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Procedure

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poration is dissolved, actions by or against it abate.[45] The crucial question in cases of this kind is whether the appointment of the receiver actually operates as a dissolution of the corporation under applicable law.[46] As it appeared that the corporation was actually dissolved under Texas law the court correctly applied principles of conflict of laws to this situation.[47] But even though a corporation is civilly dead in the state of incorporation, it may be considered still alive in another state under a statute continuing the corporate existence for the purpose of winding up in respect to remedies of that state's citizens against property in its jurisdiction.[48] An interesting question not passed on by the court is whether the fund deposited in Louisiana could be reached by non-resident creditors.[49]

VI. PROCEDURE

*Robert W. Williams**

A comparatively large number of cases touching on procedural questions were decided by the supreme court at its 1944-1945 term, but, as is so often the case, the majority of these questions should never have been raised because of the certainty of the rules which were invoked. However, several very intriguing questions were presented to and decided by the court and will undoubtedly lend themselves to more intensive study than is contemplated by this summary.

Appeals, Appellate Jurisdiction and Procedure

Walsh v. Bush[1] presents one of the increasingly numerous phenomena growing out of the housing shortage which has gripped the entire country. Here, plaintiff sued for $5,030.00 damages caused by defendant's interference with plaintiff's occupancy of a residence and garage rented by him from defendant

45. Musson v. Richardson, 11 Rob. 37 (La. 1845); McCoy v. State Line Oil & Gas Co., 180 La. 579, 157 So. 116 (1934). See La. Act 250 of 1928, § 62 [Dart's Stats. (1939) § 1142].

46. See Tangipahoa Bank & Trust Co. v. Guwang, 15 So. (2d) 148 (La. App. 1943).

47. See 2 Beale, A Treatise on the Conflict of Laws (1935) §§ 157.2, 192.3.

48. 16 Fletcher, Cyclopedia of the Law of Private Corporations (1942) § 8115, citing Rodgers v. Adriatic Fire Ins. Co., 148 N.Y. 34, 42 N.E. 515 (1895).

49. See Cognovich v. Sun Indemnity Co. of New York, 176 La. 373, 145 So. 774 (1933), cited supra note 3.

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1. 206 La. 303, 19 So. (2d) 144 (1944).

under a verbal, month to month lease, at twenty-five dollars per month. He charged that defendant had broken a flower pot full of dirt over plaintiff's porch, had padlocked the garage and had filed eviction proceedings against plaintiff in the First City Court of New Orleans, said proceedings having been dismissed. The lower court awarded plaintiff twenty-five dollars in damages and plaintiff appealed to the supreme court asking for an increase in the award. The court held, and properly so, that the amount claimed as damages was grossly inflated and that plaintiff could not reasonably expect damages as high as two thousand dollars under the facts alleged and proved. The case was accordingly transferred to the Orleans Court of Appeal. The court had, of course, ample authority for its position.[2]

Roccaforte v. Barbin[3] was a suit to annul a contract to purchase real property and to recover an eight hundred dollar deposit made by the plaintiff. Plaintiff appealed from a judgment of dismissal on an exception of no right or cause of action. Defendants moved to dismiss the appeal on the grounds that the case did not present the proper jurisdictional amount and that the appeal bond was not conditioned as required by law for a devolutive appeal. The court properly held that the suit involved not only the return of the eight hundred dollars deposit, but also the rescission of a contract for the purchase of eight thousand dollars worth of real property. The motion to dismiss because of the defect in the bond was not entertained due to the fact that it was not filed until after the lapse of more than three days from the return date. In the event there is a failure to file such motion within this period the court will not consider it unless the defect complained of is jurisdictional or strikes at the foundation of the appeal.

The appeals in *City of Gretna v. Aetna Life Insurance Company*[4] and its companion case, *City of Gretna v. St. Paul Fire and Marine Insurance Company*[5] were transferred to the proper court of appeal[6] because of the lack of the necessary jurisdictional amount. Defendants had argued that the appeals were properly

2. See Cusachs v. Salem Brick and Lumber Co., Ltd., 144 La. 411, 80 So. 608 (1919). See also La. Act 19 of 1912 [Dart's Stats. (1939) §§ 1427-1428], authorizing the transfer of the appeal to the proper court of appeal. The court also transferred the appeal in Torres v. Serpas, 207 La. 36, 20 So. (2d) 416 (1944), an election contest over the office of police juror for St. Bernard Parish when it was shown that the emolument for the entire four year term amounted to only $1,500.00.

3. 207 La. 924, 22 So. (2d) 271 (1945).

4. 207 La. 1085, 22 So. (2d) 658 (1945).

5. 207 La. 1089, 22 So. (2d) 660 (1945).

6. La. Act 19 of 1912 [Dart's Stats. (1939) §§ 1427-1428].

lodged in the supreme court because the legality of a taxing statute was at issue. The court found, however, that the taxing statute had already been upheld when the principal case was before it on appeal from a judgment sustaining an exception of no cause of action.[7]

In *Placid Oil Company v. North Central Texas Oil Company, Incorporated,*[8] one party to an interpleader proceeding appealed from the judgment of the trial court. One of the appellees answered the appeal, asking for an amendment of the judgment against the other appellee. Judge O'Niell, speaking for the court, denied the right of an appellee to seek an amendment of the original judgment without having taken an appeal from it. Numerous authorities were cited in support of this doctrine. There is language in the case of *City of Shreveport v Kahn*[9] which would seem to support the contention of the appellee who answered the appeal. However, the *Kahn* case stands only for the proposition that such appellee may seek modification of the judgment insofar as it affects appellant and does not extend to a case such as the one here where one appellee seeks to change the judgment as between the co-appellees.

The court had occasion again to announce that an appellee has the burden of proving alleged defects in the taking of an appeal. In *Waldhauser v. Adam Hats, Incorporated,*[10] appellee moved to dismiss an appeal from a judgment of eviction on the ground that the judgment was not timely filed. Having failed to prove definitely that the appeal was not entered within the twenty-four hour period allowed by law[11] the appellee was considered as not having discharged this burden; hence the motion was denied.

