Louisiana Law Review

Volume 5 | Number 2
May 1943

The Work of the Louisiana Supreme Court for the 1941-1942 Term: A Symposium

Harriet S. Daggett

R. O. Rush

Dale E. Bennett

Henry A. Mentz Jr.

The Work of the Louisiana Supreme Court for the 1941-1942 Term*

I. CIVIL CODE AND RELATED SUBJECTS

A. Family Law

Separation of Bed and Board

A wife sued in *Aydell v. Aydell*[1] for separation of bed and board on the ground of cruel treatment by the husband. The main evidence was the contradictory testimony of the husband and wife. The court found that the plaintiff's burden of proving the husband's cruelty by a preponderance of the evidence was not sustained, and after admonishing both spouses, refused the decree of separation. No mention of the "equal wrongs" doctrine was made.

In the case of *Abele v. Barker*,[2] a wife, after twenty years of marriage, with four children ranging from ten to seventeen years, sued for separation from her husband on the ground of cruelty. It appeared that the couple had serious altercations—some of them physical. However, in the instances of assault by the husband, the court found that they had been "provoked" by the wife. It was indicated that the "mutual wrongs" doctrine might have been applied had the wife not been guilty of the grievous error of going out with another man, which made "her faults outweigh the faults of the husband"[3] and entitled him to the judgment for separation and custody of the children, as he had been "embarrassed and humiliated."[4] He was "provoked" and "exasperated" into using force and bad language.

---

* This symposium has been contributed by the members of the law faculty of the Louisiana State University as follows: Family Law, Particular Contracts, Property, Conventional Obligations, Community Property, Successions, Mineral Rights—Harriet S. Daggett; Insurance, Miscellaneous—R. O. Rush; Criminal Law and Procedure, Corporations—Dale E. Bennett; Evidence, Procedure—Henry A. Mentz, Jr. (student).

1. 200 La. 47, 7 So. (2d) 611 (1942).
2. 200 La. 125, 7 So. (2d) 684 (1942).
3. 200 La. at 135, 7 So. (2d) at 687.
4. Ibid.

Custody

The criteria of the welfare of the child in a contest over his custody was again applied in the case of *State ex rel. Mims v. Parker,*[5] as was the custom of attaching great weight to the opinion of the trial judge. The mother, well-established in her second marriage, obtained custody, in habeas corpus proceedings, against the father, who was living in a tent and who had been, according to his testimony, married five times *"more or less."*[6] The point of whether a Texas court had jurisdiction to rule on the custody of a child living with its paternal grandmother in Louisiana, as an incident of the Texas divorce judgment, was not passed upon. Louisiana courts are consistent for the most part in their refusal to be diverted from the clear path of the child's welfare as the matter of paramount concern.

Interdiction

In *Rusillion v. Papania*[7] the curator of an interdict brought suit to have a certain agreement made by the interdict about six months preceding the interdiction set aside. Proof of "notorious" incapacity, necessary under Article 402,[8] failed, so the contract stood. It appeared that the agreement was beneficial to the interdict in any case, a fact which doubtless rightfully influenced the evaluation of the testimony.

Tutorship

Action in *Hines, Administrator of Veterans' Affairs v. Schumpert*[9] was provoked by the Administrator of Veterans' Affairs against the natural tutrix of a minor to remove her from the tutrixship because of alleged mismanagement of the minor's estate, realized from his father's War Risk Insurance. A remand of the case was ordered that new evidence might be presented purporting to prove that the "alleged irregularity"[10] was inconsequential, resulting in no loss to the minor; that the mother was in good faith and had acted to the best of her knowledge and ability.

5. 200 La. 191, 7 So. (2d) 706 (1942).
6. 200 La. at 196, 7 So. (2d) at 707.
7. 199 La. 211, 5 So. (2d) 749 (1941).
8. Art. 402, La. Civil Code of 1870.
9. 199 La. 740, 7 So. (2d) 39 (1942).
10. Ibid.

Alimony

Pendente lite. The case of *Tomasella v. Spano*[11] applies the clear rule of Article 148[12] awarding alimony pendente lite to a wife "proportioned to her needs and to the means of her husband" whether she be plaintiff or defendant, and regardless of the "merits" of the controversy. Plaintiff husband, suing on the ground of abandonment, pleaded the wife's failure to return to the matrimonial domicile after preliminary judgment and that she was living an immoral life, et cetera. Apparently he was willing for his child to remain with her, as he failed to appeal so far as the award of custody to the mother was concerned. The court saw no reason to disturb the lower court's award of $5.00 per week for mother *and* child. The father was making $25.00 per week, keeping a car said to be necessary in his work, and was paying certain debts of the community.

Colby v. Colby[13] records a controversy over alimony pendente lite in which the court reiterated the doctrine that "judgments fixing the amount of alimony pendente lite are mere incidents of suits for separation" and that "they are not final judgments but are subject to change at any time."[14]

The court found in *Miller v. Miller*[15] that the wife was not in comparative need, and hence had erroneously been awarded alimony pendente lite. Chief Justice O'Niell regarded the case as moot since suit for divorce and claim for alimony had abated because of the death of the wife prior to argument before the supreme court.

After final judgment. In *Jones v. Jones*[16] the husband brought suit for divorce under the "two year act" (Act 430 of 1938), and alleged that the wife left the matrimonial domicile without cause. The wife admitted the two year separation but alleged and proved that the husband had treated her cruelly. She was awarded $30.00 per month alimony after proof of her expenses. The husband's income ($50.00 per week) and his expenses were considered. Attorney's fees of $125.00 awarded by the lower court were not disturbed in amount but were ordered paid to the wife, not to the lawyer, who was not a party.

11. 201 La. 72, 9 So. (2d) 465 (1942).
12. Art. 148, La. Civil Code of 1870.
13. 200 La. 321, 7 So. (2d) 924 (1942).
14. 200 La. at 328, 7 So. (2d) at 927.
15. 199 La. 854, 7 So. (2d) 163 (1942).
16. 200 La. 911, 9 So. (2d) 227 (1942).

In the case of *Abbott v. Abbott*,[17] an absolute divorce was granted after judicial separation for one year without reconciliation. Alimony was claimed and defendant husband offered an agreement between himself and plaintiff wife to waive alimony in consideration of property settlement. The usual objection to validity of contract between married persons was made, and the usual answer that it was unnecessary for the question to be decided. Alimony was refused on the ground that the wife did not prove that she needed it, as she was in possession of the property of the alleged contract, thus giving practical, if not legal, effect to the contract. Louisiana's excellent doctrine of "pension" or allowance was reaffirmed. The husband's earnings and possessions and dependents were noted so that ability to pay as well as need could be considered. During the course of the discussion of the wife's situation, the court repeats the phrase "necessitous circumstances"[18] and the reader wonders if principles of the marital portion[19] may have been in mind, especially since the comparative stations of the two seem to have been evaluated as in the case of award of the marital portion.

The facts of *August v. Blache*[20] were that the wife obtained a judgment of separation for ill treatment. The husband, after a year and sixty days, under Act 25 of 1898 as amended by Act 56 of 1932,[21] obtained the final divorce. This contest is in the main over alimony, the husband's contention being that the wife was "at fault" in the separation and hence was not entitled to a stipend from him. After a complete history of the development of Louisiana's pertinent alimony statutes, the court concluded that the "fault" provision of Article 160[22] as amended applies only to the "two year" voluntary separation act and has no bearing upon a case of judgment separation, where the merits were previously considered and presumably the "faultless" or less faultful one obtained the decree. However, it was admitted in this case that the parties separated by "mutual consent." Unquestionably, the case was decided correctly under the statutes, but again brings out the need for some consistent public policy in regard to this most troublesome social and economic question of alimony. The

17. 199 La. 65, 5 So. (2d) 504 (1941).
18. 199 La. at 73, 5 So. (2d) at 507.
19. See Daggett, The Community Property System of Louisiana (1931) 93 et seq.
20. 200 La. 1029, 9 So. (2d) 402 (1942).
21. La. Act 56 of 1932 [Dart's Stats. (1939) § 2209].
22. Art. 160, La. Civil Code of 1870.

need is more urgent since the recent decision by the Supreme Court of the United States in *Williams v. State of North Carolina.*[23] Divorce seems to be in many cases a matter of money, and that the one or the other spouse obtains the judgment under statutes like that of Nevada is meaningless so far as domestic "fault" is concerned. If a realistic view is taken in regard to divorce, even in our own state, certainly divorces are daily procured for those with the price regardless of what the so-called merits of the case may be. Expenses of marriage and divorce should, in the writer's judgment, be cared for by the state, certainly for those who do not have funds. Health and dental care, education, and in late years many other services, are made available which are no more, if as important, than the regularization of births and property rights. If the lawgivers can accept the facts of this social question rather than the ideals, something might be done to clarify our confused position on alimony. If the troublesome question could be separated entirely from the so-called guilt or innocence of the domestic life of the parties, and made available to husbands as well as wives, social justice might be better served. Louisiana has long led the way in regard to property settlements after divorce, in dividing the community[24] equally regardless of this elusive matter called fault which because of the emotional nature of the marriage relation is really impossible to determine justly. It will be remembered that the marital portion, of Roman origin, was instituted to protect a divorced wife. This portion, now available upon dissolution of a marriage by death, is awarded without reference to the marital fault of the petitioner, who may be either husband or wife and is on a flexible comparative financial basis. Actual need is not the criteria.[25] If those citizens who, like the writer, regard divorce as a great social evil, tearing at the roots of the family—the foundation of a happy and balanced society—find that this force cannot be arrested, then the only thing to do would seem to be to mitigate the effects as much as possible by having alimony like our just property settlements, awarded without reference to rights and wrongs, the facts of which are for the most part unascertainable even when claimed. Instead, our statutes deal with judgment procurement and problems of domestic guilt

23. 63 S.Ct. 207, 87 L.Ed. 189 (1942).

24. See Fortas, The Securities Act and Corporate Reorganizations (1937) 4 Law & Contemp. Prob. 218, 225 et seq.

25. See Daggett, op. cit. supra note 19.

or fault, unsolvable by rule because the emotions, temperament, philosophy, finance, and obligations of individuals are as variant as their fingerprints. Pendente lite alimony is awarded solely on the basis of need, but of course that is because the marital bond is still unbroken and the marital fault not definitively fixed. Louisiana has led the way in making alimony independent of divorce procedure, stating it to be a stipend required by the state as a social and economic duty required from the individual rather than the state. This concept does not seem compatible with the idea of domestic guilt or innocence. The "wayward" one oftentimes may be in greater need than the virtuous. Might not the elimination of the question of fault in regard to alimony be a deterrent to some unsavory divorce suits?

B. Particular Contracts

Sale

The case of *Egle v. Constantin*[26] recites a long and detailed history of title, the real attack being launched at a long-standing forfeiture for taxes. The plaintiffs, arguing invalidity on the ground that the property was not assessed in the name of the true owner and that there was insufficient description of the property assessed, were unable to show that taxes had actually been paid and were held not to be in a position to be heard to impeach the tax sale. The property was *identifiable* and the preemptive period for annulment, on the ground of invalid title in person in whose name the assessment was made, under constitutional provision, had run.

The suit of *Stone v. Kimball's Heirs*[27] was brought to quiet a tax sale, following the provisions of Act 106 of 1934, and inviting attacks upon the tax title. The opponent was unable to prove that taxes had been paid prior to the sale and hence the constitutional preemptive period of three years before 1932, five since, settled the matter. The fact that the purchaser at the tax sale never took corporeal possession was immaterial, though the court mentioned their previous observations of disfavor in cases where tax sale purchasers had taken no steps to possess for very long periods of time, but stated that in those cases more than twenty years had elapsed as against twelve in this case, and also differentiated the cases cited by opponent on other grounds.

26. 198 La. 899, 5 So. (2d) 281 (1941).
27. 199 La. 240, 5 So. (2d) 758 (1941).

In *Fitzgerald v. Hyland,*[28] plaintiff, buyer, demanded delivery of a certain tract, but asked that the seller suffer a diminution in price allowed under Articles 2491[29] and 2492,[30] as he regarded the purchase as one by measure and the *depth* of the lot was only 165 feet when he had purchased 205 feet. The contract read as follows:

> "I offer and agree to purchase Vacant property in square 148 nearest Harlem Ave., fronting on Jefferson Highway running thru square the grounds measuring approximately 120 x 205 or, as per title for the sum of Thirty-five Hundred and no/100 Dollars ($3500.00) on terms of Cash."[31]

The court held this to be a sale per aversionem under Articles 2495 and 854, hence the plaintiff was entitled to no diminution in price. The court emphasized the fact that no quantity or rate per measure appeared, that the front footage was not in dispute and that the streets bounding the depth were visible and had been agreed upon. The tract was what was intended by both parties. Had the plea been for rescission rather than performance with diminution, the answer might have been different, the court intimated. It did appear that the buyer contracted for this very site for his "sea-food restaurant" rather than for 205 feet by 120 feet of the area, and certainly at a flat price rather than "by the foot." However, he certainly did not get as much as he thought he was going to get or what his contract called for. The responsibility is upon the court to *decide,* and certainly their duty is an unenviable one in almost all per measure versus per aversionem cases, of which this litigation is no exception.

In the case of *Louisiana Truck and Orange Land Company v. Page,*[32] plaintiff sued to rescind in part, for nonpayment of the price, a sale of land made twenty-six years previously. It was conceded by plaintiff that this action is a personal one, prescribing in ten years, but they asserted that the rule did not apply to those remaining in possession, which they alleged was the case here. It was found that they did surrender possession at the time of the sale and remained out of possession for eight months, after which they took possession of the tract in dispute, obviously in bad faith. The court intimated that had they actually remained

28. 199 La. 381, 6 So. (2d) 321 (1942).
29. Art. 2491, La. Civil Code of 1870.
30. Art. 2492, La. Civil Code of 1870.
31. 199 La. 381, 385, 6 So. (2d) 321, 322 (1942).
32. 199 La. 1, 5 So. (2d) 365 (1941).

in possession their position might have been sustainable, but under the facts, the ten year prescription was a bar to their action to rescind.

In *Texas and Pacific Railway Company v. Ellerbe*,[33] the question was simply of interpretation of an instrument in order to decide whether the railroad company had bought the land in fee simple or had acquired only a servitude. The instrument used the phrase "right of way" twice, but also mentioned the content in acres. The court found the intention of the parties clearly to have been conveyance of a right of way only.

In *Daigle v. Calcasieu National Bank in Lake Charles*[34] the court observed a rule of property firmly established by a line of jurisprudence in again holding that a designation recorded in the sale of property simply as "all vendor's undivided one-half (½) of the whole interest in all the property that he now possesses in his name"[35] in certain parishes was *not* sufficient description to act as notice to third persons relying on the public record. The fact that the deed of the vendor was of record, fully describing the whole tract of which he sold one-half, did not supply the deficiency. It was intimated that the vendee might have had a right to demand of his vendor a deed with sufficient description, had the rights of third parties not intervened.

Neither litigant being in physical possession, the suit of *Tate v. Ludeau*[36] to quiet title was brought under Act 38 of 1908. The real issue was regarding the sufficiency of description in the deed of plaintiff's vendor. The description was as follows: "A certain tract or parcel of woodland situated North of the Town of Ville Platte, Louisiana, and to be taken off the western end of the home place of vendor containing twenty (20) arpents, bounded on the North by Hillaire Bordelon, South by ——, East by Vendor and West by ——."[37] The cases of vague and insufficient description were distinguished on their facts and the court found for the plaintiff, saying:

> "If the description herein attacked vaguely described the twenty arpents only as a part of the woodland, without designating that they were to be taken from the western end of the home place, a well-known and easily ascertainable location, the

33. 199 La. 489, 6 So. (2d) 556 (1942).
34. 200 La. 1006, 9 So. (2d) 394 (1942).
35. 200 La. at 1008, 9 So. (2d) at 394.
36. 199 La. 706, 6 So. (2d) 737 (1942).
37. 199 La. at 709, 6 So. (2d) at 738.

authorities cited might apply. But under the description here, the twenty arpents are definitely located and their location is not left to the imagination of the reader of the deed or to a surveyor. Once the home place of vendor, a well-known and distinct and exclusive tract of land, is found, the extreme western twenty arpents of the woodland can be in only one place."[38]

Monte and Company v. Roane Sugars[39] was a suit to enforce a contract to buy cloth bags for sugar containers. The defendant-buyer's main argument was that he did not know and should not be held to know the contents of the contract to buy as it appeared on the reverse side of the paper. Heavy black type called attention to the details requiring shipping instructions, however, and this type appeared just above the buyer's signature in an important and conspicuous place. Furthermore, the correspondence between the parties made it clear that the buyer was aware of these terms and led the seller to believe that compliance would be forthcoming until finally the buyer simply wrote that they were no longer manufacturing sugar, would not need the bags, et cetera. The breach of the contract seems clear and unmistakable. However, the court enforced the contract, when the seller had not manufactured the bags and the buyer had no use for them instead of awarding the loss of profit to the seller as damages, a conclusion to which Justices Higgins and Fournet dissented. Justice Higgins wrote a strong opinion, citing Articles 1926 and 1927 of the Code,[40] the aversion to specific performance except in cases where no adequate compensation is possible, and many decisions of the supreme court to sustain his view, which is most convincing. Eight per cent interest was also awarded according to the terms of the contract providing for highest *legal* rate, which was indeed a pound of flesh at the present price of money. Plaintiff did not get, fortunately, federal taxes, since they were declared unconstitutional on these goods which had not been manufactured, nor did he get storage charges on what was in reality his own open stock.

Lease

Plaintiff, lessor, sued his lessee in the case of *Louque v. T.S.C. Motor Freight Lines,*[41] for damages by fire caused by the negli-

38. 199 La. at 714, 6 So. (2d) at 740.
39. 199 La. 686, 6 So. (2d) 731 (1942).
40. Arts. 1926, 1927, La. Civil Code of 1870.
41. 200 La. 393, 8 So. (2d) 66 (1942).

gence of lessee which the plaintiff alleged "spoke for itself." The court pointed out that Louisiana, unlike France, puts the burden of proof in such cases on the plaintiff, which of course, if sustained, would result in award of damages under Article 2723.[42]

The case was distinguished on its *facts* from *Jones v. Shell Petroleum Corporation*[43] and plaintiff's suit dismissed as having "failed to disclose a cause or right of action,"[44] though the *res ipsa loquitur* doctrine as set forth in *Jones v. Shell Petroleum Corporation* and relied upon by plaintiff, was approved.

> " 'Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in absence of explanation by defendant, that the accident arose from want of care,' the court reasoning that since the facts causing the injury were 'peculiarly within the knowledge of defendant and not equally accessible to plaintiff,' the burden was on the defendant to explain the cause of the accident if he desired to escape from the inference of negligence thus made out."[45]

In *Charles Tolmas, Incorporated, v. Streiffer,*[46] a lessor instituted eviction proceedings by rule for a breach of the lease—the selling of certain merchandise specially forbidden by the contract. The tenant pleaded the United States Soldiers' and Sailors' Relief Statute. The court held that there was no ambiguity in the lease and hence the proceedings would not be stayed as the Soldiers' and Sailors' Civil Relief Act of 1940[47] was only applicable in "those cases in which the rights of the persons in the military service might be prejudiced without their presence to either prosecute the action or conduct their defense."[48]

In the case of *Lowe v. Home Owners' Loan Corporation,*[49] it appeared that lessee's grandmother, the plaintiff, was injured by the coming off in her hand of a defective doorknob, causing

42. Art. 2723, La. Civil Code of 1870.
43. 185 La. 1067, 171 So. 447 (1936).
44. 200 La. 393, 395, 8 So. (2d) 66, 67 (1942).
45. Ibid.
46. 199 La. 25, 5 So. (2d) 372 (1941).
47. 54 Stat. 1178 et seq. (1940), 50 U.S.C.A. tit. 50, App. § 501 et seq. (Supp. 1942).
48. 199 La. 25, 31, 5 So. (2d) 372, 374 (1941).
49. 199 La. 672, 6 So. (2d) 726 (1941).

her to fall. It was found that the defective condition arose after the lease was in force. The lessor pleaded that the lease agreement stipulated that lessee was to accept "responsibility for the condition of the leased premises so far as it affected any liability of the lessor but without obligating himself to bear the cost of the upkeep thereon."[50] Relying upon *Klein v. Young*,[51] and Article 2322,[52] plaintiff insisted that the owner, regardless of lessor-lessee relationship, was responsible to third persons rightfully upon the premises and could not relieve himself from this responsibility by contract. The court pointed out that the assumption of risk in the *Klein v. Young* case was voluntary, whereas, in this case, the law, by the terms of Article 2716[53] placed the responsibility for minor repairs upon the lessee, and all Articles must be construed together, leaving Article 2716, specific upon the point, to govern, regardless of Article 2322 treating of owners of buildings in relation to third persons. The court stated that remarks in previous opinions indicating a responsibility of the owner of the building to third persons independent of legal duty of lessor or lessee to make different classes of repairs were dicta only. The instant case was grounded so far as jurisprudence is concerned upon the undisturbed decision of *Harris v. Tennis*[54] wherein it was held that the wife of the lessee could not recover from the lessor for injuries caused by a rotten window frame. Justice Monroe dissented in that case, not upon the principle involved, but upon the fact that this was *not* a minor repair, but a defect which the lessor should have repaired under Articles 2717 and 269. This "door knob" case seems correct under the *doctrine* of *Harris v. Tennis,* but seems to place more responsibility upon the tenant than he may be able to well sustain, and to swing the pendulum another degree in favor of absolution of property owners. Certainly this balance is more equitable, however, than that allowed by Act 174 of 1932[55] whereby the landlord can by contract shift his responsibility for *all* repairs and apparently escape tort liability to a large group of persons. This act was not mentioned in the instant case, though absolution by contract in favor of the lessor was pleaded.[56]

50. 199 La. at 675, 6 So. (2d) at 727.
51. 163 La. 59, 111 So. 495 (1926).
52. Art. 2322, La. Civil Code of 1870.
53. Art. 2716, La. Civil Code of 1870.
54. 149 La. 295, 88 So. 912 (1921).
55. La. Act 174 of 1932 [Dart's Stats. (1939) §§ 6595-6596].
56. See Comment (1942) 16 Tulane L. Rev. 448.

Agency

Certain construction companies secured contracts with the United States government to build camps in Louisiana. The contracts were made on a "cost-plus-a-fixed-fee" basis, and in accordance with the terms of the contract, the construction companies asked for competitive bids for the various types of petroleum products to be used in the construction of the camp, and the Standard Oil Company being the lowest bidder obtained this furnishing contract. In due course, the Standard Oil Company had to pay excise taxes to the State of Louisiana upon the products furnished in this construction. They paid the taxes under protest, and in the case of *Standard Oil Company of Louisiana v. Fontenot, Director of Revenue*[57] attempted to recover the amount of the levy. Their claim was based upon the fact that they were selling directly to the United States government or its agents and hence were exempt from this tax by the specific terms of the Louisiana statute as well as by the implied constitutional exemption under the idea of direct burden in essential governmental operations. The court gave careful and lengthy consideration to the problem, reviewed many cases, and decided that under the contracts the construction companies were independent contractors and not agents of the United States government, and hence the sale to them by the Standard Oil Company was not exempt under the statute. Under the control and direction tests used to distinguish agents from independent contractors, the line seems close under the facts of this controversy, as the "contracting officers" or "constructing quartermasters" who were the "government's representatives" in the case had rather broad powers of direction and supervision under these contracts which closely approximated the usual powers of a master or principal. In close cases, however, the sustaining of a tax is customary and furthermore, it was clear that the Standard Oil Company relied at all times upon the construction company and *not* the government for payment. The decision seems definitely in accord with decisions of the United States Supreme Court on construction contracts let by the government.

In the case of *Eduardo Fernandez Y Compania v. Longino and Collins*,[58] plaintiff, a commercial partnership of Honduras, sued Longino and Collins, defendant partnership of New Orleans, for

57. 198 La. 644, 4 So. (2d) 634 (1941).
58. 199 La. 343, 6 So. (2d) 137 (1942).

an accounting of a shipment of liquid amber, for which payment had been made by the defendant to one Cowie. Notice had been given to the defendant not to account to Cowie before settlement had been made, and the legal effect of this notice was the essence of the decision. Evidence of long and involved negotiations between plaintiff and Cowie were set forth, every one concerned being hampered, as the court stated, by the fact that the decision was having to be made twenty-two years after the original filing of suit in the district court. Articles of partnership between plaintiff and Cowie were proved to have been in the hands of the defendant, however, when notice was given them not to account to Cowie from whom the shipment of amber had been received, and the court relied upon Article 2867[59] for the principle that power entrusted to the administrative partner could not be revoked without "lawful cause" during the existence of the partnership. The plaintiffs' main contention was that their relationship to Cowie was one of simple agency, revocable at will and hence the notice to defendants was sufficient. The court found that even if agency was the only legal relationship that this agency was one coupled with an interest as shown by the document furnished the defendant, where it was stated that the plaintiffs owed Cowie $5000 which was secured by the amber or proceeds therefrom. Hence, the agency was *not* revocable and the defendants' procedure in settling with Cowie rather than with the plaintiffs was proper and they were fully protected. The court spoke of the fact that the suit appeared to be an attempt by the plaintiffs to settle their differences with Cowie through the defendants. The case instances careful analysis of evidence and interpretation of contracts with application of settled legal principles of the law of agency and partnership.

Besides interesting points of procedure, the decision in *Daspit v. Sinclair Refining Company*[60] involves a factual analysis to determine whether a contract existed between the attorneys who had handled a litigation for the state, from which might be deduced a joint enterprise entitling the attorneys to share the statutory fee.

The intention test was applied and the court found that the attorneys in disagreement had not worked on the case as partners, though each had signed, but had in fact worked singly at different stages of the case, each taking full responsibility and

59. Art. 2867, La. Civil Code of 1870.
60. 199 La. 441, 6 So. (2d) 341 (1942).

without contemplating the other's part in the case at the times when the work was assigned to them while in the employ of the state. There had not been a contemplation of fee sharing. There had been no contract between the two and hence there could be no joint enterprise.

Since no evidence was offered to contradict the testimony of plaintiffs in the case *In re Aetna Homestead Association*,[61] as to the value of their services as attorneys, the court saw no reason to disturb the judgment rendered in favor of plaintiffs by the lower court and confirmed the award.

