRIGHT].

3. The following chart may prove helpful in comparing the (A) FED. R. CIV. P., (B) LA. CODE CIV. P. arts. (as they appeared prior to Act 574 of 1976), and (C) LA. CODE CIV. P. arts., *as amended by* La. Acts 1976, No. 574:

A	B	C	A	B	C
26(a)	—	1421	—	1431	1435
26(b)(1)	—	1422	29	1421-22	1436
26(b)(2)	—	1423	30(a)	1436	1437
26(b)(3)	—	1424	30(b)(1)	1451	1438
26(b)(4)	—	1425	30(b)(2)	—	1439
26(c)	1452	1426	30(b)(4)	—	1440
26(d)	—	1427	30(b)(5)	1492	1441
26(e)	—	1428	30(b)(6)	1491	1442
27(a)(1)	1432	1429	30(c)	1453	1443
27(a)(2)	1433	1430	30(d)	1454	1444
27(a)(3)	1434	1431	30(e)	1455	1445
27(a)(4)	1435	1432	30(f)	1456	1446
27(b)	—	1433	30(g)	1457	1447
28	1423	1434	31(a)	1471	1448

previously made.<sup>4</sup> The "opinions" of attorneys and experts are not discoverable.<sup>5</sup>

Facts known by experts are discoverable by either interrogatories or depositions.<sup>6</sup> If the expert is to be called as a witness, no special circumstances need be shown. However, if the expert has "been retained or specially employed,"<sup>7</sup> but is not expected to be a witness, facts known to him are discoverable only if the information was obtained through examination by a physician or if the party seeking discovery shows that it is "impracticable" to gain the information by other means.<sup>8</sup> The court may order the party seeking discovery to pay a portion of the expenses of the other party in securing the services of the witness to be called as an expert; the court must do so if the expert is not expected to be called.<sup>9</sup> Two types of experts not mentioned in Act 574 could exist: those who are informally consulted and those who are generally employed.<sup>10</sup> The discovery of facts known to either of these types of experts is questionable.<sup>11</sup>

The second area of change in regard to discovery relates to insurance policies. Act 574 provides that the existence and contents of liability

A	B	C	A	B	C
31(b)(c)	1472	1449	34(b)	—	1462
32(a)	1428	1450	34(c)	—	1463
32(b)	1429	1451	35(a)	1493	1464
32(c)*	1430	1452	35(b)	1494	1465
32(d)(1)	1424	1453	36(a) ¶1	1496 ¶1	1466
32(d)(2)	1425	1454	36(a) ¶2&3	1496 ¶1	1467
32(d)(3)	1426	1455	36(b)	—	1468
32(d)(4)	1427	1456	37(a)	—	1469
33(a) ¶1	1491 ¶1	1457	37(b)(1)	1512	1470
33(a) ¶2	1491 ¶1	1458	37(b)(2)	1513	1471
33(b) ¶1	1491 ¶2	1459	37(c)	1514	1472
33(c)	—	1460	37(d)	1515	1473
34(a)	1492	1461			1474

\*Abrogated by amendment, Nov. 20, 1972, eff. July 1, 1973.

4. LA. CODE CIV. P. arts. 1424-25, as amended by La. Acts 1976, No. 574.

5. *Id.*

6. See generally Maraist, *Scope of Discovery*, in PROCEEDINGS OF THE 1975 THIRTIETH ANNUAL MISSISSIPPI LAW INSTITUTE ON STATE COURT DISCOVERY 31, 35-6 (1975) [hereinafter cited as PROCEEDINGS].

7. LA. CODE CIV. P. art. 1425, as amended by La. Acts 1976, No. 574.

8. LA. CODE CIV. P. art. 1425, as amended by La. Acts 1976, No. 574.

9. LA. CODE CIV. P. art. 1425, as amended by La. Acts 1976, No. 574. See also WRIGHT at 357-59 (discussing the development and application of comparable federal law, now FED. R. CIV. P. 26(b)(4)).

10. LA. CODE CIV. P. art. 1425, as amended by La. Acts 1976, No. 574.

11. PROCEEDINGS at 43-44.

insurance policies are discoverable.<sup>12</sup> The corresponding federal provision<sup>13</sup> expressly prohibits the discovery of the insured's application for the policy, a provision not present in the Louisiana law. It is doubtful, however, that such applications will be discoverable in Louisiana.<sup>14</sup>

Act 574 makes numerous changes in the mechanics of discovery. After an unsuccessful motion requesting discovery, the court may issue a protective order without the filing of a separate motion; likewise, no separate motion is necessary for the court to issue an order allowing discovery following an unsuccessful objection to discovery.<sup>15</sup> Furthermore, Act 574 provides for the automatic supplementation of responses in some situations.

A party must supplement:

any question directly addressed to the identity and location of persons having knowledge of discoverable matters, and the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.<sup>16</sup>

A party must also supplement:

a prior response if he obtains information upon which he knows that the response was incorrect when made, or he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.<sup>17</sup>

Leave of court must be obtained if a party seeks a deposition within fifteen days of service of citation, rather than from filing of suit, unless special notice of the unavailability of the witness is given to every other party.<sup>18</sup> Act 574 further requires that a designation of materials requested in a subpoena duces tecum be "attached or included in the notice."<sup>19</sup>

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12. LA. CODE CIV. P. art. 1425, *as amended by* La. Acts 1976, No. 574.

