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### Repository Citation

Steven A. Glaviano, James Marshall Jones Jr., Anne T. Lastilla, Constance R. LeSage, John A. Mouton III, and Emily M. Phillips, *The Work of the Louisiana Legislature for the 1978 Regular Session: A Student Symposium*, 39 La. L. Rev. (1978)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol39/iss1/7>

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# The Work of the Louisiana Legislature for the 1978 Regular Session: A Student Symposium

## **Authors**

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# THE WORK OF THE LOUISIANA LEGISLATURE FOR THE 1978 REGULAR SESSION

*A Student Symposium\**

## INTRODUCTION

The 1978 regular session of the Louisiana legislature will be remembered by those who participated in it as one of the dullest to take place in modern times. In retrospect, it will probably be recognized as the session which saw the passage of a new equal management regime superseding the old community property system. However, what the session lacked in emotion and drive was made up in volume,<sup>1</sup> and among the 797

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\* The authors of the Legislative Symposium are as follows: *Steven A. Glaviano*: Criminal Law, Criminal Procedure, Civil Procedure; *James Marshall Jones, Jr.*: State and Local Taxation, State and Local Government; *Anne T. Lastilla*: Matrimonial Regimes, Persons; *Constance R. LeSage*: Environmental Law, Health Legislation; *John A. Mouton III*: Administrative Law and Procedure, State and Local Government, Expropriation; *Emily M. Phillips*: Property, Corporations, Security Devices, Financial Institutions, Sales.

## 1. DISPOSITION OF LEGISLATIVE INSTRUMENTS

### 1978 REGULAR SESSION<sup>a</sup>

	Introduced <sup>d</sup>	Passed House of Origin	Passed Both Houses	Died in Confer- ence	Signed by Gov- ernor	Vetoed by Gov- ernor
House Bills	1587	586	546	4	541	5 <sup>f</sup>
House Joint Resolutions <sup>b</sup>	10	1	1		N/A	N/A
Senate Bills	930	416	264	1	256	8
Senate Joint Resolutions <sup>b</sup>	19	1	0			
House Resolutions <sup>c</sup>	37	26 <sup>e</sup>			N/A	N/A
House Concurrent Resolutions <sup>c</sup>	245		172		N/A	N/A

acts of the session are a number of important changes in the law of which practitioners should be aware.

In addition to the substantive changes in the law, the procedure involved in the passage or defeat of each piece of legislation should be understood and considered. The processes of introduction, committee referral, hearing, final passage and executive approval to which a bill is subjected are of ancient origin<sup>2</sup> and have been incorporated in varying forms by virtually every deliberative body in the world. In Louisiana, the procedure by which a bill becomes a law has a constitutional foundation, and thus any bill's deviation from the constitutionally compelled routine raises a serious question as to the validity of the resulting law.<sup>3</sup>

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Senate Resolutions <sup>c</sup>	12	11 <sup>e</sup>	N/A	N/A
Senate Concurrent Resolutions <sup>c</sup>	155	118	N/A	N/A

a) Data summarized in this table is taken from disposition tables compiled by the Louisiana Legislative Council and published in *Resume, 1978 Louisiana Legislature*, ii-v.

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

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

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

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

f) All vetoes sustained either in session or by declaration of no necessity for a veto session as provided in LA. CONST. art. III, § 18(C).

2. While no exhaustive study of parliamentary forms will be attempted here, a comparison of article III of the 1974 constitution with the legislative provisions of prior Louisiana Constitutions is of great utility in tracing the "received" nature of these provisions. Comparison is invited with those of the English Parliament as early as the sixteenth century.

3. The procedural requirements for the passage of laws are found primarily in article III of the 1974 constitution. A discussion of some aspects of substantive limitation can be found in the amicus curiae brief filed with the Louisiana Supreme Court in *McKenzie v. Edwards*, 361 So. 2d 880 (La. 1978), and in the section on Louisiana Constitutional Law which will appear as part of the forthcoming symposium on the work of the Louisiana appellate courts for the 1977-1978 term. Since the effective date of the Louisiana Constitution of 1974, the issue of invalidity on procedural grounds has not been raised in any reported case. However, *Terrebonne Parish Police Jury v. Bd. of Comm'rs*, 306 So. 2d 707 (La. 1975), decided under the provisions of the 1921

The 1974 constitution continued many of the prior practices, including the requirement of a specific time for the termination of the introduction of bills.<sup>4</sup> As envisioned by the delegates who drafted the new constitution, there would be a recess at the end of the introductory period during which members of the legislature would return to their constituents to evaluate introduced legislation.<sup>5</sup> Expiring after the 1976 regular session,<sup>6</sup> this rule was of only temporary constitutional stature, but the practice has been continued by rule since that time.<sup>7</sup>

In order to avoid the constitutional limitation on the time for the introduction of bills, many bills are introduced by title only.<sup>8</sup> A title-only bill does not contain the text of the proposed law, but instead includes only a title briefly describing the subject matter of the proposal and an enacting clause.<sup>9</sup> Once the bill has been introduced within the fifteen day period, any text consistent with the title can be added later in the session. The potential impact of such bills is at best uncertain and at worst devastating. In the past, titles have been introduced which indicated nothing other than the broadest subject matter of the potential legislation.<sup>10</sup> This practice frequently vio-

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constitution, does address this issue. See also Hargrave, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term - Constitutional Law*, 36 LA. L. REV. 533, 546-47 (1976).

4. LA. CONST. art. III, § 2(A). Bills must be introduced within the first fifteen days of the session.

5. A compromise between those who favored split sessions and those who opposed them resulted in the adoption of LA. CONST. art. XIV, § 7, which provided for a recess of eight days "immediately after the first fifteen calendar days of the session." This procedure has been continued since 1976 with the slight modification that the recess occurs after the sixteenth calendar day, which allows those bills that were not introduced until the last day for introduction to be referred to committee.

6. LA. CONST. art. XIV, § 7.

7. See note 5, *supra*.

8. Deidre Cruse, a reporter for the *State Times* capital news bureau, calculated that twelve percent of the bills introduced during the first fifteen days of the session were introduced by title only. *Baton Rouge State Times*, July 6, 1978, § A, at 3. The 1978 House indicated its disapproval of the title-only procedure by passing House Resolution No. 13, which prohibits the introduction of title-only bills in the House.

9. LA. CONST. art. III, § 15(A), requires that "every bill shall contain a brief title indicative of its object." LA. CONST. art. III, § 14, requires that every act contain the following: "Be it enacted by the Legislature of Louisiana." See also Hargrave, *supra* note 3, at 546-47.

10. The most flagrant example of such an abuse of the process was a bill providing in its entirety, "An Act to amend Title 33 relative to taxation," followed by an enacting clause.

lates the requirement that every bill "contain a brief title indicative of its object."<sup>11</sup> In addition, it does not appear to be consistent with either the letter or the spirit of the constitutional requirement that bills intended to have the effect of law shall not be "introduced or received by either house after midnight of the fifteenth calendar day [of the session] . . . ."<sup>12</sup>

The use of title-only bills cannot be justified by the anticipated need for new legislation after the introductory period. The constitutional scheme already provides an extraordinary procedure by which bills may be introduced after the fifteenth day of the session with the consent of two-thirds of the elected members of each house.<sup>13</sup> The vehicle used for acquiring this consent is a consent resolution.<sup>14</sup> The use of title-only bills is an unjustified attempt to circumvent the constitutional method of introducing legislation after the first fifteen days of the session.

During the last session there was an attempt by joint rule of both houses to abolish the use of title-only bills, but the resolution was defeated in the Senate committee.<sup>15</sup> The strongest argument against its adoption was that this new prohibition could be avoided simply by repeating the existing law after the enacting clause as the body of the proposed bill and then later amending the bill to fashion the change intended by the sponsor. This argument, however, begs the question since it does not address the central issue of whether the allowance of title-only bills is a sound constitutional practice. Further, on a practical level, it would be difficult to achieve the same objective by using this alternative procedure without violating the constitutional mandate that all amendments must be

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11. LA. CONST. art. III, § 15(A). For the significance of titles and what they must contain, see Hargrave, *supra* note 3, at 546-47.

12. LA. CONST. art. III, § 2(A).

13. *Id.*

14. Joint Rule No. 5, RULES OF ORDER OF THE HOUSE OF REPRESENTATIVES (1978). The adoption of the consent resolution as the vehicle for obtaining consent facilitates the process of introducing new matter in that bills are introduced "pursuant to the authority of (H. or S.) C. R. \_\_\_\_." This system allows easy and accurate tracing of the legislative record to determine if the required "favorable record vote of two-thirds of the elected members" has been complied with.

15. La. H.R. Con. Res. No. 7, 4th Reg. Sess. (1978). This concurrent resolution was considered by the Committee on Senate and Governmental Affairs. The House did prohibit the use of title-only bills in the House. See note 8, *supra*.

“germane to the bill as introduced.”<sup>16</sup> For example, under the existing system a title-only bill might recite as its title “An Act to Provide for the Taxation of Natural Resources.” However, in using the proposed scheme of repeating existing law and later amending it, the title would probably be narrower and the desired flexibility would be limited because only amendments that were “germane” to the bill as introduced, and consequently “germane” to the existing law, would be constitutional.<sup>17</sup>

The underlying policy of the constitutional provisions requiring an “indicative” title and prohibiting non-germane amendments is derived from the notion of public interest in the legislative process.<sup>18</sup> In one sense, the notion is naive in that Louisiana citizens in the 1970’s generally do not interest themselves in the legislative process as a matter of civic duty. However, the policy is logical and consistent with the reality of the present political structure. By limiting the time for the introduction of bills to a short period at the beginning of the session, the parameters of the session are defined for the legislators and for those groups and individuals who have an interest in particular legislation.<sup>19</sup> There is additional utility in allowing issues to ripen during the course of the session in some logical pattern rather than to spring full grown from the mind of a single individual or group at some point in *media res*. The limited introductory period thus advances the policy of openness in the

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16. LA. CONST. art. III, § 15(C).

17. While “germaneness” is usually decided as a legislative matter if raised by a member of the Legislature upon the offering of an amendment, this determination would not necessarily preclude later judicial determination of the issue. However, such a determination would appear unlikely if the courts were to apply the test of *Guidry v. Roberts*, 335 So. 2d 438, 446 (La. 1976), which governs questions of separation of powers.

18. See V RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 234-312 (1977).

19. Numerous discussions with legislators, legislative personnel, lobbyists and reporters support the conclusion that each session has its own psychology. Sessions are referred to by the overriding issues which dominate them. For example, the 1976 Regular Session was the “Right to Work Session.” By knowing what issues must be addressed, the leadership of the two houses can exercise considerable administrative and psychological control in disposing of those issues. The provisions of the constitution encourage the self-contained nature of each session by requiring that bills must be introduced during the session and that all bills not finally passed are withdrawn at the end of the session. LA. CONST. art. III, §§ 1(B), 15(A).

legislative process and encourages thoughtful debate on the issues.

The delegates who drafted the constitution were aware that some issues would not be apparent during the early days of a session and wisely provided a vehicle for the introduction of bills after the first fifteen days.<sup>20</sup> Utilization of that tool is not uncommon, and it allows legislators the option of determining if the subject matter of the session should be expanded to encompass the additional proposed legislation.<sup>21</sup>

*A. Edward Hardin*

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20. LA. CONST. art. III, § 2(A).

21. 65 House Bills and 40 Senate Bills were introduced pursuant to consent resolutions in the 1978 Regular Session.



## PRIVATE LAW

### PERSONS

#### UNIFORM CHILD CUSTODY JURISDICTION ACT

##### *Purposes and Scope*

Much of the law of persons enacted in the 1978 regular session deals with the well-being of minors, especially with respect to alteration in and additions to the law relating to adoption and child custody.<sup>1</sup> In approving the most significant of these measures, Act 513,<sup>2</sup> Louisiana joined seventeen other states which have enacted the Uniform Child Custody Jurisdiction Act.<sup>3</sup>

The Act begins with a statement of its general purposes as a guide to future construction;<sup>4</sup> these purposes clearly reflect

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1. The 1978 legislative session resulted in other changes in the law of persons, which will not be discussed in this symposium article: Act 73 (reduces from 18 to 16 the age after which a minor emancipated by marriage can administer his immovable property without court supervision); Act 159 (expands the definition of an adoption agency); Act 248 (permits the state to authorize necessary medical treatment when the state is the person with custody of a child); Act 362 (repeals Civil Code article 1488, which limits donations to adulterine and incestuous children); Act 450 (clarifies the requirement for court authorization for access to sealed adoption records and provides for use of a curator ad hoc to assist courts in maintaining the confidentiality of records); Act 455 (permits a name change of a minor without the signature of his non-custodial parent under certain circumstances); Act 457 (reduces from 30 years to 10 years the period of absence which will give rise to a presumption of death and absolute possession of an absentee's estate by his heirs); Act 552 (requires the State Bureau of Criminal Identification to furnish records to the Department of Health and Human Resources in connection with the investigation of prospective foster or adoptive parents); Act 693 (permits award of attorney's fees when a court makes a judgment executory in an action for past due alimony or child support); Act 714 (reduces from 21 to 18 years the age at which a single person can adopt a child or a person over 17); Act 753 (provides for issuance of a birth certificate to a foreign-born child adopted in Louisiana).

2. 1978 La. Acts, No. 513, adding LA. R.S. 13:1700-24. The Act became effective October 1, 1978.

3. These states are Alaska, California, Colorado, Delaware, Florida, Hawaii, Indiana, Iowa, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Pennsylvania, Wisconsin, and Wyoming. UNIFORM LAWS ANNOTATED, *Directory of Acts and Tables of Adopting Jurisdictions* (1978).

4. LA. R.S. 13:1700(A), added by 1978 La. Acts, No. 513, § 1. Subsection B states that "[t]his Act shall be construed to promote the general purposes stated in this Section." LA. R.S. 13:1700(B), added by 1978 La. Acts, No. 513, § 1.

two significant concerns—one humane and the other institutional. The dominant thread is concern for the best interest of the child.<sup>5</sup> The policies which promote this goal reflect the underlying assumption that this interest is threatened by the shifting of children from state to state for jurisdictional purposes (particularly through abductions and unilateral removals); by continuing controversy and relitigation over custody decrees; and by courts rendering custody decrees in states which have little or no connection with the child.<sup>6</sup> Legislation designed to avert these hazards to children has the salutary concomitant effect of promoting judicial efficiency and cooperation among courts, a goal also explicitly embraced in the policy section.<sup>7</sup>

The scope of the Act is established by its definitions of a custody determination and a custody proceeding:

“custody determination” means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;<sup>8</sup> “custody proceeding” includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings.<sup>9</sup>

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5. This is also the policy espoused in Louisiana statutes and cases. See, e.g., LA. CIV. CODE art. 157; *State ex. rel. Girtmen v. Ricketson*, 221 La. 691, 60 So. 2d 88 (1952); *Hudson v. Hudson*, 295 So. 2d 92 (La. App. 2d Cir. 1974), *cert. denied*, 295 So. 2d 446 (La. 1974); *In re Cole*, 265 So. 2d 835 (La. App. 3d Cir. 1972); *Hebert v. Hebert*, 255 So. 2d 630 (La. App. 3d Cir. 1971).

6. LA. R.S. 13:1700(A)(1), (3), (4), (5), and (6), *added by* 1978 La. Acts, No. 513, § 1.

7. LA. R.S. 13:1700(A)(2), (7), and (8), *added by* 1978 La. Acts, No. 513, § 1. The Act further states that its purpose is “to make uniform the law of those states which enact it.” LA. R.S. 13:1700(A)(9), *added by* 1978 La. Acts, No. 513, § 1.

8. LA. R.S. 13:1701(2), *added by* 1978 La. Acts, No. 513, § 1.

9. LA. R.S. 13:1701(3), *added by* 1978 La. Acts, No. 513, § 1. The meaning of child neglect and dependency proceedings in this definition is unclear. To the extent that proceedings brought for neglect or abandonment by the Department of Public Welfare may be included in this reference, Act 513 should be considered as superseded by Act 172 of the 1978 regular session, which adopts a Code of Juvenile Procedure. The priority of Act 172 is apparent for two reasons:

- 1) It is the more specific enactment with respect to child custody proceedings of a public law nature; and
- 2) The stated purposes of the Uniform Child Custody Jurisdiction Act make

The Commissioners' comments<sup>10</sup> to the Uniform Act indicate that the definition of custody proceedings is to be understood broadly, consequently including habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody.<sup>11</sup> Thus, the provisions of Act 513 may affect not only the district courts' jurisdiction under the Code of Civil Procedure,<sup>12</sup> but also the juvenile courts' jurisdiction.<sup>13</sup>

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clear that it was originally proposed to address problems involved in custody contests between private parties. Reference to neglect or abandonment proceedings should therefore be construed as including only proceedings brought by a private custody contestant against another person having custody (or custody claimant) on the basis of neglect or abandonment.

10. These comments were adopted by the National Conference of Commissioners on Uniform State Laws, which approved the Uniform Act in 1968. 9 UNIFORM LAWS ANNOTATED 99 (1968).

11. 9 UNIFORM LAWS ANNOTATED 99, 105, 109 (1968).

12. LA. CODE CIV. P. art. 10(5) grants jurisdiction over the legal custody of a minor to courts which are "otherwise competent under the laws of this state" if the minor is domiciled in, or is in, the state.

13. LA. R.S. 13:1570 (Supp. 1975) grants to the juvenile courts exclusive original jurisdiction, "except as otherwise provided herein," over proceedings concerning any minor domiciled in or present in the state

whose parent or other person legally responsible for the care and support of such child neglects or refuses, when able to do so, to provide proper or necessary support, education as required by law, or medical, surgical or other care necessary for his well-being; or who is abandoned by his parent or other custodian; or who is otherwise without proper care, custody, or support; or who is a live born human being, as defined in R.S. 13:1569(16)(e), who survives and is not killed in an abortion attempt.

The Code of Juvenile Procedure, adopted in Act 172 of the 1978 regular session, becomes effective on January 1, 1979. It indicates that a court exercising juvenile jurisdiction will have exclusive original jurisdiction over children in need of care. LA. CODE JUV. P. art. 15(c), *added by 1978 La. Acts, No. 172, § 1*. A child in need of care is one

(a) Whose parent inflicts, attempts to inflict, or, as a result of inadequate supervision, allows the infliction or attempted infliction of physical injury or sexual abuse upon the child which seriously endangers the physical, mental or emotional health of the child;

(b) Whose physical, mental or emotional condition is substantially threatened or impaired as a result of the refusal or neglect of his parent to supply the child with necessary food, clothing, shelter, medical care, counseling or education, or as a result of the parent's neglect or imposition of cruel punishment; or

(c) Who is without necessary food, clothing, shelter, medical care, education, or supervision because of abandonment by, or the disappearance or prolonged absence of, his parent, or because of any other reason.

LA. CODE JUV. P. art. 13(14), *added by 1978 La. Acts, No. 172, § 1*.

*Bases for Jurisdiction*

Revised Statutes 13:1702<sup>14</sup> defines various ways in which a state may acquire jurisdiction for a custody determination and generally disavows reliance on physical presence of the child within the state as a single sufficient criterion for exercising custody jurisdiction. Jurisdiction in a child custody determination is granted to the child's home state, which is defined as the state in which he has lived with his parents, a parent, or a person acting as a parent for at least six consecutive months immediately preceding the time involved.<sup>15</sup> The home state retains jurisdiction for up to six months after the child has left the state if (1) a parent or person acting as parent continues to reside there and (2) the child's departure was through removal or retention by a person claiming custody "or for other reasons."<sup>16</sup>

A second basis of jurisdiction focuses on the "best interest of the child"; two standards must be met to find that the forum furthers such interest. The child and his parents (or at least one contestant) must have a significant connection with the state, and there must be available in the state substantial evidence

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14. LA. R.S. 13:1702, *added by* 1978 La. Acts, No. 513, § 1.

15. LA. R.S. 13:1701(5), *added by* 1978 La. Acts, No. 513, § 1. A person acting as a parent is one who has physical custody of a child and who has either been awarded custody by a court or claims a right of custody. LA. R.S. 13:1701(9), *added by* 1978 La. Acts, No. 513, § 1. The home state of a child less than six months old is that state in which he has lived from birth with his parents, a parent, or a person acting as parent. Periods of temporary absence of any of the named persons are counted as part of the six month period. LA. R.S. 13:1701(5), *added by* 1978 La. Acts, No. 513, § 1. The latter provision seems designed to prevent highly technical arguments that a period of six months is not satisfied when, for example, a parent's business involves frequent out-of-state travel or the child or parent has spent some time visiting or vacationing elsewhere. Once a child's (or parent's) absence can no longer be reasonably termed temporary and six months has elapsed, Louisiana would presumably lose home state jurisdiction. This might occur, for example, if the child were sent out of state to live with relatives or left in Louisiana while the parent moved out of state. In such instances there might be no state with home state jurisdiction, because of the separation of the child from a parent or person acting as parent; the relatives keeping the child would not be "acting as parents," since they would not have custody or be claiming a right of custody. Either the former home state or the new residence of the child (if it is he and not the parent who leaves) would probably have jurisdiction under the second criterion of the best interest of the child. See note 17, *infra*, and accompanying text.

16. LA. R.S. 13:1702(A)(1), *added by* 1978 La. Acts, No. 513, § 1. The meaning of "for other reasons" is not explained in the comments. Literally read, it seems to mean any absence of the child would meet the requirements of this provision.

concerning the child's present or future care, protection, training, and personal relationships.<sup>17</sup>

The last two jurisdictional grounds will presumably be invoked infrequently.<sup>18</sup> One requires physical presence of the child within the state and permits the state to exercise jurisdiction if the child has been abandoned or if there is an emergency need to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.<sup>19</sup> As the comments indicate, this provision reaffirms the *parens patriae* doctrine.<sup>20</sup> However, it grants jurisdiction only under circumstances of abandonment or emergency. Absent these circumstances, child neglect or other juvenile court custody determinations must meet the standards of one of the other jurisdictional bases.<sup>21</sup>

Finally, there is "best available forum" jurisdiction when it appears that no other state meets requirements "substantially in accordance" with the other three jurisdictional grounds or when another state has declined to exercise jurisdiction on the basis that Louisiana is the more appropriate forum.<sup>22</sup> In either event, it must additionally be shown that it is in the child's best interest for the Louisiana court to assume jurisdiction.<sup>23</sup>

The section on jurisdiction also attempts to establish the weight to be given in the jurisdictional determination to physical presence of the child or of the child and a contestant. It states that except under the emergency and best available forum provisions, physical presence "is not alone sufficient" to confer jurisdiction.<sup>24</sup> By excepting the emergency and best

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17. LA. R.S. 13:1702(A)(2), added by 1978 La. Acts, No. 513, § 1. The comments warn that it is the interest of the child, not that of the feuding parties, which is relevant. The section contemplates maximum, rather than minimum, contact of the child with the state. 9 UNIFORM LAWS ANNOTATED 99, 108 (1968).

18. The comments indicate that home state and best interest of the child are the two main bases of jurisdiction. 9 UNIFORM LAWS ANNOTATED 99, 107 (1968).

19. LA. R.S. 13:1702(A)(3), added by 1978 La. Acts, No. 513, § 1.

20. 9 UNIFORM LAWS ANNOTATED 99, 108 (1968). *Parens patriae* is the doctrine that the state is the protector of all citizens who are unable to protect themselves. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1641 (3d ed. 1969).

21. The effects on juvenile jurisdiction of this restriction must be considered in connection with the newly enacted Code of Juvenile Procedure. See note 9, *supra*.

22. LA. R.S. 13:1702(A)(4), added by 1978 La. Acts, No. 513, § 1.

23. LA. R.S. 13:1702(A)(4)(ii), added by 1978 La. Acts, No. 513, § 1.

24. LA. R.S. 13:1702(B), added by 1978 La. Acts, No. 513, § 1.

available forum bases, the Act appears to imply that in those instances presence alone *is* sufficient. However, if this were true, those two provisions would be deprived of any force and would, in effect, be replaced by a single jurisdictional ground—physical presence of the child. Since reliance on this sole criterion created the problems which this act is attempting to remedy, the result would be a complete vitiation of its policy imperatives; thus, it is inconceivable that the section will be given such a literal meaning. A question remains, however, in determining the import of this reference to physical presence with respect to the last ground for jurisdiction. The best available forum jurisdiction provision does not explicitly require physical presence of the child or any party, although it is certainly possible that this factor will influence the abstention decision of another state's court. It may also bear upon whether a Louisiana court decides that exercising jurisdiction would serve the best interest of the child. This language should not be read as injecting into the best available forum jurisdiction a physical presence requirement; that factor can be given appropriate weight within the standards already imposed for this type of jurisdiction.

The final sentence of this section perhaps eliminates the danger of adoption of such an implied requirement with its unequivocal statement that "physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."<sup>25</sup> However, this directly contradicts the requirement that the exercise of jurisdiction in instances of abandonment or emergency be premised on physical presence of the child within the state.

#### *Limitations on Exercise of Jurisdiction*

A finding of jurisdiction upon any of the bases in section 1702 does not necessarily permit its exercise by a state court. Section 1705 requires the court to look to the existence of ongoing proceedings in another state;<sup>26</sup> section 1706 introduces a forum non conveniens notion into the determination;<sup>27</sup> section

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25. LA. R.S. 13:1702(C), added by 1978 La. Acts, No. 513, § 1.

26. LA. R.S. 13:1705, added by 1978 La. Acts, No. 513, § 1.

27. LA. R.S. 13:1706, added by 1978 La. Acts, No. 513, § 1.

1707 enacts a clean hands doctrine with respect to the conduct of the parties;<sup>28</sup> and section 1713 restricts the jurisdictional power to modify an out-of-state decree.<sup>29</sup>

When a custody proceeding is pending in another state exercising jurisdiction substantially in conformity with this act, Louisiana courts are prohibited from exercising jurisdiction. There is one exception to this prohibition. The Louisiana court may entertain the proceeding when the other state's proceeding is stayed because of a finding that Louisiana is the more appropriate forum, or "for other reasons."<sup>30</sup> In order to ensure its knowledge of other custody proceedings, a court is required, before hearing the petition, to examine the pleadings and other information given by the parties under oath<sup>31</sup> and to refer to the child custody registry (established elsewhere in the Act).<sup>32</sup> If through this investigation or otherwise, the court has reason to believe that proceedings may be pending elsewhere, it must direct an inquiry to that state court administrator or another appropriate official.<sup>33</sup> The Act also provides a course of action, based mainly on communication between the two courts, should the Louisiana court learn of other state proceedings after taking jurisdiction.<sup>34</sup>

Section 1706 grants a state court the discretion to decline jurisdiction on a *forum non conveniens* basis, on either its own motion, that of a party, or that of a curator ad hoc or other representative of the child.<sup>35</sup> It may exercise this discretion any

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28. LA. R.S. 13:1707, added by 1978 La. Acts, No. 513, § 1.

29. LA. R.S. 13:1713, added by 1978 La. Acts, No. 513, § 1.

30. LA. R.S. 13:1705(A), added by 1978 La. Acts, No. 513, § 1.

31. LA. R.S. 13:1708, added by 1978 La. Acts, No. 513, § 1.

32. LA. R.S. 13:1715, added by 1978 La. Acts, No. 513, § 1. This section requires the clerk of each district or family court to maintain a registry in which he shall enter the following:

(1) Certified copies of custody decrees of other states received for filing;

(2) Communications as to the pendency of custody proceedings in other states;

(3) Communications concerning a finding of inconvenient forum by a court of another state; and

(4) Other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.

33. LA. R.S. 13:1705(B), added by 1978 La. Acts, No. 513, § 1.

34. LA. R.S. 13:1705(C), added by 1978 La. Acts, No. 513, § 1.

35. LA. R.S. 13:1706(B), added by 1978 La. Acts, No. 513, § 1.

time before making a decree if it finds that it is an inconvenient forum and that a court of another state is a more appropriate one.<sup>36</sup>

In determining its inconvenience as a forum, the court *may* rely on communication with and information provided by the other state, and it *must* consider whether the interest of the child is served by resort to another forum.<sup>37</sup> Subsection C lists factors appropriate for assessing the interest of the child, several of which substantially duplicate the considerations encompassed in the various jurisdictional bases in section 1702.<sup>38</sup> The court may also look to any agreement of the parties with respect to another forum, if it is as appropriate, and to whether the exercise of its own jurisdiction would contravene any of the purposes listed in section 1700.<sup>39</sup>

Once a court finds that it is an inconvenient forum and that there is another more appropriate one, it may either dismiss the proceedings outright or stay them on the condition of their prompt commencement in another named state or upon any other "just and proper" condition.<sup>40</sup> It must then inform the more appropriate forum of its action.<sup>41</sup> When jurisdiction is declined on this basis, the court may assess against the party who commenced the proceedings, the costs of the proceedings in this state and necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Since the purpose of this penalty is to deter frivolous filings,<sup>42</sup> it may only be imposed "[i]f it appears to the court that it is clearly an inappropriate forum."<sup>43</sup>

Under section 1707, the court may decline to exercise jurisdiction in an initial custody proceeding when the petitioner has

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36. LA. R.S. 13:1706(A), *added by* 1978 La. Acts, No. 513, § 1.

37. LA. R.S. 13:1706(C), (D), *added by* 1978 La. Acts, No. 513, § 1.

38. The factors which overlap with the jurisdictional grounds are: (1) whether another state is or recently was the child's home state, (2) whether another state has a closer connection with the child and his family or with the child and one or more of the contestants and (3) whether substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

39. LA. R.S. 13:1706(C)(4), (5), *added by* 1978 La. Acts, No. 513, § 1.

40. LA. R.S. 13:1706(E), *added by* 1978 La. Acts, No. 513, § 1.

41. LA. R.S. 13:1706(H), *added by* 1978 La. Acts, No. 513, § 1.

42. 9 UNIFORM LAWS ANNOTATED 99, 115 (1968).

43. LA. R.S. 13:1706(G), *added by* 1978 La. Acts, No. 513, § 1.



wrongfully taken the child from another state or behaved in a similarly reprehensible manner, "if this is [a] just and proper [action by the court] under the circumstances."<sup>44</sup> The comments clarify that

"[w]rongfully" taking under this subsection does not mean that a "right" has been violated—both husband and wife as a rule have a right to custody until a court determination is made—but that one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction.<sup>45</sup>

The comments mention one circumstance in which it would not be just and proper to decline jurisdiction by noting that this section should not be applied to punish a parent at the expense of a child's well-being.<sup>46</sup> When a petitioner who has improperly obtained or retained custody is seeking modification of another state's decree, the court has no discretion and must refuse jurisdiction, unless the interest of the child requires the exercise of jurisdiction.<sup>47</sup> It is clear that improperly obtaining or retaining custody does not include withholding a child because of illness or injury; the use of the word "improperly" requires the court to evaluate any special circumstances justifying the petitioner's conduct.<sup>48</sup> To strengthen the deterrence function of this section, the court is authorized to charge the petitioner, where appropriate, with the necessary travel and other expenses of the other parties and witnesses, including attorneys' fees.<sup>49</sup>

A final restriction on the exercise of jurisdiction must be noted. Even where one of the jurisdictional bases favors a proceeding in a Louisiana court, our courts may not exercise juris-

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44. LA. R.S. 13:1707(A), added by 1978 La. Acts, No. 513, § 1.

45. 9 UNIFORM LAWS ANNOTATED 99, 116 (1968).

46. *Id.*

47. LA. R.S. 13:1707(B), added by 1978 La. Acts, No. 513, § 1. Presumably the interests of the child require the exercise of jurisdiction only under extreme circumstances. Thus, this statutory rule is in accord with the supreme court rule with respect to juvenile court jurisdiction that "barring an emergency situation," the state does not have sufficient interest in children who are not Louisiana domiciliaries and have been brought here against the will of their out-of-state custodial parent "to warrant intrusion into . . . a custody dispute." *In re King*, 310 So. 2d 614, 617 (La. 1975).

48. 9 UNIFORM LAWS ANNOTATED 99, 116 (1968).

49. LA. R.S. 13:1707(C), added by 1978 La. Acts, No. 513, § 1.

diction to modify another state's decree unless it appears that the court which rendered the decree no longer has jurisdiction under prerequisites substantially in accordance with the Act or has declined to assume jurisdiction to modify the decree.<sup>50</sup> The Act thus recognizes a concept of continuing jurisdiction in the court that initially renders a decree; the jurisdiction continues, however, only if there are jurisdictional grounds meeting the standards of this act—*i.e.*, something beyond the fact that the court exercised its power in the same matter on some prior occasion.<sup>51</sup>

### *Enforcement of Other States' Decrees*

To further support a widespread use of the jurisdictional criteria included in the Act, Louisiana courts are charged with recognizing and enforcing the out-of-state decrees of courts exercising jurisdiction under statutes substantially in conformity with this one or under factual circumstances meeting its jurisdictional standards.<sup>52</sup> According to the Commissioners' com-

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50. LA. R.S. 13:1713, *added by* 1978 La. Acts, No. 513, § 1.

51. Until recently, some Louisiana courts would hear a custody matter, even though the child was neither domiciled in nor present in the state, if the court had previously rendered a separation or divorce decree with respect to the custody contestants. The rule in the Third and Fourth Circuits was that a court which rendered a separation or divorce judgment retained jurisdiction over all matters incidental to the separation or divorce, including custody. *Lynn v. Lynn*, 316 So. 2d 445 (La. App. 3d Cir. 1975); *Pattison v. Pattison*, 208 So. 2d 395 (La. App. 4th Cir. 1968). The First and Second Circuits required that there be either domicile or physical presence before taking jurisdiction of a custody matter. *Stewart v. Stewart*, 233 So. 2d 305 (La. App. 1st Cir. 1970); *Nowlin v. McGee*, 180 So. 2d 72 (La. App. 2d Cir. 1965). The Louisiana Supreme Court resolved the conflict between the circuits with *Odom v. Odom*, 345 So. 2d 1154 (La. 1977), holding that absent compelling reasons a Louisiana court could not exercise jurisdiction over a custody matter where the child was neither domiciled in nor present in the state, even though that court had rendered the prior separation or divorce decree. The court felt that

Louisiana's responsibility for the welfare of such a child is remote, and its interest is, at most, vicarious and conditional because of the presence in the state of the parent who does not have custody. The state where the child is domiciled (or located) has a much more immediate interest and responsibility for, and ability to regulate conditions affecting, the welfare of the child. There are no compelling reasons for Louisiana courts to attempt to exercise "continuing jurisdiction" over the status of the absent children in this case.

(What we say here has no reference to a case in which the parent obligated to support the child is in Louisiana and the child and its custodian are absentees.)

*Odom v. Odom*, 345 So. 2d 1154, 1155 (La. 1977).

52. LA. R.S. 13:1712, *added by* 1978 La. Acts, No. 513, § 1.

ments, the out-of-state courts must have also complied strictly with the notice provisions of the Act<sup>53</sup> before recognition and enforcement of their decrees is required.<sup>54</sup> The obligation to enforce a previous decree ends once there is a subsequent modification decree which meets the standards of the Act.<sup>55</sup> For informational purposes, a certified copy of the decree of another state may be filed in the office of the clerk of any district or family court in the state.<sup>56</sup> Presumably these custody decrees, like other foreign judgments, must be made executory through an ordinary proceeding in a Louisiana court.<sup>57</sup>

### *Notice and Hearing*

The Act guarantees notice and an opportunity to be heard to all contestants, to any parent whose parental rights have not been terminated, and to any person who has physical custody of the child,<sup>58</sup> and requires that the notice be served, mailed, delivered, or published at least ten days before the hearing.<sup>59</sup> Any person who is outside the state is to be notified in a manner reasonably calculated to give actual notice and various methods of notification are provided in section 1704.<sup>60</sup> Additionally, if the court learns that a person not a party has physical custody of the child, then that person must be joined and duly notified of the pendency of the proceedings and his joinder.<sup>61</sup>

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53. See text at notes 58-59, *infra*.

54. 9 UNIFORM LAWS ANNOTATED 99, 110 (1968).

55. LA. R.S. 13:1712, added by 1978 La. Acts, No. 513, § 1.

56. LA. R.S. 13:1714(A), added by 1978 La. Acts, No. 513, § 1.

57. LA. CODE CIV. P. art. 2541 (1960).

58. LA. R.S. 13:1703, added by 1978 La. Acts, No. 513, § 1.

59. LA. R.S. 13:1704(B), added by 1978 La. Acts, No. 513, § 1.

60. LA. R.S. 13:1704(A), added by 1978 La. Acts, No. 513, § 1.

61. LA. R.S. 13:1709, added by 1978 La. Acts, No. 513, § 1. The comments to this section explain that the requirement of joinder is to prevent a relitigation of the custody to benefit a third person rather than the child. 9 UNIFORM LAWS ANNOTATED 99, 118 (1968). The persons reached by this section would presumably be considered necessary parties under Louisiana Code of Civil Procedure article 642, which provides: "Necessary parties to an action are those whose interests in the subject matter are separable and would not be directly affected by the judgment if they were not before the court, but whose joinder would be necessary for a complete adjudication of the controversy." Complete adjudication of a child's custody requires the joinder of all persons claiming or actually having custody; however, such parties, if not joined, would not be affected by the decree. LA. R.S. 13:1711, added by 1978 La. Acts, No. 513, § 1. See text at note 62, *infra*.

### *Binding Force of Decree*

The binding force and *res judicata* effect of the custody decree are explained in section 1711.<sup>62</sup> The decree binds those parties served in this state, those notified in compliance with the out-of-state notice provisions, and those who have submitted to the court's jurisdiction, if these parties have been given an opportunity to be heard. For these persons the decree is conclusive as to all factual and legal issues decided and as to the custody determination unless and until modified pursuant to law.

### *Comparison to Prior Provisions*

The principal effect of Act 513 is to both broaden and limit the exercise of custody jurisdiction under Code of Civil Procedure article 10(5). That article permits a court "otherwise competent under the laws of this state" to make a custody determination if the child "is domiciled in, or is in, this state."<sup>63</sup> The minimal requirement of physical presence has provided great opportunity for abuse and has led to the sort of child-snatching episodes<sup>64</sup> to which the Uniform Act is particularly addressed.<sup>65</sup>

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62. LA. R.S. 13:1711, added by 1978 La. Acts, No. 513, § 1.

63. LA. CODE CIV. P. art. 10(5).

64. In *Smith v. Ford*, 288 So. 2d 71 (La. App. 4th Cir. 1974), for example, a New Orleans resident mother took her children from their North Carolina school without the knowledge of their father, with whom they were living. She then filed a custody proceeding in New Orleans. The Fourth Circuit in this case refused to take jurisdiction, ruling that "only when some acute exigency obliges the state to intervene for the . . . child's welfare" should the court take jurisdiction based on "brief physical presence." *Id.* at 73. The policy ground for this decision was evident in the statement that "[m]ost certainly such jurisdiction cannot be construed or suffered to invite the spiriting away of children from their long-established home by a seldom-seen parent." *Id.* *Smith* was overruled, however, in the next year when the Fourth Circuit held that: "[t]here is no restriction on the court's jurisdiction regardless of what method was utilized to obtain the presence of the minor in this state." *Rafferty v. Rafferty*, 313 So. 2d 356, 357 (La. App. 4th Cir. 1975). The Commissioner's comments note a judicial trend toward "permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state." 9 UNIFORM LAWS ANNOTATED 99, 100 (1968).

65. The comments to the Uniform Act refer to such parental tactics as "self-help" and "seize and run." They note that:

It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a more

Under the new statutes neither domicile nor physical presence alone supports the exercise of jurisdiction. It is necessary to prove that the jurisdiction exists under the home state, best interest of the child, emergency or abandonment, or best available forum basis. While both domicile and physical presence are relevant considerations, neither is sufficient in itself to meet the requirements of any of these types of jurisdiction. Furthermore, with the exception of the abandonment/emergency basis, jurisdiction can be exercised without a finding of either domicile or physical presence of the child. Home state jurisdiction seems to require either domicile or former domicile; for best interest of the child or best available forum jurisdiction, both domicile and physical presence are considerations to be weighed, but neither is determinative.

The broadening and narrowing effects of Act 513 are also applicable to continuing jurisdiction. The state supreme court recently held that the earlier exercise of a court's custody jurisdiction to render a decree does not alone support jurisdiction for modification of the decree; absent compelling circumstances, the requirements of domicile or physical presence must still be met.<sup>66</sup> Thus, if a parent moves out-of-state with the child after a Louisiana custody determination, the other parent cannot automatically seek a modification in a Louisiana court. This rule is somewhat altered by the Act, since continuing jurisdiction would be supportable, even without domicile or physical presence, if the requirements of one of the newly enacted jurisdictional bases, such as the home state or the best interest of the child basis, were met.

The Act also affects divorce and separation proceedings in which a custody determination is sought. It would clearly be possible for the Louisiana court to have jurisdiction over the divorce or separation action<sup>67</sup> but lack jurisdiction over the

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sympathetic ear for their plea of custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years, with the child thrown back and forth from state to state, never coming to rest in one single home and in one community.

9 UNIFORM LAWS ANNOTATED 99 (1968).

66. *Odom v. Odom*, 345 So. 2d 1154 (La. 1977).

67. Louisiana courts have jurisdiction over divorce and separation actions when one or both of the spouses are domiciled in the state and, except as otherwise provided by law, the grounds therefore were committed or occurred in this state, or while the

child's custody.<sup>68</sup> This result might occur, for example, when one spouse has left the state with the child more than six months before the proceeding, or when jurisdiction in the divorce or separation suit is based on the returning spouse provision of the Civil Code.<sup>69</sup>

Juvenile court jurisdiction<sup>70</sup> is also both restricted and broadened by the Uniform Act. Formerly such jurisdiction could be exercised if the child was either present in or domiciled in the state.<sup>71</sup> The new law permits a broader jurisdiction to the extent that the home state, best interest of the child, and best available forum bases do not require either domicile or physical presence.<sup>72</sup> However, the abandonment or emergency ground for jurisdiction is the new provision most directly relevant to juvenile proceedings, and that ground is potentially more restrictive than the prior law. Since it requires physical presence in abandonment proceedings, the new law, unlike the earlier provisions, will not permit jurisdiction based on abandonment to determine custody of a child domiciled in but absent from the state. Presumably such a circumstance is rather unusual, however, and the state where the abandoned child is found would be an adequate forum (presuming its authority to exercise jurisdiction). Jurisdiction over child neglect cases is

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matrimonial domicile was in this state. LA. CODE CIV. P. art. 10(7). Civil Code article 142 makes an exception for a "returning spouse":

A separation from bed and board or a divorce may be obtained in this state for any cause allowed by the laws of this state even if the cause occurred elsewhere while either or both of the spouses were domiciled elsewhere, provided the person obtaining the separation from bed and board or the divorce was domiciled in this state prior to the time the cause of action accrued and is domiciled in this state at the time the action is filed.

LA. CIV. CODE art. 142.

68. The Commissioner's comments note that "[s]hort-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical 'domicile' for divorce or other purposes." 9 UNIFORM LAWS ANNOTATED 99, 108 (1968). Similarly, "[t]he submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction." *Id.*

69. LA. CIV. CODE art. 142.

70. LA. R.S. 13:1570(A)(1) (Supp. 1975); LA. CODE OF JUV. P. arts. 13(14)(c) and 13(15), added by 1978 La. Acts, No. 172, § 1. For the language of the pertinent portions of these statutes, see note 13, *supra*.