The right of an appellant to dismiss the appeal voluntarily was settled by the case of *Gravity Drainage District No. 2 v. Edwards,*[12] a case particularly interesting to attorneys employed on contingencies. The drainage district filed suit against various defendants on a depository bond. During the pendency of the suit, a majority of the members of plaintiff board filed a motion asking that the suit be dismissed and giving their reasons for the request. The trial court entered an order of dismissal and plaintiff, through its special counsel, appealed. After the appeal was

7. City of Gretna v. Aetna Life Ins. Co., 206 La. 715, 20 So. (2d) 1 (1944).
8. 206 La. 693, 19 So. (2d) 616 (1944).
9. 194 La. 55, 193 So. 461 (1939).
10. 206 La. 875, 20 So. (2d) 165 (1944).
11. La. Rev. Stats. of 1870, §§ 2155-2158 [Dart's Stats. (1939) §§ 6597-6600].
12. 207 La. 1, 20 So. (2d) 405 (1944).

lodged in the supreme court, the board filed a resolution instructing counsel to dismiss the appeal and, in the event he failed or refused to do so, requesting that the District Attorney for the Twenty-first Judicial District carry out the board's wishes. Special counsel for the board refused to so move and the board, through the district attorney and joined by the attorneys for the defendant, moved that the supreme court dismiss the appeal. The special counsel for the board opposed the motion on various grounds, among which was the contention that the board could not dismiss the appeal to his prejudice inasmuch as he had been retained upon a contingent fee. The court discredited this contention, stating that it was "universally recognized that a client may revoke the employment of his attorney at will, and this is true even though the attorney is serving for a contingent fee."[13]

Special counsel further urged that a succeeding board could not dismiss a suit authorized by its predecessor and thereby donate the amount involved in the suit to the defendants. The court waved this objection aside with the statement that the only inhibition placed on a voluntary dismissal of an appeal is the refusal of the appellees to give their consent.

By supplemental brief, the special counsel asked that the supreme court set his fee for the work performed by him. The court pointed out that no judgment could be rendered under the motion except a judgment of dismissal and that since the amount of the fee, which could be on a quantum meruit basis only, had not been adjudicated upon by the lower court, it could not at this time be considered on appeal.

Pool v. Gaudin[14] involved an appeal from a judgment dismissing a suit for damages for an alleged libel. Defendant moved to dismiss the appeal on the ground (1) that the appeal was granted upon plaintiff's written motion, rather than petition, filed during the vacation period of the district court that followed the term of court during which the judgment was pronounced, and (2) that the motion did not pray for, nor did the court order the citation and service of defendant. Appellant showed that the citation was actually issued to defendant and pleaded that it was immaterial that the appeal was obtained by motion rather than by petition and, further, that defendant, by failing to file his motion to dismiss within three days of the return day, had waived his rights to have the appeal dismissed.

The court, through Justice Fournet, refused to dismiss the

13. 207 La. 1, 6, 20 So. (2d) 405, 406.
14. 207 La. 403, 21 So. (2d) 424 (1945).

appeal for the reason that the fact that the citation was actually made upon defendant cured all defects in the appeal itself. The court found it unnecessary to pass upon appellant's second contention that defendant had waived his right to object to the appeal because of his failure to file his motion to dismiss within three days of the return date.

The question of the timely filing of the transcript of appeal, a question which seems to plague the court at every term, reared its ugly head again in the case of *Stafford's Estate v. Progressive National Farm Loan Association*[15] and *Succession of Edenborn.*[16] In the latter case, defendants-appellees filed a motion to dismiss the appeal on the ground that the transcript was not timely filed and asked that the supreme court rescind an order granting an extension of time for filing the transcript on the ground that appellant's motion for such extension did not set forth the true reasons for the delay in filing. In the alternative, appellees ask that the appeal be dismissed on the ground that the transcript is not in the form required by law. The extension of time for filing the transcript was granted on a certificate of the clerk of the lower court to the effect that more time was needed for its preparation. Appellees contend that if the clerk had started preparation of the transcript at the time the appeal was entered that it could have been completed by the return day and that appellant was at fault in not making it possible for the clerk to begin the transcript. However, the court, investigating the reasons for the delay, found as a fact that the delay in having the clerk start preparation was due to the inability of the appellant, appellees and the clerk to agree upon what should be included in the transcript. Hence, the court felt that its order for an extension of time was not improvidently issued and that the failure to file the transcript within the original return day was not due wholly to the appellant's fault and neglect.

The court also found that the transcript was not properly filed because certain original exhibits were attached to one transcript and that the other copies did not contain copies of these exhibits. Further, a record of the federal district court, which was to be used in evidence in this case, was not properly included in the transcripts. However, the court applied the provisions of

15. 207 La. 1097, 22 So. (2d) 662 (1945). Here the objection was made that the transcript was not timely filed, but this argument was abandoned when the mover became aware of the fact that an extension of time had been granted pursuant to Art. 883, La. Code of Practice of 1870, and the transcript had been filed within the extended period.

16. 208 La. 25, 22 So. (2d) 673 (1945).

Louisiana Act 234 of 1932[17] and allowed appellant additional time within which to properly prepare his transcript.

In *Union Sulphur Company v. Campbell,* [18] *Town of Abbeville v. Police Jury of Vermilion Parish,*[19] and *Barnes v. LeBlanc*[20] the court was required to apply three rules that need no discussion. In the former case, the court stated that it could not disturb the judgment of the trial court, even though such judgment might be erroneous on its face, when the party aggrieved thereby did not appeal from the decree.[21] In the second case, the court refused to entertain an attack upon the constitutionality of a statute when that attack was made for the first time in the brief of appellant. In the third case, the court refused to upset the trial judge's finding of fact where there was conflicting testimony, but where there was ample evidence for the trial judge to decide as he did.