13. FED. R. CIV. P. 26(b)(2). La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. art. 1423. Since liability insurance policies are normally discoverable in direct action suits, La. Act 574 does not signify a major change in this regard.

14. *See* PROCEEDINGS at 36.

15. La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. P. arts. 1426 and 1469(2).

16. LA. CODE CIV. P. art. 1423, *as amended by* La. Acts 1976, No. 574.

17. LA. CODE CIV. P. art. 1428, *as amended by* La. Acts 1976, No. 574.

18. LA. CODE CIV. P. art. 1437, *as amended by* La. Acts 1976, No. 574. *See also* LA. CODE CIV. P. art. 1436 (as it appeared prior to La. Acts 1976, No. 574) (requiring leave of court if the deposition was sought within fifteen days of commencement of the action), LA. CODE CIV. P. arts. 1438-39, *as amended by* La. Acts 1976, No. 574.

19. La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. art. 1438.

Upon order of court, a report of testimony at a deposition may now be made by "other than stenographic means . . . ." <sup>20</sup> Act 574 also provides that it is the duty of a deponent organization to designate the representative who will testify on its behalf. <sup>21</sup> Furthermore, a precise and fair procedure for the copying of and substitution for original documents is now established. <sup>22</sup>

Prior to Act 574, one could serve an interrogatory only on an adverse party; <sup>23</sup> now any party may serve an interrogatory upon any other party. <sup>24</sup> Act 574 also provides an option to produce business records in response to interrogatories, <sup>25</sup> thereby eliminating the possible use of interrogatories to harass an opponent by submitting interrogatories which require answers regarding intricate and detailed information about the party's business. The inspection of documents and the testing and sampling of property are now possible without the necessity of a court order. <sup>26</sup>

An incomplete answer is deemed a failure to answer under Act 574. <sup>27</sup> An objection that the issue is one for trial or that the party lacks the knowledge is not an acceptable excuse for failure to respond to a request for admissions. <sup>28</sup> If a party refuses to comply with a court order allowing discovery, he may now be ordered to pay the expenses resulting therefrom as an additional sanction. <sup>29</sup>

The original version of Act 574 <sup>30</sup> recommended by the Louisiana State Law Institute proposed a more expansive concept of discovery of expert witnesses' information. It allowed the discovery of expert opinion, but this provision was deleted from the bill. Fortunately, this deletion marks the only substantive deviation from the original draft.

#### CITY COURT JURISDICTION

La. Acts 1976, No. 84, *amending* LA. CODE CIV. P. arts. 4832-4833 and *repealing* LA. CODE CIV. P. art. 4834, changes the jurisdiction of city

20. LA. CODE CIV. P. art. 1440, *as amended by* La. Acts 1976, No. 574. Examples of other means are not given in Act 574. Presumably, such means would include tape recordings and similar methods.

21. La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. art. 1442.

22. LA. CODE CIV. P. art. 1446, *as amended by* La. Acts 1976, No. 574.

23. LA. CODE CIV. P. art. 1491 (as it appeared prior to Act 574 of 1976).

24. LA. CODE CIV. P. art. 1457, *as amended by* La. Acts 1976, No. 574.

25. La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. art. 1460.

26. LA. CODE CIV. P. arts. 1461-62, *as amended by* La. Acts 1976, No. 574.

27. La. Acts 1976, No. 574, *amending* LA. CODE CIV. P. art. 1469.

28. LA. CODE CIV. P. art. 1467, *as amended by* La. Acts 1976, No. 574.

29. LA. CODE CIV. P. art. 1471, *as amended by* La. Acts 1976, No. 574. *See also* WRIGHT at 395-96 (discussing federal sanctions for refusal to allow discovery).

30. La. H.B. 904, Reg. Sess. (1976).

and justice of the peace courts. The 1976 legislature raised the jurisdictional ceiling to fifteen hundred dollars for city courts and three hundred dollars for justice of the peace courts, exclusive of interest and attorney fees.<sup>31</sup>

LA. CODE CIV. P. arts. 4833-4834 (as they appeared prior to Act 84 of 1976) made a further distinction as to the jurisdiction of city courts, other than New Orleans city courts.<sup>32</sup> Act 84 removes the population demarcation and raises the amount limit. Specifically, the civil jurisdiction of city courts whose jurisdictional populations exceed ten thousand, New Orleans city courts excluded, now is concurrent with the district court in matters involving a claim not exceeding two thousand dollars.<sup>33</sup>

Prior to Act 84, appeal from a city court was to the district court if the amount in dispute was one hundred dollars or less and to the court of appeal if the amount exceeded one hundred dollars.<sup>34</sup> Act 84 changes this amount distinction to one thousand dollars.<sup>35</sup> It may be argued that articles 4899 and 5002, applying the one hundred dollar line, are tacitly amended thereby.

