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The Work of the Louisiana Supreme Court for the 1940-1941 Term: A Symposium

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The Work of the Louisiana Supreme Court for the 1940-1941 Term*

This symposium covers the last judicial term, from October 1940 to September 1941, and follows the pattern of previous surveys[1] in examining the main work of our highest appellate court and in noting the more important developments in our jurisprudence.

I. Statistical Survey

The various tables prepared in the statistical survey reveal a number of interesting facts, which are made doubly significant when compared with the corresponding tables of the three previous years. During the 1940-1941 term, there were 425 cases[2] docketed in the supreme court. This can be compared with 478, 464, and 437, the corresponding figures for the 1937-1938, 1938-1939, and 1939-1940 terms of court. Two hundred and eight, or 48.94%, of the cases were applications for supervisory writs to the lower courts and writs of certiorari or review to the courts of appeal. Of these, 146 were either granted or refused.[3] On the other hand, the supreme court disposed of 227 cases through written opinions.[4] Thus, as can be observed in Table I, a total of 373 cases, or 87.76% of the total number docketed, were actually disposed of.

* This symposium has been contributed by the members of the law faculty of the Louisiana State University as follows: Family Law, Community Property, Successions, Mineral Rights—Harriet S. Daggett; Sales, Lease, Conventional Obligations, Insurance—J. Denson Smith; Security Contracts, Property, Prescription—Joseph Dainow; Torts and Workmen's Compensation—Wex S. Malone; Public Law—Jefferson B. Fordham; Corporations, Criminal Law—Dale E. Bennett; Criminal Procedure—Dale E. Bennett and Albert S. Lutz; Procedure—Henry G. McMahon.

The statistical survey and the tables were prepared by James A. Bugea, Instructor in Law, Loyola University (New Orleans).

1. The Work of the Louisiana Supreme Court for the 1937-1938 Term (1939) 1 Louisiana Law Review 314; The Work of the Louisiana Supreme Court for the 1938-1939 Term (1939) 2 Louisiana Law Review 31; The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 Louisiana Law Review 267.

2. These figures were compiled from the Official Daily Court Record showing the cases docketed in the supreme court from October 1, 1940, to September 30, 1941.

3. See Table VIII. This information was gathered from the Official Daily Court Record.

4. This figure includes all cases for the 1940-1941 term officially reported in Volumes 195, 196, 197, and 198 of the Louisiana Reports.

This figure compares favorably with those of previous years when 96%, 89%, and 91.8% of the total number docketed were actually disposed of. This past year's result is an average of 53.29 matters per court member. In addition, a total of 130 applications for rehearings were considered, although rehearings were granted in only eleven instances.[5] In the three preceding terms, the court considered 163, 150, and 103 applications for rehearing, of which 13, 11, and 9 respectively were granted.

The number of cases appealed to the supreme court from district courts was 186, as compared with 209, 206, and 173 for the previous terms. Of this number, 55.4% of the judgments were affirmed, 29.6% were reversed, and 15% were modified or otherwise disposed of.[6] The corresponding figures for the 1937-1938, 1938-1939, and 1939-1940 terms show that 67%, 53.5%, and 56.6% respectively of the judgments were affirmed; while 20%, 14%, and 22.5% respectively were reversed; and 13%, 32.5%, and 20.9% were modified or otherwise disposed of.

As in previous years, most of the litigation reaching the supreme court[7] was based on appeals from the district courts, such litigation accounting for 82% of the cases reported (as compared with 78%, 85%, and 78.6% for the 1937-1938, 1938-1939, and 1939-1940 terms), while only 5.7% came upon writs of review to the courts of appeal (as compared with 12.7%, 7.4%, and 7.3% for the 1937-1938, 1938-1939, and 1939-1940 terms), and 7.9% on supervisory writs to the lower courts (as compared with 7.1%, 5.8%, and 11.4% for the three preceding terms).

The geographical analysis of the appeals from district courts[8] shows that the largest number came from the Parish of Orleans and constituted 24.7% of the cases appealed (as compared with 21.3%, 24.3%, and 21.4% for the three preceding terms). The Parish of Caddo sent 9.7%; Tangipahoa Parish provided 7%; East Baton Rouge—6.45%; and Calcasieu Parish—5.4%.

Thirteen cases reached the supreme court on writs of review to the courts of appeal. Of these, 23% were affirmed, 38.4% were reversed, and 38.6% were modified or otherwise disposed of.[9] The corresponding figures for the 1937-1938, 1938-1939, and 1939-1940 terms show that 26.5%, 67%, and 43.7% of the cases brought

5. See Table VII.
6. See Table II.
7. See Table V.
8. See Table VI.
9. See Tables II, III.

on writs of reviews were affirmed; while 58.8%, 11%, and 50% were reversed; and 14.7%, 22%, and 6.3% were modified or otherwise disposed of.

The topical analysis of decisions shown in Table IV has been made arbitrarily for convenience of treatment of the main subject matter to which the decisions relate. The tabulation shows that the greatest number of cases came up on procedural points, such cases accounting for 19.87% of the litigation decided in written opinions. The next largest groups were: Evidence—8.37%; Taxation—7.93%; Criminal Law and Procedure—7.44%; Successions and Donations—5.73%; Mineral Rights—5.73%; Conventional Obligations—5.29%.

TABLE I

VOLUME OF JUDICIAL BUSINESS

Cases disposed of with written opinions	227
Applications for writs filed during 1940-1941 term	208*
Applications for writs considered	146
Applications for writs pending	62
Applications for rehearings disposed of	130
Cases docketed during 1940-1941 term (excluding writ applications)	217
Total matters docketed during 1940-1941 term	425
Total cases handled by the court (excluding rehearing applications)	373
Grand total of matters handled by the court (including rehearing applications)	503

* This figure includes applications for supervisory writs to the lower courts as well as applications for writs of certiorari to the courts of appeal. See Table VIII.

TABLE II

DISPOSITION OF LITIGATION

	On Appeal from District Courts	On Appeal from Juvenile Courts	On Appeal from Recorders' Courts	On Certiorari or Review from Appellate Courts	On Supervisory Writs to District Courts	On Certified Questions from Courts of Appeal	On Original Jurisdiction	TOTAL
Affirmed	103	1	1	3	..	..	..	108
Affirmed in part and reversed in part	3	..	..	1	..	..	..	4
Affirmed in part, reversed in part and remanded	3	..	..	..	..	..	..	3
Amended and affirmed	9	..	..	1	..	..	..	10
Amended in part, affirmed in part and remanded	1	..	..	..	..	..	..	1
Amended and remanded	..	..	..	..	3	..	..	3

TABLE II (Continued)

DISPOSITION OF LITIGATION

	On Appeal from District Courts	On Appeal from Juvenile Courts	On Appeal from Recorders' Courts	On Certiorari or Review from Appellate Courts	On Supervisory Writs to District Courts	On Certified Questions from Courts of Appeal	On Original Jurisdiction	TOTAL
Annulled and case transferred to supreme court	..	..	..	1	..	..	..	1
Attorney disbarred	..	..	..	..	..	..	1	1
Certified questions answered	..	..	..	..	..	2	..	2
Exceptions overruled	..	..	..	..	..	..	3	3
Motions to dismiss appeal granted	3	..	..	..	..	..	..	3
Motions to dismiss appeal refused	7	..	..	..	..	..	..	7
Proceedings dismissed	..	..	..	..	..	..	1	1
Remanded to courts of appeal for further proceedings	..	..	..	1	..	..	..	1
Reversed and remanded	24	..	..	1	1	..	..	26
Reversed and rendered	31	..	..	..	3	..	..	34
Reversed and judgment of lower court amended	..	..	..	1	..	..	..	1
Reversed and judgment of lower court reinstated	..	..	..	3	..	..	..	3
Suit dismissed on agreement of parties on rehearing	..	..	..	1	..	..	..	1
Transferred to courts of appeal for lack of jurisdiction	2	..	..	..	..	..	..	2
Writs made peremptory	..	..	..	..	9	..	1	10
Writs recalled	..	..	..	..	2	..	..	2
TOTALS	186	1	1	13	18	2	6	227

TABLE III

DISPOSITION OF CASES REVIEWED ON WRITS OF CERTIORARI FROM COURTS OF APPEAL

	Parish of Orleans	Second Circuit	TOTAL
Affirmed	1	2	3
Affirmed in part and reversed in part	1		1
Amended and affirmed		1	1
Annulled and case transferred to supreme court	1		1
Remanded to court of appeal for further proceedings	1		1
Reversed and remanded	1		1
Reversed and judgment of lower court amended		1	1
Reversed and judgment of lower court reinstated	1	2	3
Suit dismissed on agreement of parties on rehearing		1	1
TOTALS	6	7	13

TABLE IV

TOPICAL ANALYSIS OF DECISIONS

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Emancipation	1
Evidence	19
Expropriation	5
Husband and Wife	1
Insurance	6
Lease	1
Mineral Rights	13
Mortgages	4
Municipal Corporations	8
Partition	2
Practice and Procedure	45
Prescription	3
Privileges	1
Property	6
Public Officers	4
Sales	4
Successions and Donations	13
Suretyship	2
Taxation	18
Torts and Workmen's Compensation	10
Tutors, Tutorship	6
TOTAL	227

TABLE V

JURISDICTIONAL ORIGIN OF CASES

Appeals from district courts	186
Appeal from juvenile court, Parish of Caddo	1
Appeal from recorders' court in the City of New Orleans	1
On writs of review from courts of appeal	13
Questions certified from courts of appeal	2
On supervisory writs to district courts	18
Original jurisdiction of supreme court	6
TOTAL	227

TABLE VI

GEOGRAPHICAL DISTRIBUTION OF APPEALS FROM DISTRICT COURTS

A—BY PARISH

Parish	*No. of Cases*	*Parish*	*No. of Cases*
Acadia	2	Orleans Civil	42
Allen	1	Orleans Criminal	4
Ascension	3	Ouachita	5
Assumption	1	Plaquemines	1
Avoyelles	4	Rapides	3
Beauregard	1	Red River	1
Bienville	1	Richland	2
Bossier	2	Sabine	1
Caddo	18	St. Bernard	4
Calcasieu	10	St. Charles	1
Caldwell	1	St. John the Baptist	1
Claiborne	3	St. Martin	2
Concordia	2	St. Mary	2
De Soto	3	Tangipahoa	13
East Baton Rouge	12	Terrebonne	1
Evangeline	2	Union	1
Iberia	1	Vernon	1
Iberville	1	Washington	2
Jackson	2	Webster	6
Jefferson	5	West Baton Rouge	1
Lafourche	7	West Carroll	1
Lincoln	2		
Livingston	2	TOTAL	186
Natchitoches	5		