In *Graziani v. Elder & Walters Equipment Company, Incorporated,* [22] appellant had applied for and received an order for a suspensive appeal from a judgment rejecting a money demand. Defendant moved to dismiss the appeal on the ground that the appeal bond had not been filed within ten days from the date the judgment was signed. Justice Ponder, as the organ of the court, correctly held that the appeal could not be considered as a suspensive appeal inasmuch as there was nothing to suspend. He thereupon treated the appeal as devolutive and refused the motion to dismiss because the bond had been filed timely for such appeal.

17. Dart's Stats. (1939) § 1978.1. This statute, which has done much towards liberalizing appeal procedure and which has been used on many occasions for the promotion of justice in the appellate courts, reads in part as follows: "Whenever an appellant files an incomplete transcript, or files the transcript or a further application for an extension, within three judicial days after the return day, or omits to file as part of the record any transcript exhibits offered in evidence, or whenever because of any error on the part of the Clerk of Court or of the trial Judge, or for any purely technical reason, a motion to dismiss his appeal is filed either by an appellee, third person or intervenor, charging and setting forth as grounds for dismissal any of the above reasons, no appellate court shall maintain said motion to dismiss, or dismiss the appeal, unless it first allow to the appellant at least two additional days, exclusive of Sundays and holidays, to cure and correct any and all the informalities and irregularities alleged and complained of in the motion to dismiss; and such appellant may, before the date on which the motion to dismiss is fixed for trial, cure and correct any objection, irregularity or informality charged or alleged to exist in the motion to dismiss, and if it appears to the appellate court that he has done so, the motion to dismiss shall be denied."

18. 207 La. 514, 21 So. (2d) 626 (1945).

19. 207 La. 779, 22 So. (2d) 62 (1945).

20. 207 La. 989, 22 So. (2d) 404 (1945).

21. However, the court, by virtue of Art. 547, La. Code of Practice of 1870, corrected an obvious error of calculation in the trial court's judgment.

22. 208 La. 80, 22 So. (2d) 841 (1945).

Justice Ponder did not consider the case of *Bujol v Missouri Pacific Railroad Company*[23] in reaching the above result. That opinion was rendered earlier in the term and involved a construction of Section 5 of Louisiana Act 29 of 1924,[24] which has been the subject of much controversy in the past. Here, certain members of a railroad brotherhood filed suit against the Missouri Pacific Railroad Company, the Texas and Pacific Railway Company, and various railroad brotherhoods to have an agreement between the companies and the brotherhoods dated June 2, 1927, declared effective and to have a certain decree of the Board of Appeals of the Brotherhood of Railroad Trainmen, which attempted to change the agreement of June 2, 1927, declared illegal for reasons set forth in the petition. Plaintiffs also obtained a restraining order and rule nisi for a preliminary injunction. The named defendant filed exception of misjoinder on the ground that its trustee in bankruptcy was the proper party defendant. The other defendants filed exceptions to the citation. All defendants filed motions to dissolve the restraining order. The trial judge sustained the exception of misjoinder and dismissed the suit as to the Missouri Pacific Railroad Company and sustained the motions to dissolve. The restraining order and rule nisi were vacated and the suit dismissed as to all respondents. Plaintiffs applied for devolutive and suspensive appeals and the lower court issued an order denying a devolutive appeal from the order of court recalling the rule nisi for the reason that the case in its entirety was dismissed and the court felt that the only appeal permissible was a suspensive one. However, a devolutive appeal was granted from the judgment dismissing the suit as to the named defendant and a suspensive appeal was granted from the judgment dismissing the suit in its entirety.

Appellees moved to dismiss the appeal on the grounds (1) that the devolutive appeal was frivolous, (2) that the petition failed to show facts sufficient to show appellate jurisdiction in the Supreme Court and (3) that under Section 5 of Act 29 of 1924 a suspensive appeal is not allowed from a decree refusing a preliminary injunction, but only a devolutive appeal can be had. The court felt that the first objection pertained to the merits of the case and refused to consider it. It brushed the second objection aside because appellant had filed affidavits in the supreme court showing that the necessary jurisdictional amount was involved. In treating the last, and most serious objection, the court

23. 207 La. 123, 20 So. (2d) 608 (1944).
24. Dart's Stats. (1939) § 2082.

held that the appeals were properly taken and that the appellants, by failing to invoke the supervisory jurisdiction of the supreme court, had no further appellate relief which would have the effect of suspending the judgment recalling the restraining order and the rule nisi and that a devolutive appeal was proper. It further held that a suspensive appeal from the judgment dismissing the suit in its entirety was available to plaintiffs, though the court admitted that such an appeal would not have the effect of suspending in the action taken by the district court. Section 5 of Act 29 of 1924 was deemed not applicable inasmuch as it deals with interlocutory decrees only and does not apply to a final judgment such as was rendered here.

Chief Justice O'Niell concurred in the result, but dissented from the holding of the majority that the appeal was suspensive rather than devolutive. He pointed out that there was nothing in the judgment for the suspensive appeal to suspend[25] and made the amazing observation that the cases cited by the majority were, in the main, authority for his position.[26]

Conservatory Writs

There appears to have been during the 1944-1945 term a dearth of decisions involving the issuance and effect of conservatory writs, one of the most important and widely used phases of procedural law. Moreover, none of the few decisions on this subject which were handed down was of any significance. *First National Bank Building Company, Limited v. Dickson & Denny*[27] discussed the effect of an illegal seizure by provisional seizure of the law books and office equipment of a firm of attorneys. Such property was, of course, exempt from seizure and the defendants reconvened for damages. The court, after stating the well settled rule that only actual damages could be recovered, found that the defendants had suffered no monetary loss because of the fact that the sheriff had designated them as custodians of the seized property and they had never been out of possession. Defendants

25. This objection to the naming of the appeal does not seem sufficient. The law grants one a right to a "suspensive" appeal, Arts. 564, 565, 575, La. Code of Practice of 1870, and such judgment does not only suspend execution of the judgment, but also stays all further proceedings until the judgment can be reviewed on appeal.

26. Due to the fact that defendants did not know exactly what effect the suspensive appeal had upon the litigation, the railroad companies filed a declaratory judgment proceeding in the Federal District Court for the Western District of Louisiana and interpleaded the brotherhoods and the instant plaintiffs. Judgment was there rendered for plaintiffs in the principal case and the suit is now on appeal to the United States Circuit Court.