#### SUMMARY PROCEEDINGS TO DETERMINE THE RANK OF LIENS AND PRIVILEGES

Due to an inadvertent error of the Legislative Bureau in 1974, the words "and privileges" was deleted from line (7) of Louisiana Code of Civil Procedure article 2592, thereby preventing the use of summary proceedings to decide the rank of privileges. The Louisiana Law Institute, under the authority of LA. R.S. 24:253(8) (1950), corrected the error.<sup>36</sup> La. Acts 1976, No. 321, *amending* LA. CODE CIV. P. art. 2593, insures the availability of summary proceedings to determine the rank of "liens and privileges" and thus legislatively corrects the mistake made by the Legislative Bureau.

#### DELAY FOR TAKING A DEVOLUTIVE APPEAL

La. Acts 1976, No. 201, *amending* LA. CODE CIV. P. art. 2087, reduces the allowable delay for taking a devolutive appeal from ninety to

31. La. Acts 1976, No. 84, *amending* LA. CODE CIV. P. art. 4832.

32. If the population exceeded ten thousand but was less than twenty thousand, the city court had concurrent jurisdiction with the district court in civil cases involving a claim not exceeding five hundred dollars. LA. CODE CIV. P. art. 4833 (as it appeared prior to Act 84 of 1976). If the population was twenty thousand or more, the concurrent jurisdiction existed in cases involving a dispute not exceeding one thousand dollars. LA. CODE CIV. P. art. 4834 (as it appeared prior to Act 84 of 1976).

33. LA. CODE CIV. P. art. 4833, *as amended* by La. Acts 1976, No. 84. *See also* LA. CODE CIV. P. art. 4835 (establishing the jurisdiction of New Orleans city courts).

34. LA. CODE CIV. P. arts. 4899 and 5002.

35. La. Acts 1976, No. 84, *amending* LA. CODE CIV. P. art. 4833.

36. LA. CODE CIV. P. art. 2591, n.1 (as it appeared prior to Act 321 of 1976).



sixty days.<sup>37</sup> Louisiana appeal courts consistently dismiss appeals not timely filed,<sup>38</sup> and the Louisiana Supreme Court seems to approve.<sup>39</sup> Therefore, this change should be noted with particular care.

#### EXTENSION OF RETURN DAY

Prior to La. Acts 1976, No. 426, *amending* LA. R.S. 13:4438 (1950) and LA. CODE CIV. P. art. 2125, few restrictions limited the court's power to extend the return day.<sup>40</sup> Act 426 greatly limits this authority by allowing the trial court to grant only one extension of no more than thirty days.<sup>41</sup> The clerk of the trial court must mail notice of any extension to counsel for all parties and to those parties unrepresented by counsel.<sup>42</sup> The court of appeal, for sufficient cause shown, may grant further extensions.<sup>43</sup>

#### COST OF PREPARING THE RECORD

La. Acts 1976, No. 708, *amending* LA. CODE CIV. P. art. 2126 and LA. R.S. 13:4445 (1950), changes the time limitation for payment of the costs of the record for appeal. Under prior law, these costs had to be paid "not later than three days prior to the return day,"<sup>44</sup> which could be set at any time within sixty days of the granting of appeal and could be extended even further.<sup>45</sup> Act 708 allows an estimation of the costs to be paid within "twenty days of the granting of the order of appeal . . ." The trial court

37. The original version, La. H.B. 271, Reg. Sess. (1976), proposed a thirty day time limitation, as in suspensive appeals (LA. CODE CIV. P. art. 2123).

38. *In Re* Tutorship of Jones, 310 So. 2d 698 (La. App. 1st Cir. 1975); Thomas v. Berman, 308 So. 2d 797 (La. App. 4th Cir. 1975).

39. Wall v. American Employers Ins. Co., 215 So. 2d 913 (La. App. 1st Cir. 1968), *cert. denied*, 253 La. 325, 217 So. 2d 415 (1969); Britt v. Brocado, 170 So. 2d 516 (La. App. 4th Cir.), *cert. denied*, 247 La. 618, 172 So. 2d 701 (1965).

40. Two of the restrictions were that good cause had to be shown (LA. CODE CIV. P. art. 2125 as it appeared prior to Act 426 of 1976) and that the return date previously set must not have passed. See Thibodeaux v. St. Paul Mercury Ins. Co., 310 So. 2d 860 (La. App. 3rd Cir. 1975); Louisiana Power & Light Co. v. Lasseigne, 255 La. 579, 232 So. 2d 278 (1970). In *Thibodeaux, supra*, the court had already granted three extensions; the fourth, however, was attempted after the date set by the third extension had passed.

41. La. Acts 1976, No. 426, *amending* LA. R.S. 13:4438 (1950) and LA. CODE CIV. P. art. 2125.

42. LA. CODE CIV. P. art. 2125.1, *added* by La. Acts 1976, No. 708.

43. LA. R.S. 13:4438 (1950), *as amended* by La. Acts 1976, No. 426; LA. CODE CIV. P. art. 2125, *as amended* by La. Acts 1976, No. 426.