71. LA. R.S. 13:1570 (Supp. 1975).

72. See text at notes 63-66, *supra*.

more significantly narrowed. As with abandonment, the Uniform Act permits jurisdiction only over children who are present in the state; it additionally requires that there be an emergency condition. Thus, the Act will not permit a non-custodial parent to seek a new decree based on the neglect of the custodial parent in another state without proving an emergency. The actual restrictive impact of the rather narrow abandonment/emergency jurisdictional basis may be somewhat mitigated since abandonment and neglect proceedings can be brought in Louisiana whenever the criteria of the home state, best interest of the child, or best available forum jurisdictions are met.<sup>73</sup>

Probably any impact of Act 513 on the juvenile jurisdiction of courts will be limited to instances where private parties are seeking to resolve their private custody dispute in a juvenile proceeding. The strictly public law exercise of juvenile jurisdiction should be governed entirely by the newly enacted Code of Juvenile Procedure.<sup>74</sup>

#### ADOPTION

##### *Adoption by Grandparents*

Several enactments of the 1978 session effect changes in or additions to the law of adoption. Act 101<sup>75</sup> eases the requirements for a grandparent to adopt a grandchild born out of wedlock, by permitting a final decree after the first hearing in such a private, related adoption. Normally a private adoption is a two-hearing process,<sup>76</sup> but the law permits a final decree to be rendered after one hearing in three instances where the petitioner is related to the adoptive child or one of his parents: (1) when the petitioner is the spouse of the child's legitimate parent; (2) when the petitioner is the parent of the child who was born out of wedlock; and (3) when the petitioners are a married couple seeking jointly to adopt a child born out of wedlock to one of them.<sup>77</sup>

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73. See text at note 21, *supra*.

74. See note 9, *supra*.

75. 1978 La. Acts, No. 101, amending LA. R.S. 9:434 (Supp. 1977).

76. LA. R.S. 9:432 (Supp. 1977).

77. LA. R.S. 9:434 (Supp. 1977).

Extending the one-hearing process to grandparents is consistent with the prior exceptions to the two-hearing process, but it is not clear why the change was made in favor of only those grandparents adopting *illegitimate* grandchildren. While the birth of an illegitimate grandchild may be a fairly obvious occasion for grandparental adoption, it is not the only one. There are circumstances, including separation or divorce of the parents and simultaneous death of the parents, in which the adoption of *legitimate* grandchildren is a plausible course of action.<sup>78</sup>

There does not appear to be a strong policy basis for differentiating between grandparents on the basis of the legitimacy of the grandchildren they seek to adopt. Perhaps it was felt that delays should be shortened in the case of illegitimate grandchildren in order to minimize their period of illegitimacy. This may be one of the reasons why a single-hearing procedure is permitted in the case of a parent (or parent and spouse) seeking to adopt his illegitimate child. No such justification is present, however, in the situation where the spouse of the legitimate parent seeks to adopt a child. The more general basis for all of the single-hearing private adoptions seems to be the existence of a close relationship between the persons involved, with the corollary considerations that the prospective home may already be familiar to the adoptive child, that the environment may have already proven suitable, and that problems that might arise in adoptions between strangers are less likely to occur. These reasons, however, seem equally applicable to a grandparent adopting a legitimate grandchild, and the single-hearing process should be extended to these grandparents as well.

### *Subsidized Adoption*

Another significant adoption measure, Act 734,<sup>79</sup> authorizes the Office of Family Services of the Department of Health and Human Resources to develop and implement a program for

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78. The statutes show some recognition of this by giving grandparents the same capacity as the spouse of the legitimate parent to adopt a child or children without consent of the other parent under certain circumstances. LA. R.S. 9:422.1 (Supp. 1962).

79. 1978 La. Acts, No. 734, adding LA. R.S. 46:1790-93.



subsidizing the adoption of children with special needs.<sup>80</sup> The Office is empowered to make payments to the adoptive parents on behalf of such a child placed for adoption through an agency if two conditions (in addition to the special needs of the child) are met: (1) if the office has attempted unsuccessfully to place the child and (2) if the "adoptive family is capable of providing the permanent family relationships needed by the child in all respects other than financial, and the needs of the child are beyond the economic ability and resources of the family."<sup>81</sup>

This program is clearly based on a desire to further the best interest of the child, the policy which underlies all of the child custody and adoption provisions. Children who cannot be placed in an adoptive home are usually reared by the state in an institutional setting or in foster homes by contract;<sup>82</sup> this

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80. The Act refers to a child who "because of physical or mental condition, race, age, membership in a sibling group, or other serious impediments or special needs, is considered a child that is difficult to place for adoption." LA. R.S. 46:1790(B)(1), added by 1978 La. Acts, No. 734, § 1. The listing is clearly illustrative, rather than exclusive, with the general criterion for eligibility being some characteristic which makes the child difficult to place. The Act is similar to, but not as broad as, the Model State Subsidized Adoption Act and Regulations produced by a convention of more than 1500 persons in the fields of law, medicine, and civil rights. That act makes subsidized adoption available in situations where a child is (1) currently in the care of a prospective adoptive foster family with whom he has developed a positive emotional bond; or (2) unlikely to be a candidate for adoption because of physical or mental disability, emotional disturbance, sibling relationship, racial or ethnic factors, or any combination thereof. Forty jurisdictions have adopted some kind of subsidized adoption statute: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *The Implementation of Subsidized Adoption Programs: A Preliminary Survey*, 15 J. FAM. L. 732, 737 n.16 (1976).

81. LA. R.S. 46:1790(B), added by 1978 La. Acts, No. 734, § 1. Eligibility for subsidy payments must be determined and approved prior to completion of the adoption proceeding; continued eligibility is determined annually thereafter. Eligibility of Louisiana residents as adoptive parents does not end with an out-of-state move. LA. R.S. 46:1792, added by 1978 La. Acts, No. 734, § 1. Payments are to vary according to need, but may not exceed 80% of the cost of providing foster care. They may include, but are not limited to, maintenance costs, medical and surgical expenses, and other costs incidental to the care, training, and education of the child, including special medical costs connected with a physical or mental condition existing prior to the initial judgment of adoption. Payments terminate when the child reaches age 18. LA. R.S. 46:1791, added by 1978 La. Acts, No. 734, § 1.

82. LA. R.S. 46:52(8) (1950) charges the Department of Public Welfare with:

program attempts to overcome the inherent disadvantage which children with special needs suffer with respect to placement and to increase their chances of growing up in a family environment. The cost to the state of subsidizing the adoptive parents is at least theoretically less than the cost of continued state custody of the child.<sup>83</sup>

### *Grandparental Visitation of Adopted Grandchild*

Act 458<sup>84</sup> attempts to fill a gap in the laws relating to the visitation rights of grandparents. It amends Revised Statutes 9:572 to add a provision that "in the event of an adoption, the natural parents of a deceased party to a marriage dissolved by death may have limited visitation rights to the minor child or children of the marriage dissolved by death."<sup>85</sup> Civil Code article 214 is also amended to incorporate this provision by reference as an exception to the general termination of the rights of blood relatives in cases of adoption.<sup>86</sup>

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licensing and supervising all parish, municipal, and private agencies, institutions, and individuals caring for children; contracting with private individuals to hold their homes open for and to care for children in need of temporary or long-term foster care; and providing such other services for children as may be authorized by law.

83. A recent survey indicates that subsidized adoption programs are cost-effective. Every state responding to the survey reported a savings over the cost of foster care, with the amount of savings ranging from 18.7% to over 60%. *The Implementation of Subsidized Adoption Programs: A Preliminary Survey*, 15 J. FAM. L. 732, 763, 766 (1976).

84. 1978 La. Acts, No. 458, amending LA. CIV. CODE art. 214, and LA. R.S. 9:572 (Supp. 1975). The former LA. R.S. 9:572 becomes LA. R.S. 9:572(A) and paragraph (B) is added.

85. LA. R.S. 9:572(B), added by 1978 La. Acts, No. 458, § 1. The reference to a marriage "dissolved by death" means that this paragraph would literally apply to parents of a child who had been judicially separated and subsequently died, whether or not there had been any reconciliation. It was probably not the legislature's intent to include this situation, since section 572 generally distinguishes between parents of children who have been separated or divorced and parents of children whose marriage is dissolved by death.

86. LA. CIV. CODE art 214. The article now reads as follows:

The adopted person is considered for all purposes as the legitimate child and forced heir of the adoptive parent or parents, including the right of the adopted person or his lawful descendants to inherit from the adoptive parent or parents or the relatives of the latter by blood or by adoption, and the right of the adoptive parent or parents or the relatives of the latter by blood or by adoption to inherit from the person adopted or his lawful descendants, in the same manner and to the same extent as if the person adopted were in fact the legitimate child of the adoptive parent or parents.

The need for legally cognizable grandparental visitation rights was first addressed in 1970 by an amendment to Civil Code article 157,<sup>87</sup> which deals with the award of child custody incident to separation or divorce. The amendment gives the parent of a deceased party to a marriage dissolved by divorce or the subject of a judicial separation the right to seek reasonable visitation rights to the minor child or children of the marriage. The court has the discretion to grant such rights if it finds such a grant would be in the best interest of the child or children. Similarly, section 572 was added to title nine in 1972 to permit such visitation rights for the parents of a deceased party to a marriage, without reference to divorce or separation from bed and board.

Both statutes were explicitly limited to situations where the parent of the grandchildren was dead; apparently it was assumed that while that parent was alive he would provide his parents with opportunities for contact with their grandchildren. In 1975, however, the legislature amended section 572 to provide that the parents of a noncustodial parent in a separation or divorce have a right to reasonable visitation even during the lifetime of their child.<sup>88</sup> A finding by the court that such visitation rights would be in the best interest of the child continued to be a requisite to granting them.<sup>89</sup>

An apparent gap in these provisions was illustrated in *Smith v. Trosclair*.<sup>90</sup> In that decision it was held that section 572 was not irreconcilable with Civil Code article 214, which generally terminates the rights and obligations of the blood

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If the adoptive parent is married to a blood parent of the adopted person, the relationship of that blood parent and his blood relatives to the adopted person shall remain unaltered and unaffected by the adoption. Otherwise, upon adoption: the blood parent or parents and all other blood relatives of the adopted person, except as provided by R.S. 9:572(B), are relieved of all of their legal duties and divested of all of their legal rights with regard to the adopted person, including the right of inheritance from the adopted person and his lawful descendants; and the adopted person and his lawful descendants are relieved of all their legal duties and divested of all of their legal rights with regard to the blood parent or parents and other blood relatives, except the right of inheritance from them.

87. 1970 La. Acts, No. 436, § 1.

88. 1975 La. Acts, No. 614, § 1.

89. LA. R.S. 9:572 (Supp. 1975).

90. 321 So. 2d 514 (La. 1975).

relatives of an adopted child with the adoption.<sup>91</sup> The court therefore ruled that the maternal grandmother's visitation rights were cut off when the widowed husband of her daughter remarried and the new wife adopted the grandchild.<sup>92</sup> The legislature evidently hoped to avoid this harsh result through the passage of Act 458.

While the Act clearly addresses adoption by a stepparent when the widowed parent remarries, it is not limited by its terms to this situation. It would thus extend to the presumably rare situation in which a widowed parent gives up his child or children for adoption.

The Act specifically limits its application to circumstances where the adoption occurs after the death of the parent whose parents seek visitation rights. For an adoption to occur before the death of the parent, it would be necessary for that parent to have relinquished all rights to his child.<sup>93</sup> Furthermore, at the time of adoption the rights and duties of all blood relatives would be generally terminated.<sup>94</sup> Under such circumstances, it would be strange, and perhaps disquieting to the child, for the grandparents suddenly to acquire visitation rights through the fortuity of the untimely death of their child. The proviso of Act 458 that it apply only to adoptions after the parent's death avoids such an anomalous result.

The visitation rights granted under this latest enactment are "limited visitation rights,"<sup>95</sup> while those accorded in Civil Code article 157 and section 572(A) are "reasonable visitation rights."<sup>96</sup> Consistently with these laws, the grandparents under section 572(B) must prove that visitation rights are in the best interest of the child or children.<sup>97</sup> In the adoption situation addressed by this section, they must also prove that they have been unreasonably denied visitation.<sup>98</sup> The reason for this additional requirement is not clear. The intent may have been to

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91. *Id.* at 515.

92. *Id.*

93. LA. R.S. 9:422 (Supp. 1975), 9:422.1 (Supp. 1962), 9:429 (Supp. 1960).

94. LA. CIV. CODE art. 214.

95. LA. R.S. 9:572(B), added by 1978 La. Acts, No. 458, § 1.

96. LA. CIV. CODE art. 157 and LA. R.S. 9:572(A), as amended by 1978 La. Acts, No. 458, § 1.

97. LA. R.S. 9:572(B), added by 1978 La. Acts, No. 458, § 1.

98. *Id.*

leave the court the option of denying visitation rights in certain circumstances on the basis that it would be reasonable to follow the general policy of Civil Code article 214 in severing all the rights of blood relations with respect to the adopted child. This policy, however, is most appropriate when the blood parent himself has given up his rights to the child. In the situation encompassed in the new section, the blood parent has not relinquished his rights; nor has the marriage with the other parent ended prior to that parent's death. There should be less likelihood of acrimony between the grandparents and a surviving spouse with a new mate (the adoptive parent) than there would be between the grandparents and a former spouse who had been judicially separated or divorced from their child. Yet, in the separation or divorce situation no showing of an unreasonable denial of rights (with its attendant implication that there could be a reasonable denial) is required. Of course, it is possible to envision some circumstances where a denial of visitation rights would be reasonable—for example, mental instability of the grandparent. Such situations can be adequately handled by the court, however, in determining whether visitation rights are in the best interest of the child or children.

The most serious problem with the Act is its description of the grandparents as "the *natural* parents of a deceased party to a marriage dissolved by death."<sup>99</sup> The meaning of "natural" in this context is unclear, though its use shows an intent to limit the reach of this statute to only certain grandparents. "Natural parent" is used in the Civil Code to describe the parent of an illegitimate child.<sup>100</sup> If this is the intended meaning, then the visitation rights accorded by Act 458 are not available to legitimate parents with respect to their grandchildren and the rule of *Smith v. Trosclair*<sup>101</sup> remains largely intact. Such a discrimination in favor of an illegitimate relationship would be rather unusual and is unlikely to have been the legislative intent.

Perhaps "natural parent" in this context means biological parent—as a purposeful distinction from adoptive parent. If this is the intent, "blood parent" should have been used in

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99. *Id.* (Emphasis added.)

100. LA. CIV. CODE arts. 200, 202, 210.

101. 321 So. 2d 514 (La. 1975). See text at note 85, *supra*.

order to be consistent with the phrasing of the adoption laws<sup>102</sup> and to avoid possible misinterpretation. If blood parent is the intended meaning, the underlying policy of the distinction is nevertheless inscrutable. A harsh and unnecessary distinction is made between blood parents whose children have offspring and adoptive parents whose children have offspring. It is unjustly discriminatory to deny the latter the visitation privileges accorded to the former; there is no reason to assume that the emotional ties to one's children and grandchildren are less significant because of the absence of blood ties. (Rather, it might be argued that biological parenthood is often less seriously considered and sometimes less fully intended and less joyfully sought than adoptive parenthood.) Furthermore, it is clearly the policy of Civil Code article 214 that adoptive parents have full parental rights and obligations with respect to their adopted child and his offspring.<sup>103</sup> The discrimination evidently enacted in Act 458 introduces a bizarre deviation from that policy.

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102. LA. CIV. CODE art. 214.

103. *Id.*

## MATRIMONIAL REGIMES\*

One of the most far-reaching enactments of the 1978 regular session of the Louisiana legislature is Act 627,<sup>1</sup> which provides for a new matrimonial regimes law. Of major significance is the Act's abolition of the current head and master management scheme<sup>2</sup> for the community of gains and the substitution of what is popularly labelled "Equal Management."<sup>3</sup> The

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\* This symposium article is largely limited to an explanation of the new matrimonial regimes legislation and a comparison of that law to the provisions presently in effect. A more detailed analysis of the effects of the new law can be found in the *Symposium on Louisiana's Revised Matrimonial Regimes Law*, in Issue 2 of Volume 39, *LOUISIANA LAW REVIEW*. That symposium consists of the following articles: Background of Matrimonial Regimes Revision; The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality; "Management" of Community Assets under Act 627; Louisiana's New Matrimonial Regime Law: Some Aspects of the Effect on Real Estate Practice; Act 627: A Comparison with Washington Community Property Law; A Critique of the Equal Management Act of 1978; Interim Study Year.

1. 1978 La. Acts, No. 627, adding LA. R.S. 9:2831-56, 9:1517, amending LA. CIV. CODE arts. 1790-91, LA. R.S. 9:291 (Supp. 1960), and repealing LA. CIV. CODE arts. 2325-437, 131, 1751, 2446, LA. R.S. 9:2801 (Supp. 1976), 9:2802 (Supp. 1976), 9:2803 (1950), 9:2804 (Supp. 1976), 9:2821-22 (1950). Act 627 was proposed as House Bill 1569 by Mr. Simoneaux, and represented the efforts of a joint legislative committee and its advisory committee, both of which were created by Senate Concurrent Resolution 54 of 1977. That resolution authorized and directed the legislative committee to propose in the 1978 legislative session a new matrimonial regimes law incorporating the equal management principle. The Act will not go into effect until September, 1979 and January, 1980 so the prior law is still in effect and its provisions are referred to as the present provisions. See notes 176-81, *infra*, and accompanying text.

2. LA. CIV. CODE art. 2404 establishes the husband as head and master, while certain later-enacted limitations on the husband's management power are contained in LA. CIV. CODE art. 2334. The constitutionality of article 2404 was challenged in *Corpus Christi Parish Credit Union v. Martin*, 358 So. 2d 295 (La. 1978). The district court found article 2404 unconstitutional but the supreme court reversed, finding it unnecessary to reach the constitutional issue. See text at note 117, *infra*. A strong three-man dissent called the majority view an "oversimplification" of the issue, which failed to address the "gender-based discrimination squarely posed . . . by the wife's pleadings and evidence." 358 So. 2d at 299. The dissent went on to surmise that "in view of [the] probability of legislative attention to the problem, the majority wished to avoid disruption in dealing with community-held property which might result from a present judicial declaration of the obvious unconstitutionality of the present provisions." *Id.*

3. LA. R.S. 9:2842-47, added by 1978 La. Acts, No. 627, § 1. The management provisions actually enact an equal management scheme modified by requirements of

change in management scheme is accompanied by an elimination of the interspousal incapacity to contract<sup>4</sup> and a considerable reduction of the scope of interspousal immunity to suit.<sup>5</sup> The general rewriting of the community property law also addresses various inequities imposed by the Civil Code or its jurisprudential gloss, some of which disadvantage the husband in a community regime.<sup>6</sup> The entire act represents an attempt to equalize the property rights and responsibilities of spouses.

The Act describes statutorily for the first time the function of a matrimonial regime — “to regulate the ownership and management of the assets and liabilities of married persons, and in relation to property, their rights and obligations with respect to each other and to third persons.”<sup>7</sup> The definition was perhaps included as a framework for understanding the scope and purpose of a marital property arrangement, whether estab-

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joint management (or action through concurrence of the spouses) and of sole management, in specific instances. Actually, the community assets left to the management of either spouse acting alone are relatively few and often of lesser importance than those relegated to joint or sole management. Management is certainly equal, however, because neither spouse is arbitrarily preferred in the management of any community property, even with reference to the joint and sole management provisions.

4. LA. R.S. 9:2834, added by 1978 La. Acts, No. 627, § 1, and LA. CIV. CODE art. 1790, as amended by 1978 La. Acts, No. 627, § 3.

5. LA. R.S. 9:291 (Supp. 1960), as amended by 1978 La. Acts, No. 627, § 4. The present version of section 291 permits a wife not judicially separated from her husband to sue him on four grounds only: a separation of property; restitution and enjoyment of her paraphernal property; separation from bed and board; and divorce. The courts have consistently placed the same restrictions on the husband's power to sue his wife. *Seeling v. Seeling*, 133 So. 2d 168 (La. App. 4th Cir. 1961). The amended version continues authorization to sue in these specified instances and further permits husband and wife to sue each other in four additional circumstances—each of the additions being required by other substantive changes enacted by Act 627. Three of these authorized suits relate to enforcement of the management provisions. Each spouse may sue to recover loss sustained as a result of fraud or bad faith in the administration of the community property by the other spouse. A cause of action in such a case is granted by LA. R.S. 9:2846, added by 1978 La. Acts, No. 627, § 1. Each spouse may also sue to avoid an unauthorized alienation, encumbrance, or lease of community property by the other, since the Act establishes that such transactions are voidable. LA. R.S. 9:2846, added by 1978 La. Acts, No. 627, § 1. Because concurrence requirements may sometimes operate to the detriment of family interests, a spouse may sue for judicial authorization to act without the consent of the other under certain circumstances. LA. R.S. 9:2847, added by 1978 La. Acts, No. 627, § 1. Finally, the removal of the interspousal incapacity to contract results in authorization for suits between the spouses to enforce conventional obligations.

6. See, e.g., text at notes 1, 52, 62 *infra*.

7. LA. R.S. 9:2831, added by 1978 La. Acts, No. 627, § 1.



lished by contract or provided by law. Additionally, the Act, by providing for a direct effect upon third persons, goes beyond the current understanding of the nature of a matrimonial regime.<sup>8</sup> This provision rejects the premise that matrimonial regimes regulate property rights only between the spouses—a premise which clearly follows from the view that a matrimonial regime is a purely conventional property arrangement.

This new law closely parallels present Civil Code articles 2325,<sup>9</sup> 2332,<sup>10</sup> and 2399<sup>11</sup> in stipulating that the regime provided by law will have effect in the absence of an express matrimonial regime contract and will further supplement any express contract to the extent that the legal regime's provisions are not excluded, limited, or modified by the contract.<sup>12</sup> The section states precisely that such provisions will "retain their effect as imposed by law,"<sup>13</sup> and the drafters' commentary indicates that this statement is intended to reject the tacit contract theory of the legal regime.<sup>14</sup> A probable reason for rejecting this theory is the unrealistic nature of its basic assumption.<sup>15</sup> It is

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8. See Pascal, *Updating Louisiana's Community of Gains*, 49 TUL. L. REV. 555, 556 (1975).

9. LA. CIV. CODE art. 2325 states: "In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they be not contrary to good morals, and under the modifications hereafter prescribed."

10. LA. CIV. CODE art. 2332 states: "The partnership, or community of acquets [acquets] or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist."

11. LA. CIV. CODE art. 2399 states: "Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary."

12. LA. R.S. 9:2832-33, added by 1978 La. Acts, No. 627, § 1.

13. LA. R.S. 9:2833, added by 1978 La. Acts, No. 627, § 1 (emphasis added).

14. LA. R.S. 9:2833, comment added by 1978 La. Acts, No. 627, § 1. Section 10 of Act 627, declaring that "the source notes, comments and special notes contained in this Chapter reflect the intent of the legislature," is an apparent attempt to bind the judiciary's interpretation of the new law.

15. According to the tacit contract theory, spouses who enter a marriage without making a marital contract have tacitly contracted the community of gains provided by the Civil Code. The underlying assumption that the prospective spouses know of their ability to draw a contract, know that this capacity is limited to the pre-nuptial period, and are aware of the provisions of the regime provided by law is rather unrealistic. One effort to address the practical effects of this theory is LA. R.S. 9:264 (Supp. 1975), which requires the state officer issuing a marriage license to deliver to each prospective spouse a printed summary of the current matrimonial regimes law that

indulging in fiction to conclude that couples who marry without a prior marital contract intend by their omission to subject themselves to the legal matrimonial regime. Also, the rejection of the tacit contract theory may help the new legislation withstand constitutional attack. The new regime is to affect all married couples, including those married before its effective date, who do not have an express marriage contract.<sup>16</sup> If a legally imposed regime (either that in the present law or that enacted by Act 627) were viewed as a tacit contract, then the substitution of a new regime would at least arguably impair that contract.

### CONTRACTUAL POWER

The scope of the spouses' authority to contract a regime is broad, but not unlimited. As under the present law,<sup>17</sup> they may not renounce or alter the established order of succession or prohibit legally permissible gratuitous dispositions.<sup>18</sup> A new restriction prohibits a couple from renouncing or altering the marital portion.<sup>19</sup> Marriage contracts will also be subject to the general prohibitions of Civil Code article 11—that "individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals."<sup>20</sup>

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emphasizes the presumption of a tacit acceptance of the legal regime and the inability to contract after marriage. The tacit contract theory was invoked by a federal district court to uphold the community property management scheme against an equal protection challenge in *Kirchberg v. Feenstra*, 430 F. Supp. 642 (E.D. La. 1977). See Note, *Matrimonial Regime Reform—A Constitutional Necessity*, 38 LA. L. REV. 642 (1977). The theory was less convincing to the three-man dissent in *Corpus Christi Parish Credit Union*, which found the head and master provision violative of the equal protection clause of the United States Constitution.

16. 1978 La. Acts, No. 627, § 9.

17. LA. CIV. CODE art. 2326. Additionally, article 2325 requires that the stipulations of a marriage contract not be contrary to good morals, and article 2327 forbids a contract which derogates from "the rights resulting from the power of the husband . . . as the head of the family, . . . from the rights granted to the surviving husband or wife by the title: *Of Father and Child* and by the title: *Of Minors, of their Tutorship and Emancipation*, . . . [or] from the prohibited dispositions of this code." LA. CIV. CODE art. 2327.

18. LA. R.S. 9:2833, added by 1978 La. Acts, No. 627, § 1. A slightly amended version of Civil Code article 2382, which presently provides for the marital portion (and is repealed by Act 627), is enacted in LA. R.S. 9:1517, added by 1978 La. Acts, No. 627, § 2.

19. LA. R.S. 9:2833, added by 1978 La. Acts, No. 627, § 1.

20. LA. CIV. CODE art. 11.

The formalities required of a matrimonial regime contract remain unchanged,<sup>21</sup> but a major substantive reform in the power to contract is introduced—it is no longer restricted to the antenuptial period. A couple may contractually establish or modify a regime or terminate an established one at any time “before or during marriage.”<sup>22</sup> Effect of the contract on third persons depends upon prior filing for registry in the mortgage records of the parish of the matrimonial domicile and the parish where immovable property is located.<sup>23</sup> Present law only requires recordation of marriage contracts which would affect

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21. LA. R.S. 9:2834, added by 1978 La. Acts, No. 627, § 1, requires that the contract be entered into by an act passed before a notary and two witnesses. The same requirement is currently in force under LA. CIV. CODE art. 2328.

22. LA. R.S. 9:2834, added by 1978 La. Acts, No. 627, § 1. See LA. CIV. CODE art. 2329, which restricts alteration of the marriage contract to the antenuptial period, except for married couples moving to Louisiana, who are allowed one year after their move to make a valid marriage contract. The power to modify the marriage contract was a particularly controversial portion of the Act, even among proponents of the equal management concept. Amendments were offered in both the House of Representatives and the Senate to restrict the power of altering a marriage contract to the antenuptial period. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 4th Reg. Sess. at 43 (June 21, 1978); OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 4th Reg. Sess. at 73, 75 (July 5, 1978). Curiously, these efforts were not accompanied by amendments to leave the general interspousal incapacity to contract in its present form. Thus, even had the amending efforts succeeded, the amendment of Civil Code article 1790 by Act 627 would still have left the spouses with full contractual power during the marriage. They would have been free to substantially alter their property arrangements by individual contracts which did not expressly initiate or alter a matrimonial regime.

Concern over the ability to alter the marriage contract stemmed from the legislators' fear of the possible adverse consequences for creditors and for forced heirs, particularly in instances of second marriages. Baton Rouge Morning Advocate, July 6, 1978, §A, at 1. The concerns were not well-founded, however. Creditors are adequately protected by the present remedies provided by law—the declaration in simulation and the revocatory action. See LA. CIV. CODE arts. 1984, 2480. Forced heirs are likewise not disadvantaged by the contractual capacity granted by the new legislation. They too are protected by the declaration in simulation if a parent attempts a simulated sale, for example, to a new spouse. If an actual sale takes place, the consideration given will replace the conveyed property in the estate of the parent. With respect to gratuitous dispositions between spouses, there is no change from the present law except a removal of the ban on reciprocal donations in the same act. LA. CIV. CODE art. 1751, repealed by 1978 La. Acts, No. 627, § 5. A forced heir will continue to have an action to reduce any donation which impinges on his legitime. LA. CIV. CODE arts. 1517, 1518. Continued concern over the power to modify the marriage contract is reflected by the fact that the legislature explicitly commended it to further study, prior to the effective dates of Act 627, in House Concurrent Resolution 232. See text at note 179, *infra*.

23. LA. R.S. 9:2834, added by 1978 La. Acts, No. 627, § 1.

immovable property and limits the recordation requirement to the parish where the immovable property is located.<sup>24</sup>

Minors may enter into a marriage contract with the written permission of either the father and mother, the parent with legal custody, or the tutor of the person.<sup>25</sup> Presently, according to the recent interpretation by the supreme court of Civil Code articles 2330<sup>26</sup> and 97,<sup>27</sup> an unemancipated minor can enter into a marriage contract only with the consent of either both parents, the survivor if one is dead, or the tutor if both are dead.<sup>28</sup> The provision for permission of the parent with custody is thus new, as is the clarification of "tutor" to mean tutor of the person as distinguished from tutor of the property. The new law is also a change in that it evidently applies to all minors, not to just unemancipated minors.<sup>29</sup>

It should also be noted that Act 627 amends Civil Code article 1790 to delete the general interspousal incapacity to contract.<sup>30</sup> Since all lawful contracts will thus be permitted

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24. LA. CIV. CODE arts. 2265, 2266.

25. LA. R.S. 9:2835, added by 1978 La. Acts, No. 627, § 1.

26. LA. CIV. CODE art. 2330 states: "The minor, who is capable of contracting matrimony, may give his consent to any agreements which this contract is susceptible of; and the agreements entered into and the donations he has made by the same, are valid, provided that, if he be not emancipated, he has been assisted in the agreement by those persons whose consent is necessary to his marriage."

27. LA. CIV. CODE art. 97 states:

The minor of either sex, who has attained the competent age to marry, must have received the consent of his father and mother or of the survivor of them; and if they are both dead, the consent of his tutor.

He must furnish proof of this consent to the officer to whom he applies for permission to marry.

28. *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975).

29. Act 73 of the 1978 regular session of the Louisiana legislature amends Civil Code article 382 to give a minor emancipated by marriage full administrative power over his immovable property at an earlier age. It provides that the authority exercised over immovables by a tutor or undertutor, or by an administrator of the minor's property, will extend beyond marriage only to age sixteen—the article had previously extended this authority to age eighteen. The new matrimonial regime law, however, by not differentiating between emancipated and unemancipated minors, will require parental consent (or that of the other specified responsible adult) for adoption or change of a marriage contract by a minor sixteen years of age or older. This restriction clearly conflicts with the policy of Act 73 to give married minors sixteen or older full power over their property. However, the conflict may have little practical effect since the minor could accomplish by individual contracts with his spouse whatever changes might have been incorporated in a marriage contract. See note 30, *infra*, and accompanying text.

30. LA. CIV. CODE art. 1790, as amended by 1978 La. Acts, No. 627, § 3, reads as follows:

between husband and wife, it would have been possible for the spouses to significantly affect their property arrangements after marriage even without express authority to enter into or modify a matrimonial regime contract during marriage.

#### CLASSIFICATION OF PROPERTY

The new classification of property as community or separate generally follows the pattern established by Civil Code articles 2402<sup>31</sup> and 2334.<sup>32</sup> However, the new legislation at-

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Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contract such as purchases, by the administrator, of any part of the estate which is committed to his charge. These take place only in the cases specially provided by law, under different titles of this Code.

The present version of article 1790 establishes a complete contractual disability between husband and wife by listing them as parties incapable of contracting with each other. Limited exceptions to the disability are found in Civil Code article 2446 (permitting certain sales) and article 1746 (permitting donations). Article 2446 is repealed by Act 627 so that, consistently with a broad contractual capacity, all sales between husband and wife will be permitted in the future. Article 1746 is not repealed so it continues to limit the donations between husband and wife to those which "he or she may give to a stranger." The prohibition against mutual or reciprocal donations by one and the same acts, found in article 1751, is repealed in Act 627. See note 22, *supra*.

31. LA. CIV. CODE art. 2402 states:

This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

32. LA. CIV. CODE art. 2334 states:

The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly. The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and

tempts to clarify ambiguities in those articles, codify certain jurisprudence, and eliminate disparities in the treatment of husband and wife. Under the new provision, things acquired during the legal regime through the effort, skill, or industry of either spouse will be community property.<sup>33</sup> The intent no doubt is to include all that is classified under the present law as community property by virtue of its being "the produce of the reciprocal industry and labor of both husband and wife."<sup>34</sup> The new phrasing not only has a more modern tone, but is also somewhat broader. While "effort, skill or industry of either spouse" probably means the same as "reciprocal industry and labor," "things acquired . . . through" these activities literally encompasses more than "the produce" of them. The new language however, will probably not place anything more in the community of gains than is presently included, since things presently acquired with the produce of the labor and industry of the spouses become community property due to real subrogation.<sup>35</sup>

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quasi offenses and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be leased, mortgaged or sold by the husband without the wife's written authority or consent.

Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.

Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.

The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

The declaration may be general as to all such property or it may specify property to which it shall or shall not apply. If the declaration so provides, it may apply generally to property which may be acquired in the future, but a contrary declaration of withdrawal of her authority or consent by the wife may be made and recorded.

33. LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.

34. LA. CIV. CODE art. 2402.

35. See 1 A. YIANNPOULOS, PROPERTY § 79 in 2 LOUISIANA CIVIL LAW TREATISE 234-

The legislation classifies as community property both those things acquired with community assets<sup>36</sup> and those things acquired with community and separate assets if the community investment is not inconsequential.<sup>37</sup> These express categories are not part of the present code articles, but they achieve results similar to those which occur under the present scheme. Civil Code article 2402 includes within community property "the estate which [the spouses] may acquire during the marriage . . . by purchase, or in any . . . similar way"<sup>38</sup> without reference to the character of the assets used to make the acquisition. Consequently, the courts have found all property acquired with community or mixed assets to be community property unless, in the latter case, the community portion of the assets is inconsequential.<sup>39</sup> Clearly those things acquired with community assets alone are community property through real subrogation. Including in community property most things acquired with mixed assets reflects a policy decision in favor of community property. The new law stipulates that reimbursement shall be due from the community assets to the separate estate.<sup>40</sup> Similarly, present jurisprudence permits the same reimbursement when the amount of separate investment can be proved.<sup>41</sup>

Under the new legislation, things donated or bequeathed to the spouses jointly enter the community;<sup>42</sup> Civil Code article 2402 presently has the same effect, although it refers only to things donated to the spouses jointly.<sup>43</sup> The present phrasing discloses no intent to exclude donations mortis causa; the addition of the word "bequeathed" is simply a clearer expression of the present provision.

The new classification of the fruits and revenues of sepa-

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38 (1966). The omnibus clause of Civil Code article 2334 would also bring about this effect.

36. LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.

37. *Id.*

38. LA. CIV. CODE art. 2402.

39. Succession of Land, 212 La. 103, 31 So. 2d 609 (1947); Succession of Russo, 246 So. 2d 26 (La. App. 4th Cir.), cert. denied, 258 La. 760, 247 So. 2d 861 (1971).

40. LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.

41. See, e.g., Succession of Videau, 197 So. 2d 655 (La. App. 4th Cir.), cert. denied, 250 La. 920, 199 So. 2d 922 (1967).

42. LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.

43. LA. CIV. CODE art. 2402.

rate property is a significant change from present law and is also an equalization of the treatment of husband and wife. Presently, the "profits" of the husband's separate property are always community property,<sup>44</sup> while the "profits" of the wife's separate property are likewise community property if the husband administers her paraphernalia.<sup>45</sup> The wife has the option, however, of making and recording a notarial reservation of the administration and the fruits of her separate property,<sup>46</sup> and once such a declaration of paraphernality is made, the fruits of the wife's separate property are separate.<sup>47</sup> The new regime grants to the husband the same option of making a notarial reservation.<sup>48</sup> The use of the words "fruits and revenues" is also a clarification and codification of jurisprudence. "Profits" in Civil Code article 2402 is a mistranslation of the French wording of the article, and the courts early substituted the word "fruits" in their decisions dealing with this article.<sup>49</sup> The word "revenues" appears to be intentionally broad and may include any income generated from property, such as proceeds from timber operations or the sale of mineral rights. Certainly it should be read as including civil fruits, which are defined by Civil Code article 551 to be "revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions."<sup>50</sup>

Damages awarded for loss or injury to a community asset are also to be community property.<sup>51</sup> Although no specific section presently provides for this, the same result is obtained through real subrogation. Again, the new legislation adds clarity.

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44. LA. CIV. CODE art. 2402; *Milling v. Collector of Revenue*, 220 La. 773, 57 So. 2d 679 (1952).

45. LA. CIV. CODE arts. 2402, 2386. If the husband administers the wife's separate property as her agent, however, she is still deemed to have the administration of her separate property, and the fruits remain separate. *Trorlicht v. Collector of Revenue*, 25 So. 2d 547 (La. App. Orl. Cir. 1946).

46. LA. CIV. CODE art. 2386.

47. See Pascal, *supra* note 8, at 572.

48. LA. R.S. 9:2839(5), added by 1978 La. Acts, No. 627, § 1.

49. *United States v. Harang*, 165 F.2d 106 (5th Cir. 1947); *Succession of Webre*, 49 La. Ann. 1491, 1494, 22 So. 390, 392 (1897); *Succession of Rugg*, 339 So. 2d 519 (La. App. 2d Cir. 1976), *cert. denied*, 341 So. 2d 897 (La. 1977).

50. LA. CIV. CODE art. 551.

51. LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.



Presently Civil Code article 2334 does deal with "actions for damages resulting from offenses and quasi offenses" against each spouse. The wife's damages are always her separate property, but the husband's recovery is community property unless the tort occurs at a time when he is living separate and apart from his wife "by reason of fault on her part, sufficient for separation or divorce."<sup>52</sup> Article 2402 also provides that damages resulting from personal injuries to the wife shall not form part of the community, "but shall always be and remain the separate property of the wife."<sup>53</sup> The inequity of these provisions is corrected in the new legislation, which provides that recovery for a tort against the person of either spouse constitutes that spouse's separate property.<sup>54</sup> Any portion of the recovery, however, which compensates for expenses incurred during the regime because of the injury, or which compensates for the loss of community earnings, is community property.<sup>55</sup> This is consistent with the categorization as community of those damages compensating for the loss of a community asset. The portion of the tort award that represents future earnings presents a special problem in classification—a determination of what part of those earnings is community property is only possible if the community has been dissolved. Thus, the new legislation provides that the portion of an award attributable to loss of community earnings will be determined, as between the spouses, upon dissolution of the regime.<sup>56</sup>

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52. LA. CIV. CODE art. 2334.

53. LA. CIV. CODE art. 2402.

54. LA. R.S. 9:2840, added by 1978 La. Acts, No. 627, § 1.

55. *Id.* This is true presently with respect to a wife's personal injury award. See, e.g., *Charles v. Sewerage & Water Bd. of New Orleans*, 331 So. 2d 216 (La. App. 4th Cir.), cert. denied, 334 So. 2d 431 (La. 1976); *Warren v. Yellow Cab Co. of Shreveport*, 136 So. 2d 319 (La. App. 2d Cir. 1961).

56. LA. R.S. 9:2840, added by 1978 La. Acts, No. 627, § 1. If the community is dissolved by the death of the injured spouse, all of the recovery for loss of earnings is community property. The Advisory Committee (see text at note 178, *infra*) will propose amended wording for this portion of section 2840 to read as follows:

If the community regime is subsequently dissolved, other than by the death of the injured spouse, the portion of the recovery or award attributable to loss of earnings that would have accrued after dissolution of the community regime shall then be determined to be the separate property of the injured spouse.

A discussion of several recent decisions is necessary to clarify the present method of allocating the portion of a tort recovery attributable to a husband's lost earnings. It is possible that these cases will influence the interpretation of the new provisions. In

the 1971 case of *Chambers v. Chambers*, 259 La. 246, 249 So. 2d 896 (1971), the state supreme court seemed to approve the appellate court's holding that the portion of a husband's personal injury award for a tort occurring during the community regime which compensates him for damages accruing after the dissolution of the community is the husband's separate property. However, because of the length of time between the injury and trial and consequent proof problems in determining which elements entered into settlement negotiations and comprised the lump sum award, the court upheld the trial court's award of one-half of the settlement recovery to the wife. A per curiam opinion on rehearing created further confusion by stating that "the majority intended to hold that the time the husband's cause of action arises determines the community or separate nature of the cause of action and the community or separate nature of the funds obtained when the suits on the cause of action were settled." *Id.* at 277, 249 So. 2d at 907.

Clarification came in 1975 with *West v. Ortego*, 325 So. 2d 242 (La. 1975), a workmen's compensation case. The state supreme court first determined that a workmen's compensation claim "is more likely than not founded upon an offense or quasi-offense" and thus subject to any provisions of law dealing with recovery for offenses and quasi offenses. *Id.* at 244. The court then concluded that there was a hiatus in the law with respect to a husband's damages from an injury occurring during the community regime, when those damages are received after termination of the community and as compensation for post-dissolution wages and losses. In the absence of positive law addressing the precise question, the court resorted to equity to hold that "where a husband's settlement monies, acquired after dissolution of the community, but based upon a pre-dissolution, accident-related cause of action, compensate for both pre-dissolution and post-dissolution losses, that portion of the settlement which compensates for post-dissolution losses falls into the separate estate of the husband." *Id.* at 248, 249.

The new legislation both codifies and goes beyond the *West* result. Because a workmen's compensation award is considered to be a replacement for earnings, the *West* court did not have to address allocation of general damages. Furthermore, that court was only deciding how to allocate a recovery occurring after termination of the marriage. Act 627 refers to the recovery for a tort committed against the spouse during the existence of the community regime, which should make the time when the recovery for such tort is actually received irrelevant. LA. R.S. 9:2840, added by 1978 La. Acts, No. 627, § 1. Additionally, the residual character of the recovery is separate under the new provisions, with only those portions compensating for community expenses or for lost community earnings falling into the community. Thus, neither spouse shares in the other's recovery for such damages as pain, suffering, and disability. This result is consistent with the underlying policy of tort recovery and eliminates the bizarre effect of present provisions whereby a wife may profit from her husband's suffering and physical impairment.

In *Broussard v. Broussard*, 340 So. 2d 1309 (La. 1976), the husband had recovered a personal injury award during his marriage for damages from a premarital accident. In an action to partition the community property after divorce, his wife claimed a part of this recovery. The court of appeal held that she was entitled to one-half of that portion of the award which compensated for loss of earning capacity during the period of the marriage. 326 So. 2d 572 (La. App. 3d Cir.), *rev'd*, 340 So. 2d 1309 (La. 1976). The supreme court admitted the logic of this extension of *West*, but held that the situation was clearly covered by the statutes which classify all property brought into the marriage as separate, LA. CIV. CODE art. 2334, and which label a cause of action as property, LA. CODE CIV. P. art. 426. It therefore reversed and held the entire personal

Inclusion of an omnibus provision<sup>57</sup> similar to that in present Civil Code article 2334<sup>58</sup> resolves unforeseen classification problems in favor of the community. The new language is somewhat broader than the old, since it refers to "all things not classified as separate property by other provisions" rather than merely property "acquired by the husband and wife during marriage" in any manner other than those declared in article 2334.

Both present law and the new legislation also include a community presumption,<sup>59</sup> but the two provisions are significantly different in one respect. Civil Code article 2405 states that property possessed by the spouses at the *dissolution* of the marriage is presumed to be community property; the courts go

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injury award to be Mr. Broussard's separate property. Although the *Broussard* court could not make a *West* type of allocation of lost earnings because it found no hiatus in the law to justify such judicial improvisation, Justice Dennis commented that the *West* solution for a premarital tort should perhaps be considered in revising the Civil Code. *Broussard v. Broussard*, 340 So. 2d 1309, 1312 (La. 1976). The new legislation, however, does not enact such a solution. With respect to personal injury awards, it specifically addresses only those recovered for a tort occurring during the community regime.