27. 207 La. 298, 21 So. (2d) 226 (1945).

argued further that they were entitled to damages for the embarrassment and humiliation they had suffered. The court held, and properly so, that their alleged humiliation and embarrassment was caused, not by the seizure, but by the suit itself, which was for unpaid office rent. After finding no malice on the part of the seizing creditor, which would have been sufficient to allow the granting of an award for damages, the court reiterated the rule that since the humiliation caused by the issuance of the writ could not be differentiated from the humiliation caused by the suit itself, the could would refuse to entertain defendants' reconventional demand.

In *Sugar Field Oil Company, Incorporated v. Carter,*[28] the court ordered, by virtue of Code of Practice Article 303,[29] the issuance of a preliminary injunction to prevent the distribution of a sum of money held by an individual for the benefit of the named defendant's creditors. Plaintiff had agreed for a consideration, later set at the sum of twenty-five thousand dollars, to find a purchaser for defendant Carter's property, which was at that time under the control of defendant Hereford and being administered by him for the benefit of Carter's creditors. Plaintiff alleged that through his efforts a purchaser had been found and asked that judgment be given him for the agreed consideration. In the alternative, plaintiff prayed that he be paid on a quantum meruit basis. It was proved that the sale had not been actually consummated, but that the prospective purchaser had given Hereford sixty-five thousand dollars for an option, the money to be forfeited to him if the option was not exercised. The court held that under the plaintiff's alternative plea it might be that he would be entitled to recovery and if the fund was distributed to Carter's creditors before recognition of plaintiff's claim, it would work irreparable injury to plaintiff.

In re Hibernia Bank & Trust Company[30] allowed the state bank commissioner to sequester[31] certain books and documents belonging to the Hibernia Bank & Trust Company in liquidation and to obtain the latter's release to him without furnishing bond. The court held that by virtue of Louisiana Act 153 of 1912,[32] the

28. 207 La. 453, 21 So. (2d) 495 (1945).
29. "Besides the cases above mentioned, courts of justice may grant injunctions in all cases when it is necessary to preserve the property in dispute during the pendency of the action, and to prevent one of the parties, during the continuance of the suit, from dilapidating the same, or from doing some other act injurious to the other party."
30. 207 La. 995, 22 So. (2d) 406 (1945).
31. Art. 279, La. Code of Practice of 1870.
32. Dart's Stats. (1939) § 707.

commissioner was not required to furnish judicial bonds while acting in behalf of a state bank as liquidator.

Exceptions, Rules and Motions

Exceptions of estoppel and of no right or cause of action were overruled in *City of New Orleans v. Westwego Canal and Terminal Company, Incorporated.*[33] This was a suit under Act 38 of 1908[34] to establish title to vacant property and defendant contended that, inasmuch as plaintiff had instituted an action in jactitation and trespass against it, involving the same property, and as that suit had been dismissed on defendant's motion for want of prosecution,[35] plaintiff was now estopped from maintaining this action. The court was given ample authority to the effect that a suit dismissed for want of prosecution does not decide any issues between the parties and does not preclude the plaintiff from bringing the same suit a second time, provided that prescription had not run on the original claim, not considering the abandonment decree as an interrupting factor. The exceptions of no right or cause of action were based on the proposition that defendant's title to the property in question was set out in plaintiff's petition. However, the court had no trouble in overruling these exceptions in view of the fact that Act 38 of 1908[36] contemplates a suit against a person who is asserting rights to property by virtue of a record title and a decision relating to the superiority of the title. Hence, plaintiff's allegation setting out defendant's record title could not constitute an admission of defendant's ownership.

In *City of Gretna v. Aetna Life Insurance Company*[37] the court, on an appeal from a judgment sustaining an exception of no cause of action, rendered judgment for the plaintiff on the merits of the case. However, the court rectified this obvious error on rehearing and restricted its judgment to overruling the exception. It was stated that the court's error was brought about by the existence in the record of a stipulation of facts which the attorneys intended to use on the trial of the case. In the case of *Terry v. Womack,*[38] the court used the *City of Gretna* case as authority for the rule that it must restrict its decision to a review of the trial court's holding even while exercising its supervisory jurisdiction. The court further held in the latter case that ex-

33. 206 La. 450, 19 So. (2d) 201 (1944).
34. Dart's Stats. (1939) §§ 6549-6550.
35. Art. 3519, La. Civil Code of 1870.
36. Dart's Stats. (1939) §§ 6549-6550.
37. 206 La. 715, 20 So. (2d) 1 (1944).
38. 206 La. 1069, 20 So. (2d) 365 (1944).

ceptions of res judicata and of no cause of action will not lie to a petition seeking to enjoin the enforcement of a judgment obtained by fraud. Insofar as the exception of res judicata is concerned, the allegations of fraud inject new issues in the case;[39] and for the purpose of the exception of no cause of action, all allegations must be taken as true.

Exceptions to procedural capacity and to the form of action were sustained in *Castille v. Gallagher*,[40] which involved a summary proceeding to oust a curatrix of an interdict. The first exception was sustained because the law allows such an action only at the instance of the undercurator except when it is shown that the undercurator has been called upon to bring the action and has failed or refused.[41] The next exception was good because such an action is an ordinary action and cannot be instituted by rule.[42] An interesting question was posed upon the allegation and admission that the curatrix had divorced the interdict after the interdiction had been pronounced. The court pondered this, but decided to accept the allegation as true in view of the judicial admissions of both parties.