B—BY JUDICIAL DISTRICT

	No. of Cases
First District (Caddo)	18
Second District (Claiborne, Jackson, Bienville)	6
Third District (Lincoln, Union)	3
Fourth District (Ouachita, Morehouse)	5
Fifth District (West Carroll, Richland, Franklin)	3
Seventh District (Catahoula, Concordia)	2
Ninth District (Rapides)	3
Tenth District (Natchitoches, Red River)	6
Eleventh District (De Soto, Vernon, Sabine)	5
Twelfth District (Avoyelles)	4
Thirteenth District (Evangeline)	2
Fourteenth District (Calcasieu, Jefferson Davis, Allen, Beauregard, Cameron)	12
Fifteenth District (Acadia, Lafayette, Vermilion)	2
Sixteenth District (St. Mary, Iberia, St. Martin)	5
Seventeenth District (Terrebonne, Lafourche)	8
Eighteenth District (Iberville, West Baton Rouge, Pointe Coupee)	2
Nineteenth District (East Baton Rouge)	12
Twenty-first District (Tangipahoa, Livingston, St. Helena)	15
Twenty-second District (Washington, St. Tammany)	2
Twenty-third District (Assumption, Ascension, St. James)	4

TABLE VI (Continued)

B—By Judicial District	*No. of Cases*
Twenty-fourth District (Jefferson, St. John the Baptist, St. Charles)	7
Twenty-fifth District (St. Bernard, Plaquemines)	5
Twenty-sixth District (Bossier, Webster)	8
Twenty-eighth District (La Salle, Caldwell)	1
TOTAL	140
Orleans Civil District	42
Orleans Criminal District	4
TOTAL	186

TABLE VII

DISPOSITIONS OF APPLICATIONS FOR WRITS AND REHEARINGS

	Granted	*Refused*	TOTAL
Applications for rehearings	11	119	130
Applications for writs	38	108	146*
TOTALS	49	227	276

* This figure includes applications for supervisory writs to the lower courts as well as applications for writs of certiorari or review to the courts of appeal. See Table VIII.

TABLE VIII

DISPOSITION OF APPLICATIONS FOR WRITS

	Granted	*Refused*	*Pending*	TOTAL
Supervisory writs to lower courts	21	26	39	86
Writs of certiorari to courts of appeal	17	82	23	122
TOTALS	38	108	62	208

TABLE IX

DISSENTS*

	With Opinion	*Without Opinion*	TOTAL
O'Niell, C. J.	6	9	15
Odom, J.	4	3	7
Ponder, J.		1	1
TOTALS	10	13	23

* In cases wherein rehearings have been granted, the dissents here tabulated are those from the opinion on rehearing. Dissents from the original opinions therein have not been included, since in such cases the final opinion of the court is that rendered on the rehearing. Total number of cases in which dissents were expressed—19.

II. CIVIL CODE AND RELATED SUBJECTS

A. FAMILY LAW

Tutors

The court held in the case of *Jackson v. United Gas Public Service Company*[1] that minors, when properly represented and safeguarded by compliance with the statutes for their protection, are bound by the representations made in good faith by their legal representatives, particularly when they have received the benefit, and it is impossible to restore the parties to their original status. A collateral attack upon the defect of the composition of the family meeting was unavailing as the proceeding had been promulgated and no detriment to the minor had occurred. The court remarked that, while it was undoubtedly the policy of the court to protect minors in every way possible, it was also important that property owners, acting in good faith and relying on the record, be protected.

This case represents another chapter of a prolonged controversy, the plaintiffs being heirs of Gus Gibson, who was recognized as one of the irregular heirs of Louise Tyson Gibson. The plaintiffs were claiming a one-fourth interest in Rodessa Oil Field lands. Their main demand was predicated on the idea that when they sold the land, they believed they were legal heirs and owners, whereas they, as irregular heirs, had only a right to claim. The court held on the first hearing that whatever interest they acquired in legal proceedings held after the sale, which they were trying to repudiate, inured to their vendees, and on the rehearing, that plaintiffs were estopped to deny their warranty that they were regular heirs.

The first alternative plea of the first hearing, to the effect that the proceedings leading to the sale of minors' property were defective, due to improper composition of family meeting, et cetera was disposed of by reiteration of the doctrine that, in such cases, the purchaser is protected by the orders convening the family meeting and promulgating its proceedings.

The third point made against the plaintiffs, as indicated above, was that minors, properly represented, are bound by the representations of their tutors made in regular judicial proceedings and that, while minors must be protected, titles must be stable and certain.

1. 196 La. 1, 198 So. 633 (1940).

The *Succession of Fontano*[2] involves a long and detailed controversy over the father's account as tutor for his minor children. The court pointed out that the father, as natural tutor, has the same obligations as those prescribed for all other tutors; that his usufruct of the children's property ceased when he became tutor; and that his obligation to support the children was not in force while they had a sufficient income for that purpose.

The facts in the *Succession of Burg*[3] were that Burg, surviving husband and tutor of minors, had certain community property adjudicated to him. A judgment was subsequently acquired against him for a community debt and he sold the property in question for a fair price to acquire money with which to pay this judgment. The property was later transferred to the plaintiff in the present controversy, who wished to have the title cleared of the minors' mortgages. The trial court ordered the recorder to cancel the encumbrances and the recorder alone availed himself of the right to appeal. The supreme court felt that under these circumstances the recorder would be protected against liability.

In the case of *Leadman v. First National Bank*[4] a natural tutrix, unauthorized by judgment or order of court, used minor's funds to purchase a note from the defendant bank, who, knowingly, received them. This case holds that the misrepresented individual now has a claim against the bank based on a quasi contract.

Custody

For the third time the matter of the custody of little Caroline Anne Martinez reached the supreme court in *Hattier v. Martinez*.[5] The involved procedure will be discussed elsewhere in this article.[6] The court, with the aid of Section 10 of Article VII of the Constitution of 1921, was able to shear through the maze and review this matter with only the best interests of the child in mind. The lower court's judgment, awarding custody to the mother, had provided that the father was to have the child on Saturdays and alternating Sundays, to which the mother seemed to acquiesce. It developed, however, that the child, who was not very well, was made very nervous by these visits and, when the child cried and refused to go with the father, the mother refused

2. 196 La. 775, 200 So. 142 (1941).
3. 3 So. (2d) 555 (La. 1941).
4. 3 So. (2d) 739 (La. 1941).
5. 197 La. 121, 1 So. (2d) 51 (1941).
6. See p. 301, infra.

to force her to do so. The court found this *not* to be contempt of court on the mother's part, as she had only the child's interest at heart and did not even realize, doubtless, that she was in contempt. The father was not paying the alimony of $2.50 per week for the child and, it was the court's belief that had he really loved the child, he would have met this obligation, and would not have wanted the child distressed by taking her forcibly with him. The judgment of contempt was annulled and the mother discharged.

In re Caronna[7] records an attempt by adopting parents to regain custody of a small child who had been removed from the care of the adopting parents by the juvenile court because of their neglect, immoral habits, and general unfitness. The court emphasized the fact that there was "only one paramount interest, i.e., the physical and moral welfare of the child." The opinion also points out that the juvenile court judge has broad discretionary powers. Hence, the justices refused to disturb the decision of the juvenile court judge and did *not* restore the custody of the child to the adopting parents.

State ex rel. Johnson v. Ashmore[8] was a habeas corpus proceeding by a husband against his wife, voluntarily separated from him, to obtain custody of twin boys, aged twenty-three months, who with their mother were residing with the latter's parents. The mother was preparing at Louisiana State Normal School to become a teacher in order to support herself and her children. She spent weekends with the twins. After examining all the circumstances of the two homes, that of the mother's mother and that of the father's mother (as he also lived with his parents), the court refused to move the children. The guiding principles of the decision are that the children's welfare is the real concern, and that great weight should be given the district judge's opinion.

The court's great care and progressive social attitude in matters concerning the welfare of both legitimate and illegitimate children is very heartening to students in this field and to all others with an intelligent interest in these issues.

Emancipation

The case of *Emancipation of Dupuy*[9] was another attempt[10] by a minor and his father to defeat the control of the mother, who

7. 197 La. 494, 2 So. (2d) 1 (1941).
8. 197 La. 971, 2 So. (2d) 897 (1941).
9. 196 La. 439, 199 So. 384 (1940).
10. Guillory v. Dupuy, 195 La. 585, 197 So. 240 (1940).

had been awarded the custody of the child in a judgment of separation of bed and board granted in the mother's favor. The court found that, particularly under these circumstances, the mother's consent to the emancipation was necessary, under the plain language of Article 387 and the jurisprudence of the state, unless cruel treatment was proved.

Cruel treatment was not proved and hence the minor's suit for emancipation failed. The main allegations of cruel treatment were that the mother was under the domination of the minor's older brother, who was dissipating the estate of the minor. It appeared that the minor was neglecting his work as a jockey, was not obeying the trainers, and was, in general, exhibiting a bad attitude. This is but another instance of the sad situation where emotional disturbance and dissatisfaction with its attendant results are manifested in the children of divorced or separated parents.

The mother was getting forty per cent of the wages of the minor, and this amount seemed to be the main support of the mother and sister. This fact appeared to be another source of dissatisfaction to the minor who doubtless rightly felt that the much-talked-of older brother should assume part of this obligation. The court cited Article 223 for the rule that the mother had a right to the usufruct of the minor's estate. Both the judgment of separation[11] and Article 226, excluding from this usufruct all property acquired by the child's "own labor or industry," would be thus ignored.

Under all circumstances, it certainly appeared that if emancipation were ordered the minor would be no better off than before, if, indeed he would fare as well, and the court adhered to the law without neglecting consideration of the welfare of the unhappy boy.

Husband and Wife

The court held in the case of *Kramer v. Freeman*[12] that a husband can sue his wife for the restitution or value of his separate property which she had taken from him. The cases bearing upon the subject were reviewed and the tendency noted "to maintain such a suit where a denial of the right would result in a miscarriage of justice." Spanish sources of the Code of

11. Art. 221, La. Code of 1870, as amended, and Art. 157, La. Code of 1870, as amended.

12. 3 So. (2d) 609 (La. 1941).