44. LA. CODE CIV. P. art. 2126 and LA. R.S. 13:4445 (1950) (as they appeared prior to Act 708 of 1976).

45. LA. CODE CIV. P. art. 2125 (as it appeared prior to Act 426 of 1976).

may grant only one twenty-day extension; and, if there is any discrepancy between estimated and actual costs, the difference is to be paid "not later than three days prior to the return day or extended return day."<sup>46</sup>

## PRE-TRIAL CRIMINAL PROCEDURE

### SHOPLIFTER DETECTION

La. Acts 1976, No. 339, *amending* LA. CODE CRIM. P. art. 215, provides that, if notice of the device is given to customers, the signal from a shoplifter detection device "constitutes a sufficient . . . basis for reasonable cause to detain the person." In a recent case,<sup>1</sup> the Louisiana Supreme Court reversed the appellate court and found civil liability for detaining a customer whom the detection device had signalled as a suspect. The decision, however, was based upon the imputation of knowledge of an employee (who did not remove the tag from the goods) to her employer and upon knowledge of numerous malfunctions of the device.<sup>2</sup> The court found that since the defendant had such knowledge he "did not have reasonable grounds to believe that the sounding of the alarm was caused by a theft of goods . . . ." <sup>3</sup> The court did not discuss the possible outcome had the defendant been ignorant of the circumstances.

The effect Act 339 would have on such a situation is not clear. A merchant must meet the requirements of the statute to avoid liability,<sup>4</sup> and the Act provides that a signal from the device is "sufficient basis for reasonable cause . . . ." However, the circumstances surrounding the signal will surely be examined; and, if a merchant knows that his detection device is prone to malfunction and knows (by imputation at least) that the tag was not removed from the goods, surely his detention of the customer is unreasonable if based solely upon the signal.

### INDIGENT DEFENSE

Appointed counsel for indigent defendants is a sensitive problem

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46. LA. CODE CIV. P. art. 2126 and LA. R.S. 13:4445 (1950), *as amended* by La. Acts 1976, No. 708.

1. *Clark v. I.H. Rubenstein, Inc.*, 314 So. 2d 489 (La. App. 1st Cir. 1975), *rev'd*, 326 So. 2d 497 (La. 1976).

2. 326 So. 2d at 488-89.

3. *Id.*

4. *See Lasseigne v. Walgreen*, 274 So. 2d 480, 482 (La. App. 1st Cir. 1973). *See also* Comment, *Louisiana Merchant Detention Statute*, 25 LA. L. REV. 956 (1965).

involving the rights of both defendants and attorneys.<sup>5</sup> La. Acts 1976, No. 653, establishes the new indigent defense program and recognizes the needs of both groups.<sup>6</sup>

Act 653 creates the Louisiana Indigent Defender Board,<sup>7</sup> composed of eleven members.<sup>8</sup> The duties of the state board are to regulate the judicial district indigent defender boards and to report to the legislature, at least thirty days before the regular annual session, on the "status and cost of legal representation for indigent defendants."<sup>9</sup>

Each judicial district is to have a separate district board, composed of three to seven members selected by the district court from nominees of the district bar association.<sup>10</sup> The district boards may select one of two alternative means of providing counsel for indigents: appointment from a list of volunteer attorneys, and, if inadequate, appointment from a nonvolunteer

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5. The right of the indigent defendant to appointed counsel has been expanded in recent years, and this expansion has been fully discussed by doctrinal writers. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 45 (1974) (comparing LA. CONST. art. I, § 13 with *Argersinger v. Hamlin*, 407 U.S. 25 (1972)); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pretrial Criminal Procedure*, 36 LA. L. REV. 575, 600 (1976) (discussing the retroactivity of *Argersinger v. Hamlin*); Comment, *Balance Sheet of Appointed Counsel in Louisiana Criminal Cases*, 34 LA. L. REV. 88 (1973) (discussing the problem of defining indigency); Note, 33 LA. L. REV. 731 (1973) (casenote on *Argersinger v. Hamlin*, establishing the right to counsel for defendants prosecuted for offenses punished by imprisonment); Note, 33 LA. L. REV. 740 (1973) (discussing the possibility of malpractice suit against a court-appointed attorney). See also LA. CONST. art. I, § 13 (extending right to counsel to those prosecuted for offenses punishable by imprisonment).

Attorneys themselves have brought their own rights to the attention of the courts. See *State v. Carruth*, 324 So. 2d 400 (La. 1975); *State v. Wells*, 324 So. 2d 399 (La. 1975); *State v. Campbell*, 324 So. 2d 395 (La. 1975); *State v. Bryant*, 324 So. 2d 389 (La. 1975) (all dealing with the right of the appointed attorney to reasonable compensation). For a superficial comparison of the rights of doctors, investigators, and attorneys see also *State v. Cummings*, 324 So.2d 401, 402 (La. 1975); *State v. Jackson*, 324 So. 2d 398 (La. 1975). Attorneys in both cases filed motions requesting the appointment of an investigator and a medical doctor. In *Jackson*, both were denied. In *Cummings*, the Court stated: "Nor has any showing been made to warrant either the motion to withdraw or the motion to appoint an investigator." However, the Court made no mention of the motion to appoint a medical doctor.