In *Hall v. Hall*, 349 So. 2d 1349 (La. App. 4th Cir. 1977), the Fourth Circuit was faced with a situation explicitly left open by *West*—the classification of a husband's tort award received during the marriage for an injury occurring during the marriage. The wife filed for divorce ten days after her husband received his \$400,000 settlement check and sought in her divorce suit a declaratory judgment stipulating that the proceeds of the settlement entered the community of acquets and gains. The trial court had applied the *West* rationale and allocated to the community only that part of the award which compensated for pre-dissolution losses. However, the appellate court was unable to ignore the clear and positive directive of the law, which stated that anything acquired during the marriage in any manner different from that described in article 2334 would be community property. The *West* court had been able to avoid this distasteful result only because the husband's recovery, although for injuries occurring during the marriage, was acquired after the marriage terminated. The unfortunate result in *Hall* is avoided in the new provisions, since the tort recovery of both spouses, for torts committed during the existence of the community, is their separate property, except to the extent that it compensates for community expenses or community earnings.

57. LA. R.S. 9:2838(8), added by 1978 La. Acts, No. 627, § 1, classifies as community property "all other things not classified as separate property by other provisions of this Part."

58. LA. CIV. CODE art. 2334 states in part: "Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared."

59. LA. CIV. CODE art. 2405; LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.

further by applying a community presumption to any property *acquired during* the existence of the community regime.<sup>60</sup> The new community presumption will have an even broader reach, however, since it applies to all property *possessed* by either spouse *during* the community regime—regardless of the time of acquisition.<sup>61</sup> This will include even separate property acquired before the establishment of the regime, and if the character of any property is contested, the spouse claiming separate ownership of the property will have the burden of proving its separate character.

Act 627 adopts the policy of the present law favoring the community and strengthens it through broader language. The community presumption has some potential for unfairness, however—a potential which is dramatically illustrated by a line of jurisprudence which conclusively characterizes as community property a husband's purchases of immovable property during the existence of the community, unless the act of acquisition includes a double declaration that the purchase is made with his separate funds and that he intended to acquire a separate asset.<sup>62</sup> In response to this harsh rule the new community presumption is made a clearly rebuttable one; both spouses have the right to prove the separate character of any property.<sup>63</sup> The comment to this portion of the bill amplifies the redactors' intent to abrogate the double declaration requirement: "Neither spouse is barred from presenting evidence of the separate character of property because of failure to include a statement in the act of purchase that the property is being purchased with separate funds for the purchasing spouse's separate estate."<sup>64</sup>

Separate property is defined by Act 627 as including things

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60. See, e.g., *Succession of Milton*, 278 So. 2d 159 (La. App. 1st Cir. 1973); *Succession of Elrod v. Elrod*, 218 So. 2d 83 (La. App. 4th Cir. 1969); *Succession of Marshall*, 174 So. 2d 234 (La. App. 4th Cir.), *cert. denied*, 247 La. 1035, 175 So. 2d 647 (1965); *Vining v. Beatty*, 161 So. 2d 298 (La. App. 2d Cir. 1964).

61. LA. R.S. 9:2838, *added by* 1978 La. Acts, No. 627, § 1.

62. See *Slayton v. King*, 214 La. 89, 36 So. 2d 648 (1948), and cases cited therein. The courts continue to apply this doctrine, *Barnett v. Barnett*, 339 So. 2d 495 (La. App. 2d Cir. 1976), *cert. denied*, 341 So. 2d 1127 (La. 1977), though sometimes with some reluctance. See, e.g., *Phillips v. Nereaux*, 357 So. 2d 813 (La. App. 1st Cir. 1978).

63. LA. R.S. 9:2838, *added by* 1978 La. Acts, No. 627, § 1.

64. LA. R.S. 9:2838, comment, *added by* 1978 La. Acts, No. 627, § 1.

belonging to the spouses prior to the community regime and things acquired with separate assets, including those acquired in exchange for separate assets.<sup>65</sup> These classifications represent no change in the law—Civil Code article 2334 includes essentially the same provisions, except that it does not deal with things acquired through exchange.<sup>66</sup> Real subrogation, however, operates under the present statutes to place property acquired through the exchange of separate property in the spouse's separate estate.

Things acquired by a spouse through inheritance, donation, or bequest continue to be separate property.<sup>67</sup> Under the new act, the addition of the word "bequest" is a change in expression but not in effect, since "donation" includes within its meaning donations mortis causa.

Things acquired with separate and community assets when the amount of community investment is inconsequential are separate property.<sup>68</sup> As with the complementary statement in the classification of community property, this is essentially a codification of jurisprudence. The Act provides for reimbursement to the community of its investment, a result reached under present law through Civil Code article 2408.<sup>69</sup>

The Act provides that the fruits and revenues of a spouse's separate property which accrue after the making and filing for recordation of a notarial act of reservation are separate property. Prior to such filing, fruits and revenues of separate property enter the community of gains.<sup>70</sup> This is a change in the law with respect to the husband only, since the wife is presently able to file such a declaration.<sup>71</sup>

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65. LA. R.S. 9:2839(1), (2), *added by* 1978 La. Acts, No. 627, § 1.

66. LA. CIV. CODE art. 2334.

67. LA. R.S. 9:2839(4), *added by* 1978 La. Acts, No. 627, § 1; LA. CIV. CODE art. 2334.

68. LA. R.S. 9:2839(3), *added by* 1978 La. Acts, No. 627, § 1.

69. LA. CIV. CODE art. 2408 states:

When the separate property of either the husband or wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the results of the common labor, expenses, or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

70. LA. R.S. 9:2839(5), *added by* 1978 La. Acts, No. 627, § 1.

71. See notes 46-48, *supra*, and accompanying text.

Finally, an entirely new provision classifies as separate property damages awarded to a spouse for loss sustained as result of fraud or bad faith in the administration of community property by the other spouse.<sup>72</sup> The provision is necessary since a substantive right to sue for such damages, granted elsewhere in the Act,<sup>73</sup> creates a type of property which has not previously existed. Without a special provision this new type of property would be classified as community property under the omnibus clause.<sup>74</sup>

The new statutes delete one further advantage currently given the wife in the classification of property. Presently her earnings are separate property when she is living physically separate from her husband;<sup>75</sup> a husband's earnings during such a separation continue to enter the community.<sup>76</sup> This advantage is not inappropriate when the husband manages the community, because the physically separated wife can not otherwise legally retain and spend her own earnings. Under an equal management scheme the necessity for this disparate treatment of husband and wife is absent, although it might be desirable to classify the earnings of both spouses during physical separation as separate property.<sup>77</sup> However, since Act 627 does not

72. LA. R.S. 9:2839(6), added by 1978 La. Acts, No. 627, § 1.

73. LA. R.S. 9:2846, added by 1978 La. Acts, No. 627, § 1, and LA. R.S. 9:291 (Supp. 1960), as amended by 1978 La. Acts, No. 627, § 4.

74. See notes 57-58, *supra*, and accompanying text.

75. LA. CIV. CODE art. 2334 states in part: "The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, [and] her earnings, when carrying on a business, trade, occupation or industry separate from her husband . . . are her separate property." Though the language seems to indicate that a wife's earnings are separate property when she is living with her husband but engaged in a separate business, trade, occupation, or industry, the court rejected this interpretation in an early decision. *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933).

76. LA. CIV. CODE art. 2334 contains no language similar to that quoted in note 75, *supra*, with respect to the husband; his earnings under such circumstances enter the community by operation of that article's statement that: "Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared." LA. CIV. CODE art. 2334.

77. See *Burger v. Burger*, 357 So. 2d 1178 (La. App. 4th Cir. 1978), where the court stated in dictum:

[P]erhaps by "extensive interpretation" in the Civil Law tradition . . . the principle of the 1912 amendment of [Civil Code article] 2334 is that the *spouse* (despite that article's word "wife") who no longer shares a community life

address this situation, both spouses' earnings will enter the community and be subject to equal management even after physical separation.<sup>78</sup>

#### CLASSIFICATION OF OBLIGATIONS

The new statutes also classify the obligations of the spouses as either separate or for their common interests.<sup>79</sup> Such classification has significance between the spouses for purposes of reimbursement; its significance extends to third persons only upon dissolution of the regime, and only if there is an express and unconditional acceptance of the community by either spouse.<sup>80</sup> The Civil Code presently classifies debts only by time, so that those incurred during the marriage, by the husband or by the wife with the husband's authority, are community debts, and those incurred by a spouse prior to marriage are separate debts of that spouse.<sup>81</sup> The new legislation incorporates the classification of a spouse's pre-marital debts as separate, though it necessarily modifies the present language to include debts incurred antecedent to the establishment of a community regime but after the inception of the marriage.<sup>82</sup> It also categorizes as separate debts those resulting from an intentional tort of a spouse and those incurred for the separate estate of one spouse to the extent that they do not inure to the benefit of the community or family.<sup>83</sup> All other obligations incurred by either spouse during the community regime "are presumed to have been incurred for the common interests of the spouses."<sup>84</sup>

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should not be obliged to divide his or her earnings with the other spouse. By extensive interpretation [Civil Code article 2334's] explicit provision for the wife could apply to the husband as well, making his earnings while living separate and apart, although not judicially separated, his separate property just as the wife's are hers.

357 So. 2d at 1181.

The court evidently felt that such an interpretation could only be made by the supreme court, however, and did not hold the husband's earnings during a physical separation to be separate property.

78. LA. R.S. 9:2838(8), added by 1978 La. Acts, No. 627, § 1.

79. LA. R.S. 9:2852(G), added by 1978 La. Acts, No. 627, § 1.

80. See note 92, *infra*, and accompanying text.

81. LA. CIV. CODE art. 2403.

82. LA. R.S. 9:2852(G), added by 1978 La. Acts, No. 627, § 1, reads in part: "separate obligations include obligations incurred prior to the establishment of the community regime."

83. LA. R.S. 9:2852(G), added by 1978 La. Acts, No. 627, § 1.

84. *Id.*

The law also stipulates that "alimentary obligations imposed by law on a spouse shall be deemed to have been incurred during the existence of the community regime for the common interests of the spouses,"<sup>85</sup> thus codifying the rule established in *Connell v. Connell*.<sup>86</sup>

The new statutes do not refer specifically to "community obligations," possibly to avoid any implication that the community should be viewed as an entity responsible for debts. Instead the Act categorizes obligations as either separate or incurred for the common interests of the spouses.

#### SHARING OF ASSETS AND OBLIGATIONS

Each spouse in a community regime under the new law will own an undivided one-half interest in the community assets,<sup>87</sup> but the legislative comments negate any consequent implication that spouses are to be treated legally like other co-owners who may force a partition at will.<sup>88</sup> The language of this particular provision is essentially that of Civil Code article 2398,<sup>89</sup> as enacted in 1976, with the reference to the husband's management powers appropriately deleted.

The new scheme makes each spouse responsible for the debts he incurs, whether the obligation is for his separate benefit or for the common interests of the spouses.<sup>90</sup> Payment, however, may be made from community assets, with reimbursement due to the other spouse, upon dissolution, for one-half of

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85. *Id.*

86. *Connell v. Connell*, 331 So. 2d 4 (La. 1976), held per curiam that a husband's obligation to support his first family is an obligation existing during the second marriage and not an antenuptial debt to be acquitted from his separate property.

87. LA. R.S. 9:2838, added by 1978 La. Acts, No. 627, § 1.

88. LA. R.S. 9:2838, comment, added by 1978 La. Acts, No. 627, § 1.

89. LA. CIV. CODE art. 2398 states: "Each spouse owns a present undivided one-half share in the community property subject to the management of the community by the husband in accordance with the rights and restrictions provided by law." This article was enacted in response to language in a supreme court decision describing the wife's interest in community property as an imperfect ownership. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973). The court in *Creech* stated:

"[T]he wife's interest in the community is imperfect ownership without use . . . . As to third persons, her patrimony then consists of her separate property in perfect ownership and the imperfect ownership without use of one-half of the community . . . ." *Id.* at 510.

90. LA. R.S. 9:2841, added by 1978 La. Acts, No. 627, § 1.



the community property used to pay a separate debt.<sup>91</sup> A spouse does not become personally liable for obligations incurred by the other for their common interests unless he accepts the dissolved community expressly and unconditionally.<sup>92</sup> The provisions with respect to obligations are a significant change from present law with respect to access to community property by the separate creditors of the spouses. Presently, all of a husband's antenuptial debts may be satisfied from community property,<sup>93</sup> while a wife's antenuptial debts may be satisfied from community property only to the extent of her earnings.<sup>94</sup> The new law permits antenuptial and other separate debts of either spouse to be satisfied in their entirety from community property.

#### COMMINGLING AND REIMBURSEMENT

Normally the contractual or legal community regime will co-exist with the separate estates of the individual spouses. The new legislation accomodates the practical difficulties inherent in this typical situation in a manner similar to the present Civil Code and jurisprudential solutions,<sup>95</sup> by providing for reimbursement between the community property and the separate property of the spouses. When property bought with separate and community assets is classified as separate because the community investment is inconsequential, reimbursement is due to the community from the separate estate.<sup>96</sup> Likewise, when community property is used to satisfy a spouse's separate

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91. LA. R.S. 9:2841 and 9:2852(E), added by 1978 La. Acts, No. 627, § 1.

92. LA. R.S. 9:2850, added by 1978 La. Acts, No. 627, § 1.

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

94. This has been true only since the 1975 enactment of the Louisiana Equal Credit Opportunity Law, LA. R.S. 9:3581 *et seq.* (Supp. 1975). Prior to that time no antenuptial debts of the wife could be satisfied from community property. *Flogny v. Hatch*, 12 Mart. (O.S.) 82 (La. 1822); *Greenleeze v. Penny*, 1 La. 241 (1830).

95. See LA. CIV. CODE art. 2408, and cases cited in note 41, *supra*.

96. LA. R.S. 9:2839(3), added by 1978 La. Acts, No. 627, § 1. Some of the reimbursement provisions are placed in LA. R.S. 9:2852, added by 1978 La. Acts, No. 627, § 1, which deals with the community under administration; the advisory committee will propose that these be placed in a separate section to be entitled, "Community property used to satisfy separate obligations and vice versa; reimbursement; definition of obligations incurred for the common interest." *Minutes, Meeting of the Joint Legislative Subcomm. Considering a Revision of Louisiana's Community Property Laws* (Sept. 6, 1978).

debt, or is applied to or appropriated to the use of the separate property of one spouse, that spouse's separate estate must reimburse the other for one-half of the amount used, upon dissolution of the community.<sup>97</sup> Measuring reimbursement liability by "the amount used" is a change in the law, since reimbursement is currently based on enhanced value rather than amount of investment.<sup>98</sup> Even under the new law, however, if the separate property of one spouse increases in value due to the uncompensated labor or industry of either spouse, the owning spouse owes to the other one-half the value of the increase.<sup>99</sup>

Similar adjustments are to be made when community property has benefited in some way through the use of either spouse's separate estate. If an obligation for the common interest of the spouses is satisfied from one spouse's separate property, that spouse is entitled to retrieve one-half of the amount expended if there are community assets available at dissolution to make the reimbursement.<sup>100</sup> The same reimbursement occurs, if community property is available at dissolution, whenever the separate property of one spouse has been applied to or appropriated to the use of the community.<sup>101</sup> Even if there are no community assets available, a spouse shall make reimbursement for one-half the value of any obligations satisfied from the separate property of the other that were incurred for the ordinary and customary expenses of the marriage or for the support, maintenance, and education of the children, in keeping with the economic condition of the community regime.<sup>102</sup>

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97. LA. R.S. 9:2852(E), 9:2853, *added by* 1978 La. Acts, No. 627, § 1.

98. *Abraham v. Abraham*, 230 La. 78, 87 So. 2d 735 (1956); *Funderburk v. Funderburk*, 214 La. 717, 38 So. 2d 502 (1949); *Succession of Goll*, 156 La. 910, 101 So. 263 (1924).

99. LA. R.S. 9:2854, *added by* 1978 La. Acts, No. 627, § 1. This is the same formula that is provided by the present law.

100. LA. R.S. 9:2852(F), *added by* 1978 La. Acts, No. 627, § 1.

101. LA. R.S. 9:2853, *added by* 1978 La. Acts, No. 627, § 1.

102. LA. R.S. 9:2852(F), *added by* 1978 La. Acts, No. 627, § 1. Thus the legislation applies two different standards of reimbursement when separate property is used for the common interests of the spouses. There is always a right to reimbursement if community property is available for such a purpose. A spouse can collect from the other's separate property, however, for reimbursements respecting only particularly favored obligations—the ordinary and customary expenses of the marriage or the support, maintenance, and education of the children. Such obligations must also have been in keeping with the economic condition of the community regime. Thus, the line seems to be drawn between obligations which are necessary and reasonable for the

## MANAGEMENT

*Head and Master*

Presently, the husband is the "head and master" of the community of gains under Civil Code article 2404.<sup>103</sup> This designation is considered to be one of the provisions of the legal community which cannot be contractually altered; thus, the wife cannot be made head of the community, nor can a contract stipulate a joint or equal management scheme (although there are some transactions involving certain community property which a husband cannot enter without his wife's consent.)<sup>104</sup> The basis of this restriction is Civil Code article 2327, which prohibits a marital contract which would derogate from the "rights resulting from the power of the husband . . . which belong to the husband as head of the family."<sup>105</sup> Consequently, the husband is the sole manager of the community property, and the wife has no management powers except through him—*i.e.*, through an express or implied mandate. The courts generally presume that the husband has authorized his wife to contract in his name for ordinary family expenses and for the education of the children.<sup>106</sup>

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benefit of the marriage and the family and those which are "for the interests of the spouses" in only a more peripheral way. With respect to the latter type of obligation, it was not deemed appropriate to burden the spouse who did not incur the obligation with a possible life-long personal liability to the other spouse, who had taken the managerial initiative (perhaps unwisely and unnecessarily) in incurring the obligation.

103. LA. CIV. CODE art. 2404 states:

The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

104. These are stipulated in LA. CIV. CODE arts. 2404 and 2334. See notes 107-16, *infra*, and accompanying text.

105. LA. CIV. CODE art. 2327.

106. R. PASCAL, LOUISIANA FAMILY LAW COURSE § 6.8 (1973); Comment, *Liability*

*Limitation on Husband's Power*

The husband's managerial powers are not totally unrestricted. Since 1825, article 2404 has prohibited the intervivos donation of community immovables or of a whole or a quota of movables except for the "establishment of the children of the marriage."<sup>107</sup> More recently, his power to enter onerous transactions with respect to certain community property has been limited. The first restriction of this sort made it possible to record a declaration designating certain property as the family home.<sup>108</sup> After recordation, the husband cannot sell, lease, or mortgage the home without the wife's written consent.<sup>109</sup> The wife may make this recordation if the husband fails to do so,<sup>110</sup> although until recently she had to wait until his inaction had lasted for six months after acquisition of the property.<sup>111</sup> In 1962, Civil Code article 2334 was amended to require the wife's written consent to the sale, lease, or mortgage of any community property registered in her name alone.<sup>112</sup> She could likewise require her written consent for the sale, encumbrance, or lease of all community immovables registered in the name of both spouses by recording in the parish of situs an authentic act declaring that her authority or consent was required.<sup>113</sup> The husband continued to have unrestricted powers with respect to onerous transactions affecting community property registered in his name alone—a significant loophole in the protective

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*of the Husband for Contractual Obligations of His Wife*, 30 LA. L. REV. 441 (1970).

107. LA. CIV. CODE art. 2404. The 1808 statute placed no such restriction on the husband and, in fact, stated that he could "sell and even give away the [community assets] without the consent and permission of his wife, because she has no sort of right in them until her husband be dead."

108. LA. R.S. 9:2801 (Supp. 1976), 9:2802 (Supp. 1976), 9:2803 (1950), 9:2804 (Supp. 1976), *repealed by* 1978 La. Acts, No. 627.

109. LA. R.S. 9:2801 (1950) (as it appeared prior to 1976 La. Acts, No. 679, § 2). In 1976, the possibility of a recorded declaration by the wife permitting alienation without her consent was added to the statute. See text at notes 114-16, *infra*. Sections 2801 through 2804 are repealed by Act 627, see note 108, *supra*. The declaration of a family home is no longer needed since all community immovables are subject to concurrence in management. See note 125, *infra*, and accompanying text.

110. LA. R.S. 9:2802 (1950).

111. LA. R.S. 9:2802 (1950) (as it appeared prior to 1974 La. Acts, No. 405).

112. LA. CIV. CODE art. 2334 (as it appeared prior to 1976 La. Acts, No. 679, § 1).

113. *Id.*

measures since he alone has the power to acquire community property and he can thus determine in whose name it will be held.

In 1977, the burden of inaction was shifted with respect to community immovables in the name of both spouses; presently, the wife's consent is required in the sale, encumbrance, or lease of such immovables, unless she has recorded in the parish of situs an authentic declaration that her authority or consent is not required.<sup>114</sup> The declaration may specify certain property or encompass all property in the parish; it may even apply generally to property acquired in the future, although in that case, the wife can later file a contrary declaration withdrawing her authority or consent.<sup>115</sup> The latter amendment also now requires the wife's consent to the alienation, encumbrance, or lease of the family home standing in the husband's name alone, unless a declaration as described above has been recorded.<sup>116</sup>

Thus, while the wife presently has no independent management powers, she may exercise a veto over transactions affecting property in her name and property deemed of particular importance to the family, *i.e.*, the family home and immovable property held in both spouses' names. However, the protection this veto power affords is far from complete; it basically leaves intact the loophole for community property in the husband's name and likewise leaves all community movables not in the wife's name alone subject to his unrestricted powers of onerous alienation. Such movables may constitute a significant part of the family wealth, since the category of movables includes such things as stock shares, bank certificates, valuable paintings or antiques, and actions for damages. Furthermore, while these statutory changes have afforded some protection to the wife and family, they have also served to protect the head and master management scheme when it has been subjected to constitutional challenges.<sup>117</sup> Recently, a four-man majority of the state supreme court was able to avoid reaching an equal-

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114. 1976 La. Acts, No. 679, § 1, amending LA. CIV. CODE art. 2334 (effective January 1, 1977).

115. LA. CIV. CODE art. 2334.

116. *Id.*

117. *See, e.g.*, the cases cited in note 15, *supra*.

protection-based constitutional challenge to the present management provisions, principally by noting that the complaining wife could have prevented her husband's mortgage of the family home had she followed the statutorily prescribed method.<sup>118</sup>

### *Equal Management*

The new management scheme radically departs from existing law by giving the wife equal management power with the husband.<sup>119</sup> The change perhaps reflects a perception that it is inappropriate and demeaning for adults of normal mental capacity to be deprived of all management powers over property in which they have an ownership interest. Even the expansion of a wife's control over community property represented by the consent requirements discussed above falls far short of actually giving her management authority. As the dissenting justices in *Martin* point out, for example, the wife could not herself sell or mortgage the family home, even with her husband's consent (and even when, as in that case, it was purchased largely with her earnings).<sup>120</sup> This differential treatment of husband and wife was a strong reason for the enactment of an equal management regime. Even if not viewed as in itself an evil requiring correction, such differential treatment makes the present law vulnerable to constitutional attack. Furthermore, the head and master arrangement has become increasingly inappropriate for the circumstances of modern marriages and property ownership. Louisiana is, in fact, the only community property state in the country which continues to make the husband the mandatory manager of the community property.<sup>121</sup>

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118. *Corpus Christi Parish Credit Union v. Martin*, 358 So. 2d 295 (La. 1978). The law at the time of the challenged mortgage of the family home required the wife's consent for such an encumbrance only if she had recorded a declaration in authentic form that her authorization was necessary. The court considered this protection sufficient although Mrs. Martin, unaware of the law, bore the burden of the action. The rationale is akin to the "no insurmountable barrier" notion raised by the United States Supreme Court in *Labine v. Vincent*, 401 U.S. 532 (1971), and largely repudiated by that same court in *Trimble v. Gordon*, 430 U.S. 762 (1977). The same statutory provision was relied upon by a federal court to uphold the head and master management scheme in *Kirchberg v. Feenstra*, 420 F. Supp. 642 (E.D. La. 1977).

119. LA. R.S. 9:2842, added by 1978 La. Acts, No. 627, § 1.

120. *Corpus Christi Parish Credit Union v. Martin*, 358 So. 2d 295, 301 (La. 1978) (Tate, Calogero, and Dennis, JJ., dissenting).

121. J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS,

The new act initially establishes that each spouse acting alone may manage, control, and dispose of his or her separate property and, except as otherwise provided by law, may manage, control, and dispose of community property.<sup>122</sup> The Act then limits the equal management power of the spouses by defining certain instances in which the concurrence of both spouses is required<sup>123</sup> and others in which one spouse has management power to the exclusion of the other.<sup>124</sup>

### *Concurrence Requirements*

The spouses must concur to alienate, lease, or encumber (except for encumbrances imposed by law): (1) community immovables; (2) community furniture or furnishings in use in the family home; (3) a community business or all or substantially all of its assets; and (4) movables when issued or registered as provided by law in the names of both spouses.<sup>125</sup> Additionally, the donation of community assets requires concurrence, except in cases of usual or customary gifts of a value "commensurate with the economic status of the spouses at the time of the donation."<sup>126</sup>

Some of these transactions requiring concurrence of the spouses correspond to those which presently require the consent or authorization of the wife. The first category—the alienation, lease, or encumbrance of community immovables—corresponds generally to the present statute requiring a wife's consent in transactions affecting community immovables in her name or the names of the spouses jointly. The new provision, however, closes the present loophole with respect to

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TRUSTS, AND ESTATES 558 (1978); Bartke, *Community Property Law Reform in the United States and in Canada—A Comparison and Critique*, 50 TUL. L. REV. 214, 228, 230 (1976).

122. LA. R.S. 9:2842, added by 1978 La. Acts, No. 627, § 1. The power of management in each spouse is a change not only with respect to community property, but also with respect to the wife's separate property. Under present law, the wife has a right to administer her paraphernal property, but there is a presumption that it is under the administration of her husband with its fruits entering the community of gains. She must make and record a notarial act in order to reserve the fruits and administration to herself. LA. CIV. CODE arts. 2384-86.

123. LA. R.S. 9:2843, added by 1978 La. Acts, No. 627, § 1.

124. LA. R.S. 9:2844, 2845, added by 1978 La. Acts, No. 627, § 1.

125. LA. R.S. 9:2843, added by 1978 La. Acts, No. 627, § 1.

126. *Id.*

community immovables in the name of the husband alone.

Since all community immovables are covered by the provision, special protection for the family home is no longer necessary. Some additional protection is given the home environment, however, by the concurrence requirement imposed on transactions involving community furniture or furnishings in use in the family home.

The concurrence requirement placed on alienation, encumbrance or lease of a family business is entirely new. It seems to reflect a recognition that when spouses own a business in community, it probably represents a significant, if not the principal, source of income to the community. Frequently it will also have been purchased, established, continued, or expanded through considerable community investment. The statute does not impose the need for concurrence on every transaction affecting the business—only those which affect the entire entity, immovable property owned by it, or all or substantially all of its assets. Thus, for example, if both spouses participate in managing the business, either one alone could order or sell merchandise or equipment, and enter contracts to purchase or render service.

The new concurrence requirements also affect community movables when issued or registered as provided by law in the name of both spouses. This is a change from present law and gives some attention to the fact that significant portions of a couple's wealth may be held in movables. Among the movables affected by this provision are stocks, bonds, securities, bank certificates, and motor vehicles, if held in both names jointly. However, either spouse may, under equal management, purchase these items individually and have them registered in his name alone; in that case the movables would be exempt from the concurrence requirements and from the control of the other spouse.

The new requirement for concurrence with respect to donations is somewhat like the current restriction imposed on the husband by Civil Code article 2404. Act 627's scope is broader, however, since individual community movables are also covered. The practical exception made for "usual or customary" gifts presumably includes such donations as birthday, Christmas, and wedding gifts; small charitable contributions; and



perhaps even small political contributions. The two limitations—that the donations be “usual or customary” in nature<sup>127</sup> and “commensurate with the economic status of the spouses at the time of donation”—should prevent any excessive donations of movables.<sup>128</sup>

While the new statutes establish a need for concurrence in specified instances, they do not define the method of concurring—whether written consent is sufficient or whether both spouses need be party to each transaction. A comment to this section states that “a spouse who joins in a transaction or grants a power of attorney or mandate becomes a party to the transaction unless personal responsibility as a party is expressly negated.”<sup>129</sup> A possible inference from this comment is that a spouse can concur by some action short of joining in the transaction or granting a power of attorney or mandate.

The redactors' comments indicate that concurrence is required in each of these situations because of their importance to the well-being of the family.<sup>130</sup> With this as the declared policy, it is appropriate that the requirement of concurrence may be circumvented when the effect of its enforcement would be contrary to the interests of the family. Thus, Act 627 provides that a court may authorize either spouse, through a summary proceeding, to act without the other's consent upon a showing by that spouse that (1) the action is in the best interest of the family and that (2) the lack of concurrence is due to either the arbitrary refusal or the physical incapacity, mental incompetence, commitment, imprisonment, or absence of the other spouse.<sup>131</sup> This language is almost identical to that of Code of Civil Procedure article 4502,<sup>132</sup> which authorizes the

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127. There is no indication of the standard by which “usual or customary” is to be judged. It might be a broad social one—*e.g.*, in this culture, gifts are exchanged on birthdays, for Christmas, at the birth of babies, etc. On the other hand, it could be developed from the behavior patterns of the particular spouses or family—*e.g.*, their generosity is annually most conspicuous in celebration of the spring solstice, or they celebrate Easter with more gifting than Christmas.

128. The restriction is still greater than that in the present law, and these limitations can be applied by a fact finder should a spouse bring an action to nullify an unauthorized alienation by donation. LA. R.S. 9:2846, added by 1978 La. Acts, No. 627, § 1, and LA. R.S. 9:291 (Supp. 1960), as amended by 1978 La. Acts, No. 627, § 4.

129. LA. R.S. 9:2843, comment, added by 1978 La. Acts, No. 627, § 1.

130. LA. R.S. 9:2842, comment, added by 1978 La. Acts, No. 627, § 1.

131. LA. R.S. 9:2847, added by 1978 La. Acts, No. 627, § 1.

132. LA. CODE CIV. P. art. 4502 states: “The mother shall have the authority of

mother to act in place of the father as administrator of the minor child's property under certain circumstances.

The principal difference between the two provisions is the inclusion of interdiction within the circumstances listed in article 4502 and its absence in the matrimonial regime provision. The omission presumably reflects an intent that the curator have the power to concur or refuse consent for the interdicted spouse. If the curator refused consent, the other spouse would presumably be able to go to court and get authorization for the transaction upon showing that the refusal was arbitrary. In order to consent for the interdicted spouse, the curator might have to go to court under the procedural articles that require court approval for the alienation, lease, or encumbrance of an interdict's property.<sup>133</sup> This would depend on whether consent to such a transaction was interpreted as requiring the same supervision as actually participating in it. If so, the court supervision of the curator would serve the same protective function as court supervision of the spouse wishing to act without the other's concurrence. This would be particularly relevant if the curator were the spouse.<sup>134</sup> Then the court authorization for the spouse acting as curator would simply substitute for court authorization to a spouse to act without concurrence.

There are no comments clarifying whether court authorization is limited to specific, named transactions or may be more general in character. It would be appropriate for the court authorization to be limited to a specific transaction or group of transactions when based on a showing of arbitrary refusal. When consent is lacking for one of the other listed reasons, and if there are also indications that repeated resort to court authorization will be necessary, it should be possible for a spouse to get a broader authorization for some period of time. The phrasing of the statute does not appear to preclude this interpretation; action in the best interest of the family may encom-

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the father during such time as the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge, the mother may represent the minor whenever the father fails or refuses to do so; and in any event she may represent the minor under the conditions of the laws on the voluntary management of another's affairs."

133. LA. CODE CIV. P. arts. 4554, 4268, 4270, 4271, 4301.

134. LA. CODE CIV. P. art. 4550 provides in part that "[t]he spouse of an interdicted person has the prior right to be appointed curator."

pass more than one transaction and certain of the conditions creating a lack of consent are inherently of more than momentary duration.

### *Sole Management*

It is also possible for the concurrence requirement to become a cumbersome and unnecessary form of protection for certain couples under some circumstances. The nuisance potential of the provision has been recognized and partially mitigated by granting authority to one spouse to confer expressly upon the other the "sole and irrevocable" right to alienate, encumber, or lease a community immovable or a community business or all or substantially all of its assets.<sup>135</sup> This provision was not a part of the original advisory committee bill,<sup>136</sup> and it probably addresses the concerns of persons, such as real estate dealers who are not really covered by the business exception discussed below,<sup>137</sup> and whose daily business dealings would be considerably hampered by the requirement that both spouses concur in the sale of an immovable. The comments elaborate upon the irrevocability of this right. It may be of unlimited duration, for a definite period of time, or until the happening of a certain or uncertain event. Additionally, the giving of consideration is not required to support the irrevocability of the right.<sup>138</sup>

In several respects the exact operation of this provision is not sufficiently clear from either the statutory language or the comments. For example, the Act does not indicate whether this

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135. LA. R.S. 9:2843, added by 1978 La. Acts, No. 627, § 1.

136. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 4th Reg. Sess. at 42 (June 21, 1978).

137. See notes 143, 144, *infra*, and accompanying text.

138. LA. R.S. 9:2843, comment, added by La. Acts, No. 627, § 1. Obviously a spouse could empower the other to act for him through an ordinary mandate, LA. CIV. CODE art. 2985, since the contractual incapacity between spouses is removed. See notes 4, 30, *supra*, and accompanying text. Mandate, however, would not be irrevocable unless coupled with an interest. LA. CIV. CODE arts. 3027, 3028; *Robinson v. Hunt*, 211 La. 1019, 31 So. 2d 197 (1947); *Marchand v. Gulf Refining Co.*, 187 La. 1002, 175 So. 647 (1937), and would also bind the principal spouse as a party to transactions by the mandatory spouse. See note 129, *supra*, and accompanying text. Since irrevocability would appear to be necessary, at least for some period of time, to facilitate credit financing, this provision was evidently designed to provide an alternative to mandate, which would not be accompanied by the latter's disadvantages.

right of sole management can be conferred in a marriage contract, though it would not contravene the prohibitions with respect to such contracts. The precise nature of the grant of an irrevocable right is also unclear. It could, for example, be a type of power of attorney, with consequent personal responsibility of the granting spouse as a party to all transactions, or it could be a waiver, with freedom from such personal responsibility on the part of the granting spouse. A provision of this sort may be necessary to address adequately the needs of commerce;<sup>139</sup> clarification is needed, however, and apparently will be provided in the 1979 session.<sup>140</sup>

Three provisions of Act 627 place sole management in one spouse by law, rather than by agreement of the parties. When movables are issued or registered as provided by law in the name of one spouse, they may be managed by only that spouse.<sup>141</sup> This is largely a change in the law in favor of the wife's management powers. While the husband presently may not alienate, encumber, or lease any community property in the wife's name without her consent (or without a recorded declaration permitting him to do so), she has not generally had actual management powers over such property.<sup>142</sup> The husband, however, as head and master of the community property, possesses the right of sole management of such property in his name, except for the restrictions placed on alienation of the family home in his name. The new law places the spouses on equal footing with respect to community movables registered in the name of one spouse.

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139. The comments refer to "instances of such importance to commerce that one spouse is entitled to act to the exclusion of the other." LA. R.S. 9:3842, comment, added by 1978 La. Acts, No. 627, § 1.

140. The Joint Legislative Subcommittee Considering a Revision of Louisiana's Community Property Laws will propose to change this portion of the law to read as follows: "A spouse may expressly and irrevocably waive the necessity of concurrence to the alienation, encumbrance, or lease of a community immovable or a community business or all or substantially all of the assets of a community business." *Minutes, Meeting of the Joint Legislative Subcomm. Considering a Revision of Louisiana's Community Property Laws* (Sept. 6, 1978).

141. LA. R.S. 9:2845, added by 1978 La. Acts, No. 627, § 1.

142. There are limited exceptions, however, with respect to funds in bank accounts, savings and loan shares in her name, and negotiable securities in her name. Special statutes permit her to act alone in disposing of such community assets in certain instances. R. PASCAL, *supra* note 106, at § 6.5.

In order to facilitate commerce, the Act also includes a "business exception," which gives the spouse who manages a community business "without the participation in management of the other"<sup>143</sup> the sole power to acquire, encumber, alienate, or lease the movable assets of the business.<sup>144</sup> This power is simply a restriction upon equal management and does not alter concurrence requirements or the reservation of any asset to the sole management of one spouse. It thus must be exercised within the limitations imposed by the other management provisions. Consequently, the spouse managing under the business exception does not have the power to alienate, encumber, or lease all or substantially all of the business's movable assets, or any movables issued or registered in the name of both spouses jointly or the other spouse alone. The exception, by its terms, applies to movable assets and thus does not alter the concurrence requirements with respect to community immovables, even if they are part of the business. The only actual effect of the exception is to withdraw the non-managing spouse's power to act alone with respect to movable assets of a community business.

A final instance of sole management concerns a spouse who is a partner. The new statute provides that such a spouse will have the sole right to alienate, encumber, or lease his or her partnership interest.<sup>145</sup> This is equivalent to treating a spouse's partnership interest as a movable in that spouse's name and is analogous to the treatment of corporate stock.<sup>146</sup>

It should be noted that the reservation of any property to the sole management of a spouse under any of the provisions discussed above does not alter creditors' rights in the property. The comments warn that none of the instances of sole management in one spouse are intended to limit the rights of creditors

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143. This phrase is important in determining the applicability of the business exception. If both spouses participate in the community business at the managerial level, then they have equal management of this asset. The business exception applies only to situations where one spouse does not participate in the business at all, or does not participate in a managerial capacity.

144. LA. R.S. 9:2844, added by 1978 La. Acts, No. 627, § 1.

145. *Id.*

146. Furthermore, since partnership is a contract, LA. CIV. CODE art. 2801, it is appropriate that only the spouse who is a party to the contract will have management power with respect to it.

of the other spouse to seize the community property so managed.<sup>147</sup>

#### ENFORCEMENT AND PROTECTION PROVISIONS

Several provisions of the new law address enforcement of the management provisions and protection against their abuse. Any alienation of community property made by a spouse without authority is voidable by the other spouse.<sup>148</sup> Spouses are also liable to each other, even during existence of the community regime, for losses or damages caused by fraud or bad faith in management of the community.<sup>149</sup> Present law imposes liability for fraudulently disposing of community property, but the wife's action is only enforceable upon dissolution of the community.<sup>150</sup> The courts have traditionally required the proof of fraud to meet a particularly stringent standard,<sup>151</sup> and there is no reason to assume that they will not continue to do so. The addition of "bad faith" as a ground for this action, however, may be indicative of a legislative intent to lighten somewhat the plaintiff-spouse's burden.

Protection from both fraudulent and non-fraudulent mismanagement by one spouse is afforded by the right of either spouse to sue for a separation of property<sup>152</sup>—a right the wife

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147. LA. R.S. 9:2843-45, comments, *added by* 1978 La. Acts, No. 627, § 1.

148. LA. R.S. 9:2846, *added by* 1978 La. Acts, No. 627, § 1. No prescriptive period is provided for such an action by a spouse against a spouse. The ten-year prescription of Civil Code article 2121 would seem to be the most likely to be applied by the courts in the absence of statutory stipulation. *See Berry v. Franklin St. Bank & Trust Co.*, 186 La. 623, 173 So. 126 (1937). However, a shorter prescriptive period would seem to be more appropriate, since this is an action available only to the immediate parties to the marriage (not to their creditors). A special prescriptive period should therefore be provided by statute.

149. LA. R.S. 9:2846, *added by* 1978 La. Acts, No. 627, § 1.

150. LA. CIV. CODE art. 2404 states in part: "But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud." Although the language seems to address dissolution of the community only by death, the courts have interpreted the article as permitting the wife's action upon dissolution of the community by any cause and against the husband as well as his heirs. *Thigpen v. Thigpen*, 231 La. 206, 91 So. 2d 12 (1957).

151. *Peltier v. Begovich*, 239 La. 238, 118 So. 2d 395 (1960); *Succession of Packwood*, 12 Rob. 334 (1845).

152. LA. R.S. 9:2856, *added by* 1978 La. Acts, No. 627, § 1.

currently enjoys whenever her dowry is threatened by the mismanagement of the husband or the "disorder of his affairs" causes her to believe that his estate may be insufficient to meet "her rights and claims."<sup>153</sup> The jurisprudence has interpreted this protection to include a right to sue for a judicial separation of property simply to protect her earnings, even where there is no dotal or paraphernal property to be protected.<sup>154</sup> With the inception of equal management, a separation of property will be available to either spouse for essentially the same grounds as under the present law and for the additional grounds of fault, negligence, or incompetence. The new statute grants a right to sue for separation of property whenever a spouse's interest is "threatened or diminished by the fraud, fault, neglect or incompetence of the other or when the disorder of the other's affairs jeopardizes that spouse's interests under their matrimonial regime."<sup>155</sup> Thus a spouse may protect his or her share in the community property before drastic losses become imminent and without having to show egregious mismanagement on the part of the other spouse. The action protects a spouse against the other's recalcitrance in entering into or modifying a marriage contract if equal management proves unworkable for them. However, it permits judicial intervention only when there is a financial justification—not merely for purposes of enforcing the wishes of one spouse when the two cannot agree. Therefore, the complaining spouse must prove that his or her community property interests are being threatened or diminished.

Both the current judgment of separation of property and that authorized by Act 627 are retroactive to the date of filing<sup>156</sup> and are also subject to an attack by the creditors of a spouse as in fraud of their rights.<sup>157</sup> The new legislation specifies a

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153. LA. CIV. CODE art. 2425.

154. *Mock v. Kennedy*, 11 La. Ann. 525 (1856); *Davock v. Carcy*, 6 Rob, 342 (1844); *Mitchell v. Mitchell*, 231 So. 2d 414 (La. App. 2d Cir. 1970).

155. LA. R.S. 9:2856(A), added by 1978 La. Acts, No. 627, § 1.

156. LA. CIV. CODE art. 2432; LA. R.S. 9:2856(B), added by 1978 La. Acts, No. 627, § 1.

157. LA. CIV. CODE art. 2434; LA. R.S. 9:2856(C), added by 1978 La. Acts, No. 627, § 1. The latter provision states: "The creditors of a spouse may object to the separation of property as in fraud of their rights, either pending the suit for separation or within one year after final judgment without prejudice to the rights of third parties.

prescriptive period of one year from final judgment for the exercise of this right by the creditors.<sup>158</sup>

Separation of property may also be established by marital contract.<sup>159</sup> Each spouse under such a regime has complete control over all of his property, but is obligated to contribute to the expenses of the marriage. The contract may stipulate how expenses are to be divided; in the absence of such a stipulation, each spouse is to contribute "in proportion to his or her means."<sup>160</sup>

When separation of property is accomplished judicially, the problem of allocation of marriage expenses is not directly addressed by the legislation. Logically, expenses should also be divided in proportion to the means of the spouses if they do not choose to contractually resolve their respective responsibilities.<sup>161</sup>

The Civil Code presently handles responsibility for marriage expenses in a separate property regime in a similar manner, permitting such responsibility to be established by the antenuptial marriage contract and stipulating that it otherwise is to be shared between the spouses, with the wife's contribution limited to one-half of her income.<sup>162</sup> The Code does not state that the sharing of expenses in a contractual separation of property is proportionate to the means of the spouses; proportionate sharing is stipulated, however, if a judicial separation of property is obtained by the wife during the marriage.<sup>163</sup> In that case, there is also no limit on the wife's contribution

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If the judgment has been executed, they may assert its nullity to the extent they have been defrauded."

158. LA. R.S. 9:2856(C), added by 1978 La. Acts, No. 627, § 1.

159. LA. R.S. 9:2855, added by 1978 La. Acts, No. 627, § 1.

160. "Means" has been defined by the courts (while interpreting the alimony articles of the Civil Code) as including all resources and income. *Ward v. Ward*, 339 So. 2d 839 (La. 1976); *Bowsky v. Silverman*, 184 La. 977, 168 So. 121 (1936).

161. This will be proposed by the Joint Legislative Subcommittee Considering Revision of Louisiana's Community Property Laws in the 1979 regular session. *Minutes, Meeting of the Joint Legislative Subcomm. Considering a Revision of Louisiana's Community Property Laws* (Sept. 6, 1978).