Practice were cited for additional assistance in the interpretation of the pertinent articles, plain in themselves. The court made clear the fact that the limited prohibitions against the wife suing the husband are not necessarily imposed on the husband. However, the opinion also indicates that questions of public policy might prevent the court from permitting the husband to sue in some cases. The principle was asserted that since there could be no accounting of community property, the husband could not sue to get possession of *community* property. He could sue to have his separate property returned. Since the wife in this case had already been convicted of bigamy, the court thought the question of disturbing the tranquillity of the home by this suit was hardly pertinent. The case is most interesting as a social document as well as for the judicial clarification of hitherto doubtful questions. The Code specifically gives this form of relief to a wife and it is certainly desirable and proper that the court should give a remedy to this husband, beaten and robbed of his jewels by a wife (assisted by a mother-in-law), from whom he appears not to have sought a judicial separation or divorce!

Divorce—Separation—Alimony

In the case of *Adams v. Adams*[13] the plaintiff and defendant had been married thirty-one years and had ten children when this suit for divorce was filed by the husband. The proof of adultery having failed, the court also dismissed the alternative plea for a separation of bed and board on ground of cruel treatment, reversing the judgment of the lower court given on this ground:

> "We find it unnecessary to discuss the question whether a wife is guilty of such cruelty toward her husband as is mentioned in Article 138 of the Revised Civil Code if she consorts with or has dates with or carries on an affair with a single man or men, in cases where the testimony fails to show that she was ever guilty of adultery. It suffices to say that, if it be conceded that such conduct does amount to cruelty, the plaintiff in this case has failed to show by satisfactory testimony that his wife was in fact guilty of such conduct."[14]

The court discussed the case of *Holmes v. Holmes*[15] at length and distinguished it on its facts, largely it appeared, because the

13. 196 La. 464, 199 So. 392 (1940).
14. 199 So. at 394.
15. 50 La. Ann. 768, 23 So. 324 (1898).

husband in the instant case, not knowing of the wife's association with other men, until after he had left her, could not have been hurt by it.

The case is a sordid and depressing social document as the children of the couple, majors and minors, were brought in by both spouses as witnesses in tawdry recital of unpleasant details, many of which were palpable lies. Perhaps the school of law-givers which refuses divorce upon any ground, after twenty-five years of marriage, is right. Certainly the court was wise to proceed cautiously with the expansion of the "mental cruelty" doctrine in this instance as it might well open the door to indulgence in suits of this nature by the malicious or emotionally disturbed spouse. The change in social customs makes it easy for a jealous husband or wife to find and sieze upon an innocent incident which would be "evidence" of the type of mental cruelty alleged here.

One Coston, a Pullman porter, in *Coston v. Coston*[16] obtained a divorce from his wife on the ground of adultery. The proof included facts showing the wife to have spent some hours in a house operated for immoral purposes. The court made the following excellent statement:

> "Adultery may be established by indirect or circumstantial evidence, as well as by direct evidence. In the nature of things, the offense can seldom be established by direct or positive evidence, and a prima facie case may be made out by showing facts or circumstances that lead fairly and necessarily to the conclusion that adultery has been committed as alleged in the petition. For instance, the character of the house where the parties met, the circumstances under which they met, and all the facts indicating illicit relations between them may be proved, and it is then for the court to determine whether those facts and circumstances have made out the case.
>
> "In a case very similar to the present one, this court granted the husband a divorce, holding, as shown by the syllabus, that: 'In actions for divorce, courts must take such evidence as the nature of the case permits, circumstantial, direct, or positive, and to bring to bear upon it the experiences and observations of life, and, thus weighing it with prudence and care, give effect to its just preponderance.' "[17]

16. 196 La. 1095, 200 So. 474 (1941).
17. 200 So. at 476.

One Mrs. Gillis sued her husband for a separation of bed and board on the ground of cruel treatment.[18] The court found the testimony conflicting but believed that a preponderation was in favor of the wife's plea, particularly because of one major episode where the defendant had hit the plaintiff in the mouth. His very interesting explanation of her bruise was that he had attempted a make-up kiss, whereupon she bit him and he had to hit her on the chin in order to get her teeth loose. The testimony of witnesses was corroborative of the wife's version of the affair.

The husband made $120 per month. The wife made $95 per month and paid a nurse for the care of the 4½ year old child. The lower court had awarded $25 per month during pendency of the suit. This sum was awarded not as alimony to the wife but was to be used for the child's support only. The injunction against the husband to prevent disposal of community property was perpetuated and the case was remanded for the purpose of affecting a partition of the community.

The only question in the case of *Scott v. Scott*[19] was whether or not the wife was entitled to alimony, her husband having procured a divorce from her under the "four year" act. The court terms the case a "divorce suit" and agreed with the lower court that the wife was not "at fault." The case was remanded in order that the district judge might determine the matter of alimony after hearing testimony on the need of the wife and the husband's ability to pay. Such a long period of time had elapsed, due to the death of the wife's attorney, that the court properly decided that the financial circumstances disclosed by the record might have changed in the interim. The court was disinclined to award a lump sum of fifteen hundred dollars due under the original award. Whether the wife was receiving a *pendente lite* award does not appear. If the wife was in need—a basis for any alimony—her means of support pending judgment is a matter of social interest.

The opinion stated that the divorce was rendered at a time when Act 31 of 1932, the "four year" act, was in force. However, the decree had not become final, due to the appeal; and hence, would not fall under the doctrine of *Blakely v. Magnon*[20] which would have barred her claim for alimony during the interim between the passage of the four-year act in 1932 and the 1934

18. Gillis v. Gillis, 197 La. 392, 1 So. (2d) 556 (1941).
19. 197 La. 726, 2 So. (2d) 193 (1941).
20. 180 La. 464, 156 So. 466 (1934).

amendment to Article 160 taking care of the legislature's apparent oversight.

Alimony

Plaintiff sued her mother and her son for support in the case of *Tolley v. Karcher et al.*[21] The court applied the plain language of Article 229 and awarded this needy woman alimony from both her mother and her son. The plaintiff's only property was one-sixth interest in the naked ownership of certain property in New Orleans, and the court stressed the fact that funds must be available in order to preclude an alimony award. Furthermore, the court stated that the plaintiff did not have to sacrifice her interest in this property by taking a grossly inadequate offer made by her mother. The mother's income was found to be at least $232 per month; that of the son at least $100 per month. The mother was ordered to pay $10 per week alimony; and the son, $2.50 per week.

B. Community Property

After a comment on the purposes of the Workmen's Compensation Act, the court held in *Brownfield v. Southern Amusement Company, Incorporated,*[1] that a married woman had a right to bring an action under this act against her employer despite the fact that her earnings were community property. The court said: "The obligation of the employer to pay compensation to his employee, or the employee's dependents is not the result of a contract. It is purely statutory."[2]

A husband incurred an indebtedness after the death of his wife. In satisfaction thereof the creditors seized and sold land belonging to the previously existing community. The court held in *Long v. Chailan*[3] that this sale was null so far as the half-interest of the heirs of the wife and mother were concerned. There was no estoppel against these heirs even if they had accepted the succession of the husband-father unconditionally, as the theory "is not applicable to a case where the property was seized and sold to pay a debt of the ancestor without his consent."

The court in *Jones v. Thibodaux*[4] again reaffirmed the settled doctrine that the "rules governing the revocatory action do not

21. 196 La. 685, 200 So. 4 (1941).
1. 196 La. 74, 198 So. 656 (1940).
2. 198 So. at 658.
3. 196 La. 380, 199 So. 222 (1940).
4. 196 La. 533, 199 So. 633 (1940).

apply to a dation en paiement made by a husband to his wife in satisfaction of her just claim against him for paraphernal funds which he has received from her and alienated."

The court quoted from *Hewitt v. Williams*[5] the statement that "The law favors restitution to the wife and looks with favor upon the efforts of the husband to secure her just and honest claim . . . against him." The dation in question was of stock. The transfer was made by notarial act. Creditors of the alleged "virtually insolvent" husband, as an apparent afterthought, argued that there had been no physical delivery of the stock. While it seems highly doubtful that such a delivery of stock certificates, placed in the name of the wife and also transferred by notarial act, would have been necessary to complete the dation; nevertheless, the court felt that since the wife had locked the certificates in her armoire, delivery was good, which is a much more progressive attitude than that indicated in some of the manual gift cases discussing complete control.

The court in *American Surety Company of New York v. Noble & Salter*[6] again reiterated the well-established rule that a wife who has neglected to recite in her deed that property purchased in her name alone was bought with separate funds for her separate benefit may make proof that the purchase funds were separate property. The facts were that the wife had received the two lots in question as part of the price of a large property, appearing in the name of husband *and* wife, sold to the owner of these lots. The judgment creditor of the husband maintained that the property appearing in both names was undoubtedly community property and hence the two lots should also be community. This transaction was accomplished long before the present debt of the husband was made and the court forced the judgment creditor to his reliance upon the state of the title at the time he became a creditor. It seemed entirely clear that the joint purchase had been paid for by funds which the wife received from her mother, but the question was left open as to whether or not the wife would have been permitted to make this proof. There would seem to be no good reason why this presumption of community should not be subject to rebuttal as well as the case of property standing in the sole name of the wife.

In the case of *Childs v. Pruitt*[7] the heirs of the deceased ques-

5. 47 La. Ann. 742, 17 So. 269 (1895).
6. 196 La. 312, 199 So. 131 (1940).
7. 196 La. 866, 200 So. 282 (1941).

tioned the authority of a surviving husband and father to acknowledge service and waived executory process in a proceeding against property belonging to the former community and seized for satisfaction of a community debt. The court held under the jurisprudence, particularly the case of *Gay v. Hebert*,[8] that the surviving spouse in community had a right to accept service of process and waive delays and required notice in the seizure and sale of the property. There was no fraud and the property secured a debt contracted during the existence of the community.