State v. Younger[43] is a civil suit growing out of the famous, or infamous, "Louisiana Scandal" cases. The state and the highway commission[44] asked for judgment against Younger, ex-Governor Leche, and others for money belonging to the highway commission, wrongfully withheld by defendants. Suit was filed in Rapides Parish and judgment in solido against all defendants was prayed for. Defendant Leche, a resident of St. Tammany Parish, filed an exception to the jurisdiction of the court ratione personae and, reserving his rights thereunder, simultaneously filed other dilatory exceptions. The trial court overruled the exception to the jurisdiction and the supreme court granted writs. Plaintiffs' first contention is that Leche waived any objection to the jurisdiction ratione personae by filing other exceptions and hence making an appearance before the court for purposes other than excepting to the jurisdiction. The court rejected this reasoning and held that under Article 333, Louisiana Code of Practice, the defendant did exactly what the law required him to do

39. See Couret v. Couret, 206 La. 85, 18 So. (2d) 661 (1944).
40. 206 La. 904, 20 So. (2d) 175 (1944).
41. See Art. 409, La. Civil Code of 1870; Arts. 1015, 1016, La. Code of Practice of 1870.
42. Art. 1017, La. Code of Practice of 1870 and cases cited in the above opinion.
43. 206 La. 1037, 20 So. (2d) 305 (1944).
44. Now the Department of Highways.

and hence could not be deemed to have waived the objection to the jurisdiction of the Rapides Parish court.[45]

Plaintiffs admitted that the suit had been compromised and dismissed as to all defendants other than Leche, but further argued that this was an action ex delicto and thereby jurisdiction vested in the court having jurisdiction over the place where the tort was committed. The court refused to classify this action, but held that regardless of whether this suit was one ex contractu or one ex delicto the only court having jurisdiction was the court of defendant's domicile. If the action was ex contractu, then the court's position was entirely correct.[46] But if the action was ex delicto, the jurisdiction of the court would depend upon whether the tort was one of omission or commission.[47] Inasmuch as this suit was brought for money wrongfully *withheld*, it is apparent that the tort was one of omission.

Having disposed of these two arguments, the court had no difficulty in finding authority for the proposition that one who is sued in solido in a court having jurisdiction of one of his co-defendants[48] may successfully object to the jurisdiction if his co-defendants are dismissed from the suit.

In *State ex rel. Divens v. Johnson*,[49] the court sustained an exception of lis pendens to a habeas corpus proceeding upon finding that the same parties and the same issues were before the court in a divorce suit which contained an ancillary proceeding by rule for the custody of a minor sought to be obtained by the application for the writ of habeas corpus.

In *Miller v. Miller*,[50] the court found that in this particular instance exceptions of payment and prescription, though not filed in the alternative, were not repugnant and would be passed upon.

LeBlanc v. Trahan[51] decided that an action to quiet a tax title in accordance with the terms of Louisiana Act 106 of 1934[52] was an ordinary action and was subject to the rules of ordinary pro-

45. This interesting question had been raised by Art. 333, La. Code of Practice of 1870, as amended by La. Act 124 of 1936. See Comment (1938) 1 LOUISIANA LAW REVIEW 174 for a full discussion of the problems involved. Browne v. Gajan, 173 So. 485 (La. App. 1937) had decided that all declinatory and dilatory exceptions should be filed together, but this appears to be the first time that the supreme court has passed squarely upon the issue.

46. Art. 162, La. Code of Practice of 1870.

47. Art. 165(9), La. Code of Practice of 1870. Tripani v. Meraux, 184 La. 66, 165 So. 453 (1936).

48. Which was permissible under Art. 165(6), La. Code of Practice of 1870.

49. 207 La. 23, 20 So. (2d) 412 (1944).

50. 207 La. 43, 20 So. (2d) 419 (1944).

51. 207 La. 171, 20 So. (2d) 745 (1945).

52. Dart's Stats. (1939) §§ 8502-8504.

ceedings so as to allow a defendant the legal delays after citation required by Articles 179 and 180, Code of Practice, despite the fact that the act recited "that the delay for answer shall be ten (10) days . . . ."[53] In *Brown v. Boudreaux*,[54] the court overruled a plea of res judicata which was predicated upon a judgment which had never been signed by the trial judge.[55]

The case of *Dugas v. Powell*,[56] which has already been before the supreme court[57] and which promises to make a reappearance on the scene, reiterated the well established doctrine that a plea of estoppel based merely on silence and inaction, will not serve to deprive a litigant of his rights when those rights are not yet barred by prescription. Though not important to the decision, it would seem that the term "estoppel" as used here, is a misnomer. Is this not actually a plea of laches?

Justice Hamiter, in an opinion excellent both in style and analysis resolved a most interesting question in *Outdoor Electric Advertising, Incorporated v. Saurage*.[58] Suit was brought by a Texas corporation to recover money allegedly owed by defendant under several written contracts for the erection and maintenance of certain advertising signs along the highways of Louisiana. After answer was filed and the trial commenced, counsel for defendant filed an exception alleging that the plaintiff corporation was not qualified to do business in Louisiana as directed by law[59] and hence by the terms of the statute was forbidden to invoke the machinery of the Louisiana courts. Defendant did not name the exception,[60] but insisted that it was peremptory in its nature and could be filed at any stage of the proceedings. The lower court sustained the exception and dismissed plaintiff's suit. On appeal the court found that this objection to the prosecution of a suit had been considered on various occasions but had never been classified as a dilatory or peremptory exception. Investigating the nature of the exception, the court found that it did not attempt to test the legal sufficiency of the plaintiff's allegations and concluded that it was not an exception of no cause of action. The court also found that it could not be classified as an exception of

53. Id. at § 3 [Dart's Stats. (1939) § 8504].
54. 207 La. 233, 21 So. (2d) 44 (1945).
55. The trial judge's signature is, of course, sacramental to a definitive judgment. Art. 546, La. Code of Practice of 1870.
56. 207 La. 316, 21 So. (2d) 366 (1945).
57. See 197 La. 409, 1 So. (2d) 677 (1941).
58. 207 La. 344, 21 So. (2d) 375 (1945).
59. La. Act 8 of 1935 (3 E.S.) [Dart's Stats. (1939) §§ 1247.1-1247.2].
60. The trial judge, not quite so unimaginative, euphoniously termed it an "exception to the right to assert a right of action."

no right of action inasmuch as there was no attempt to traverse the plaintiff's allegations of interest in the subject matter of the lawsuit. Examining the function of the exception, the court found that it could not defeat the lawsuit, but could serve only to retard its progress. This result is due to the construction of the statute by which an unauthorized plaintiff is allowed to qualify to do business in the state and resume a case he had instituted in contravention of the statutory prohibition. Having reached this conclusion, it naturally follows that the exception was dilatory in its nature[61] and was waived by not having been filed in limine.[62]

The court sustained an exception of prematurity in *Sugar Field Oil Company, Incorporated v. Carter*[63] as to plaintiff's first cause of action, which was for the recovery of a commission allegedly earned by the plaintiff for finding a purchaser for defendant's property, when the defendant proved that there had been no sale, but only the granting of an option.