162. LA. CIV. CODE art. 2395.

163. *Id.* If the wife has obtained a separation of property during the marriage, however, Civil Code article 2435 provides that she must contribute in proportion to "her fortune and to that of her husband" and must support the expenses alone "if there remains nothing to her husband."



and she must bear all expenses of the marriage if the husband is unable to contribute.

#### DISSOLUTION

Under the new legislation the community regime is dissolved by the death of one spouse, a judgment of divorce or separation, a judgment decreeing separation of property, or the contract of the spouses;<sup>164</sup> only the latter is an addition to present law.<sup>165</sup> At the time of dissolution, either spouse may petition for an administration of the property.<sup>166</sup> The legislation establishes principles for liquidation of the community by the administrator, including preference to secured creditors against secured property, pro rata satisfaction of all other creditors from unsecured property, and satisfaction of claims between the spouses (in the nature of reimbursement or damages for fraud or bad faith in administration of the community) only after third party creditors.<sup>167</sup> If there is no administration, creditors' claims are satisfied in the same way as during the existence of the community, *i.e.*, from the community property and the separate property of the spouse incurring the obligation.<sup>168</sup> A principal effect of the petition for administration is to prevent execution against any community property except through a conventional mortgage or pledge<sup>169</sup>—much as administration of a succession prevents such execution.<sup>170</sup>

Presently, the wife has the option upon dissolution of the community to accept the community under benefit of inventory, "in the same manner and with the same benefits and advantages as the heirs of a succession."<sup>171</sup> The new legislation

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164. LA. R.S. 9:2848, *added by* 1978 La. Acts, No. 627, § 1.

165. Dissolution of the community under present law is provided by LA. CIV. CODE arts. 155 (separation of bed and board), 159 (divorce), 136, 2406 (death of a spouse, divorce, nullity), and 2425 (judgment of separation of property).

166. LA. R.S. 9:2851, *added by* 1978 La. Acts, No. 627, § 1. The petition for administration may also be filed when a suit which may result in dissolution of the community is pending. *Id.* Rules are to be provided in the Code of Civil Procedure; the statutes providing for the administration of community property will not take effect until such articles are enacted. 1978 La. Acts, No. 627, § 9.

167. LA. R.S. 9:2852, *added by* 1978 La. Acts, No. 627, § 1.

168. LA. R.S. 9:2849, *added by* 1978 La. Acts, No. 627, § 1.

169. LA. R.S. 9:2851, *added by* 1978 La. Acts, No. 627, § 1.

170. LA. CODE CIV. P. arts. 3247, 3248.

171. LA. R.S. 9:2821 (1950).

repeals this statute<sup>172</sup> but establishes the same options for both spouses through two mechanisms—the petition for administration<sup>173</sup> and the provision requiring an express and unconditional acceptance of the community before a spouse assumes personal liability for debts incurred (for their common interests) by the other spouse.<sup>174</sup> The latter provision changes the law in that it requires any acceptance to be express, while presently it is possible for a wife tacitly to accept the community simply by her actions.<sup>175</sup> Further, by predicating personal liability on an express and unconditional acceptance, the statute implicitly recognizes the possibility of a conditional acceptance having an effect similar to an acceptance with benefit of inventory.

#### EFFECTIVE DATE AND CONTINUED STUDY

It should be noted that none of the new law's provisions take effect before September 1, 1979,<sup>176</sup> and most of them take effect on January 1, 1980.<sup>177</sup> The changes in law which permit the spouses to contract with each other and, in particular, to enter a marriage contract during marriage become effective in September, 1979,<sup>178</sup> so that spouses under the present regime may contract out of the new regime before it affects them, if they so desire.

In addition to delaying the implementation of the new law, the legislature has extended the life of the joint legislative committee and its advisory committee for the express purpose of "further studying the equal management concept and coordinating efforts to draft such additional legislation as may be necessary to properly and orderly implement the concept of equal management of the community of acquets and gains and all of the laws related thereto."<sup>179</sup>

The Louisiana Law Institute is authorized and directed to review Act 627, the existing statutes and codes, and any pro-

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172. 1978 La. Acts, No. 627, § 8.

173. See text at note 166, *supra*.

174. LA. R.S. 9:2850, added by 1978 La. Acts, No. 627, § 1.

175. *White v. White*, 153 La. 313, 95 So. 791 (1923).

176. 1978 La. Acts, No. 627, § 9.

177. *Id.*

178. *Id.*

179. La. H. Con. Res. No. 232, 4th Reg. Sess. (1978).

posals of the legislative and advisory committees. It is also directed to submit three different proposals with respect to the spouses power to contract with each other—one which would give the spouses an unlimited right to contract with each other (as in Act 627), one which would allow them to contract with each other only in specific instances, and one which would prohibit all contracts between spouses.<sup>180</sup>

Concern over the contractual capacity of the spouses was clearly a principal reason for the resolution. Also acknowledged is a need for further study of the changes in the law, because "House Bill 1569 does not encompass all of the necessary modifications, repeals, or changes in the many provisions of the various statutes and codal articles not found in Title VI of the Revised Civil Code of Louisiana, particularly those laws which are premised upon the husband being the head and master, or the sole legal representative, of the community or laws which are in any manner affected by the repeal of the head and master concept."<sup>181</sup> Because of Act 627's delayed implementation and the specific mandate of further legislative study in House Concurrent Resolution 232, it is clear that further enactments on matrimonial regimes will be forthcoming in the 1979 legislative session. It was intended that any such changes be consistent with the modifications adopted in 1978—*i.e.*, that they only add clarifications or conform related laws to the new management provisions. However, more substantial changes are not foreclosed, and they will almost certainly be proposed.

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180. *Id.*

181. *Id.*

## PROPERTY

The first time that a Louisiana Law Institute bill proposing a major change in the law was defeated was during the 1977 legislative session when a property bill revising book II, title I of the Civil Code on Things was deferred indefinitely by committee.<sup>1</sup> Efforts by the Law Institute to overcome last year's opposition, which had focused primarily upon changes in articles 451, 455, and 457, defining the seashore and the banks of navigable rivers, resulted in the 1978 passage of House Bill 191 with only a few amendments.<sup>2</sup> The bill's approval completes the modernization of all the property sections in the Civil Code except title II on Ownership.<sup>3</sup>

The revision of title I achieves the dual purposes of clarifying and synthesizing the Civil Code, which facilitates reading and understanding it. These accomplishments are reflected in the elimination of outdated terminology and illustrations as well as in a reduction of the number of codal articles.<sup>4</sup> The revision generally retains the basic conceptual structure of the Civil Code of 1870 despite a noteworthy but uncontroversial abolishment of immovables by destination.<sup>5</sup>

### COMMON, PUBLIC, AND PRIVATE THINGS

In accord with early civilian classification, article 448 as amended still divides "things" into: 1) common, public, and private things; 2) corporeals and incorporeals; and 3) movables and immovables.<sup>6</sup> The significance of these classifications is in

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1. See *The Work of the Louisiana Legislature for the 1977 Regular Session—Property*, 38 LA. L. REV. 52, 62 (1977).

2. See 1978 La. Acts, No. 728.

3. The effective date of the revision of book II, title I on Things is Jan. 1, 1979. The proposed revision of title II on Ownership is scheduled to be presented to the Louisiana Legislature during the 1979 legislative session. The revision of title III on the personal servitudes of Usufruct, Use, and Habitation has been in effect since Jan. 1, 1977, and the revised versions of title IV concerning Predial Servitudes, title V on Building Restrictions, and title VI on Boundaries all became effective on Jan. 1, 1978.

4. The revision eliminated eleven articles by combining those articles which presented similar concepts.

5. See LA. CIV. CODE art. 467, as amended by 1978 La. Acts, No. 728.

6. LA. CIV. CODE art. 448, as amended by 1978 La. Acts, No. 728, combines prior LA. CIV. CODE arts. 449, 460, and 461.

the applicability of different legal rules to each division of things.<sup>7</sup> In the first division of common, public, and private things, the analytical framework involves susceptibility of ownership.<sup>8</sup> Common things are not owned by anyone; public things are owned by the state or its political subdivisions in their capacity as public persons; and private things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons.<sup>9</sup>

Article 450, summarizing several scattered codal provisions,<sup>10</sup> offers a logical approach to public property law. It embodies the legislative reclassifications and also explains the nature of public things, stating that water bodies are owned by the state in its sovereign capacity,<sup>11</sup> and that streets and public squares may belong to the state's political subdivisions. These examples of public things are illustrative rather than exclusive. In addition, the deletion of the concept of "public domain" should be noted throughout the title I revision.<sup>12</sup>

Strong opposition during the 1977 legislative session to the Law Institute's proposed definition of "seashore" was a major factor contributing to the revision's defeat. At that time, article 451 of the Civil Code stated: "Seashore is that space of land over which the waters of the sea spread in the highest water, during the winter season." The change advocated by the Law

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7. Yiannopoulos, *Introduction to the Law of Things: Louisiana and Comparative Law*, 22 LA. L. REV. 756, 763-64 (1962).

8. See *Expose des Motifs* of 1978 La. Acts, No. 728, at 3-6; and Yiannopoulos, *Common, Public and Private Things in Louisiana: Civilian Tradition and Modern Practice*, 22 LA. L. REV. 697, 700 (1961).

Legislative reclassification has greatly enlarged the category of public things by adding running water, the sea, and the seashore, which were formerly common things, so that the state can impose conservatory measures while gaining financial and administrative advantages. The category of common things has dwindled to include only the air and the high seas.

9. See LA. CIV. CODE arts. 449, 450, 453, as amended by 1978 La. Acts, No. 728.

10. These provisions include LA. CIV. CODE arts. 453, 454, 481, and 483 (as they appeared prior to 1978 La. Acts, No. 728).

11. The comment to LA. CIV. CODE art. 450, as amended by 1978 La. Acts, No. 728, provides that the expression "natural navigable water bodies" refers to inland water bottoms belonging to the state because of its sovereignty or other modes of acquisition, including expropriation.

12. A possible reason for dispensing with the concept of "public domain" may be the disagreement among legal scholars as to the criteria for distinguishing things in the public domain from those belonging to the private domain. See A. YIANNOPoulos, PROPERTY § 30 in 2 LOUISIANA CIVIL LAW TREATISE 77 (1967).

Institute in 1977 was somewhat drastic and would have defined the "seashore" as the "area between the ordinary low and the ordinary high stage of the water of the sea."<sup>13</sup> Forced to capitulate on this particular article, the Law Institute altered its 1977 proposal and reenacted prior article 451 with only a minor word change. Article 451 now provides that "seashore is the space of land over which the waters of the sea spread in the highest tide during the winter season."<sup>14</sup> Such a compromise undoubtedly aided in saving the entire revision from a second defeat and avoided possible future problems concerning the taking of private property without due process of law.<sup>15</sup>

Article 452 of Act 728 changes the law by eliminating the public's right to build cabins on the seashore, but it retains the other enumerated rights of the public, which include the right to fish, to land on the seashore, to have shelter, to moor boats and to dry nets, provided no injury occurs to the property of adjoining owners.<sup>16</sup> A possible reason for the change may have been that the right to build cabins was too great a burden on adjoining landowners.

The most controversial subject in the revision concerns the definition of the banks of navigable rivers or streams as outlined in article 456 of Act 728. A complete understanding of the troublesome area can be reached only by examining the pertinent Civil Code articles of 1870, the 1977 Law Institute proposal, and the 1978 provision which ultimately passed after committee and floor amendments. Part of the problem stems from a mistranslation of the French text into English in the drafting of Civil Code article 457, which provided:

The banks of a river or stream are . . . that which contains it in its ordinary state of high water; for the nature of the banks does not change, although for some cause they may be overflowed for a time.

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13. La. H.B. 213, 3d Reg. Sess. (1977). For doctrinal observations on LA. CIV. CODE art. 451, see A. YIANNPOULOS, *supra* note 12, at § 28.

14. LA. CIV. CODE art. 451, as amended by 1978 La. Acts, No. 728.

15. See *Proposed Revision of the Civil Code: Hearings Before the Subcomm. on Civil Code Revision of the House Comm. on Civil Law and Procedure*, 4th Reg. Sess. (Jan. 17, 1978) (statement of Professor A. N. Yiannopoulos).

16. In addition, article 452 provides that the seashore within municipal limits is subject to ordinances under the local police power.

Nevertheless on the borders of the Mississippi and other navigable streams, where there are levees . . . the levees shall form the banks.<sup>17</sup>

The French text used the word "lit" meaning "bed," but the English version erroneously translated it to mean "banks."<sup>18</sup> Apparently, the Louisiana legislatures of 1825 and 1870 intended that the *bed* of a river be the area from ordinary low to ordinary high. If so, then article 457 was actually the definition of the bed of a river, not the bank,<sup>19</sup> and the area above the ordinary high mark should have been defined as the bank.<sup>20</sup>

The mistranslation had important repercussions when oil was discovered and the definition of banks was litigated. The Louisiana Supreme Court followed the erroneous translation by defining banks as the area between the ordinary low and the ordinary high which resulted in favoring landowners as recipients of the oil production.<sup>21</sup>

Since a legislative overruling of the jurisprudence could have created serious constitutional due process problems, the Law Institute's 1977 proposal retained the definition of banks that had been judicially sanctioned since the early 1900's. However, concerning public use in general, the 1977 proposal would have eliminated the second paragraph of article 457 defining levees as banks, apparently to insure that private landowners would receive remuneration if the public used areas above the ordinary water mark.<sup>22</sup>

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17. LA. CIV. CODE art. 457 (as it appeared prior to 1978 La. Acts, No. 728). See also LA. CIV. CODE art. 456, as amended by 1978 La. Acts, No. 728.

18. See *The Work of the Louisiana Legislature for the 1977 Regular Session—Property*, 38 LA. L. REV. 62, 75-80 (1977), which discusses the historical background concerning the mistranslation from French into English. See also *Proposed Revision of the Civil Code: Hearings Before the Subcomm. on Civil Code Revision of the House Comm. on Civil Law and Procedure*, 4th Reg. Sess. (Jan. 17, 1978) (statement of Professor A. N. Yiannopoulos).

19. See *The Work of the Louisiana Legislature for the 1977 Regular Session—Property*, *supra* note 18, at 75-80.

20. *Id.*

21. See *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922). See also *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Morgan v. Livingston*, 6 Mart. (O.S.) 19 (La. 1819); *State v. Cockrell*, 162 So. 2d 361 (La. App. 1st Cir. 1964).

22. See *Proposed Revision of the Civil Code: Hearings Before the Subcomm. on Civil Code Revision of the House Comm. on Civil Law and Procedure*, 4th Reg. Sess. (Jan. 17, 1978) (statement of Professor A. N. Yiannopoulos.)

The 1978 version of article 456 produces a significant change in that banks are still defined as the area between the ordinary low and the ordinary high water mark in accord with previous Louisiana jurisprudence, but levees are only defined as banks when they are in *proximity to the water*.<sup>23</sup> As a result, levees which are a considerable distance from the water, which are fairly common under present conditions,<sup>24</sup> are no longer considered banks. Since the bank of a navigable river is a private thing subject to a servitude of public use,<sup>25</sup> the levee provision seems to favor private landowners by diminishing the area constituting banks and thus decreasing the land subject to public use.<sup>26</sup>

Article 458 as amended by Act 728 reproduces the substance of Civil Code article 861 by stating that works built without a permit on public things such as the sea, the seashore, the bottoms of natural navigable waters, or the banks of navigable rivers may be removed at the expense of those who built them, if such works obstruct the public use. Public authorities or anyone residing in the state may require such removal, and the owner of the works cannot use prescription or possession as a defense.<sup>27</sup> However, revised article 460 provides that state port commissions or municipalities have the authority to con-

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23. *Id.*

24. See *Mayer v. Board of Comm'rs*, 177 La. 1119, 150 So. 295 (1933), in which the court stated:

When article 457, defining the banks of rivers, was carried into the present Code . . . , levees . . . were small affairs and were generally constructed close to the river, say between 60 feet and an acre or two. The levees could then serve with some degree of exactness as the banks of the river, and may do so, in many instances, now. Today, however, the levees are usually built much larger, and not infrequently some distance from the natural bank of the river . . . . To apply the codal definition of the banks of a river, and thereby make, with the aid of article 453 . . . , all land lying between the levee and the river a part of the bed of the river, and a public thing, no longer available for private use, without reservation or qualification, to present methods of building levees, would be going further than the Legislature ever intended by its enactment.

25. According to LA. CIV. CODE art. 665 (as it appeared prior to 1978 La. Acts, No. 728), the law imposes a servitude for the common utility on lands abutting navigable streams for construction and repair of levees, roads and other purposes. See also *Eldridge v. Trezevant*, 160 U.S. 452, 463 (1896); *Ruch v. New Orleans*, 43 La. Ann. 275, 9 So. 473 (1891); *Morgan v. Livingston*, 6 Mart. (O.S.) 19, 235, 236 (La. 1819).

26. See *Mayer v. Board of Comm'rs*, 177 La. 1123, 150 So. 299 (1933).

27. See *Yiannopoulos, The Public Use of the Banks of Navigable Rivers in Louisiana*, 31 LA. L. REV. 563, 579-85 (1971).



struct navigation facilities on public places within their jurisdictions.<sup>28</sup> In addition, according to revised article 459, a building encroaching on the public way may remain if it does not inhibit the public use and can not be removed without great damage to its owner.<sup>29</sup>

### IMMOVABLES

Of special interest to practitioners is the elimination of the categories of immovables by nature, immovables by destination, and immovables by their object.<sup>30</sup> Classifying things merely as movables or immovables should greatly simplify the entire practice of law because the division of things affects not only property law but also "carries consequences in the fields of obligations, family law, successions, civil procedure, taxation, criminal law and conflict of laws."<sup>31</sup> The division of things into movables and immovables was retained, and the distinction remains significant in understanding the scope, acquisition, protection, and transfer of rights.<sup>32</sup>

The revision's entire section concerning immovables, articles 462-470, was completely rewritten, but only some articles

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28. Prior to its amendment, the bill stated that municipalities could, within their jurisdictions, construct and maintain works necessary for public utility on public places, in the beds of natural navigable water bodies, and on their banks or shores. Examples included buildings, wharves, and other facilities for the mooring of vessels and loading or discharging of cargo and passengers. However, after its amendment by the House Committee on Civil Law and Procedure, the bill gave this authority to the state port commissions, and only in the absence of port commissions having jurisdiction, can municipalities exercise these powers.

29. LA. CIV. CODE art. 459, as amended by 1978 La. Acts, No. 728, further provides that if such a building is demolished from any cause, the owner is bound to restore to the public the part of the way upon which the building stood.

30. LA. CIV. CODE art. 463 (as it appeared prior to 1978 La. Acts, No. 728) listed the kinds of immovables as immovables by nature, by destination, and by the object to which they are applied. Immovables are now only classified as corporeal or incorporeal according to LA. CIV. CODE art. 461, as amended by 1978 La. Acts, No. 728.

31. Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 517 (1962). See also *Expose des Motifs* of 1978 La. Acts, No. 728, at 9.

32. Yiannopoulos, *supra* note 31, at 517 n.4. Professor Yiannopoulos gives the following examples of areas which are affected by the division of movables and immovables: "Civil Code articles 600-708 (legal servitudes); articles 3472-3477 (acquisitive prescription); articles 1536, 1539, 2440, 2441 (formalities of transfer); articles 3191-3251 (privileges); articles 3278-3471 (mortgages); articles 3176-3181 (antichresis); and articles 3133-3175 (pledges) of the Civil Code of 1870." *Id.*

represent substantive changes in the law while others merely codify Louisiana jurisprudence. Revised article 462 codifies prior law by stating that tracts of land, with their component parts, are immovables.<sup>33</sup> Revised article 463 defines these component parts as "buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees . . . when they belong to the owner of the ground."<sup>34</sup>

The practical significance of the term "component part" is that an alienation or encumbrance of the land will include the component parts. However, it should be noted that the revision states that constructions permanently attached to the ground, other than buildings, are component parts only *when they belong to the owner of the ground*—they are *movables* when they belong to another person.<sup>35</sup> According to revised arti-

33. LA. CIV. CODE art. 462, as amended by 1978 La. Acts, No. 728. LA. CIV. CODE art. 464 (as it appeared prior to 1978 La. Acts, No. 728) designated land, buildings, and other constructions as immovables by nature, whether or not they had their foundations in the soil. Since the revision designates them as simply immovables, which only serves as a clarification or conceptual tool rather than as a substantive change in the law, the Louisiana jurisprudence concerning article 464 remains relevant. See LA. CIV. CODE art. 462, comment, as amended by 1978 La. Acts, No. 728.

34. LA. CIV. CODE art. 463, as amended by 1978 La. Acts, No. 728, defining the component parts of a tract of land, is based on LA. CIV. CODE arts. 464 and 465 (as they appeared prior to 1978 La. Acts, No. 728). LA. CIV. CODE art. 465 (as it appeared prior to 1978 La. Acts, No. 728) provided:

Standing crops and fruits of trees not gathered, and trees before they are cut down, are likewise immovable and are considered as part of the land to which they are attached.

As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables.

If a part only of the crop be cut down, that part only is movable.

Some examples of "other constructions permanently attached to the ground," as construed by Louisiana courts, are: *American Creosote Co. v. Springer*, 257 La. 116, 241 So. 2d 510 (1970) (railroad tracks); *Prevot v. Courtney*, 241 La. 313, 129 So. 2d 1 (1961) (tractor and poultry house); *Ellis v. Dillon*, 345 So. 2d 1241 (La. App. 1st Cir. 1977) (a mobile home); *Bailey v. Kruithoff*, 280 So. 2d 262 (La. App. 2d Cir. 1973) (a fence); *Industrial Outdoor Displays v. Reuter*, 162 So. 2d 160 (La. App. 4th Cir. 1964). The *Ellis* case states that what constitutes a building or other construction qualifying as an immovable is to be judicially determined based on societal needs at the time. Three criteria have generally been used to determine whether an object is an "other construction:" the size of the structure; the degree of integration or attachment to the soil; and, most importantly, the degree of permanency. *Telerent Leasing Corp. v. R and P Motels, Inc.*, 343 So. 2d 267 (La. App. 1st Cir. 1977); *Benoit v. Acadia Fuel and Oil Distrib., Inc.*, 315 So. 2d 842 (La. App. 3d Cir. 1975), *cert. denied*, 320 So. 2d 550 (La. 1975).

35. See comment to LA. CIV. CODE art. 464, as amended by 1978 La. Acts, No. 728.

cle 464, only buildings and standing timber are *separate immovables* when they belong to a person other than the owner of the ground. Therefore, if buildings and standing timber belong to a lessee rather than the owner of the ground, then these immovables are not component parts. These things would clearly be separate immovables, and in the event of an alienation or encumbrance of the land by the owner, the lessee would be protected because separate immovables do not pass with the land. The revised article encourages economic growth and land development by facilitating leasing.<sup>36</sup>

Revised article 465 is a new version of the principle that things such as building materials which are incorporated into a tract of land, a building, or an "other construction" and become an integral part of it are considered its component parts. Also retained is the jurisprudential idea that movables incorporated into a tract of land or building become part of the immovable regardless of whether the owner or the lessee has incorporated them.<sup>37</sup>

Revised article 466 creates a substantive change in the law by eliminating the "use or convenience of the building" test for component parts as well as the "unity of ownership" requirement, except when an immovable by declaration exists as provided in revised article 467. Former article 467 provided that fixtures connected or attached to a building by its owner for its use or convenience were immovables by nature.<sup>38</sup> Revised arti-

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36. See *Proposed Revision of the Civil Code: Hearings Before the Subcomm. on Civil Code Revision of the House Comm. on Civil Law and Procedure*, 4th Reg. Sess. (Jan. 17, 1978) (statement of Professor A.N. Yiannopoulos). Professor Yiannopoulos gives shopping centers and individual lot development as examples envisioned by LA. CIV. CODE art. 464. According to the Louisiana Condominium Act, LA. R.S. 9:1121 (Supp. 1974), a unit in a condominium is also a separate immovable.

37. See *Lighting Fixture Co. v. Pacific Fire Ins. Co.*, 176 La. 499, 146 So. 35 (1932). Immobilization under LA. CIV. CODE art. 465, as amended by 1978 La. Acts, No. 728, is inoperative when the law provides otherwise. An example is LA. R.S. 9:5357 (1950), which states that a movable subject to a chattel mortgage remains a movable and does not pass with a sale of the immovable property.

38. LA. CIV. CODE art. 467 (as it appeared prior to 1978 La. Acts, No. 728). In *Lafleur v. Foret*, 213 So. 2d 141 (La. App. 3d Cir. 1968), one court in interpreting this article held that portable window unit air conditioners, with racks attached to window sills by two screws, and small doghouses were "movables" that did not pass with the sale of the house, but the chicken brooder sheds were "immovables" that did pass with the sale.

See LA. CIV. CODE art. 466, as amended by 1978 La. Acts, No. 728, which reads:  
Things permanently attached to a building or other construction, such as

cle 466 does not require that there be unity of ownership or that a component part be attached for the use or convenience of the building.<sup>39</sup> Instead, the only requirement for a component part under revised article 466 is that the thing be permanently attached to the building. "Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached."<sup>40</sup> The result of revised article 466 is that purchasers of property are protected against lessees who have installed such items as electrical devices and intend to remove them. Buyers can now assume that any device incorporated into a building was installed by the owner and will pass with the sale, unless the public records prove otherwise. The revised article not only simplifies the law in this area, but also abolishes immovables by destination, a category which has burdened the courts by requiring a case-by-case definition.<sup>41</sup>

Practitioners should note that revised article 467 makes some changes in the category of immovables by declaration. Article 467 now states:

The owner of an immovable may declare that machinery, appliances, and equipment owned by him and placed on the immovable, other than his private residence, for its service and improvement are deemed to be its component parts. The declaration shall be filed for registry in the

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plumbing, heating, cooling, electrical or other installations are the component parts.

Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.

39. See comments to LA. CIV. CODE art. 466, as amended by 1978 La. Acts, No. 728.

40. LA. CIV. CODE art. 466, as amended by 1978 La. Acts, No. 728.

41. See *Hilltop Bowl, Inc. v. United States Fidelity & Guar. Co.*, 248 F. Supp. 572 (D.C. 1966); *Indoor Displays v. Reuter*, 162 So. 2d 160 (La. App. 4th Cir.), cert. denied, 246 La. 348, 164 So. 2d 352 (1964) (stating that a movable does not become immobilized unless it is placed on or attached to real estate by the owner, or by his direction, for its service and improvement); *Chestnut v. Hammatt*, 157 So. 2d 915 (La. App. 1st Cir. 1963) (holding that a bulk milk tank on a farm was an "immovable by destination" and usually would pass with the land as an improvement). According to the jurisprudence, the elements of an immovable by destination were that the object must be: 1) an accessory to the property, 2) employed in service of such property, and 3) placed there by one who owned both the property and the accessory. See *Louisiana Dept. of Highways v. Thompson*, 188 So. 2d 753 (La. App. 2d Cir. 1966).

conveyance records of the parish in which the immovable is located.<sup>42</sup>

This provision expands the concept of a section of the Louisiana Revised Statutes dealing with industrial establishments<sup>43</sup> to include all immovables except private residences.<sup>44</sup> Contrary to the area of immovables by incorporation, immobilization by declaration is subject to the same unity of ownership requirement as was immobilization by destination under prior article 468(1).<sup>45</sup> Consequently, the major difference between the two types of immobilization is that immobilization by declaration can take effect *only by declaration* of the owner while previously immobilization by destination took place by operation of law.<sup>46</sup> An owner may still immobilize the movables which he uses as part of his immovable, but he must declare his intent to do so rather than rely on the operation of law.<sup>47</sup>

Revised article 468 codifies Louisiana jurisprudence by outlining three instances where deimmobilization occurs: 1) Where component parts of an immovable are so damaged or deteriorated that they can no longer be useful to the land or buildings; 2) Where the owner deimmobilizes the component parts of an immovable by an act translative of ownership and delivers such parts to an acquirer in good faith who does not know that he is acquiring the component parts of an immovable; or 3) Where the rights of third persons are not involved and the owner deimmobilizes things by detachment or removal.<sup>48</sup>

Revised article 469 is an important provision concerning

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42. LA. CIV. CODE art. 467, as amended by 1978 La. Acts, No. 728.

43. LA. R.S. 9:1104 (1950) states that an owner may file a declaration, for purposes of mortgage and sale, to the effect that machinery and appliances are to be considered part of the land and thus immovables by destination.

44. See *Proposed Revision of the Civil Code: Hearings Before the Subcomm. on Civil Code Revision of the House Comm. on Civil Law and Procedure*, 4th Reg. Sess. (Jan. 17, 1978) (statement of Professor A. N. Yiannopoulos). Residences are exempted to prevent money lenders from taking advantage of the general public by incorrectly stating that a mortgage on a private residence includes all objects in the home.

45. For cases discussing the unity of ownership requirement for immovables by destination, see note 41, *supra*.

46. See *Proposed Revision of the Civil Code: Hearings Before the Subcomm. on Civil Code Revision of the House Comm. on Civil Law and Procedure*, 4th Reg. Sess. (Jan. 17, 1978) (statement of Professor A. N. Yiannopoulos).

47. *Id.*

48. LA. CIV. CODE art. 468, as amended by 1978 La. Acts, No. 728.

the relationship between an immovable and its component parts, and it states that "the transfer or encumbrance of an immovable includes its component parts."<sup>49</sup> Nevertheless, one with a pre-existing right to a component part of an immovable may assert that right against a third person if an appropriate instrument has been filed for registry in the parish where the immovable is located.<sup>50</sup>

The last new provision in the section on immovables, article 470, defines incorporeal immovables as "rights and actions that apply to immovable things."<sup>51</sup> This changes the law by no longer classifying an action for the recovery of an entire succession as an immovable, but instead allowing classification to depend upon the object of the action.<sup>52</sup>

### MOVABLES

Similar to its treatment of immovables, the revision modernizes codal language dealing with movables. Revised article 471 defines corporeal movables as animate or inanimate things that move or can be moved from one place to another.<sup>53</sup> Incorporeal movables are defined as rights, obligations, and actions, such as bonds and annuities, that relate to a corporeal movable.<sup>54</sup> Materials used to erect a new building or other construction, *even though derived from the demolition of an old building*, are movables until after their incorporation into the new building or until after construction.<sup>55</sup> However, materials separated from a building or other construction to repair, add, or alter it, with the intention of putting them back, remain immovables.<sup>56</sup> Revised article 474<sup>57</sup> codifies the holdings of

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49. LA. CIV. CODE art. 469, *as amended by* 1978 La. Acts, No. 728.

50. *Id.*

51. LA. CIV. CODE art. 470, *as amended by* 1978 La. Acts, No. 728. Examples of incorporeal immovables are illustratively listed as "personal servitudes established on immovables, predial servitudes, mineral rights, and petitory or possessory actions."

52. *See* comments to LA. CIV. CODE art. 470, *as amended by* 1978 La. Acts, No. 728.

53. LA. CIV. CODE art. 471, *as amended by* 1978 La. Acts, No. 728.

54. LA. CIV. CODE art. 473, *as amended by* 1978 La. Acts, No. 728. Article 473 further states: "Interests or shares in a juridical person that owns immovables are considered as movables as long as the entity exists; upon its dissolution, the right of each individual to a share in the movables is an immovable."

55. LA. CIV. CODE art. 472, *as amended by* 1978 La. Acts, No. 728.

56. *Id.*

57. LA. CIV. CODE art. 474, *as amended by* 1978 La. Acts, No. 728, states:

*Citizens Bank v. Wiltz*<sup>58</sup> and *Succession of Minter*.<sup>59</sup> *Wiltz* classified unharvested crops and ungathered fruits of trees as movables by anticipation when they belong to one other than the landowner or when they are encumbered by the rights of third parties. *Minter* held that a landowner's act of deimmobilization must be recorded to be effective against third persons.<sup>60</sup> Revised article 475 states the basic principle that all things which are not considered immovables are movables.

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Unharvested crops and ungathered fruits of trees are movables by anticipation when they belong to a person other than the landowner. When encumbered with security rights of third persons, they are movables by anticipation insofar as the creditor is concerned.

The landowner, by act translative of ownership or by pledge, mobilizes by anticipation unharvested crops and ungathered fruits of trees that belong to him.

58. 31 La. Ann. 244 (1879).

59. 180 La. 38, 156 So. 167 (1934).

60. See also comments to LA. CIV. CODE art. 474, as amended by 1978 La. Acts, No. 728.

## SECURITY DEVICES

New provisions in the area of security devices concern pledges of alternative deposits to financial institutions; a pledgor's use or disposition of a pledged incorporeal without accounting to the pledgee; exemptions from the vendor's privilege<sup>1</sup> and the usury law; and investments in real estate mortgages.

According to Act 703, the most important of the new provisions, a pledgor of an incorporeal can collect an account receivable, exercise contract rights, or use or dispose of any proceeds without invalidating the pledge or defrauding his creditors, regardless of whether he is required to account to the pledgee for the proceeds and regardless of whether the pledge is evidenced in writing.<sup>2</sup> The new provision eliminates an area of uncertainty by making it clear that in a pledge of an incorporeal, the mere fact that the pledgee allows the pledgor to receive or enjoy the proceeds will not render an otherwise valid pledge ineffective or fraudulent.

Also relating to pledges, Act 586 provides that, absent a specific contractual provision to the contrary, any person with a right to make withdrawals from a joint deposit may validly pledge all or part of the entire deposit to a bank, savings bank, or trust company.<sup>3</sup> Act 586 includes, but is not limited to, time and savings accounts and certificates of deposit.<sup>4</sup>

Another change during the session concerns domestic insurers who are presently prohibited from investing directly or indirectly in loans that are not secured by a first mortgage or a privilege on the property.<sup>5</sup> Act 454 creates an exception which permits an insurer to acquire a second mortgage and treats it as equivalent to a first mortgage if the following requirements are met:

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1. 1978 La. Acts, No. 609, adding LA. R.S. 9:4544, exempts fresh and frozen vegetables, seafood, and other perishable food products from the vendor's privilege.
  2. 1978 La. Acts, No. 703, adding LA. R.S. 9:4324.
  3. 1978 La. Acts, No. 586, adding LA. R.S. 6:32(E).
  4. *Id.*
  5. LA. R.S. 22:844(A), (H) (Supp. 1977) (as it appeared prior to Act 454 of 1978).



1. The insurer who makes or acquires the second mortgage loan also holds the first mortgage loan on the immovable property, and there are no intervening liens;
2. The total of the balance due on the original loan and the amount of the additional loan does not exceed a certain set percentage of the appraised value of the immovable property.<sup>6</sup>

Permitting investment for such second mortgages should facilitate domestic insurance investments without prejudicing the basic integrity of the policy against second mortgage financing. Before the amendment the same result could have been obtained through refinancing the first mortgage debt and consolidating it with the second mortgage loan, and the Act eliminates this needlessly expensive procedure.

Revised Statutes 9:3504 provides that mortgage loans insured or guaranteed by the Federal Housing Administration or the Veterans Administration are not usurious if the interest rates charged are not in excess of those permitted by the regulations of these agencies and are agreed to by the parties in writing. Act 621 extends the benefit of this provision to loans which, although "eligible" to be guaranteed or insured by such agencies, have been turned down for some reason other than an excessive rate of interest.<sup>7</sup> The Act does not specifically define "eligible" for guarantee or insurance, but rather refers to the statutory provisions governing the Federal Housing Administration and the Veterans Administration.<sup>8</sup> The regulations are so extensive that it is difficult to imagine why an "eligible" loan would be turned down. However, if a loan is denied because it is "ineligible," then the Act's usury exemption will not apply. Consequently, unless "eligible" loans are frequently denied, the scope of the Act seems limited.

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6. 1978 La. Acts, No. 454, *amending* LA. R.S. 22:844(A), (H) (Supp. 1977).

7. 1978 La. Acts, No. 621, *amending* LA. R.S. 9:3504 (Supp. 1969).

8. National Housing Act, 12 U.S.C. § 1709(b) (1977). Veteran's Benefits Act, Pub. L. No. 85-857, §§ 1801-17, 72 Stat. 1203 (1958) (codified at 38 U.S.C. §§ 1801-17 (1976)). To be "eligible" for mortgage insurance a mortgagee must be approved as responsible and capable of servicing the mortgage. In addition, the terms of the mortgage must meet numerous technical requirements relating to amount, duration, interest, insurance, etc.

## CORPORATIONS

Several provisions concerning corporations were passed during the 1978 legislative session. Possibly the most noteworthy addition to Louisiana corporate law is the increased power of state and local political subdivisions to create nonprofit corporations, especially for economic development purposes.

A new chapter, known as the Cooperative Economic Development Law, was added to title 33 of the Louisiana Revised Statutes.<sup>1</sup> It authorizes the state, its local political subdivisions, and public corporations to participate with one another, federal agencies, and others in cooperative endeavors designed to alleviate unemployment or underemployment through "cooperative financing"<sup>2</sup> or "cooperative development."<sup>3</sup>

A nonprofit economic development corporation may be created upon the application of at least three persons either to the legislature or to the governing authority of a local governmental subdivision.<sup>4</sup> After the application is submitted, but before it is approved, the proposed corporation must send its economic development plans to state and regional "clearinghouses" for review.<sup>5</sup> The local governing authority must consider any clearinghouse comments and hold a public hearing<sup>6</sup> before it can vote on the need for such a corporation.

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1. 1978 La. Acts, No. 617, adding LA. R.S. 33:9020-31 (Chapter 27).

2. LA. R.S. 33:9022(2), added by 1978 La. Acts, No. 617, defines "cooperative financing" as "any method of financing an economic development project between . . . the state [and] its local governmental subdivisions . . . . Said methods shall include loans, loan guarantees, land writedowns, grants, lease guarantees or any form of financial subsidy or incentive."

3. LA. R.S. 33:9022(3), added by 1978 La. Acts, No. 617, defines "cooperative development" as "any method of cooperative development between . . . the state [and] its local governmental subdivisions . . . . Said methods shall include any number of joint development agreements such as condominiums and cooperative ownership limited partnerships and investment syndicates."

4. LA. R.S. 33:9023(B), added by 1978 La. Acts, No. 617. An application must contain the articles of incorporation, the bylaws, a description of the proposed corporate structure, a listing of assets, a proposed economic development plan, an overall policy, the geographic location of the corporation, and a statement of whether the proposed corporation will request any assistance from other public or private associations or individuals. *Id.*

5. LA. R.S. 33:9023(F), added by 1978 La. Acts, No. 617.

6. LA. R.S. 33:9023(E), added by 1978 La. Acts, No. 617.

After the approval of the application, the governing authority may provide funds for the corporation.<sup>7</sup>

The economic corporation has a wide range of powers,<sup>8</sup> but it must operate as a private nonprofit corporation<sup>9</sup> and file an annual report available for public inspection with the proper governing authority.<sup>10</sup> Every economic development plan is subject to annual review and reapproval by the governing authority,<sup>11</sup> and the failure to submit a plan or the rejection of it by the governing authority will result in the termination of the corporation as a matter of law.<sup>12</sup>

Neither the state nor any local political subdivision is liable for any actions of this type of corporation,<sup>13</sup> and any judgment against the corporation must be paid from corporate funds, even though corporate property and funds are exempt from seizure.<sup>14</sup> Purchasers or lessees who obtain real property from the corporation must devote the property only to the uses mentioned in the economic development plan and must comply with other requirements of the corporation, including the obligation to begin improvements within a reasonable time.<sup>15</sup> These economic development corporations should aid in reducing the state's unemployment by providing a vehicle with which to attack the problem.

Another piece of legislation concerning nonprofit corporations is Act 203, which makes the limitations on incorporation of nonprofit corporations inapplicable to local political subdivisions with populations in excess of 150,000, or to their boards, commissions, or departments.<sup>16</sup> Additionally, although subsec-

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7. LA. R.S. 33:9023(G), *added by* 1978 La. Acts, No. 617.

8. LA. R.S. 33:9023(C), *added by* 1978 La. Acts, No. 617. The economic corporation's powers include, but are not limited to, the power to sue and to be sued; to adopt, amend and repeal bylaws; to purchase, lease, mortgage, bequeath or otherwise dispose of any real or personal property; to issue revenue bonds which are exempt from all taxes; to contract, to apply for loans from any source and to give security as required; to invest funds not required for immediate use; and to designate economic development areas. *Id.*

9. LA. R.S. 33:9024, *added by* 1978 La. Acts, No. 617.

10. LA. R.S. 33:9025, *added by* 1978 La. Acts, No. 617.

11. LA. R.S. 33:9026, *added by* 1978 La. Acts, No. 617.

12. *Id.*

13. LA. R.S. 33:9027, *added by* 1978 La. Acts, No. 617.

14. LA. R.S. 33:9028, *added by* 1978 La. Acts, No. 617.

15. LA. R.S. 33:9029, *added by* 1978 La. Acts, No. 617.

16. 1978 La. Acts, No. 203, *adding* LA. R.S. 12:202.1(D). LA. R.S. 12:202.1 (Supp.

tion (C) of the present statute allows the creation of quasi-public nonprofit corporations with the right to issue both negotiable revenue bonds and other obligations not in excess of one million dollars,<sup>17</sup> new subsection (D) gives the corporations created by local political subdivisions the right to issue only negotiable revenue bonds.<sup>18</sup> Act 203 provides that all property and assets owned by these nonprofit corporations shall be exempt from state and local taxation, including ad valorem taxes. It further states that these quasi-public nonprofit corporations are subject to the public contract, public meeting, and public records laws.

In a different area of corporate law, the legislature passed Act 178,<sup>19</sup> which prohibits corporations from making campaign contributions without specific authorization from the board of directors or from an executive officer acting with board authorization. The Act also provides that all contributions, except those in kind, must be made by check. Neither of these provisions departs from prior law, but the Act does make a needed change, which should promote greater public accountability, by extending the applicability of the regulations to labor corporations; profit and nonprofit corporations; and trade, business, or professional associations.

Act 181 adds new provisions to the several titles in the Louisiana Revised Statutes which regulate deceptive advertising.<sup>20</sup> The new provisions prohibit a profit-making corporation

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1970) presently outlines the limitations on the formation of nonprofit corporations. State boards, commissions, and departments are forbidden to incorporate any nonprofit corporation with a public or quasi-public function if any bonds or other forms of corporate indebtedness will be issued, unless certain relevant information has first been submitted to and approved by the legislature. Such information includes: the purpose of the proposed corporation; the amount of bonds it will issue; the method of financing the bonds, including, but not limited to, the term of the bonds; the interest and other charges; and the purpose of the issuance of the bonds. One exception to these limitations on nonprofit corporations is found in LA. R.S. 12:202.1(C) (Supp. 1970), which allows the city of Baton Rouge and East Baton Rouge Parish to grant permits or franchises to a public transportation corporation without following these procedures.

17. LA. R.S. 12:202.1(C) (Supp. 1970).

18. LA. R.S. 12:202.1(D), added by 1978 La. Acts, No. 203. Both LA. R.S. 12:202.1(C) (Supp. 1970) and LA. R.S. 12:202.1(D) (Supp. 1978) limit the total issuance of the negotiable revenue bonds (or the other obligations, if allowed) to one million dollars at a tax exempt interest rate not in excess of eight per cent per annum.

19. 1978 La. Acts, No. 178, amending LA. R.S. 18:1488(C) (Supp. 1975).

20. 1978 La. Acts, No. 181, amending LA. R.S. 12:23 (Supp. 1968), and LA. R.S.

or organization from using any corporate name, trademark, or trade name which deceptively or falsely suggests a charitable or nonprofit nature. The Secretary of State is prohibited from registering or allowing the use of a deceptive name and is authorized to establish all review procedures necessary to effectuate the intent of the Act.<sup>21</sup>

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51:212-13 (Supp. 1976). For a general discussion of section 23 of the Louisiana Business Corporation Act, see *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Corporations*, 35 LA. L. REV. 341-42 (1975).