6. La. Acts 1976, No. 653, amending LA. R.S. 15:141 (Supp. 1976), 142 (Supp. 1972), 143-44 (Supp. 1974), 145 (Supp. 1975), and LA. CODE CRIM. P. arts. 512-13, and adding LA. R.S. 15:146-49 (Supp. 1976).

7. Hereinafter referred to as the state board.

8. La. Acts 1976, No. 653, amending LA. R.S. 15:141 (Supp. 1976).

9. LA. R.S. 15:143 (Supp. 1974), as amended by La. Acts 1976, No. 653.

10. LA. R.S. 15:144 (Supp. 1974), as amended by La. Acts 1976, No. 653.

list; or appointment of a salaried "chief indigent defender" and assistants.<sup>11</sup>

Act 653 provides two means for bearing the cost of the system. First, an indigent defender fund supplied by special costs taxed by every court of original jurisdiction is established for each judicial district.<sup>12</sup> Second, the state allocates ten thousand dollars to each district board.<sup>13</sup>

The court must make the decision on indigency "at any stage of the proceedings."<sup>14</sup> The law sets forth factors to be considered in making the determination, including "property owned, outstanding obligations, number and ages of dependents . . . ."<sup>15</sup> A person may still receive appointed counsel even though he is released on bail.<sup>16</sup> If the defendant is able to pay part of the cost of counsel, the court will so order and may even "order payment in installments . . . ."<sup>17</sup> Such payments, however, enter the district fund and are not paid to the attorney.<sup>18</sup>

Act 653 further provides that the Department of Corrections is responsible for providing counsel for an indigent parolee at a prerevocation or revocation hearing.<sup>19</sup> Therefore, it is not the duty of the district boards to provide counsel in such situations.

Act 653 changes the law on assignment of counsel in capital<sup>20</sup> and other cases.<sup>21</sup> Now, the court must follow the new indigent defense plan in appointing counsel, as described above. Furthermore, the new law removes the provision that the defendant is not required to pay for counsel.<sup>22</sup>

## CRIMINAL TRIAL PROCEDURE

### JURY SERVICE EXCUSALS

Louisiana HOUSE BILL 272, Regular Session (1976), proposed adding a new section to LA. R.S. (1950) relative to the excusal of prospective jurors from jury service in any trial "whether criminal or civil." Fortunately, the

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11. LA. R.S. 15:145 (Supp. 1975), *as amended by* La. Acts 1976, No. 653.
  12. La. Acts 1976, No. 653, *adding* LA. R.S. 15:146 (Supp. 1976).
  13. La. Acts 1976, No. 653, *adding* LA. R.S. 15:146 (Supp. 1976).
  14. LA. R.S. 15:147 (Supp. 1976), *added by* La. Acts 1976, No. 653.
  15. *Id.*
  16. *Id.*
  17. LA. R.S. 15:148 (Supp. 1976), *added by* La. Acts 1976, No. 653.
  18. *Id.*
  19. La. Acts 1976, No. 653, *adding* LA. R.S. 15:149 (Supp. 1976).
  20. La. Acts 1976, No. 653, *amending* LA. CODE CRIM. P. art. 512.
  21. La. Acts 1976, No. 653, *amending* LA. CODE CRIM. P. art. 513.
  22. La. Acts 1976, No. 653, *amending* LA. CODE CRIM. P. arts. 512-13.

legislature chose a more direct and thus preferable method of reaching the same result in La. Acts 1976, No. 212, *amending* LA. CODE CIV. P. art. 1767 and LA. CODE CRIM. P. art. 873.<sup>1</sup> Act 212 provides that the district court may excuse prospective jurors if "undue hardship" or "extreme inconvenience" would result from jury service<sup>2</sup> and prohibits the automatic excusal of any group from jury service.<sup>3</sup>

However, the constitutionality of Act 212 is questionable since Article V, § 33(B) of the Louisiana Constitution gives the Louisiana Supreme Court the authority to provide for exemptions from jury service.<sup>4</sup> The court has done so in Louisiana Supreme Court Rule XXV.<sup>5</sup>

#### RESPONSIVE VERDICTS TO THEFT AND ATTEMPTED THEFT

In *State v. White*,<sup>6</sup> the Louisiana Supreme Court invalidated a responsive verdict which was specifically provided for by LA. CODE CRIM. P. art.

1. The original version, La. H.B. 272, Reg. Sess. (1976), included the phrase "whether criminal or civil" because one law was intended to apply to both types of cases. Since the legislature chose instead to amend the pertinent articles in both the Louisiana Code of Civil Procedure and the Louisiana Code of Criminal Procedure, the phrase should have been deleted. However, though omitted in the amendment of Louisiana Code of Civil Procedure article 1767, the phrase was retained in the amendment of Louisiana Code of Criminal Procedure article 783. The retention of the phrase is an obvious oversight, but it should present no practical legal problems.