The real issue presented in *Maas v. Harvey*[62] was whether or not a negligent employee, a salesman, was "acting within the scope of his employment at the time the accident occurred."[63] He was driving a car furnished by his employers with their consent, but was engaged in a personal mission having no connection with his employers' interests. It was argued that he might have met a prospective purchaser of the wares of defendant while on his way to collect his guests' baggage, purchase football tickets, et cetera, but the court thought that it was unlikely that a chance contact would desire a caterpillar tractor, dragline or machinery of a like nature. Furthermore, the court cited with approval a New York case which held that a transaction arising incidentally while employee was on a trip for his personal pleasure would not bring the trip into the scope, rendering the employer liable for an injury negligently caused by the employee while on his return trip in the employer's car. The test was said to be not whether "actual benefit to the employer developed out of the trip, but whether when [employee] started the trip he was performing a duty or function within the actual or reasonable scope of his employment."[64]

In *Police Jury of Tangipahoa Parish v. Begnaud, State Bank Commissioner*[65] suit was brought upon a compromise agreement entered into between the Police Jury and a special agent and attorney of the State Bank Commissioner. The defense was non-authorization of these agents. The evidence showed that the special agent had been regularly appointed and had acted in that capacity and was generally known and recognized as the special agent. The court stated that if there was to be a repudiation of

61. 199 La. 929, 7 So. (2d) 188 (1942).
62. 200 La. 736, 8 So. (2d) 683 (1942).
63. 200 La. at 742, 8 So. (2d) at 686.
64. 200 La. at 749, 8 So. (2d) at 688.
65. 200 La. 1020, 9 So. (2d) 399 (1942).

this agent by the commissioner, his principal, that it must be done under oath by him. Answer had been filed by a firm of attorneys and the affidavit signed by one of the firm had been made "to the best of his information and belief." The attorney represented himself as acting for the liquidator, which was sufficient allegation of authority. "It is not to be presumed that an attorney at law who appears in court as the representative of a client is acting without authority."[66] It was further established that the fact that the judgment included attorney's fees did not prevent the judgment holder from settling with the debtor without consent of the attorneys, who could be paid thereafter.

Security Devices

The case entitled *Succession of Hope v. First National Bank & Trust Company*[67] evidences an unsuccessful attempt on the part of an intervening Oklahoma bank to prove that a certain paper signed by deceased was a guaranty for past obligations of a corporation in which deceased had an interest. The court interpreted the instrument to cover only future loans, not made, and hence no recovery was allowed the bank for the amount due after they had received their share of the corporation assets after liquidation. Oklahoma statutes governing the case were cited to the effect that consideration was needed to give effect to a guaranty, not coexistent with the original obligation.

The case *Southland Investment Company v. Motor Sales Company*[68] raises a question of application of Act 28 of 1934.[69] This act provides that, where a mortgagee or other creditor takes advantage of debtor's waiver of appraisement and provokes a judicial sale, the creditor cannot pursue the debtor for any deficiency. The debtor in the instant case sought to have this act applied to a *private* sale of automobiles repossessed by the plaintiff finance company under a contract with the defendant motor sales company. The court properly refused to apply the act to a private sale made with the knowledge and consent of defendants. The loss incurred was covered by a reserve fund held by plaintiffs under their agreement with defendants and the court held that it was proper that this reserve should be credited to the losses as they were incurred. Other claims were held to have been prematurely made.

66. 200 La. at 1028, 9 So. (2d) at 401.
67. 198 La. 878, 5 So. (2d) 138 (1941).
68. 198 La. 1028, 5 So. (2d) 324 (1941).
69. La. Act 28 of 1934 [Dart's Stats. (1939) §§ 5021.6-5021.8].

The court again found it unnecessary to pass upon the question of whether or not husband and wife may contract with each other as "the facts of this case, as disclosed by the record, unmistakably show that no such contract existed between Mr. Stevens and his wife."[70] Suit was brought against the spouses as composing a commercial partnership. Judgment was rendered by the lower court against the Motor Sales Company and L. M. Stevens, the husband, and, but for costs, was affirmed.

In *State ex rel. Pitmann Brothers Construction Company v. Watson*,[71] plaintiff construction company furnished to defendant, clerk of court, bonds for the amount of certain liens and claims filed against the work of the company as provided by Act 246 of 1926.[72] The clerk refused to erase the liens from the record and the owner of the building refused to pay plaintiff the balance due on the construction contract until the liens were erased. Plaintiff sought a writ of mandamus to compel the clerk to erase the record of the liens. The court ordered the erasure, reasoning that while Act 246 of 1926, granting to a contractor the right to bond such claims, does not specifically provide for erasure after bonding, the logical meaning would include such a provision as otherwise there would be no purpose served by the bonding. Furthermore, Act 248 of 1926, a companion act, providing for bonding under contract to perform public rather than private works had already been construed to carry the inference that the bond was to stand in lieu of the lien, and that a clear lien certificate must be furnished after bond was made.

In *Holley v. Owens*,[73] one Ashley purchased a Ford car from the Andress Motor Company and executed a chattel mortgage in favor of his vendor to secure the unpaid balance of the price. This mortgage was by private act, but proved to have been later acknowledged before a notary by one of the subscribing witnesses and hence valid. The mortgage was executed in Webster Parish, the domicile of the mortgagor, and was recorded in the one parish, Webster. The notes and mortgage were transferred by the vendor to the Universal Credit Company, intervenors in the suit. Ashley later transferred the car to one Owens, domiciled in Claiborne Parish and the Finance Company made itself a party to the contract in order to evidence consent to have the car removed from

70. 198 La. 1028, 1033, 5 So. (2d) 324, 325 (1941).
71. 199 La. 623, 6 So. (2d) 709 (1942).
72. La. Act 246 of 1926 [Dart's Stats. (1939) § 5134].
73. 199 La. 752, 7 So. (2d) 46 (1942).

Webster, as required by the statute. Holley, a creditor of Owens, seized the car in Claiborne and argued in this suit that this mortgage should have been recorded in Claiborne to support the claim of the Finance Company, holder of the chattel mortgage, against him. The lower court so held, on the theory that a new mortgage had arisen at the time of Ashley's transfer and should have been registered in Claiborne, the domicile of the new mortgagor, in order to be effective against Owens' creditor, Holley. The supreme court decided that no new mortgage had been given, since the instrument specifically showed that Ashley and Owens promised to carry out not a new contract, but *Ashley's* contract. There was no novation because the existing obligation, Ashley's, was *not* extinguished. The court remarked upon the "purely statutory" nature of the chattel mortgage law and refused to be swayed by common law authorities which had applied estoppel in similar cases, where the mortgagor had made himself a party to the transfer contract. This case indicates again the need for a statewide system of recordation similar to those which have been proven in other states of the Union.

In *Hindelang v. Collord Motors, Incorporated,*[74] plaintiff purchased a Plymouth automobile from one Evans, of the Evans Sales Company of Port Sulphur in the Parish of Plaquemines, and gave him a Dodge car and balance in cash. A chattel mortgage had been given on this car to the Finance Company, and Evans absconded without paying off the mortgage. This mortgage was not recorded in Plaquemines Parish, the domicile of the mortgagor, until two hours and twenty minutes after the sale to plaintiff, an innocent purchaser, had been consummated, and hence, the mortgage was ineffective against him and the seizure of his car illegal. He had been led to a so-called compromise under an error of fact, due to misrepresentations by the defendant, and hence his agreement was not binding. Plaintiff was awarded $250 for his humiliation, loss of use of car, et cetera, as well as the price of the new Plymouth, which was not shown to have depreciated while in plaintiff's hands.

C. Conventional Obligations

The court has consistently upheld the letter and spirit of the Teachers' Tenure Act and has prevented all attempts to defeat its worthy purpose. Four cases appear in the period covered by

74. 200 La. 569, 8 So. (2d) 600 (1942).

this year's resumé. Twice, in *State ex rel. Nobles v. Bienville Parish School Board,*[75] a school principal on a one-year contract was dismissed without cause and without proper procedure under the act, and each time the court held that the tenure statute protected both "temporary" and "permanent" teachers. The "probationary" teacher may only be dismissed by the school board, " 'upon written recommendation, accompanied by the valid reasons therefor, of the superintendent of schools of that parish.' "[76] Plaintiff, teacher, was twice reinstated. Demotion was held in *State ex rel. McNeal v. Avoyelles Parish School Board*[77] to come within the meaning of the word "removed" as used in the tenure act. "Reorganization" of staff as a device for preventing resumption of duties of a teacher on leave to have a baby was not countenanced in *Gassen v. St. Charles Parish School Board.*[78]

In the case of *Burton v. Allen Parish Police Jury,*[79] the court refused to allow the defendant to set off unrecovered deposits against a debt to the bank, because defendant had estopped himself by having accepted the bank's reorganization plan allowing forty per cent of the deposits and certain participating certificates. No tender of the benefits received was made and defendant could not thus enrich himself and at the same time deny the indebtedness evidenced by his note.

The plaintiff in *Misuraca v. Metropolitan Life Insurance Company*[80] had secured a policy from the defendant providing for a disability stipend to which plaintiff later became entitled. After payments had been received for some time, the plaintiff in his naturalization papers declared his birth date to be other than that shown in his application for insurance. This fact came to the attention of the insurance company, and they advised the plaintiff that proper adjustment in payments according to a clause in the policy must be accepted by him or they would sue for reformation of the policy, despite its contestable clause. Plaintiff and his wife then entered into an agreement with the company whereby the latter agreed to continue payments at a reduced amount, allowing a gradual return of the amount of the overpayment instead of suspending payments entirely until a sufficient amount had accrued to take care of his indebtedness. Plaintiff now at-

75. 198 La. 688, 4 So. (2d) 649 (1941) and 200 La. 983, 9 So. (2d) 310 (1942).
76. 198 La. at 693, 4 So. (2d) at 650.
77. 199 La. 859, 7 So. (2d) 165 (1942).
78. 199 La. 954, 7 So. (2d) 217 (1942).
79. 198 La. 752, 4 So. (2d) 817 (1941).
80. 199 La. 868, 7 So. (2d) 167 (1942).

tacks this agreement on the ground of no consideration and error of law. The court held this agreement to be a *compromise,* supported by the consideration of forbearance from suit and not subject to attack for error of law. The lower court found as a fact that the plaintiff had stated his age correctly in his naturalization papers, and incorrectly in his policy, and hence there was no error of fact which might be ground for attacking the compromise.

In the case of *Cust v. Item Company,*[81] plaintiff, domiciled out of the state, sued the Item Company for having induced her partner in the Southern Hospitality Service to breach her contract which purported to restrain the partner from engaging in a similar business for a certain period of time. The Item Company was said to have organized a similar business with the aid of plaintiff's partner and then hired the partner to assist with the project. The court adhered to the settled doctrine of Louisiana that "one who is not a party to a contract is not liable in damages to one of the parties to the contract for inducing the other party to breach the contract."[82] The restraint clause of the contract was null under Act 133 of 1934[83] which embodied the public policy previously declared by the court in *Blanchard v. Haber.*[84] The court indicated that even if plaintiff had shown a cause of action, many of her alleged damages as, for example, her nervous breakdown, would have been too remote to permit recovery.

In *Empire Mills Company v. J. A. Jones Construction Company,*[85] plaintiff sued for balance due on contract for certain bricks delivered and used. Defendant reconvened on the ground that the bricks were not up to sample, had to be culled and hence necessitated the purchase of an additional quantity at a higher price. The opinion is concerned with factual materials only, no cases being cited, and it was found that the bricks *were* up to sample, there was no negligence in handling, and hence the lower court's judgment for plaintiff was affirmed.

D. Property

The case of *Shreveport v. Case*[86] is concerned with the interpretation of legislative enactments delegating certain powers over Cross Lake to the City of Shreveport. The court held that the

81. 200 La. 515, 8 So. (2d) 361 (1942).
82. 200 La. at 522, 8 So. (2d) at 363.
83. La. Act 133 of 1934 [Dart's Stats. (1939) §§ 4963.1-4963.3].
84. 166 La. 1014, 118 So. 117 (1928).
85. 201 La. 178, 9 So. (2d) 513 (1942).
86. 198 La. 702, 4 So. (2d) 801 (1941).

statutes must be strictly construed and found that the delegation had been solely for the purpose of protecting the water supply from pollution and contamination, and that plenary powers of police for any other purpose had *not* been granted. The defendant had been charged with operating his motor boat on the lake without a muffler in violation of a city ordinance. It was conceded that if motor boat operation was allowed at all, which it was, the muffler had no connection with the purity of the water, so the court held the ordinance "not unconstitutional but it is illegal and unenforceable."[87]

The decision in *State v. Department of Highways*[88] reiterates that an owner of property abutting upon a highway has a property right of access to the highway which cannot be taken from him without just compensation. The decision also recognizes the police power of the state to regulate highways in the interest of public safety, and hence an individual may not be permitted to decide the number and location of points of egress from his property. The lower court, in this case, decided the number and location of the entrances and their judgment was affirmed.

The plaintiff in *Cogswell v. Texas and New Orleans Railroad Company*[89] complained that certain railroad tracks were interfering with proper enjoyment of her property. The facts were found to be that the tracks were located on the slope of the levee, in accordance with the New Orleans ordinance necessitating permission from the Commission Council, and also with the consent of the Levee Board. The levee and not the tracks really occupied the street which plaintiff complained had been rendered useless by the tracks, so plaintiff sustained no damage from the railroad company and her suit was dismissed.

Expropriation

The case of *Housing Authority of Shreveport v. Green*,[90] an expropriation proceeding, raised two questions, i.e., did the jury have the necessary qualifications, and was the amount of the award adequate? The jurors were found to have been legally qualified under Article 2632 as amended by Act 187 of 1940,[91] as they were " 'freeholders, residents of the parish in which the land

87. 198 La. at 713, 4 So. (2d) at 804.
88. 200 La. 409, 8 So. (2d) 71 (1942).
89. 200 La. 696, 8 So. (2d) 645 (1942).
90. 200 La. 463, 8 So. (2d) 295 (1942).
91. La. Act 187 of 1940.

lies, and not interested in the issue to be tried.' "[92] The court stated that: " 'If one possesses average common sense, he is a good juror. Ignorance of land value and his inability in that direction are not ground for excluding him. He may discharge the duties of a juror by hearing the testimony, observing closely, and deciding according to the best light before him.' "[93] The award for the actual compensation of the property expropriated was raised from the jury estimate of $3650 to $4500, and one Justice thought the evidence of the record justified $5100. There was no "market value" of the property, as it was in a section among persons who were financially unable to purchase it, so the evidence was concerned with replacement value, present intrinsic value, et cetera. The court quoted with approval the following excerpt dealing with "intrinsic value or value to the owner": "This means substantially that the owner shall be put in as good position pecuniarily as he would have been in if his property had not been taken."[94] The damages claimed for loss of music pupils, said to be speculative, was not allowed nor was an unsupported claim for moving charges, nor claim for inconveniences. The latter must be suffered, the court states, as a sacrifice for the public good.

The defendant in *Police Jury of the Parish of St. James v. Borne*[95] was dissatisfied with the compensation allowed by the police jury in accord with the expropriation for a right of passage across his land. All of the statutory procedure was found to have been properly followed, and the public necessity for the road was found to have warranted the taking. The award, based on the purchase value of thirty-nine years preceding the condemnation, was adjudged inadequate and was raised from $360 to $660.

Party Walls

The suit of *Lacoste v. Jones*[96] was brought to force the closing of certain apertures cut in a single wall of a remodeled residence, which served as an enclosure for the adjoining patio. The openings were found to have been inserted in accordance with the city ordinance passed to protect public health and safety which was said to supersede Article 696 of the Civil Code[97] dealing with common walls. The constitutionality of the ordinance and the

92. 200 La. 463, 467, 8 So. (2d) 295, 296 (1942).
93. 200 La. at 467, 8 So. (2d) at 296-297.
94. 200 La. at 473, 8 So. (2d) at 298.
95. 198 La. 959, 5 So. (2d) 301 (1941).
96. 200 La. 221, 7 So. (2d) 833 (1942).
97. Art. 696, La. Civil Code of 1870.

statute authorizing it was tested in the case of *Federal Land Bank v. John D. Nix, Jr.*[98] It was indicated that if and when the patio owner desired to build on this back line and use the wall for support, he had the right under the ordinance to close the openings. An additional factor in favor of defendant was that the windows were not objected to when put in by the owner from whom plaintiff bought, and were there at the time of purchase, though this point was not passed on in the decision. Furthermore, the trial judge had visited the premises in person and found that step-ladders would be necessary from either side for privacy to be invaded. The Vieux Carré Commission was not before the court, and it was not shown that any ordinance passed by them in carrying out their special powers had been violated.

In the case of *Esnard v. Cangelosi,*[99] the plaintiff proved that defendant had knowingly placed the entire sixteen-inch wall of his building on plaintiff's property, and the court held under Article 508[100] and *Barker v. Houssiere-Latreille Oil Company*[101] that plaintiff was legally entitled to demand the demolition and removal of the wall. Article 675[102] permitting the party building *first* to place one-half of a high wall over the line was *not* discussed. Damages were disallowed on the rehearing, as the claim was stale, plaintiff having waited seventeen years to sue. Furthermore, the plaintiff had made some use of the wall to protect his building "from the ravages of the weather," and the rental value per foot of property in the area was not clearly proved. Defendant pleaded the common law doctrine of Balancing the Equities in Trespass Cases, which of course was properly refused, as the Code clearly provides for the situation. The equity doctrine is discussed in the case note found in (1942) 5 LOUISIANA LAW REVIEW 141.

Partition

The plaintiff in *Aucoin v. Greenwood*[103] brought suit to partition in kind certain lots in a village. The partition was resisted on the ground that a valid lease upon the property existed and that the lessee had the right to remove all buildings and improvements, which of course was no impediment as the lease would

98. 166 La. 566, 117 So. 720 (1928).
99. 200 La. 703, 8 So. (2d) 673 (1942).
100. Art. 508, La. Civil Code of 1870.
101. 160 La. 52, 106 So. 672 (1925).
102. Art. 675, La. Civil Code of 1870.
103. 199 La. 764, 7 So. (2d) 50 (1942).

merely continue upon the land until its expiration and the fact that the lessee owned the buildings with right to remove facilitated the practicality of division in kind. The lease was originally granted by a half owner and usufructuary and the court emphatically stated the rule that the lease terminated at the death of the usufructuary, as of course he had no right to burden the property beyond his own term of enjoyment. No indemnification is due the lessee from the heirs of the usufructuary lessor unless the usufructuary fails to make known to the lessee his limited right. *This lease* did not terminate at the death of the usufructuary for the simple reason that the usufructuary waived his right of usufruct before his death, and plaintiff, purchaser of the naked ownership originally owned by the lessor's children, affirmed the lease of defendant, purchaser of the lessor's full half share, and made the lease his own before the death of the usufructuary. The partition was made in kind by compensating the more valuable portion bounded by the highways by a larger share of the less valuable. The judge properly appointed a notary and experts to make up the lots to be drawn under the procedure outlined by the Code of Practice. Costs were taxed equally to the parties to the litigation.

Building Restrictions

Alfortish v. Wagner[104] recognized the settled doctrine that building restrictions may be provided for by deed and, when made under proper conditions, will run with the land. In an orderly disposition of defendant's contentions, and in deciding that the defendant must observe the set back restriction, the court found as facts that there *was* a general plan of building for the area in question, and that the plan had *not* been abandoned but adhered to by the owners of the property of the area; that the character of the area had *not* changed, as it had always been used for both residential and commercial purposes, and in any case, the restriction was for a set back only. The court also decided that because two of the plaintiffs might not have had a right of action, since the restrictions did not appear in their titles, would not affect the judgment in favor of the five plaintiffs who did have a right. This case has been noted in the LOUISIANA LAW REVIEW[105] where full discussion of the principles involved appear.

104. 200 La. 198, 7 So. (2d) 708 (1942).
105. Note (1942) 5 LOUISIANA LAW REVIEW 131.

Boundaries

Pan American Production Company v. Robichaux[106] was a concursus proceeding instigated by an oil company to determine the proper owners of the land upon which producing wells were located. More than ten years before this suit two adjacent property owners established a boundary line between their lands "by consent" but not in accordance with the method laid down by Article 833.[107] The survey upon which the parties relied in their agreement was erroneous, which the court held vitiated the agreement, being an error of fact striking at the principal cause of the contract.[108] The boundary was not fixed according to the legal procedure described in Article 833. Hence, Article 853 stating that an error in the survey will be cured in ten years, if the parties are present, which these were, did not apply. In answer to the plea of estoppel, the court remarked that title to real estate cannot be acquired by estoppel, and since it was not acquired by prescription, ownership depended upon the correct lines unaffected by the erroneous survey, which had been the subject matter of the boundary agreement void for lack of actual consent.

Action in *Harper v. Learned*[109] was brought to have a boundary fixed between batture properties acquired by riparian owners under the law expressed by Article 516 of the Civil Code[110] recognizing the doctrine of accretion. The owners had reached an amicable agreement in settlement of the boundary question, but failed to put it in writing. The plaintiff had affirmed his recognition of a certain line as boundary on five different occasions by using the line in public acts and records. By virtue of these affirmations, the plaintiff was held to have been estopped to contest the boundary line. The doctrine of estoppel is clearly and convincingly summarized by the author of the opinion and is reproduced here:

> "All of the requisite legal elements of estoppel appear: (1) The acts, representations and declarations of the plaintiff; (2) the actions by the defendant in relying thereon; and (3) the irreparable injury which the defendant will suffer if the plaintiff is permitted to change his position and repudiate his acts and representations after more than twenty years.

106. 200 La. 666, 8 So. (2d) 635 (1942).
107. Art. 833, La. Civil Code of 1870.
108. Arts. 1819, 1820, 1821, 1823, La. Civil Code of 1870.
109. 199 La. 398, 6 So. (2d) 326 (1942).
110. Art. 516, La. Civil Code of 1870.

"The plea of estoppel is well founded and is, therefore, sustained.

"The authorities relied upon by the plaintiff fall into three classes: First, cases denying estoppel where the party sought to be estopped was ignorant of the facts; second, cases holding that title to realty cannot be proved by parol; and, third, cases holding that estoppel by deed cannot be urged except by the parties to the deed and their privies.

"It is clear that the plaintiff cannot evade estoppel herein on the grounds of ignorance of the true facts in view of the record in this case.

"The defendant is not attempting to establish a verbal link in his chain of title in a petitory action. The titles and respective acts of purchase of both parties are admitted. Therefore, there is no necessity for proof of these titles. This suit was instituted for the purpose of establishing the boundary line and thereby the division of the accretion to the lands, which the respective parties have titles to as contiguous riparian owners. The batture or accretion is granted to the riparian owner by law. Revised Civil Code, Article 516. Parol evidence is admissible to prove a visible boundary recognized by the parties. Blanc v. Duplessis, 13 La. 334. Furthermore, parol evidence is admissible to establish equitable estoppel.

"Estoppel by deed is a particular type of estoppel and is not an estoppel in pais or equitable estoppel. The deeds and records offered in evidence were tendered by the defendant as valid and effective evidence as the acts and representations of the plaintiff that go in part to constitute the conduct and the equitable estoppel by which he is bound. Therefore, it appears that the authorities relied upon by the plaintiff are inappropriate."[111]

E. Community Property

Talbert v. Talbert,[112] concerned with settlement of the community after judicial separation, applies well-settled principles. The community was credited with certain moneys spent by the husband on his separate estate. Money in the bank when the husband was married was traced to the payment of a mortgage on his separate property and preserved as his separate property.

111. 199 La. 398, 416-418, 6 So. (2d) 326, 332-333.
112. 199 La. 882, 7 So. (2d) 173 (1942).

The date of dissolution of the community was fixed as of the day suit was filed, and debts incurred thereafter were held to be separate and not community debts. Expenses of the separation were charged to the community, but attorney's fees for this suit brought by the husband to settle the community were charged to him, as the court did not consider this settlement to fall under Act 69 of 1918 "authorizing assessment of attorney's fees as costs in non-contested judicial partitions."[113]

F. Successions

In *Succession of Boutte*[114] "the sole question presented is whether or not the appointment of the co-administrators can be set aside and their office vacated by summary proceedings" and the answer is *no*.

In *Succession of Joublanc*[115] the decedent had promised to leave a certain piece of property to a woman who had boarded, kept house, and nursed him for ten years, besides helping him run his dairy. He had left her the piece of property in one will, of which he gave her a copy, but a few days before he died, this will was revoked and a new one made in which he left everything to his son and daughter. The housekeeper sued for the value of her uncompensated services. The court awarded the inventoried value of the piece of property with which she had expected to be paid. Prescription in such cases was said to begin to run from the date of the death of the promisor who had failed to fulfill his obligation. The period applicable was not stated nor was any mention made of the old "peonage" statute prohibiting a contract for personal services for longer than five years—sometimes successfully pleaded to defeat such a claim. The evidence was clear and overwhelmingly in favor of this claimant on all counts and the justness of the decision brings a deep sense of satisfaction to the reader.

After the will of decedent, Edenborn, was declared revoked,[116] Mrs. Edenborn and the two nieces and two nephews of Edenborn entered into an agreement purporting to carry out Edenborn's wishes whereby Mrs. Edenborn was to pay the nieces and nephews a certain percentage of the succession, and they were to re-

113. La. Act 69 of 1918 [Dart's Stats. (1939) § 6588].
114. 199 La. 182, 5 So. (2d) 543 (1941).
115. 199 La. 250, 5 So. (2d) 762 (1941).
116. See Hessmer v. Edenborn, 196 La. 575, 199 So. 647 (1940), discussed in The Work of the Louisiana Supreme Court for the 1940-1941 Term (1942) 4 Louisiana Law Review 183.

linquish all claims and assist her in being put into possession of the entire estate. It was also agreed that the obligation of Mrs. Edenborn was not to be enforceable until the affairs of Edenborn's railroad were put in sound financial condition. Mrs. Edenborn was later put into possession of the estate and some of the claimants were authorized to manage the affairs of the railroad. It was restored to sound condition and sold for $10,000,000. Payments were made to the claimants and receipts signed. Now, in the case of *Mann v. Edenborn*[117] the nieces and nephews sue to set aside the judgment putting Mrs. Edenborn in possession and to vitiate the recited arrangements on the ground that the settlement was reached by misrepresentations on the part of Mrs. Edenborn that the property of the decedent was all community property. Lesion beyond one-fourth was also pleaded so far as the settlement was concerned. The question was factual and after thorough review the court found that there had been no misrepresentation, nor did the purchaser alone know the value of the succession and permit the plaintiffs to remain in ignorance of it. On the contrary, it clearly appeared that the claimants knew far more about the affairs of the succession than did Mrs. Edenborn. The judgment putting Mrs. Edenborn in possession of the entire estate was affirmed.

In *Succession of Rembert*,[118] decedent named his daughter testamentary executrix and named a certain attorney legal adviser. The daughter saw fit to employ her own counsel and ignore her father's will in its designation of a legal adviser, whereupon the attorney took appropriate steps to enforce his recognition. Representing the widow and legatee of the testator, he first filed proceedings to force the probate of the will, and obtained an order for an inventory, whereupon the daughter qualified as testamentary executrix and sought to have the order authorizing the widow to take inventory stayed. Then the testamentary legal adviser attempted to have the daughter's qualifications as testamentary executrix revoked and to enjoin her from further proceedings in such a capacity. The supreme court did not see fit to disturb the qualification as testamentary executrix, but in a forceful and certain manner apprised the daughter of the necessity of accepting the legal adviser designated by the father's will. The opinion is fully documented and should be of particular interest to practicing attorneys.

117. 199 La. 578, 6 So. (2d) 667 (1942).
118. 199 La. 743, 7 So. (2d) 40 (1942).