21. LA. R.S. 12:213, added by 1978 La. Acts, No. 181.

## FINANCIAL INSTITUTIONS

Legislative changes concerning financial institutions should increase the ease with which commercial transactions may be accomplished, affording greater power and protection to financial institutions.

Act 153 facilitates monetary exchanges by increasing from \$5,000 to \$7,500 the amount which a bank, credit union, or other depository may pay to a surviving spouse without a court proceeding.<sup>1</sup> The surviving spouse can avoid the delays inherent in a court proceeding by giving an affidavit to the depository stating that the total funds withdrawn from all depositories do not exceed \$7,500. According to *Hornsby v. Fidelity National Bank of Baton Rouge*,<sup>2</sup> the surviving spouse may draw upon either the decedent's deposits or community deposits as a source of available funds to continue community affairs; to meet the needs of the surviving spouse and other dependents of the decedent; and to defray the costs of the decedent's illness or funeral and other reasonable expenses.<sup>3</sup> The duty of a bank to allow withdrawal was construed to be permissive, not mandatory,<sup>4</sup> but the financial institution's discretion may not be exercised arbitrarily.<sup>5</sup> Since Act 153 merely increases the amount which may be withdrawn and was perhaps only passed in an effort to accommodate the rising cost of living for a surviving spouse, prior jurisprudence should remain relevant.

Act 547<sup>6</sup> is an important relaxation of banking association requirements. Although the Act does not change the provision

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1. 1978 La. Acts, No. 153, amending LA. R.S. 9:1513-14 (Supp. 1974).

2. 243 So. 2d 96 (La. App. 1st Cir. 1970), cert. denied, 258 La. 215, 245 So. 2d 411 (1971).

3. *Id.*

4. *Id.*

5. *Id.* In *Hornsby*, the court held that where the surviving wife made no claim of need until 18 months after her spouse's death, and her claim to deposits in the name of decedent was disputed by the executrix of the estate, it was within the bank's discretion to refuse withdrawal.

6. 1978 La. Acts, No. 547, amending LA. R.S. 6:249(E) (Supp. 1974), and LA. R.S. 6:326(E) (Supp. 1974).

that cash items in transit<sup>7</sup> or in the process of collection<sup>8</sup> are not considered part of the reserve fund,<sup>9</sup> it increases from thirty to fifty per cent the maximum percentage of required reserves which may be held in the form of investments that are direct obligations of the state and federal governments and mature within two years from the date of the reserve computation.<sup>10</sup> The Act reiterates the requirement that both types of governmental securities must be owned by the bank as of the date of the computation and cannot be subject to pledge, right of repurchase, or any method of hypothecation.<sup>11</sup>

Act 547 deletes the previous requirement that the remainder of a banking association's liabilities for demand deposits be offset by an amount equal to its liabilities either in United States currency; in cash due from other banks, bills of exchange, or discounted paper maturing within not more than one year; or in federal, state, levee board, municipality, or municipal corporate bonds, stocks, or securities.<sup>12</sup> Although this provision was not being used by state banks at the time of its deletion, there was a possibility that it would be misused. The clause allowing the banks to hold "discounted paper maturing within not more than one year" could have been interpreted to allow the use of a loan, a risk asset, as part of the required reserve. Since this was not the intent of the statute, the provision was deleted.

A further legislative change encourages consumer protection by including deferral charges within the Louisiana Consumer Credit Law's definition of a "loan finance charge,"<sup>13</sup> thereby facilitating consumer recovery of prepayment rebates. Act 761 provides that deferral charges must be rebated upon

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7. See LA. R.S. 6:326(A)(4) (Supp. 1974), which states that "cash items in transit" are items in the process of collection.

8. See LA. R.S. 6:326(A)(5) (Supp. 1974), which defines "cash items in process of collection" as items which are going to be collected or credited within twenty-four hours or less.

9. 1978 La. Acts, No. 547, amending LA. R.S. 6:249(E) (Supp. 1974), and LA. R.S. 6:326(E) (Supp. 1974).

10. *Id.*

11. *Id.*

12. *Id.*

13. 1978 La. Acts, No. 761, amending LA. R.S. 9:3516(20) (Supp. 1972), and LA. R.S. 9:3528 (Supp. 1972). The Louisiana Consumer Credit Law is found in LA. R.S. 9:3510 *et seq.* (Supp. 1972).

prepayment on the same basis as loan finance charges.<sup>14</sup> The Act retains the definition of "loan finance charge" as the sum of all charges payable by the consumer and imposed by the lender, as well as the charges paid by the consumer for investigating his credit worthiness.<sup>15</sup> Only default and delinquent charges are not covered by the term "loan finance charge," and, therefore, these charges are not subject to prepayment rebates on the same basis.

Act 412 broadens the public records exception to the evidentiary hearsay rule by authorizing banks to install photostatic copying machinery to supplement the present use of microfilm.<sup>16</sup> The Act provides that a photostatic copy will be deemed an original record for all purposes and will be admissible evidence in all courts.

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14. 1978 La. Acts, No. 761, *amending* LA. R.S. 9:3528 (Supp. 1972). The method for computing the unearned loan finance charge which must be rebated upon prepayment is either the "rule of 78's" or the "sum of the digits" method. The lender must refund the unearned loan finance charge and the refund must represent at least as great a proportion of the total charge (after deducting a prepayment charge of not more than twenty-five dollars) as the sum of the remaining monthly balances (beginning one month after prepayment is made) bears to the sum of all the monthly balances under the contract's schedule of payments.

15. 1978 La. Acts, No. 761, *amending* LA. R.S. 9:3516(20) (Supp. 1972).

16. 1978 La. Acts, No. 412, *amending* LA. R.S. 6:69 (1950).



## SALES

Act 164, a "book" bill<sup>1</sup> proposed by the Law Institute, adopts articles 7 and 8 of the Uniform Commercial Code with minor modifications. The Act affects warehouse receipts, bills of lading, and other documents of title and produces a major change in the law which should facilitate interstate business transactions. The complex implications of this legislation are beyond the scope of this brief symposium article.

One of the bills which passed during this legislative session and affects the law of sales is Act 212, which retains the bulk sales law's requirement that the transferee in a bulk sales contract personally notify every creditor<sup>2</sup> of the terms of the proposed transfer; the consideration paid; and the time, terms, and conditions of the sale. The transferee must send this notification to each creditor at least ten days before the completion of the transfer or the payment of any consideration.<sup>3</sup> The Act restates the present provision that any creditor whose name has been omitted from the statement notifying creditors can give written notice of his claim to the transferee, thereby entitling him to share equally with other notified creditors in any proceeds.<sup>4</sup> In addition to these provisions, Act 212 further requires the transferee to advertise the date, place, and time of the sale in the official journal of the parish where the business is located at least fifteen days before the completion of the transfer.<sup>5</sup>

One piece of legislation somewhat related to sales is Act 692, the Louisiana Abandoned Animals Act, which defines an "abandoned animal" as one whose owner has not paid the charges for veterinarian services or for boarding within thirty

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1. A "book" bill is one proposing a major change in the law. See the introduction to *The Work of the Louisiana Legislature for the 1977 Regular Session*, 38 LA. L. REV. 51, 52 n.6 (1977).

2. 1978 La. Acts, No. 212, amending LA. R.S. 9:292(C) (1950), retains the requirement that the transferee in a bulk sales contract must personally notify every creditor who is listed or of whom the transferee has knowledge or could, with reasonable diligence, acquire knowledge. The notification must be by registered or certified mail.

3. *Id.*

4. *Id.*

5. *Id.*

days after receiving the invoice.<sup>6</sup> After thirty days, the veterinarian may give notice by registered or certified mail that if the animal is not claimed within ten days after receipt of the notice, the animal may be sold, donated to a humane society or pound, or euthanized.<sup>7</sup> If the notice cannot be delivered, then it must be published in a newspaper of general circulation where the custodian of the animal is doing business.<sup>8</sup> The owner's receipt of notice or publication relieves the custodian of any liability for the animal. If the animal is sold, the proceeds will be applied to the delinquent bill, and the balance, if any, will belong to the animal's owner.<sup>9</sup> If the sale brings less than is owed, the custodian can proceed against the owner for the deficiency.<sup>10</sup> Prior to sale or other disposition, the owner can reclaim the animal by paying all charges and costs.<sup>11</sup>

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6. 1978 La. Acts, No. 692, adding LA. R.S. 3:2451-54.

7. LA. R.S. 3:2453(A), added by 1978 La. Acts, No. 692.

8. LA. R.S. 3:2453(B), added by 1978 La. Acts, No. 692.

9. LA. R.S. 3:2454(A), added by 1978 La. Acts, No. 692.

10. *Id.*

11. LA. R.S. 3:2454(B), added by 1978 La. Acts, No. 692.

## PUBLIC LAW

### ADMINISTRATIVE LAW AND PROCEDURE

#### STATE CONTRACTS

The 1978 amendments to the statutes concerning state contracts significantly restrict those contracts not subject to public bid requirements. Act 772<sup>1</sup> establishes new procedures for the letting of contracts for personal, professional, and consulting services by the state or its agencies. Consulting service contracts of more than \$75,000—for feasibility studies, research projects, and similar work—must be put through a competitive negotiation process pursuant to regulations of the newly created Office of Contractual Review. This office will be within the Office of Division of Administration and will be headed by a director appointed by the Commissioner of Administration. The Act mandates that contracts contain specific information about the services to be rendered, the time frame within which the work must be completed, and certification after the contractual review is made that the funds for the project have been appropriated. The distinction between personal<sup>2</sup> and professional<sup>3</sup> services is clarified so as to remedy past problems that have occurred when state agencies have awarded non-bid con-

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1. 1978 La. Acts, No. 772, adding LA. R.S. 39:1428-73.

2. 1978 La. Acts, No. 772, adding LA. R.S. 39:1431(15), defines "personal service" as follows:

"Personal Service" means work rendered by individuals which require use of creative or artistic skills, such as but not limited to graphic artists, sculptors, musicians, photographers, and writers, or which require use of highly technical or unique individual skills or talents, such as, but not limited to, paramedicals, therapists, handwriting analysts, and expert witnesses for adjudications or other court proceedings.

3. 1978 La. Acts, No. 772, adding LA. R.S. 39:1431(17) defines "professional service" as follows:

"Professional Service" means work rendered by an independent contractor who has a professed knowledge of some department of learning or science used by its practical application to the affairs of others or in the practice of an art founded on it, including but not limited to lawyers, doctors, dentists, veterinarians, architects, engineers, landscape architects, and accountants. A profession is a vocation founded upon prolonged and specialized intellectual training which enables a particular service to be rendered. The word "professional" implies professed attainments in special knowledge as distinguished from mere skill.

tracts to firms whose services were not of such a creative or artistic nature as to warrant a non-bid status. The evident purpose of Act 772 is to structure the competitive negotiation process followed by state agencies so needed services may be obtained at the best price. More importantly, an attempt is made to put an end to the expenditures of tremendous amounts of money which are often wasted on consulting services that are of little importance or benefit to the state.<sup>4</sup>

The procedure relative to state agency purchases was also altered by new legislation. Act 578<sup>5</sup> prohibits state agencies from entering into any agreement, including agreements of lease, lease-purchase, or third party financing, which requires annual state payments of \$100,000 or more, without prior written approval of the State Bond Commission. A companion measure, Act 742,<sup>6</sup> was also approved, mandating that multi-year contracts for the purchase of movable property or equipment be contingent upon a legislative appropriation.<sup>7</sup> The requirement of a legislative appropriation is intended to prevent state agencies from entering into long-term contracts that have not been approved by the legislature.<sup>8</sup>

### MOTOR VEHICLES

Revised Statutes 32:412 currently provides that every applicant for an initial driver's license, or renewal thereof every

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4. The Act sets particular restrictions on the handling of consulting services. These restrictions may be in response to a Department of Corrections consultants' contract for a feasibility study on a prison mental facility in the Orleans area that raised a House inquiry early in the 1978 regular legislative session.

5. 1978 La. Acts, No. 578, *designating* LA. R.S. 39:1410.1-.9 as Subpart A of Part II of Chapter 11 of Title 39 of the Louisiana Revised Statutes of 1950, and *adding* Subpart B thereto.

6. 1978 La. Acts, No. 742, *adding* LA. R.S. 39:171.3.

7. All such contracts will have to contain the following clause:

The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the legislature. If the legislature fails to appropriate sufficient monies to provide for the continuation of the contract, the contract shall become null and void on the date of the beginning of the succeeding fiscal year from the one in which the contract was initiated.

*Id.*

8. Acts 578 and 742 are probably responses to the recent investigation by the Legislative Audit Advisory Committee into the Division of Administration's controversial lease-purchase agreement for \$6 million worth of Honeywell computer equipment.

two years, must pay a fee of \$3.50. Act 311<sup>9</sup> effects an important change in the renewal period by extending it from two years to four years with a lump sum license fee of \$7.00.<sup>10</sup> The four-year interval should serve as a convenience to Louisiana drivers at no extra cost and should result in savings to the state because of the reduced need for driver's license examiners. Act 311 also provides that out-of-state students who have a valid driver's license from their home state do not need a Louisiana driver's license until ninety days after they stop being students.<sup>11</sup>

Act 122<sup>12</sup> requires the Department of Public Safety to furnish written information concerning gifts pursuant to the Anatomical Gift Act upon the request of any applicant for a driver's license. This provision aids in the implementation of the Anatomical Gift Act by enabling a person who desires to make such a donation to include the relevant information on his or her driver's license.<sup>13</sup>

#### CLAIMS AGAINST THE STATE

As a result of the abolition of sovereign immunity in cases of contract and tort by article 12, section 10, of the Louisiana Constitution of 1974,<sup>14</sup> numerous problems have arisen con-

9. 1978 La. Acts, No. 311, *amending* LA. R.S. 32:404 (1950), 32:409 (1950), 32:412 (Supp. 1970), 32:668(B) (Supp. 1968).

10. LA. R.S. 32:412(A) (Supp. 1970), *as amended* by 1978 La. Acts, No. 311.

11. 1978 La. Acts, No. 311, *amending* LA. R.S. 32:404 (1950).

12. 1978 La. Acts, No. 122, *adding* LA. R.S. 32:410(7).

13. In other action, the legislature enacted Act 35 which eases the restrictions on the length and weight of multiple axle trucks on Louisiana highways, thereby benefiting the state's timber industry. 1978 La. Acts, No. 35, *amending* LA. R.S. 32:382(A), (B) (Supp. 1977), 32:386(I) (Supp. 1977), and *adding* LA. R.S. 32:386(E-I), (K). Finally, acts were passed which: (1) define an established place of business as it pertains to used car dealers, 1978 La. Acts, No. 170, *amending* LA. R.S. 32:719(B)(3) (1950); (2) define a "habitual offender" under the motor vehicle habitual offender law, 1978 La. Acts, No. 310, *amending* LA. R.S. 32:1477(A)(2) (Supp. 1972); and (3) provide for and expand the definition of "dealer" as used in the vehicle certificate of title law, 1978 La. Acts, No. 631, *amending* LA. R.S. 32:702(2) (1950).

14. LA. CONST. art. 12, § 10, provides:

(A) Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

(B) The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

(C) The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment,

cerning who is the proper defendant in an action based on a tort allegedly committed by a public officer or public employee. The jurisprudence has been inconsistent in determining whether the state, a political subdivision, or a particular public officer is the party properly responsible for torts committed by public officers and employees.<sup>15</sup> Until now, the only safe way

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but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid, except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.

15. The major source of trouble in this area lies in determining which employees are working for which entity of state and local governments, and the supreme court has done little to establish coherent guidelines.

In *Honeycutt v. Town of Boyce*, 327 So. 2d 154 (La. App. 3d Cir.), *rev'd on other grounds*, 341 So. 2d 327 (La. 1976), the court of appeals rejected the theory that the town of Boyce could not be liable for the actions of its town marshal because he was an elected official over whose actions the town had no control, and the supreme court agreed that the marshal had been performing a duty incident to his employment with the town when he committed the alleged tort. 341 So. 2d at 330. However, in *Cosenza v. Aetna Insurance Co.*, 341 So. 2d 1304 (La. App. 3d Cir. 1977), the same circuit held that the judge of a city court was a state officer and that therefore neither the city nor the parish was liable for the alleged tortious conduct of the judge-appointed clerk. One of the factors which the court pointed to was the lack of authority in the city and parish to interfere with or direct the activities of the court. The theory that the city's lack of authority over the officer prevented the city from being liable was purportedly rejected in *Honeycutt*; but the clear implication of *Cosenza* is that only the state would be liable for the actions of the clerk, since the clerk was appointed by a state officer.

After *Honeycutt* and *Cosenza*, in *Foster v. Hampton*, 352 So. 2d 197 (La. 1977), the supreme court held that a deputy sheriff was an employee of the state and hinted that the doctrine of respondeat superior would be available to hold the state liable for his actions. In *Foster*, the plaintiff was injured by a deputy sheriff in an automobile accident. The court stated that Foster had a remedy against the deputy sheriff and might further be able to recover from the state, the proper party to sue as employer of Hampton, the deputy. *Id.* at 202. The liability of a sheriff for the acts of a deputy was limited by LA. R.S. 33:1433 (Supp. 1968) to the amount of the liability bond provided by the deputy unless the tort was committed "in compliance with a direct order of, and in the personal presence of, the said sheriff . . ." The court noted the well-settled rule that a sheriff is not liable for the acts of his deputies under the doctrine of respondeat superior because the relationship between the sheriff and his deputy is "official" and not "private." Hence, a sheriff could be held liable only if the deputy's act was an "official" one, and driving a car had previously been held not to constitute an official act in *Gray v. De Bretton*, 192 La. 628, 188 So. 722 (1939). Moreover, the court stated that the sheriff would not be liable even if the act were an official one unless the requirements of LA. R.S. 33:1433 (Supp. 1968) were met. 352 So. 2d at 201. The court also rejected the plaintiff's argument that section 1433 granted immunity to the sheriff in violation of LA. CONST. art. 12, § 10, stating that the statute merely provided a restriction on the sheriff's liability to acts over which he had direct control, and that this restriction had never been based on any theory of governmental immunity. *Id.* at 202. Finally, the supreme court rejected the contention that the parish was

to sue a public officer or employee has been to join as a defendant every entity which could conceivably be held liable, including the state, any relevant political subdivision, the tortfeasor, and any public officer in charge of the tortfeasor. In an effort to clarify some of the confusion resulting from recent judicial decisions, the legislature enacted Act 318.<sup>16</sup>

The thrust of Act 318 is twofold: first, it attempts to eliminate the possibility of state liability for the torts of certain public officers and employees;<sup>17</sup> second, it removes the former limit on the liability of sheriffs for the acts of their deputies.<sup>18</sup> The intent of the Act is to place the potential for liability on those political subdivisions or public officers most closely related to the tortfeasor, but the Act does not give any guidelines for determining which public officer or political subdivision is to be liable in a particular case. Hence, it will still be up to the courts to determine which parties should properly be liable for the torts of a particular officer or employee.

Act 318 makes it clear that the state will not assume liability for the acts of every public officer and employee in the state. The reasons for shifting responsibility away from the state are

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vicariously liable, adopting the opinion of the court of appeals which had pointed to the lack of control of the parish over the activities of the sheriff and his deputies.

These cases do not provide any definite answer to the problem of which governmental entity is liable for the torts of public employees. In *Honeycutt*, the supreme court found a town marshal to be a town employee; yet in *Foster*, the court found that a deputy sheriff was not an employee of the parish, or at least not of the Sheriff's Office, but instead was an employee of the state. Moreover, the language of the court in *Foster* seemed to indicate that a deputy sheriff might not be considered an employee of the state under all circumstances. Finally, the ability to control the actions of the tortfeasor, while seemingly dispositive in relieving the parishes in *Cosenza* and *Foster*, would hardly provide a rational basis for placing the ultimate liability on the state, which has even less control over the activities of the tortfeasor.

16. 1978 La. Acts, No. 318, amending LA. R.S. 33:1433(A) (Supp. 1968), and adding LA. R.S. 42:1441.

17. 1978 La. Acts, No. 318, adding LA. R.S. 42:1441 provides in part:

A. The state of Louisiana shall not be liable for any damage caused by a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision within the course and scope of his official duties, or damage caused by an employee of a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision.

18. 1978 La. Acts, No. 318, amending LA. R.S. 33:1433(A) (Supp. 1968). Under the former provisions, a sheriff was not liable for the acts of his deputies beyond the bond or insurance policy limit required to be furnished by each deputy, unless the act was in compliance with a direct order of, and in the presence of, the sheriff. This limitation on liability was eliminated by Act 318.

readily apparent. The state is in no position to oversee every public officer and employee, whereas the local political subdivisions and public officers may be, and it is more equitable to put the burden on the locality involved. The local populace, through the election process, has more control over its public officers and employees and therefore is in a better position not only to prevent a tort's occurrence, but also to remedy the situation when the tortious act has already been committed. While at first glance it might seem to be more equitable to spread the costs over the entire state, thus reducing the burden which befalls the individual taxpayer, this approach does not address the problem of preventing these torts, because the voters in one part of the state have no voice in the election of local public officers—who in turn select their employees—in another part of the state.

Several problems remain to be solved by the courts. Though it is now clear that the state will not be liable for the acts of the enumerated officers and employees, there is no indication of which other entity should be held liable. In many cases, political subdivisions lack the power to direct the activities of the tortfeasor involved, especially where the tortfeasor is an employee of a public officer. On the other hand, many public officers lack the financial resources necessary to assume liability for the torts of the officer's employees. It may well be that the legislature has attempted to thwart the constitutional waiver of immunity from liability in tort by placing the ultimate responsibility on public officers that do not have the funds necessary to satisfy the immense potential liability. If so, then unless the courts are able to place the liability on those who have the ability to pay, the Act may violate the spirit of the provisions of the new constitution.<sup>19</sup>

The state's liability for the acts of public employees is also the subject of Act 611,<sup>20</sup> which places a \$500,000 limit on the

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19. See note 14, *supra*. In the context of the liability of sheriffs in particular, the new provisions may prove totally futile. Though the statutory limit on liability has been removed, the doctrine of "official duty" remains and was in fact used by the supreme court in *Foster*. See note 15, *supra*. Thus, there still remains a barrier to imposing liability on a sheriff for the torts of his deputy, and many plaintiffs may be denied proper redress for their injury.

20. 1978 La. Acts, No. 611, amending LA. R.S. 40:1299.39 (Supp. 1976). In the Special Session of 1977, the legislature adopted a resolution which suspended the



state's liability for the injury or death of any patient caused through the negligence of any state health care provider and provides for indemnification of health care providers working for or on behalf of the state.<sup>21</sup> The Act also instructs the Attorney General to provide an attorney experienced in medical malpractice claims to act as legal counsel to the Division of Administration in defense of the claim<sup>22</sup> and gives the Division of Administration the right to compromise any claim with the approval of both the legal counsel and the court.<sup>23</sup>

One question which immediately arises is whether this limit on state liability is constitutionally permissible.<sup>24</sup> The effect of the limitation is simply to immunize the state from liability for any amount in excess of \$500,000. The clear language of the constitution does not call for a partial waiver of immunity which would allow the state's liability to be limited. On the other hand, the Act does no more than provide the same ceiling on liability available to private health care workers under the Medical Malpractice Act.<sup>25</sup> The constitutional validity of this act also remains open to question, however, as

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operation of LA. R.S. 30:1299.39 (Supp. 1976). LA. H.R. No. 49, 4th Reg. Sess. (1978). The resolution additionally provided that the state could seek indemnification from any health care provider for whom the state was adjudged liable, but that such a suit could not be instituted until the judgment rendered against the state had become definitive. In addition, a prescriptive period of one year from the date the judgment became definitive was provided.

21. LA. R.S. 40:1299.39(B) (Supp. 1976), as amended by 1978 La. Acts, No. 611. Indemnification with respect to the health care provider is mandated where he was "acting within the course and scope of his employment" for any alleged act of medical malpractice, which is defined by the Act as "any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient." LA. R.S. 40:1299.39(A)(5) (Supp. 1978), as amended by 1978 La. Acts, No. 611.

22. LA. R.S. 40:1299.39(E) (Supp. 1976), as amended by 1978 La. Acts, No. 611. The Division of Administration is charged with investigating the claim, assembling all relevant data, and coordinating a defense to the claim with legal counsel. LA. R.S. 40:1299.39(D) (Supp. 1978), as amended by 1978 La. Acts, No. 611.

23. LA. R.S. 40:1299.39(E) (Supp. 1976), as amended by 1978 La. Acts, No. 611. The compromise is of course subject to the \$500,000 limit on liability, and the procedure for such a compromise is outlined in the statute. If the claim is compromised or results in a judgment for less than \$25,000, the procedure may be disregarded. 1978 La. Acts, No. 611, amending LA. R.S. 40:1299.39(F) (Supp. 1976).

24. See note 14, *supra*.

25. LA. R.S. 40:1299.41-1299.48 (Supp. 1975). For an excellent discussion of the provisions of the Medical Malpractice Act, see *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978).

the Louisiana Supreme Court has not been faced with deciding the issue.<sup>26</sup> It is certain that the limitations of both Act 611 and the Medical Malpractice Act will eventually be tested to determine whether the two provisions meet constitutional standards.

The legislature passed two other noteworthy acts in the area of claims against the state. The first was Act 136,<sup>27</sup> which prevents personal judgments rendered against present or former public officers and employees of the state from becoming executory until the legislature has had the opportunity to appropriate funds to pay them.<sup>28</sup> The Act is interesting in that the state is under no obligation to pay a *personal* judgment rendered against such an officer or employee,<sup>29</sup> as its liability is predicated only upon being cast in judgment in a suit wherein the state is a defendant. Perhaps the Act indicates a desire to indemnify state officers and employees for torts committed during the course of their public service,<sup>30</sup> but the effect of the statute is to force a judgment creditor to wait for money which may never be appropriated and possibly force him to look again to the actual tortfeasor for satisfaction.

Under the present provisions, judgment creditors are at the mercy of the state and its political subdivisions. Absent appropriation of the necessary funds, judgment creditors have no recourse, because public funds and public property are not

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26. In *Everett*, the court expressly stated that it offered no opinion as to the constitutional validity of the maximum recovery provisions of the Medical Malpractice Act, 359 So. 2d at 1262 n.4, perhaps indicating doubts in the minds of some of the justices as to the constitutionality of such a provision.

27. 1978 La. Acts, No. 136, adding LA. R.S. 42:261.3.

28. 1978 La. Acts, No. 136, adding LA. R.S. 42:261.3, which provides in part:

Personal judgments for sums of money rendered against present or former public officers or employees of the state or their estates for acts or omissions in the course of public employment shall not become executory until ninety days after the close of the next regular session following the time such judgments become final, or until such time as the Legislature appropriates funds therefor, whichever occurs first . . . .

29. This statement is subject to one exception. The state must indemnify where the action is one under 42 U.S.C. §§ 1981-83 (1977), the federal civil rights actions, and the tort was not intentional or grossly negligent. LA. R.S. 13:5108.1 (Supp. 1975). Senate Bill 896, which would have provided a general indemnification for all negligent torts committed during the course and scope of employment, failed to pass.

30. The failure of Senate Bill 896 to pass would seem to counter this argument. See note 29, *supra*.

subject to seizure.<sup>31</sup> If the Act were addressed to judgments rendered against the state per se, it would do nothing more than confirm what is already true: judgment creditors must await the legislative appropriation. However, the Act prevents a successful plaintiff from executing a judgment rendered against a person who may be perfectly capable of paying it, with no guarantee that the plaintiff will not be forced, as much as a year later, to look to that same person for satisfaction. While the policy of indemnifying state officers and employees is commendable, the effect of the Act is harsh as to the plaintiff who must now await legislative action.

Act 149<sup>32</sup> also bears on judgments, but this Act concerns judgments rendered by default against the state or one of its instrumentalities. The Act amends the Code of Civil Procedure by adding article 1704, which gives the state added protection against a default judgment by extending from two days to fifteen the necessary time between entry of the preliminary default and confirmation in suits against the state.<sup>33</sup> The addition to the Code is a wise one, as it is easy for a large office which handles so many legal affairs as does the Attorney General's Office to allow a pending trial date to slip by undetected. The new law should not work any undue hardship on a plaintiff, for it merely helps to assure that the state will have the opportunity to present its defense.

#### PRISONS AND PRISONERS

Several problems facing the legislature this session concerned the recent controversies resulting from the overcrowded conditions of Angola State Penitentiary.<sup>34</sup> The first of these problems emerged from attempts to build new prison facilities

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31. LA. CONST. art. 12, § 10. For the text of this provision, see note 14, *supra*. See also *Foreman v. Vermillion Parish Police Jury*, 336 So. 2d 986 (La. 1976).

32. 1978 La. Acts, No. 149, adding LA. CODE CIV. P. art. 1704.

33. Act 149 also requires that notice of the entry of the default judgment be mailed by the plaintiff to the Attorney General or that the sheriff personally serve the Attorney General or his first assistant. 1978 La. Acts, No. 149, adding LA. CODE CIV. P. art. 1704.

34. For an interesting discussion of the prison controversy and attempts to prevent the establishment of new prisons through zoning laws, see Miller, *Zoning and the State's Primary Police Power to Use Its Property in Performing Governmental Functions*. 3 S.U.L. REV. 133 (1977).

in other parts of the state; the result of these attempts was a clamor of protest from residents of the proposed locations. In answer to this outcry, the legislature passed Act 696<sup>35</sup> which prohibits the location, establishment, enlargement, construction or change in character of any prison within two miles of any residential area<sup>36</sup> unless certain procedures are followed. The Act requires the Department of Corrections to give notice of any proposal in the official journal of the parish involved at least once a week for two consecutive weeks<sup>37</sup> and to hold a public hearing in the parish or municipality of the proposed site. The Department must consider the information presented at the hearing for a period of at least thirty days before rendering its final decision.

Although the Act requires the Department of Corrections to follow the procedures outlined above, it does not specify any considerations or factors to guide the Department in reaching its decision. In fact, the Department does not appear to be bound by any of the information received. There are no required findings of fact, nor is it mandated that the decision have any specified basis; the Department is only required to *consider* the information. Hence, even though at first glance the Act purports to be a device for preventing the location of an unwanted prison facility in an area, it does little more than provide a forum for those who wish to object. Perhaps the procedure will encourage the Department to locate any new correctional facilities outside of "residential areas" as that term is defined in the Act, for there is no requirement of notice and hearing unless such an area is involved.<sup>38</sup> If so, it seems likely

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35. 1978 La. Acts, No. 696, adding LA. R.S. 15:891.

36. "An area shall be considered a residential area if it has been zoned or designated as such by the appropriate local governing authority or if within an area of one-quarter square mile or larger there is a population density of two thousand or more persons per square mile." LA. R.S. 15:891(A) (Supp. 1978), added by 1978 La. Acts, No. 696.

37. The notice must contain the following information: (1) the precise location of the proposed site; (2) the exact type of criminal to be incarcerated in the facility; (3) the general degree of security and the type of construction planned; and (4) the date, time, and location of the public hearing. LA. R.S. 15:891(B) (Supp. 1978), added by 1978 La. Acts, No. 696.

38. Even this will be difficult, however, for the local governing authority can classify the area as residential as soon as it learns of the Department's proposal to build in the area. An earlier version of the Act, House Bill 361, would have required the

that future prison facilities will be created in the Angola mold—isolated and hidden from the view of the general public.

A second controversy which has recently arisen concerns inmate furloughs and the use of inmate labor. There were no uniform rules concerning these matters, and in the last session the legislature undertook the task of clarifying the law by setting out guidelines.<sup>39</sup> Under the new law, the Department of Corrections must give final approval to any actions involving prisoners by state agencies which have contracted for the use of inmate labor. Also, inmates transferred to a sheriff's custody through a maintenance agreement shall not be eligible for the sheriff's work release program unless they meet the standards for work release maintained by the Department of Corrections.<sup>40</sup>

Finally, the legislature increased the amount of money which the Department of Corrections must pay to each sheriff for the costs of holding in parish prisons inmates who would otherwise go to the state penitentiary but cannot be placed there due to either a lack of facilities at Angola or a pending appeal.<sup>41</sup> This problem has become particularly acute because

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zoning classification to have been residential at least six months prior to the Department's decision to locate there.

39. LA. R.S. 15:832 (Supp. 1968), *as amended by* 1978 La. Acts, No. 770. The new law provides guidelines for any agency, board, commission, or department contracting for inmate labor with the Department of Corrections. Primarily, it becomes the contracting authority's responsibility to provide for housing and all costs associated with the care and custody of the prisoner; to notify the Department prior to granting any pass, furlough or emergency leave; to permit the inmate to perform only the work for which he was contracted; and to obtain prior approval from the Department before transferring the prisoner to a work release program. LA. R.S. 15:833 (Supp. 1972), *as amended by* 1978 La. Acts, No. 770, requires any prisoner requesting a furlough to submit a furlough plan which must be approved by the Secretary of the Department of Corrections. A responsible member of the inmate's family or some other approved person must sign a responsibility agreement. In addition, persons convicted of particularly serious offenses are ineligible for release except in cases of serious illness or death in the inmate's family or for the purpose of attending an interview with a prospective employer; release under these circumstances may only be with a security escort. *See also* LA. R.S. 48:261 (Supp. 1968), *as amended by* 1978 La. Acts, No. 485, setting forth guidelines for the Department of Transportation and Development in the hiring of inmate labor.

40. LA. R.S. 15:711 (Supp. 1968), *as amended by* 1978 La. Acts, No. 440. Under the old law, each sheriff determined the standards for his own work release programs.

41. LA. R.S. 15:824 (Supp. 1976), *as amended by* 1978 La. Acts, No. 568; LA. R.S. 15:566 (1950), *as amended by* 1978 La. Acts, No. 569.

more and more prisoners sentenced to Angola are being held in parish prisons due to the state penitentiary's lack of space.

The above changes do work toward easing the prison problems now facing Louisiana, but more action is needed in this area. The overcrowding problem worsens as the parish facilities themselves become filled beyond their respective capacities. One major obstacle to be overcome is local resistance to the location of new facilities in populated areas. Angola, however, has proven that there are many problems associated with isolated facilities, particularly those of finding trained personnel willing to work so far away from any city.

### PUBLIC RECORDS

The legislature also enacted some major changes in the Louisiana Public Records Law,<sup>42</sup> one of which extends the right of inspection of public records to all persons over the age of majority.<sup>43</sup> Under prior law, this right was limited to electors, state taxpayers, and their agents.<sup>44</sup> Additionally, under the new statute the procedure for enforcing the public records provisions has been amended and clarified. Now, any person who feels he has been wrongfully denied access to the public records may institute a suit for the issuance of a writ of mandamus or injunctive or declaratory relief.<sup>45</sup> The most significant change from the old law is that attorney's fees and costs are now available to the party prevailing in such an action.<sup>46</sup> Furthermore, if the court finds that the custodian of the records in question acted in an arbitrary, capricious, or unreasonable manner, it may award any actual damages proven by the person requesting the records.<sup>47</sup> The burden of proof is placed on

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42. Title 44 of the Louisiana Revised Statutes of 1950.

43. 1978 La. Acts, No. 686, *amending* LA. R.S. 44:31 (1950).

44. LA. R.S. 44:31 (1950) (as it appeared prior to Act 686 of 1978).

45. The old law merely provided that any suit to enforce the provisions of the Public Records Law must be tried by preference and in a summary manner. Any appeal was required to be disposed of by the appellate court within ten days. LA. R.S. 44:35 (1950) (as it appeared prior to Act 686 of 1978).

46. LA. R.S. 44:35 (1950), *as amended* by 1978 La. Acts, No. 686.

47. The new law provides that "[t]he custodian shall be personally liable for the payment of any such damages and shall be liable in solido with the public body for the payment of the requester's attorney's fees and other costs of litigation, except where the custodian has withheld or denied production of the requested record or

the custodian to justify a denial of access to the records.<sup>48</sup>

These changes are clearly in the public interest. First, by extending the right of inspection to all persons over eighteen, the legislature has provided the opportunity to many who might truly need the information but were not, until now, qualified to obtain it. Second, the new enforcement provisions will insure that people are not denied access to particular records on an unreasonable basis, and the provisions allowing the court to award attorney's fees, costs, and damages will serve to encourage many people who might not otherwise have pressed their valid claims.

### UNEMPLOYMENT

The legislature was quite active in the unemployment area, and several important new laws were passed. Two significant acts were signed into law by the Governor. The first, Act 162,<sup>49</sup> prohibits age discrimination by employers, employment agencies, and labor unions except "where age is a bona fide occupational qualification . . ."<sup>50</sup> Enforcement of the provisions is accomplished through a civil action which may be brought by any person who feels he has been treated discriminatorily in violation of the Act's provisions.<sup>51</sup> The Act's provisions are limited, however, to persons at least forty but less than seventy years of age. Admittedly, persons in this age bracket may need more protection than those in a younger age group, but it is submitted that it would have been wiser not to have stipulated a threshold to the Act's application, for there is always the possibility of age discrimination against persons

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records on advice of the legal counsel representing the public body . . . ." LA. R.S. 44:35(E) (1950), *as amended by* 1978 La. Acts, No. 686. In addition, where the custodian has retained private counsel for his defense, the court may award attorney's fees to the custodian. *Id.*

48. LA. R.S. 44:35(B) (1950), *as amended by* 1978 La. Acts, No. 686.

49. 1978 La. Acts, No. 162, *adding* LA. R.S. 23:971-76.

50. LA. R.S. 23:972(F)(1) (Supp. 1978), *added by* 1978 La. Acts, No. 162. In addition to the prohibition against discrimination because of age, the Act prohibits discrimination against any employee or potential employee who has taken advantage of the rights conferred by the new law. Moreover, employers, labor unions, and employment agencies are prohibited from conducting advertising for prospective employees that contains any preference, limitation, specification, or discrimination based on age.

51. LA. R.S. 23:973 (Supp. 1978), *added by* 1978 La. Acts, No. 162.

who have not reached the age of forty.<sup>52</sup> Thus it would seem that the Act, while purporting to prohibit age discrimination, is itself discriminatory with respect to those persons who do not meet the minimum age requisite to the Act's application.

In a second measure bearing on fair employment practices, the legislature passed Act 341,<sup>53</sup> which defines the effect of a criminal conviction on eligibility for a license, permit, or certificate where it is necessary to engage in any trade, profession, or occupation. Under the Act, a person can not be disqualified solely because of a prior criminal record "except in cases in which the applicant has been convicted of a felony, and such conviction directly relates to the position of employment sought, or to the specific occupation, trade or profession."<sup>54</sup> The Act serves the exemplary purpose of preventing examining boards from denying licenses and permits on the basis of petty offenses and crimes which have no relevance to the applicant's qualifications for the particular job, trade, occupation, or profession. Hopefully, the Act will aid those convicted of minor crimes to find meaningful employment and prevent them from returning to a livelihood of crime.

### *Work Opportunity Program*

Following the lead of other states, the Louisiana legislature enacted Act 512,<sup>55</sup> creating a Work Opportunity Program to be administered in conjunction with unemployment and welfare services. According to the Act, the legislative intent is to "increase employment opportunities and incentives and to

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52. The Act was undoubtedly modeled after the federal provisions which provide a threshold age of forty. 29 U.S.C. § 631 (1978). Admittedly, providing no minimum age would raise problems with minors complaining of age discrimination, but it would seem wiser to restrict the Act's application to all persons over the age of majority, rather than to those over forty.

53. 1978 La. Acts, No. 341, adding LA. R.S. 37:2750.

54. *Id.* Under the Act, any refusal to grant a permit, license, or certificate which is based in whole or in part on the conviction of any crime must explicitly state in writing the reasons for the decision. *Id.* The Act exempts the following groups from its provisions: any law enforcement agency, the Louisiana State Board of Medical Examiners, The Louisiana State Board of Nursing, the Louisiana State Board of Practical Nurse Examiners, the State Racing Commission, the State Athletic Commission, the Louisiana State Bar Association, and the Office of Alcoholic Beverage Control of the Department of Public Safety.

55. 1978 La. Acts, No. 512, adding LA. R.S. 23:1801-09.



upgrade employment skills in order to open the way to permanent self-support . . . .<sup>56</sup> Undoubtedly, the legislature wants to remove from the welfare and unemployment rolls those persons who should not be receiving benefits and hopes to train those who have not been able to find jobs because of a genuine lack of skill:

Under Act 512, the Office of Employment Security is designated as the exclusive agency for administering the program. Any person receiving unemployment benefits must register and participate in the Work Opportunity Program as a condition to future eligibility for benefits.<sup>57</sup> The Office of Family Services determines the eligibility of welfare recipients for the program and turns nonexempted persons over to the Office of Employment Security. Enforcement of the program is relatively simple: any person receiving unemployment benefits who fails without good cause to participate in the program will be disqualified from receiving further benefits until such time as he decides to take part.<sup>58</sup> Welfare benefits will be terminated in a similar fashion, but the procedure relative to notice and hearing is a little more complex.<sup>59</sup>

The Act is a commendable attempt to reduce the number of people on the unemployment and welfare rolls. First, it will aid those who have marketable skills to obtain employment through a job placement program. Second, it will help to teach a trade to those who cannot acquire jobs with the skills they already possess. Finally, through the threat of termination of benefits, the program will force recalcitrant recipients of benefits to become dependent upon themselves for an income. Naturally, whether the plan will work will depend upon the ability

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56. LA. R.S. 23:1801 (Supp. 1978), *added by 1978 La. Acts, No. 512.*

57. Under Act 512, several programs are to be administered by the Office of Employment Security: (1) a job placement and employment training program; (2) an institutional and work experience training program; and (3) a public service employment program. The Office is in charge of placing participants in one of the above programs. Any participant determined to have marketable skills will immediately be placed in job referral and job placement programs. It is also within the authority of the Office to contract with state vocational-technical schools and trade schools to utilize these facilities for the purpose of completing the new programs.

58. LA. R.S. 23:1806 (Supp. 1978), *added by 1978 La. Acts, No. 512.* Determinations of disqualifications can be made only after the participant is afforded an opportunity for a fair hearing.

59. LA. R.S. 23:1807 (Supp. 1978), *added by 1978 La. Acts, No. 512.*

of the Office of Employment Security to implement and maintain the program, but the new law is at least a step in the right direction.

Act 512 was not the only piece of legislation directed at reducing the number of persons receiving unemployment. In Act 517<sup>60</sup> the legislature amended the law relative to eligibility for unemployment compensation by requiring the unemployed individual to conduct an active search for work.<sup>61</sup> Thus, through the combined effect of the Work Opportunity Program and the requirement that unemployment compensation recipients actively seek employment, the legislature hopes to combat the ever-growing cost of unemployment. It is now up to the Office of Employment Security to see that the legislative intent is effectuated by implementing the program and rigidly enforcing the new provisions.

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60. 1978 La. Acts, No. 517, *amending* LA. R.S. 23:1600 (Supp. 1977).

61. LA. R.S. 23:1600 (Supp. 1977), *as amended by* 1978 La. Acts, No. 517. Section 1600 used to require that an individual be both able to work and available for work in order to be eligible for unemployment benefits. LA. R.S. 23:1600 (Supp. 1977). Now, in addition, the individual must actively seek employment under a reemployment assistance plan approved by the assistant secretary for the Office of Employment Security. The plan must take into account the claimant's qualifications for work, the distance of his residence from employment establishments, his prior work history, and current labor market conditions related to his normal and customary occupation.

For union members, an active search for work is satisfied when the member has a reemployment plan and continues to be available to his union for job referrals. To reflect his availability, the individual must report to the hiring hall of his union at least once a week and maintain evidence of having done so by securing the signature of a union official on his unemployment booklet. If the member lives more than ten miles from the union hall, he may fulfill the above requirements by making weekly telephone calls.