An exception to the jurisdiction ratione personae was sustained when plaintiff sought an interpretation of a lease of commercial property situated in East Baton Rouge Parish. Suit was filed at the situs of the property against a defendant domiciled in the Parish of Orleans. The court stated that the well-settled rule that a lease on commercial property gives only a personal right required the suit to be brought at the domicile of the defendant under the terms of Article 162, Louisiana Code of Practice.[64]

City of Gretna v. Gulf Distilling Corporation[65] reversed the judgment of a district court which sustained an exception of vagueness. The petition was admittedly vague, but under the peculiar facts of the case it was perfectly apparent that plaintiff had alleged all that it could allege and that the defendant was or should have been in possession of the omitted facts.

Plaintiff appealed from a judgment discharging defendant from contempt for failure to pay alimony and granting defendant a certain set-off against the alimony judgment in *Cassagne v. Cassagne*.[66] In the supreme court, the defendant filed for the first time what he termed an exception of no right or cause of action based on the theory that the district court was without jurisdiction to consider the rule here because it had been filed ancillary

61. Art. 332, La. Code of Practice of 1870.
62. Art. 333, La. Code of Practice of 1870.
63. 207 La. 453, 21 So. (2d) 495 (1945).
64. Weber v. H. G. Hill Stores, Inc., 207 La. 500, 21 So. (2d) 510 (1945).
65. 207 La. 719, 21 So. (2d) 884 (1945).
66. 207 La. 1033, 22 So. (2d) 559 (1945).

to a separation suit, whereas a judgment of divorce had been rendered between the parties in a separate action. Justice Rogers, the organ of the court, held that the exception was actually a plea in abatement[67] and, as such, had been waived by not having been filed in limine.[68]

Fidelity & Deposit Company of Maryland v. Bussa[69] presented a very interesting and novel problem. It is well settled that a Louisiana court will take personal jurisdiction over a nonresident if the defendant is found within the confines of the court's jurisdiction and if personal service is made upon him.[70] However, in the instant case, the court refused to apply this rule and sustained an exception to the jurisdiction ratione personae where it was shown that the defendant was lured into Louisiana from the state of his domicile by fraud and artifice for the express purpose of subjecting him to the jurisdiction of the Louisiana courts.

Final Judgment

The determination of when an order of court becomes a final judgment[71] is often a difficult task, but this term of court seems to have more than its share of decisions revolving around the rule that an appeal cannot be taken from a judgment of court until that judgment has become final.[72] In *Brown v. Boudreaux*,[73] the court overruled an exception of res judicata predicated upon a judgment of the First City Court of New Orleans which had never been signed. Not being a final judgment until the judge's signature is appended thereto, such judgment cannot support a plea of res judicata.

Carmody v. Land[74] presented a very interesting application of the rule. There, the defendant's reconventional demand, converting a jactitory action into a petitory action, had been dismissed under the provisions of Article 3519, Louisiana Civil Code of 1870,[75] but more than a year elapsed before judgment was given on the merits in favor of plaintiff. Plaintiff appealed, ask-

67. See Cotton v. Wright, 193 La. 520, 190 So. 665 (1939).
68. Art. 333, La. Code of Practice of 1870.
69. 207 La. 1042, 22 So. (2d) 562 (1945).
70. Art. 165, La. Code of Practice of 1870.
71. Art. 539, La. Code of Practice of 1870.
72. Art. 565, La. Code of Practice of 1870. An exception to the general rule is announced by Art. 566, La. Code of Practice of 1870.
73. 207 La. 233, 21 So. (2d) 44 (1945).
74. 207 La. 625, 21 So. (2d) 764 (1945).
75. Providing for the dismissal of a suit in case plaintiff allows five years to elapse without taking steps in the prosecution thereof.

ing an amendment of the judgment in his favor, and defendant answered the appeal asking that his reconventional demand be reinstated. The court, in a well written opinion by Justice Hawthorne,[76] concluded that the order dismissing the reconventional demand was not a final judgment because it left undecided the main demand and hence was not decisive of all points in controversy. Since the decree was merely interlocutory, the court held that the trial judge's decision could be reviewed on this appeal.

State ex rel. Land v. Martin, Secretary of State,[77] held that a ruling of the trial court, denying a new trial or rehearing, was in the nature of an interlocutory judgment from which no appeal would lie unless the appellant could show that the denial would cause him irreparable injury. It is to be noted that no appeal was had from the judgment on the merits, but was limited to the order denying the new trial or rehearing. This rule was reiterated in *Rapides Central Railway Company v. Missouri Pacific Railway Company,*[78] where the court was constrained to dismiss an appeal from a judgment overruling exceptions of no right or cause of action, and in *In re Hibernia Bank & Trust Company,*[79] which involved an appeal from a judgment making absolute a rule for the possession of sequestered property.[80]

Habeas Corpus

Four decisions dealing with the writ of habeas corpus were rendered during this term of court, but no novel doctrines were announced. *State ex rel. Bayer v. White*[81] involved an appeal from a judgment recalling and rescinding a rule nisi for a writ of habeas corpus. The court refused to consider the appeal when it was shown that the party was no longer held in custody on the ground that the appeal dealt with a moot question.