One Isaac Griffith seemed to have acquired a title to 161.44 acres of land from the United States government in 1850, which was confirmed by a patent in 1926. Griffith died in 1853. Griffith entered this land in 1835 and sold it to defendant's ancestors in 1836, but due to some contest the land was recalled. The plaintiff, Judge B. Griffith, in *Griffith's Estate v. Glaze's Heirs*,[119] claims that the title inured to the benefit of his ancestor and he now sues as adminstrator of Isaac's estate, and as curator of absent heirs. The court decided against him on the merits by application of the well-known doctrine that "a title acquired by one who previously made a sale purporting to convey the title to a third party inures to the third party."[120]

In the case of *Owles v. Jackson*,[121] the court held two acts of adoption, made in 1918, to be absolutely void for lack of the concurrence of both of the parents of the children, as prescribed by Act 31 of 1872.[122] The children were not "foundlings" under Act 173 of 1919,[123] even "conceding without holding" that an institution such as the Louisiana Children's Home Society from which the children were taken might have consented to adoption of "foundlings." Act 46 of 1932,[124] declaring a prescriptive period of six months for invalidation of adoptions previously made had no application as "the purported acts of adoption had already been set at naught at the suggestion and request of the parents of the children, acquiesced in by plaintiff and his wife."[125] The children were claiming the property interests of plaintiff's deceased wife, hence the necessity for plaintiff to have the acts purporting to effect a legal adoption stricken from the records.

The controversy in *Succession of Burns*[126] came to the court as an opposition to the final account of the testamentary executor of deceased. The major contest was between the first and third wives of the decedent. The first wife claimed under an agreement signed by decedent wherein he set over certain property to her and declared that he yet owed $8000 in settlement of the first community, giving a note secured by mortgage for this declared indebtedness. Preceding decedent's third marriage, he had given his number one wife certain property in full settlement for her

119. 199 La. 800, 7 So. (2d) 62 (1942).
120. 199 La. at 806, 7 So. (2d) at 64.
121. 199 La. 940, 7 So. (2d) 192 (1942).
122. La. Act 31 of 1872, repealed by La. Act 146 of 1932.
123. La. Act 173 of 1910 [Dart's Stats. (1939) §§ 4891-4895].
124. La. Act 46 of 1932 [Dart's Stats. (1939) §§ 4827-4839.2].
125. 199 La. 940, 954, 7 So. (2d) 192, 196 (1942).
126. 199 La. 1081, 7 So. (2d) 359 (1942).

share of the community. The second agreement purported to annul this settlement. The court held that this first settlement with the "giving in payment" like unto the common law "accord and satisfaction" was a bar to any attack on the ground of inadequacy of consideration. Hence there could be no further debt owing as declared by the second agreement. It was pleaded that the moral consideration of knowledge of the inadequate and unfair settlement could support the second agreement but the court cited the distinction between moral and natural obligations, reiterated the previous conclusion that the list of natural obligations set forth in Article 1758 is *exclusive,* and pointed out that the alleged consideration of the second agreement fell into none of the categories. The third wife was granted the $2000 homestead exemption, as she had a minor, dependent child. The privileged claim for funeral expenses was cut to $200. The first wife was held *not* to be responsible for her child's negligence in losing a diamond ring of deceased, given him by his father's nurse while in his father's house and not under the control of his mother. The recorded mortgages in favor of the first wife to secure the disproved $8000 debt to the first wife were ordered cancelled from the record.

In *Succession of Farrell*[127] the court adhered to the established principle that proceeds of life insurance of the husband taken out during the existence of the community and payable to his estate fall into the community and not into the husband's separate estate. Also, under Article 3252,[128] the misnamed "widow's homestead," if the widow and minor children have between them the sum of $1000, they may not claim this bounty, and whatever the widow and minor children have together must be subtracted from the $1000 award and only the deficit awarded. These settled rules were applied and the claimant widow received $27.18 ahead of all creditors of the insolvent succession of her husband, since she and her minor children together were owners and inheritors of $972.82 insurance, payable to the estate of the husband, and falling into the community but exempt from the creditors of deceased.

The suit *In re Gray's Succession*[129] was brought by a grandchild and two great grandchildren of Silas Gray to have themselves recognized as the irregular heirs of Silas Gray and to dis-

127. 200 La. 29, 7 So. (2d) 605 (1942).
128. Art. 3252, La. Civil Code of 1870.
129. 201 La. 121, 9 So. (2d) 481 (1942).

possess the natural child and other irregular heirs of Silas Gray who had failed to assert their claims within the thirty years allowed them under Article 1030 of the Revised Civil Code. The plaintiffs, alleging the incapacity of the defendants, were unable to sustain their burden of proof. The presumption of legitimacy of the defendants prevailed and 1030 was hence inapplicable.

G. Mineral Rights

Servitude

The decisions of the year on mineral rights are of unusual interest as novel questions are presented and certain developments are recorded in the evolution of the theory of the reversionary interest and the royalty per se.

In *Scott v. Magnolia Petroleum Company*[130] a novel and interesting question was presented, i.e., "whether the doctrine of confusion and merger applies to a mineral right and a mineral lease"[131] and if so which is the "greater" right into which the "lesser" would merge in the hands of the same owner.

The facts were that one Foster, landowner, granted a lease to Stokes, and by a second subsequent transaction, though on the same day, *sold* a one-fourth mineral interest in the same land to Stokes, the lessee. The lease and sale were recorded on the same day, the lease under file number 48,654, and the sale under file number 48,655. The second instrument, that of sale, contained the following provision:

> "It is understood between the parties hereto that this sale is made subject to any valid and duly recorded oil and gas lease, but covers and includes one-fourth (¼) of all the oil royalties and gas rentals or royalties due and to become due under the terms of any such lease."[132]

Stokes later sold one-fourth of his one-fourth mineral interest to Scott, prior to Stokes' assignment of his *lease* to the Magnolia Petroleum Company. The day after the assignment of his lease, Stokes sold his remaining three-fourths of his one-fourth to O'Brien. The Magnolia Company subsequently brought in a well and now Scott as plaintiff claims one-sixteenth of *all* the oil produced, having refused the Magnolia Company's tender of one-sixteenth of one-eighth. Plaintiff's first position under his merger

130. 200 La. 401, 8 So. (2d) 69 (1942).
131. 200 La. at 405, 8 So. (2d) at 70.
132. 200 La. at 404, 8 So. (2d) at 70.

theory was that this interest in the *lease* was the "lesser" right which merged into the servitude, but later, having conceded that he purchased the mineral servitude *subject to the lease,* he maintained that the lease was the "greater" right. The court remarked that:

> "In view of plaintiff's apparent inability to take a definite position as to which right was extinguished, if such were the fact, it would be difficult for this Court to determine that question for plaintiff if it were necessary to do so, which it is not."[133]

Again the court said:

> "But it is not important for the Court to determine in this case whether the doctrine of confusion and merger applies to a mineral lease and a mineral right."[134]

The case was decided under the doctrine of waiver as plaintiff was said to have expressly renounced any rights he might have had to more royalty in the instrument of sale, *subject to the recorded lease.* Thus, the tantalizing question of "merger" is left for meditation. Article 805[135] of the Civil Code contemplates the uniting of a servitude with other outstanding rights to form full ownership. "Confusion" may result, however, in any debtor-creditor relationship. A mineral lease is a right to search, governed by certain legal rules; a mineral servitude is a right to search, governed by other legal rules. A servitude owner can grant a lease, though the converse is not true. Which is the "greater" right? Could merger ever take place of rights fundamentally the same, but unlike in their government? The doctrine would seem to be practically inapplicable.

The very interesting case of *Holloway Gravel Company v. McKowen*[136] decided that a reservation of "mineral, oil and gas rights" would not include gravel unless it was clearly shown to have been the intention of the contracting parties to include it. It would appear that this intention would ordinarily, though not necessarily, have to be indicated by mentioning the substance. The flat question of whether or not gravel is a mineral cannot be answered categorically, either legally or scientifically, as authorities in both fields of learning are divided on the question. The intention test was certainly the proper one to be applied in this controversy. Furthermore, a declaration by the court that a

133. 200 La. at 405, 8 So. (2d) at 70.
134. 200 La. at 406, 8 So. (2d) at 71.
135. Art. 805, La. Civil Code of 1870.
136. 200 La. 917, 9 So. (2d) 228 (1942).

"mineral" reservation necessarily included gravel would have been virtually to destroy our carefully built user of servitude doctrine and thus might well have endangered our public policy of land tenure, as such a servitude could have been kept alive indefinitely in many instances by occasional "users" of surface gravel deposits—a cheap method of holding valuable oil rights.[137]

Two questions of fact had to be determined in *Hunter v. Ulrich*[138] in order to apply settled rules of law. The first claim made by plaintiff was that a certain exploration, resulting in a dry hole, had been made in bad faith to a depth at which production could not reasonably have been expected in order to further a stock selling scheme, and hence that interruption of prescription on the mineral servitude had not occurred. Weighing the evidence of depth, cost, location, comparison with history of other wells in the vicinity, care in keeping the well's log, et cetera, the court agreed with the district judge that the well had been drilled in good faith, and that prescription had been interrupted by this use of the mineral servitude. The second factual analysis was to determine whether certain canals occupied land owned in fee by the canal company, or whether the latter had purchased only a right of way. The deed to the canal company was not available for examination and interpretation, as it had burned in the Lake Charles court house. Abstractors' excerpts, reference in subsequent instruments, and the price paid, led the court to again agree with the lower tribunal that only a right of way for canal purposes existed and hence the lands covered by the original mineral servitude were contiguous and the interruption of prescription discussed above affected the entire acreage of the original servitude grant. The court observed finally that:

> "The question as to which party bears the burden of proof is not of controlling importance. On the issues raised by the pleadings, the evidence as a whole preponderates in favor of the defendant and justifies the judgment of the court below."[139]

Suit was filed by the plaintiff in *Schwing Lumber & Shingle Company v. Board of Commissioners of Atchafalaya Basin Levee District*[140] to enjoin defendant from attempting to deal with mineral rights on plaintiff's land. The defendant had contracted to

137. For further discussion, see Note (1942) 5 LOUISIANA LAW REVIEW 150.
138. 200 La. 536, 8 So. (2d) 531 (1942).
139. 200 La. at 551, 8 So. (2d) at 536.
140. 200 La. 1049, 9 So. (2d) 409 (1942).

sell in full ownership the land involved prior to the constitutional prohibition against selling mineral rights, but had executed a quitclaim deed to the property after this prohibition became effective, and hence defendant maintained that title to the mineral rights could not have legally passed. The court reiterated the doctrine founded on Article 2041[141] that when conditions in a contract to sell have been performed title passes as of the date of the original agreement. The quitclaim deed was said to be merely confirmative evidence of the previously completed transfer.

The case of *Hodges v. Norton*[142] reaffirms the doctrine that the term of a servitude may be delimited by convention. Furthermore, the case holds that if the delimitation of a mineral servitude is afterwards renounced, the life of the servitude would then be governed by the rules of the Code. The landowner sold his land and reserved one-half of the mineral for fifteen years. Thus, the buyer of the land would have acquired the servitude in ten years without user and in fifteen in any case. The buyer of the land renounced his reversionary interest, however, and thus changed the conventional term of fifteen years maximum to the legal term determined by user. Production having occurred within the original legal ten-year period, the land buyer had no right to claim his servitude at the end of the fifteen-year period.

Chief Justice O'Niell's view seemed to be that a renunciation or release of the delimiting period had not been effected, but a transfer of the reversionary interest, against which prescription would begin to run as of the date of the transfer, *not* as of the date of the reversion, i.e., fifteen years after the original reservation. Under this interpretation the transferee would have bought only a hope of reversion within his term, unrealized because of user by first owner of the servitude.

The first part of *White v. Hodges*[143] is occupied with factual interpretation resulting in a finding that landowners had *not* interrupted prescription by acknowledgment in favor of servitude owners by signing a joint lease, again strengthening the well-established doctrine that mere acknowledgment of an outstanding mineral right without proof of intention to interrupt will *not* have the latter effect. The mineral owners received consideration for the lease in preventing foreclosure of a preexisting mortgage

141. Art. 2041, La. Civil Code of 1870.
142. 200 La. 614, 8 So. (2d) 618 (1942).
143. 201 La. 1, 9 So. (2d) 433 (1942).

which would have wiped out their interests. The rentals were dedicated to payment of the mortgage. The lease was found to have *extended* the life of the servitude, except in the case of the minors involved whose tutrix was not properly authorized by the court. The evidence clearly showed in regard to a second lease in question pleaded by defendants as a further extension of the servitude that the landowners did not intend to sign a joint or pooling lease. The latter and most interesting part of the case deals with the purchase of a mineral servitude after *all* had been sold by the landowner vendor, which vendee was found not to have known, though the previous sales were on record. The opinion indicates two theories. One was that since the vendee was unaware of the previous sales totaling the vendor's entire mineral interest, that the vendor had sold, not his reversionary interest, but simply a right that he did not own.[144] When this *right* (by reversion from nonuser) came into the hands of the heirs of the vendor, warrantor, who had unconditionally accepted the estate of their father, title vested by law in the vendee. The court states, first, however, that prescription did not run against this defendant, vendee, because of an obstacle to the use of the servitude to which, since he did not know of it, he could not have consented. That being the case, prescription did not begin to run until the obstacle was removed by reversion and before the second ten-year period had run, oil was produced which of course kept the servitude alive for the defendant. Either of these theories would justify the decision in defendant's favor under the particular facts of this case, but leave the reader in considerable doubt about the doctrine. The various problems present considerable difficulty when considered in the light of the established public policy regarding tenure.

The court declared in *Gailey v. McFarlain*[145] that the reversionary interest in a mineral servitude *might* be sold by a landowner, but in interpreting the contract found that the parties had *not* agreed on such subject matter, i.e., that "there was no sale or grant in praesenti of McFarlain's reversionary mineral interest."[146] If the case of *White v. Hodges*[147] is grounded on the theory that the parties' minds did not meet on the vendor's reversionary interest, but on the immediately usable mineral servitude, which the

144. Art. 2452, La. Civil Code of 1870.
145. 194 La. 150, 193 So. 570 (1940).
146. 194 La. at 161, 193 So. at 574.
147. 201 La. 1, 9 So. (2d) 433 (1942).

vendor did not own, then under Article 2452[148] and the jurisprudence, since the innocent vendee had not brought suit to rescind, the title having been acquired by the unconditional heirs of the vendor, would vest in the vendee and the theory of obstacle seems at variance. Had the purchase been of the reversionary interest of the landowner, then he was buying a future interest anyway, and hence the obstacle provisions would have had no place. However, it is indicated in connection with the remarks on obstacle that prescription would not begin to run against the vendee until the obstacle (title in another) had been removed, which was when the reversion occurred by nonuser, thus setting the date from which prescription would begin to run against the vendee as the date of reversion and not the date of acquisition of his interest. If the purchaser did not acquire anything until title revested in his vendee, how could it be said that an obstacle, presupposing a servitude, hindered a right which he did not have. The court has means of escape from long term holding in the sale of reversionary interest—one by using the method evolved in *Vincent v. Bullock*[149] of purchase conditioned upon the happening of a future uncertain event. The event of course in the instant problem would be reversion—within the legal period, ten years. Second, prescription of ten years to begin to run at date of purchase has been suggested by Chief Justice O'Niell in his concurring opinion in *Gailey v. McFarland,* and again in the opinion of *Hodges v. Norton,*[150] where a different reversionary interest was involved. If the entire period should be concurrent with that of previously existing servitudes, relief could be afforded an innocent vendee by Article 2452, if the reversion vested in another than the vendor or his unconditional heirs. A full discussion of the problem of reversionary interest will be found in (1942) 5 LOUISIANA LAW REVIEW 115. In the writer's opinion, no problem of reversionary interest was at issue in the case under discussion, since the court interpreted the conveyance to be not of a future, but of a *present* interest, *not owned* by the vendor.

Mineral Lease

The case of *Texas Company v. Fontenot, Director of Revenue*[151] records a contest over the severance tax. The plaintiff, lessee, maintained that it did *not* owe the tax on one-fourth of its

148. Art. 2452, La. Civil Code of 1870.
149. 192 La. 1, 187 So. 35 (1939).
150. 200 La. 614, 8 So. (2d) 618 (1942).
151. 200 La. 753, 8 So. (2d) 689 (1942).

seven-eighths producers' share of the oil as under the lease from the State of Louisiana, this fraction belonged to the state, and under the constitutional authorization for the levy of the severance, it was "to be paid proportionately by the owners thereof at the time of severance."[152] It was conceded that:

> "The settled jurisprudence, therefore, is that, under an oil and gas lease contract in which the lessor reserves a stipulated fractional royalty interest, the parties own the oil or gas jointly at the time of severance, the lessor owning the fractional interest reserved as royalty and the lessee owning the remainder, and that the severance tax must be paid by the parties in proportion to the respective interests owned by each."[153]

The plaintiff contended that the state was the owner not only of one-eighth, customary landowner's share, but also owned one-fourth of the other seven-eighths under an additional clause of the lease reading as follows: " ' "Lessee also agrees to pay $50,000.00 out of ¼ of ⅞ of first oil produced and saved." ' "[154] The court very properly construed that clause to mean that a bonus or additional compensation of $50,000 was to be paid the state for the lease on a deferred payment plan and that the *ownership* of a full seven-eighths was in the lessee at the moment of severance and hence that the lessee owed the tax in proportion to this ownership.

The *French v. Querbes*[155] case again announces that the mere execution of one lease by two or more persons owning separate tracts of land does *not* raise a presumption that the parties intended a joint or community lease and such intention has to be found from other facts and circumstances. Applying the "intention" test of *United States Gas Public Service Company v. Eaton*[156] the court found that the parties agreed that the disputed royalty was to be paid from the tract from which it was produced. "The statement in the mineral deed that it is subject to the lease was inserted therein solely to protect the plaintiffs as warrantors and not for the purpose of showing that the lessors intended to make a joint or pooling lease."[157]

---

152. 200 La. at 758, 8 So. (2d) at 691.
153. 200 La. at 762, 8 So. (2d) at 692.
154. 200 La. at 758, 8 So. (2d) at 690.
155. 200 La. 654, 8 So. (2d) 631 (1942).
156. 153 So. 702 (La. App. 1934).
157. 200 La. 654, 664, 8 So. (2d) 631, 635 (1942).

Action was brought in *Coyle v. North American Oil Consolidated*[158] to have certain oil leases cancelled for failure of lessee to drill offset wells, and in the alternative for cancellation for abandonment. The land covered by the lease contained two strata of oil-bearing sands—one to a depth of 5,500 to 8,000 feet, the second below 8,000 feet. Oil was being produced from the deeper stratum only, by the lessees, and the lessors' complaint was that the shallower deposit was being drained by adjacent developments carried on indeed by the defendants, who also owned the adjacent lease. Plaintiffs failed to sustain their burden of proof to show that the alleged drainage was taking place, as it was demonstrated by defendants that when they drilled through the first stratum they had examined cores at proper depths and had found no oil. It would have been manifestly to defendants' advantage to save the extra cost of drilling to the second level if they could have produced from the first. Experts testified that the first level was "lenticular in formation," i.e., "spotty" as to location of oil pools and had evidently "pinched out" in plaintiff's area. In the course of the opinion the court observed that:

> "We are not called upon to decide in this case, and do not decide, the question whether, in a case of this kind where it is shown that there are two or more separate and distinct strata of oil-bearing sands in land, each stratum should be considered a separate and distinct oil field."[159]

The court originally understood that parties had conceded that these strata were *separate fields,* which defendants later strenuously denied, as indicated in the opinion after rehearing. The alternative plea of abandonment was remanded on first hearing because under certain pooling leases, all interested parties were thought not to have had a chance to be heard. Later, these parties appeared and urged the court to pass on the alternative demand, and the rehearing is concerned therewith. The intention of the parties as disclosed by the lease agreement was said to be decisive of this abandonment plea, and since the lease called simply for production in paying quantities from the area designated by surface boundaries to sustain the life of the lease, and oil *was* being produced from the deeper stratum in paying quantities, no abandonment was found.

158. 201 La. 99, 9 So. (2d) 473 (1942).
159. 9 So. (2d) at 475.

Suppose one or both parties did not even know of the possibility of existence of two strata. How could their "intention" be deduced from an instrument making no provision for such a contingency? What will be the court's reaction to the idea of separate fields by vertical rather than surface boundaries? Answers to these questions suggested by the case must await proper future presentation.

The case of *Gulf Refining Company v. Bagby*[160] is concerned with the review of many facts and of precepts of the law of negotiable instruments resulting in the decision that certain mineral lease rentals had been paid in time and hence that the life of the lease had been preserved. The theory of the lower court upon which cancellation had been grounded was that the lease money had not been actually paid until the cashing of the check representing the payment. The supreme court found that the *deposit* of the check to the lessor's credit satisfied the terms of the lease, and this deposit was within the time limit.

The case of *Wadkins v. Wilson Oil Corporation*[161] affirms the judgment of the lower court cancelling a mineral lease because of the lessee's failure to "fully develop, under the implied obligations of the lease."[162] The opinion is concerned with interesting scientific data about depths, formations, sands and progressive methods of production as well as figures indicating financial returns, as compared with those of adjacent leases. That the lessee failed to try the new acidizing process found successful by other producers under the same conditions—chalk rock formation—was perhaps the decisive fact. The reasonable production test laid down in previous decisions was applied. The lessee, by denying his obligation, blocked his plea of not having been put in default under the settled jurisprudence. Furthermore, there had been many informal demands made, that new production methods be used, to which no attention had been paid by lessee.

Royalty

Royalty per se. The case of *Martel v. A. Veeder Company, Incorporated,*[163] adds another chapter to the interesting story of royalty per se, or without leasing control by the owner, begun in the landmark case of *Vincent v. Bullock,*[164] again confirmed

160. 200 La. 258, 7 So. (2d) 903 (1942).
161. 199 La. 656, 6 So. (2d) 720 (1942).
162. 199 La. at 658, 6 So. (2d) at 721.
163. 199 La. 423, 6 So. (2d) 335 (1942).
164. 192 La. 1, 187 So. 35 (1939).

by this decision. Mrs. Martel, plaintiff, bought a 1/32 royalty interest in a certain plantation, the Amanda, from defendant company, which reserved all leasing rights and delay rentals. This plantation was leased together with several other tracts under an agreement that royalties would be paid to the respective owners of the various tracts, if and when oil was produced on any specific tract. Thus, as to the *lessors,* the lease was not "joint," so far as division of production was concerned. Oil was produced on the lease, but *not* from the Amanda plantation, so it was held that Mrs. Martel had no share in this production. Certain instruments signed by Mrs. Martel, though not sufficient to effect a technical estoppel against her, were weighed by the court in determining her understanding of her purchase and the intention of the parties. Prescription of ten years from date of purchase of this royalty was said to have run against plaintiff, as production (the happening of that uncertain future event of the *Vincent-Bullock* case) had *not* occurred within the period set by law. The prescriptive period was held *not* to have been interrupted by filing of suit on the last day. It was also held that the period would *not* be lengthened by the continued existence of the lease. The event—production—simply did not happen on plaintiff's tract within the ten years. This decision should further discourage purchasing of royalty per se as this hope of production might be defeated on the very day preceding the bringing in of a well if the court adheres to the flat rule of this case eminently correct under the original theory of Vincent-Bullock. Some indication of a veering from that theory is observed, however, in discussion of consent to *obstacle,* a precept of servitude. The *Vincent-Bullock* case definitely declared purchase of this type of royalty was not purchase of servitude, because no use was contemplated, but the right was one running with the land dependent upon the happening of a future uncertain event, i.e., production. The case under discussion adhered to the *Vincent-Bullock* case so far as the decision is concerned, but in the course of the opinion appears the statement on obstacle—irrelevant under the *Vincent-Bullock* theory—and also an incidental remark that this real right of the *Vincent-Bullock* case "characterized" as a royalty interest is "in the nature of a personal servitude."[165] Certain straws like this found in these "obstacle" discussion eddies *might* indicate an undercurrent of the court's thought to be flowing away from the channel of the *Vincent-Bullock* theory.

165. 199 La. 423, 439, 6 So. (2d) 335, 340 (1942).

Whether the court is presently engaged in "hedging" in regard to this theory remains to be seen of course. If they are, it is a necessary and recognizedly desirable technique of the judicial sculptural art in creating acceptable legal figures for the guidance and practical use of the public. There is much to be said for the conveyancer, the abstractor, the counselor, the layman in a simplification and compression of the law of mineral rights to the two now fairly well-defined fields of lease and servitude where prescriptive rights and other troublesome problems are settled. However, the loss in intellectual enjoyment to the student and commentator would be irreparable!

Rent royalty (condensate). The plaintiff's contention in *Roy v. Arkansas-Louisiana Gas Company*[166] was that he, the lessor, should be paid for distillate (condensate) produced at the rate agreed upon in the lease under the *oil* royalty clause rather than under the *gas* royalty clause. A most interesting and informative and well-organized dissertation by the district court judge was set forth which was adopted by the supreme court in deciding against the plaintiff under the clauses of the lease. The "oil" clause of the lease spoke of "oil produced and saved"[167] and provided for one-eighth royalty in *oil,* delivered in pipe line or storage at lessor's option. The "gas" clause provided for payment in money at one-half of one cent per thousand cubic feet including gasoline, whether recovered by "drips, absorption plant or otherwise." The substance in question was a colorless fluid which has been labeled by different names at different times and in different localities—"water white oil," "white oil," "drip," "drip gasoline," or "distillate" (since about 1935), and now according to one survey on gas recycling and distillate recovery—"condensate," which is said by that author to "most exactly describe the product and [to be] . . . finding general acceptance"[168] because it seems the latter term is a production term, while distillate has refining or manufacturing connotations. This substance was not processed in any way and in the case under discussion was not even separated from the gas as it came to the surface. Expert testimony was received on the problem of what this substance was, how it existed below ground, et cetera. A history of terminology was given; the history and evolution of lease forms was analyzed; the

166. 200 La. 233, 7 So. (2d) 895 (1942).
167. 200 La. at 237, 7 So. (2d) at 896.
168. Weber, Recycling Trend Expands with Bigger Gas Reserves, Gas Recycling and Distillate Recovery, p. 2.

jurisprudence of Louisiana and other states was examined dealing with casinghead gas and other types of by-product from both oil *and* gas wells. The decision was reached finally, however, by judicial interpretations of the pertinent clauses of the lease and the interpretation and intention of the agreement by the parties themselves as evidenced by their actions, and statements. The plaintiff's claim against the sublessee for cancellation for failure to pay the posted price was rejected because of his agreement to the division order and lack of any previous complaint about payment. The case is a repository of excellent material not found elsewhere in any one place.

II. TORTS

Res Ipsa Loquitur

The much noted case of *Ortego v. Nehi Bottling Works*[1] involved a suit brought against the Nehi Bottling Works for injuries sustained when a bottle of a carbonated beverage exploded, due to excessive gas pressure or to the use of a defective bottle. Courts deciding these bottling cases have adopted two completely distinct approaches. A considerable number of recent decisions have disregarded the technical lack of privity and found an "implied warranty" of fitness for intended use. A majority of American courts have chosen to base the consumer's cause of action upon a tort theory of negligence, and in many cases reach very favorable results for the consumer by application of the doctrine of res ipsa loquitur. While our Louisiana courts have studiously avoided the implied warranty theory,[2] they have often given practically the same full measure of relief by recognizing an almost irrebuttable presumption of negligence under the res ipsa loquitur theory.[3] The *Ortego* case, which is the first bottling case to reach the Louisiana Supreme Court, reaffirmed frequent court of appeal holdings that negligence was the proper ground of recovery and put an end to a controversy between the first and second circuit courts[4] as to the applicability of the res ipsa loqui-

1. 199 La. 599, 6 So. (2d) 677 (1942), noted in (1942) 4 LOUISIANA LAW REVIEW 606, (1942) 1 Loyola L. Rev. 240, (1942) 17 Tulane L. Rev. 142.