## EXPROPRIATION

Under Louisiana's new constitution, the state must compensate landowners for lands expropriated for levees and levee drainage facilities.<sup>1</sup> In Act 314,<sup>2</sup> the legislature endeavored to define the measure of compensation due for land expropriated for such purposes. The Act provides that the measure of the landowner's loss is to be determined by two separate evaluations, one for property actually taken or destroyed and a second for any change in value to the land remaining. Under the new Act, improvements resulting from the levee work are balanced against the damage caused by that work in order to determine the owner's actual losses. This balancing is accomplished by determining the value of the land immediately before the work and then again immediately after. If the property not actually taken or destroyed has suffered no decrease in value due to the levee work, then there has been no loss as to that portion of the property, and therefore the landowner will only be entitled to compensation for the value of any land that he actually loses.

However, as to any land actually taken there can be no consideration of any possible increase in value resulting from the construction of levees or levee drainage facilities simply because any benefit realized by this portion of the property will not inure to the landowner. Thus, while improvements on any part of the property may be considered inasmuch as they affect the value of the property not taken or destroyed by the levee project, these improvements may not be considered in the ultimate determination of the value of the land which is taken or rendered unusable. This new procedure is within the mandate of the new constitution, which merely provides that the owner must be compensated as provided by law,<sup>3</sup> and the standard is more than equitable to the landowner who may even receive a windfall where the value of his land remaining is enhanced beyond the amount of any damages caused.

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1. LA. CONST. art. VI, § 42, provides in part: "Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law."

2. 1978 La. Acts, No. 314, amending LA. R.S. 38:281 (Supp. 1977).

3. See note 1, *supra*.

## STATE AND LOCAL GOVERNMENT

## SALARIES

The 1978 regular legislative session was significantly involved in supplementing the salaries of various locally elected officials. Legislation to increase the pay of judges began with a measure mandating a six percent increase annually. This annual six percent increase was later deleted, but a joint conference committee eventually established an eight percent increase for the 1978-1979 fiscal year.<sup>1</sup> Act 208<sup>2</sup> increases the annual salaries of the justices of the supreme court from \$50,000 to \$54,000, increases the annual salaries of the courts of appeal judges from \$47,500 to \$51,300, and increases the annual salaries of the district judges from judicial districts having a single parish with a population of 225,000 or more from \$45,000 to \$48,000.<sup>3</sup> The annual salaries of the rest of the district judges were increased from \$42,500 to \$45,900.<sup>4</sup>

Legislation supplementing the salaries of parish coroners was passed for the first time during the 1978 regular legislative session. Act 104<sup>5</sup> provides that any coroner who is presently paid either a salary or a salary plus fees will also be paid \$500 per month by the state. Any coroner who is paid only fees will now be paid \$500 per month by the state and may be paid an

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1. Baton Rouge Sunday Advocate, July 16, 1978, § A, at 14.

2. 1978 La. Acts, No. 208, *amending* LA. R.S. 13:102 (1950), 13:311 (1950), 13:691(A), (B) (Supp. 1975).

3. Included in the measure supplementing the salaries of the district judges are the civil district court judges and the criminal district court judges of the parish of Orleans, the magistrate of the criminal district court for the parish of Orleans, the judges of the juvenile courts for the parishes of Orleans, Caddo, and Jefferson, and the judges of the family court of East Baton Rouge Parish.

4. 1978 La. Acts, No. 640, *amending* LA. R.S. 13:1875 (1950), 13:2152(A) (1950), provides that the judges of the city court of Monroe shall be paid \$1,080 monthly by the city of Monroe and \$432 monthly by the parish of Ouachita, in addition to their state salary of \$14,600 per annum. The Act further provides that the salary of the judges of the First City Court of the city of New Orleans shall be \$41,500 per annum, of which \$14,600 shall be paid by the state and \$26,900 shall be payable out of the Judicial Expense Fund of the Parish of Orleans. 1978 La. Acts, No. 107, *adding* LA. R.S. 13:1875(12), also increases the annual salary of the city court judge of Alexandria.

5. 1978 La. Acts, No. 104, *adding* LA. R.S. 33:1558.1, and *amending* LA. R.S. 33:1621 (1950).

additional \$500 per month by the parish. The Act excludes those coroners who are presently paid \$25,000 a year or more. The Act also eliminates the ceiling on the salary of the Orleans Parish coroner and provides that he will receive a minimum salary of \$12,000 per annum.

Act 204<sup>6</sup> raises the salaries of the sheriffs of the various parishes by \$4,000 per annum and continues to permit them to use the hefty expense allowances that they receive in addition to their salaries in any manner that they choose, without having to document expenditures. The Act sets each sheriff's salary in accordance with the population of the particular parish he serves, with the pay scale ranging from \$29,675 to \$42,435. The amount granted to sheriffs as an expense allowance in addition to their salaries is equal to ten percent of their regular pay.<sup>7</sup> House members had added language to the sheriffs' pay raise bill<sup>8</sup> to limit their expense allowances either to "official use" or to those expenditures meeting the approval of the Legislative Auditor,<sup>9</sup> but the Senate deleted the "official use" limitation and the bill was finally passed in that form. It is interesting to note that a Sheriff's Salary Fund exists completely apart from the ten percent expense allowance, and this fund can be used to pay for clerical expenses, salaries of the sheriff and his deputies, reasonable attorney fees for legal services, premiums on bonds required by sheriffs and deputies, undercover operational duties, membership dues for various sheriffs' associations, and uniforms and clothing.<sup>10</sup> The sheriffs may also use ten percent of the fund to promote youth or junior deputy programs. It should be noted, however, that the use of the salary fund is not restricted to those expenses listed, and it seems likely that this fund is adequate to pay for most, if not all, of the expenses incurred in performing the duties of a sheriff. Therefore, by allowing the sheriffs to keep the ten percent expense allowance which need not be limited to "official use," the legislature only obscures the total amount of the salary which is actually received.

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6. 1978 LA. Acrs, No. 204, *amending* LA. R.S. 33:1421(A) (1950), and *adding* LA. R.S. 33:1321(E).

7. LA. R.S. 33:1421(B) (1950 & Supp. 1976).

8. La. H.B. 725, 4th Reg. Sess. (1978).

9. Baton Rouge State Times, June 21, 1978, § A, at 18.

10. LA. R.S. 33:1422 (1950 & Supp. 1968).

Clerks of the district courts of the various parishes, Orleans excepted, also received an increase in their annual salaries. Act 577<sup>11</sup> provides that each clerk of court will receive an increase in salary of \$4,000 per annum and, in addition, will be allowed to continue to keep an expense allowance equal to five percent of his salary.<sup>12</sup> The salaries of the various clerks will be based on the populations of the parishes they serve. Pursuant to Act 323,<sup>13</sup> the clerks and deputy clerks of each court of appeal will also receive an increase in annual salary; the clerks will now receive \$25,500 per annum while the deputy clerks will receive an annual salary of \$21,500.

Act 31<sup>14</sup> relates to an increase in the salaries of various tax assessors in the state and provides for increases ranging from \$4,400 to \$5,800 per year. The tax assessors will now be paid annual salaries varying from \$26,640 to \$34,602, depending upon the population of the parish served.

Act 220<sup>15</sup> continues to give school board members the option of receiving compensation either through an expense allowance or on a per diem basis. The per diem rate remains at \$50 per day, but the maximum number of meetings allowed in one year has been raised from 100 to 144. Under the prior law,<sup>16</sup> school board members could collect \$350 per month plus per diem for one board committee meeting per month, in lieu of straight per diem, and compensation of up to \$550 per month was permitted in parishes with a population of more than 275,000 persons. Act 220 now permits school board members to receive an expense allowance not to exceed \$600 per month, with \$700 allocated for the school board presidents. The Act requires any school board to advertise its intent to vote on whether the board will be paid per diem or by expense allowance, and a two-thirds vote of a school board is required before any increase in compensation can be approved. In addition to

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11. 1978 La. Acts, No. 577, adding LA. R.S. 13:782(J), (K).

12. This expense allowance of five percent of the clerk's salary is provided for in LA. R.S. 13:782(H) (Supp. 1974).

13. 1978 La. Acts, No. 323, amending LA. R.S. 13:351(A), (B) (1950).

14. 1978 La. Acts, No. 31, amending 47:1907(B) (1950), 47:1911(A), (B) (1950), and adding LA. R.S. 47:1907.1.

15. 1978 La. Acts, No. 220, amending LA. R.S. 17:56(A) (1950), and adding LA. R.S. 17:56(D).

16. LA. R.S. 17:58(A) (1950 & Supp. 1976).

the per diem or expense allowance, a school board member is eligible to collect mileage expenses at the rate of sixteen cents per mile.

#### RETIREMENT

Substantial changes in the law governing the state retirement system were made during the 1978 regular legislative session. Act 347<sup>17</sup> provides for a cost-of-living increase in retirement benefits for persons in the State Teacher's Retirement System, and the Act gives the board of trustees of the retirement system the option of granting a three percent increase in benefits, up to a maximum of \$900 annually. The amount received will be based in part on the salary collected while the individual was publicly employed, and any supplemental adjustments in benefits are to reflect fluctuations between the annual Consumer Price Indexes of the two preceding years. It is significant that this act removes an existing provision which restricted cost-of-living increases to those retiring before 1975.

Act 748<sup>18</sup> appropriated the sum of \$1,600,000 out of the state's General Fund for the teachers' retirement system to provide funds for a one and one-half percent cost-of-living increase, but the system itself will have to support the other half of the cost-of-living increase. It should be noted that the system now has a \$1 billion unfunded liability. Furthermore, last year the system paid out \$80 million in retirement benefits, but earned only \$60 million, and had to make up the difference from the contributions of teachers who are still working. Thus, the expenditure for the cost-of-living increase could add to the financial instability of the teachers' retirement system.

Act 643<sup>19</sup> provides for the transfer of LSU faculty into the State Teachers' Retirement System and transfers all other LSU employees into State Employment Retirement System, thus eliminating the existing LSU Retirement System. All new memberships covered by the Act will be determined in accord-

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17. 1978 La. Acts, No. 347, *adding* LA. R.S. 17:635.7.

18. 1978 La. Acts, No. 748.

19. 1978 La. Acts, No. 643, *abolishing* the Louisiana State University Retirement System, as established by LA. R.S. 17:1611-44 (Supp. 1971), and *adding* LA. R.S. 17:700.2.

ance with the existing guidelines of the two systems. The rationale behind the transfer seems to be that because the LSU Retirement System was tied to the Social Security System, and because Social Security costs are constantly increasing, it would cost the state more to continue to fund the LSU system than to transfer these individuals into the other two systems.

The 1978 legislative session also changed the compulsory retirement age of public employees. Act 160<sup>20</sup> provides for the compulsory retirement at age seventy of all public employees except elected officials and department heads appointed by the governor. However, the Act also provides for continuance in service beyond age seventy for one-year intervals upon certification by the employee's appointing authority that such continued employment would be advantageous to the public.

One of the most significant bills affecting Louisiana's retirement system was Senate Bill 18,<sup>21</sup> which was primarily introduced to stop the practice of "double dipping," whereby a state employee works for the state for twenty years, retires, and then secures other employment while drawing retirement benefits from the state. The bill would have raised the retirement requirements to thirty-five years of employment or sixty-two years of age and hopefully would have helped reduce the \$2 billion in unfunded accrued liability which the state now owes state workers in future retirement benefits. The bill passed the Senate but was not acted upon in the House.

### ELECTIONS

Act 38<sup>22</sup> was enacted this session in an attempt to correct some of the problems with the 1976 Election Code.<sup>23</sup> One of the most important changes is the establishment of separate provisions for filling a vacancy in the office of judge.<sup>24</sup> The amend-

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20. 1978 La. Acts, No. 160, *amending* LA. R.S. 42:691 (Supp. 1950), and *repealing* LA. R.S. 16:1042(6) (Supp. 1956), 17:634 (Supp. 1976), 17:912 (1950), 17:1262(6) (Supp. 1976), 17:1623(B) (Supp. 1972), 18:1732(6) (Supp. 1974), 33:6172(D) (Supp. 1958), 33:7272(7) (Supp. 1965), 42:572 (1950). This new provision relative to compulsory retirement age is in accord with the "Age Discrimination in Employment Act of 1978," 29 U.S.C. § 631 (1978).

21. La. S.B. 16, 4th Reg. Sess. (1978).

22. 1978 La. Acts, No. 38, *amending* La. R.S. tit. 18 (Supp. 1976).

23. Title 18 of the Louisiana Revised Statutes as amended in 1976.

24. Under the old law, the office of judge was subject to the same rules as



ment places the authority to call a special election to fill such a vacancy in the hands of the governor<sup>25</sup> and, more importantly, gives the governor some discretion in fixing the dates for the special elections.<sup>26</sup> Apparently, the purpose of this legislation is to provide a more expedient procedure for filling judicial vacancies, which is a necessary change in view of the already overcrowded dockets of the Louisiana courts.

Act 38 also contains an addition to the Louisiana Election Code providing a uniform resignation procedure for all elected officials except members of the legislature and Congress.<sup>27</sup> Under the Act, a resignation must be filed with the Secretary of State,<sup>28</sup> who must immediately send notice of the vacancy

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virtually all other elective offices. LA. R.S. 18:402 (Supp. 1977). Act 38 provides a new procedure which mandates that within twenty-four hours of learning of the vacancy, the supreme court shall give written notice to the Governor. Within ten days of this notice, the Governor shall determine the dates of the qualifying period and the dates on which the special elections shall be held and shall issue a proclamation ordering the elections. LA. R.S. 18:402 (Supp. 1978), *added by* 1978 La. Acts, No. 38.

25. Prior to its amendment in 1978 by Act 38, LA. R.S. 18:402 (Supp. 1976) merely provided for the "appropriate authority" to issue the proclamation calling the election.

26. LA. R.S. 18:621 (A) (Supp. 1978), *added by* 1978 La. Acts, No. 38, provides in part: "In determining the dates on which the special elections are to be held, *to the extent feasible* the governor shall call the elections in accordance with the provisions of R.S. 18:402." (Emphasis supplied.) This language allowing dates differing from those mandated by section 402 is found in no other provision requiring special elections to fill vacancies.

27. 1978 La. Acts, No. 38, *adding* LA. R.S. 18:651-54. In *McKenzie v. Edwards*, 361 So. 2d 880 (La. 1978), it was alleged that Act 38 violated the Louisiana Constitution by allowing a special election to be called based upon an *anticipated* vacancy in a city court judgeship. The supreme court found Act 38 to be inapplicable to the case, however, because it had not yet been approved by a three-judge federal court or the Department of Justice as required by the Federal Voting Rights Act, 42 U.S.C. § 1971-74(e) (1976). The court, basing its decision on the Louisiana Constitution, found that there was no prohibition against the calling of a special election on the basis of an anticipated judicial vacancy. The court noted that article 10, section 28, of the constitution provides that a vacancy occurs in the event of a resignation and the Governor is empowered to call a special election to fill a judicial vacancy when it occurs. The fact that the resignation in question was prospectively effective did not prevent the vacancy from occurring on the date the resignation became irrevocable, for upon that date the vacancy was certain to occur. The court stated that allowing vacancies to be filled in this manner assured continuity in office. While the decision was not based on Act 38, it is now clear that the provisions allowing special elections based upon anticipated vacancies do not violate the Louisiana Constitution.

28. The filing may be in person or by certified mail. LA. R.S. 18:652, *added by* 1978 La. Acts, No. 38. In addition, the resignation must be in writing, dated, and signed by the resigning official before an officer authorized to administer oaths. *Id.*

to the authorities charged with making a temporary appointment and calling a special election.<sup>29</sup> The resignation thus submitted becomes irrevocable three days after the Secretary's notice is sent.<sup>30</sup>

Also related to elections is Act 580<sup>31</sup> which presents an interesting change in the law. Under the former law,<sup>32</sup> the polling place of a precinct had to be within that precinct. Under the change provided by Act 580, however, a polling place may be located outside of a precinct when "after the exercise of due diligence, the governing authority . . . is unable to secure a location for a polling place within the precinct."<sup>33</sup> The change was undoubtedly prompted by *Charbonnet v. Braden*<sup>34</sup> in which an election was contested on the ground that one of the polling places had been moved outside the boundaries of the precinct it served and notice of the move was only posted the day before the election. The court of appeal found that the troublesome problem was not that the polling place was outside of the precinct, but rather that notice of the move was inadequate. However, the court held that the plaintiff had failed to establish that the move had been prejudicial to him.<sup>35</sup>

The legislature addressed the problem by providing a procedure by which a polling place may be located outside of the precinct. The change thus recognizes a recurrent problem which is particularly acute in New Orleans—the inability of local authorities to secure adequate polling facilities in each precinct. In *Charbonnet* it was noted that other polling places had been located out of their respective precincts, but that these had not been contested.<sup>36</sup> Under Act 580 the local authorities may now secure polling places outside of the precinct without violating the Election Code.

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Further, the resignation may specify a prospective date upon which the resignation will be effective. *Id.*

29. LA. R.S. 18:653 (Supp. 1978), added by 1978 La. Acts, No. 38.

30. LA. R.S. 18:654 (Supp. 1978), added by 1978 La. Acts, No. 38.

31. 1978 La. Acts, No. 580, amending LA. R.S. 18:533 (B) (Supp. 1977), and adding LA. R.S. 18:536.

32. LA. R.S. 18:533 (B) (Supp. 1977).

33. LA. R.S. 18:533 (B) (Supp. 1977), as amended by LA. ACTS, No. 580.

34. 358 So. 2d 360 (La. App. 4th Cir.), cert. denied, 357 So. 2d 560 (La. 1978).

35. *Id.* at 362-63.

36. *Id.* at 361.

*Presidential Elections*

In a close vote, the House of Representatives defeated Senate Bill 11 which would have provided for presidential primaries in Louisiana. According to its proponents, the bill would have permitted greater public participation in the selection of presidential candidates by establishing a primary system for the election of delegates to the national conventions of the respective political parties.<sup>37</sup> Opponents of the bill, however, argued that the costs involved in holding these primaries would be too high.

Under the proposed measure, districts would have been created paralleling either Senatorial or Congressional districts, depending on the number of delegates allowed to the state. Persons who ran as delegates committed to a particular candidate would have been required to vote for that candidate on the first ballot of the nominating convention. No delegate would have been allowed to subvert the election process by running as one committed to a particular candidate and then voting for another candidate once he reached the convention. After the first ballot, however, each delegate would have been free to vote for the candidate of his choice and would not have been forced to continue to vote for a candidate whose chances of nomination appeared hopeless after the first ballot.

This bill would have allowed earlier voter participation in the selection of a president by allowing the voters to pick delegates to the nominating conventions based on the particular delegate's commitment to a candidate. It is unfortunate that the measure, or some compromise version thereof, failed to pass the legislature, but hopefully, future attempts will be

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37. In the past, the procedure for electing delegates to the nominating conventions has been left to the discretion of the parties. Each of the state central committees submits a plan to the respective national party committees for approval. In the last presidential race, the Republican Party used a procedure whereby caucuses were held in each congressional district. Persons were elected to attend the state convention at which three delegates and three alternates were elected from each district to attend the national convention. The Democratic party, on the other hand, provided for elections within each congressional district and four delegates from each district were chosen. A state convention was later held and at-large delegates were selected. In addition, the Democratic party had several ex-officio members, including the Governor and the state party chairman.

more successful and Louisiana will join the large number of states presently holding presidential primaries.

### THE JUDICIARY

Act 39<sup>38</sup> of the 1978 legislative session will greatly aid the administration of justice in Louisiana by creating additional district judgeships in ten Judicial Districts<sup>39</sup> and by adding a new commissioner in the magistrates section of the criminal district court for Orleans Parish. With this expansion of the judicial system, the legislature hopes to reduce the problem of overcrowded court dockets.

In another measure, Act 571,<sup>40</sup> the provisions of the 1921 Constitution relative to the retirement of judges<sup>41</sup> were amended and reenacted as a part of the Revised Statutes.<sup>42</sup> The new provisions reduce the mandatory retirement age for judges from seventy-five years to seventy, except in the case of judges already over seventy. These judges may continue to serve until they have completed twenty years of service or until they reach the age of eighty, whichever occurs first.<sup>43</sup>

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38. 1978 La. Acts, No. 39.

39. 1978 La. Acts, No. 39. The districts are the First, Second, Fifth, Seventh, Ninth, Fifteenth, Nineteenth, Twenty-second, Twenty-fourth, Twenty-ninth, and Thirty-eighth Judicial Districts. The Thirty-eighth Judicial District was created by 1978 La. Acts, No. 14.

40. 1978 La. Acts, No. 571, adding LA. R.S. 13:30.

41. LA. CONST. of 1921, arts. 7, 8, 13. These provisions were continued as statutes by La. Const. arts. 14, 16 (A)(5).

42. 1978 La. Acts, No. 571, adding LA. R.S. 13:30. These provisions of the 1921 constitution, see note 40, *supra*, became LA. R.S. 13:30 (Supp. 1978).

43. LA. R.S. 13:30 (B) (Supp. 1978), added by 1978 La. Acts, No. 571. It should be pointed out that Act 571 creates a windfall for judges who are now over the age of seventy. Under the old provisions, those judges would face mandatory retirement at the age of seventy-five. However, by virtue of the change intended to lower the mandatory retirement age for judges, those judges now over the age of seventy may serve until the age of eighty, unless of course they attain twenty years of service first. Other measures bearing on retirement include the following: 1978 La. Acts, Nos. 67, 344 (State Employees' Retirement System); 1978 La. Acts, Nos. 347, 390, 648 (Teachers Retirement System); 1978 La. Acts, No. 532 (State Police Pension and Retirement System); 1978 La. Acts, No. 533 (Judges and Court Officers); 1978 La. Acts, No. 579 (Assessors' Retirement Fund); 1978 La. Acts, No. 643 (Abolition of Louisiana State University Retirement System); 1978 La. Acts, Nos. 727, 787 (Uniform Procedure for Disability Retirement in Public Retirement Systems); and 1978 La. Acts, No. 788 (Municipal Employees' Retirement System).

## GOVERNMENTAL ACCOUNTABILITY

The new Louisiana Constitution requires the legislature to enact a Code of Ethics for all public employees and officials.<sup>44</sup> The task proved to be too controversial for this year's session, however, and when the legislature adjourned, none of the proposed ethics provisions had survived.<sup>45</sup> The House of Representatives, frustrated by Senate amendments which for the second straight session virtually destroyed the House's version of the ethics bill, adopted a resolution urging the legislature to at least adopt a Code of Ethics for itself in the next session.<sup>46</sup> Hence, the controversy is far from over, for the constitutional mandate remains to be met, and one of the highlights of the next legislative session necessarily will be the topic of governmental ethics.

Although the legislature could not agree on the provisions of a new Code of Ethics, it did manage to pass legislation in other areas of governmental accountability. One of these provisions was Act 456<sup>47</sup> which prohibits public boards, bodies and agencies<sup>48</sup> from utilizing any manner of proxy voting procedure.<sup>49</sup> The Act is to be applauded as one that prevents an individual who has been placed in a position of public trust from shirking his responsibilities simply by sending in a substitute. While there are instances where public officials can not, for good reason, attend a particular meeting, the potential for abuse of a proxy voting procedure is tremendous.

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44. LA. CONST. art. 10, § 21.

45. House Bill 334, as originally passed by the House, would have created two ethics commissions, one for elected officials and another for public employees. However, the bill was completely rewritten in Senate committee and as a result of the committee's changes, two ethics commissions would have been required for every parish in the state. The House was not willing to accept this change, nor was the Senate willing to accept the original House version, and the bill was never passed.

46. La. H. R. Con. Res. No. 29, 4th Reg. Sess. 1978.

47. 1978 La. Acts, No. 456, *amending* LA. R.S. 42:5 (Supp. 1976).

48. The Act's application extends to governing boards and bodies holding meetings that are required to be open to the public by LA. R.S. 42:5(A) (Supp. 1976) and to state agencies that are defined as boards and commissions subject to the Administrative Procedures Act, LA. R.S. 49:951-68 (Supp. 1966).

49. The Act also provides for a penalty of either a fine of not more than \$500, or imprisonment for not more than six months, or both, for any member of a governing board, body, or state agency violating the provisions.

## LOBBYING

One area which incited much heated debate this year concerned the regulation of lobbying and lobbyists. Though much reform legislation was proposed, little managed to survive the legislative process. One comprehensive bill on lobbying never got out of committee in its house of origin.<sup>50</sup> A second bill, Senate Bill 871, fared better, but proponents could not muster enough support for final passage. The Senate Bill would have required lobbyists to make financial disclosures for all expenditures made for lobbying purposes in a "quarterly lobbyist activity report." One of the asserted purposes of the bill was to increase public awareness of the magnitude of lobby efforts. The bill was extremely controversial, and a similar measure is certain to be proposed in the next legislative session.

## EXECUTIVE REORGANIZATION

In continuing the implementation of the executive reorganization mandated by the new Louisiana Constitution,<sup>51</sup> the legislature passed two Acts. The first, act 350,<sup>52</sup> provides that the newly created Joint Committee on Legislative Oversight shall be the successor to the Joint Legislative Committee on Reorganization of the Executive Branch. Further, the Act provides that all executive departments shall be subject to the reporting requirements set forth in sections 956-58 of title 36 of the Louisiana Revised Statutes.<sup>53</sup>

In Act 357,<sup>54</sup> the legislature created the Joint Committee on Legislative Oversight and set forth its composition,<sup>55</sup> pur-

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50. LA. H.B. 1553, 4th Reg. Sess. (1978).

51. LA. CONST. art. 14 § 6. The first stage of executive reorganization culminated in 1975 La. Acts, No. 720, which enacted title 36 of the Louisiana Revised Statutes. This title was amended and reenacted a second time by 1976 La. Acts, No. 513, and a third time by 1977 La. Acts, No. 83.

52. 1978 La. Acts, No. 350, adding LA. R.S. 36:959.1-59.2.

53. 1978 La. Acts, No. 350. Sections 956-58 provide for the filing, with the committee, of reports that provide the goals of the department; information relative to the budget request to be made by the department for the next fiscal year; and information relative to continued reorganization and improved and more efficient operation and management of the department. Prior to the addition, only the departments set forth in LA. R.S. 36:951-57 (Supp. 1977) were required to make such reports.

54. 1978 La. Acts, No. 357, adding LA. R.S. 36: 671-711.

55. The Committee is composed of four senators, four representatives, the Speaker of the House, and the President of the Senate. LA. R.S. 36: 672 (Supp. 1978), added by 1978 La. Acts, No. 357.

poses, and duties. In essence, the primary responsibility of the Committee is to conduct studies and propose legislation necessary for the continued reorganization of the Executive Branch.<sup>56</sup> The Committee has been given wide investigatory powers, enforceable through the contempt power, to carry out its duties.<sup>57</sup> Additionally, the Committee is charged with reporting its findings and recommendations, together with a draft of proposed legislation, to the legislature<sup>58</sup> and is empowered to conduct "program reviews"<sup>59</sup> of particular programs at the request of any legislator, legislative committee, elected state official, or state department or agency head. Further, the Committee is charged with coordinating and assisting in the implementation of the Sunset Law<sup>60</sup> and any subsequent legislation relative to the termination of statutory agencies. Under the Sunset Law, each state agency basically must justify its existence or face possible termination or absorption into another entity.

Act 357 also continues the Joint Legislative Audit Advisory Council and provides for its composition and duties. The Council's primary function is to aid the Legislative Auditor in preparing each annual budget.<sup>61</sup> The Council is given broad investigatory powers with which to carry out its responsibilities.<sup>62</sup>

With these acts the legislature has provided for a continuing program of reorganization in an effort to provide a more streamlined government. Although one unfortunate by-product of these annual reports and reorganizations is a degree

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56. LA. R.S. 36:672(C) (Supp. 1978), *added by* 1978 La. Acts, No. 357.

57. LA. R.S. 36:674 (Supp. 1978), *added by* 1978 La. Acts, No. 357.

58. LA. R.S. 36:676 (Supp. 1978), *added by* 1978 La. Acts, No. 357.

59. A "program review" is defined as a "concentrated, in-depth study and evaluation of a particular program of state government to determine: 1) whether it accomplishes its intended purposes; 2) whether it is conducted as effectively and efficiently as possible in terms of services rendered, benefits achieved, and purposes accomplished and in terms of economic costs; 3) whether the program should be modified or eliminated; or 4) what specific changes should be made in the program." LA. R.S. 36:691(B) (Supp. 1978), *added by* 1978 La. Acts, No. 357.

60. 1976 La. Acts, No. 277.

61. LA. R.S. 36:552-53 (Supp. 1977), *as amended by* 1978 La. Acts, No. 357.

62. LA. R.S. 36:554 (Supp. 1977), *as amended by* 1978 La. Acts, No. 357. In addition to its power to investigate, the Council may punish for contempt. LA. R.S. 36:555-56 (Supp. 1977), *as amended by* 1978 La. Acts, No. 357.

of confusion and uncertainty among the various state agencies, it is hoped that in the long run these efforts will produce better service with greater efficiency and lower costs. With growing taxpayer dissatisfaction with the present levels of government spending, the need for more efficiency has clearly arisen.



## STATE AND LOCAL TAXATION

## "FIRST-USE" TAX

Perhaps the most important piece of legislation produced by the 1978 legislative session was Act 294, the so-called "first-use" tax on natural gas.<sup>1</sup> This tax will be levied on natural gas which is produced from the federally-controlled outer continental shelf and piped through Louisiana on its way to consumers in other states. The tax will be paid by the companies that own the gas, who are then expected to pass the cost on to out-of-state customers. First-use tax credits have been designed to protect Louisiana producers and consumers from the impact of the tax.<sup>2</sup> The tax will become effective this year and is expected to generate revenues of approximately \$170 million per year.<sup>3</sup> However, the tax is presently under constitutional attack<sup>4</sup> and until the litigation comes to an end, the state has agreed to place all proceeds from the tax into a special escrow account. Should the state lose the case, all proceeds would be returned to the taxpayers.<sup>5</sup>

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1. 1978 La. Acts, No. 294, adding LA. R.S. 47:1301-07. This Act provides for the levy and collection of a tax upon the first use of natural gas produced outside the territorial limits of the state. Act 294 defines "use" as:

the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquifiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

2. See *The Proposed First-Use Tax on Natural Resources: Hearings On H.B. 768 Before The Revenue and Fiscal Affairs Comm. of the Louisiana Senate*, 4th Reg. Sess. (1978) [hereinafter cited as *Use Tax Hearings*] (Statement of A. C. Gardner, Jr., Southeastern Production Division Manager, Exxon Co., June 26, 1978).

3. Louisiana presently levies a tax of seven cents per thousand cubic feet on natural gas at the point it is "severed" from the ground. Louisiana receives almost \$500 million a year in revenues from severance taxes on oil and natural gas. The first-use tax will be levied at a similar rate of seven cents per thousand cubic feet. Estimates are that the tax will produce revenues of approximately \$170 million a year. Thus, the tax could extinguish the existing state debt of \$1.7 billion in ten to fifteen years. *Baton Rouge Morning Advocate*, June 7, 1978, § B, at 1.

4. *Federal Energy Regulatory Comm'n v. McNamara*, No. 78-384 (M.D. La. 1978).

5. *Baton Rouge Morning Advocate*, June 7, 1978, § B, at 1.

Act 293<sup>6</sup> provides for the dedication of the revenues from the tax by dividing the monies into two primary funds. Twenty-five percent of the revenues will go into the Barrier Islands Conservation Account and will be used exclusively to conserve and maintain Louisiana's eroding coastline.<sup>7</sup> The remaining seventy-five percent of the revenues will be deposited into the Initial Proceeds Account and the Debt Retirement and Redemption Account. The Initial Proceeds Account will receive the first \$500 million of the tax proceeds. This sum must be maintained in the account at all times and may be used only for investment purposes. All monies in excess of the first \$500 million will be placed in the Debt Retirement and Redemption Account and, except for investment purposes, may be used solely to pay interest on current state debt, to retire outstanding state debt, or to purchase state bonds in advance of maturity. In the event the Debt Retirement and Redemption Account is not funded or for any reason is depleted, any portion of the Initial Proceeds Account's investment earnings that are not necessary to provide the required \$500 million balance may be used for any purpose for which the Debt Retirement and Redemption Account may be used.

Act 797<sup>8</sup> proposed an amendment to article IX of the state constitution which would create the First Use Tax Fund in the state treasury and establish the procedure for distribution of the proceeds of the trust fund. The proposed amendment was overwhelmingly approved by the voters of Louisiana last November, which means that seventy-five percent of the funds generated by the first-use tax may be spent only for the purpose of reducing the state's bonded indebtedness. Passage of the amendment also insures that the established procedure for distribution of the proceeds will be insulated from any future legislative alteration.

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6. 1978 La. Acts, No. 293, adding LA. R.S. 47:1351.

7. In *The Tidelands Case*, 394 U.S. 11 (1969), the United States Supreme Court held that the state's three-mile limit is "ambulatory," and therefore it is subject to change as the state loses its coastline through erosion. The Barrier Islands Conservation Account will serve to protect against erosion and the resulting change in the three-mile limit.

8. 1978 La. Acts, No. 797. This act proposed the addition of a ninth section to article IX of the 1974 constitution. It should be noted that Act 797 represented the first proposed amendment to the 1974 constitution submitted to Louisiana voters for approval or rejection.

Proponents of the first-use tax offer two justifications for the tax. First, they argue that the state is due compensation from out-of-state consumers for damage to Louisiana's coastal regions caused by the activities accompanying the production of the natural gas.<sup>9</sup> Secondly, proponents argue that because untaxed federal gas competes in the same markets as state gas, which is taxed at seven cents per thousand cubic feet, sellers of federal gas gain an unfair competitive advantage.

Opponents of the tax contend that because it exempts gas produced within this state (intrastate gas) and also interstate gas upon which severance taxes have been paid to other states, it is discriminatory in nature. Opponents also contend that the "pass-through" provision,<sup>10</sup> which passes the cost of the tax on to consumers in other states, amounts to an abrogation of existing contracts between producers and pipeline companies. Furthermore, opponents contend that the tax is in violation of the Outer Continental Shelf Lands Act;<sup>11</sup> is neither fairly apportioned between interstate and intrastate commerce, nor fairly related to any benefit provided to the taxpayer; and is in violation of federal constitutional prohibitions against individual

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9. Baton Rouge State Times, June 13, 1978, § B, at 1.

10. One of the key features of the tax is a "pass-through" provision which, if approved by the Federal Energy Regulatory Commission, will allow pipelines to pass the tax cost on to the consumer. The Commission presently allows pipeline companies to make at least a ten percent profit, and the redactors of the first-use tax hope that the Federal Energy Regulatory Commission will allow the tax to be added to the price that pipeline companies charge their customers. If, however, the Commission does not allow the "pass-through" of the tax, some producers fear that the pipeline companies will seek to recover the cost of the tax through contract arrangements with the producers whereby the producer agrees to assume all the costs of processing natural gas liquids (methane, butane, propane) in exchange for the right to recover these liquids from the gas when it comes ashore. Act 294 seeks to prevent this passback of the tax from the pipeline company to the producer by declaring that any contract or agreement by which an "owner" (*i.e.* a pipeline company) claims a right of reimbursement of such taxes from any other party in interest, is against public policy and unenforceable. 1978 La. Acts, No. 294, adding LA. R.S. 47:1303(C). While proponents of the tax call this restriction a "contract modification," opponents claim this attempts to make a contractual provision unenforceable and, as such, amounts to an unconstitutional abrogation of contract. See *Use Tax Hearings*, *supra* note 2; see also *The Proposed First Use Tax on Natural Resources: Hearings on H.B. 768 Before the Comm. on Ways and Means of the Louisiana House of Representatives*, 4th Reg. Sess. (1978) [hereinafter cited as *Hearings on H.B. 768*] (Statement of M. Truman Woodward, Jr., Esq., June 6, 1978).

11. 43 U.S.C. § 1801 *et seq.* (1954).

states taxing or interfering with interstate commerce.<sup>12</sup>

In this writer's opinion, the first-use tax performs the same function as does a conventional retail use tax by enabling intrastate sales to compete fairly with interstate sales. Presently, all methane gas produced and processed in Louisiana is subjected to a severance tax of seven cents per thousand cubic feet as part of the cost to the state of affording protection to the gas while processing is conducted. Conversely, the identical gas processed in Louisiana plants and coming across the same Louisiana shorelines, but from the outer continental shelf, presently goes to market in and from Louisiana without bearing its fair share of the state costs incident to affording protection and repairing damage caused by activities such as processing and separation, which occur within the state. Through imposition of a similar seven cents per thousand cubic feet tax on gas produced on the outer continental shelf, the first-use tax insures that all methane gas processed in Louisiana and consumed either in or out of the state bears its fair share of the incidental state costs. The result is that the use tax enables gas that is produced and processed in Louisiana to compete fairly with gas produced out-of-state but processed in Louisiana. Consequently, the use tax should not be viewed as discriminatory. On the contrary, it seems to remedy a discrimination which has heretofore existed.

The purpose of the first-use tax is to insure that interstate customers bear their fair share of the tax burden which would otherwise be borne by citizens of Louisiana. Mere contribution of a "fair share" should not be considered a burden on interstate commerce. As the Court said in *Western Live Stock v. Bureau of Revenue*:<sup>13</sup> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." Furthermore, it seems evident that any possible impairment of contracts caused by this exercise of state power is justified by the need for an equitable apportionment of the tax burden on all methane gas separated and prepared for marketing in Louisiana. The "uses" or activities

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12. See *Use Tax Hearings*, *supra* note 2; see also *Hearings on H.B. 768*, *supra* note 10.

13. 303 U.S. 250, 254 (1938).

taxed seem to have a substantial connection with the state in that the transportation of the gas occurs solely within the boundaries and over the shorelines of the state. The tax seems fairly apportioned between interstate and intrastate commerce in that it is levied upon all methane gas processed in Louisiana which has not been previously taxed, whatever the ultimate destination of the gas. Moreover, because the taxed activities have the benefit of state protection while they are being conducted, and because such activities often result in damage to the Barrier Islands and the shoreline, the tax seems fairly related to a benefit to the taxpayer. Finally, since the tax is justifiable as a legitimate and reasonable exercise of the state's police power, it should be considered permissible under the due process clause. There can be no deprivation of due process when only the ultimate consumers of the gas bear the tax burden.<sup>14</sup>

#### AD VALOREM TAXES

The 1978 regular legislative session produced several changes in the area of ad valorem taxation. Act 557<sup>15</sup> amends the statutes relative to redemption from and annulment of tax sales and the procedure for quieting tax title. The Act provides that nothing in these statutes shall affect the principle that prescription does not begin to run against a tax debtor in possession, or in favor of the tax title purchaser, until the tax debtor/owner has first been dispossessed. The Act seems to state, in general terms, that the preemptive period of five years from the date of recordation of a tax deed does not run if the property sold at the tax sale has been subject to open, actual,

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14. A recent study conducted by the Library of Congress adds support to Louisiana's attempt to levy the first-use tax. The study noted the following points:

States are allowed to tax products in interstate commerce when work is performed on them within the state's borders. The first use tax would apply to natural gas that is processed, sold, treated and stored within Louisiana.

The federal gas would be taxed at the same rate that intrastate gas is taxed.

The area falling under the Outer Continental Shelf Lands Act cannot be taxed, but the study said it is the gas that's to be taxed not the land.

The sites from which the gas is drawn are part of the United States, so the gas cannot be considered an import. A state cannot tax imports without approval from Congress.

Baton Rouge Morning Advocate, Sept. 5, 1978, § A, at 8.

15. 1978 La. Acts, No. 557, amending LA. R.S. 47:2221, 14:2228 (1950).

and corporeal possession by the tax debtor or his successors.<sup>16</sup> The Act fails, however, to point out that the tax purchaser is not always required to take corporeal possession of the property in order to dispossess the tax debtor/owner. When dealing with undeveloped land, it is sufficient for the purchaser to record his tax deed and be afforded the protection of the five-year peremption by thus acquiring civil or constructive possession.<sup>17</sup>

Act 530<sup>18</sup> provides for an additional requirement for tax debtors paying ad valorem taxes on immovable property located in Louisiana.<sup>19</sup> In addition to returning the notice with a remittance of the tax due on such property, the tax debtor now must also designate on the notice the country of which he is a citizen. If the tax debtor is a citizen of one or more countries, or a resident alien of one or more countries, each country and the status of the tax debtor in that country must be designated on the notice.

Act 530 further provides that if the tax debtor is a corporation, it shall designate the country or countries of citizenship of any individuals who are not American citizens and own or control a majority of the voting stock.<sup>20</sup> The reporting of individual stockholders shall begin with the largest stockholder and proceed toward the smallest until 51% of the stock is listed.<sup>21</sup> Failure to supply the ownership designation or the

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16. See, e.g., *Lesseigne v. Clement*, 311 So. 2d 600 (La. App. 4th Cir.), cert. denied, 313 So. 2d 846 (La. 1975).

17. *Id.* at 602.

18. 1978 La. Acts, No. 530, adding LA. R.S. 47:2101.1.

19. LA. R.S. 47:2101 (1950) requires that immediately following the filing of the tax roll by the assessor in each calendar year, the tax collector with whom such tax roll is filed shall mail a notice, by post card or letter, to each tax debtor listed on the tax roll. The notice must disclose the amount of taxes due by the tax debtor for the current year, the ward in which the property taxed is located, and the number of the assessment. The tax debtor is required to return the notice to the tax collector with a remittance.

20. A corporation or real estate investment trust which is subject to the provisions of Act 530, and which is listed on the American Stock Exchange or the New York Stock Exchange, may state the exchange on which the corporation is listed in lieu of designating the citizenship of the major stockholders.

21. Act 530 also provides for the method of designating citizenship on the tax notice where the tax debtor is owned or controlled by or is a subsidiary of one or more corporations or holding companies. See 1978 La. Acts, No. 530, adding LA. R.S. 47:2101(C)(2), (3). Act 530 further provides that if the tax debtor is a partnership, business association, or other unincorporated business entity, it must list the country or countries of which each of the partners, associates, or members is a citizen or

making of any false statement in connection therewith will be punishable by a fine of not less than fifty dollars or more than ten thousand dollars for each violation. It appears very likely that the motive behind this requirement of designation of citizenship on tax notices is to provide a method of determining the extent of investment by foreign oil-producing nations in immovable property. Many states have passed similar legislation in response to fears concerning the degree of control and influence which countries among the Organization of Petroleum Exporting Countries might gain as their investments increase. However, it seems questionable whether the legislation will really accomplish anything, unless a record is kept of the immovable property owned primarily by foreign investors.

Senate Bill 519,<sup>22</sup> which failed to pass, was introduced primarily to provide a tax break for farmers who sell their farm lands for another use. Under existing law, if property assessed as agricultural land is sold for other purposes, the farmer must pay the equivalent of the deferred tax for the current year and the preceding four tax years, based on the proposed new use of the property. Senate Bill 519 would have deleted this deferred tax disadvantage from the state's tax laws. However, it is arguable that such a tax break would have resulted in windfall profits for real estate developers who have kept property that is prime for residential development classified as agricultural land, thus being able to take advantage of the lower value assessments that are provided for agricultural land.<sup>23</sup> Had the

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resident alien, and the percentage or participation of each partner, associate, or member. If a partnership member is a corporation, that corporation is required to designate the citizenship of its stockholders in accordance with the above described procedures. If the tax debtor is a trust, the tax debtor must designate the countries of which each of the beneficiaries, whether an individual, a partnership, an association, a corporation, or any other entity, is a citizen or resident alien, and the percentage of each beneficiary's participation.

22. La. S.B. 519, 4th Reg. Sess. (1978).

23. LA. R.S. 47:2303 (Supp. 1976) provides that in order for property to be classified as bona fide agricultural land and assessed as such: (1) it must be at least ten acres in size or have produced an average gross annual income of at least \$2,000 in one or more of the designated uses (agricultural, horticultural, marsh, or timber land) for the four preceding years; and (2) the landowner must have signed an agreement that the land will be devoted to one or more of the designated uses as defined by LA. R.S. 47:2302 (Supp. 1976). Thus, a landowner may make his property eligible for the more favorable agricultural use value assessment if his property consists of more than 10 acres, and the landowner signs the necessary agreement and shows some indicia of agricultural use.

proposed legislation passed, a real estate developer would have been able to convert agricultural land into residential or commercial property without having to pay any deferred taxes.