The second part of the opinion in the *Succession of Stallings*[9] is concerned with usufruct of the surviving spouse of the deceased's share of the community. The husband died in 1901 before the 1910 amendment to Article 915. The wife married again in 1905 and died in 1940. Sisters of the first husband claimed that the widow's usufruct of the half of the first community terminated upon her remarriage rather than upon her death. The court pointed out that Articles 915 and 916 cover two entirely different situations and that the proviso of Article 916 (Section 2 of Act 152 of 1844) did not apply to Article 915 (Section 1 of Act 152 of 1844) which in its plain terms before 1910 stated that the usufruct was for life—when there were only collaterals and no will. Since 1910, of course, full ownership is given to the surviving spouse under these circumstances. It seems distressing that the supreme court should be forced to rule on a matter which the statute appears to state so clearly; but in view of the fact that the court was charged with this duty, the opinion is nevertheless valuable for a historical review of the statutory development and for a resume of the jurisprudence.

In *Sanderson v. Frost*[10] plaintiffs sued their mother, insisting that certain land was theirs alone, being the separate property of their deceased father and not community property of which she owned one-half. Plaintiffs' father bought the property during the existence of the community at succession sale of his father's, held for the announced purpose of paying debts and legacies. Part cash was paid and the balance in notes which later were cancelled in a settlement among the heirs. The latter arrangement did *not* convert the succession sale into a partition; the property was not then received as an inheritance; words were not found in the deed stating that the property was bought with

8. 44 La. Ann. 301, 10 So. 775 (1892) and La. Act 57 of 1926.
9. 197 La. 449, 1 So. (2d) 690 (1941).
10. 3 So. (2d) 626 (La. 1941).

separate funds and for his separate benefit; and hence, the presumption that the property was community was not rebutted. The partition sale cases were recognized and distinguished, and the decision seems entirely correct.

In *Wood v. Mason*[11] a widower claimed the constitutional homestead exemption under the "surviving spouse" clause. Judgment had been obtained against the wife prior to her death, and in the present case the judgment owner is attempting to collect against her estate—community property. The court held that, since the widower had accepted the wife's succession unconditionally, the debt was a personal one and not one of the marital community. Hence, the widower was not entitled to exemption under the surviving spouse clause and, having no dependents within the meaning of the constitution, was not exempt at all.

C. Successions

Unconditional Acceptance

The case of *Little v. Barbe*[1] discussed elsewhere in this article, again reaffirms the doctrine that "an heir who accepts unconditionally the succession of his ancestor is estopped to claim from a third party property which the ancestor sold under a warranty of title." However, the court states further that the "rule never has been applied to a judicial sale, or to any other than a private conventional sale, as far as we know." The heirs in question were held *not* bound in warranty by the sale made in the succession of their grandmother, as they had never accepted her succession at all, so far as the record showed, and were claiming by representation of their father and grandmother in the succession of their *great* grandmother, which they were privileged to do.

Wills

Suit was brought in the case of *Landry v. Landry*[2] to annul a testament on the ground of mental incapacity of the testator. Plaintiffs argued that the proponents of the will should have proved the sanity of the testator. The court again affirmed the rule that unless the will itself indicates weakness of mind the burden of proving the testator incapable is upon those who make

11. 3 So. (2d) 256 (La. 1941).
1. 195 La. 1071, 198 So. 368 (1940).
2. 196 La. 490, 199 So. 401 (1940).

the attack upon the instrument. The presumption of sanity arising from the document was not overcome by the evidence adduced in this case, and hence the testament was not annulled.

The interesting case of *Hessmer v. Edenborn*[3] deals with revocation of a testament. The will was made in St. Louis, Missouri, and left there with a trust company which issued to the testator a receipt. Upon this receipt in a blank space between the lines of printed matter of the form, the testator, after ten years, wrote the following:

"New Orleans Feb'y 1st 1919

"The Will and Testament above referred to I hereby declare void

"Wm Edenborn"

This revocation was attacked mainly on the ground that the words "above referred to" incorporated the printed material in the otherwise valid olographic revocation and thereby rendered it void. The court did not subscribe to this view. The opinion states that it was not necessary to "look to a separate writing in order to find the substance of" the testator's wish. Abundant authority was reviewed and cited to sustain the court's opinion that the intent of the testator to revoke was clear and that his reference to the receipt was merely for the permissible purpose of rendering certain the will he intended to revoke. Since the testator expressed his intent to revoke in a document valid in form, abundant authority was available to support the position that extrinsic testimony or documents might be consulted to make certain the vague descriptions or *references* in the will.

In *Draper v. Van Leer*[4] the court reiterated the rule that under a valid will the forced heir is remitted to a suit to reduce the donation when he has not received his legitime; that he must bring his suit within five years from probate, if a major; that "those who claim exemption from prescription by reason of ignorance resulting from fraud must allege and show that such ignorance was neither willful nor negligent."

The story of the case is interesting as a record of human affairs. The plaintiff alleged that he was the son of the deceased by a second marriage, which was of short duration, ending in divorce followed by suicide of his mother. The deceased was over seventy at the time of plaintiff's conception and, while ap-

3. 196 La. 575, 199 So. 647 (1940).
4. 197 La. 259, 1 So. (2d) 513 (1941).

parently there were no disavowal proceedings, he had maintained in the divorce proceedings that the child was not his and no support for the child was decreed. The plaintiff had been raised by maternal relatives and used their name.

The court found that an attorney for absent heirs had been appointed; that proper search had been made; that the daughter by first marriage and universal legatee of deceased had been frank about all the facts of her father's second marriage; that the plaintiff had been willfully neglectful in not searching out his old father at least in the eight years since his majority. The plaintiff, claiming against his alleged half-sister, demanded one-half, rather than one-fourth, which was not noticed by the court, of course, since they properly found him entitled to nothing.

The *Succession of Stallings*[5] deals with two interesting points, one of which is mentioned here and the other in the section dealing with community property.[6] The court had a difficult problem in interpreting the effect of several codicils upon a will. They cited the articles on revocation, gave an excellent review of the jurisprudence and held that since additional bequests in the codicils to particular legatees named in the main instrument were not in conflict and showed intent to give more rather than less, the legatees were entitled to both the gifts in the main body of the will and the gifts stipulated in the codicils.

In the *Succession of Meyer*[7] a mother had left a will giving certain specified pieces of property to each of her three children, sons, and then stated in the testament that "I give and bequeath to my son Julius H. Meyer for his loving care and attention to me the disposable portion of my estate as an extra portion." All property was disposed of by the particular bequests except $605.85. Son Julius, also executor, sued to reduce the donation made to one of his brothers that each might have one-third of two-thirds or two-ninths, leaving him one-third extra. On first hearing, the court held that he had mistaken his remedy in asking for a reduction as he had received his legitime and he was remitted to an action to rescind the *partition* made by the testator. On rehearing, it was again stated that the proper action was not to reduce, but the theory of rescission of partition was rejected as plaintiff was *not* suing to protect his legitime. The plaintiff

5. 197 La. 449, 1 So. (2d) 690 (1941).
6. See p. 181, supra.
7. 3 So. (2d) 273 (La. 1941).

argued that the testament was contradictory in giving away practically *all* the estate in three particular bequests and then giving the disposable portion as an extra gift to him; that the latter part of the testament should prevail under Article 1723.

On rehearing, the court disposed of this theory of contradiction by stating that the last bequest was one under universal title, being one-third of the estate—not contradictory to the preceding bequests but subordinate to them in satisfaction as they were particular legacies which "must be discharged in preference to all others."[8] The case of *Spann v. Hellen*[9] was properly distinguished and classified as a suit for collation dealing with gifts inter vivos, and the court remarked that it was not clear why the case was dismissed and the plaintiff's remedy, "if any she had," declared to be rescission of partition.

In the *Succession of Lissa*[10] the court decided that parol evidence might be introduced to show that a child had been forgiven by the parent before the making of a will disinheriting the child. The case has been previously noted in this journal[11] and will not again be discussed in detail. The decision seems desirable on its facts, particularly as there was a suggestion of fraud on the part of the heirs attempting to enforce the disinherison. The decision is welcome on policy grounds as it strengthens the doctrine of forced heirship, an admirable and revered device for maintaining unity of the family by again discouraging and delimiting disinherison. It departs, however, from the clear language of the pertinent Code articles as understood by the writer.

Administration

The *Succession of Benoit*[12] deals with an opposition to the final account of a bank as testamentary executor. The period of administration covered sixteen years. General maladministration was charged and after a prolonged recitation of factual material, the court affirmed, with slight amendment, the finding of the lower court that there had been no maladministration. The account was approved and the demand of the heirs, that their right to sue the executor for maladministration be reserved, was denied. The court emphasized the fact the heirs had acquiesced, had ratified, and had failed to avail themselves of the right to dis-

8. Art. 1634, La. Civil Code of 1870.
9. 114 La. 336, 38 So. 248 (1905).
10. 3 So. (2d) 534 (La. 1941).
11. See Note (1941) 3 LOUISIANA LAW REVIEW 653.
12. 196 La. 509, 199 So. 625 (1940).

charge or to resort to any legal remedy during this long period. The opinion indicated that the "depression" was the cause of decreased rentals and pointed out that the bank was only bound to act as a "prudent administrator." The neglect to repair buildings, et cetera, was ascribed to an attempt to hold down expenses. No benefit could be derived here by recounting the factual details involved in the litigation. The court simply found, after thorough review of the evidence, that there had been no maladministration—a matter of opinion about which there might be many views.

It would appear that there might be a tendency, because of inertia or practical difficulty of ascertaining the stale facts, for the court to approve accounts of this nature too readily. Opponents are in a weak position in these contests. The laws for their protection are clear but difficult to apply justly as is always true in purely factual situations, particularly where detailed accounting over long periods is involved and all books and papers are in the possession of the administrator.

In *Succession of Savoie*[13] the defendant was required to show cause why he should not render an immediate account of his administration, and his major plea was simply, and strangely enough, that he was not the administrator. He maintained that a certain bank which had instigated the appointment of an administrator and had kept procedures moving because of their desire to collect debts, had indeed been the appointee. The court found against the defendant after examination of all the papers, which were far from clear. The defendant was signatory of the bond, although the oath of office, for example, stated that the defendant was *acting for and in the name of* the bank.