2. Russo v. Louisiana Coca Cola Bottling Co., 161 So. 909 (La. App. 1935).

3. Dye v. American Beverage Co., 194 So. 438 (La. App. 1940). See other Louisiana cases collected in Note (1942) 4 LOUISIANA LAW REVIEW 606, 609, n. 14.

4. For a discussion and collection of prior Louisiana decisions, see Note (1942) 4 LOUISIANA LAW REVIEW 606, 608.

tur doctrine to this group of cases. It not only held the doctrine applicable, but also recognized the prima facie case of negligence, thus made out, as virtually irrebuttable. In answer to the defendant's argument that the bottles had been secured from a reputable manufacturer and thoroughly tested, and that the latest approved appliance was used to prevent excessive gas pressure, Justice Fournet succinctly remarked, "despite all this evidence the fact remains that the bottle did explode."[5]

It is interesting to compare the *Ortego* decision with the same court's holding in *Davis v. Teche Lines, Incorporated,*[6] decided shortly thereafter. In that case a fire, started when defendant's employees were filling the gas tank of a bus, destroyed the plaintiff's property. It was assumed without argument that the "res ipsa loquitur" doctrine was applicable, but the court held that the defendant had sufficiently refuted the prima facie case of negligence by divulging facts showing that due care had been exercised in re-fueling the bus. Mr. Justice Ponder declared: "The burden or duty of explanation is not satisfactorily to account for the occurrence and to show the actual cause of the injury, but merely to rebut the inference that he had failed to use due care."[7]

There is nothing inconsistent in these two somewhat diverse holdings as to the strength of the prima facie case of negligence which the defendant must overcome in a res ipsa loquitur situation. The weight of the presumption of negligence is not necessarily uniform, but may vary according to the situation out of which it arises. In bottling cases, where a bottle bursts or contains some deleterious substance, the presumption that the bottling company was negligent is very strong. However, in situations such as that presented in the *Davis* case, the res ipsa loquitur doctrine may properly be applicable, but the presumption of negligence is much weaker and more easily refuted.

Conflicting Rules of the Road

Rules of the road, whether established by statute or municipal ordinance, are useful to establish general standards of conduct for motorists. However, a motorist having the technical right

5. 6 So. (2d) 677, 680 (La. 1942).

6. 200 La. 1, 7 So. (2d) 365 (1942), noted in (1943) 5 LOUISIANA LAW REVIEW 344.

7. 200 La. 1, 8, 7 So.(2d) 365, 367 (1942). Defendant had showed a careful method of operation by the attendants, but had failed to explain the exact cause of the fire.

of way is chargeable with contributory negligence if he approaches an intersection at a high rate of speed and without keeping a proper lookout;[8] or if he goes ahead and tries to beat the car on the less favored street after he becomes, or should have become, aware that the other driver is not going to yield the right of way.[9] This principle came into play in *Burden v. Capitol Stores, Incorporated*[10] which arose out of a collision between two vehicles which reached a street intersection at the same time. The respective drivers proceeded forward, each expecting the other to stop or slow up to let him pass, and the inevitable collision resulted. Plaintiff relied upon a Baton Rouge ordinance giving the street upon which he was travelling a right of way. Defendant relied upon a provision in the State Traffic Code[11] that where two vehicles approach or enter an intersection at approximately the same time the driver approaching from the right shall have the right of way. The trial court, court of appeal, and the supreme court agreed that irrespective of which driver was entitled to the right of way, the drivers of both cars were negligent, and that therefore neither party could recover damages for his resultant injuries.[12] Thus a really controversial issue presented by briefs of counsel remains undecided. In case of conflict does the general provision of the State Traffic Code or the more particular rule of the city ordinance control? While the weight of authority is probably against this view, it is believed that a practical solution of this conflict would be to recognize the city ordinance as controlling.[13] Certainly the general right of way provision in the State Traffic Code was not intended to nullify the many city ordinances seeking to promote orderly traffic by establishing preferential right of ways in favor of certain streets.

Existing Conditions Aggravating Damages.

Broughton v. T.S.C. Motor Freight Lines, Incorporated[14] involved the measure of damages recoverable in a negligent injury case. Defendant's truck had negligently skidded into the rear of plaintiff's car. The impact was not particularly severe, but was sufficient to throw plaintiff against the steering wheel of her car,

8. Bagley v. Standard Coffee Co., 168 So. 350 (La. App. 1936).
9. Wyble v. Lafleur, 164 So. 461 (La. App. 1935).
10. 200 La. 329, 8 So.(2d) 45 (1942), noted infra p. 349.
11. State Highway Regulatory Act, La. Act 286 of 1938, tit. 2, § 3, rule 11 [Dart's Stats. (1939) § 5216].
12. LeBlanc, J., in 4 So.(2d) 62, 66 (La. App. 1941).
13. See note infra p. 349.
14. 200 La. 421, 8 So.(2d) 76 (1942), noted infra p. 338.

resulting in general contusions of the back and the stomach and a sprained neck. Plaintiff was pregnant at the time, and her claim to approximately $10,000 damages was largely based upon allegations that the accident resulted in the premature birth and resultant death of her baby. The court held that these allegations were not sufficiently proved, and also dismissed a considerable part of plaintiff's personal suffering as normal labor pains. However, the court did award plaintiff a judgment of $500 for the physical suffering and mental anguish actually caused by the negligent impact. In recognizing plaintiff's right to such damages, Mr. Justice McCaleb declared, "The fact that plaintiff was pregnant at the time of the accident is a factor which should be taken into consideration in fixing her damage for, unquestionably, the traumatic injuries aggravated the suffering which she would have normally endured. Moreover, it is not unreasonable to conclude that the plaintiff, in her delicate condition, suffered greater mental anguish than she would have experienced under ordinary circumstances."[15] If, in the instant case, it had been proved that a miscarriage actually resulted, defendant would have been held liable for the full damages. The plaintiff's pregnancy would be treated as an "existing condition." Any special physical infirmity of the victim is treated as a part of the circumstances upon which the defendant's tortious conduct acts, and does not operate as a superseding cause breaking the chain of causation.[16]

III. CRIMINAL LAW AND PROCEDURE

A. Criminal Law

Self-Defense

In *State v. Stroud*[1] the defendant, a discharged employee of a lumber mill, had procured a pistol, engaged in a little target practice, and then returned to the company premises where he met and shot the foreman who had fired him. Defendant was indicted for "shooting with intent to murder,"[2] and urged the usual

15. 200 La. 421, 431, 8 So.(2d) 76, 79 (1942).

16. Shaffer v. Southern Bell Tel. & Tel. Co., 184 La. 158, 165 So. 651 (1936) (death by acceleration of dormant pre-existing disease); Leitz v. Rosenthal, 166 So. 651 (La. App. 1936) (deceased had arterio sclerosis which prevented ligatures used in amputation from holding because of his brittle arteries).

1. 198 La. 841, 5 So.(2d) 125 (1941).

2. Under the new Louisiana Criminal Code defendant would be indicted for an "Attempt to commit murder," with a penalty of imprisonment at hard labor for not more than twenty years. La. Crim. Code, Art. 27.

plea of self-defense. The trial court refused a special charge that " 'A defendant may plead self-defense, and at the same time, that he shot only to stop one assaulting him.' " In affirming the jury's verdict of "guilty as charged," Mr. Justice Higgins declared that "This requested charge, without any explanation, qualification or limitation, is not a correct statement of the law. If the judge had given it, it would have tended to confuse and mislead the jury."[3]

Justice Higgins then continued with a fine discussion of the explanations and qualifications which would have been necessary in order to make the requested charge proper. He first pointed out that the aggressor or one who brings on a difficulty cannot claim self-defense, unless his right of self-defense has been restored by his retreating or abandoning the difficulty to the knowledge of his adversary. This statement is in substantial accord with the rule stated in Article 21 of the new Louisiana Criminal Code that "A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows *or should know* that he desires to withdraw and discontinue the conflict." The words italicized by the writer indicate a point in which Article 21 will be slightly more favorable to the withdrawing aggressor than was the rule stated in the instant decision.

Mr. Justice Higgins' second point was that where one is free from fault and has a right of self-defense, he may only use such force as "a reasonable and prudent man would consider necessary to repel the assault." Thus where the assault does not endanger life or threaten serious bodily harm, one is not justified in shooting and killing his adversary. The new Louisiana Criminal Code places a similar limitation upon the justifiable use of force or violence in self-defense. Article 19 makes it clear that the force used in defense of one's person must be "reasonable and apparently necessary," and Article 20 (1) further provides that a homicide in self-defense is only justifiable where one "reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm, and that the killing is necessary to save himself from that danger." It should be noted that prior Louisiana jurisprudence,[4] and the hoped for interpretation of the "reasonable belief" requirements of the new Criminal Code,[5] is to the

3. 198 La. 841, 850, 5 So.(2d) 125, 128 (1941).
4. State v. Halliday, 112 La. 846, 36 So. 753 (1904).
5. See Reporters' Comment to Article 20, Louisiana Crim. Code, p. 14.

effect that a person's belief that he is in danger of losing his life or receiving great bodily harm is not reasonable unless it is founded upon an actual physical attack or hostile demonstration. That limitation is particularly applicable to the apparent facts of the *Stroud* case.

Louisiana decisions have formed no intelligible pattern on the controversial question as to whether one who is in the right may stand his ground and kill, or is obligated to retreat if he may do so with safety.[6] For example, suppose an aged man starts after an agile youth with a pitch fork. May the youth "stand his ground" and kill in protection of his life; or must he resort to the less manly, but equally safe, alternative of flight? Language used in Mr. Justice Higgins' opinion might be construed as recognizing a right to "stand your ground" and kill in self-defense,[7] but such a dictum inference should be of slight weight in a future case directly presenting the issue. This is especially true now in view of express statement in Article 20 of the new Louisiana Criminal Code that one must reasonably believe "that the killing is *necessary*" to save himself from the threatened danger. The possibility of safely escaping by retreat, as well as other possibilities of avoiding the danger by forcible means short of killing, are all factors which a jury must consider in determining this controlling question of the reasonable and apparent necessity of taking the antagonist's life.

Negligent Homicide

Homicides caused by the reckless driving of automobiles were originally tried as manslaughter, but juries were reluctant to convict the motorist of that serious felony. As a result, thirty-four states, including Louisiana, have enacted statutes making such negligent killings a lesser offense. In *State v. Vinzant*,[8] the Louisiana Supreme Court was called upon to construe our 1930 involuntary homicide statute;[9] and pointed out that the defendant who had caused a death by the reckless driving of his automobile could be prosecuted for either manslaughter or the lesser offense of involuntary homicide, at the discretion of the district

6. See authorities cited in the Reporters' Comment to Article 20 of the Louisiana Criminal Code, pp. 14, 15.

7. Justice Higgins states [5 So.(2d) 125, 128], "But, if one is free from fault and has the right to stand his ground and repel force with force, he has no right to use force other than that which a reasonable and prudent man would consider necessary to repel the assault."

8. 200 La. 301, 7 So. (2d) 917 (1942).

9. La. Act 64 of 1930 [Dart's Crim. Stats. (1932) §§ 1047-1052].

attorney.[10] After concluding that the indictment in the principal case was for involuntary homicide, Justice Odom continued with a very clear and accurate analysis of the somewhat cumbersome wording of the Louisiana statute. In defining the requisite "grossly negligent or grossly reckless manner," he declared, "It is the 'want of that diligence which even careless men are accustomed to exercise'," but is not synonymous with "wilfully and wantonly" which imply the intentional and deliberate disregarding of the safety of others.[11]

Under the new Louisiana Criminal Code, all negligent killings will be prosecuted as negligent homicide,[12] with a penalty which is appropriately less than that for the more serious crime of manslaughter. Criminal negligence is defined in the Criminal Code as a "gross deviation" below the standard of care of the reasonably careful man.[13] As thus defined, criminal negligence requires more than the ordinary lack of due care sufficient for civil liability, and is virtually synonymous with the definition of "gross negligence or gross recklessness" enunciated in the *Vinzant* decision.[14]

Issuing Worthless Checks

The defendant, in *State v. Courreges*,[15] had obtained $112 by means of worthless checks known to be invalid since defendant's checking account had been closed the day before. The Louisiana Supreme Court affirmed a conviction for violation of the "Confidence Game" statute,[16] thus continuing a properly liberal interpretation of that statute which has served to supplement the more technical requirements of the crimes of larceny, obtaining by false pretenses and embezzlement. One may wonder why defendant was not prosecuted under the more specific provisions of the "Worthless Checks" statute[17] which was enacted subsequent to the "Confidence Game" statute, and might have been construed as exclusively applicable to this specific offense.[18] Rather than to

10. 200 La. 301, 308, 7 So.(2d) 917, 920 (1942).
11. 200 La. 301, 315, 7 So.(2d) 917, 922 (1942).
12. La. Crim. Code, Art. 32.
13. Id. at Art. 12.
14. See Note (1942) 5 LOUISIANA LAW REVIEW 136.
15. 201 La. 62, 9 So. (2d) 453 (1942).
16. La. Act 43 of 1912 [Dart's Crim. Stats. (1932) § 946].
17. La. Act 209 of 1914 [Dart's Gen. Stats. (1939) §§ 676, 677].
18. Previous Louisiana cases had permitted such prosecutions under the "Confidence Game" statute. State v. Bigner, 163 La. 473, 112 So. 303(1927) (obtaining goods by bogus check). Cf. State v. Young, 165 La. 120, 115 So. 407 (1927) where it was held that a defendant, accused of stealing automobile

indulge in what is now an academic question of statutory interpretation, it is interesting to analyze the offense committed in light of the new Louisiana Criminal Code. The facts of the case clearly bring the offender within the general *theft* article (Article 67). The express purpose of this article is to abolish the technical and purposeless distinctions between the various stealing crimes, which include larceny, embezzlement, obtaining by false pretenses, the confidence game, and the numerous specialized forms of these major offenses. Under Article 67, all cases where one person takes, misappropriates or fraudulently obtains the property of another will constitute *theft*[19] and the facts of the instant case fall clearly within the language of that article.[20] The case would also come within the more particularized offense of issuing worthless checks (Article 71). Here is a situation where Article 4[21] of the new Criminal Code becomes significant. Under the liberal rule of construction enunciated in that article, the prosecutor would have an option to proceed either under the general provision for theft (Article 67), or under the specific provision for issuing worthless checks (Article 71). It is submitted that, except where the offense is particularly aggravated, so as to call for the more serious penalties available upon a conviction for theft,[22] a prosecution for issuing worthless checks is more appropriate.

Gambling—Slot Machines

In *State v. Croal*[23] defendant was charged with permitting a slot machine on his premises in violation of Louisiana Act 107 of 1908.[24] He filed a demurrer averring specifically that the machine

---

parts and accessories, could not be convicted under the general larceny statute, but must be prosecuted under the more recently enacted special statute (La. Act 33 of 1926) punishing the stealing of automobile parts, accessories, or equipment.

19. See Bennett, The Louisiana Criminal Code (1942) 5 LOUISIANA LAW REVIEW 6, 37.

20. "Art. 67. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. . . ." La. Crim. Code, Art. 67.

21. "Art. 4. Prosecution may proceed under either provision, in the discretion of the district attorney, whenever an offender's conduct is:

"(1) Criminal according to a general article of this Code and also according to a special article of this Code. . . ."

22. "Issuing Worthless Checks" is a misdemeanor and the maximum penalty is imprisonment for one year. "Theft," where the misappropriation or taking amounts to a value of $100 or more, is a felony and carries a maximum penalty of ten years at hard labor.

23. 198 La. 820, 5 So.(2d) 16 (1941).

24. Dart's Crim. Stats (1932) § 1008.

seized on his premises was not a "gambling device," but was merely a contrivance for selling mint tablets by the dropping of a nickle in the slot. The case was submitted on an agreed stipulation of facts minutely describing the construction of the machine and its modus operandi. The trial court sustained the demurrer, holding that the machine described was not such a "slot machine or similar mechanical device" as that which was banned by the statute; whereupon the state invoked the supervisory jurisdiction of the supreme court by a writ of certiorari. Since the information was otherwise vitiated by a failure to allege certain essential elements of the statutory offense,[25] the supreme court did not deem it necessary to pass upon the trial court's ruling as to the nature of the machine. Thus the real and signifiicant issue which the state sought to present in the *Croal* case remains undetermined. The old slot machine statute was repealed by the 1942 legislature, but the simple and direct language of Article 90 of the new Criminal Code will fully cover those who operate, or assist in the operation of these tantalizing and effective devices for depriving the gullible of their cash. Article 90 defines gambling as "the intentional conducting, or directly assisting in the conducting, *as a business,* of any game, contest, lottery, or *contrivance* whereby a person risks the loss of anything of value in order to realize a profit." (Italics supplied by writer). In many instances the slot machine delivers coins when lady luck temporarily smiles upon the victim. In such cases there can be no doubt but that the owner of the machine, and the business man who assists by permitting the machine in his establishment, are both guilty of the crime of gambling. Where the machine, as claimed by defendant in the *Croal* case, only returns mints no offense is committed. If, however, the player striking a lucky combination is entitled to or receives additional remuneration, the operators are violating Article 90. In this latter situation, the principal question is one of fact, rather than of law.

B. Criminal Procedure

Bail

Provisions for release of the accused on bail represent a compromise of conflicting considerations. On the one hand, the ac-

25. The bill of information failed to charge that the mechanical device was "in operation," or that "business was conducted" upon the defendant's premises where the machine was seized.

cused is presumed to be innnocent, and thus it becomes important to provide that he shall not be required to suffer incarceration during the sometimes long period pending a final determination of his case. On the other hand, the accused may be found guilty (the grand jury or the district attorney have indicated their belief as to this probability), and a guilty defendant is likely to flee from justice if temporarily released. The rules governing the admission of defendants to bail[1] were developed with both of the above considerations in mind. While they seek to give the accused his liberty pending trial, they must also give the state some assurance that he will be in court when his case is called for a hearing. Thus, a person charged with a capital offense, where the presumption of guilt is great, may not be admitted to bail.[2] In other cases the amount of the recognizance shall be fixed at a sum which will provide a reasonable assurance of the accused's appearing at the trial.[3] In *State v. Chivers*,[4] a defendant had been charged with embezzlement of a sum in excess of twelve thousand dollars and his appearance bond was fixed at five thousand dollars. In upholding the trial court's refusal to reduce the amount of the bond, the Louisiana Supreme Court stressed the gravity of the offense which carried a maximum penalty of fifteen years at hard labor. In answer to the defendant's plea that he was financially unable to make the bond, the court declared that while the judge fixing bond should give some consideration to the ability of the accused to make it, the mere inability of accused to make the bond fixed does not necessarily render the amount excessive.[5] While the supreme court refused to announce any stereotyped formula for the amount of bail bonds, it did indicate that the gravity of the offense charged was of first importance, and that the ability of the accused to make the bond was also entitled to consideration. The ability of accused to make the bond required is not specifically set out in Article 86 of the Code of Criminal Procedure as one of the considerations for determining the amount of bail bond.[6]

1. Arts. 85-112, La. Code of Crim. Proc. of 1928.
2. Id. at Art. 85.
3. Id. at Art. 86. The factors to be considered are seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial of the cause.
4. 198 La. 1098, 5 So. (2d) 363 (1941).
5. It is also clear from the supreme court's opinion that the accused did not satisfy the court that it was actually impossible for him to make the bond fixed.
6. Cf. State v. Aucoin, 47 La. Ann. 1677, 18 So. 709 (1895), decided prior to the Louisiana Code of Criminal Procedure of 1928.

Prescription

Article 8 of the Code of Criminal Procedure[7] provides that prosecution for all crimes, with the exception of certain enumerated felonies, is prescribed "within one year after the offense shall have been made known to the judge, district attorney or grand jury having jurisdiction." Where an indictment is found, or an information is filed, it has the effect of interrupting the running of prescription. However, it was held in *State v. Smith*[8] that an information filed in the wrong parish, and overruled for lack of jurisdiction, did not serve to toll the running of the prescriptive period. For the filing of an indictment or information to interrupt the running of the prescriptive period, it must be pending in a court having jurisdiction of the offense charged.

In *State v. Guillot*,[9] an information for burglary, filed on February 26, 1941, charged the offense to have been committed "on or before February 27, 1940." At the outset of the trial, defense counsel announced that he would restrict the state to proof of the burglary on February 27, 1940, for if it had been committed prior to that time, the crime was prescribed. The jury returned a verdict of guilty, whereupon defendant moved for a new trial, urging the one-year prescription period. In upholding the trial court's denial of defendant's motion, the Louisiana Supreme Court held that the question of prescription had already been presented, though in an informal sort of way, to the jury and they had decided adversely to defendant when he was convicted of the crime charged. The accused had no right to disregard this holding and insist on presenting the same issue to the trial judge. Also, he was held to have waived his right to urge the plea of prescription by a failure to file a special plea before trial and insist upon a ruling thereon.

Where the indictment shows on its face that the crime is already prescribed, as where the indictment is dated over a year after the stated time of the offense, the plea of prescription may even be raised after conviction by a motion in arrest of judgment.[10] The indictment in *State v. Guillot* did not come within this rule. The words "on or about" were treated as surplusage, and the real date charged was deemed to be February 27, 1940,

7. See amendments by La. Acts 147 and 323 of 1942.
8. 200 La. 10, 7 So. (2d) 368 (1942).
9. 200 La. 935, 9 So. (2d) 235 (1942).
10. State v. Foley, 113 La. 206, 36 So. 940 (1904).

which was just within the one-year prescriptive period. Thus it could not be held that the offense was prescribed on the face of the indictment.

Venue

Article I, Section 9 of the Louisiana Constitution provides that "all trials shall take place in the parish in which the offense was committed, unless the venue be changed; . . . ." This provision was incorporated verbatim in Article 13 of the Louisiana Code of Criminal Procedure of 1928. Section 988 of the Revised Statutes of 1870, which was considered unrepealed by the Louisiana Code of Criminal Procedure of 1928, provided further that when a crime was begun in one parish and completed in another, it might be dealt with and the offender prosecuted in either parish. At first the Louisiana Supreme Court held this provision unconstitutional, but has recently come around to the correct conclusion that it is clearly constitutional.[11] Still, however, the venue problem has persisted to plague district attorneys and courts and to provide a frequent technical defense for astute defense counsel.

The two latest venue decisions, while presenting familiar problems, are well considered opinions and deserving of careful analysis. *State v. Briwa*[12] was a prosecution in Orleans Parish for the publication of an alleged criminal libel which appeared in "The Farmers' Friend," official organ of the Louisiana Farmers' Protective Union. The papers were printed by a New Orleans commercial printer, packed in bundles, delivered to trucks of the union and taken to the union's home office in Hammond, Louisiana; and then they were sent to the paper's subscribers and otherwise distributed throughout the state. In sustaining the plea of defense counsel to the territorial jurisdiction of the Orleans Parish Court, Justice Higgins declared that the offense was committed in Tangipahoa Parish at the home office of the union. The printing of the papers, and their ultimate circulation in Orleans Parish, were brushed aside as immaterial. The often

11. In State v. Moore, 140 La. 281, 72 So. 965 (1916) the Louisiana Supreme Court held Section 988 unconstitutional, and this view was reasserted in State v. Smith, 194 La. 1015, 195 So. 523 (1940). Shortly thereafter, the court declared, by way of dictum, that "we are not aware of any constitutional objection to the provision in Section 988 of the Revised Statutes, with reference to a crime that was begun in one parish and completed in another." See State v. Hart, 195 La. 184, 206, 196 So. 62, 69 (1940). See Comment, The Resurrrection and Constitutionality of a Liberal Criminal Venue Provision (1942) 4 LOUISIANA LAW REVIEW 321.

12. 198 La. 970, 5 So. (2d) 304 (1941).

cited case of *State v. Moore*[13] was relied upon for the proposition that the paper was published, and the libel committed, in Hammond, Louisiana, where the papers were first issued and put into the process of circulation by the Farmers' Protective Union. This parish, according to Justice Higgins, was the *only parish* where a prosecution for the criminal libel might be instituted. The offense was committed by the original publication, and since there was only one offense the further circulation did not constitute criminal libel. It is interesting to note that Justice Higgins relies upon, and quotes extensively, from *State v. Moore,* a case decided when the supreme court was of the opinion that Section 988 of the Revised Statutes was unconstitutional, and that no offense was triable in more than one parish. It might well have been found that the criminal libel was triable in either Orleans or Tangipahoa Parish, and certainly no great injustice or hardship would have resulted.

The troublesome venue problem again made its presence felt in *State v. Cason.*[14] State officials were prosecuted in Orleans Parish for the embezzlement[15] of public monies entrusted to their care. The misappropriations had been effected by the payment of salaries to a number of individuals for services never actually performed. The money had been entrusted to defendants, and they were under a duty to account for the same, in East Baton Rouge Parish. The payments were by means of checks sent to the "deadheads" in New Orleans. The checks were cashed at New Orleans banks and were then forwarded to the City National Bank in Baton Rouge where they were presented for payment, honored by the drawee bank, paid out of state funds, and the state's account debited for the amount thereof. In holding that the offense was committed in East Baton Rouge Parish, and that prosecution could not be maintained in Orleans Parish, Justice McCaleb placed little reliance upon previous judicial declarations that the embezzlement takes place where the money is entrusted or where the duty to account is fixed. He declared that these were merely "presumptions" which "can be indulged in only in the absence of proof showing that the conversion of the monies took place within another jurisdiction."[16] Then, relying heavily

13. 140 La. 281, 72 So. 965 (1916).

14. 198 La. 828, 5 So. (2d) 121 (1941).

15. Under the 1942 Louisiana Criminal Code, the offense would be "Theft." See Art. 67, Louisiana Criminal Code, and Comments thereto.

16. 198 La. 828, 835, 5 So. (2d) 121, 123 (1941). It is interesting to note that East Baton Rouge Parish was the proper venue by each of these tests.

upon the supreme court's recent decision in the parallel case of *State v. Smith*,[17] he concluded that the embezzlement had clearly taken place in East Baton Rouge Parish where the checks, already cashed by the "deadheads," were presented and honored by the City National Bank. If *one* parish must be chosen as the situs of the crime, the East Baton Rouge Parish was properly chosen. Again, it may be suggested that the offense might well have been considered as a continuing offense triable in either East Baton Rouge or Orleans Parish; for a rather "substantial element" of the offense took place in the latter parish.[18]

The venue provision in Article 13 of the Louisiana Code of Criminal Procedure of 1928 was liberalized by a 1942 amendment.[19] It is hoped that the Louisiana Supreme Court will interpret this amendment so as to effect a departure from the technical venue limitations of our existing jurisprudence, and permit prosecution in any parish having a substantial connection with the offense charged. Such an interpretation would permit prosecution in *either* parish in both the *Briwa* and the *Cason* cases.