2. La. Acts 1976, No. 212, *amending* LA. CODE CIV. P. art. 1767(B) and LA. CODE CRIM. P. art. 783(B). However, even prior to Act 212, Louisiana courts exercised broad discretion in excusing prospective jurors. *See State v. Elam*, 312 So. 2d 318 (La. 1975) (no reversible error in excusing twenty prospective jurors before voir dire); *State v. Sears*, 298 So. 2d 814 (La. 1974) (no abuse of trial judge's discretion in excusing a prospective juror on the basis of financial hardship); *State v. Ceaser*, 249 La. 435, 187 So. 2d 432 (1966) (trial judge's discretion in excusing prospective jurors will not be disturbed absent a showing of prejudice to accused); *Lindsey v. Tioga Lumber Co.*, 108 La. 468, 32 So. 464 (1902) (in civil case when juryman became ill during trial, judge had authority to excuse him and substitute another juryman).

3. La. Acts 1976, No. 212, *amending* LA. CODE CIV. P. art. 1767(C) and LA. CODE CRIM. P. art. 783(C).

Delegate Dennis speaking of Article V, § 33(B): "The reason we adopted this is that exemptions from jury service have really become much too much of a political matter as handled in the legislature. . . . We have placed this decision in the hands of the Supreme Court." XI TRANSCRIPTS OF THE CONSTITUTIONAL CONVENTION OF 1974, 36th Convention Day, p. 99. Furthermore, it is evident that the term "exemption" also encompasses the situations referred to as excusals in Act 212. *Id.* p. 102.

4. *See generally Taylor v. La.*, 419 U.S. 522, 534 (approving "exemptions . . . to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare"); *State v. Procell*, 332 So. 2d 814 (La. 1976) and *State v. Gaines*, 315 So. 2d 298 (La. 1975) (both interpreting Louisiana Supreme Court Rule XXV).

5. 315 So. 2d 301 (La. 1975).

6. LA. R.S. 14:27(D)(2) (1950), *as amended* by La. Acts 1970, No. 471.

814 (as it appeared prior to Act 85 of 1976). The verdict, guilty of attempted theft, failed to specify the value of the property involved. Since a determination of the value is necessary to set the possible sentence, the court found that the verdict did not form the basis of a valid judgment because it did not reveal the jury's decision as to the grade of theft attempted.<sup>7</sup> La. Acts 1976, No. 85, *amending* LA. CODE CRIM. P. art. 814(23) and (24), prevents another such situation by requiring that the value of the property involved be set forth in the verdict.

#### CAPITAL PUNISHMENT

In *Roberts v. Louisiana*,<sup>8</sup> the United States Supreme Court held Louisiana's death penalty scheme unconstitutional, finding "no standards to guide the jury in the exercise of its power . . . and no meaningful appellate review of the jury's decision."<sup>9</sup> Following this decision, the Louisiana legislature in 1976 redefined first and second degree murder,<sup>10</sup> provided specific procedures to be followed in determining the sentence to be imposed for a capital offense,<sup>11</sup> and provided for mandatory review of death sentences by the Louisiana Supreme Court.<sup>12</sup>

La. Acts 1976, No. 657, *amending* LA. R.S. 14:30 (1950) and 30.1 (Supp. 1973), defines first degree murder as the "killing of a human being when the offender has specific intent to kill or to inflict great bodily harm." The penalty is death or life imprisonment, "in accordance with the recommendation of the jury." Act 657 defines second degree murder as "the killing of a human being when the offender is engaged in the perpetration or attempted perpetration" of certain enumerated felonies, even without intent to kill, punishable by life imprisonment at hard labor.

La. Acts 1976, No. 694, *adding* LA. CODE CRIM. P. arts. 905-905.9, provides a new sentencing procedure in capital cases. Article 905 requires a sentencing hearing before the death penalty may be imposed. The hearing is held before the jury which decided the issue of guilt, and the order of sequestration remains in effect.<sup>13</sup> The "hearing shall focus on the circum-

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7. 315 So. 2d at 306.

8. 96 S. Ct. 3001 (1976).

9. *Id.* at 3007.

10. La. Acts 1976, No. 657, *amending* LA. R.S. 14:30 (1950) and 30.1 (Supp. 1973).

11. La. Acts 1976, No. 694, *adding* LA. CODE CRIM. P. arts. 905-905.9.

12. *Id.*

13. LA. CODE CRIM. P. art. 905.1, *added by* La. Acts 1976, No. 694. Since the new law requires the sentencing hearing to be held before the same jury which determines the guilt issue and requires a unanimous agreement to impose the death

stances of the offense and the character and propensities of the offender."<sup>14</sup> Article 905.3 requires a finding of "at least one statutory aggravating circumstance" and the jury's consideration of mitigating factors before the death penalty can be imposed.<sup>15</sup> Article 905.4 lists seven aggravating circumstances; and Article 905.6 lists seven mitigating circumstances and an eighth catch-all provision: "Any other relevant mitigating circumstance." In order to impose the death penalty, the jury must unanimously agree; otherwise, the sentence is "life imprisonment without benefit of probation, parole or suspension of sentence."<sup>16</sup> Review of each death sentence by the Louisiana Supreme Court is mandatory.<sup>17</sup>

The legislature did not pass Louisiana HOUSE BILL 1506, Regular Session (1976), which would have provided new responsive verdicts for first degree murder. Whether Acts 657 and 694 alone provide sufficient guidelines for the jury to meet constitutional requirements is questionable. Referring to Louisiana's responsive verdict provision,<sup>18</sup> the United States Supreme Court in *Roberts v. Louisiana* noted that it

not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the

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penalty, a problem may arise if one of the jurors becomes incapacitated and cannot attend the sentencing hearing.