## CRIMINAL LAW

## HOMICIDE

In *State v. Kennedy*<sup>1</sup> and *State v. Moore*,<sup>2</sup> the Louisiana courts applied the common law rule that a killing does not constitute the crime of murder if more than a year and a day intervenes between the injury and the death of the victim.<sup>3</sup> This "year and a day" rule was expressly included in article 29 of the Criminal Code,<sup>4</sup> but has been criticized as being unnecessary in light of the technical advances in medical science.<sup>5</sup> Act 393, however, eliminates the requirement that death occur within one year in order for there to be a homicide.<sup>6</sup> Criminal actions may now be prosecuted in cases where death occurs more than a year after the initial act, procurement, or culpable omission of the perpetrator, as long as the prosecution can satisfactorily meet its burden of proving that the defendant's conduct was in fact the proximate cause of the victim's demise.<sup>7</sup>

## SECOND DEGREE MURDER

Act 657 of 1976 amended the second degree murder statute, redefining the crime of second degree murder to include only felony murder.<sup>8</sup> Act 121 of 1977 added a second definition: "the killing of a human being when the offender has a specific intent to kill," provided that there are no aggravating circum-

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1. 8 Rob. 590 (La. 1845).

2. 196 La. 617, 199 So. 661 (1940).

3. See W. LaFAVE & A. SCOTT, *CRIMINAL LAW* 266 (1972):

Several centuries ago, when doctors knew very little about medicine, the judges created an absolute rule of law: one cannot be guilty of murder if the victim lives a year and a day after the blow. The difficulty in proving that the blow caused the death after so long an interval was obviously the basis of the rule.

4. LA. R.S. 14:29 (1950 & Supp. 1973).

5. See Rault, *On Louisiana's New Homicide Statutes: Purpose, Constitutionality and Problems of Interpretation*, 19 *LOU. L. REV.* 570-71 (1973); Morrow, *The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered*, 17 *TUL. L. REV.* 1, 19-20 (1942).

6. 1978 La. Acts, No. 393, amending LA. R.S. 14:29 (1950 & Supp. 1973).

7. See *State v. Holmes*, 258 La. 221, 245 So. 2d 707 (1971).

8. 1976 La. Acts, No. 657, amending LA. R.S. 14:30.1 (Supp. 1975).

stances.<sup>9</sup> This provision was duplicative since killing with a specific intent to kill, but without aggravating circumstances,<sup>10</sup> was already defined as a species of first degree murder in Revised Statutes 14:30 and article 905.3 of the Code of Criminal Procedure.<sup>11</sup> The new definition was criticized as establishing two different penalties for the same crime without any standard for determining which would be appropriate.<sup>12</sup> Act 796 of 1978 eliminates this superfluous definition of second degree murder and also increases the penalty for second degree murder to prohibit entirely any possibility of probation or suspension of sentence.<sup>13</sup>

### ASSAULT AND BATTERY

Upon the recommendation of the Louisiana State Law Institute, the legislature has revised the Criminal Code provisions on assault, battery, and related offenses as part of an effort to remove specialized statutes from the Criminal Code.<sup>14</sup> Prior to the 1978 legislation, the definition of simple battery required that the battery be committed "without a dangerous weapon."<sup>15</sup> As such, it was arguable that the burden was on the

9. 1977 La. Acts, No. 121, *amending* LA. R. S. 14:30.1(B) (Supp. 1976).

10. The aggravating circumstances referred to by LA. R.S. 14:30.1(B) (Supp. 1977) (as it appeared prior to Act 796 of 1978) can be found in LA. CODE CRIM. P. art. 905.4.

11. LA. R.S. 14:30 (Supp. 1976) provides:

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

See LA. CODE CRIM. P. art. 905.3 which provides:

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

12. See *The Work of the Louisiana Legislature for the 1977 Regular Session—Criminal Law*, 38 LA. L. REV. 125, 126 (1977).

13. 1978 La. Acts, No. 796, *amending* LA. R.S. 14:30.1 (1950 & Supp. 1977).

14. Subpart B of Part II of Chapter 1 of the Criminal Code was revised by 1978 La. Acts, No. 394, *amending* LA. R.S. 14:33 (1950), 14:33.1 (Supp. 1972), 14:34 (1950), 14:34.1 (Supp. 1960), 14:35 (Supp. 1968), 14:35.1 (Supp. 1970), 14:36 (1950), 14:37 (Supp. 1968), 14:38 (1950), 14:39 (Supp. 1968), 14:40 (1950).

15. LA. R.S. 14:35 (1950 & Supp. 1968) (as it appeared prior to Act 394 of 1978).

prosecution to prove as an element of the offense that the defendant was unarmed. Act 394 of 1978 eliminates this requirement<sup>16</sup> and thus allows prosecution for simple battery even if a dangerous weapon was used.<sup>17</sup>

In addition to aggravated battery and simple battery, a new category of battery has been created. Second degree battery is one committed without the consent of the victim, when the offender "intentionally inflicts serious bodily injury."<sup>18</sup> Serious bodily injury is defined as "bodily injury" which involves "unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death."<sup>19</sup> It should be noted that "serious bodily injury" requires a greater degree of harm than mere "bodily injury." This variance is in accord with the provisions of the statute's source articles.<sup>20</sup> Unlike aggravated battery and simple battery, this statute will apparently place the burden on the prosecution to introduce evidence of the extent of the victim's injuries.<sup>21</sup>

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16. 1978 La. Acts, No. 394, amending LA. R.S. 14:35 (1950 & Supp. 1968).

17. LA. R.S. 14:35 (1950 & Supp. 1968), as amended by 1978 La. Acts, No. 394, provides in part: "Simple battery is a battery committed without the consent of the victim."

18. 1978 La. Acts, No. 394, amending LA. R.S. 14:34.1 (Supp. 1960).

19. LA. R.S. 14:34.1 (Supp. 1960), as amended by 1978 La. Acts, No. 394.

20. Compare section 109 of the proposed FEDERAL CRIMINAL CODE with article 210 of the MODEL PENAL CODE. Section 109 of the proposed FEDERAL CRIMINAL CODE provides:

(b) "bodily injury" means any impairment of physical condition, including physical pain.

(aj) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ.

*Proposed Reform of the Federal Criminal Laws: Hearings on Title 18, United States Code Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 163 (1977) [hereinafter cited as Proposed Reform of the Federal Criminal Laws].* Article 210 of the MODEL PENAL CODE provides:

§210.0(2) "bodily injury" means physical pain, illness, or any impairment of physical condition.

§210.0(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

21. The requirement that the victim suffer "serious bodily injury" may raise interesting questions regarding appellate review of the jury's findings on this issue. See *State v. Jones*, 298 So. 2d 774 (La. 1974).

Under the former law, persons who acted without a dangerous weapon, and yet inflicted crippling injuries upon the victim, could only be prosecuted for the crime of simple battery. Consequently, the possible penalty for the perpetrator was disproportionately lenient in relation to the harm suffered by the victim. As a result of the new law, persons convicted of second degree battery may now receive a more appropriate penalty.

Act 697<sup>22</sup> of 1978 repealed article 35.1, which set forth the crime of battery in particular circumstances. The only effect of this act was to eliminate the crime of throwing missiles at parades,<sup>23</sup> because the second part of article 35.1, the crime of mingling harmful substances, was reenacted by Act 394 as article 38.1.<sup>24</sup>

### TERRORIZING

Another addition to this section of the Criminal Code is the crime of terrorizing.<sup>25</sup> A person is guilty of terrorizing if he intentionally communicates certain information which he knows to be false. The proscribed information must claim that the commission of a violent crime is imminent or in progress, or that "a circumstance dangerous to human life exists or is about to exist." The third element of the crime is that the person's actions must either cause someone "to be in sustained fear of his or another person's safety," cause "evacuation of a building, a public structure, or a facility of transportation," or cause other "serious disruption to the public."<sup>26</sup> This article, which is similar to Section 1614(b) of the proposed Federal Criminal Code, will reach acts of public terrorism such as bomb scares.<sup>27</sup>

It should be noted that terrorizing as defined by Act 394 seems to encompass acts which were already proscribed under

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22. 1978 La. Acts, No. 697, *repealing* LA. R.S. 14:35.1 (Supp. 1970).

23. LA. R.S. 14:35.1 (Supp. 1970) (as it appeared prior to its repeal by Act 697 of 1978). This provision was the result of an incident in New Orleans in which local entertainer Al Hirt, while riding atop a Mardi Gras parade float, was struck by a brick thrown from the crowd.

24. 1978 La. Acts, No. 394, *adding* LA. R.S. 14:38.1.

25. 1978 La. Acts, No. 394, *adding* LA. R.S. 14:40.1.

26. LA. R.S. 14:40.1 (Supp. 1978), *added by* 1978 La. Acts, No. 394.

27. *Proposed Reform of the Federal Criminal Laws*, *supra* note 20, at 332.

Louisiana law. For instance, article 54.1 of the Criminal Code makes it unlawful to convey false information concerning arson or attempted arson,<sup>28</sup> while Act 394 is broader and prohibits communication of false information relative to *any* "crime of violence."<sup>29</sup> Since arson or attempted arson under article 52 includes "damaging by any explosive substance,"<sup>30</sup> acts such as bomb scares may now be subject to two different penalties without any standard for determining which is more appropriate.<sup>31</sup>

Although Act 394 reenacted the entire Criminal Code section dealing with assault and battery,<sup>32</sup> no mention was made of former article 34.1, which prohibited aggravated battery resulting from breach of the peace.<sup>33</sup> Enacted as a result of the civil rights "sit in" demonstrations in 1960, this seldom used statute was of questionable constitutionality.<sup>34</sup> Former article 34.1 provided stiff penalties for persons whose conduct caused a breach of the peace or incited a riot, if another person was maimed, killed, or injured as a result.<sup>35</sup>

#### BURGLARY

Perhaps in response to the increasing problem of residential burglaries, Act 745 of 1978 creates the crime of simple burglary of an inhabited dwelling.<sup>36</sup> This article applies to the unauthorized entry of any "inhabited dwelling, house, apartment, or other structure used in whole or in part as a home or place of abode by a person or persons" with the intent to commit a felony or theft therein, other than as set forth in the article dealing with aggravated burglary.<sup>37</sup> Aggravated burglary

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28. LA. R.S. 14:54.1 (Supp. 1970).

29. 1978 La. Acts, No. 394, adding LA. R.S. 14:40.1.

30. LA. R.S. 14:52 (1950 & Supp. 1977).

31. This disparity of possible sentences is by no means insignificant. The maximum possible sentence under article 54.1 is twenty years at hard labor, while the maximum sentence for terrorizing under article 40.1 is six months and a five hundred dollar fine.

32. See note 14, *supra*, and accompanying text.

33. LA. R.S. 14:34.1 (Supp. 1960) (as it appeared prior to its repeal by Act 394 of 1978).

34. See Wollet, *Race Relations*, 21 LA. L. REV. 85 (1960).

35. LA. R.S. 14:34.1 (Supp. 1960) (as it appeared prior to its repeal by Act 394 of 1978).

36. 1978 La. Acts, No. 745, adding LA. R.S. 14:62.2.

37. LA. R.S. 14:62.2 (Supp. 1978), added by 1978 La. Acts, No. 745.

already affords protection against unauthorized entry of virtually every type of structure whenever the offender is armed, arms himself, or commits a battery during the burglary.<sup>38</sup> Under the old law, if a residence was burglarized, but the offender was neither armed nor committed a battery, then the crime would only be a simple burglary.<sup>39</sup> After Act 745, article 62.2 will apply to any burglary of a residence that is not an aggravated burglary.<sup>40</sup>

The sentencing provision for simple burglary of an inhabited dwelling is written somewhat ambiguously. It provides that "whoever commits the crime of simple burglary of an inhabited dwelling shall be imprisoned at hard labor for not less than one year, without benefit of parole, probation or suspension of sentence, nor more than twelve years."<sup>41</sup> Thus, it is unclear whether the denial of the benefit of parole, probation, or suspension of sentence was intended to apply to the minimum one year sentence or to the entire term. Presumably, only the first year must be without benefit of parole, probation, or suspension of sentence.<sup>42</sup>

### THEFT

Act 222 lengthens the list of the types of livestock protected by article 67.1 of the Criminal Code.<sup>43</sup> Article 67.1 now defines livestock to mean "any animal, hybrid, mixture, or mutation of the species of horses, mules, donkeys, asses, cattle, swine, sheep, goats, domesticated deer, buffalo, bison, beefalo, or oxen."<sup>44</sup> The reference to "any animal" in the Act is some-

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38. LA. R.S. 14:60 (1950).

39. See LA. R.S. 14:62, comment (1950 & Supp. 1977). "If any of the essentials of one of the more serious types of burglary is lacking, the offender then commits the crime of simple burglary with a lesser maximum penalty provided therefor."

40. 1978 La. Acts, No. 745, adding LA. R.S. 14:62.2.

41. LA. R.S. 14:62.2 (Supp. 1978), added by 1978 La. Acts, No. 745.

42. Compare the sentence provision for simple battery of an inhabited dwelling with the sentence provision for armed robbery, which mandates that the entire sentence imposed be without benefit of parole, probation, or suspension of sentence. LA. R.S. 14:64 (Supp. 1966) provides: "Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence."

43. 1978 La. Acts, No. 222, amending LA. R.S. 14:67.1 (Supp. 1975).

44. 1978 La. Acts, No. 222, amending LA. R.S. 14:67.1 (Supp. 1975). Prior to the 1978 amendment, article 67.1 made it unlawful to take or misappropriate cattle, horses, mules, sheep, hogs, or goats.

what ambiguous, but a proper reading of the Act would restrict its applicability to any animal of the species mentioned, the listing of animals being considered exclusive.

In addition to broadening the definition of livestock, Act 222 proscribes the transportation of livestock to a slaughterhouse or an auction sale barn if the animals are then assigned in the record book in a name other than that of the owner. An intent to deprive the owner permanently of the funds derived from the sale is essential;<sup>45</sup> but in effect, the Act provides for a presumption that the person who brings the animals to the slaughterhouse and falsely registers them in the name of the owner is the thief.

The presumption created by this statute is analogous to that created by Revised Statutes 15:432, which states that the law presumes that the person in the unexplained possession of recently stolen property is the thief.<sup>46</sup> To the extent that the defendant is then required to testify to overcome the presumption, there is possibly an infringement on his right not to testify.<sup>47</sup> However, a flexible standard has thus far been applied in judging the reasonableness of this presumption; and, therefore, the presumption may be sustainable since there is a rational connection between the fact proved and the ultimate fact presumed.<sup>48</sup>

It is unfortunate that the Louisiana Criminal Code is becoming more complicated by specialized theft provisions such as article 67.1. Article 67 clearly and simply states the fundamental notion that it is criminally and socially wrong to take the property of another, in any fashion whatsoever;<sup>49</sup> and Act 222 seems to be an unnecessary addition.

#### SEX OFFENSES

An effort is being made by the Louisiana legislature to eliminate sexually discriminatory provisions from the Louisi-

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45. *Id.*

46. LA. R.S. 15:432 (1950).

47. U.S. CONST. amend. V. *But see* State v. McQueen, 278 So. 2d 114 (La. 1973), in which the court upheld the constitutionality of LA. R.S. 15:432 (1950).

48. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 52 (1974).

49. *See* LA. R.S. 14:67, comment (Supp. 1972).

ana Criminal Code. Several bills were passed which endeavor to extend the definitions of certain statutory crimes to include both men and women, as well as to extend protection<sup>1</sup> from sexual offenses to both sexes.

Prior to its 1978 amendment, article 80 of the Criminal Code, dealing with carnal knowledge of a juvenile, made it unlawful for "anyone" over the age of 17 to have sexual intercourse with any unmarried "female person" of the age of twelve years or over, but under the age of seventeen years, when there was an age difference of greater than two years between the two persons.<sup>50</sup> Act 757 of 1978 continues the traditional prohibition of sexual intercourse between adult males and minor unmarried females.<sup>51</sup> However, article 80(2) now extends protection to minor "person(s)" from "anal or oral sexual intercourse" with a "person" over the age of seventeen.<sup>52</sup> Both male and female juveniles are granted protections under this act which were not provided by the former article 80.<sup>53</sup> However, this provision is arguably unconstitutional due to the arbitrary classification which makes adult-female/minor-unmarried-male anal or oral intercourse subject to criminal penalties while placing no restriction on adult-female/minor-unmarried-male vaginal sexual intercourse. Given the apparent legislative policy of extending statutory protections to the sexually unsophisticated of both sexes, it would be difficult to justify the disparate treatment of the different sexual acts.<sup>54</sup>

Act 49 of 1977 amended the Criminal Code article on prostitution so as to prohibit acts of male prostitution.<sup>55</sup> Prostitution had been defined as applying only to women prostitutes,

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50. LA. R.S. 14:80 (1950 & Supp. 1977) (as it appeared prior to Act 757 of 1978).

51. 1978 La. Acts, No. 757, amending LA. R.S. 14:80 (1950 & Supp. 1977). Article 80(1) provides: "Carnal knowledge of a juvenile is committed when: (1) A male over the age of seventeen has sexual intercourse, with consent, with any unmarried female of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons . . . ."

52. 1978 La. Acts, No. 757, amending LA. R.S. 14:80 (1950 & Supp. 1977). Article 80(2) provides that carnal knowledge of a juvenile is committed when: "A person over the age of seventeen has anal or oral sexual intercourse, with consent, with a person of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons."

53. *Id.* Anal and oral sexual intercourse are now prohibited between either male or female adults and male or female minors.

54. See *Craig v. Boren*, 429 U.S. 190 (1976).

55. 1977 La. Acts, No. 49, amending LA. R.S. 14:82 (1950).



but in 1977 its definition was extended to apply to any "person."<sup>56</sup> Using a similar approach, Act 434 of 1978<sup>57</sup> broadens the crime of enticing minors into prostitution to encompass male prostitution by amending article 86 to protect "any person."<sup>58</sup>

Prior to its amendment in 1978, article 84 of the Criminal Code prohibited male pandering of female prostitutes. Act 219 of 1978 broadens article 84 to prohibit pandering by either males or females with respect to prostitutes of either sex.<sup>59</sup> Also, under the former provision receiving or accepting "as support or maintenance" anything of value known to be from the earnings of any female engaged in prostitution constituted pandering.<sup>60</sup> The substantive requirements of this aspect of the crime have been amended to require that what is received or accepted from the earnings of "any person" engaged in prostitution constitute "a substantial part of" the support or maintenance of the person receiving it.<sup>61</sup>

Act 612 of 1975 classified rape into two categories: heterosexual rape, *i.e.*, a male engaging in sexual intercourse with a female without her consent;<sup>62</sup> and homosexual rape, *i.e.*, a male engaging in anal sexual intercourse with a male without his consent.<sup>63</sup> Act 239 of 1978<sup>64</sup> consolidates these classifications into one provision. Rape is now defined as an act of "anal or vaginal sexual intercourse" with a "male or female person" who is not the "spouse" of the offender, committed without that "person's" lawful consent.<sup>65</sup> As a result of this amendment, the rape provision is now broad enough to cover circumstances to which the former article was not applicable, such as male anal rape of a female or female vaginal rape of a male. Additionally, Act 239 amended the Criminal Code provisions dealing with aggravated rape,<sup>66</sup> forcible rape,<sup>67</sup> and simple

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56. LA. R.S. 14:82 (1950 & Supp. 1977).

57. 1978 La. Acts, No. 434 amending LA. R.S. 14:86 (1950).

58. *Id.*

59. 1978 La. Acts, No. 219, amending LA. R.S. 14:84 (1950).

60. LA. R.S. 14:84 (1950) (as it appeared prior to Act 219 of 1978).

61. 1978 La. Acts, No. 219, amending LA. R.S. 14:84 (1950).

62. 1975 La. Acts, No. 612, amending LA. R.S. 14:41 (1950).

63. *Id.*

64. 1978 La. Acts, No. 239, amending LA. R.S. 14:41 (Supp. 1975).

65. LA. R.S. 14:41 (Supp. 1978), as amended by 1978 La. Acts, No. 239.

66. 1978 La. Acts, No. 239, amending LA. R.S. 14:42 (1950 & Supp. 1977).

67. 1978 La. Acts, No. 239, amending LA. R.S. 14:43.1 (1975 & Supp. 1977).

rape<sup>68</sup> to make them coincide with the new definition of rape.

A new addition to this section of the Criminal Code is the crime of sexual battery.<sup>69</sup> Sexual battery is intentionally engaging in a "sexual act" with another person who is not the offender's spouse, where the offender compels the victim to submit by placing him or her in fear of receiving bodily harm.<sup>70</sup> Act 239 defines "sexual act" as contact between the penis and the vulva, the penis and the anus, the mouth or tongue and the penis, or the mouth or tongue and the vulva.<sup>71</sup> As a result of this provision, prosecutors are extended greater latitude in penalizing sexual offenses which fall short of rape.<sup>72</sup>

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68. 1978 La. Acts, No. 239, amending LA. R.S. 14:43 (Supp. 1975).

69. LA. R.S. 14:43.1 (Supp. 1978), added by 1978 La. Acts, No. 239.

70. *Id.*

71. *Id.* See also *Proposed Reform of the Federal Criminal Laws*, *supra* note 20, at 344, 346.

72. See, e.g., LA. R.S. 14:89.1 (Supp. 1962) (aggravated crime against nature).

## HEALTH LEGISLATION

## ABORTION GUIDELINES

With an eye to United States Supreme Court decisions, the Louisiana legislature passed a very restricted, yet suspect, abortion bill. Act 435 provides that no physician can perform an abortion after the fetus is viable.<sup>1</sup> Viability is presumed if more than twenty-four weeks have elapsed from the beginning of the last menstrual period of the pregnant woman, but the presumption can be overcome if the physician certifies in writing that the unborn child is not viable.<sup>2</sup> In addition, all abortions after the first trimester must be performed in a hospital,<sup>3</sup> and the physician must prepare a confidential report concerning the abortion.<sup>4</sup>

Other provisions of the Act involve notice and consent requirements. The physician must wait twenty-four hours after the pregnant woman signs an informed written consent before performing the abortion.<sup>5</sup> Abortions cannot be performed on a minor unless notice is given to one parent<sup>6</sup> and cannot be performed on a woman under the age of fifteen years without one parent's written consent, except by court order.<sup>7</sup>

In *Roe v. Wade*,<sup>8</sup> the United States Supreme Court held that a prohibition of abortions before viability, the point at which the fetus can live outside the mother's womb, was an

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1. 1978 La. Acts, No. 435, adding LA. R.S. 40:1299.35.4. An abortion can be performed after viability if it is necessary to protect the health of the mother, but the physician must try to preserve the life of the unborn child if viability is presumed. *Id.*

2. *Id.* The physician must certify in writing that the particular unborn child is not viable and must specify the precise medical findings upon which he bases that judgment.

3. 1978 La. Acts, No. 435, adding LA. R.S. 40:1299.35.3.

4. 1978 La. Acts, No. 435, adding LA. R.S. 40:1299.35.10. This abortion report must be submitted to the Department of Health and Human Resources which prepares an annual statistical report based on such data.

5. 1978 La. Acts, No. 435, adding LA. R.S. 40:1299.35.7.

6. Twenty-four hour actual notice or seventy-two hour constructive notice must be given to one of the parents or the legal guardian of the minor. 1978 La. Acts, No. 435, adding LA. R.S. 40:1299.35.5.

7. *Id.*

8. 410 U.S. 113 (1973).

unconstitutional invasion of the right to privacy.<sup>9</sup> However, after the first trimester the state can regulate abortion procedures to protect the health of the mother,<sup>10</sup> and the state can completely proscribe abortion after viability unless the abortion is necessary to preserve the health of the mother.<sup>11</sup> In *Doe v. Bolton*,<sup>12</sup> the Court held that a requirement that abortions during the first trimester be performed in a hospital was unconstitutional.<sup>13</sup> In *Planned Parenthood of Central Missouri v. Danforth*,<sup>14</sup> the Court concluded that the legislature cannot fix viability at a specific point in the gestation period, because that is a matter for a physician's judgment.<sup>15</sup> The Court also held that the requirement that parental consent be obtained before an abortion is performed on a minor was unconstitutional,<sup>16</sup> but upheld the requirement that a woman's prior written consent to the abortion be obtained.<sup>17</sup> Reporting requirements which were concerned with maternal health and were kept confidential were also found constitutional.<sup>18</sup>

Act 435 was obviously passed to restrict abortions as much as possible without offending any of the direct holdings of these cases. Notwithstanding this attempt, some of the Act's provisions are of questionable constitutionality. The United States Supreme Court has said that it is not a legislative function to determine viability, as this is a matter for a physician's judgment,<sup>19</sup> and therefore, the new presumption of viability may be exposed to valid constitutional objections. However, the Act's presumption is not as restrictive as a legislative determination of viability, because the physician can perform an abortion

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9. *Id.* at 163.

10. *Id.*

11. *Id.* at 163-64.

12. 410 U.S. 179 (1973).

13. *Id.* at 195.

14. 428 U.S. 52 (1976).

15. *Id.* at 64. A United States District Court, in *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn. 1974), held a statute fixing the point of viability unconstitutional.

16. *Planned Parenthood v. Danforth*, 428 U.S. at 74.

17. *Id.* at 67. Footnote 8 of *Planned Parenthood's* majority opinion states, "One might well wonder, offhand, just what 'informed consent' of a patient is . . . [W]e are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences." *Id.* at 67 n.8.

18. *Id.* at 81.

19. *Id.* at 64.

even though viability is presumed by certifying in writing that the unborn child is not viable.<sup>20</sup> This ability to overcome the presumption may save the provision from invalidation.

The requirement that an abortion be performed in a hospital after the first trimester is constitutional if such a requirement is necessary to protect the health of the woman, because this state interest is compelling during the second and third trimesters.<sup>21</sup> However, Act 435's abortion report provision may not be constitutional, because it requires the report to include information concerning the patient's race and educational background.<sup>22</sup> Reporting requirements that are reasonably directed to the preservation of maternal health are permissible,<sup>23</sup> but information regarding race and educational background bears no relation to the interest of maternal health. However, it could be argued that the state has a compelling interest in educating its citizens in the area of birth control and abortions, and that information about race and educational background could be used to identify which persons were most in need of education about these matters.

The Supreme Court has upheld a requirement that a woman's prior written consent to the abortion be obtained.<sup>24</sup> The Court reasoned that the consent procedure is justified by the need to insure that the decision be made with full knowledge of its nature and consequences.<sup>25</sup> The Louisiana statute, however, does more than provide the woman with full knowledge; it requires the physician to tell the woman that "the unborn child is a human life from the moment of conception" and to describe in detail the anatomical and physiological characteristics of the particular unborn child.<sup>26</sup> This provision seems to serve no other purpose than to increase the likelihood

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20. See note 2, *supra*.

21. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

22. 1978 La. Acts, No. 435, *adding* LA. R.S. 40:1299.35.10.

23. *Planned Parenthood v. Danforth*, 428 U.S. 52, 80 (1976). Recordkeeping and reporting requirements must also properly respect a patient's confidentiality and privacy in order to be constitutional. *Id.* Act 435 does meet this requirement. 1978 La. Acts, No. 435, *adding* LA. R.S. 40:1299.35.10.

24. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976). See text at note 17, *supra*.

25. *Id.*

26. 1978 La. Acts, No. 435, *adding* LA. R.S. 40:1299.35.6. The woman must also be told that the abortion can result in severe emotional disturbances.

that a woman will forego the abortion, thereby protecting the potentiality of human life. However, the Supreme Court has held that the state's compelling interest to regulate abortions only arises at the point of viability,<sup>27</sup> and because these particular aspects of the informed consent requirement regulate all abortions and not just those performed after viability, they are likely to be an unconstitutional invasion of the woman's right to privacy.

In *Planned Parenthood*, the Court held unconstitutional a requirement that parental consent be obtained before the performing of an abortion upon a woman under the age of eighteen.<sup>28</sup> The majority opinion stated that the state's interest in safeguarding the family unit and parental authority would not be furthered by requiring such consent.<sup>29</sup> The Court also emphasized the fact that under the Missouri provision the parents had a veto power over the minor's decision to have an abortion,<sup>30</sup> and the same is true under Act 435's requirement that parental consent be obtained before an abortion is performed on a minor under the age of fifteen. However, the Supreme Court in *Bellotti v. Baird*<sup>31</sup> indicated that at some point a minor may not be able to give an informed consent,<sup>32</sup> and girls

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27. *Roe v. Wade*, 410 U.S. 113 (1973). The Court stated: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163.

28. 428 U.S. 52, 74 (1976).

29. *Id.* at 75. The Court reasoned that providing parents with this veto power was unlikely to strengthen the family unit. They also concluded, "[n]either is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure." *Id.*

30. *Id.* Justice Stewart's majority opinion stated: "The fault with [the provision] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction." *Id.* In *Bellotti v. Baird*, 428 U.S. 132 (1976), the Court refused to decide the constitutionality of a similar Massachusetts statute involving parental consent because "the District Court should have abstained [from deciding this issue] pending the construction of the statute by the Massachusetts courts." 428 U.S. at 146. The Court in *Bellotti* once more indicated that the question of an abortion statute's constitutionality depends on the extent to which it burdens a woman's decision to have an abortion. *See also Maher v. Roe*, 432 U.S. 464, 473-4 (1977).

31. 428 U.S. 132 (1976).

32. The Court's opinion stated that "there were unquestionably greater risks of inability to give an informed consent" when minors were involved. *Id.* at 147.

under fifteen may be young enough to fit under *Bellotti's* reasoning. Also, Louisiana's new law is less burdensome than it might be because it allows a minor under the age of fifteen to obtain an abortion by court order if both parents refuse to consent.<sup>33</sup> The new requirement that parents of all minors be notified of a pending abortion may also be unconstitutional, unless a notice requirement can be said to further the state's interest in safeguarding the family unit and parental authority more than a consent requirement.

Despite its attempt to comply with the Supreme Court's decision, the Act's future is in doubt. Several women's clinics have filed suit in federal court to enjoin the enforcement of Act 435 on the ground that it is unconstitutional.<sup>34</sup>

A second act regarding abortions prohibits the use of public funds for an abortion.<sup>35</sup> This legislation was prompted by *Maher v. Roe*,<sup>36</sup> which involved Connecticut's proscription of the use of public funds for abortions. According to *Maher*, "the right [to privacy] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."<sup>37</sup>

#### INTERDICTION

Act 680 implements needed protection for the mentally retarded by succinctly stating their rights and privileges. First, the Act seeks to insure that no individual is involuntarily committed to an institution for the mentally retarded unless he is in need of such a commitment. A judicial hearing must be conducted<sup>38</sup> at which the mentally retarded individual has a

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33. 1978 La. Acts, No. 435, adding LA. R.S. 40:1299.35.5.

34. *Margaret S. v. Edwards*, No. 79-2765 (E.D. La. 1978).

35. 1978 La. Acts, No. 704, adding LA. R.S. 40:1299.35.

36. 432 U.S. 464 (1977).

37. *Id.* at 473-74.

38. 1978 La. Acts, No. 680, adding LA. R.S. 28:398. The court can commit an individual to a mental retardation facility only when the evidence indicates that the needs of the individual can be adequately met by care in that type of facility.

right to an attorney,<sup>39</sup> a right to be present at the hearing,<sup>40</sup> and a right to subpoena<sup>41</sup> and cross examine witnesses.<sup>42</sup> In addition, the court must order a diagnosis and evaluation by a "diagnosis and evaluation team" before committing any person.<sup>43</sup> This comprehensive diagnosis and evaluation must also be made before an individual can voluntarily commit himself to an institution for the mentally retarded,<sup>44</sup> unless an emergency is involved<sup>45</sup> or special care for a brief period of time is needed.<sup>46</sup> In the latter two instances, substantial evidence that the individual is retarded is still required.<sup>47</sup>

The new law also establishes a Bill of Rights for the mentally retarded person.<sup>48</sup> Every mentally retarded person has the right to live in the least restrictive setting appropriate to his individual needs and abilities,<sup>49</sup> to receive a prompt comprehensive diagnosis,<sup>50</sup> to contest the findings of the diagnostic team,<sup>51</sup> to receive periodic re-diagnosis,<sup>52</sup> to obtain a written individualized training and education program,<sup>53</sup> to withdraw from voluntary services,<sup>54</sup> and to be informed of his rights.<sup>55</sup> Residents of retardation facilities have additional rights including the right to communicate by uncensored mail,<sup>56</sup> to re-

39. *Id.* If the mentally retarded person has no attorney, the court must appoint one to represent him, and the attorney must be granted access to all of the mentally retarded person's records.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. 1978 La. Acts, No. 680, adding LA. R.S. 28:394. The diagnosis and evaluation must show that the services of the facility are appropriate to the needs of the individual.

45. 1978 La. Acts, No. 680, adding LA. R.S. 28:392. An emergency exists when there is an immediate and compelling need for short-term training, treatment, or care. *Id.*

46. 1978 La. Acts, No. 680, adding LA. R.S. 28:392, 28:396.

47. 1978 La. Acts, No. 680, adding LA. R.S. 28:395-96.

48. 1978 La. Acts, No. 680, adding LA. R.S. 28:390-91.

49. 1978 La. Acts, No. 680, adding LA. R.S. 28:390.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* No person shall be detained longer than 72 hours after requesting discharge unless a commitment proceeding is instituted by the facility's director.

55. *Id.* If the person is unable to comprehend these rights, notice to the parent of a minor or to the tutor or curator is sufficient.

56. 1978 La. Acts, No. 680, adding LA. R.S. 28:391.



ceive visitors,<sup>57</sup> to have their own personal possessions,<sup>58</sup> to refuse specific modes of treatment,<sup>59</sup> to communicate with their physicians outside the facility or their spiritual advisors,<sup>60</sup> to practice their religion,<sup>61</sup> and to visit with their attorneys.<sup>62</sup>

In last year's session, the legislature adopted new procedures for the commitment of mentally ill individuals.<sup>63</sup> Those procedures provide that a mentally ill person or a person suffering from substance abuse can be admitted to a treatment facility under an emergency certificate for a period not to exceed fifteen days.<sup>64</sup> A physician's certificate, based on an examination of the individual, is needed for such a detainment.<sup>65</sup> A person can also be judicially committed upon a finding by the court, based on clear and convincing evidence, that he is dangerous to himself or to others or is gravely disabled.<sup>66</sup> Any person can file a petition with the court to initiate a hearing to consider having the individual committed.<sup>67</sup> Under these provisions the coroner had no authority to examine individuals for the purposes of issuing an emergency certificate unless they consented. Act 782 adds a new provision to the commitment laws, which allows any parish coroner or judge of a court of competent jurisdiction to order a person taken into custody for examination when a statement is executed under private signature specifying that, to the best of the affiant's knowledge, the person is mentally ill or suffering from substance abuse.<sup>68</sup>

#### COMPLAINTS OF NURSING HOME RESIDENTS

The legislature also sought to protect the interests of nurs-

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57. *Id.* "This right shall only be abridged if it is essential in order to prevent serious physical and mental harm to the resident or to maintain orderly administration of the facility." *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. 1977 La. Acts, No. 714, amending LA. R.S. 28:2, 28:50-57, 28:59, 28:61, 28:171 (1950 & Supp. 1976), and adding LA. R.S. 28:52.1-52.3, 28:63, 28:64.

64. LA. R.S. 28:53 (Supp. 1977).

65. *Id.*

66. LA. R.S. 28:54 (Supp. 1977).

67. *Id.*

68. 1978 La. Acts, No. 782, adding LA. R.S. 28:53.2.

ing home residents by passing Act 687, which provides a method of complaint for any person having knowledge of the abuse of a patient or of the violation of any state or federal law or regulation.<sup>69</sup> The Department of Health and Human Resources must investigate if there are reasonable grounds for the complaint.<sup>70</sup> If a violation is found to exist, the Department must issue a correction order to the nursing home,<sup>71</sup> and any complainant or nursing home that is dissatisfied with the Department's determination can request a hearing within the Department.<sup>72</sup>

Act 687 provides that a complainant's identity cannot be revealed to the home without his consent,<sup>73</sup> and if disclosure of his identity is essential to the investigation, the complainant must be given the opportunity to withdraw the complaint.<sup>74</sup> These provisions were apparently designed to remove the element of fear involved in the reporting of nursing home abuse by the home's residents. The Act does provide criminal penalties for any retaliatory action taken against a complainant,<sup>75</sup> but unless these criminal penalties are strictly applied, the fear of reprisal may not be eliminated.

#### DISABILITY BENEFITS—WORKMEN'S COMPENSATION

Act 750 was passed in response to the controversy between the state and the federal government over which entity was to pay disability benefits. Federal law requires that federal Social Security benefits be reduced to the extent that an individual receives state workmen's compensation disability benefits.<sup>76</sup>

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69. 1978 La. Acts, No. 687, adding LA. R.S. 40:2009.13. Any complaint is to be submitted to the Department of Health and Human Resources either in writing, by telephone, or by personal visit.

70. 1978 La. Acts, No. 687, adding LA. R.S. 40:2009.14. If the Department determines that grounds for an investigation do not exist, it must notify the complainant within fifteen days after receipt of the complaint. If an investigation is conducted, a report must be made to the complainant within 30 days after the complaint is received.

71. 1978 La. Acts, No. 687, adding LA. R.S. 40:2009.15. If the violation is detrimental to the health of the residents, the time allowed for correction must not exceed five days. In all other cases, the home has 90 days to make the correction.

72. 1978 La. Acts, No. 687, adding LA. R.S. 40:2009.16.

73. 1978 La. Acts, No. 687, adding LA. R.S. 40:2009.14.

74. *Id.*

75. 1978 La. Acts, No. 687, adding LA. R.S. 40:2009.17.

76. 42 U.S.C. § 424(a) (1976). The federal provision applies to federal old age, survivor's, and disability insurance benefits. Any state workmen's compensation bene-

The Louisiana legislature apparently decided that if an individual is only going to receive a certain maximum number of dollars under both the federal and state programs, then the state should pay as little as possible. Act 750 requires that any state permanent total disability benefits be reduced to the extent that those benefits would cause a reduction in federal Social Security benefits.<sup>77</sup> For example, if an individual is eligible for \$300 in Social Security benefits and \$100 in state disability benefits, then his Social Security benefits would be reduced to \$200, except that the new Louisiana act now prevents him from receiving the \$100 in state benefits. Thus, his Social Security benefits will not be reduced, and he will receive the full \$300 for which he is eligible under federal law.

Disabled persons whose state workmen's compensation benefits are reduced as a result of Act 750 may have substantial economic problems because the Social Security Act requires a six month waiting period before an individual can receive the Social Security benefits.<sup>78</sup> Thus, disabled persons affected by Act 750 could go six months before receiving any benefits.

In other health legislation, the legislature established a program to assess the presence and causes of cancer within the state.<sup>79</sup> The Department of Health and Human Resources is to direct the program, which involves a statewide system for gathering the statistical data<sup>80</sup> furnished by hospitals and pathology labs.<sup>81</sup> The Act's passage will result in the state's receiving federal funds for the study of cancer.<sup>82</sup> The legislature also legalized prescription use of marijuana for cancer chemotherapy, and for glaucoma patients who are involved in life or sense threatening situations and for whom conventional controlled substances have either resulted in no response or caused severe side effects.<sup>83</sup>

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fits for total or partial disability (whether permanent or not) are affected by the federal reduction provision. The requirement only applies to any month prior to the month in which the individual attains the age of 62.

77. 1978 La. Acts, No. 750, *adding* LA. R.S. 23:1225.

78. 42 U.S.C. § 423 (1972).

79. 1978 La. Acts, No. 653, *adding* LA. R.S. 40:1299.70-76.

80. 1978 La. Acts, No. 653, *adding* LA. R.S. 40:1299.71.

81. Each hospital and pathology laboratory in the state will have to participate in the reporting program and keep these records in accordance with the regulations. 1978 La. Acts, No. 653, *adding* LA. R.S. 40:1299.74.

82. 42 U.S.C. § 286(b) (1977).

83. 1978 La. Acts, No. 725, *adding* LA. R.S. 40:1021-26.

## ENVIRONMENTAL LAW

## COASTAL ZONE MANAGEMENT

Congress' concept of the federal government's role in the area of environmental affairs is one of increasing federal determination of the substantive environmental quality standards, with the implementation of these standards left up to the states.<sup>1</sup> The federal substantive standards designed to encourage the protection and preservation of coastal areas<sup>2</sup> were enacted in 1973 in the Coastal Zone Management Act.<sup>3</sup> The Act provides coastal zone states<sup>4</sup> with funds to assist them in developing a coastal zone management program which will meet the requirements of the federal act.<sup>5</sup> A state's development of a federally approved program is not mandatory,<sup>6</sup> but it is a prerequisite to receiving federal funds for coastal zone management.<sup>7</sup> If a state's program meets further enumerated requirements, the state can receive additional funds for the management of the program.<sup>8</sup>

The 1977 Louisiana legislature passed a Coastal Zone

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1. Murchison, *Waivers of Intergovernmental Immunity in Federal Environmental Statutes*, 62 VA. L. REV. 1177, 1177 (1976).

2. Coastal areas are defined as the coastal waters (including the lands therein and thereunder) that are strongly influenced by each other and are in proximity to the shorelines of the several coastal states, including islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. 16 U.S.C. § 1453(1) (1976).

3. 16 U.S.C. §§ 1451-64 (1976). See Brewer, *The Concept of State and Local Relations Under CZMA*, 16 WM. & MARY L. REV. 717 (1975).

4. A coastal state is any state in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. 16 U.S.C. § 1453(3) (1976).

5. 16 U.S.C. § 1454 (1975). The management program for each coastal state must include an identification of the coastal zone areas subject to the program; a definition of permissible land and water uses within the zone; an inventory and designation of areas of particular concern within the zone; the means by which the state proposes to exert control over the land and water uses; broad guidelines on priorities of uses in such areas; and a description of the organizational structure which will implement the program.

6. 16 U.S.C. § 1451(h) (1976). The Act is designed to protect "the land and water resources of the coastal zone" by *encouraging* "the states to exercise their full authority over the lands and waters in the coastal zone." *Id.*

7. 16 U.S.C. §§ 1454, 1455 (1976). See note 5, *supra*.

8. 16 U.S.C. § 1455 (1976).

Management Act<sup>9</sup> which failed to receive federal approval because it did not meet certain requirements of the federal act.<sup>10</sup> Act 361 of 1978, however, creates a coastal zone management plan<sup>11</sup> which is expected to receive federal approval.<sup>12</sup> The Secretary of the Department of Transportation and Development will be charged with the administration of the plan<sup>13</sup> and the development of the guidelines to be followed in coastal zone programs.<sup>14</sup> These guidelines must further certain goals such as achieving full use of coastal resources with a balance between development and conservation.<sup>15</sup> The Louisiana Act also creates a Coastal Commission<sup>16</sup> which will be composed of eleven members representing interest groups,<sup>17</sup> eleven members representing various coastal zone parishes,<sup>18</sup> and the Secretary of the Department of Wildlife and Fisheries.<sup>19</sup> The Commission's primary purpose will be to hear appeals from decisions concerning coastal zone plans.<sup>20</sup>

Act 361 allows local governments to control a great deal of the regulation of coastal land uses within their areas. Using a state approved program, a local government can regulate uses of local concern<sup>21</sup> such as dredge and fill projects and private

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9. 1977 La. Acts, No. 705, amending LA. R.S. 49:213.1-.6 (Supp. 1976), and adding LA. R.S. 49:213.7-.12.

10. *The Work of the Louisiana Legislature for the 1977 Regular Session—Environmental Law*, 38 LA. L. REV. 141, 144 (1977). The Act failed because the coastal zone inland boundary was inconsistent with the federal boundary. *Id.*

11. LA. R.S. 49:213.1-.21 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

12. See Letter from Robert W. Knecht, Assistant Administrator for Coastal Zone Management, Office of Coastal Zone Management (June 27, 1978).