Indictments

Article 3 of the Louisiana Code of Criminal Procedure adopted a rule, already stated in Louisiana jurisprudence, that a jury indictment is not valid unless it has been properly endorsed "A True Bill" and that endorsement signed by the foreman of the grand jury. In *State v. Stoma*,[20] the Louisiana Supreme Court annulled and set aside a conviction of rape which was had under an indictment which had not been thus endorsed and signed by the foreman of the grand jury. The indictment was bad on its face and the proceedings thereunder were fatally defective; especially in the absence of an entry in the minutes indicating that the indictment had been read in open court in the presence

17. 194 La. 1015, 195 So. 523 (1940) discussed in The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 385.

18. The district attorney contended that under the liberal provision of Section 988 of the Revised Statutes of 1870 prosecution might be brought in either parish; but the supreme court held that the crime was entirely consummated in East Baton Rouge Parish and was not such a "continuing offense" as was contemplated by that provision.

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

20. 199 La. 529, 6 So.(2d) 650 (1942).

of the grand jury. The state took the position, on a rehearing, that the case should be remanded so that the record might be corrected and completed to show that the indictment had actually been properly endorsed and signed by the foreman of the jury. The state was prepared to prove, by resort to the indictment itself, that the omission of such endorsement and signature from the transcript of the record was an inadvertent omission or typographical error. The majority of the supreme court held that the suggestion of incompleteness of the record came too late after the case had once been submitted to that court on the record as made up and decided by it. Mr. Justice Higgins (dissenting) unsuccessfully argued that since the indictment was unquestionably valid, the court should not permit defense counsel to thwart justice by an escape from a verdict and sentence upon a mere technicality. The decision in *State v. Stoma* definitely indicates that both parties in a criminal proceeding must follow the rules set out in the Code of Criminal Procedure. If the state sleeps at the switch and does not seek to correct errors in the record in seasonable time, it cannot complain that it is barred from later making the correction. While the error in the indictment had not been urged in argument in the principal case, it had been assigned as error by defense counsel and should have been disposed of by the state on the first hearing of the case.

The case of *State v. Guillot*[21] presented a familiar problem of duplicity. The information charged that defendant broke and entered a certain building "with intent to steal, and did steal, take and carry away the following property." The supreme court overruled defendant's argument that the information was duplicious in charging both burglary and larceny in the same count. The indictment was treated as one for burglary, with the larceny allegations being considered as only expressing the intention with which the burglary is committed. In such a case, the verdict of "guilty of larceny" would not be responsive or valid.

Short form indictments are expressly authorized by Article 235 of the Louisiana Code of Criminal Procedure.[22] The use of these "short forms" has plugged up a technical loophole often availed of by defense counsel seeking grounds for reversal. The

21. 200 La. 935, 9 So.(2d) 235 (1942).

22. A companion statute, La. Act 147 of 1942, serves to correlate the substance and terminology of the 1942 Louisiana Criminal Code and the 1928 Code of Criminal Procedure. Among the various amendments included, the short forms of indictment have been redrafted to conform with the changed names and nature of the various offenses.

district attorney is no longer faced with the task of laboriously spelling out the indictment in terms of the criminal statute violated. He may use the short form, and then if the defense needs further information in order to apprise them of the exact nature of the charge, they may secure it through a bill of particulars.[23] The recent case of *State v. Digilormo*[24] is a nice illustration of the advantages of the short form indictment. Defendant, who was desirous of marrying a thirteen year old girl, procured his sister to impersonate the child bride at the marriage ceremony and to forge her name on the marriage license. When the fraud was discovered defendant was charged with procuring the forgery of a public document. The general forgery statute,[25] under which the indictment was framed, was a veritable district attorney's nightmare. As a result of patch upon patch amendments its language had become exceedingly involved and cumbersome.[26] Defendant claimed that the indictment was defective in failing to follow the language of the forgery statute and failing to set forth that the forgery was procured with intent to injure or defraud "any person or any body politic or corporate." This objection was summarily overruled, the court holding that it was sufficient to follow the "short forms" of indictment authorized by the Code of Criminal Procedure.

Recusation of Judges and District Attorneys

Article 303 of the Code of Criminal Procedure specifies the causes for which the trial judge in a criminal case may be recused. The first of these is "being interested in the cause." A number of cases decided in the 1941-42 term involved an application of this provision. Those cases, replete with able dissenting opinions, turned largely upon questions of fact as to what constituted the forbidden "interest of the cause." However, a number of important legal principles emerge from those decisions.

---

23. "The granting or refusing of a bill of particulars is a matter which addresses itself to the sound discretion of the trial judge." Justice McCaleb in State v. Augusta, 199 La. 896, 903, 7 So.(2d) 177, 180 (1942). In that case the manslaughter indictment had been framed so as to fully comply with the liberal requirements of Articles 235 and 248 of the Code of Criminal Procedure, and the trial court had denied defendant's motion for a bill of particulars setting forth the manner, time, circumstances, and instrument used in the alleged slaying.

24. 200 La. 895, 9 So.(2d) 221 (1942).

25. La. Rev. Stats. of 1870, § 833; La. Act 67 of 1896; La. Act 204 of 1918 [Dart's Crim. Stats. (1932) § 936].

26. Compare the simple, yet equally inclusive, wording of the Forgery article (Art. 72) in the 1942 Louisiana Criminal Code.

In *State v. Doucet*[27] the defendant sheriff was indicted for embezzlement of public funds, alleged to have been committed by a system of overpayment of deputies and subsequent "kick backs" by them for political purposes. Defendant's motion to recuse the trial judge was predicated upon allegations that he was the organizer and president of a group which was hostile to the defendant's political faction. It was alleged that the trial judge, as an individual and political leader, had made investigations and collected evidence which resulted in the defendant's indictment. It was also alleged that the judge and his political group were interested in securing defendant's conviction to the end that he would not be re-elected as sheriff. Defendant's motion to recuse was referred by the trial judge to another magistrate and overruled by him. On appeal, the supreme court ordered the motion for recusal sustained and another judge appointed to try the case. The court declared it immaterial that the trial judge's hostile political activities had transpired prior to his induction into office as a judge; and pointed out that his previous and substantial interest did not vanish into thin air upon his ascending the judicial bench. *State v. Manouvrier*[28] was a connected case where recusal of the same trial judge was sought on the ground of hostility and interest. In that case the trial judge, holding that defendant's motion for recusal was frivolous, refused to either recuse himself or to refer the motion to a judge of an adjoining district. Again, the supreme court, assigning the reasons more fully set out in the *Doucet* opinion, held that the motion for recusation had been improperly denied, recused the regular trial judge, and appointed another judge to try the case in his stead. A similar decision was rendered in *State v. Savoy*.[29] Chief Justice O'Niell concurred in the *Doucet* decision but was of the opinion that the supreme court went too far in the *Manouvrier* and *Savoy* decisions, and it should have remanded those cases for a hearing on the motion to recuse.

A similar situation, where the allegations of political bias were even more direct and specific, was presented in *State v. Hayes*.[30] The trial judge had refused either to recuse himself or to submit a motion for recusation to a judge of an adjoining district. The supreme court held that, in view of the serious nature

27. 199 La. 276, 5 So.(2d) 894 (1942).
28. 199 La. 300, 5 So.(2d) 901 (1942).
29. 199 La. 305, 5 So.(2d) 903 (1942).
30. 199 La. 549, 6 So.(2d) 657 (1942).

of the charges made, a summary overruling of the motion for recusation constituted a denial of the right of the accused to a "fair and impartial trial," and was in direct violation of the judge's mandatory duty under Article 309 of the Code of Criminal Procedure.[31]

In the much litigated and relitigated case of *State v. Henry*[32] the industrious defense counsel again mustered sufficient legal technicalities to get their case before the Louisiana Supreme Court.[33] Defense counsel had sought to have the district attorney and his assistant recused on the ground that friends of Mrs. Henry had approached them in an effort to secure them to assist in the defense. In holding that this was not a sufficient ground for recusation, the supreme court stressed the fact that while they had been approached with a view of employment they had never "been employed or consulted as attorney for the accused" within the specific provision of Article 310 of the Code of Criminal Procedure. Under the circumstances, it was evident that the district attorney had never been placed in a position to secure confidential and privileged information which might be used to the detriment of the accused.

Double Jeopardy

Louisiana has the usual constitutional and statutory provisions that no person shall "be twice put in jeopardy of life or liberty for the same offense."[34] In *State v. Schneller*,[35] the state had prosecuted defendant for the receiving of stolen goods on July 21st. Upon the trial the court rejected evidence of the receipt of such stolen goods on July 18th. The state's attorney proceeded with the trial and the jury rendered a verdict of not guilty. Immediately thereafter the district attorney filed another information which charged receipt of the same identical property on July 18th. In sustaining the defendant's plea of former

31 Mr. Justice Odom who had dissented in the case of *State v. Savoy*, supra note 29, concurred in the majority opinion and declared: "The allegations in this case are more direct and much stronger, I think, than those made in the case of State v. Savoy." 199 La. 549, 556, 6 So.(2d) 657, 659 (1942).

32. 200 La. 875, 9 So.(2d) 215 (1942).

33. The case involved the cold blooded murder of a traveling salesman who had given Mrs. Henry and her accomplice, Finnon Burks, a free lift. After robbing their benefactor, the two criminals shot him while he was on his knees begging for mercy. For a further discussion of previous supreme court decisions in this notorious case, see The Work of the Louisiana Supreme Court for the 1940-1941 Term (1942) 4 LOUISIANA LAW REVIEW 165, 277.

34. La. Const. of 1921, Art. I, § 9; Art. 274, La. Code of Crim. Proc. of 1928.

35. 199 La. 811, 7 So.(2d) 66 (1942).

jeopardy, the supreme court pointed out that the offenses charged in the two informations were identical, and that the difference in the alleged dates was immaterial. The essential elements of the offense were that the goods had been actually stolen and that the defendant had knowledge of this fact when he received and retained possession of them. Mr. Justice Higgins, writing the opinion for the court, declared that "The unlawful possession of the goods by the defendant over a period of several days constituted a continuing offense and not a separate and distinct offense for each day that he retained the goods."[36] This analysis was also stressed in Chief Justice O'Niell's concurring opinion[37] wherein he distinguished his dissent in *State v. Schiro*,[38] which had involved the effect of a prior acquittal for maiming on a certain day. The majority of the Louisiana Supreme Court had held that this barred a subsequent prosecution for maiming on another date; but Chief Justice O'Niell dissented on the ground that the alleged maimings were separate and distinct offenses, so that an acquittal for the first would not preclude a prosecution for the second. While there may be some differences as to the practical application of the rule, the Louisiana Supreme Court justices seemed agreed that a proper test as to the appropriateness of the plea of former jeopardy is whether "the evidence required to legally secure a conviction on the charge preferred in the first indictment will be sufficient to convict on the charge preferred in the second."[39]

Jurors—Challenge for Cause

Article 351 of the Code of Criminal Procedure sets out those special causes for which a juror may be challenged; and one of these causes is that the relationship between the accused and the person injured is such "that it must be reasonably believed that they would influence the juror in coming to a verdict." In *State v. Houck*[40] defendant had been convicted of an assault on a twelve-year old girl with intent to commit rape. The only substantial ground urged in his motion for a new trial was that one of the jurors had falsely declared on voir dire examination that he was not related to the victim by either blood or marriage. A remote collateral relationship was later discovered—the victim's

36. 199 La. 811, 819, 7 So.(2d) 66, 69 (1942).
37. 199 La. 811, 822, 7 So.(2d) 66, 70 (1942).
38. 143 La. 841, 79 So. 426 (1918).
39. 199 La. 811, 818, 7 So.(2d) 66, 68 (1942).
40. 199 La. 478, 6 So.(2d) 553 (1942).

uncle being a first cousin of the juror's wife. The supreme court held that such family ties would not ordinarily be considered close enough to disqualify the juror if he revealed them on his voir dire examination. However, the court concluded that under the circumstances of the instant case service of the related juror was a sufficient basis for the granting of a new trial. Two factors were deemed significant by the court. First, the offense charged (attempted rape) "was, in its very nature, apt to arouse such intense indignation and prejudice on the part of the members of the family of the prosecuting witness as to divert their attention from the question of guilt or innocence of the party accused."[41] Secondly, the court pointed out that the juror's false answer as to his relationship had deprived defense counsel of the opportunity to challenge him for cause, and also of the further opportunity to challenge him peremptorily if the challenge for cause was overruled (the record disclosed that defendant had not exhausted his peremptory challenges in the empanelling of the jury).

In *State v. Henry*[42] the trial court had overruled defendant's challenge for cause of two prospective jurors, who were educated and intelligent men, but who had admitted having formed an opinion of defendant's guilt from having read the newspaper report of former trials. Both jurors assured the court that they could easily set aside their preconceived opinion and try the case as though they had never heard of it before. In holding that this was not reversible error, the Louisiana Supreme Court followed the clear and explicit language of Article 351(1) of the Code of Criminal Procedure.

Jurors—Effect of Erroneous Overruling of Challenge for Cause

Article 353 of the Louisiana Code of Criminal Procedure reads as follows:

> "No defendant can complain of any ruling sustaining or refusing to sustain a challenge for cause, unless his peremptory challenges shall have been exhausted before the completion of the panel; moreover, the erroneous allowance of challenges for cause affords the defendant no ground of complaint, unless the effect of such ruling is the exercise by the prosecution of more peremptory challenges than it is

41. 199 La. 478, 483, 6 So.(2d) 553, 555 (1942).
42. Supra note 32.

entitled to by law, or unless the defendant by such ruling is forced to accept an obnoxious juror."

It is a well settled and logical application of this provision that where the trial court has erroneously overruled the challenge of a prospective juror for cause the defendant has no grounds for complaint unless he exhausts his peremptory challenges.[43] The case of *State v. Breedlove*[44] presented a more difficult problem. The trial court had erroneously overruled the defendant's challenge of a prospective juror for cause. Defendant then peremptorily challenged the objectionable juror and exhausted the remainder of his peremptory challenges before the jury panel was completed. There was nothing, however, in the record to indicate that he was not entirely satisfied with the jurors finally selected to determine his case. The jury found defendant guilty of murder, and then defense counsel became very active in urging the erroneous refusal to discharge a juror for cause as a ground for setting aside the conviction. The supreme court upheld the conviction in a four to three decision.

The majority opinion was predicated upon the idea that where a challenge for cause is erroneously overruled the defendant, in addition to exhausting his peremptory challenges, must specifically show that he was compelled to accept an obnoxious juror as a result of the erroneous ruling. Much stress was placed upon the general provision in Article 557 of the Code of Criminal Procedure which declares that no judgment shall be set aside for a procedural error unless it "constitutes a substantial violation of a constitutional or statutory right." Mr. Justice Higgins who delivered the majority opinion emphasized the fact that defense counsel had made no objections to any of the jurors selected after they had exhausted all of their peremptory challenges. Thus, he concluded, there was no evidence in the record of defendant's need for the twelfth peremptory challenge which had been used to get rid of the juror which the court erroneously refused to discharge for cause.

Chief Justice O'Niell, in a very vigorous and scholarly dissent, argued that where a challenge for cause is improperly overruled, and the defendant's peremptory challenges are exhausted before the jury is obtained, the accused is per se prejudiced, and the verdict should be set aside. Chief Justice O'Niell declared that

43. State v. Henry, 197 La. 999, 3 So.(2d) 104 (1941).
44. 199 La. 965, 7 So.(2d) 221 (1942).

this was not only a proper application of the law as it existed before the Code of Criminal Procedure but that it was also a proper interpretation of Article 353.

The justices of the supreme court appear to be at considerable variance as to the proper construction and meaning of the language employed in Article 353. A careful reading of the article impresses one with the fact that it is ambiguously phrased and should be redrafted so as to clarify the legislative intent. As it now stands, the supreme court justices appear to be divided along these three lines. Justices O'Niell, Odom and Ponder (dissenting) hold to the view that it is only necessary for a defendant to exhaust his peremptory challenges in order to secure a reversal on the ground of improper overruling of his challenge of a juror for cause. Justices Higgins and Fournet have adopted the view that very little significance should be placed upon the semicolon in Article 353; and that, in addition to exhausting his peremptory challenges, the defendant must show that he has been "forced to accept an obnoxious juror." Justice Higgins points out that the defendant can do this by objecting to additional jurors after his peremptory challenges have been exhausted. Justices Rogers and McCaleb (lining up with the majority) entertain some doubt as to whether this is the correct interpretation of Article 353, but they achieve the same result by placing special stress on the broad provisions of Article 557 requiring a specific showing of prejudice, harm or injury from the erroneous ruling complained of.

The problem presented in the *Breedlove* case is one which almost defies precise technical analysis. In such a case, policy considerations become of utmost importance. Chief Justice O'Niell was impressed by the fact that the defendant was unable to secure a reversal of his conviction because his attorney did not have the foresight or the ingenuity to object to additional jurors after his peremptory challenges had been exhausted. Justice Higgins, writing the majority opinion, is equally forceful in urging that there is nothing in the record to show that an innocent man has been convicted, but that it only shows that a convicted criminal has not been permitted to seize upon a trial irregularity to set aside a conviction which was fairly and squarely secured.

As Article 353 is now interpreted in the *Breedlove* case, a defendant must do two things before he can complain of the erroneous overruling of his challenge of a prospective juror for

cause: (1) he must exhaust his peremptory challenges, and (2) he must show actual injury. This is to be done by getting the fact into the record that he would have peremptorily challenged subsequent jurors but for the fact that he had lost one of his peremptory challenges by having to use it to eliminate a juror who should have been challenged for cause. The view of the majority of the court is definitely strengthened by a consideration of Article 557 of the Code of Criminal Procedure which makes it abundantly clear that reversals should not be secured on the basis of procedural defects which did not result in actual injury. If this spirit is carried over to the interpretation of Article 353 it becomes easier to conclude that the words "unless the defendant by such ruling is forced to accept an obnoxious juror" were intended to apply to cases where the trial court erroneously refuses to sustain a challenge for cause. In view, however, of the diversity of opinion among the supreme court justices, it appears that real clarification can only be achieved by an amendment to Article 353.

The Trial

State v. Albano[45] applied the rule of Article 266 of the Code of Criminal Procedure that the allowance or disallowance of the withdrawal of a plea of guilty as "within the sound discretion of the court." In that case the trial judge had refused to permit the withdrawal of a plea of guilty which had been entered some three years before. In affirming the conviction and sentence the supreme court declared that it did not feel disposed to disturb the trial ruling unless it amounted to a clear abuse of judicial discretion; and, also, stressed the fact that to permit a change of plea after so long a time would work a serious hardship upon the state whose evidence might now be inaccessible or destroyed.

In *State v. Courreges*[46] the Bill of Information charged violation of the confidence game statute on May 22nd. When the testimony showed that while the check used had been dated on May 22nd it had not been cashed until May 23rd, the district attorney was permitted to amend the information so as to charge commission of the offense at the later date. In holding that the motion of defense counsel for a continuance had been properly overruled, the supreme court stressed the fact that defendant had

45. 199 La. 227, 5 So.(2d) 755 (1942).
46. 201 La. 62, 9 So.(2d) 453 (1942).

not been materially prejudiced by the change of date,[47] and distinguished previous cases where the defendant had been relying on an alibi. Where defendant comes into court prepared to establish an alibi, it is universally held that the date is essential and that an amendment in the information changing the date of the alleged crime is a proper ground for a continuance.[48]

One tried for a felony must be personally present in court at every important stage of the trial from arraignment to sentence. However, this rule does not apply to proceedings before arraignment, and it was held in *State v. Breedlove*[49] that it was not reversible error where defendant was not personally present in court when a motion to quash the indictment was heard. It was also held not to be reversible error in *State v. Stroud*[50] that defendant was absent from the court room at the time his counsel said that they were ready for trial. It was sufficient that the court was completely satisfied that defendant was present in open court at the arraignment and at the moment the first juror was called for qualification.[51]

The constitutional right of a defendant to be confronted with the witnesses against him includes the right to be present when depositions used in his trial are taken. In *State v. McLeod*[52] the court overruled defendant's argument, after conviction, that she was not present when the depositions introduced in evidence against her were taken. The court pointed out that defendant failed to allege or prove her actual absence at this time, and that it was not essential that the depositions themselves indicate the presence of the accused. Authorities holding that the minutes must affirmatively show the presence of accused at all important stages of the trial were held inapplicable, since depositions taken prior to a trial are not entered in the minutes of the court.

State v. Augusta[53] applied the general rule that in all homicide cases, where time is not of the essence, the state is not re-

47. It had been argued that defendant came prepared to show that he had an account of $2.20 with the bank on May 22nd while on May 23rd the account had been closed. This small amount was held to be "of no particular importance" in view of the fact that the check fraudulently cashed amounted to $112.00.

48. State v. Singleton, 169 La. 191, 124 So. 824 (1929).

49. 199 La. 965, 7 So.(2d) 221 (1942).

50. 198 La. 841, 5 So.(2d) 125 (1941).

51. Justice Higgins pointed out that under Article 332 of the Code of Criminal Procedure, the trial begins the moment the first juror is called for qualification.

52. 199 La. 372, 6 So.(2d) 146 (1942).

53. 199 La. 896, 7 So.(2d) 177 (1942).

quired to prove that the crime was committed on the exact date set out in the indictment.

In *State v. Snowden*[54] a defendant was charged with shooting his wife with intent to murder her. After the trial had begun, court was adjourned until the following morning, and the jurors went their separate ways with proper instructions from the court. During the adjournment two of the five jurors read an erroneous newspaper account to the effect that a razor had been found upon defendant when he appeared in court. The trial court refused defense counsel's motion for a new trial based upon these facts, but instructed the jury that the account was erroneous and should be disregarded. In affirming the trial court's overruling of a motion for a new trial, the supreme court was of the opinion that any prejudicial effect of the newspaper articles had been removed by the trial court's special instruction to disregard them. Justice Fournet dissented, arguing that it was enough to vitiate the verdict that the reading of the newspaper articles *might* have prejudiced or influenced the jurors in their decision. A careful reading of Justice Odom's majority opinion shows that in order to vitiate a verdict for such trial irregularities it must appear, from all the surrounding circumstances, that there is *real probability* that the jury were influenced. A remote possibility, such as that in the instant case, should not be enough to set the verdict at naught.

Habitual Offender Statute

The Louisiana multiple offender act[55] was recently amended so as to provide a more usable and reasonable statute.[56] The principal change effected was an appreciable reduction of the minimum and maximum sentences applicable to second, third and subsequent offenders. Under the old statute, which followed the usual pattern of earlier habitual offender acts, the penalties imposed on subsequent offenders were so harsh and out of proportion that it was a common practice not to charge the habitual, but not desperate, criminal under its provisions. It is hoped that the new more reasonable sentence provision will result in a more frequent and consistent use of this important statute. Another troublesome problem which has bothered our courts in applica-

54. 198 La. 1076, 5 So.(2d) 355 (1941).
55. La. Act 15 of 1928 [Dart's Crim. Stats. (1932) §§ 709-711].
56. La. Act 45 of 1942. See Wilson, Making the Punishment Fit the Criminal (1942) 5 LOUISIANA LAW REVIEW 53, 60.

tion of the habitual offender statute was not solved by the new act. Both statutes are only applicable to convictions under the laws of other states or governments where the offense committed would have been a felony according to Louisiana law. This problem is nicely illustrated by the recent case *State v. Vaccaro*.[57] In that case, defendant had been convicted of the unlawful possession of marijuana in violation of the Uniform Narcotic Drug Act adopted in Louisiana in 1934.[58] Thereafter the state filed a bill against defendant under the habitual criminal act charging him with being a triple offender, in that he had twice previously been convicted in federal courts for violation of the Harrison Narcotic Drug Act. Although both statutes were aimed at the same sort of anti-social conduct—the traffic in narcotic drugs—their modus operandi was different and the acts prescribed as criminal in one are not identical with the acts denounced as felonies in the other. The Harrison Act is in the form of a revenue statute made effective by certain penal sanctions;[59] while the Louisiana statute was a straight narcotic law making the unlawful possession of narcotics a crime without regard to revenue payments or permits. Since there was not an identity of *all elements* of the offenses the federal crimes could not be considered in determining whether defendant came within the Louisiana multiple offender statute.

When the new statute was drafted other alternatives were considered, but were rejected as being even more unsatisfactory than the existing rule. For example, it was suggested that the test as to crimes committed elsewhere should be whether they were "felonies" according to the law of the jurisdiction under which the conviction was secured. However, a general survey of comparative criminal laws indicated so wide a variance as to what crimes are "felonies" as to make such a criterion very inconsistent and, hence, unfair.

Sentence

Article 521 of the Code of Criminal Procedure provides that "in all criminal cases at least twenty-four hours shall elapse between conviction and sentence, unless the accused waive the delay and ask for the imposition of sentence at once. In *State v.*

57. 200 La. 475, 8 So.(2d) 299 (1942).

58. La. Act 14 of 1934 (2 E.S.) [Dart's Stats. (1939) §§ 3315.1-3315.27].

59. See Menna v. Menna, 102 F.(2d) 617, 618 (App. D.C. 1939), where violation of the Harrison Narcotic Act was held to be a serious felony "involving moral turpitude."

Martin[60] defendant had been tried and convicted of criminal trespass. The presiding judge explained to her that she was entitled to a twenty-four hour delay before being sentenced, and she replied that she was ready for sentence. The supreme court held that this amounted to a sufficient waiver of the delay. It is not necessary, in order to constitute an effective waiver, that the defendant shall formally waive the delay and ask for the imposition of sentence at once.

In *Pierre v. Jones*[61] the defendant had been convicted of murder and sentenced to suffer death by hanging. Subsequently, and while the case was pending on appeal, the Louisiana legislature enacted a statute which amended Article 569 of the Code of Criminal Procedure so as to substitute the more humane method of execution by electrocution[62] for that of hanging. This statute was expressly made applicable to all future executions, even with respect to persons convicted of prior offenses. Defense counsel urged that the new statute violated both the federal and state constitutional prohibitions against the enactment of ex post facto laws. The Louisiana Supreme Court held, as had the United States Supreme Court,[63] that the statute changing the mode of execution and suggesting the more humane and less painful means of carrying out the death penalty, did not affect substantive rights, and thus might be made retrospective without being unconstitutional as an ex post facto law.[64] A second procedural question was also decided. The court might have treated the provision in the sentence for execution by hanging as surplusage, and held that the new method of carrying out the death penalty was substituted therefor by operation of law. However, it chose to remand the case to the district court to have the sentence amended in conformity with the provisions of the new statute.