14. LA. CODE CRIM. P. art. 905.2, *added by* La. Acts 1976, No. 694. This same language was used by the United States Supreme Court in *Roberts v. Louisiana* to explain what a proper sentencing hearing should consider. 96 S. Ct. at 3006.

15. The jury is given a list of aggravating and mitigating circumstances.

16. LA. CODE CRIM. P. art. 905.6, *added by* La. Acts 1976, No. 694.

17. LA. CODE CRIM. P. art. 905.9, *added by* La. Acts 1976, No. 694. Even prior to Act 694, defendant had the right to review, but review was not mandatory. Note also that the Louisiana Constitution, Article V, § 5, limits the review of the Louisiana Supreme Court in criminal cases to questions of law. It is questionable whether a death penalty is a question of fact or one of law, though in some instances the Louisiana Supreme Court has given a broad interpretation to "questions of law." See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-Trial Criminal Procedure*, 36 LA. L. REV. 575, 590-93 (1976); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Postconviction Procedure*, 35 LA. L. REV. 512, 512-15 (1975) and cases discussed therein.

18. LA. CODE CRIM. P. art. 814(A)(1). See generally *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Criminal Trial Procedure*, 35 LA. L. REV. 493, 505 (1975); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Criminal Law*, 34 LA. L. REV. 332, 334 (1974) (discussions of *Furman v. Georgia*, 408 U.S. 238 (1972) and *State v. Hill*, 297 So. 2d 660 (La.), cert. denied, 419 U.S. 1090 (1974)).

death penalty is inappropriate. . . . The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion.<sup>19</sup>

However, in *Gregg v. Georgia*,<sup>20</sup> the Court rejected petitioner's argument against the jury's ability to convict of a lesser included offense<sup>21</sup> and upheld Georgia's capital punishment scheme, finding sufficient guidelines for the jury and adequate review of the decision.<sup>22</sup> The Louisiana statute hopefully provides sufficient guidelines as does the Georgia statute in this area.<sup>23</sup>

## POSTCONVICTION PROCEDURE

### CONCURRENT SENTENCING

Louisiana Code of Criminal Procedure article 883 provides that if the defendant is convicted of two or more offenses arising from a common act or plan, the sentences are to run concurrently, unless the court expressly directs otherwise. However, if the offenses do not arise from the same act or plan, the sentences run consecutively, unless the court specifies that they run concurrently. La. Acts 1976, No. 439, *adding* LA. CODE CRIM. P. art. 883.1, expands the court's power by providing in pertinent part: "The sentencing court may specify that the sentence imposed be served concurrently with a sentence imposed by a federal court or a court of any other state . . . ." Unlike the scheme of article 883, the court must specify if the multi-sovereign sentences are to run concurrently whether or not the offenses for which they are imposed arise from a common act or plan.

Prior to Act 439, the possibility of concurrent service of multi-sovereign sentences was questionable in Louisiana. In *State v. Jones*,<sup>1</sup> the Louisiana Supreme Court indicated the possibility of such concurrent

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19. 96 S. Ct. at 3007.

20. 96 S. Ct. 2909 (1976).

21. *Id.* at 2937-38.

22. *Id.* at 2936-37.

23. Compare LA. CODE CRIM. P. arts. 905.3-4, *added by* La. Acts 1976, No. 694 with GA. CODE § 27-2534.1 (Supp. 1975) (both dealing with aggravating circumstances for jury consideration). Both statutes list ten very similar aggravating circumstances, and both require a jury finding of at least one such circumstance before the death penalty may be imposed. See also *Gregg v. Georgia*, 96 S. Ct. 2909, 2936 (1976) (discussing the attributes of the Georgia statute).

1. 285 So. 2d 231 (La. 1973).



service when it referred to one reason for a prompt probationary hearing as the "otherwise possible loss of having multiple sentences run concurrently rather than consecutively."<sup>2</sup> However, in *State v. McClanahan*<sup>3</sup> and *State ex rel. George v. Hunt*,<sup>4</sup> the court refused to allow concurrent service of a Louisiana sentence with a federal sentence.

#### HABEAS CORPUS APPLICATIONS

La. Acts 1976, No. 382, *amending* LA. CODE CRIM. P. art. 353, addresses itself to the "persistent troublesome problem"<sup>5</sup> of repetitive writs for habeas corpus relief.<sup>6</sup> Act 382 requires that an application for habeas corpus relief state the factual basis of the grounds asserted, all previous applications by the same person with regard to his present custody, and "all errors known or discoverable by the exercise of due diligence." The final provision of the Act states, *inter alia*:

In cases in which the person in custody is imprisoned after sentence for the commission of an offense, a subsequent petition may be dismissed if it does not allege new or different grounds for relief or, if . . . the court finds that a failure to assert these grounds in a prior petition is not excusable.