13. LA. R.S. 49:213.6(A) (Supp. 1977), as amended by 1978 La. Acts, No. 361.

14. LA. R.S. 49:213.8 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

15. *Id.*

16. LA. R.S. 49:213.7 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

17. *Id.* The interest groups include the oil and gas industry, agriculture and forestry, commercial fishing and trapping, sport fishing, hunting and outdoor recreation, ports, shipping and transportation, nature preservation and environmental protection, coastal landowners, municipalities, the utility industry, producers of solid minerals, and industrial development.

18. *Id.* The parishes are Cameron, St. Tammany, Vermillion, Iberia, St. Mary, Terrebonne, Lafourche, Jefferson, Plaquemines, St. Bernard, and Orleans.

19. *Id.*

20. *Id.*

21. LA. R.S. 49:213.9 (Supp. 1977), as amended by 1978 La. Acts, No. 361. Uses of local concern are those which directly and significantly affect coastal waters, but are not uses of state concern. LA. R.S. 49:213.5 (A)(2) (Supp. 1977), as amended by 1978 La. Acts, No. 361. Uses of state concern are uses which directly and significantly

water control structures.<sup>22</sup> The Department of Transportation and Development will manage uses of state concern<sup>23</sup> and uses in areas without local programs.<sup>24</sup>

According to the new legislation, no one can begin a land use in a coastal area without a permit from the state agency or local government regulating that use.<sup>25</sup> An agency or local government can hold a public hearing on a permit application, if it so desires,<sup>26</sup> and all appeal hearings must be public.<sup>27</sup> The right to question any decision granting a permit is very broad, and such a decision may be appealed by the applicant, the secretary, any affected local government, any agency, or any adversely affected person.<sup>28</sup> These same parties, as well as the Commission Administrator, can petition for a judicial review of a Commission decision.<sup>29</sup> Additional protection is provided for the applicant in that a "trial de novo" must be held if requested by any party.<sup>30</sup>

The Commission can reverse permit decisions if they are unreasonable, arbitrary, or characterized by an abuse of discretion.<sup>31</sup> However, whether the Commission can review the *merits* of decisions, *i.e.*, review whether the best alternative was chosen, remains unclear. Nevertheless, the Commission does have

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affect coastal waters and which have an impact which goes beyond local significance and significantly affects interests of regional, state, or national concern. LA. R.S. 49:213.5(A)(1) (Supp. 1977).

22. LA. R.S. 49:213.5(A)(2) (Supp. 1977), as amended by 1978 La. Acts, No. 361. Local governments can regulate private water control structures which cost less than \$15,000.

23. LA. R.S. 49:213.6 (Supp. 1977), as amended by 1978 La. Acts, No. 361. For the definition of uses of state concern, see note 21, *supra*.

24. The Act retains the existing statutory authority of the Office of Conservation to permit the location, drilling, exploration, and production of oil, gas, sulphur, and other minerals and the existing authority of the Department of Wildlife and Fisheries over oyster fishing operations. LA. R.S. 49:213.12 (Supp. 1977), as amended by 1978 La. Acts, No. 361. Activities conducted pursuant to a permit granted by one of these agencies must be consistent with the coastal zone guidelines, the state program, and any affected local program. *Id.*

25. LA. R.S. 49:213.11 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

26. *Id.*

27. LA. R.S. 49:213.16 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

28. LA. R.S. 49:213.11 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

29. LA. R.S. 49:213.16 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

30. *Id.*

31. *Id.* The Commission can also reverse permit decisions if the decision either represents an unreasonable interpretation of the state program, or is clearly contrary to the Act or to the evidence presented. *Id.*

the power to review the merits of permit decisions to the extent that they place an onerous and inequitable burden on the applicant by preventing actions which would result in only minimal and inconsequential variances from the objectives of the Act.

Several provisions of the Act may create interpretation and implementation problems. For instance, the seaward boundary definition is potentially inconsistent with the federal act. The Louisiana Coastal Zone Act's seaward boundary is the seaward boundary of Louisiana<sup>32</sup> (three miles distant from its coastline as defined in the Federal Submerged Lands Act).<sup>33</sup> However, the Federal Coastal Zone Act's seaward boundary is the territorial sea of the United States,<sup>34</sup> which is presently also recognized as being three miles distant from the United States coastline.<sup>35</sup> If the definition of the seaward boundary of the state or the United States is changed such that the United States seaward boundary is further distant from the coastline than the Louisiana seaward boundary, the Federal Coastal Zone Act will cover an area that is unregulated by the Louisiana Coastal Zone Act. On the other hand, if any definitional change results in the state's seaward boundary being further distant from the coastline than the United States', then the Louisiana Coastal Zone Act will regulate an area over which the state has no authority.

The Act also can be criticized for forbidding the public acquisition of privately owned property without the owner's consent,<sup>36</sup> thus providing a possible method for hampering necessary public works. Moreover, the Act provides little or no guidance in distinguishing state uses from local uses,<sup>37</sup> thereby

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32. LA. R.S. 49:213.4 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

33. 43 U.S.C. § 1312 (1970).

34. 16 U.S.C. § 1453(1) (1976).

35. See *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923). The three-mile limit has not been established by any federal statute, but it is the clearly recognized policy of the United States government. Many countries claim a more extensive territorial sea breadth, and the international trend is towards acceptance of a twelve-mile limit. See Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/Wp. 10 (July 15, 1977), art. 3. However, despite this international trend, the United States may retain its present three-mile limit and not ratify any new treaty on the subject. See Stevenson, *International Law and the Oceans*, 62 DEP'T STATE BULL. 339, 340-41 (1970).

36. LA. R.S. 49:213.19 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

37. See note 21, *supra*.

necessitating the development of a process for designating such uses. Other examples of problem areas include different starting dates for different aspects of the program,<sup>38</sup> a lack of Livingston Parish representation on the Coastal Commission,<sup>39</sup> and the issue of whether the "trial de novo" will be a public hearing.<sup>40</sup>

### HAZARDOUS WASTE CONTROL

Federal law also prompted the passage of Act 334, the Louisiana Hazardous Waste Control Act.<sup>41</sup> The Federal Resource Conservation and Recovery Act of 1976<sup>42</sup> gives the Environmental Protection Agency (EPA) the authority to regulate hazardous wastes in any state that has not developed an EPA-approved hazardous waste control program,<sup>43</sup> and it orders the EPA Administrator to promulgate regulations applicable to facilities which contribute to the hazardous waste problem.<sup>44</sup>

In order to receive federal approval, a state plan must be at least as strict as the guidelines promulgated by the EPA,<sup>45</sup> and the Louisiana Hazardous Waste Law closely follows the language of the federal act. Act 334 was designed to give the

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38. The Act will become effective on January 1, 1979, except that the coastal use permit program will not commence until 30 days after the adoption of the guidelines in section 213.8. LA. R.S. 49:213.20 (Supp. 1977), as amended by 1978 La. Acts, No. 361. The Secretary has 120 days after the effective date to adopt guidelines for decisionmaking regarding coastal use permits that are consistent with section 213.8. LA. R.S. 49:213.11 (Supp. 1977), as amended by 1978 La. Acts, No. 361. Within 180 days of enactment, the Secretary is to adopt a fully delineated inland boundary. LA. R.S. 49:213.4 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

39. LA. R.S. 49:213.4 (Supp. 1977), 49:213.7 (Supp. 1977), as amended by 1978 La. Acts, No. 361.

40. LA. R.S. 49:213.16 (Supp. 1977), as amended by 1978 La. Acts, No. 361. The Act simply states that a "trial de novo" shall be held upon the request of any party.

41. 1978 La. Acts, No. 334, adding LA. R.S. 30:1101-16.

42. Pub. L. No. 94-580, §§ 3001-11, 90 Stat. 2806 (1976). Various other federal pollution control laws presently regulate hazardous wastes, including the Federal Clean Air Act, 42 U.S.C. § 7412 (1977), and the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (1977). Success in controlling air and water pollution has contributed to the problem of land-polluting hazardous wastes, because discards that were once dumped into the air and water are now being placed on land. These wastes often find their way back into surface or ground waters or into the ocean, and the purpose of the hazardous waste management laws is to prevent such abuses and provide a more sensible network of pollution regulation. [1977] 8 ENVIR. REP. (BNA) (Oct. 7).

43. Pub. L. No. 94-580, § 3006, 90 Stat. 2806 (1976).

44. *Id.* at §§ 3001-05.

45. *Id.* at § 3006(b).



Department of Natural Resources the authority and discretion necessary to develop a program capable of attaining federal approval, because if the Louisiana plan is approved, the state will receive federal funds to assist in the implementation of its program.<sup>46</sup>

Act 334 defines hazardous wastes as wastes which may (1) cause an increase in mortality or serious illness or (2) pose a substantial hazard to human health or the environment if improperly managed.<sup>47</sup> The Act gives the Department of Natural Resources jurisdiction over the regulation of the generation, transportation, storage, and disposal of hazardous wastes, and the Department must develop criteria for identifying the characteristics of hazardous wastes and for listing those hazardous wastes subject to regulation.<sup>48</sup>

The Department of Natural Resources must also promulgate standards applicable to facilities which generate, transport, dispose, store, or treat hazardous wastes.<sup>49</sup> Transporters and treatment, storage, and disposal facilities cannot operate without a permit issued by the Natural Resources Depart-

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46. The Environmental Protection Agency is authorized to appropriate \$25,000,000 for each of the fiscal years 1978 and 1979 to be used for state grants. *Id.* at § 3011(a). Amounts appropriated will be allocated among the states on the basis of regulations promulgated by the EPA Administrator, which will take into account the extent to which hazardous waste is generated, transported, treated, stored, and disposed of within any particular state. *Id.* at § 3011(b).

47. 1978 La. Acts, No. 334, adding LA. R.S. 30:1102(3). The Act states:

'Hazardous waste' means any waste, or combination of wastes, which because of its quantity, concentration, physical, chemical, or infectious characteristics may (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

One of the Department of Natural Resources' major tasks will be determining which wastes are hazardous wastes.

48. 1978 La. Acts, No. 334, adding LA. R.S. 30:1105. Radioactive wastes are exempted from regulation because they are controlled by the United States Nuclear Regulatory Commission. 42 U.S.C. § 5842 (1974).

49. Generators must follow standards regarding recordkeeping, labeling practices, use of containers, and furnishing of information to transporters. 1978 La. Acts, No. 334, adding LA. R.S. 30:1106(A). Standards are required for transporters respecting recordkeeping and transportation equipment, and for treatment, storage, and disposal facilities respecting recordkeeping and the design, construction, and operation of the facilities. 1978 La. Acts, No. 334, adding LA. R.S. 30:1197(B), 30:1108(B).

ment,<sup>50</sup> and generators may only utilize transporters and disposal facilities which have obtained valid permits.<sup>51</sup>

The Department must also establish a manifest system for the orderly tracking of hazardous wastes from the generation site to the site of treatment, storage, or disposal.<sup>52</sup> The system should provide information as to the quantity, composition, origin, routing, and destination of all hazardous wastes in the state.<sup>53</sup>

The power to make inspections and investigations will enable the Natural Resources Department to discover violations,<sup>54</sup> and the Department has the power to bring a civil action to recover any damages resulting from violations<sup>55</sup> as well as the power to issue compliance orders to any violators.<sup>56</sup> The refusal to obey a compliance order will result in a civil penalty of not more than \$25,000 for each day of non-compliance and a possible suspension or revocation of any permit or license.<sup>57</sup> In addition to civil liabilities, any person who knowingly violates a regulation can, upon conviction, be fined up to \$25,000 for each day of violation, or be imprisoned for up to one year, or both.<sup>58</sup>

Act 334 provides the Department of Natural Resources with the discretion to develop as stringent standards as are necessary, and they will have to be at least as strict as those promulgated by the EPA. Whether the dangers posed by hazardous wastes will be controlled by Act 334 will depend upon how the EPA and the Natural Resources Department use the authority given them by the Federal Hazardous Waste Control Act and its Louisiana counterpart.

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50. 1978 La. Acts, No. 334, adding LA. R.S. 30:1107-08.

51. 1978 La. Acts, No. 334, adding LA. R.S. 30:1106(B).

52. 1978 La. Acts, No. 334, adding LA. R.S. 30:1109.

53. *Id.*

54. 1978 La. Acts, No. 334, adding LA. R.S. 30:1110(A).

55. 1978 La. Acts, No. 334, adding LA. R.S. 30:1113(B). The measure of damages will be the cost of restoring the affected area to its condition prior to the violation, plus the cost of all reasonable and necessary investigations made by the state. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

## TRANSPORTATION OF RADIOACTIVE WASTES

Act 327 prohibits the transportation of high level radioactive wastes into Louisiana for disposal or storage in this state or elsewhere.<sup>59</sup> There is, however, some question as to whether the Act is constitutional, because federal legislation in the area of the disposal of nuclear wastes is so pervasive. Federal legislation heavily regulating an area of concern evidences a Congressional intent that only federal law affect that area.<sup>60</sup> The federal action is said to preempt the field, and thus any state laws attempting to regulate the subject may violate the supremacy clause of the United States Constitution.<sup>61</sup> Under the Atomic Energy Act, the Atomic Energy Commission is given broad authority to regulate nuclear wastes<sup>62</sup> and is required to retain the authority to regulate the disposal of waste by-products.<sup>63</sup> Consequently, Louisiana may be constitutionally precluded from legislating on this subject.

## SURFACE MINING REGULATION

The Federal Surface Mining Control and Reclamation Act of 1977<sup>64</sup> gave the Department of Interior the authority to establish a nationwide program for the regulation of surface coal mining and reclamation.<sup>65</sup> Any state may assume jurisdiction over the mining operations within its boundaries by obtaining the Secretary of the Interior's approval of the state's program of regulation.<sup>66</sup> The state must demonstrate that it has the capacity to achieve the purposes of the federal act,<sup>67</sup> which include the protection of the environment from the adverse effects of surface coal mining and the protection of surface landowners' rights.<sup>68</sup> In response to the federal program, the Louisiana legislature passed Act 406 which will enable

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59. 1978 La. Acts, No. 327, adding LA. R.S. 51:1072.

60. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

61. *Id.* at 236. See also U.S. CONST. art. VI, cl. 2.

62. 42 U.S.C. §§ 2011-296 (1946).

63. *Id.* at § 2021(b).

64. Pub. L. No. 95-87, 91 Stat. 445 (1977).

65. *Id.*

66. *Id.* at § 503.

67. *Id.*

68. *Id.* at § 102.

Louisiana to undertake the regulation of its own surface coal mining.<sup>69</sup>

According to Act 406, no person can engage in surface coal mining operations without a permit from the Office of Conservation,<sup>70</sup> and these permits will require mining operations to meet certain performance standards.<sup>71</sup> Each permit applicant must also submit an approved reclamation plan,<sup>72</sup> the faithful performance of which will be assured by a performance bond.<sup>73</sup> A noteworthy provision of the Act is one which, like many federal environmental laws,<sup>74</sup> allows any citizen who may be adversely affected by surface mining to commence a civil action to compel compliance with the Act.<sup>75</sup> Citizen suits are important if the purposes of the Act are to be accomplished and the destruction of the land prevented. Landowners are more likely to be aware of what is taking place on their land than a state agency, and therefore, citizen suits should promote more effective enforcement.

### SOLAR ENERGY

The legislature also showed an interest in encouraging the use of solar energy. Act 591 exempts from ad valorem taxation any owner-occupied residential building or residential swimming pool that uses solar energy.<sup>76</sup> Other legislation requires the Department of Natural Resources to develop a program for the research and development of solar energy<sup>77</sup> and to adopt

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69. 1978 La. Acts, No. 406, *amending* LA. R.S. 30:902, 30:904-14 (1950), and *adding* LA. R.S. 30:915-32.

70. 1978 La. Acts, No. 406, *amending* LA. R.S. 30:906(A) (1950).

71. 1978 La. Acts, No. 406, *adding* LA. R.S. 30:915. Mining operations will be required to "maximize the utilization and conservation of the solid fuel resource being recovered so that reffecting the land in the future through surface coal mining can be minimized." *Id.*

72. 1978 La. Acts, No. 406, *amending* LA. R.S. 30:906, 30:908 (1950).

73. 1978 La. Acts, No. 406, *amending* LA. R.S. 30:909 (1950).

74. *See, e.g.,* Federal Clean Air Act, 42 U.S.C. § 7604 (1977).

75. 1978 La. Acts, No. 406, *adding* LA. R.S. 30:920.

76. 1978 La. Acts, No. 591, *adding* LA. R.S. 47:1706.

77. 1978 La. Acts, No. 542, *adding* LA. R.S. 30:1102.

regulations governing solar devices<sup>78</sup> which will encourage the development and use of solar energy.<sup>79</sup>

#### OFFICE OF ENVIRONMENTAL AFFAIRS

One significant environmental measure which failed to pass the 1978 legislature was House Bill 1396,<sup>80</sup> which would have established an Office of Environmental Affairs within the Department of Natural Resources.<sup>81</sup> This office was to have jurisdiction over all matters affecting the regulation of the environment within the state, including but not limited to the regulation of air quality, water quality, solid and hazardous waste disposal, radiation control, and noise levels.<sup>82</sup> The new Office of Environmental Affairs would have eliminated the present duplication of functions in various agencies and thus would have promoted the more efficient regulation of environmental matters.

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78. 1978 La. Acts, No. 542, adding LA. R.S. 30:1104. For example, the Department must develop standards for testing, inspection, certification, and installation of solar devices.

79. *Id.*

80. La. H.B. 1396, 4th Reg. Sess. (1978).

81. La. H.B. 1396, § 1071(A), 4th Reg. Sess. (1978).

82. *Id.*

## PROCEDURE

### CIVIL PROCEDURE

#### SEIZURES

Code of Civil Procedure article 323 provides exceptions to the general rule that a sheriff shall not execute any writ, mandate, order, or judgment of a court in a civil case on a legal holiday.<sup>1</sup> Under article 323, neither a writ of attachment, a writ of sequestration, nor an injunction are prohibited from being executed on holidays.<sup>2</sup> Act 169 of 1978 amends article 323 to additionally permit a writ of fieri facias and a writ of seizure and sale under executory process to be executed on a legal holiday.<sup>3</sup>

Act 408 of 1978 adds a new provision to title 13 of the Louisiana Revised Statutes regarding the seizure of property.<sup>4</sup> According to the revision, when the sheriff to whom a writ is directed cannot find or identify the subject movable property, he may call upon the seizing creditor to point out any property to which the creditor may have a claim, or any other property belonging to the debtor which the creditor wants seized.<sup>5</sup> This statute authorizes a practice previously not officially recognized, but common in some areas of the state.

#### DEFAULT JUDGMENTS AGAINST THE STATE

When a defendant in a principal or incidental demand fails to answer within the time prescribed by law, a judgment of default may be entered against him.<sup>6</sup> Formerly, this default could be confirmed after two days, exclusive of holidays, from

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1. LA. CODE CIV. P. art. 323 (as it appeared prior to Act 169 of 1978).

2. *Id.*

3. 1978 La. Acts, No. 169, *amending* LA. CODE CIV. P. art. 323.

4. 1978 La. Acts, No. 408, *adding* LA. R.S. 13:3884.

5. *Id.*

6. LA. CODE CIV. P. art. 1701 states:

If a defendant in the principal or incidental demand fails to answer within the time prescribed by law, judgment of default may be entered against him. The judgment may be obtained by oral motion in open court or by written motion, either of which shall be entered in the minutes of the court, but the judgment shall consist merely of an entry in the minutes.

the entry of the preliminary default in the minutes of the court.<sup>7</sup> Act 149 of 1978 provides a different procedure for litigants who seek to confirm a judgment of default against the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities.<sup>8</sup> Now, before such a default can be confirmed, a certified copy of the minute entry reflecting the preliminary default and a certified copy of the petition or other demand must be delivered to the Attorney General either by registered mail, by certified mail, or by personal service.<sup>9</sup>

If this notice is sent by mail, the person mailing such items must execute and file in the record an affidavit stating that these items have been enclosed in an envelope properly addressed to the Attorney General with sufficient postage affixed, and stating the date on which the envelope was deposited in the United States mails. In addition, the return receipt must be attached to the affidavit which has been filed in the record.<sup>10</sup>

Under Act 149, the state is entitled to an additional fifteen days following the receipt of the above described notice in which to file an answer. If no answer is filed during this time period, the plaintiff may then confirm his default judgment by the proof required in Code of Civil Procedure article 1702.<sup>11</sup>

### MOTION TO DISMISS

In 1977, the legislature added Louisiana Code of Civil Procedure article 1810 in order to allow directed verdicts in

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7. LA. CODE CIV. P. art. 1702 states in part: "A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the judgment of default."

8. 1978 La. Acts, No. 149, adding LA. CODE CIV. P. art. 1704. The reference in the Act to "the state or any of its . . . instrumentalities" raises the interesting question of the extent to which article 1704 will also apply to parishes or municipal corporations. In *Niette v. Natchitoches Police Jury*, 348 So. 2d 162, 165 (La. App. 3d Cir.), cert. denied, 351 So. 2d 160 (La. 1977), the court stated that parishes and municipal corporations were creatures of the state and were only vested with such powers as were delegated to them by the constitution or the legislature. Therefore, it can be argued that parishes and municipal corporations should be considered as instrumentalities of the state, and as such, entitled to the benefit of article 149.

9. 1978 La. Acts, No. 149, adding LA. CODE CIV. P. art. 1704. Personal service may be made upon the Attorney General or the First Assistant Attorney General at the office of the Attorney General. *Id.*

10. *Id.* Although the Act does not so state, it presupposes that a notice sent by certified or registered mail must request a return receipt.

11. *Id.* See also LA. CODE CIV. P. art. 1702.

Louisiana civil jury trials.<sup>12</sup> In a jury trial, the motion for a directed verdict is made by either party at the close of the evidence offered by his opponent, and, if granted, it in effect usurps the power of the jury to decide the case. In a non-jury trial, the motion to dismiss is somewhat analogous to the directed verdict, but it was not previously provided for under Louisiana law. Act 156 of 1978 amended article 1810 to allow a motion to dismiss, but the motion can be made only upon the completion of the plaintiff's evidence and only by a party seeking a dismissal of the action against himself.<sup>13</sup>

This device should promote judicial efficiency by relieving a party from the burden of conducting a defense when the plaintiff's evidence is insufficient to support any claim for relief. However, in light of Louisiana's system of appellate review of fact, litigants should be aware of the possible consequences of an incomplete record on appeal. In circumstances where the motion to dismiss is granted at mid-trial and later reversed on appeal, the court of appeal will have to remand the case to the district court in order for the moving party to complete his presentation of evidence. Consequently, the motion to dismiss, although designed to promote judicial efficiency, could ultimately result in piecemeal litigation.

#### CODE OF JUVENILE PROCEDURE

Practitioners participating in juvenile proceedings should take cognizance of the legislature's adoption of a Code of Juvenile Procedure.<sup>14</sup> While a thorough review of the new Code is beyond the scope of this symposium, it should be noted that this comprehensive work consolidates and revises the laws applicable to courts exercising juvenile jurisdiction and provides procedures for practicing before these courts.<sup>15</sup>

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12. 1977 La. Acts, No. 699, adding LA. CODE CIV. P. art. 1810. This act adopted verbatim the provisions of Federal Rule of Civil Procedure 50(a).

13. 1978 La. Acts, No. 156, amending LA. CODE CIV. P. art. 1810. Compare FED. R. CIV. P. 41(b) with LA. CODE CIV. P. art. 1810, as amended by 1978 La. Acts, No. 156.

14. 1978 La. Acts, No. 172, adding LOUISIANA CODE OF JUVENILE PROCEDURE.

15. *Id.* See also 1978 La. Acts, No. 460, amending LA. R.S. 13:1571.1 (Supp. 1974), relative to the transfer of prosecutions from juvenile court to the appropriate court exercising adult criminal jurisdiction.



## LEGAL HOLIDAYS

In computing the period of time allowed or prescribed for various actions by law or by order of a court, it is important to make the necessary allowances for legal holidays. According to article 5059 of the Code of Civil Procedure, a legal holiday is to be included in the computation of a period of time allowed or prescribed except when it is expressly excluded, when it would otherwise be the last day of the period, or when the period is less than seven days.<sup>16</sup> Revised Statutes 1:55 generally designates which days are days of public rest, legal holidays, and half-holidays.<sup>17</sup> However, due to the legislature's generosity in decreeing holidays, it has become increasingly difficult for practitioners to keep track of every legal holiday which would affect the computation of the time for legal delays. To alleviate this problem, Act 163 of 1978 amends Revised Statutes 1:55(E) to limit legal holidays for the purposes of article 5059 to Saturdays, Sundays, and those holidays listed therein.<sup>18</sup>

## CONFESSION OF JUDGMENT

Central to Louisiana's executory proceeding is the requirement of an authentic act importing a confession of judgment.<sup>19</sup> In the Louisiana Constitution of 1921, confessions of judgment were prohibited except when made for the purposes of executory process.<sup>20</sup> However, this prohibition was not included in the Louisiana Constitution of 1974,<sup>21</sup> and since then, confessions of judgment have been technically permissible for any purpose. Act 518 of 1978 fills this void by providing that confessions of judgment, although generally prohibited prior to the maturity of the obligation sued upon, are permissible for the purposes of executory process.<sup>22</sup>

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16. LA. CODE CIV. P. art. 5059.

17. LA. R.S. 1:55 (Supp. 1977 & 1978).

18. 1978 La. Acts, No. 163, *amending* LA. R.S. 1:55 (Supp. 1977).

19. LA. CODE CIV. P. art. 2631.

20. LA. CONST. of 1921, art. VII, § 44, provided: "Service of citation shall not be waived, nor judgment confessed, prior to the maturity of the obligation sued on, except for the purposes of executory process . . . ."

21. *See Disposition Table*, LA. CONST. of 1974.

22. 1978 La. Acts, No. 518, *adding* LA. R.S. 9:3590.

## DELAYS FOR APPLICATION FOR REHEARING OR WRIT OF CERTIORARI

Act 179 of 1977 amended article 2166 of the Code of Civil Procedure to increase to thirty days the delay for applying to the court of appeal for a rehearing or to the supreme court for a writ of certiorari.<sup>23</sup> Act 179 provided that it would be effective on January 1, 1978, and would apply to all appeals in which the *order of appeal* had been granted on or after the Act's effective date.<sup>24</sup> However, in *Whitener v. Clark*<sup>25</sup> the Second Circuit held that Supreme Court Rule 29,<sup>26</sup> which had been amended to conform to Act 179, controlled applications for rehearing to the appellate courts.<sup>27</sup> The court stated that according to rule 29, article 2166 as amended would be applicable to all *judgments rendered* by an appellate court on or after January 1, 1978, regardless of the date on which the appeal was *ordered*.<sup>28</sup>

In Act 363 of 1978,<sup>29</sup> the legislature attempted to conform Act 179 of 1977 to *Whitener* and rule 29. Act 179 was amended so that it only provides for an effective date of January 1, 1978, and makes no mention of which appeals will be affected thereby.<sup>30</sup> With the deletion of Act 179's reference to when an appeal was *ordered*, there is nothing to conflict with *Whitener's* holding that article 2166 applies to all *judgments rendered* after the Act's effective date.

However, section 2 of Act 363 of 1978 states that "the provisions of Article 2166 of the Louisiana Code of Civil Procedure shall apply to all cases in which a judgment is rendered by a court of appeal on or after the effective date hereof."<sup>31</sup> The effective date of Act 363 is July 12, 1978, the date on which it was approved by the Governor, and it is possible that Act 363,

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23. 1977 La. Acts, No. 179, amending LA. CODE CIV. P. art. 2166.

24. *Id.*

25. 356 So. 2d 1094 (La. App. 2d Cir.), *cert. denied*, 358 So. 2d 538 (La. 1978).

26. "Section 2. The provisions of this rule are applicable to all decisions of the courts of appeal rendered on January 1, 1978 and thereafter." LA. SUP. CT. R. 29(2).

27. *Whitener v. Clark*, 356 So. 2d 1094, 1099 (La. App. 2d Cir.), *cert. denied*, 358 So. 2d 638 (La. 1978).

28. *Id.*

29. 1978 La. Acts, No. 363, amending 1977 La. Acts, No. 179, which amended LA. CODE CIV. P. art. 2166.

30. *Id.*

31. *Id.*

read literally, makes this same date the effective date of article 2166. However, such an interpretation would cause great confusion, and it seems more proper to read the phrase "effective date hereof" in section 2 of Act 363 as referring to January 1, 1978. Thus read, article 2166 as amended by Act 179 of 1977 would be applicable to all cases in which a judgment was rendered by a court of appeal on or after January 1, 1978. In this way, needless uncertainty would be avoided and the legislative purpose realized.

## CRIMINAL PROCEDURE

## SEVERANCE OF OFFENSES

In 1975 the Louisiana legislature amended the Code of Criminal Procedure articles relative to joinder of offenses in an indictment or information.<sup>1</sup> Article 493,<sup>2</sup> dealing with the joinder of offenses, was derived from the language of Federal Rule of Criminal Procedure 8(a).<sup>3</sup> However, the Louisiana legislature did not at that time adopt the companion provision relative to relief from prejudicial joinder embodied in Federal Rule 14.<sup>4</sup> Rather, a rule paralleling the American Bar Association's recommendation on severance of offenses was enacted.<sup>5</sup> Act 466

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1. 1975 La. Acts, No. 528, amending LA. CODE CRIM. P. arts. 493-95, adding art. 495.1, and repealing arts. 491-92.

2. LA. CODE CRIM. P. art. 493 provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

3. FED. R. CRIM. P. 8(a) provides:

*Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

4. FED. R. CRIM. P. 14 provides:

*Relief from Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires . . .

5. LA. CODE CRIM. P. art. 495.1 (as it appeared prior to Act 466 of 1978), states:

The court, on application of the prosecuting attorney, or on application of the defendant shall grant a severance of offenses whenever:

(a) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

(b) if during the trial upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The Court shall consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

of 1978 departs from the ABA standard by amending article 495.1 of the Code of Criminal Procedure to conform to the corresponding federal provision. As amended, article 495.1 now gives the trial court the *discretion* to grant relief whenever it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment, information, or trial.<sup>6</sup>

Under the former severance provision, the sole relief available from prejudicial joinder was a severance of offenses.<sup>7</sup> However, article 495.1 as amended gives the court discretion either to order separate trials, to grant severance of offenses, or to provide whatever other relief justice requires.<sup>8</sup>

In determining whether a severance should have been granted under the former statute, the Louisiana Supreme Court has held that the admissibility of the evidence of the respective joined offenses almost always<sup>9</sup> determines the propriety of severance.<sup>10</sup> That is, if evidence of one of the joined offenses would have been admissible at a separate trial of the other offense as "res gestae"<sup>11</sup> or as an "other crime,"<sup>12</sup> evidence relating to each crime will be equally permissible if they are tried together.<sup>13</sup> The federal jurisprudence interpreting Federal Rule 14 follows much the same standard.<sup>14</sup> Therefore, if the

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See AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.2(b) (1968), which states:

The court, on application of the prosecuting attorney, or on application of the defendant . . . should grant a severance of offenses whenever: (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or (ii) if during trial upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court should consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

6. 1978 La. Acts, No. 466, amending LA. CODE CRIM. P. art. 495.1.

7. LA. CODE CRIM. P. art 495.1 (as it appeared prior to Act 466 of 1978). See note 5, *supra*, for the text of this article.

8. LA. CODE CRIM. P. art. 495.1, as amended by 1978 La. Acts, No. 466.

9. In *State v. Carter*, 352 So. 2d 607, 614 (La. 1977), the court declined to set out *absolute* rules for joinder and severance of offenses due to possible situations in which compelling reasons might require severance even though evidence of the offenses was admissible.

10. *State v. Carter*, 352 So. 2d 607, 614 (La. 1977).

11. LA. R.S. 15:447-48 (1950).

12. LA. R.S. 15:446 (1950). See *State v. Prieur*, 277 So. 2d 126 (La. 1973).

13. 352 So. 2d at 614.

14. *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

Louisiana courts follow the federal courts' interpretation of this severance provision, Act 466 may not effect a change in the law. However, the federal courts have also found no prejudicial effect from joinder when the evidence of each crime is simple and distinct, reasoning that in this situation the jury can easily keep the evidence separate in their deliberations as to the respective crimes.<sup>15</sup> If this aspect of the federal jurisprudence is followed, then Act 466 will narrow the extent to which severance will be available to the accused.

#### CRIMINAL FORFEITURE OF PROPERTY

Act 730 of 1978<sup>16</sup> amends Revised Statutes 40:989, which generally provided for the forfeiture of: (1) controlled dangerous substances; (2) contraband related to their production, manufacture, and distribution; and (3) the conveyances used to transport such items.<sup>17</sup> The purpose of the amendment is to meet the requirements set forth in *State v. 1971 Green GMC Van*,<sup>18</sup> in which the Louisiana Supreme Court held that section 989 A(4), dealing specifically with the forfeiture of a conveyance, was unconstitutional.

In *Green GMC Van*, the court held that section 989 A(4) offended the due process clauses of the federal and state constitutions because it allowed the forfeiture of a person's vehicle without proof of conviction of the subject drug offense, without proof of the legality of the search and seizure, and without proof that the vehicle owner himself knew of, should have known of, or was involved in the criminal offense.<sup>19</sup> The court also held that the forfeiture statute unlawfully impinged upon the right to property guaranteed by the Louisiana Constitution because the forfeiture of an automobile, boat, or plane would be too harsh a penalty for a crime such as the knowing possession of small amounts of marijuana.<sup>20</sup> As a result of this case, Act 730 requires that before a vehicle seized by the state may

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15. *Id.* at 91.

16. 1978 La. Acts, No. 730, amending LA. R.S. 40:989 (1950).

17. LA. R.S. 40:989 (1950) (as it appeared prior to Act 730 of 1978).

18. 354 So. 2d 479 (La. 1977).

19. *State v. 1971 Green GMC Van*, 354 So. 2d 479, 486 (La. 1977). See U.S. CONST. amends. V, XIV; LA. CONST. art. I, § 2.

20. 354 So. 2d at 487.

be forfeited, the district attorney must show that a conviction resulted from the violation under which the seizure was authorized, that the seizure was constitutionally valid, that the owner of the seized conveyance was privy to the subject violation, and that the contraband was in excess of five hundred dollars or was intended for commercial sale.<sup>21</sup>

However, despite Act 730 there may still be some constitutional problems. In arguing for the validity of the statute in *Green GMC Van*, the prosecution also contended that the defendant automobiles were "derivative contraband."<sup>22</sup> As such, it was argued that these vehicles were subject to seizure because of the contraband exception to article I, section 4, of the Louisiana Constitution, which provides that "personal effects, other than contraband, shall never be taken."<sup>23</sup> In rejecting this position, the court noted that the "vehicles are not contraband but are personal effects, the ownership of which is protected by Article I, section 4 of the Constitution."<sup>24</sup> Thus, the argument can be made that the Louisiana Constitution extends an absolute protection to personal vehicles, and that therefore, despite the new procedures provided by Act 730, section 989 A(4) remains unconstitutional.

#### MOTION TO SUPPRESS

Act 746 of 1978 amends in two respects Code of Criminal Procedure article 703 dealing with the motion to suppress evidence.<sup>25</sup> First, article 703 is broadened to allow a defendant to move to suppress both written and oral confessions or inculpatory statements,<sup>26</sup> rather than only written evidence as under the former article.<sup>27</sup>

Act 746 also defines the scope of cross examination to

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21. 1978 La. Acts, No. 730, amending LA. R.S. 40:989 (1950).

22. 354 So. 2d at 486-87.

23. LA. CONST. art. I, § 4.

24. 354 So. 2d at 487.

25. 1978 La. Acts, No. 746, amending LA. CODE CRIM. P. art. 703.

26. LA. CODE CRIM. P. art. 703, as amended by 1978 La. Acts, No. 746.

27. LA. CODE CRIM. P. art. 703 (B) (as it appeared prior to Act 746 of 1978). According to *State v. Daniels*, 262 La. 475, 483, 263 So. 2d 859, 862 (1972), cert. denied, 410 U.S. 944 (1973), "Oral confessions and exculpatory statements are not subject to a motion to suppress. Such a motion may be directed only to written confessions or written exculpatory statements."

which a defendant is subject upon becoming a witness at trial to testify concerning the circumstances surrounding a confession or inculpatory statement. In *State v. Lovett*,<sup>28</sup> the Louisiana Supreme Court held as a matter of statutory interpretation that an accused must be permitted to testify at the trial on the merits for the limited purpose of contesting the voluntariness of a confession. The court decided that since the defendant could take the stand at the preliminary hearing for this limited purpose under article 794 of the Code of Criminal Procedure, he should be accorded the same privilege at trial. Thus, the defendant's testimony could be given to the jury contemporaneously with the state's presentation of its predicate designed to establish the voluntariness of the confession. The defendant testifying for this limited purpose would not, under the *Lovett* rationale, be subject to cross examination on the case as a whole, but only on the validity of the confession and on his credibility, including impeachment on the basis of prior convictions.<sup>29</sup>

The court expressly avoided basing its decision on any constitutional objection to the pre-*Lovett* procedure, whereby the accused was required to waive his rights against self-incrimination when he took the stand to testify as to a limited issue.<sup>30</sup> Thus, the door was left open for the legislature to statutorily overrule *State v. Lovett*, which it did via Act 746 of 1978. Section B of article 703 now provides that "if a defendant becomes a witness at the trial on the merits, he shall be subject to cross examination on the whole case."<sup>31</sup>

#### IDENTIFICATION OF DEFENDANT IN CONVICTION RECORD

Act 302 provides that whenever someone is convicted of a felony, the judge must attach the defendant's fingerprints to the indictment or bill of information.<sup>32</sup> In addition, the judge must certify that the fingerprints are actually those of the defendant.<sup>33</sup> In effect, Act 302 protects defendants against the

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28. 345 So. 2d 1139 (La. 1977).

29. *Id.* at 1143.

30. *Id.* See also *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 345, 346 (1972).

31. LA. CODE CRIM. P. art. 703 (B), as amended by 1978 La. Acts, No. 746.

32. 1978 La. Acts, No. 302, amending LA. CODE CRIM. P. art. 871.

33. *Id.*



possibility that another person's conviction could be used against the defendant for purposes of impeachment or multiple offender sentencing in circumstances where two or more persons have substantially similar names.

### PRETRIAL MOTIONS

Upon the recommendation of the Louisiana State Law Institute, the Code of Criminal Procedure has been amended by Act 735 of 1978 in an effort to standardize as much as possible the time for the filing of pretrial motions.<sup>34</sup> Central to this effort is the addition of article 521, which provides that, generally, pretrial motions shall be made or filed within thirty days after arraignment, unless a different time is provided by law or fixed by the court at arraignment.<sup>35</sup> Article 521 further provides that the court shall allow additional time for filing pretrial motions at any time upon written motion and upon a showing of good cause.<sup>36</sup> As a result of Act 735, article 521 generally regulates the time for the filing of a motion for a bill of particulars,<sup>37</sup> a motion to quash,<sup>38</sup> a motion for a change of venue,<sup>39</sup> a motion

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34. 1978 La. Acts, No. 735, amending LA. CODE CRIM. P. arts. 484, 535, 621, 681, 707, 729 and adding art. 521.

35. LA. CODE CRIM P. art. 521, added by 1978 La. Acts, No. 735.

36. *Id.*

37. LA. CODE CRIM. P. art. 484, as amended by 1978 La. Acts, No. 735.

Prior to the 1978 amendment, article 484 of the Code of Criminal Procedure granted a defendant the right to file a bill of particulars either before trial or within ten days after arraignment, whichever was earlier. After the expiration of the ten day period, but prior to trial, permission to file this motion was within the court's discretion. LA. CODE CRIM. P. art. 484 (as it appeared prior to Act 735 of 1978). As amended by Act 735, article 484 provides that the time for filing a bill of particulars is governed by LA. CODE CRIM. P. art. 521.

38. LA. CODE CRIM. P. art. 535, as amended by 1978 La. Acts, No. 735. Under article 535, the time for filing a motion to quash depends upon the grounds on which the motion is based. Prior to the 1978 amendment, a defendant was required to file the motion at least three judicial days before the commencement of trial, or at any time prior to trial with the court's permission, if the motion was based either on the expiration of the time limitation for the commencement of trial, or upon objections to the petit or grand jury venire. LA. CODE CRIM. P. art. 535 (B) (as it appeared prior to Act 735 of 1978). Act 735 amends section B of article 535 to provide that a motion to quash on the ground that the time limitation for commencement of trial has expired "may be filed at any time before commencement of trial." 1978 La. Acts, No. 735, amending LA. CODE CRIM. P. art. 535 (B). This provision seems to give the trial court discretion to allow the defendant to file this motion, because (A) uses different language and states that when a motion to quash is based upon the reasons listed therein, the motion "may be filed of right at any time before commencement of the trial." LA.

to recuse the district attorney,<sup>40</sup> a motion for a continuance,<sup>41</sup> and a motion for discovery by a defendant.<sup>42</sup>

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CODE CRIM. P. art. 535 (A) (emphasis added). Presumably, had the legislature not intended a different treatment for motions filed on the ground that the time limit for commencement of trial has expired, these motions would have been included with those listed in section A of article 535.

Under former article 535(C), a motion to quash based upon any ground other than those stated in paragraphs A or B could be filed of right within ten days after arraignment or before commencement of the trial, whichever was earlier. After expiration of the ten day period, but prior to the commencement of trial, the motion could be filed only with the permission of the court. LA. CODE CRIM. P. art. 535 (C) (as it appeared prior to Act 735 of 1978). As amended by Act 735, these motions to quash must now be filed in accordance with article 521. 1978 La. Acts, No. 735, *amending* LA. CODE CRIM. P. art. 535(C).

One motion now coming under section C is the motion to quash based on objections to the petit or grand jury venires, since this motion is no longer included under article 535(B) as amended. LA. CODE CRIM. P. art. 535(B), *as amended by* 1978 La. Acts, No. 735. Consequently, the time for filing motions based upon grounds other than those stated in paragraphs A or B will now be controlled by article 535 (C). LA. CODE CRIM. P. art. 535 (C), *as amended by* 1978 La. Acts, No. 735.

39. LA. CODE CRIM. P. art. 621, *as amended by* 1978 La. Acts, No. 735. Formerly, a motion for a change of venue was required to be made at least five days prior to the date then fixed for commencement of trial. LA. CODE CRIM. P. art. 621 (as it appeared prior to Act 735 of 1978). As amended by Act 735, article 621 provides that this motion shall be filed in accordance with article 521. Subsequent to the first 30 days after arraignment, it is within the court's discretion to allow a motion for a change of venue any time before the first witness is sworn in at the trial on the merits. LA. CODE CRIM. P. art. 621, *as amended by* 1978 La. Acts, No. 735.

40. 1978 La. Acts, No. 735, *amending* LA. CODE CRIM. P. art. 681. Under former article 681, the motion to recuse the district attorney was required to be filed and tried contradictorily prior to the commencement of trial. LA. CODE CRIM. P. art. 681 (as it appeared prior to Act 735 of 1978). Act 735 amends this provision and mandates that this motion be filed in accordance with article 521. 1978 La. Acts, No. 735, *amending* LA. CODE CRIM. P. art. 681.

41. 1978 La. Acts, No. 735, *amending* LA. CODE CRIM. P. art. 707. Act 735 amends article 707 to provide that a motion for a continuance may be filed at any time prior to the commencement of trial.

42. 1978 La. Acts, No. 735, *amending* LA. CODE CRIM. P. art. 729. Prior to amendment, article 729 provided that this motion was to be filed "not later than ten days before trial or within such reasonable time as the court may permit." LA. CODE CRIM. P. art. 729 (as it appeared prior to Act 735 of 1978). Act 735 of 1978 now provides that a motion for discovery by a defendant may be filed in accordance with article 521 or within such reasonable time as the court may permit. 1978 La. Acts, No. 735, *amending* LA. CODE CRIM. P. art. 729.