In *State ex rel. Divens v. Johnson,*[82] an exception of lis pendens was maintained upon a showing that the custody of the minor child sought by the application for a writ of habeas corpus was also the subject of a rule for custody filed as an ancillary proceeding to a divorce suit. *State ex rel. Steen v. Wade*[83] held

76. Chief Justice O'Niell concurring in the decree.
77. 207 La. 410, 21 So. (2d) 481 (1945).
78. 207 La. 870, 22 So. (2d) 200 (1945).
79. 207 La. 995, 22 So. (2d) 406 (1945).
80. Art. 279, La. Code of Practice of 1870, does not provide for procedure by rule, but the plaintiff here, who was seeking the release of the property, was a state official, who was relieved by La. Act 153 of 1912 [Dart's Stats. (1939) § 707] from furnishing the bond required by Art. 279.
81. 206 La. 200, 19 So. (2d) 47 (1944).
82. 207 La. 23, 20 So. (2d) 412 (1944).
83. 207 La. 177, 20 So. (2d) 747 (1944).

that a father who was given custody of his minor child by judgment of the district court of LaSalle Parish in a divorce action could maintain a habeas corpus proceeding there against his mother-in-law, a resident of East Baton Rouge Parish, who had actual custody of the child. The court grounded its reasoning on Article VII, Section 2, Louisiana Constitution of 1921 which gives the district courts the authority to issue writs of habeas corpus "in behalf of any person in actual custody in cases within their respective jurisdictions" and held that the words "within their respective jurisdictions" modified the word "cases" and not the word "person."[84]

State v. Brockner[85] was an action to have a minor child declared a neglected child under Louisiana Act 83 of the Extra Session of 1921.[86] The court allowed the defendant to invoke its original jurisdiction and obtain the issuance of a writ of habeas corpus.[87] The court ordered the release of the minor child to relator on the strength of affidavits contained in the record.

Real Actions

Only one case of any importance to the field of procedure is found dealing with the usually numerous real actions. *Haas v. Board of Commissioners of Red River, Atchafalaya and Bayou Boeuf Levee District,*[88] *City of New Orleans v. Westwego Canal and Terminal Company, Incorporated,*[89] and *Dugas v. Powell*[90] are all real actions, but there are no procedural points decided which can be profitably examined here.

Carmody v. Land,[91] however, presented a very interesting question for decision. Plaintiff had instituted an action of jactitation, commonly called an action of slander of title, and the defendants in their answer alleged ownership of a portion of the property which was actually possessed by plaintiff. For years the court has said that this type of plea converts the jactitory action to a petitory action and places the defendants in the posi-

84. The defendant in the habeas corpus proceeding had subjected herself to the jurisdiction of the lower court in the divorce proceeding by intervening and asking to be awarded the custody of the child. However, it is submitted that the deciding factor in the decision is the construction of La. Const. of 1921, Art. VII, § 2. The construction seems strained and the idea of extending a district court's jurisdiction in this manner appears to be new.

85. 207 La. 465, 21 So. (2d) 499 (1945).

86. Dart's Stats. (1939) §§ 1679-1687.

87. La. Const. of 1921, Art. VII, § 2.

88. 206 La. 378, 19 So. (2d) 173 (1944).

89. 206 La. 450, 19 So. (2d) 201 (1944).

90. 207 La. 316, 21 So. (2d) 366 (1945).

91. 207 La. 625, 21 So. (2d) 764 (1945).

tion of plaintiff, who must rely on the strength of their own title and not on the weakness of the title of plaintiff.[92] Acting under this theory, the lower court, on motion of plaintiff, dismissed defendants' reconventional demand for want of prosecution for five years.[93] On appeal, however, the court decided that the language used in the past had been rather loose and that defendants did not become plaintiffs within the meaning of Article 3519, Louisiana Civil Code of 1870. The judgment of the lower court was accordingly reversed and the cause remanded.[94]

Supervisory Jurisdiction

The court has consistently held through the years that though an appeal will not lie from a judgment overruling a declinatory exception, the court will grant supervisory writs to such a decree so that the defendant will not be required to stand the expense of a trial which is void from its inception due to the fact that it is tried before a court which has no jurisdiction.[95] In six cases in this term, the court allowed this type of relief.[96]

State v. Beamish[97] merely applied Supreme Court Rule 12, Section 5,[98] and refused to allow a rehearing on the court's refusal to grant supervisory writs.

In *Terry v. Womack*[99] the court refused to decide the merits in a case before it on writs, but properly limited its decision to a determination of those questions passed on by the lower court.

Interdiction of Escat[100] presented the unusual, though not necessarily novel, situation where the court allowed writs from a judgment from which there could have been had an immediate

92. Haas v. Board of Com'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 206 La. 378, 19 So. (2d) 173 (1944).

93. Art. 3519, La. Civil Code of 1870.

94. If the plaintiff had been out of possession, the principal case could not be questioned because he would still be required to maintain the burden of proof. Griffon v. Blanc, 12 La. Ann. 5 (1857). And the same is true if neither party is in possession. Atchafalaya Land Co. v. Brownell-Drews Lbr. Co., 130 La. 657, 58 So. 500 (1912). However, in a pure jactitory action, which requires plaintiff to be in actual possession, as was the case here, does not defendant become a plaintiff in the true sense of the word? See Millaudon v. McDonough, 18 La. 102 (1841); Caldwell v. Hennen, 5 Rob. 20 (La. 1843); Dalton v. Wickliffe, 35 La. Ann. 355 (1883).

95. However, see Wilson v. Yazoo & M. V. R. R., 139 La. 643, 71 So. 931 (1916) for the contrary.

96. State v. Younger, 206 La. 1037, 20 So. (2d) 305 (1944); State ex rel. Divens v. Johnson, 207 La. 23, 20 So. (2d) 412 (1944); State ex rel. Steen v. Wade, 207 La. 177, 20 So. (2d) 747 (1944); LeBlanc v. Trahan, 207 La. 171, 20 So. (2d) 745 (1945); Weber v. H. G. Hill Stores, Inc., 207 La. 500, 21 So. (2d) 510 (1945); State v. Savoy, 207 La. 982, 22 So. (2d) 402 (1945).

97. 206 La. 579, 19 So. (2d) 258 (1944).

98. See 191 La. xliv (1939).

99. 206 La. 1069, 20 So. (2d) 365 (1944).