The indeterminate sentence provision in Article 529 of the 1928 Code of Criminal Procedure had given Louisiana courts no

60. 199 La. 39, 5 So.(2d) 377 (1941).
61. 200 La. 808, 9 So.(2d) 42 (1942).
62. La. Act 14 of 1940 [Dart's Crim. Stats. (1932) §§ 569, 570].
63. State ex rel. Pierre v. Jones, 63 S.Ct. 64, 87 L.Ed. 29 (1942).
64. Mr. Justice Higgins reiterated the United States Supreme Court's holding in Malloy v. State of South Carolina, 237 U. S. 180, 35 S.Ct. 507, 508, 59 L.Ed. 905, 906 (1915) that "The constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment."

end of trouble. The case of *State v. Jackson*[65] was just one more example of the confusion which attended its application. In that case a defendant convicted of assault with intent to commit rape had moved for an indeterminate sentence. Among those enumerated crimes where the offender was excepted from the benefits of the indeterminate sentence provision were "rape" and "attempt to commit rape." The trial court, concluding that defendant's crime was within those exceptions, refused to give indeterminate sentence. On appeal to the Louisiana Supreme Court, it was held that the crime committed did not come within the exceptions to the indeterminate sentence law, and that the defendant should have been given an indeterminate rather than a flat sentence. In so holding, the supreme court was following its previous exacting attitude as to the names of offenses. It held that the words "attempt to commit rape" were not synonymous with the defendant's crime of "assault with intent to commit rape." It is interesting to note that if this interpretation was correct, Louisiana statute books recognized no such crime as the "attempt to commit rape" which was specified in the indeterminate sentence provision. The *Jackson* decision is only one of a multitude of instances where the trial judge had incorrectly given flat sentences in cases where indeterminate sentences were called for. Similar anomalous situations were presented in regard to arson and burglary where there was a serious question as to which of the numerous gradations of those crimes were meant to be excepted from the benefits of Article 529. Again, trial judges had frequently overlooked the indeterminate sentence provision entirely. The 1942 legislature has cured all these defective sentences by amending Article 529 so as to provide that determinate sentences for a fixed duration shall be imposed in all cases, but that the offender has the privilege of applying for parole after serving one-third of his sentence. The substantial effect of these new changes is to give every prisoner the practical benefits which were only available to some under the old indeterminate sentence provision.[66]

Motion for New Trial and Appeal

It is generally provided in Article 520 of the Code of Criminal Procedure that a defendant cannot avail himself after verdict of

65. 200 La. 432, 8 So.(2d) 285 (1942).

66. See Wilson, Making the Punishment Fit the Criminal (1942) 5 LOUISIANA LAW REVIEW 53, 63.

error, not patent on the face of the record, unless he has reserved a formal bill of exception when the error occurred. However, the practical reason for a full technical application of this rule fails in a case of an erroneous overruling of a motion for a new trial. In *State v. Houck*[67] the court had improperly overruled defendant's motion for a new trial. The defendant excepted to the ruling and obtained permission to take up the testimony of the trial of the motion. The transcript contained such testimony and the written reasons assigned by the trial judge for overruling the motion. The supreme court held that omission of defense counsel to reserve a formal bill of exception to the trial court's refusal to order a new trial did not deprive the defendant of his right to appeal from the erroneous ruling.

Two cases[68] applied the well settled rule that the overruling of a motion for a new trial, based upon an alleged insufficiency of the evidence, was not appealable. The supreme court's appellate jurisdiction in criminal cases is limited to questions of law alone. Thus it has no jurisdiction to hear any appeal based upon a complaint that the verdict is "contrary to the law and the evidence."[69]

State v. Mancuso[70] involved a conflict between the provision in Article 561 of the Code of Criminal Procedure that all criminal judgments rendered by a district court under its appellate or supervisory jurisdiction should become final on the third *calendar* day after rendition unless a rehearing was applied for, and the rules adopted by the appellate court pursuant to Article VII, Section 83 of the Louisiana Constitution which allowed three *judicial* days in which to file an application for a rehearing. If this latter slightly more liberal rule had applied, the state's motion would have been filed in time. However, the supreme court held that Article 561 controlled and that the judgment had already become final and executory on the third judicial day when the application for a rehearing was filed.[71]

67. 199 La. 478, 6 So.(2d) 553 (1942).

68. State v. Allen, 200 La. 687, 8 So. (2d) 643 (1942); State v. Hardy, 198 La. 1048, 5 So.(2d) 330 (1941).

69. State v. Williams, 199 La. 418, 423, 6 So.(2d) 333, 334 (1942); State v. Houck, 199 La. 478, 482, 6 So.(2d) 553, 554 (1942).

70. 199 La. 509, 6 So.(2d) 644 (1942).

71. Mr. Justice Ponder declared: "In the absence of any provision to the contrary, the authority granted contemplates that the rules are to be made consistent with law and not in contravention thereof. The rule of the court involved herein being inconsistent with Article 561 of the Code of Criminal Procedure must therefore yield to the statute." 199 La. 509, 514, 6 So.(2d) 644, 645 (1942.)

Supervisory Jurisdiction of the Louisiana Supreme Court

In *State v. Doucet*[72] the Louisiana Supreme Court granted writs of certiorari, prohibition and mandamus under its supervisory jurisdiction; and ordered that the trial judge should be recused from trying the case, and assigned another district judge to preside at the trial. The district attorney urged that the supreme court's ruling was premature since Article 312 of the Code of Criminal Procedure expressly declares that no ruling on a motion to recuse shall be reviewable in any manner before sentence. The Louisiana Supreme Court, however, refused to be controlled by this legislative restriction; and held that their constitutional supervisory jurisdiction over all inferior courts[73] prevailed over any conflicting legislation.[74]

In *State v. Martin,* [75] it was held that where a defendant invokes the supervisory jurisdiction of the supreme court by a writ of certiorari, that court has no jurisdiction to pass upon questions of fact relating to his guilt or innocence, but must accept the trial judge's recital of the facts proved at the trial as conclusive.

IV. INSURANCE

An interesting decision was *Branch v. Springfield Fire Insurance Company,*[1] in which the court strictly construed a stipulation in an insurance policy requiring that the determination of the amount of damages be submitted to appraisers in case of disagreement between insured and insurer. Defendant insured plaintiff's building against loss by windstorm. The policy contained a clause stipulating that if the parties disagreed as to the amount of any loss they would submit the question to two appraisers who, after selecting an umpire, would estimate the loss "stating separately sound value and damage"[2] and, if they failed to agree, to submit their differences to an umpire. The award of any two would determine the damages. A loss occurred and

72. 199 La. 276, 5 So.(2d) 894 (1942).
73. La. Const. of 1921, Art. VII, §§ 2, 10.
74. The court relied upon the analogous case of State v. Burris, 169 La. 520, 536, 125 So. 580, 585 (1929) which held that rulings of the trial court upon defendant's insanity pleas might be reviewed prior to sentence, under the supreme court's constant supervisory jurisdiction; and this despite the similarly express prohibition found in Article 273 of the Code of Criminal Procedure.
75. 199 La. 39, 47, 5 So.(2d) 377, 380 (1941).
1. 198 La. 720, 4 So.(2d) 806 (1941).
2. 198 La. 720, 726, 4 So.(2d) 806, 808 (1941).

plaintiff and defendant disagreed as to the amount of damages. They submitted the question to appointed appraisers by written agreement which stated, "the appraisement . . . is for the purpose of ascertaining and fixing the sound value of said property and the amount of said loss and damage."[3] The appraisers failed to agree and called in the umpire. The umpire and one appraiser estimated the loss. Plaintiff refused to accept their decision and sued. Defendant contends that its liability is limited to the estimated figure. The court held that plaintiff was not bound by appraisers' figure because they failed to perform the duties required of them by the policy in that they failed to ascertain the sound value of the plaintiff's building in their appraisement. Recognizing the validity of stipulations providing for arbitration in case of disagreement as to loss in Louisiana,[4] the court stated "in order for the award . . . to be binding it must clearly appear that they have performed the duties required of them by the policy."[5] Finding no interpretation of similar stipulations in Louisiana, the court followed the interpretation of other jurisdictions, stating "where the policy and the agreement of submission requires that sound value be ascertained, the failure of the appraisers to ascertain the sound value invalidates the award."[6]

The court expressed a definition of a windstorm in *Bogalusa Gin & Warehouse, Incorporated v. Western Assurance Company.*[7] The plaintiff's buildings collapsed during an alleged windstorm. Plaintiff sued on two windstorm policies issued by defendant. Defendant contended that the buildings fell as a result of decay and not from a windstorm. The court found that the buildings collapsed when the wind velocity was thirty-five miles an hour; that a wind with a velocity in excess of twenty-seven miles an hour was a windstorm;[8] therefore the buildings collapsed dur-

3. 198 La. at 726, 4 So.(2d) at 809.

4. Hart v. Springfield Fire & Marine Ins. Co., 136 La. 114, 66 So. 558 (1914); Martin v. Home Ins. Co., 16 La. App. 216, 133 So. 773 (1931); Officer v. American Eagle Fire Ins. Co., 175 La. 581, 143 So. 500 (1932). Vance, Handbook of the Law of Insurance (2 ed. 1930) 763, § 206. If made a condition precedent to action on the policy it is void as violating a statute prohibiting any condition in an insurance policy from depriving the insured of his right to jury trial on any question of fact arising under the policy. Insur. Co. of N.A. v. Kempner, 132 Ark. 215, 200 S.W. 986 (1918); Firemen's Ins. Co. v. Davis, 130 Ark. 576, 198 S.W. 127 (1917).

5. 198 La. 720, 727, 4 So.(2d) 806, 809 (1941).

6. 198 La. at 728, 4 So.(2d) at 809. Also stated: "The established jurisprudence of this country is that the failure of the appraisers to fix the sound value, where the policy requires it to be fixed, renders the award unenforceable."

7. 199 La. 715, 6 So.(2d) 740 (1942).

8. The definition of a windstorm expressed in Sabatier Bros. v. Scottish

ing a windstorm and plaintiff could recover despite the fact that decay had set in in some parts of the buildings.

It was also announced that the purchase price of buildings is not the sole criterion to be used in estimating loss. But in arriving at the amount the plaintiff is entitled to recover the court must "take into consideration all of the facts, the price paid for the buildings, the estimate of their value made by defendant's agent at the time the policies were issued, the policies themselves, the terms of the policies and the cost of replacement."[9]

In *Misuraca v. Metropolitan Life Insurance Company*[10] the insured stated in an application for a disability policy that he was born in 1884. In 1928 he became totally and permanently disabled and the insurer made disability payments of one hundred dollars a month for several years. In 1936 the insured stated in an application for naturalization that he was born in 1881. The insurer notified the insured that it would be compelled to enforce the age adjustment clause in the policy and reduce the amount from $10,000.00 to $9,243.74 and that this entitled the insured to only $92.44 a month instead of $100.00. Insurer also stated that the insured had been overpaid $778.68 in benefits and that it would therefore discontinue the payments until the overpayment was liquidated. An agreement was reached whereby the insurer agreed to pay $60.00 a month and withhold only $32.44 a month until the debt was liquidated and not to sue to reform the policy in consideration of the acceptance by the insured that the correct date of his birth was 1881 and that $92.44 was the correct disability monthly payment. In 1938 the plaintiff sued to recover the difference between the $100.00 and the $60.00 payments, contending that his age was not misstated and that, even if misstated, the incontestable clause prevented the company from adjusting its liability under the age adjustment clause in the policy. The court held that the agreement was a compromise under Article 3071[11] supported by an adequate consideration, which, although it could be set aside by showing an error of fact, could never be set aside for an error of law. To set it aside, therefore, the plaintiff would have had to prove by a preponderance of evidence that he was born in 1884.

Union & National Ins. Co., 152 So. 85, 86 (La. App. 1934) was: "there must be more than an ordinary current of air, that is, an outburst of tumultuous force. . . . 'An ordinary gust of wind, no matter how prolonged, is not a windstorm'."

9. 199 La. 715, 719, 6 So.(2d) 740, 742 (1942).

10. 199 La. 867, 7 So.(2d) 167 (1942).

11. La. Civil Code of 1870.

In *Davies v. Consolidated Underwriters*[12] defendant issued a policy of insurance covering loss to Mabry's automobile. Plaintiff's minor child was run over and injured by Mabry's automobile while it was being driven by Stahl, the nephew of Mabry. Plaintiff sued the defendant insurance company, contending that a provision of the policy extended coverage to any person driving the automobile with the consent of Mabry. The provision was that "any person using the automobile described herein with the permission of the named subscriber . . . may, if the subscriber shall in writing so direct within 30 days after the presentation of a claim, be entitled to indemnity in the same manner and under the same conditions as the subscriber."[13] Defendant contends that since Mabry did not direct in writing that the coverage should extend to Stahl, he was not included. The evidence revealed that a few minutes after the accident Mabry notified the defendant's local agent of the details and after an investigation the agent, at Mabry's request, sent a telegram to the defendant company notifying it of the accident. The receipt of the telegram was acknowledged by a letter sent direct to Mabry. Within thirty days an adjuster of the defendant company made a complete investigation and took statements from Mabry and Stahl. The court concluded that the notice given by Mabry, although it did not expressly request it, was sufficient to extend the coverage to include Stahl, and therefore the defendant was liable under the terms of the policy for the injuries sustained by plaintiff's child. It was stated that notice need not expressly request in any particular words that the coverage be extended to a third person but that the requirement was accomplished if an intention was expressed within the time limit.

The plaintiff sued the insurer of the car owner directly, as he is permitted to do under the Louisiana statute,[14] without making any claim for damages either against Mabry or Stahl. It was stated that he did not lose this right when he failed to give a notice of loss as required of the insured in the policy, for the court says: "rarely has the injured party knowledge as to who may be the insurer of the party responsible for his injuries. It is therefore not within his power to give a notice as required by the policy and the enforcement of a policy provision requiring

12. 199 La. 459, 6 So.(2d) 351 (1942).
13. 199 La. at 471, 6 So.(2d) at 355.
14. La. Act 55 of 1930.

notice to be given by the insured automatically . . . deprives him of the right of action granted by law. It is not desirable that he should be divested of such action . . . except in a clear case."[15] By this statement an injured third person is not deprived of his right of action against the insurer by his failure to give the timely notice required of the insured of the accident to the insurer. Of course, it is only a matter of speculation to say that such a statement can also be interpreted to mean that the third party is not deprived of such right of action by the failure of the insured to give timely notice of loss. If it can be so interpreted, the court has settled a very controversial point. Before the 1930 statute was enacted the Orleans Court of Appeal in *Edwards v. Fidelity & Casualty Company of New York*[16] stated that the failure of insured to give timely notice could not deprive the injured third person of his action against the insurer under Louisiana Act 253 of 1918. However, in *Howard v. Rowan*[17] the court of appeal for the second circuit held in deciding a case under the 1930 statute[18] that the insurer was not liable to the insured or the injured third person where notice was not given until forty-four days after the accident. The policy required immediate notice to be given to the insurer of any accident. In *Duncan v. Pedarre*[19] the insured gave notice to the insurer eight months after the accident. It was held by the court of appeal for the first circuit that the insurer was discharged from liability to the third person by the failure of the insured to give timely notice. In *Jones v. Shehee-Ford Wagon & Harness Company*[20] the supreme court refused to decide the question, stating: "This conclusion makes it unnecessary to consider the question whether a breach of a contract of public liability insurance, by a failure of the insured to give the insurer immediate notice of an accident, should defeat the right of action of the injured person as well as the right of action of the insured, under the provisions of Act No. 55 of 1930."[21] The court in *Davies v. Consolidated Underwriters*[22] stated that this statute "expresses the public policy of this state in that an insurance policy against liability is not issued primarily for the

15. 199 La. 459, 477, 6 So.(2d) 351, 357 (1942).
16. 11 La. App. 176, 123 So. 162 (La. App. 1929).
17. 154 So. 382 (La. App. 1934).
18. La. Act 55 of 1930.
19. 164 So. 498 (La. App. 1935).
20. 183 La. 293, 163 So. 129 (1935).
21. 183 La. at 302, 163 So. at 132.
22. 199 La. 459, 6 So.(2d) 351 (1942).

protection of the insured but for the protection of the public."[23] Since the purpose of the statute is to protect the public or the injured third person and the court will not permit his own negligence in failing to give timely notice to deprive him of his right of action, it should follow that the negligence of the insured in failing to give the required notice should not deprive him of his statutory right of action.

A settled point of Louisiana law was reiterated by the court in *Maas v. Harvey*,[24] where it was decided that an insurance company was not liable on a policy issued to the employer for the negligence of an employee while acting outside the scope of his employment. The employee was permitted to keep and use a car owned by his employer for personal and business purposes. While using the car for his personal pleasure, the employee injured the plaintiff. He was definitely negligent and the plaintiff, exercising her statutory right,[25] sued the employer's insurer, alleging liability on the policy of insurance. The coverage clause of the policy made the insurer responsible for any sum which the *assured* was obligated to pay to any person sustaining damage by accident arising out of the operations defined in the policy. To recover judgment against the insurer the plaintiff was required to show that the employee was one of the class of persons designated as an "assured" or that the "assured" was legally responsible for the employee's negligent acts.

The policy did not contain the usual omnibus clause.[26] Instead it contained a restricted definition of the word "assured" in that it extended coverage to certain enumerated officials of the company only. Therefore the employee was not within the meaning of the term "assured."

To show that the employer was legally responsible for the negligence of the employee, the plaintiff was required to show that the employee was acting within the scope of his employment. The plaintiff contended that the employee was so acting at any time he used his employer's car, for his personal use or pleasure. The court disposed of this contention by referring to the case of *Oliphant v. Town of Lake Providence*,[27] where it was held that

23. 199 La. at 476, 6 So.(2d) at 357.
24. 200 La. 736, 8 So.(2d) 683 (1942).
25. La. Act 55 of 1930 [Dart's Stats. (1939) § 4248].
26. 200 La. 736, 739, 8 So.(2d) 683, 685 (1942): "the omnibus clause, providing, in substance, that the unqualified word 'Assured' in the policy, means not only the named assured but also any person using the car with the permission of the named assured."
27. 193 La. 675, 192 So. 95 (1939).

unless an employee was acting within the scope of his employment while driving the employer's car, the employer was not legally responsible for his negligence. Having determined that the employee was not so acting, the employer was therefore not legally responsible for his negligence and consequently there was no liability on the insurer.

V. EVIDENCE

In civil cases the rules of evidence are applied rather liberally, objections generally being assigned to the weight rather than the admissibility. But in criminal cases tried by jury,[1] the rules of evidence perform their normal function of regulating the admissibility. Issues are more often appealed when the objection assigned to weight or admissibility is to evidence whose effect may determine the decision of the case. Twenty-two cases were noted as containing evidential points, but only eighteen appear worthy of comment: seven involving civil evidence, and ten involving criminal evidence. A case of general interest on the subject of evidence is *State v. Lassiter*,[2] holding that police juries have no authority to prescribe rules of evidence, even though they might have power to make certain acts criminal.[3]

A. Civil Cases

Admissions

Gulf Refining Company v. Bagby[4] held certain telephoned statements of defendant's secretary, made in defendant's presence and under his direction, to be admissions, properly introduceable in evidence.[5]

---

1. La. Const. of 1921, Art. 1, § 9.
2. 198 La. 742, 4 So.(2d) 814 (1941).
3. Cf. City of Shreveport v. Maroun, 134 La. 490, 64 So. 388 (1914), where it was held that the Shreveport City Council could not prescribe rules of evidence.
4. 200 La. 258, 7 So.(2d) 903 (1942).
5. An admission is for a party-opponent what a self-contradiction is to an ordinary witness—"a statement made somewhere else, and inconsistent with his allegations of claim or defense in the case on trial." Wigmore, Student's Textbook on the Law of Evidence (1935) 197, § 180. Such a statement is properly admissible to discredit a party-opponent. The admission may be made by an agent, and need not have been against the party-opponent's interest at the time it was made (better rule); it is enough that such admission be inconsistent with his present claim or defense. 4 Wigmore, Treatise on Evidence (3 ed. 1940) 4, § 1048. The old rule of thumb that anything said by another person in the party's presence was admissible against him, has been generally discarded, the question of admissibility depending greatly on

The Hearsay Rule

In re Gray's Succession[6] repeated the familiar rule that hearsay testimony is admissible in cases involving pedigree—to prove not only descent and relationship, but also facts as to birth, marriage and death, and the dates when such events occurred.[7]

The Parol Evidence Rule

Wooten v. Jones[8] reiterated the rule of the foundation case of *Le Bleu v. Savoie,*[9] to the effect that "parol evidence is admissible to prove the fraud or alleged error; that the plaintiff may show that by fraud or by error the written instrument was made to embody a different agreement from that entered into by the parties, or that, by fraud of the defendant, the plaintiff was made to agree to something the nature of which he did not rightly understand."[10] *Templet v. Babbitt*[11] held that a vendor's acknowledgment in an authentic act of sale, that he received a stipulated sum in cash as consideration for the transfer, is conclusive as to him unless he alleges and can prove that his consent and signature to the act were procured by fraud, error, or force.[12]

Presumptions

Two cases involved presumption of fact. *Ludeau v. Stromer*[13] was a suit to recover for conspiracy to defraud. Plaintiff sued one of the co-conspirators only; the other had made good his defal-

---

the facts of each case. In *Gulf Refining Company v. Bagby,* the statements in question were not only made in the defendant's presence, but under his direction, and were properly admissible.

6. 201 La. 121, 9 So.(2d) 481 (1942).

7. The court seems to state this exception rather broadly, and it is doubtful whether the common law limitations to this doctrine are recognized (that the testimony be as to matters relatively in the past, that there are no living witnesses to the same matter, that the declarant must be shown unavailable, that the declarations must have been made before the controversy arose and with no interest or motive to deceive, and that the declarant was testimonially qualified). 5 Wigmore, Treatise on Evidence (3 ed. 1940) 293-321, §§ 1481-1497. The court states: "[Any] objection [goes] to the effect and not the admissibility of the testimony." In re Gray's Succession, 201 La. 121, 9 So.(2d) 481, 482 (1942).

8. 200 La. 333, 8 So.(2d) 46 (1942).

9. 109 La. 680, 681, 33 So. 729, 730 (1903).

10. The ground of admitting such evidence is ex necessitate— that otherwise the courts might find themselves aiding perpetration of frauds. Barrow v. Grant's Estate, 116 La. 952, 41 So. 220 (1906).

11. 198 La. 810, 5 So.(2d) 13 (1941).

12. Article 2236 of the Louisiana Civil Code of 1870 declares: "The authentic act is full proof of the agreement contained in it . . . unless it be . . . proved a forgery." The court apparently construes "forgery" so as to include fraud, error, or force. In this connection, see Succession of Tete, 7 La. Ann. 95 (1852), to the effect that the word "forgery" in Article 2236 means "false."

13. 199 La. 824, 7 So.(2d) 70 (1942).

cation and was summoned as plaintiff's witness. The court assumed that the latter co-conspirator's testimony would have been unfavorable to plaintiff, where plaintiff had summoned him but had failed to place him on the stand to rebut the defendant-co-conspirator's defense.[14] *Gulf Refining Company v. Bagby*[15] laid down the generally accepted rule in regard to a letter received in due course of mail and purporting to be a reply from one to whom a letter has previously been sent: that a presumption of fact exists in favor of the genuineness of the signature, and the letter is admissible in evidence without further authentication.[16]

Presumptions of law were involved in two decisions. *In re Gray's Succession*[17] approved prior jurisprudence[18] to the effect that: "The presumption in favor of marriage and the legitimacy of children is one of the strongest known to the law, and in favor of a child asserting its legitimacy this presumption applies with peculiar force."[19] *Succession of Hope v. First National Bank & Trust Company*[20] held that a stale claim, long withheld from prosecution until the one against whom it was preferred had died, must be established with more than reasonable certainty. An unfavorable presumption is created by the delay, and it can be removed only by peculiarly strong and exceptionally conclusive testimony.[21]

---

14. The court cited no precedents for such a presumption, but this seems a legitimate inference of fact.

15. 200 La. 258, 7 So.(2d) 903 (1942). This case is also commented on under the sub-title, "Admissions."

16. 1 Jones, Commentaries on the Law of Evidence (2 ed.) 341, § 201; 1 Jones, The Law of Evidence in Civil Cases (4 ed.) 89, § 52; 7 Wigmore, Treatise on Evidence (3 ed. 1940) 611, § 2153.

17. 201 La. 121, 9 So.(2d) 481 (1942). This case is also commented upon under the sub-title, "The Hearsay Rule."

18. Jackson v. United Gas Public Service Co., 196 La. 1, 198 So. 633 (1940); Succession of Curtis, 161 La. 1045, 109 So. 832 (1926).

19. In re Gray's Succession, 201 La. 121, 9 So.(2d) 481, 483 (1942).

20. 198 La. 878, 5 So.(2d) 138 (1941), rehearing denied December 1, 1941. Justice Ponder delivered the opinion of the court, with Chief Justice O'Niell dissenting without comment.

21. In civil cases generally, a preponderance of the evidence only is required. One exception formerly recognized—that, wherever in a civil case a criminal act is charged, the criminal rule of proof beyond a reasonable doubt should be applied—has been repudiated in a majority of the jurisdictions. See 9 Wigmore, Treatise on Evidence (3 ed. 1940) 327, § 2498, and authorities therein cited. Most jurisdictions, however, require clear and convincing proof as to charges of fraud, or undue influence; to the existence and contents of a lost deed or will; to a parol gift, or an agreement to bequeath by will or to adopt; to mutual mistake sufficient to justify reformation of an instrument; for a parol or constructive trust; for an oral contract as a basis for specific performance; for impeaching a notary's certificate of acknowledgment; for prior anticipatory use of an invention; for an agreement to hold a deed absolute as a mortgage; and for sundry classes of local practice. These exceptions are given in Wigmore, op. cit. supra, at 329 et seq., § 2498. The ex-

Witnesses

In *Housing Authority of Shreveport v. Harkey*,[22] it was held that the testimony of one hired by the Housing Authority to make estimates, at so much per estimate made and submitted, was not disqualified as an interested witness; and his testimony as to valuation was admissible in condemnation proceedings instituted by the Housing Authority.

B. Criminal Cases

Confessions

State v. Allen[23] held that the requirement of the Louisiana Code of Criminal Procedure, Article 451, that a confession introduced in evidence must be affirmatively shown to be "free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises," is met by a prima facie showing; and it was not necessary to show that the officers who held the defendant did not menace, intimidate, et cetera, him.[24] In *State v. Johnson*[25] the defendant contended his confession was involuntary, but the only evidence tending to connect the police with the beating that defendant received was the testimony of the accused himself.[26] The court held that mere grounds for suspicion or general principles alone were insufficient to reject a confession, where the "overwhelming proof" indicates that defendant's rights were not violated.

---

ception recognized in the *Succession of Hope* case would seem to come under "sundry cases of local practice." See Wood v. Egan, 39 La. Ann. 684, 2 So. 191 (1887), stating the same rule as the *Hope* case, and cited approvingly in Kuhn v. Bercher, 114 La. 602, 38 So. 468 (1905).

22. 200 La. 526, 8 So.(2d) 528 (1942). Justice Odom delivered the opinion of the court, Justice Fournet dissenting on another point. Rehearing denied May 25, 1942.

23. 200 La. 687, 8 So.(2d) 643 (1942).

24. Three state's witnesses—police officers—testified that defendant's confession was free and spontaneous. Defendant introduced no conflicting evidence but merely relied on the fact that he had been in police custody prior to the confession. For another case involving "prima facie showing," see State v. Nattalie, 163 La. 641, 112 So. 514 (1927). Professor Flory, in his survey of the Louisiana Evidence cases for 1940-41, points out that there is a serious social problem as to whether confessions secured by police officers from one under arrest should be admitted in evidence at all. The Work of the Louisiana Supreme Court for the 1940-1941 Term (1942) 4 Louisiana Law Review 265, 271.

25. 199 La. 219, 5 So. (2d) 751 (1942).