The administrator filed his final account in the case *In re Succession of Bright*[14] and asked that he be permitted to deposit the residue of the estate in the registry of the court pending a judicial determination of the rights of several persons claiming to be heirs. Later, the state filed a claim stating in effect that since the claimants had failed to establish that they were heirs, the succession was vacant and the state should receive the money. The court felt that the decision below was correct; that the claimants had not sustained the burden of proving that they were heirs; and that the state was due the property. However, the court de-

13. 196 La. 1002, 200 So. 327 (1941).
14. 197 La. 251, 1 So. (2d) 94 (1941).

cided that all parties concerned should have a chance to bring in additional evidence and remanded for the purpose though they were careful to state that they did not think the lower court had abused its discretion in refusing this plea and that under ordinary circumstances they would *not* have overridden the decision in this respect.

In the *Succession of Price*[15] legatees secured a rule requiring a testamentary executor to show cause why inventories of the succession should not be annulled, as they had not been notified to attend the taking of the inventories. They also complained that no attorney was appointed for absent heirs. The court found that an inventory, like a judgment of probate, cannot be annulled for the sole reason of lack of notification; that the designation of an attorney for absent heirs is not an arbitrary requirement and that no necessity was shown in this case; and furthermore, that the requirement regarding heirs does not apply to legatees. No errors in the inventories were claimed and no one had suffered for lack of notice, and hence, the rule was dismissed on the exceptions of want of interest and no cause of action.

Plaintiffs were attempting in *Succession of Uthoff*[16] to set aside the judgment placing the residuary legatee in possession. The grounds of complaint were that the residuary legatee had failed to make provision for payment of plaintiffs' unliquidated claims in litigation. The court found the plaintiffs' petition "barren of any allegation to the effect that the result" of the litigation referred to would show the succession indebted to plaintiffs, nor was there any showing that the funds remaining in the succession were insufficient to satisfy plaintiffs' claims, and hence, the plaintiffs had no cause for action.

The court in the case of *Kelley v. Kelley*[17] after most careful consideration and a review of previous jurisprudence, held: (1) that an ex parte judgment sending heirs into possession with benefit of inventory does *not* close the succession, but only entitles the heirs to the residuum of the estate and assumes administration and subsequent settlement to be not only proper but necessary; (2) that giving a release on property of the widow alleged to be her separate property, surrendering a life insurance policy, and leasing succession property with provisions that rents

15. 197 La. 579, 2 So. (2d) 29 (1941).
16. 196 La. 892, 200 So. 290 (1941).
17. 3 So. (2d) 641 (La. 1941).

be used to pay taxes and debts of succession were *not* such unqualified acts of ownership as to constitute an unconditional acceptance, closing the estate and making subsequent administration null.

Partition

In the case of *Stone v. Jefferson*[18] Mary Leviston and Henry Jefferson owned a certain tract of land jointly. This land was sold for taxes. Later, they purchased the land by two separate instruments from the holder of the purchase at tax sale. The deed recited respectively the north and south *halves* of the property. Subsequently, Mary Leviston sold a one-half interest in the tract to plaintiff who now seeks to partition the tract by licitation, maintaining that the transactions of reacquisition were redemption deeds which simply restored the original status of joint owners in indivision. The defendants maintained that the acts were outright sales as the purchases were made more than one year after the allowable period of redemption. The court, adopting the view most favorable to the plaintiffs, treated the deeds as redemptions, and held that a partition had been accomplished when the two separate acts were passed, which was just as effective as though one partition instrument had been used for the transfers. The state of indivision was terminated—whatever the form or the name—and hence, there was no further "partition" necessary or possible.

The court prohibited further proceedings to partition by licitation in the case of *Broussard v. Allen*[19] until another suit dealing with ownership of the tract to be partitioned should be settled and the six hundred or more owners of the tract and their proportional parts designated with judicial certainty.

D. Mineral Rights

The very important case of *Ohio Oil Company v. Cox*[1] again re-affirms and might also be said to broaden the landmark decision of *Sample v. Whitaker*,[2] dealing with the suspension of prescription of mineral servitudes because of minority of owner and with the indivisibility of servitude. Cox, landowner, sold

18. 196 La. 1057, 200 So. 461 (1941).
19. 3 So. (2d) 742 (La. 1941).
1. 196 La. 193, 198 So. 902 (1940).
2. 172 La. 722, 135 So. 38 (1931).

one-half of his mineral rights on September 21, 1922, and an additional one-fourth on March 1, 1924. All holders apparently joined in a lease extension to the Ohio Oil Company on September 11, 1925. The trial well resulted in a dry hole and was abandoned on September 16, 1926, but interrupted the original prescriptive periods. The Ohio Oil Company acquired new leases, secured a pooling agreement, and started drilling again on August 27, 1937, and this time was successful. Each original grantee of a servitude sold at *various times* fractional parts of his holdings, the original owner of the grant of one-half disposing finally of *all* his interest. In both lines of title proceeding from the grant of one-third and the grant of one-fourth, minors inherited fractional parts and the court held that this minority suspended the prescription which would have run between September 16, 1926, and August 2, 1927, not only for themselves, but for the major co-owners. The court said:

> "[I]f a mineral servitude is a property right, though indivisible, then an undivided interest in such property may be sold and disposed of in the same manner as any other property right in an indivisible object may be disposed of, and yet the property or the property right will continue to be indivisible. The only thing that occurs is that one joint owner in an indivisible property is replaced by the vendee or transferee, who then becomes a joint owner in the indivisible property in the place of his vendor."[3]

A gift to a minor was involved and a *sale* to a minor was involved, but it was not necessary to pass on these particular transactions since the clear rule of the inheriting minors sustained any doubts of their positions, as it did for the majors.

Since minor heirs appeared in both lines, the question of whether a minor heir in one line would have suspended for all major co-owners in the *other* line, did not arise. However, the two grants by Cox were treated separately.

The *Angelloz v. Humble Oil & Refining Company*[4] case is the first decision of the Supreme Court of Louisiana on the question of the destruction of the leasing value of land by virtue of disclosure of information obtained illicitly. The court followed the principle of the *Lebleu* case[5] and the *Shell Petroleum Corpora-*

3. Ohio Oil Co. v. Cox, 196 La. 193, 213, 198 So. 902, 908 (1940).
4. 196 La. 604, 199 So. 656 (1940).
5. Lebleu v. Vacuum Oil Co., 15 La. App. 689, 132 So. 233 (1931).

tion case[6] and confirmed the award of the lower court in the sum of $7,500 damages. Both the lower and higher courts were of the opinion that the plaintiff failed to prove the "full value in dollars and cents of the damage actually suffered" yet the discretion of the lower court in the award because of "disparagement of mineral quality" was thought not to have been abused.

The case of *Standard Oil Company of Louisiana v. Allison*[7] arose as a concursus proceeding brought by the plaintiff to determine rights to the price of oil deposited in the registry of the court. The land from which the oil was obtained had been sold in 1895 by the Caddo Levee District under the Act of 1892, but formal instruments of conveyance had not been obtained from the State Auditor and State Registrar of Lands until after the adoption of the 1921 Constitution, which stipulates for the reservation of mineral rights in all state lands sold. The position of the levee district was that the mineral rights in the lands under discussion did not pass to the vendees of 1895 because the formal instruments were not issued until after the constitutional prohibition. The court found that the wrongful refusal of the state officials to perform the ministerial functions involved was the cause of the delay in getting formal title to which the vendees were clearly entitled prior to the constitutional amendment; and hence, the sale of the lands in 1895 included the mineral rights.

Similarly, the court held in *State ex rel. Hyams' Heirs v. Grace*[8] that when the Register of the State Land Office had wrongfully refused to issue a patent under a "lieu warrant" authorized by Act 104 of 1888, the applicants having been diligent in their efforts to secure it, the patent should issue without reservation of mineral rights by the state, as the constitutional provision of 1921 does not have a retrospective effect.

The case of *Fite v. Miller*[9] first reached the supreme court by an exception of no right or cause of action and the tribunal found that a cause *was* stated, as plaintiff had alleged that "he had sustained the loss of the chance or prospect of being enriched if defendant had fulfilled his contract" which was to drill a well. The case again reached the supreme court on the merits of the issue of damage.[10] The court was guided by Article 1934, which

6. Shell Petroleum Corporation v. Scully, 71 F.(2d) 772, 776 (C.C.A. 5th, 1934).
7. 196 La. 838, 200 So. 273 (1941).
8. 197 La. 428, 1 So. (2d) 683 (1941).
9. 192 La. 229, 187 So. 650, 122 A.L.R. 446 (1939).
10. Fite v. Miller, 196 La. 876, 200 So. 285 (1940).

prescribes damages for both loss sustained and profits unrealized because of the breach of contract. Since it was established that the hopes of finding oil were very remote, since a nearby well had proved dry and geological information was unfavorable, the court refused to grant damages for loss of profit. They found, however, that the cost of drilling the well, $6,500, was the measure of damages for the loss sustained by the plaintiff, who had given, as consideration for defendant's promise to drill, mineral rights, valuable at the time of the contract. The court found that defendant could not simply release the mineral interests to the plaintiff and thus have gambled at plaintiff's expense. Neither was the defendant allowed to charge off profits anticipated from his share of the returns from the well, which was never drilled. The court used the most convincing illustration of consideration in *dollars,* the value of which had depreciated. This decision anchors the most desirable relief suggested in the first chapter of this litigation and should discourage manipulations of this variety.