100. 207 La. 228, 21 So. (2d) 43 (1945).

direct appeal to the court. It felt that under the particular facts of this case the interests of justice could best be served by the granting of writs and acted accordingly. The court is absolutely correct in doing as it did, but it is to be hoped that such a tendency will not result in a deluge of applications.

Another unusual, but equally correct holding, is found in *State v. Brockner*,[101] where the court demonstrated that it will, given a proper case, exercise its supervisory jurisdiction and prohibit an inferior court (here the Juvenile Court for the Parish of St. Tammany) from taking cognizance of a case over which it has no jurisdiction even though the inferior court has not yet had an opportunity of ruling on its own jurisdiction.

On consideration of the return of the respondent judge to the writs granted in *Howze v. Hollandsworth*,[102] the court found that the question had become moot and recalled the writs.

Expert Testimony

Act 19 of 1884[103] provides for the payment of "additional compensation," to be taxed as costs, for the testimony of expert witnesses. In *Womack v. Burka*,[104] the court had occasion to interpret this statute and to disallow as costs additional compensation for the testimony of certain physicians who testified only as to the reasonableness of an operating fee sued for by plaintiff. The court held that there were only two instances in which a witness was entitled to a fee for testifying as an expert. One instance is where the witness is called to testify only to an opinion founded upon a special study or experience in any science or profession and the other is where the witness is called to make a scientific or professional examination and to state the results thereof. Testimony as to the reasonableness of a fee for professional services does not fall within either of these categories. The court further pointed out that the statute allows such additional compensation only in case the expert testimony is necessary as elucidating a technical or scientific subject. And the reasonableness of a medical fee can be established by testimony other than that of doctors and physicians.

New Trial

In *Nixon v. English*,[105] the court refused to disturb the trial court's refusal to grant a new trial on the ground of newly dis-

101. 207 La. 465, 21 So. (2d) 499 (1945).
102. 207 La. 1009, 22 So. (2d) 470 (1945).
103. Dart's Stats. (1939) § 1990.
104. 206 La. 251, 19 So. (2d) 127 (1944).
105. 207 La. 906, 22 So. (2d) 266 (1945).

covered evidence for the reasons that the applicant was not shown to have exercised due diligence in attempting to obtain the evidence before trial and it was further apparent that the introduction of the new evidence was not sufficient to change the trial court's decision on the merits.

Recusation

The well settled rule that a trial judge can enter no order except one of acquiescence after a motion of recusation is made was again applied in *State of Louisiana v. Savoy*.[106] There the trial judge, after the motion of recusation was made and before it was passed upon, ordered the dismissal of the suit as to one of the defendants on the application of plaintiff. The supreme court granted writs and reversed the lower court's ruling.

Third Opposition

Not unlike a puppy chasing its tail is the case of *Atkins v. Smith*,[107] which was a demand for the balance due on a contract to sell certain unimproved real property to defendant. Plaintiff asked for recognition of her vendor's lien, even though she was still record owner of the property, the contract never having been reduced to one of sale. A final judgment by default was rendered for plaintiff and she caused the issuance of a writ of fieri facias. At this time, defendant's husband filed a third opposition alleging ownership of a house he had erected upon the property and asking that he be paid the value of the house out of the proceeds of the sale. A sheriff's sale was had and the property was adjudicated to plaintiff. The third opponent appealed to the Court of Appeal, Second Circuit, from an order dismissing his opposition. That court held[108] that plaintiff was not entitled to a vendor's lien and dismissed as of nonsuit the third opposition. The supreme court granted writs and reversed the decision of the court of appeal.[109] When remanded to the court of appeal, that court rejected the demand of the third opponent;[110] and the supreme court granted a writ of review, which brings us to the principal case. Justice Rogers, after discussing the rights of one who improves the real property of another, held that the plaintiff had acquired nothing by virtue of the sheriff's sale, and since she was still the owner of the property, and as the defendant and

106. 207 La. 982, 22 So. (2d) 402 (1945).
107. 207 La. 560, 21 So. (2d) 728 (1945).
108. 21 So. (2d) 85 (La. App. 1942).
109. 204 La. 468, 15 So. (2d) 855 (1943).
110. 21 So. (2d) 89 (La. App. 1944).

heirs of the third opponent[111] were still the owners of the contract, the parties, like the puppy mentioned above, were right back where they had started from. Third opponent had appeared in the case solely because of the proposed sheriff's sale and as the sale had been annulled, there was nothing left in the case upon which a judgment for the third opponent could be based.

VII. EVIDENCE

*Robert A. Pascal**

Opinion Evidence

The admissibility of opinion evidence on matters of sanity and competency is now generally recognized, as long as such opinions are conclusions based on observed data and not merely expressions of belief without foundation in the experience of the witness.[1] The extent to which the background data, or "facts on which the opinion is based," must be made known varies from court to court.[2] In *Interdiction of Escat*[3] the supreme court declared error the admission of opinions of a psychiatrist and a layman as to the capacity of the defendant to manage her affairs on the ground that "Neither of these witnesses, as a predicate for his opinion, has stated any facts or circumstances upon which it is based and *from which the court is able to form and decree its own conclusions.*"[4]

It is no doubt wise for a court to ascertain that the experience of an expert or lay witness qualifies him to render the opinion offered in evidence; but to require a statement of the facts on which the opinion is based *so that the court may form its own opinion* is another matter. This, in effect, is to pit the opinion of the witness against that of the court and in so doing to overlook the reason for accepting opinion evidence. An opinion is admitted, if at all, because in the particular instance the witness is better able than the court to evaluate the data correctly.[5] The expert witness' special training or experience renders him more qualified than the court to interpret facts perhaps equally available to both. A layman's opinion may be more valuable than

111. The third opponent died during the pendency of the suit, but it is small wonder—this type of litigation would worry anyone to death!

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1. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (3 ed. 1940) §§ 1933-1938.

2. Id. at § 1938.

3. 206 La. 207, 19 So. (2d) 96 (1944).

4. 206 La. 207, 212; 19 So. (2d) 96.

5. Cf. Wigmore, op. cit. supra note 1, at §§ 1917(8)-1924.