26. The evidence showed that defendant was arrested on the night of March 17th, *kept in custody of the police during the 18th and 19th*, and admitted to the parish prison on the 20th. Two doctors testified that the defendant on admittance showed a severe beating. As all police officers testified that the confession was voluntary and spontaneous, the court concluded that

Evidence of Prior Convictions

State v. Guillory[27] was a murder prosecution. The state introduced evidence during cross-examination of the defendant, of previous convictions *and charges* against him. Held, it was proper thus to discredit the defendant on cross examination, after he testifies in his own behalf.[28] *State v. Gardner*[29] recognized another exception to the general rule that evidence of the commission of another offense than that for which the defendant is being tried, is inadmissible.[30] In the prosecution for illegal sale of a pint of whiskey, the state introduced evidence of previous sales of liquor by the defendant. Since no question of motive or intent was at issue, and there was no connection shown between the previous sales of liquor and the sale charged in the indictment,

---

the injuries must have been received in another way, prior to the arrest. See State v. Cannon, 184 La. 514, 166 So. 485 (1936), cert. denied 299 U.S. 503, 57 S.Ct. 13, 81 L.Ed. 373 (1936).

27. 201 La. 52, 9 So. (2d) 450 (1942), rehearing denied July 20, 1942.

28. The rules as to cross-examination of the accused as to previous arrests, indictments, and convictions, as affecting his credibility, are, in general, as follows: As to arrests and indictments, it is generally held that inquiries of an accused on cross-examination as to prior arrests [Mitrovich v. United States, 15 F.(2d) 163 (C.C.A. 9th, 1926)] or prior indictments [People v. Rogers, 324 Ill. 224, 154 N.E. 909 (1926)] are not competent for the purpose of affecting his credibility. The minority rule is contra—as to arrests [State v. Dalton, 197 N.C. 125, 147 S.E. 731 (1929)]; as to indictments [State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928)]. In contrast to both, the Texas Rule permits cross-examination of the accused as to prior arrests and indictments, but such arrests and indictments must relate to felonies or offenses involving moral turpitude. Jones v. State, 112 Tex. Crim. Rep. 31, 13 S.W.(2d) 845 (1929); Betts v. Stats, 126 Tex. Crim. Rep. 235, 70 S.W.(2d) 722 (1934). As to conviction, statutes generally provide that a previous conviction of crime may be shown on the cross-examination of a witness for the purpose of affecting his credibility. See elaborate annotation, 103 A.L.R. 350 (1936). The Louisiana Rule of Article 495, La. Code of Criminal Procedure of 1928, is both narrower and broader than the above common law rules. Evidence of prior convictions is, of course, admissible; but although the accused may be compelled to answer on cross examination whether or not he has ever been indicted or arrested and how many times, evidence of such prior arrests, indictments, or prosecutions is inadmissible. If the witness denies that he has ever been arrested or indicted, his cross-examiner is bound by the answer; but if he denies that he has ever been convicted of crime, evidence of conviction may be adduced from other sources. State v. Vastine, 172 La. 137, 133 So. 389 (1931). The Louisiana rule is broader in that in the *Guillory* case the court also says that by appearing as a witness, the defendant subjected himself to cross-examination with respect to *other charges* preferred against him. Cf. State v. Goodwin, 189 La. 443, 179 So. 591 (1938), where court permitted accused to be asked whether he had a rule for contempt of court in a civil case pending against him, on the ground that it was a quasi-criminal proceeding.

29. 198 La. 861, 5 So. (2d) 132 (1941), rehearing denied December 1, 1941.

30. "In certain classes of cases collateral offenses may be shown to prove the mental processes or mental attitude of the accused. This includes five different things: (1) Motive—such as commission of the crime charged to suppress evidence of some other crime; (2) intent—as in embezzlement and forgery cases; (3) absence of accident or mistake—such as passing counter-

evidence of the prior sales was held inadmissible. Hence the evidence offered did not come within the exception recognized.

Injury Must Be Shown

In *State v. Snowden*[31] it was shown that two of five jurors has read allegedly prejudicial newspaper articles. Defendant's counsel, however, offered no proof that these jurors had been influenced. It was held that no new trial will be granted, as injury or prejudice must be shown.[32] Justice Fournet dissented with an opinion concurred in by Justice Ponder in which it is argued that to show prejudice in such a case would be almost impossible, that the court should not require an almost impossible act, that the test should be whether the defendant might have been prejudiced by such an error.

Real Evidence

In *State v. Williams*[33] (a prosecution for cow stealing) the defendant admitted taking the cow, but pleaded mistake. The jury was given a view of the cow, it having been properly identi-

feit coins or bills, or receiving stolen property; (4) identity of the person charged with the commission of the crime on trial—as when, on a charge of murder, it is shown that the crime was committed with a weapon proven to have been stolen by the defendant at some other time or place; and (5) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other—such as a series of sales of intoxicating liquor shown to establish that the defendant did sell the particular liquor charged." 1 Wharton, Criminal Evidence (11 ed. 1935) 490, § 345. See 1 Wigmore, Treatise on Evidence (1940) 718, § 217; 2 Marr, Criminal Jurisprudence of Louisiana (2 ed. 1923) 872, § 566.

31. 198 La. 1076, 5 So.(2d) 355 (1941), rehearing denied December 22, 1941.

32. This seems to be not only the established jurisprudence but the rule of Art. 557, La. Code of Crim. Proc. of 1928: "[No] new trial [may be granted] . . . on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless . . . it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right." Although neither majority or dissent refer to this article, the court might well have disposed of defendant's contention with the words "Ita scripta est," and cited Article 557.

A perusal of the jurisprudence cited by the majority [2 Marr, Criminal Jurisprudence (1923) 1189, § 770; State v. Hoffman, 120 La. 949, 45 So. 951 (1908); State v. Alvarez, 182 La. 908, 162 So. 725 (1935); State v. Green, 185 La. 175, 168 So. 766 (1936); State v. Taylor, 192 La. 653, 188 So. 731 (1939); State v. McClain, 194 La. 605, 194 So. 563 (1940)] indicates that their understanding of these authorities is undoubtedly correct. Justice Fournet in his dissent states: "My appreciation of the foregoing authorities is that they do not uphold the view expressed in the majority opinion" [198 La. 1076, 1087, 5 So.(2d) 355, 360 (1941)], but instead of distinguishing or explaining away these cases [Justice Fournet sat on four of the above five cases, and apparently concurred], he launches into an elaborate discussion of the common law authorities which, although expressive of sound social policy, would appear inapplicable in view of Article 557 of the Louisiana Code of Criminal Procedure.

33. 199 La. 418, 6 So. (2d) 333 (1942), rehearing denied February 2, 1942.

fied. The defendant relies on *State v. Foret*[34] to show that this was prejudicial. It was held that the jury's view of the cow was unimportant after defendant admitted taking the cow and pleaded mistake. The *Foret* case was distinguished on the ground that the defendant there denied taking the steer, and that the identity of the steer was not properly shown.[35]

Rebuttal Evidence

In *State v. Moreau,* [36] the prosecution, understanding defendant's alibi to be that he was listening to President Roosevelt's speech at the time of the crime, introduced rebuttal evidence that no such speech had been made on that date. The court found that the defendant had not testified as to the particular day on which he had heard the president's speech, and that the admission of such prejudicial evidence as rebuttal where there was nothing to rebut could only result in discrediting defendant and confusing the jury.[37]

Remote and Prejudicial Evidence

In *State v. Vincent,*[38] a prosecution for murder, the court admitted evidence of an altercation between defendant's children and the children of the deceased occurring an hour before the homicide, as relevant to show motive or malice, and rejected

34. 196 La. 675, 200 So. 1 (1941). See discussion, The Work of the Louisiana Supreme Court for the 1940-1941 Term (1942) 4 LOUISIANA LAW REVIEW 165, 267. The facts of the *Williams* and *Foret* cases are similar except that in the latter the defendant denied taking the steer, and the steer was not properly identified.

35. The *Foret* case involved "autoptic preference," a doctrine not applicable to the *Williams* case. Autoptic preference involves the self-inspection by the judge or jury of real evidence, and is to be distinguished from testimonial and circumstantial evidence. 4 Wigmore, Treatise on Evidence (3 ed. 1940) 237, § 1150. Though Wigmore gives the general rule that "no question of relevancy can arise with reference to Autoptic Preference" (1 Wigmore, op. cit. supra, at 397, § 24), proper authentication of such real evidence is required (7 Wigmore, op. cit. supra, at 564, § 2129) in order to avert the "natural tendency to infer from the mere production of any material object, the truth of all that is predicated upon it" (4 Wigmore, op. cit. supra, at 254, § 1157). Thus Chief Justice O'Niell says, "Without some such proof of the identity of the steer in the truck he was not admissible in evidence." State v. Foret, 196 La. 675, 680, 200 So. 1, 3 (1941).

36. 200 La. 293, 7 So.(2d) 915 (1942). The case was remanded for a new trial.

37. Witness Ballard (a co-defendant who turned state's evidence) testified that the crime was committed on the night of May 20, 1941, and that during that day he had sold defendant a hog. Then defendant testified that he had heard the President's speech on the night of the day he bought a hog from Ballard. Held, this does not necessarily show the night of the crime to have been May 20, 1941, according to defendant, and hence evidence in rebuttal of such a statement is inadmissible.

38. 198 La. 1037, 5 So.(2d) 327 (1941), rehearing denied December 1, 1941.

evidence of a somewhat similar incident which happened five years previously, as being too remote. Another murder prosecution, *State v. Guillory*,[39] witnessed the state introducing evidence of defendant's escape from an East Texas jail a few hours before committing the alleged crime in Western Louisiana. This evidence was held relevant to show that the murder was premeditated, and that defendant had malice aforethought.[40]

Res Gestae

In *State v. Dale*[41] the deceased told his daughter within one minute of the fatal shooting, and his wife within three minutes, that the defendant had shot him. It was held that testimony of the wife and daughter was properly admissible as part of the res gestae.[42]

State v. Guillory[43] illustrated perhaps a more interesting application of the res gestae doctrine. The defendant was prosecuted for murder, and the state introduced evidence of his escape from an East Texas jail a few hours before committing the alleged homicide in Western Louisiana. The escape was held to form a part of the res gestae, it appearing that the jailbreak was a step in defendant's plan to kill the deceased.

---

39. 201 La. 52, 9 So.(2d) 450 (1942).

40. "When the scienter or quo animo forms an essential or indispensable part of the inquiry, testimony may be offered of such acts, conduct or declarations of accused as tend to establish such knowledge or intent, notwithstanding they may, in law, constitute a distinct offense. That is to say, to the general rule that no evidence can be given of felonies committed by accused other than that charged in the indictment there are exceptions. Thus, proof of a different crime from the one charged is admissible when both offenses are closely linked and constitute part of the res gestae, or when it is pertinent and necessary to show motive or intent." 2 Marr, Criminal Jurisprudence (2 ed. 1923) 868, § 565, cited approvingly in State v. Guillory, 201 La. 57, 9 So.(2d) 450, 451 (1942). The court also cited Article 495 of the Louisiana Code of Criminal Procedure of 1928 as authority, but it is difficult to see its relevancy, inasmuch as Article 495 deals with impeaching the credibility of witnesses.

41. 200 La. 19, 7 So.(2d) 371 (1942).

42. "The distinguishing characteristics of these declarations are that they must be necessary incidents of the criminal act or immediate concomitants of it, and that they are not due to calculated policy or deliberate design. There are no limits of time within which the res gestae can be arbitrarily confined. They vary in fact with each particular case." State v. Williams, 158 La. 1011, 1013, 105 So. 46, 47 (1925). Cf. Arts. 447-448, La. Code of Crim. Proc. of 1928. This testimony might have been equally admissible as dying declarations under Article 249 of the Louisiana Code of Criminal Procedure of 1928, if shown that declarant was conscious of impending death. But admissibility under the res gestae doctrine may be easier to show.

43. 201 La. 52, 9 So.(2d) 450 (1942), rehearing denied July 20, 1942. Justice Fournet delivered the opinion of the court, with Chief Justice O'Niell dissenting in part.

Witnesses

In *State v. Augusta*[44] non-compliance with Article 493[45]—that a proper foundation must be laid before impeaching the accused's credibility by a prior inconsistent statement—was held as reversible error. In the same case the court also held it no reversible error for a witness who had already testified, to repeat part of her evidence as a rebuttal witness, no prejudice being shown to the substantial rights of the accused.

VI. PROCEDURE

Appeals and Appellate Procedure

Brock v. Police Jury of Rapides Parish[1] reiterated the rule that there is no right of appeal from a final judgment until it is signed.[2] Such signing must take place before the appellants file their appeal bond; otherwise the appeal will have to be dismissed, even though the appellees may not move to dismiss it. In *Mount Olive Baptist Church v. New Zion Baptist Church,*[3] the appeal bond had not been filed within the year after the judgment was signed. The court held that the declaration in Article 593 of the Code of Practice that "no appeal will lie . . . after a year has expired," is so imperative that the appellate court has no jurisdiction over a case where the appeal bond was not filed within the year after the judgment was signed.

Interlocutory and final judgments were distinguished in *Reeves v. Barbe,*[4] the court holding that "a judgment dismissing, on exception of no cause of action, only a part of the case is an interlocutory judgment from which no appeal lies unless irrepar-

44. 199 La. 896, 7 So.(2d) 177 (1942).

45. Art. 493, La. Code of Crim. Proc. of 1928: "Whenever the credibility of a witness is to be impeached by proof of any statement made by him contradictory to his testimony, he must first be asked whether he has made such statement, and his attention must be called to the time, place and circumstances, and to the person to whom the alleged statement was made, in order that the witness may have an opportunity of explaining that which is prima facie contradictory. If the witness does not distinctly admit making such statement, evidence that he did make it is admissible." Apparently the court will reverse for mere non-compliance with this article—without applying the "injury must be shown" requirement. It is difficult to draw the line between what the court considers as per se reversible, and what is reversible only if injury is shown. See note 32, supra.

1. 198 La. 787, 4 So.(2d) 829 (1941).

2. Accord: Succession of Savoie, 195 La. 433, 196 So. 923 (1940).

3. 198 La. 896, 5 So.(2d) 144 (1941).

4. 200 La. 1073, 9 So.(2d) 426 (1942).

able injury will result."[5] Moreover, the mere fact that both parties consent to the appeal does not warrant the court's entertaining it, nor does it prevent dismissal of the appeal ex proprio motu.

In *McDermott v. Kilpatrick*,[6] the appellants had instructed the district court clerk to prepare the transcript. Although the latter gave it to the Express Company, it was never received in the supreme court. It was held to be the duty of the appellant, not the district court clerk, to file transcripts of appeal in the supreme court. Where the appellant entrusts the transcript to the clerk for filing, the clerk becomes the appellant's agent.[7] Act 234 of 1932 was not applicable because the motion to dismiss the appeal was not based on an error or omission in the transcript, but on the appellant's failure to file at all. However, in *Wren v. Brock*,[8] where there was an alleged lack of certain documents in the transcript, the court of appeal was held without authority, under Act 234 of 1932, to dismiss the appeal ex proprio motu without first granting the appellant "at least two additional days, exclusive of Sundays and holidays, to cure and correct any and all the informalities and irregularities" complained of in the motion to dismiss.[9]

In *Pettingill v. Hills, Incorporated*,[10] the lower court gave a judgment of partition, which was executed, and the party cast took a devolutive appeal. The court held that where it is impossible for the appellate court to undo what has been done, the

5. Reeves v. Barbe, 200 La. 1073, 1075, 9 So.(2d) 426, 427 (1942). Art. 539, La. Code of Practice of 1870: "Definitive or final judgments are such as decide all the points in controversy, between the parties." The law does not favor interruption of judicial proceedings by appeals from interlocutory decrees. In re Byrne, 193 La. 566, 191 So. 729 (1939).

6. 198 La. 1053, 5 So.(2d) 332 (1941).

7. Where the appellant effects his appeal and fails to file the transcript on or before the return day or within the days of grace following the return day, he is conclusively presumed to have abandoned the appeal. Such presumption can only be avoided by timely application to the appellate court for an extension of the return day. Arts. 587, 883, and 884, La. Code of Practice of 1870. The filing fee of $25.00 in civil cases, prescribed by La. Act 75 of 1906, § 1, is in no way considered a part of the transcript. Most of appellant's contentions were disposed of in Aaron v. Mizer, 196 La. 481, 199 So. 398 (1940).

8. 198 La. 1026, 5 So.(2d) 323 (1941).

9. La. Act 234 of 1932, § 1 [Dart's Stats. (1939) § 1978.1]; Dart, La. Code of Practice (1942) Art. 898.1. The act states: "[Where] a motion to dismiss his appeal is filed either by an appellee, third person, or intervenor. . . ." In the *Wren* case, the dismissal by the court of appeal was ex proprio motu. In this connection, see Moseley v. Doran, 163 So. 198 (La. App. 1935), where there was an omission in the record, but no motion to dismiss. The court considered the record as corrected, having in view the provisions of Act 234 of 1932.

10. 199 La. 557, 6 So.(2d) 660 (1942).

questions litigated in the lower court will not be decided, and the appeal will be dismissed.[11] In *Ducros v. St. Bernard Parish Police Jury*,[12] the appellants, though conceding that the question at issue was moot (because the election they had sought to enjoin had been held), contended that the legality of the election should be decided on devolutive appeal in order that liability for wrongful issuance of injunction could be determined. The court held in accord with the *Pettingill* case.

In *Rowley v. Bird Island Trapping Company*,[13] the plaintiff's demands were rejected in the trial court, and he had appealed suspensively and devolutively on the thirteenth day after the decree. Since plaintiff's demands were rejected, there was nothing to suspend, but the appeal was perfected as a devolutive one. The court relied on *Thompson v. Jones*,[14] decided the same day, holding that "failure to take an appeal within ten days, exclusive of Sundays, from the signing of a judgment, is not a cause for which the appeal should be dismissed, but a cause for which . . . the appeal should be declared not to have stayed execution of the judgment appealed from."[15]

A very important point was passed on in the cases of *In re Guardian Homestead Association*[16] and *In re Liberty Homestead Association*.[17] In proceedings for the liquidation of a homestead, a special agent and two attorneys separately ruled the liquidator into court to show cause why certain fees should not be paid. Both rules were filed on the same day; both were made absolute on the same day; but the liquidator only moved for one appeal and filed one appeal bond. It was held that there were two separate judgments here, but only one appeal, which was defective in failing to specify or identify which one of the two judgments

11. In Hollingsworth v. Caldwell, 195 La. 30, 196 So. 10 (1940), the court held that, if the party cast fails to protect his right by suspending the execution of the judgment of partition, the court cannot undo what has already been done by virtue of the executory judgment. This general principle has been applied in cases of sales under executory process [Unity Industrial Life Ins. Co. v. DeJoie, 197 La. 38, 200 So. 813 (1941)], and, even though the sale took place during the pendency of the appeal [Bank of LaFourche v. Barrios, 167 La. 215, 118 So. 893 (1928)]. Also in election controversies [Hollander v. Bailey, 148 La. 453, 87 So. 234 (1921)]; and in sheriff's sales of perishable property [Olson v. American Guaranty Co., 152 La. 1021, 95 So. 109 (1922)].

12. 200 La. 766, 8 So.(2d) 694 (1942).

13. 200 La. 442, 8 So.(2d) 288 (1942).

14. 200 La. 437, 8 So.(2d) 286 (1942).

15. Thompson v. Jones, 200 La. 437, 441, 8 So.(2d) 286, 288 (1942). See Reine v. Reine, 170 La. 839, 129 So. 364 (1926); Kelly, Weber & Co. v. F. D. Harvey & Co., 178 La. 266, 151 So. 201 (1933). Art. 575, La. Code of Practice of 1870.

16. 199 La. 216, 5 So.(2d) 750 (1942).

17. 198 La. 1068, 5 So.(2d) 353 (1941).

had been appealed from. As the order did not authorize an appeal from both judgments, or either one in particular, the appeal was dismissed.[18]

Well-recognized rules were re-stated in *State ex rel. Willis v. General Longshore Workers, Incorporated,*[19] and in *Gravier v. Gravier.*[20] The former case held that the merits of an appeal cannot be considered on hearing of a motion to dismiss the appeal;[21] and if a justiciable question is brought up by appeal, it will not be considered on a motion to dismiss.[22] In the latter case, the court said: "We consider the jurisprudence settled that the husband who is condemned to pay alimony pendente lite for the support and maintenance of his wife, is entitled to a suspensive appeal from such a judgment, in a divorce or separation . . . proceeding."[23]

Several cases interpreted Section 5 of Act 29 of 1924,[24] governing appeals from restraining orders and preliminary writs of injunction. *Ducros v. St. Bernard Parish Police Jury*[25] emphasized that no appeal can be taken from a decree refusing or granting, continuing or dissolving a restraining order. In *Waggoner v. Grant Parish Police Jury,*[26] the district judge granted plaintiffs both suspensive and devolutive appeals from a decree denying a preliminary injunction. The court held that, by the explicit terms of Act 29 of 1924,[27] plaintiffs were entitled to a devolutive appeal only, but that "a devolutive appeal from an

18. Pichon v. Pichon Land Co., 174 La. 77, 139 So. 764 (1932).

19. 200 La. 398, 8 So.(2d) 68 (1942).

20. 200 La. 775, 8 So.(2d) 697 (1942). Justice Higgins delivered the opinion of the court, with Chief Justice O'Niell dissenting.

21. Succession of Lissa, 194 La. 328, 193 So. 663 (1940); Succession of Price, 196 La. 172, 198 So. 894 (1940).

22. Drewes & Co. v. Ham & Seymour, 157 La. 861, 103 So. 241 (1925); Gottlieb v. Avery Realty Co., 180 La. 621, 157 So. 369 (1934).

23. Ramos v. Ramos, 173 La. 407, 137 So. 196 (1927); Weyand v. Weyand, 169 La. 390, 125 So. 282 (1929); Demerell v. Gerlinger, 183 La. 704, 164 So. 633 (1935); Cotton v. Wright, 187 La. 265, 174 So. 351 (1937). Chief Justice O'Niell dissented in all of these cases, and still believes contra to the majority on this point, as witness his dissent in Gravier v. Gravier, 200 La. 775, 8 So.(2d) 697 (1942).

24. Dart's Stats. (1939) § 2082; Dart, La. Code of Practice (1942) Art. 297.5.

25. 200 La. 766, 8 So.(2d) 694 (1942).

26. 198 La. 798, 4 So.(2d) 833 (1941).

27. La. Act 29 of 1924, § 5 [Dart's Stats. (1939) § 2082]; Dart, La. Code of Practice (1942) Art. 297.5: "but where upon a hearing, a preliminary writ of injunction shall have been granted, continued, refused, or dissolved by an interlocutory order or decree . . . a devolutive, *but not a suspensive* appeal, may be taken as a matter of right." A suspensive appeal may be granted in the trial court's discretion. Mitchell v. Dixie Ice Co., 157 La. 383, 102 So. 497 (1924). "The law does not contemplate that a restraining order, granted by the trial judge, pending an application for a preliminary injunction, should be . . . reinstated by a suspensive appeal, and operate during the pendency

order refusing a preliminary injunction, although allowed by law, is neither an adequate nor an appropriate remedy . . . and that the only effective relief to be obtained in such cases is by application to this court under its general supervisory jurisdiction."[28] *Brock v. Police Jury of Rapides Parish*[29] indicated that the remedy for one denied a preliminary injunction is to apply to the supreme court for certiorari and mandamus to compel the lower court to grant a preliminary injunction, not a suspensive appeal.

Conservatory Writs

The problem of *Roper v. Brooks*[30] was an interesting one; the decision of the court was in essence that personal service of citation on a defendant under the Non-Resident Motorists' Act does not deprive a plaintiff of his right to attach the non-resident's property located within the court's jurisdiction.[31]

Costs

The dispute in *Westwego Canal & Terminal Company v. Louisiana Highway Commission*[32] involved the question of wheth-

---

of the appeal." Snowden v. Red River & Bayou Des Glaises Levee & Drainage District, 172 La. 447, 454, 134 So. 389, 391 (1931). Evidently this was in reality only a devolutive appeal.

28. Waggoner v. Grant Parish Police Jury, 198 La. 798, 809, 4 So.(2d) 833, 836 (1941). Succession of Levins, 184 La. 825, 167 So. 454 (1936). But an appeal from a judgment rejecting the plaintiff's demand at the outset is essentially only a devolutive appeal (because there is nothing to suspend), even though the judge and appellant may call it a suspensive appeal. Brock v. Stassi, 189 La. 88, 179 So. 44 (1938); Brock v. Police Jury of Rapides Parish, 198 La. 787, 4 So.(2d) 829 (1941). But see Agricultural Supply Co. v. Livigne, 177 La. 15, 147 So. 365 (1933), where an appeal from an order rejecting a preliminary injunction was called a suspensive appeal.

29. 198 La. 787, 4 So.(2d) 829 (1941).

30. 201 La. 135, 9 So.(2d) 485 (1942).

31. The Non-Resident Motorist's Act (Louisiana Act 86 of 1928 as amended by La. Act 184 of 1932) provides that the operation of motor vehicles on Louisiana highways shall be deemed equivalent to appointment of the Louisiana Secretary of State as agent for the service of process on the non-resident, in actions growing out of the use of such highways, but that "nothing in this Act shall be construed as affecting other methods of process against non-residents." Act 220 of 1932 permits attachment to issue against non-residents in all suits involving a money demand, "provided that the provisions of this Act shall not apply in cases in which the defendant has a duly appointed agent in the State of Louisiana upon whom service of process may be made." Both statutes contemplate a non-resident having no *personally appointed* agent for service of process in the state. All that is meant by the provisos is that, if a non-resident has appointed his own agent for the service of process, Act 220 of 1932 is inapplicable. See Burgin Bros. & McCane v. Barker Baking Co., 152 La. 1075, 95 So. 227 (1922), where the appointment of a resident agent for service of process was held to prevent a non-resident attachment from issuing on a foreign corporation. Under Act 220 of 1930, it is immaterial that both plaintiff and defendant are non-residents. Jackson State Nat. Bank v. Merchants' Bank & Trust Co., 177 La. 975, 149 So. 539 (1933).

32. 200 La. 990, 9 So.(2d) 389 (1942).

er the highway commission was liable for court costs in an unsuccessful expropriation proceeding. The court answered affirmatively, on the ground that the statute creating the commission indicated an intention to subject it to the liability of an unsuccessful litigant for costs.[33]

Depositions

In *Byrd v. Louisiana Highway Commission,*[34] the plaintiff in forma pauperis was ruled into court to show cause why a certain non-resident witness should not be questioned de bene esse[35] under Act 143, Section 1, of 1934.[36] The plaintiff opposes on the ground that if this is permitted, he will be deprived of a valuable right—that of cross-examining the witness—because he has no money to send an attorney to cross-examine the witness, and urges that the testimony should be taken by written interrogatories instead. The Commission had offered to pay the expenses of plaintiff's trip. It was held that although Act 143 of 1934 says that testimony may be taken "with permission of the court before which the case is pending," this contemplates partial, rather than full, judicial discretion. It was not necessary for the defendant to cross-examine the witness, and the trial court abused its partial discretion by not permitting such oral deposition.