After a most interesting discussion, involving the history of the *Frost-Johnson Lumber Company v. Salling's Heirs*[11] case and comments thereupon, pertinent to the interpretation of a contract, the court held in *Gregory v. Central Coal & Coke Corporation*[12] that parties had effected a valid "transaction or compromise" by the instrument in question. The merits of this question are discussed under another title in this article.[13] Having decided this question, the preservation of the servitude without use beyond the ten-year period followed as a necessary corollary under the settled jurisprudence of Louisiana by virtue of the fact that "plaintiffs were all minors when they acquired their interest by inheritance from their father at his death, . . . or about one year after the alleged servitude was granted, and since two of them are yet minors, . . ."[14]

The case of *Knight v. Blackwell Oil & Gas Company*[15] arose as a suit to cancel a lease under Act 168 of 1920[16] and turned upon an interpretation of the lease. The court applied the doctrine of adopting that interpretation which would give effect to all clauses

11. 150 La. 756, 91 So. 207 (1920).
12. 197 La. 95, 200 So. 832 (1941).
13. See section on Conventional Obligation, p. 202.
14. Gregory v. Central Coal & Coke Corp., 197 La. 95, 200 So. 832, 834 (1941).
15. 197 La. 237, 1 So. (2d) 89 (1941).
16. Dart's Stats. (1939) §§ 4729-4730.

of the instrument rather than one which would disregard part of the contract. Since the test well on other property had proved to be dry, the duty of drilling an offset provided for by the lease did not arise. That being the case, the lease did *not* elapse sixty days after the completion of the test well, which would have been the case had the test well produced "in paying quantities" but not sufficiently to warrant the lessees' drilling additional wells. Hence, another clause of the lease, a flat two-year, paid-up agreement, controlled the situation and plaintiffs' suit for cancellation prior to the expiration of that term was unavailing. Since a plea for extending the period to cover the time consumed by the suit was not made in the lower court, the judgment could not be amended to grant this request. In the course of the opinion, the court stated that:

> ". . . the words 'in paying quantities' can mean the production of oil or gas in such a quantity as will pay a small profit over operation costs of the well, although the expense of drilling and equipping the well may never be paid, and thus, the operation as a whole might result in a loss to the lessee."[17]

The case of *Louisiana Gas Lands, Incorporated v. Burrow*[18] raises most interesting and troublesome questions. The essence of plaintiff's complaint was that the operator was not producing and marketing "the full allowable amount of gas . . . or some unstated percentage thereof, and that this constituted a breach of defendant's implied obligation to reasonably operate the wells to their mutual profit and to protect the leased premises against drainage." The plaintiff insisted that defendant *was* taking out the full amount allowable from other wells owned by it in the same field as were other operators in the field, while the two wells of plaintiff were only worked from four to ten per cent of the allowable. Plaintiff urged that Act 252 of 1924,[19] being in effect a proration law, was violated by defendant's procedure. The court stated that this statute was merely a conservation act setting a prohibitory maximum. The justices also decided that it would only be by "a narrow construction" of the lease that it could be held that "the same quantity or percentage of allowable should be produced" as from that of other wells in the field and that plaintiff's allegation regarding drainage was a mere "conclusion of the pleader."

17. Knight v. Blackwell Oil & Gas Co., 197 La. 237, 1 So. (2d) 89, 91 (1941).
18. 197 La. 275, 1 So. (2d) 518 (1941).
19. Dart's Stats. (1939) § 4773.

The following paragraphs are interesting, though somewhat isolated from the opinion as a whole:

> "It would seem to be clear that plaintiff is entitled to the benefit of production from its land, which production should be equal to the proportion of the total production of gas from the field, to be determined by the percentage the eighty acres of land owned by plaintiff bears to the total acreage embraced in the field.
>
> "If plaintiff, through the many years during which the lessee has produced gas from plaintiff's lands, has received the benefit of a total quantity of production equal to, or exceeding, plaintiff's fair share of the total production from the common reservoir of the entire field, it can not be successfully contended that plaintiff has not received its fair share of the total production, even though, for a particular term during a specified period of time, the production from plaintiff's lands has not proportionately equalled the production of nearby lands, or lands in the same section.
>
> "The rule which imposes the implied obligation upon a lessee to operate the leased premises to the mutual profit and advantage of both parties to the contract can not be invoked so as to erase entirely from the contract those provisions which expressly declare that the lessee's rights shall continue so long as gas is produced in paying quantities. It is only by a narrow construction it could be held the implied obligation in question requires that the same quantity of gas or percentage of allowable should be produced from each of plaintiff's wells as that produced from some other wells located nearby, in the same section, or elsewhere in the field. This would seem to be especially true where the lessee is complying with its express obligation of producing gas in paying quantities and in the absence of any well-pleaded facts showing that the pro rata share of gas has not been, and is not being, produced from plaintiff's eighty-acre tract."[20]

This decision might well be heeded by conveyancers. The present statute has received high praise from all commentators, but like Act 252 of 1924,[21] it is a *conservation* statute, and in the paragraphs dealing with the *fair share,* speaks in terms of *producers.* While any "interested person" is given a right to sue if

20. Louisiana Gas Lands, Inc. v. Burrow, 197 La. 275, 1 So. (2d) 518, 521 (1941).

21. Dart's Stats. (1939) §§ 4771-4783.

the commissioner does not, relief might still be unavailable to an individual lessor in a situation similar to that in the case under discussion. While no injustice may have resulted under the facts of the case, and the exception of no *right* was not passed upon by the supreme court, yet addenda to the usual due diligence clause might be a desirable safeguard.

The case of *Achee v. Caillouet*[22] is a most welcome exposition of the true meaning of the court's use of the word "interruption" in those cases which dealt with leases, the terms of which were longer than the life of the servitude upon which their existence was necessarily grounded, in part. This case makes it clear and positive that unless the landowner signatory of the lease evidences in unmistakable terms the purpose and intention of interrupting the prescription of the term of the mineral servitude, a new term will *not* begin by virtue of the lease having been given, but will only be *extended* for such time as the lease may happen to run beyond the original term of the servitude.

The case of *Parten v. Webb*[23] came to the supreme court as an appeal from a ruling on an exception of no cause of action. The defendant had subleased to an oil company, which had been successful in producing oil. The plaintiff maintained that defendant's lease had lapsed by its own terms prior to defendant's disposition of it; and hence, the proceeds that defendant expected to receive under the lease belonged to plaintiff. Defendant took the position that if the lease was dead, then plaintiff had nothing to ratify and should sue in tort. The court, after a careful and extensive review of the jurisprudence, decided in plaintiff's favor, holding that he had a right to make his own the lease which the defendant had wrongfully dealt with.

The series of cases composed of *Robinson v. Horton*,[24] *Spears v. Nesbitt*,[25] and *Spears v. Trinity Royalty Company, Incorporated*,[26] are particularly interesting for the light they shed on "pooling agreements" and their relation to servitudes.

The plaintiff, a landowner, in *Robinson v. Horton*,[27] had sold one-fourth of her mineral rights in a certain area to J. A. Watson and later another one-fourth in another designated area to C. G. Watson. Subsequently, plaintiff and the then owners of these

22. 197 La. 313, 1 So. (2d) 530 (1941).
23. 197 La. 197, 1 So. (2d) 76 (1941).
24. 197 La. 919, 2 So. (2d) 647 (1941).
25. 197 La. 931, 2 So. (2d) 650 (1941).
26. Ibid.
27. 197 La. 919, 2 So. (2d) 647 (1941).

mineral rights executed a lease contract. The lessees drilled on land owned by plaintiff and covered by the lease but not included in the designated areas of her above-mentioned grants of mineral rights. Plaintiff landowner now contends that prescription of non-user has run on the mineral servitudes and asks to have the grants cancelled from the record. The court regarded the question one of interpretation of the lease contract to which the various parties were bound and in deciding in favor of defendants, made the following statement:

> "Thus it may be seen that the plaintiff and defendants, by entering into the joint lease contract of January 4, 1935, in clear and unambiguous terms unitized or integrated their mineral interests by creating one whole lease in favor of the lessee in order to have the land developed and they are, in turn, to receive royalties from the oil produced from the land in the proportion that their mineral rights bear to the whole, which the lessee obligated itself to pay as long as oil or gas is produced therefrom in paying quantities. They have contracted; they are bound by their contract; and the question of whether the servitudes, owned by the defendants in these two cases at the time of the confection of the contract, were actually used by drilling is immaterial."[28]

The facts in *Spears v. Trinity Royalty Company*[29] were that the defendants owned one-half of the mineral rights in N ½ NW ¼ sec. 29 Township 20 NR5W, Claiborne Parish, together with one-half of the mineral rights in NW ¼ NW ¼ of the same section. Prescription started running anew on these holdings on September 13, 1929. On August 25, 1933, defendants joined with the landowner and others in the execution of *two* separate leases covering W½ sec. 29 and one covering E ½ sec. 29. Defendants' acreage was thus divided and the court held that the fact that the lease on the west half of the section lived on because of production did not save the life of defendants' servitude bearing on the acreage in the east half of the section after the separate lease on that part had lapsed by its own terms on August 25, 1939. There was no *intention* on the part of the landowner to interrupt the running of prescription on this mineral right; and hence, the mere signing of a lease to which the defendant was also a party did *not* have the effect of interrupting the prescription for non-user.

28. 2 So. (2d) at 650.
29. 197 La. 931, 2 So. (2d) 650 (1941).

The court specifically overruled "the reason for the holding" in the case of *Mulhern v. Hayne*,[30] which, it was explained, had already been "in effect" overruled by *Achee v. Caillouet*.[31]

The plaintiff landowner in the case of *Spears v. Nesbitt*[32] was bound by lease contract, similar in terms and purpose of development with the instruments interpreted in *Robinson v. Horton*[33] decided on the same day and controlling this decision against the plaintiff's contention.

In *Risinger v. Arkansas-Louisiana Gas Company*[34] a gas well had been brought in, but due to the presence of gasoline and a large amount of salt water, the well had been capped and acreage rental payment resumed. The lessors insisted that the gas should be marketed or the lease cancelled. The court very thoroughly analyzed the problem, most of the aspects of which were purely economic, and decided that the plaintiffs were unreasonable in their immediate demands. Since the producer had spent $62,500 in the well, it was logical to assume that they were as anxious as were plaintiffs to solve the peculiar problems of the case and market the gas as soon as a reasonably priced plan of operation could be evolved. The date at which that might be accomplished appeared quite indefinite and dependent upon further development in the area, but the court pointed out that in any case the primary term of the lease had not expired; that the circumstances were better under the terms of the lease than if a dry hole had been found; and that under all the aspects there had been no violation in the "due diligence in operation" clause. The fact that plaintiffs had not received gas for domestic use was a matter of their own choice.

E. Particular Contracts

Sale

The most interesting case falling within this classification was *Folse v. Dale*.[1] The plaintiff, an assignee of a judgment, sued to have annulled its seizure and sale at the instance of the State of Louisiana acting by virtue of an alleged lien growing out of franchise taxes owed by the assignor. The evidence sustained the

30. 171 La. 1003, 132 So. 659 (1931).
31. 197 La. 313, 1 So. (2d) 530 (1941).
32. 197 La. 931, 2 So. (2d) 650 (1941).
33. 197 La. 919, 2 So. (2d) 647 (1941).
34. 3 So. (2d) 289 (La. 1941).
1. 197 La. 511, 2 So. (2d) 6 (1941).

position of the assignee that notice of the assignment had been given to the debtors. Although the lien allowed the State of Louisiana was effected through recordation prior to the time the assignment to plaintiff was made, and although the state had no knowledge of the assignment, the court found that the sale of the judgment was null and void as against the assignee for lack of notice of the seizure. The difficulty, of course, arises from the granting of a lien on property the transfer of which does not have to be recorded. The position of the court was simply that, as assignees of the property, plaintiffs could not be deprived of their rights by a sale thereof without notice to them. It thus avoided passing on the very interesting question of whether the statutory lien arising from the recordation would follow the property into the hands of a third party.