This final provision deals with two separate concepts: "res judicata"<sup>7</sup> and by-pass. If the issues raised have been alleged in a previous petition, the application will be dismissed; if the new ground could have been raised in a previous application and the failure to do so is inexcusable, the application will be dismissed.<sup>8</sup> This new law should help to relieve the problem of identifying and disposing of repetitive writs.

2. *Id.* at 234.

3. 262 La. 138, 262 So. 2d 499 (1972).

4. 327 So. 2d 375 (La. 1976).

5. LA. CODE CRIM. P. art. 353, comment (d).

6. *See also* 28 U.S.C. 2244 (1948) (dealing with multiple applications for habeas corpus relief in the federal system); 28 U.S.C. 2255 (providing in pertinent part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.").

7. The term is not used in its technical sense, but only to indicate the situation in which the issues have been previously determined. Res judicata is not technically applicable in habeas corpus proceedings. *See Tyler v. Henderson*, 322 F. Supp. 142, 144 (D.C. La.), *aff'd.*, 453 F.2d 790 (5th Cir. 1971); *Townsend v. Twomey*, 322 F. Supp. 158, 173 (N.D. Ill.) *rev'd on other grounds*, 452 F.2d 350 (7th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972).

8. *See also Murch v. Mottram*, 409 U.S. 41 (1972); *Lawrence v. Henderson*, 478 F.2d 705 (1973), *cert. denied*, 421 U.S. 1002 (1975); Proposed Rule 9 as reported in *Rules Governing Section 2254 Cases in the United States District Courts*, 19 CRIM. L. REP. 3047, 4049 (1976). However, *Murch* seems to hinge upon the fact that the United

## EVIDENCE

## CHAIN OF EVIDENCE

La. Acts 1976, No. 439, adding LA. R.S. 15:499, 500, 501 (Supp. 1976), deals with the concept generally known as "chain of evidence." The Act provides that proof of findings by criminal laboratories may be made by the certificate of the person in charge of the laboratory.<sup>1</sup> The certificate is admissible in evidence in criminal cases and cases of a criminal nature in juvenile or family court, "as prima facie proof of its contents and as prima facie proof of proper custody of said evidence from the time of delivery to the laboratory until the time of its removal for transport to court . . . ."<sup>2</sup> However, this presumption will not apply if the opposing party summons the maker of the certificate for cross-examination, as he has the right to do.<sup>3</sup> Written notice of the intent to introduce such a certificate must be given at least ten days before trial.<sup>4</sup>

Act 439 applies only to the chain of evidence during the custody of the laboratory, and its effect is thereby limited. Furthermore, since the continuity of possession influences the weight of the evidence, as opposed to its admissibility,<sup>5</sup> Louisiana courts usually find that the evidence sufficiently establishes the chain,<sup>6</sup> though the presence of any chain is sometimes difficult to imagine.<sup>7</sup> Since the identification of evidence may already be

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States Supreme Court sustained the findings of the District Court at a hearing of the facts surrounding the by-pass, "at which transcripts of the trials and of the state post-conviction proceedings, as well as the testimony of witnesses called by Mottram, were introduced into evidence." 409 U.S. at 44. Therefore, the importance of such a hearing to establish fact findings which will later be given a presumption of correctness by a reviewing court is obvious.

1. La. Acts, No. 439, adding LA. R.S. 15:499 (Supp. 1976).
2. LA. R.S. 15:500 (Supp. 1976), added by La. Acts 1976, No. 439.
3. LA. R.S. 15:499 (Supp. 1976), added by La. Acts 1976, No. 439.
4. LA. R.S. 15:501 (Supp. 1976), added by La. Acts 1976, No. 439.
5. See *State v. Mims*, 330 So. 2d 905, 911 (La. 1976); *State v. Batiste*, 318 So. 2d 27, 33 (La. 1975) and cases cited therein.
6. See *State v. Jones*, 332 So. 2d 466 (La. 1976); *State v. Mims*, 330 So. 2d 905 (La. 1976); *State v. Collins*, 328 So. 2d 674 (La. 1976); *State v. Lemoine*, 319 So. 2d 911 (La. 1975); *State v. Nance*, 315 So. 2d 695 (La. 1975); *State v. Mitchell*, 311 So. 2d 888 (La. 1975); *State v. Adams*, 302 So. 2d 599 (La. 1974); *State v. Flood*, 301 So. 2d 637 (La. 1974); *State v. Sarrazin*, 291 So. 2d 393 (La. 1974); *State v. Dotson*, 260 La. 471, 256 So. 2d 594 (1971), cert. denied, 409 U.S. 913 (1972).
7. E.g., *State v. Flood*, 301 So. 2d 637, 646-47 (La. 1974) (allowed admission of blood which the examining physician "assumed" was taken from the victim and of

accomplished either by testimony identifying the particular evidence or proof of the chain of custody,<sup>8</sup> the actual effect of Act 439 on the identification of evidence will probably not be extensive.

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toenail and hair clippings obtained by an "unnamed person" whom the state did not produce).

8. See *State v. Collins*, 328 So. 2d 674, 677 (La. 1976); *State v. Dotson*, 260 La. 471, 512, 256 So. 2d 5d 594, 608 (1971), *cert. denied*, 409 U.S. 913 (1972).