Estoppel

Buillard v. Davis[37] illustrated an application of Article 389 of the Code of Practice,[38] defining an intervention or an inter-

33. Section 27 of Act 95 of 1921 (E.S.) authorizes the commission to acquire by expropriation proceedings all rights of way necessary for new highways. The payment of costs by the commission as party cast was held a necessary and proper incident of such proceedings. Compare Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U.S. 81, 61 S.Ct. 485, 85 L.Ed. 595 (1941). Act 95 of 1921 (E.S.) was referred to as a special law, and was not repealed by Act 135 of 1936, a general law purposed to exempt the state and its political subdivisions from payment of court costs in judicial proceedings. A contrary holding in this case would apparently violate La. Const. of 1921, Art. I, § 2, guaranteeing "just and adequate compensation" for such expropriation. Petersburg School District of Nelson County v. Peterson, 14 N.D. 344, 103 N.W. 756 (1905).

34. 199 La. 838, 7 So.(2d) 158 (1942).

35. See 1 McMahon, Louisiana Practice (1940) 777, n. 9, where that author observes: " 'Depositions—on Oral Examination'. This is the method which Louisiana legislators, judges and attorneys refer to erroneously as *'depositions de bene esse'*. Cf. La. Act 98 of 1926, § 1; Dart's Stats. (1939), § 1996. Depositions de bene esse are merely *provisional* testimony to be used if, and *only if*, the witness is dead or absent at the time of the trial."

36. Dart's Stats. (1939) §§ 1998.1-1998.5; Dart, La. Code of Practice (1942) Arts. 440.1-440.5.

37. 201 La. 116, 9 So.(2d) 479 (1942).

38. "An intervention or interpleader is a demand by which a third person requires to be permitted to become a party in a suit between other persons."

pleader proceeding. The party who had previously intervened in a prior suit involving the same issues was held estopped to relitigate the matters therein decided.

Exceptions

The court observed, in *State v. Texas Company,*[39] that the attorney general has the inherent and constitutional right to file suit in the name of the state to protect the state's rights and interests, without obtaining the permission of any executive or administrative officer or board.[40] Thus, when he sues in the state's name to protect a right which he believes has been invaded, any question addressed to the state's right to sue, or whether it has a cause of action, cannot be raised by an exception to the authority of the attorney general to proceed on behalf of the state, but must be urged by way of exception of no right or cause of action. In *French v. Querbes*[41] the court stated the general rule that where "the case comes to us solely on the issue of whether or not the trial judge correctly maintained the exceptions of no right and no cause of action, the allegations of fact of the plaintiff's original and supplemental petitions, and the facts established by the documents annexed to the pleadings, are to be accepted as true for the purpose of considering the exceptions."[42] *Adkins' Heirs v. Crawford, Jenkins & Booth, Incorporated,*[43] held that a petition which stated a good cause of action as to any point would not be dismissed on an exception of no cause of action.

In *Griffith's Estate v. Glaze's Heirs,*[44] the court held that a judgment rendered, but still subject to a devolutive appeal, will support the plea or exception of lis pendens.

Forma Pauperis Proceedings

The plaintiff in *Byrd v. Louisiana Highway Commission*[45]

A dismissal of plaintiff's suit carries with it the dismissal of the intervention. Erskine v. Gardiner, 162 La. 83, 110 So. 97 (1926); Miller v. Board of Commissioners of the Port of New Orleans, 199 La. 1071, 7 So.(2d) 355 (1942).

39. 199 La. 846, 7 So.(2d) 161 (1942). Chief Justice O'Niell dissented in part, on the ground that in this case the exception of want of authority presents the same issue as an exception of no right or cause of action, and hence the court should give its opinion now rather than remand the case.

40. La. Const. of 1921, Art. 7, § 56.

41. 200 La. 654, 8 So.(2d) 631 (1942).

42. French v. Querbes, 200 La. 654, 658, 8 So.(2d) 631, 633 (1942). To the same effect, Hindelang v. Collord Motors, Inc., 200 La. 569, 8 So.(2d) 600 (1942).

43. 200 La. 561, 8 So.(2d) 539 (1942).

44. 199 La. 800, 7 So.(2d) 62 (1942).

45. 199 La. 838, 7 So.(2d) 158 (1942).

had been allowed to proceed under the forma pauperis acts.[46] These acts contemplate that the impecunious litigant shall not be excused from the expenses of an attorney to cross-examine a witness the defendant wishes to question de bene esse under Act 143 of 1934. It was held that the items of cost from which the Forma Pauperis Acts relieve litigants are specified therein, and the expenses of an attorney in cases of this kind are neither included nor contemplated in the acts. *Janice v. Bieber*[47] illustrated an instance where the court remanded the case that evidence be adduced as to whether plaintiff may proceed in forma pauperis.

Judgments

The court pointed out in *Reeves v. Barbe*[48] that a judgment dismissing, on an exception of no cause of action, only a *part* of a case, is an interlocutory rather than a final judgment, because it does not "decide all the points in controversy."[49] In *Lacaze v. Hardee*,[50] Act 16 of 1910 was interpreted as providing that judgments of the court of appeal become final and executory on the fifteenth calendar day after rendition, such fifteenth day to be reckoned from the day on which notice is actually given or delivered to counsel of record.[51]

Judgments by Default

The trial judge, in *Eiermann v. Eiermann*,[52] entered a default judgment and signed it, but at eleven o'clock of the same day, an answer had previously been filed with the clerk of court. The court held that it is only when no answer or other pleading has been filed that a judgment by default is authorized; and that if the defendant, on the very day when a definitive judgment by default was to have been rendered against him, appear and an-

46. La. Act 156 of 1912, § 1; La. Act 260 of 1918, § 1; La. Act 421 of 1938, § 1 [Dart's Stats. (1939) § 1400]; Dart, La. Code of Practice (1942) Art. 2073. See Cadwallader, Civil Suits in Forma Pauperis (1939) 1 LOUISIANA LAW REVIEW 787.

47. 200 La. 92, 7 So.(2d) 673 (1942). In this case the parties had submitted on the face of the pleadings the issue as to whether plaintiff might proceed in forma pauperis. The appellate court remanded the case in order that evidence might be adduced on this point.

48. 200 La. 1073, 9 So.(2d) 426 (1942).

49. Art. 539, La. Code of Practice of 1870.

50. 199 La. 566, 6 So.(2d) 663 (1942).

51. La. Const. of 1921, Art. VII, § 24: "Notice of all judgments shall be given to the counsel of record; and the court shall provide by rule for the giving of such notices. No delays shall run until such notice shall have been given." See the Rules of the Louisiana Supreme Court, Rule 13, §§ 2, 7; La. Act 16 of 1910.

52. 200 La. 26, 7 So.(2d) 604 (1942).

swer, the preliminary default taken should be set aside.[53] The rule was stated in *Whalen v. Davis*,[54] that in order to confirm a judgment taken by default, the plaintiff must in all cases prove his demand.[55]

Jurisdiction

The plaintiffs in *State ex rel. Pickrel v. Tugwell*[56] and *State ex rel. Hood v. Tugwell*[57] claimed back salary of $1,000 each, alleging they had been underpaid $125 per month for eight months. As their terms had over a year more to run, the anticipated underpayment would aggregate about $3,000. The court held that the amount in dispute, rather than the amount claimed, determined jurisdiction.[58] *Thompson v. Jones*[59] again stated the accepted rule that "an attorney's fee fixed in a promissory note forms part of the demand, and that it is inseparable from the main demand in determining the matter of appellate jurisdiction."[60]

State v. Thomasella[61] involved the question of whether the juvenile court, even though the district court has awarded the child to the mother in pending separation proceedings, has jurisdiction to determine whether the minor is a "neglected child" within the meaning of the law.[62] It was held that the juvenile court, on a proper finding, might take the child out of the custody of the party to whom the district court awarded the minor.[63]

53. Arts. 310, 311, 312, and 314, La. Code of Practice of 1870.
54. 200 La. 1066, 9 So.(2d) 424 (1942).
55. Art. 312, La. Code of Practice of 1870. Dunham & Co. v. Locke, 149 La. 897, 90 So. 236 (1921).
56. 199 La. 185, 5 So.(2d) 544 (1941).
57. Ibid.
58. La. Const. of 1921, Art. VII, § 10(3): "It shall have appellate jurisdiction in civil suits where the amount in dispute, or the fund to be distributed, irrespective of the amount therein claimed, shall exceed Two Thousand Dollars exclusive of interest."
59. 200 La. 437, 8 So.(2d) 286 (1942).
60. Thompson v. Jones, 200 La. 437, 439, 8 So.(2d) 286, 287 (1942).
61. 200 La. 60, 7 So.(2d) 615 (1942).
62. La. Act 126 of 1921 (E.S.), § 3 [Dart's Stats. (1939) § 1711] provides: "The term 'neglected child' shall mean any child seventeen years of age and under . . . found destitute, or dependent on the public for support, or without proper guardianship, or whose home, by reason of the neglect, cruelty, depravity, or indigence of its parents, guardians, or other persons, is an unfit place for said child, or having a single surviving parent undergoing punishment for crime, or found wandering about the streets at night without being on any lawful business."
63. "The fact that a district court has previously placed a child in the custody of one of the parents in a divorce proceeding does not vest that court with perpetual, exclusive jurisdiction to try all cases involving the welfare of such child." State ex rel. Graham v. Graham, 173 La. 469, 471, 137 So. 855, 856 (1931). Accord: Brana v. Brana, 139 La. 305, 71 So. 519 (1916); In re Owen, 170 La. 255, 127 So. 619 (1930). The general rule is that once a court has assumed

In *Adkins' Heirs v. Crawford, Jenkins & Booth, Incorporated,*[64] it was held that an appearance in an independent suit to annul a former judgment was no waiver of a party's right to question the court's jurisdiction ratione personae in the former suit.

Particular Actions

In *Whalen v. Davis,*[65] the court decided that in a petitory action, proof of adverse possession is a necessary part of plaintiff's case, because the petitory action can only be maintained against a party in possession.[66] *Painter v. Pilie*[67] stated a rule of procedure in boundary actions thusly: "An order homologating the report of a surveyor in an action of boundary does not have the effect of establishing the correct boundary of the contiguous estates and cannot be regarded as a disposal of the case on its merits."[68]

Pleadings

Prior jurisprudence to the effect that inconsistent causes of action may be cumulated in one action if the demands are pleaded in the alternative[69] was confirmed in *Templet v. Babbit.*[70] In a suit for conspiracy to defraud—*Hindelang v. Collord Motors*[71]—the defendants pleaded in bar a compromise agreement, the validity of which was attacked in plaintiff's petition. Must plaintiff sue directly to annul the compromise agreement before suit can be brought for damages? The court held that this collateral, rather than direct attack, was permissible, inasmuch as the record had been fully made up and evidence on this issue had been presented on both sides.

The defendant, in *Emery v. Orleans Levee Board,*[72] denied in his answer "each and every one of the allegations made by the plaintiffs save as hereinafter admitted." This was held not to

jurisdiction over a res, no other court may acquire custody of it. But the hearing of whether the child is neglected is a quasi-criminal proceeding.

64. 200 La. 561, 8 So.(2d) 539 (1942).

65. 200 La. 1066, 9 So.(2d) 424 (1942).

66. Girard's Heirs v. New Orleans, 13 La. Ann. 295 (1858).

67. 198 La. 713, 4 So.(2d) 804 (1941).

68. Art. 841, La. Civil Code of 1870. Griffing v. King, 12 La. App. 376, 125 So. 497 (1929).

69. Nicol v. Jacoby, 157 La. 757, 103 So. 33 (1925); Haas v. McCain, 161 La. 114, 108 So. 305 (1926); Johnson v. Johnson, 191 La. 408, 185 So. 299 (1938). Barre v. Hunter, 181 So. 674 (La. App. 1938), was disapproved, while Parker v. Talbot, 37 La. Ann. 22 (1885) was distinguished.

70. 198 La. 810, 5 So.(2d) 13 (1941).

71. 200 La. 569, 8 So.(2d) 600 (1942).

72. 200 La. 285, 7 So.(2d) 912 (1942).

be a sufficient compliance with the Pleading and Practice Act,[73] not being a denial of each allegation separately. Then the plaintiff claimed to be entitled to a judgment on the face of the pleadings.[74] The court held that, although the plaintiff might be otherwise entitled to such a judgment, the defendant would be allowed to redraft his answer, because the lower court had led the defendant to believe that his answer was in correct form, by refusing to require him to redraft it. In *Burton v. Allen Parish Police Jury*,[75] the court refused to consider new matters not covered by the pleadings and raised for the first time in the supreme court, for the reason that it would have been necessary to remand the case to take testimony on those points.

Rules of the Supreme Court

Rule III permits a party to move and obtain an extension of time for filing his transcript by a prima facie showing, specifically stating the cause preventing the completion of the transcript, and accompanying such motion with a certificate of the clerk of the trial court or an affidavit of himself or his attorney.[76] *Haas v. Cerami*[77] held that an appellant, in thus procuring an extension of time by a prima facie showing, runs the risk of having the order vacated in case it should subsequently appear that the facts alleged in the motion and affidavit were not true.[78]

Section 5 of Rule XIII[79] requires a petition for a writ of review to be verified by an affidavit of petitioner or his attorney, and accompanied by certain documents, enumerated in the rule. In *Davies v. Consolidated Underwriters*,[80] the court stated: "While

73. La. Act 157 of 1912, § 2(4), that the defendant in his answer shall either admit or deny specifically each material allegation or (of) fact contained in the plaintiff's petition. In Section 4 it is stated that all material allegations of fact contained in the petition which are not denied in the answer shall be deemed to be admitted.

74. La. Act 157 of 1912, § 1(4), as amended by La. Act 27 of 1926 [Dart's Stats. (1938) § 1483(4)]: "At any time after the answer is filed the plaintiff may by rule submit to the court the question of his right to a judgment upon the petition and answer."

75. 198 La. 752, 4 So.(2d) 817 (1941).

76. Rule III, Section 1, Rules of the Supreme Court of Louisiana, as promulgated Jan. 3, 1939, and amended down to Sept. 29, 1941. Dart, La. Code of Practice (1942) 1503.

77. 198 La. 735, 4 So.(2d) 812 (1941).

78. The extension of time is at the appellant's risk. Succession of Kuntz, 33 La. Ann. 30 (1881); Oertling v. Commonwealth Bonding & Casualty Co., 134 La. 26, 63 So. 611 (1913).

79. Rule XIII, Section 5, Rules of the Supreme Court of Louisiana, as promulgated Jan. 3, 1939, and amended down to Sept. 29, 1941. Dart, La. Code of Practice (1942) 1510.

80. 199 La. 459, 6 So.(2d) 351 (1942), rehearing denied Feb. 2, 1942.

the failure to literally observe the requirements . . . might justify the Court in refusing to issue the writ, it would not justify the Court in dismissing the proceeding *after* it had issued the writ and had before it the record and briefs filed in the Court of Appeal."[81]

Succession Procedure

The administrator of the estate in *Griffith's Estate v. Glaze's Heirs*[82] sued to recover certain land. The court held that an administrator has no right to bring a real action to recover property for the succession which he represents, if the succession does not owe any debts.[83]

Supervisory Writs

In *Wagonner v. Grant Parish Police Jury,*[84] a preliminary injunction was denied and the petitioners appealed. Later they applied for certiorari on the ground that the appeals did not afford an adequate remedy. It was held that "as a general rule, certiorari can issue only in cases in which the regularity of the proceedings of the trial court is attacked, but the Constitution lodged in the Supreme Court control and general supervision over all inferior courts. The power thus granted is plenary, and its exercise rests in the sound discretion of the Court."[85] The court, in *State v. Hayes,*[86] dismissed applications for mandamus, where the matter at issue in the lower court had become moot.

Venue

Miller v. Commercial Standard Insurance Company[87] involved construction of Act 55 of 1930, giving an injured person a direct right of action against his tortfeasor's insurer, suit to be brought in the parish where the injury occurred, or in the parish

81. 199 La. 459, 468, 6 So.(2d) 351, 354 (1942). Pipes v. Gallman, 174 La. 265 140 So. 43 (1932); Hatten-Hatten v. Haynes, 175 La. 743, 144 So. 483 (1932); Laurent v. Unity Industrial Life Ins. Co., 189 La. 426, 179 So. 586 (1938).

82. 199 La. 800, 7 So.(2d) 62 (1942).

83. The court indicated that this is particularly true as to a suit to recover title which was conveyed by a person whose succession the administrator represents. Succession of Preston v. Brady, 125 La. 535, 51 So. 579 (1910); Bull v. Andrus, 137 La. 982, 69 So. 799 (1915) Succession of McBurney, 162 La. 758, 111 So. 86 (1926).

84. 198 La. 798, 4 So.(2d) 833 (1941).

85. Waggoner v. Grant Parish, 198 La. 798, 809, 4 So.(2d) 833, 837 (1941), citing Loeb v. Collier, 131 La. 377, 59 So. 816 (1912). Since the adoption of La. Const. of 1921, Art. 7, § 10, giving the supreme court control and general supervision over all inferior courts, Articles 845 and 857 of the Louisiana Code of Practice of 1870 have become obsolete. Keegan v. Board of Commissioners, 154 La. 639, 98 So. 50 (1923).

86. 199 La. 269, 5 So.(2d) 768 (1941).

87. 199 La. 515, 6 So.(2d) 646 (1942).

of insured's domicile. The court held that, since this was a statute giving both the right of action and the venue in which it might be exercised, these venues were restrictive, and suit could not be brought elsewhere, even at the defendant-insurer's domicile.[88] In *Conerly v. Dyer*,[89] it was decided that where the statute[90] creating the Louisiana Milk Commission (a public body) fixed its domicile in East Baton Rouge Parish, a suit against the commission must be brought in the parish of its domicile, though service on members might be secured in Tangipahoa Parish, where the only office of the commission was located.

Louisiana v. McIlhenny[91] was a suit against McIlhenny of Iberia Parish and Leche of St. Tammany Parish, to recover for an alleged conspiracy to defraud. Suit was brought in Iberia Parish, but the complaint was dismissed as to McIlhenny on an exception of no cause of action. The court held that it has jurisdiction only by virtue of the fact that defendants were liable in solido as joint tortfeasors. Since the suit was dismissed as to the resident defendant, McIlhenny, the court can have no jurisdiction over the non-resident defendant.[92]

VII. MISCELLANEOUS

This section includes a condensation of several of the cases in which the court was called upon to render an interpretation of certain of our statutes.

In *Prudential Insurance Company of America v. Flournoy*[1] the court determined what commission a sheriff was entitled to under Louisiana Act 203 of 1898 as amended by Act 167 of 1928 for making a seizure and sale of property under an order of

88. La. Act 253 of 1918 [Dart's Stats. (1939) § 4248] permitted a direct action by an insured person against the tortfeasor's insurer only when the insured was insolvent or bankrupt. Under the amendment—Act 55 of 1930—the exercise of this right of action is not qualified except that suit must be brought in one of the two venues enumerated. The decision, in theory, involved the rule of statutory interpretation: *"Expressio unius est exclusio alterius."* For a comparison of Act 55 with similar Wisconsin and Rhode Island "direct action" statutes, see excellent discussion in Note (1942) 4 LOUISIANA LAW REVIEW 455.

89. 200 La. 727, 8 So.(2d) 681 (1942).

90. La. Act 195 of 1938.

91. 201 La. 78, 9 So.(2d) 467 (1942).

92. La. Code of Practice, Art. 165(6): "When the defendants are joint or solidary obligors, they may be cited at the domicile of either one of them." But suit on joint or solidary obligations can be maintained at the domicile of any one of such obligors only if such resident obligor is actually made a party to the suit. Pittman Bros. Construction Co. v. American Indemnity Co., 194 La. 437, 193 So. 699 (1940).

1. 199 La. 786, 7 So.(2d) 58 (1942).

seizure and sale. Prior to the 1928 amendment the court of appeal interpreted Louisiana Act 203 of 1898 as meaning that the sheriff was entitled to a commission only on the amount actually collected by him and paid over to the seizing creditor and was not entitled to a fee on any amount retained by the purchaser to liquidate ranking mortgages.[2] At the following session of the legislature the amendment[3] was enacted providing that the sheriff was entitled to his fee on the "price of adjudication"[4] instead of on the "amount collected and paid over" to the seizing creditor. The 1928 amendment also provided that the sheriff's fee was to be "2% on the first $500.00 and 1% on any excess . . . on the price of adjudication . . . provided that when the price of the adjudication includes a mortgage . . . assumed by the purchaser, or when the purchaser retains . . . the amount necessary to pay such mortgage . . . the fees . . . on that part of the price . . . assumed or retained . . . shall be 1% of the first $1,000.00, one-half of 1% on the next $4,000; ¼ of 1% on the next $8,000, and ⅛ of 1% on the balance."[5] The plaintiff held a first mortgage on certain property and had it seized and sold under a writ of fieri facias. He bid in the property at the sale and the amount of his bid was credited against the writ and judgment. The sheriff contended his fee should be computed just as if the property had been adjudicated to a third person for cash and this third person had paid the price to the sheriff who had paid the money over to the seizing creditor. If so computed, the fee would amount to $2,255.00. The plaintiff contended that the commission should be $327.00 as computed under the exception because the price was retained by him to pay off the mortgage which he held. The court held that the property was sold for cash free of all mortgages. Since there was no ranking mortgage to be assumed or paid off the plaintiff could not have retained any of the price bid, and "the fact that the seizing creditor here was not called upon to pay to the sheriff the amount actually bid in cash . . . is of no moment, for the adjudicatee did, in effect, pay this amount over to the sheriff, since the writ . . . and judgment . . . were both

2. Investors' Mortgage Co. v. Theriot, 7 La. App. 397 (1928); Investors' Mortgage Co. v. Prejean, 8 La. App. 46 (1928).

3. La. Act 167 of 1928.

4. The words "price of adjudication" were inserted in the amendment in lieu of the words "amount collected and paid over to the party causing the execution." These last mentioned words were in the statute before the amendment.

5. La. Act 203 of 1898, as amended by La. Act 167 of 1928 [Dart's Stats. (1939) § 1338].

credited to the . . . amount of the bid."[6] Chief Justice O'Niell dissented on the ground that the amendment should not be interpreted to mean that the lower rate of commission is to be applied only to a case where the purchaser retains an amount of his bid to pay prior or ranking mortgages held by a third person. He states that the statute reads "the lower rate . . . shall apply when the price of the adjudication includes a mortgage . . . assumed by the purchaser, or when the purchaser retains . . . the amount necessary to pay such mortgage. . . . [The] phrase does not mean that the amount retained . . . must be actually paid by him to a third party—and not retained in payment . . . of a mortgage due to . . . himself. There is no reason why . . . such a distinction should be made between a purchaser who retains an amount to pay a mortgage held by a third party, and a purchaser who retains an amount to pay . . . a mortgage held by him."[7]

In *State ex rel. Item Company, Incorporated v. O'Niell, Clerk of Court,*[8] it was held that the New Orleans Item is a daily newspaper within the meaning of the Louisiana statutes requiring the clerk to publish judicial advertisements in a daily newspaper.[9] The clerk contended that the Item was not a daily newspaper because it was not published on Sunday. The court reiterated the definition of a daily newspaper expressed in *State ex rel. Item Company v. Commissioner of Public Finances*[10] that "papers published every day except Monday, or every day except both Sunday and Monday are regarded by the general public as daily papers."[11]

In *Carnahan v. Police Jury of Calcasieu Parish,*[12] the court held that substantial compliance with Louisiana Act 46 of 1921 (E.S.) was a sufficient compliance. This act requires publication of notice of a taxpayers' election authorizing a proposed bond issue for thirty days in a newspaper published in the political subdivision that proposes to issue the bonds. It also requires the publication of the results of the balloting in the subdivision. The only newspaper published in the subdivision was published at Sulphur but at uncertain, irregular intervals. Therefore it was held that publication of the notice and results in the paper pub-

6. 199 La. 786, 791, 7 So.(2d) 58, 59 (1942).
7. 199 La. at 797, 7 So.(2d) at 61.
8. 198 La. 639, 4 So.(2d) 633 (1941).
9. La. Act 49 of 1877, La. Act 104 of 1878, La. Act 75 of 1938.
10. 161 La. 915, 109 So. 675 (1926).
11. 161 La. at 918, 109 So. at 676.
12. 199 La. 262, 5 So.(2d) 766 (1942).

lished at Lake Charles, which had a circulation throughout the road district, was a sufficient publication. Consequently a taxpayers' suit to annul the election failed. As the plaintiff brought suit more than sixty days after the results were promulgated, the court also announced that the suit had prescribed.[13] A long line of decisions enunciating this rule were cited.[14]

Louisiana Act 195 of 1938 conferred upon the Louisiana Milk Commission the power to appoint its secretary. The commission appointed the plaintiff as secretary for a term that was to expire in 1942. In 1941 the commission, by resolution, voted to remove him. He sought an injunction in *Garnier v. Louisiana Milk Commission*.[15] It was held that where a statute confers the power to appoint an officer and does not specify the term, the power to remove is an incident to the power to appoint. The appointing body may remove him at any time, even though they appointed him for a specific term and that term has not expired.[16] Such a rule is founded on the theory that the implied power of the appointing authority to remove cannot be contracted away where the statute granting the power to appoint does not fix the tenure of the office.[17] It was found, however, that the resolution removing the plaintiff was null because one of the members of the commission who voted for the removal was not a legally constituted member. The statute names as one of the members "the Executive Secretary of the Louisiana State Live Stock Sanitary Board of Louisiana State University." The illegally constituted member is the "Secretary of the Louisiana State Live Stock Sanitary Board" and there is no such office in the state as the one stipulated in the statute; therefore he is not a de jure member. In answer to the contention that if he was not a de jure officer, he was a de facto one, the court stated that as there can be no de facto officer unless there is a de jure office in existence,[18] and since there was no such de jure office in existence, the member cannot be regarded as a de facto officer, but is only a mere intruder. As

13. La. Const. of 1921, Art. XIV, § 14(n); La. Act 46 of 1921(E.S.) § 43.

14. Hardin v. Police Jury of Vernon Parish, 155 La. 899, 99 So. 690 (1924); Brock v. Police Jury of St. Landry Parish, 159 La. 66, 105 So. 227 (1925); Roy v. City of Lafayette, 168 La. 1081, 123 So. 720 (1929); Sealy v. Iberia Parish School Board, 191 La. 223, 183 So. 6 (1938).

15. 200 La. 594, 8 So.(2d) 611 (1942).

16. Potts v. Morehouse Parish School Board, 177 La. 1103, 150 So. 290 (1933).

17. 200 La. 594, 604, 8 So.(2d) 611, 614 (1942).

18. Davenport v. Davenport, 116 La. 1009, 41 So. 240 (1906); Board of Public Utilities v. New Orleans Ry. & Light Co., 145 La. 308, 82 So. 280 (1919).

the resolution was null, the plaintiff was not legally removed and was entitled to the office until validly removed.

The court in *State ex rel. Galloway v. Roberts*[19] expressly overruled *State ex rel. Marrero, District Attorney v. Ehret*[20] insofar as it held that the conclusion of the governor on the question of sufficiency of the number of signers of a petition for the incorporation of a village is not subject to judicial investigation. The governor's decision, therefore, in ascertaining from the names signed upon a petition for incorporating a village, who are qualified electors and who are bona fide residents in the area proposed to be incorporated, is not conclusive but is subject to judicial review. He is not performing an ordinary political function but is acting only upon the authority granted to him by the act of the legislature.

19. 200 La. 36, 7 So.(2d) 607 (1942).
20. 135 La. 643, 65 So. 871 (1914).