Two cases involved only questions of interpretation of acts of sale. In *Authement v. Weill,*[2] judgment was for the plaintiff, who was suing to have an instrument recorded by defendants cancelled and erased as a cloud on his title. In *Pierce v. Lefort,*[3] a like issue, based on the wording of the deed, was resolved in favor of the plaintiff.

Lesion beyond moiety was claimed in *Morris v. Kleinpeter,*[4] but the evidence produced concerning the value of the land at the time of sale was found by the court to be insufficient to sustain the charge.

Lease

The court decided only one case under this classification. That was *Reilley v. Kroll.*[5] A lessor sued to enjoin the lessee of a service station from erecting a sign on the leased premises in such a way as to obstruct the view of another sign on the side of the adjoining premises also leased by plaintiff to an advertising company for such use. The defendant relied on Article 2710 of the Civil Code and contended that he was but undertaking to make use of the premises in accordance with the purpose of the lease. On the basis of the evidence before the court it was concluded that no such use of the premises was warranted. Of course, the case must stand on its own facts.

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2. 197 La. 585, 2 So. (2d) 31 (1941).
3. 197 La. 1, 200 So. 801 (1941).
4. 197 La. 758, 2 So. (2d) 203 (1941).
5. 197 La. 790, 2 So. (2d) 214 (1941).

Security Contracts

Suretyship. Act 236 of 1920[6] regulates the real estate business and requires a bond to protect the public against wrongful acts of real estate brokers, but does not apply to the acts of "owner or lessor . . . with reference to property owned by them."[7] In *Buras v. Fidelity & Deposit Company*[8] the court held that a real estate broker was still a real estate broker within the contemplation of the statute when he was developing a new subdivision and selling lots on a large tract of land which he himself owned. Consequently where the broker was guilty of wrongful conduct in failing to convey title under a bond for deed agreement, the surety on his bond was liable.

Two questions regarding a surety's liability on a public works building contract bond[9] were dealt with in *Louisiana Highway Commission v. McCain.*[10] It is a well settled rule that the surety's liability covers only claims for materials which form a component part of the completed structure or are consumed in the work. Accordingly, it was held that claims for the rental of equipment (barges, dragline, bulldozer, tractors, graders) were not covered by the bond because the equipment survived the work and was available for use on other jobs. In view of this rule, those who supply materials of both kinds try to have partial payments imputed to the account of things not covered by the bond. Here, such an agreement with the job superintendent was maintained, but only as regards purchases made subsequent thereto. This left an unsecured claim against the contractor for materials furnished prior to the agreement which did not go into the structure, and a secured claim against the contractor and surety for the balance remaining due for things which did go into the structure.

Privileges. Between the competing privileges of lessor and vendor, the former takes precedence over the latter.[11] This rule was not disputed in *Interstate Electric Company v. Tucker*[12] but the vendor tried unsuccessfully to show that the lessors were personally liable for the debt by reason of (1) a partnership with the

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6. La. Act 236 of 1920, as amended by La. Act 175 of 1936 [Dart's Stats. (1939) § 6558-6580].
7. Id. at § 2 [Dart's Stats. (1939) § 6559].
8. 197 La. 378, 1 So. (2d) 552 (1941), reversing 198 So. 396 (La. App. 1940).
9. La. Act 224 of 1918, § 1, amended by La. Act 271 of 1926, § 2 [Dart's Stats. (1939) § 5123].
10. 197 La. 359, 1 So. (2d) 545 (1941).
11. Art. 3263, La. Civil Code of 1870.
12. 197 La. 660, 2 So. (2d) 56 (1941).

debtor, (2) the extension of a continuing guaranty agreement made by their late father. The court found nothing more than an ordinary lessor-lessee relationship and applied the general rule which also covers merchandise consigned to a lessee for the purpose of sale.[13]

Mortgages. A mortgage is an accessory to a principal obligation[14] and this principal obligation may be not only of concurrent creation but also of past[15] or future[16] creation. Accordingly, in *Gast v. Gast*[17] it was held that a mortgage given to secure an antecedent debt is not for that reason a simulation or sham. Of course, the mortgage security in any case cannot exceed the amount of the principal obligation.

In *Moriarity v. Weiss*[18] two parties (Dessalles and Weiss) traded properties and each assumed the mortgage on the property he acquired. When Dessalles defaulted on his obligations, Weiss obtained a judgment which cancelled the transfer to him from Dessalles. This extinguished the obligations which Weiss had assumed under that transaction, but left him liable for two notes on which he had undertaken direct liability in an independent "extension agreement" with the plaintiffs.

In *Stahl v. Caron*[19] the court applied the rule that the holder of a part of a series of mortgage notes is entitled to a proportionate share of the proceeds provided he has not been a party to the foreclosure proceedings. Here, although the attorney had acted on behalf of several noteholders, the adjudication made to himself prior to a transfer to the *real* adjudicatee did not affect the rights of the *real* noteholders.

The rule of Article 3369 regarding the ten-year peremption of mortgage inscriptions was applied in *State ex rel. Pickett v. Bullock.*[20] A late reinscription takes rank only from the date of such reinscription, and the pendency of litigation involving the

13. Arts. 2707, 3218, 3230, La. Civil Code of 1870. Goodrich v. Bodley, 35 La. Ann. 525 (1883); Henry Rose Mercantile & Mfg. Co. v. Stearns, 159 La. 957, 106 So. 455 (1925).

14. Arts. 3284, 3285, La. Civil Code of 1870.

15. Arts. 3278, 3284, 3285, 3290, 3291, La. Civil Code of 1870. Hibernia National Bank v. Sarah Planting and Refining Co., 107 La. 650, 31 So. 1031 (1901).

16. Art. 3292, La. Civil Code of 1870. Pickersgill v. Brown, 7 La. Ann. 297 (1852).

17. 3 So. (2d) 173 (La. 1941).

18. 196 La. 34, 198 So. 643 (1940).

19. 197 La. 31, 200 So. 811 (1941).

20. 197 La. 776, 2 So. (2d) 209 (1941).

mortgage did not create any exemption. Accordingly, the holder of a second mortgage was entitled to have the first one erased insofar as it affects his rights.

The recorder of mortgages is under a duty to furnish a certificate of mortgages and encumbrances whenever requested to do so.[21] The system of land registration in Louisiana is organized on the basis of the names of the parties and the recorder's search for encumbrances can only be made in relation to the names mentioned in the request. In the absence of any cadastral (lot and block) recordation system on the basis of each separate property unit, it is a practical impossibility to have a general unrestricted certificate of mortgages for any specific property. In *State ex rel. Flournoy v. Simmons*[22] the court held that the recorder could not be obliged to furnish such a certificate.

F. PROPERTY

Three companion cases[1] brought before the court certain questions regarding a separate estate in timber as created by Act 188 of 1904.[2] The respective deeds of sale conveyed "all the merchantable timber," to be cut and removed within a specified time, and the dispute really centered upon the interpretation of the word *merchantable*. For the landowners it was contended that the timber rights had been exhausted by the cutting and removal of all the timber which it had been profitable to handle at that time. However, the court adopted the objective test that "trees large enough to be manufactured into lumber are generally understood to be 'merchantable timber' "[3] regardless of prevailing market conditions. Since the sale must be taken to have conveyed the timber which was "merchantable on the date of the purchase,"[4] the selective cuttings did not exhaust the timber estate

21. Arts. 3392, 3393, La. Civil Code of 1870.

22. 197 La. 299, 1 So. (2d) 525 (1941).

1. Clark v. Weaver Bros. Realty Corp., 197 La. 63, 200 So. 821 (1941); Nabors v. Weaver Bros. Lumber Co., 197 La. 81, 200 So. 827 (1941); Williams v. Weaver Bros. Lumber Co., 197 La. 89, 200 So. 830 (1941).

2. Dart's Stats. (1939) § 6548.

3. Nabors v. Weaver Bros. Lumber Co., 197 La. 81, 200 So. 827 (1941).

4. Clark v. Weaver Bros. Realty Corp., 197 La. 63, 73, 200 So. 821, 825 (1941), quoting from American Creosote Works v. Campbell, 172 La. 866, 135 So. 659 (1931). The principle of this case was followed but the facts were distinguished because in *American Creosote Works v. Campbell* all the timber merchantable at the time of the purchase had been cut and removed so that the rights were completely exhausted. Re-entry upon the cut-over land was not permitted even though attempted within the time specified by the original deed.

and left the right to re-enter within the specified time to cut and remove the remainder.

In *Akard v. City of Shreveport*[5] two points were settled. In the first place, a sale of property "to the bank" and "along the bank" of a navigable waterway is the sale of a riparian property and it cannot be construed to contain a reservation of the strip called the "bank" between the high water and low water marks. The tract was in the shape of a triangle with the base along the bayou, and on the real issue of the case the court followed *Heirs of Delord v. City of New Orleans*[6] that the sole criterion for dividing alluvion is the riparian frontage of the respective properties, without any regard to the course of their side lines. This means that each riparian proprietor owns the alluvion adjacent to his original water frontage,[7] and the action of the court in dividing the alluvian by its "quantity" is not clear. No mention is made of *Newell v. Leathers*[8] in which the court interpreted Article 516 "to exclude the idea of a proportionate area or acreage system of division between the several tracts fronting on the alluvion to be divided,"[9] and followed the *Delord* case, by interpreting it accordingly.

It is well settled that building restrictions constitute real rights and are treated as covenants running with the land,[10] but if a building restriction is repeatedly disregarded, it may be considered as abandoned by common consent.[11] The method of evaluating such violations was considered in *Edwards v. Wiseman,*[12] and the facts of this case are stated fully elsewhere in this issue.[13] Although each case must be considered on its own particular facts, the court adopted the broad principle that the relative

5. 196 La. 714, 200 So. 14 (1941).

6. 11 La. Ann. 699 (1856).

7. Art. 516, La. Civil Code of 1870: "If an alluvion be formed in front of the property of several riparian proprietors, the division is to be made according to the extent of the front line of each at the time of the formation of the alluvion."

Compare the original French version of the corresponding Art. 508, La. Civil Code of 1825: *"S'il se forme une alluvion en face de plusieurs propriétés riveraines, le partage s'en fera entre leurs propriétaires, suivant l'étendue ou la face de l'héritage que chacun d'eux possédait sur la rivière, lors de la formation de cette alluvion."*

8. 50 La. Ann. 162, 23 So. 243 (1897).

9. 50 La. Ann. at 165, 23 So. at 246.

10. Hill v. Ross, 166 La. 582, 117 So. 725 (1928); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938). See Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915).

11. Cf. Hill v. Ross, 166 La. 582, 117 So. 725 (1928).

12. 3 So. (2d) 661 (La. 1941), affirming 3 So. (2d) 655 (La. App. 1941).

13. Note (1941) 4 LOUISIANA LAW REVIEW 329.

weight of the violations should be determined by comparison with the number of possible violations in the particular area and not necessarily by comparison with the total number of lots in the whole subdivision.

G. Conventional Obligations

As is usually true, most of the cases under this heading that reached the supreme court were disposed of on issues of fact rather than of law. A few cases, however, involved problems of more consequence both to the practicing lawyer and to the law teacher. In this group *Gregory v. Central Coal & Coke Corporation*[1] may be included. The suit grew out of a deed in notarial form by which the successor of the original purchaser retransferred to the original grantors the mineral rights which had been reserved but subsequently lost through prescription. The petition of the grantors seeking a recognition of their mineral ownership was answered by the fee owner who acquired the land from the successor of the original purchaser through bankruptcy proceedings. The defense was based on the theory that the attempted reconveyance of the prescribed mineral rights was ineffective for lack of consideration. The court passed up the interesting possibility of whether the deed of reconveyance could be effective as a donation in the absence of an equivalent given or promised in return, and the further possibility of treating the reconveyance as having been made in response to a natural obligation which survived the running of prescription. The decision was put on the ground that the transfer was made by way of compromise of a possible claim by the original grantors that the original grant was subject to a resolutory action for failure of consideration in that a material reservation deemed to be in perpetuity had proved to be destructible by a ten year prescriptive period. The facts adequately supported the court's disposition of the case, and consequently there is no room to complain that it might have thrown further light on the intriguing doctrine of causa in relation to transfers not involving the element of bargain.

The case of *Connor v. Harper*[2] also involved a problem of considerable interest as well as importance. The plaintiff sued to recover certain bonds and interest coupons that had been with-

1. 197 La. 95, 200 So. 832 (1941).
2. 197 La. 677, 2 So. (2d) 177 (1941).

held from him by the defendant, an attorney, as constituting the latter's fee for services rendered. The defense was that there had been an accord and satisfaction through the receipt by plaintiff of a portion of the bonds recovered, and reliance was placed on the prior case of *Berger v. Quintero*.[3] In that case the defendant attorney had remitted to plaintiff a portion of the sum collected by him, which remittance was tendered in full satisfaction of the entire amount due. The court upheld the defendant's plea of estoppel based on the receipt by the plaintiff of the portion remitted. In refusing to apply the doctrine of *Berger v. Quintero* in the present case the court pointed out that the defendant in surrendering a portion of the bonds to the plaintiff was merely giving him possession of his own property. It also found that the plaintiff had at all times protested against the defendant's withholding any part of the bonds, and that the return of the portion had not been offered in full satisfaction of the whole claim.

The court might well have taken the opportunity to overrule the *Berger* case. That decision constitutes an insupportable justification of the breach by an agent of the duty he owes his principal to deliver to him whatever has been received on his behalf.[4] Certainly as between attorney and client that duty should enjoy its full vigor. Even although under certain circumstances the agent may enjoy a right of retention,[5] such fact should not justify applying the doctrine of estoppel against the principal. Other cases here and elsewhere are contrary to the *Berger* case.[6]

Since collective bargaining contracts seem to be the order of the day, the case of *Spencer v. Luckenbach Gulf Steamship Company*[7] should be of more than passing interest. It involved an attempt on the part of a labor union to recover damages for breach of a collective bargaining agreement requiring defendant to employ members of the union to load and unload vessels. The damages claimed were based on an alleged loss of membership dues resulting from the employer's violation of its contractual duty to employ plaintiff's members. No fraud or bad faith on the part of the defendant was alleged. In disallowing recovery, the court took the position that the damages claimed were too remote and speculative, even if bad faith had occasioned the

3. 170 La. 37, 127 So. 356 (1930).
4. See Arts. 3004, 3005, La. Civil Code of 1870.
5. See Art. 3023, La. Civil Code of 1870.
6. Mayer v. Mayer, 15 La. App. 702, 131 So. 696 (1930); Hudson v. Yonkers Fruit Co., 258 N.Y. 168, 179 N.E. 373 (1932).
7. 197 La. 652, 2 So. (2d) 53 (1941).

breach. The principle applied is contained in Article 1934 of the Civil Code. The difficulties that the plaintiff experienced are common to cases of this kind and provide a basis on which injunctive relief against such a breach may be obtained.[8]

The court considered three cases where reformation was sought—two involving deeds and the third an act of mortgage. Reformation of a deed was allowed in *Haas v. Opelousas Mercantile Company*[9] on a clear showing of mutual error in describing the land covered by the deed. The court also applied the settled rule that reformation may be obtained by those who hold under the defective deed as well as by the immediate parties thereto. In *Akard v. Hutton*,[10] the court refused to reform an act of sale so that it would include additional land. The refusal was based on a lack of evidence to support the claim. The case also called for an application of the rule that, where the vendor in a sale with right of redemption delivers possession of the property after the expiration of the redemptive period, the sale becomes absolute. Finally, an attempt to secure reformation of a mortgage failed in *Federal Land Bank of New Orleans v. Bankston*[11] where the evidence was considered insufficient to constitute the high degree of proof required in such cases.

In *Jones v. Thibodaux*,[12] a creditor attacked a transfer made by husband to wife as being a fraudulent simulation. On the basis of the evidence, the court applied the well settled rule that a dation en paiement made by husband to wife in satisfaction of her claim against him for paraphernal funds is not subject to attack as an unlawful preference. It also found that a delivery of the property transferred, that is, stock certificates, had been accomplished.

A consideration of the Louisiana Arbitration Act[13] was necessary in *Housing Authority of New Orleans v. Henry Ericsson Company*,[14] where the court had before it a dispute which had been submitted to certain arbitrators appointed by the parties to a construction contract. Plaintiff sought to have the award reversed, and contended that under the terms of the arbitration

8. See Mason, Organized Labor as Party Plaintiff in Injunction Cases (1930) 30 Col. L. Rev. 466; Witte, Labor's Resort to Injunctions (1930) 39 Yale L. J. 374; Yankewich, Labor's Use of the Injunction (1932) 37 Com. L. J. 623.
9. 197 La. 500, 2 So. (2d) 3 (1941).
10. 196 La. 758, 200 So. 137 (1941).
11. 196 La. 146, 198 So. 886 (1940).
12. 196 La. 533, 199 So. 633 (1941).
13. La. Act 262 of 1928, as amended by La. Act 218 of 1932.
14. 197 La. 732, 2 So. (2d) 195 (1941).

contract the arbitrators were entrusted only with the duty of making up a record for the benefit of the court. The court found, however, that the parties intended to act under the Louisiana Arbitration Act and intended to confer on the arbitrators the authority made permissible by that act. Consequently, it was held that the court was without authority to reverse the action of the arbitrators but could only modify or vacate the award and direct a rehearing. No sufficient evidence was found by the court to justify either course.

Other cases disposed of on the issue of proof were *D'Angelo v. Nicolosi*,[15] decided against plaintiff because of his failure to carry the burden resting upon him under Civil Code Article 2245 and Code of Practice Article 325 of proving the genuineness of the signatures of the defendants who denied them; *Byrd v. Babin*,[16] where the proof was found to support plaintiff's claim for certain profits growing out of a real estate development contract; *Mora v. Ruffin*,[17] in which the evidence offered by defendant was insufficient to prove an alleged subsequent agreement on the part of plaintiffs to accept a certain payment in lieu of the performance promised; and *Davilla v. Boswell*,[18] where the proof did not satisfy the requirements of Civil Code Article 2277 which establishes the degree of proof necessary to show a verbal contract involving an amount in access of $500.

In *Kramer v. Freeman*,[19] where the real issue was the form of plaintiff's action and the prescriptive period applicable thereto, the court recognized that under the Civil Code and decided cases quasi contractual liability is incurred by one who tortiously acquires the property of another.[20]

H. Prescription

Liberandi causa

The preliminary classification of the cause of action was the basis of contention in *State ex rel. Hyams' Heirs v. Grace*.[1] The proceeding was a mandamus to compel the state to issue a patent for a certain tract of land. The court considered that this was an

15. 197 La. 797, 2 So. (2d) 216 (1941).
16. 196 La. 902, 200 So. 294 (1941).
17. 197 La. 693, 2 So. (2d) 182 (1941).
18. 197 La. 488, 1 So. (2d) 703 (1941).
19. 3 So. (2d) 609 (La. 1941).
20. See Arts. 2292, 2301, 2312, La. Civil Code of 1870.
1. 197 La. 428, 1 So. (2d) 683 (1941).

action to compel the conveyance of land and was therefore a real action. Consequently, the prescriptive period was thirty years,[2] and not ten years as against personal actions.[3]

An important practical issue in prescription cases is the matter of fixing the point of time at which a conceded prescription begins to run. The underlying theory is that prescription runs against a person when he refrains from exercising a right which he is in position and has the power to exercise. Thus, in *Haas v. Opelousas Mercantile Company, Limited,*[4] the action was for the reformation of a deed and subject to the ten year prescription, but the court adhered to the position that this "prescription did not begin to run until the plaintiffs discovered the mistake or from the time, by the use of due diligence, they could have discovered the information, which would have revealed the error in the description."[5]

In *Draper v. Van Leer*[6] the same kind of question was presented. Article 3542 of the Civil Code provides a specific prescription of five years for an action to reduce excessive donations. This period begins to run on the date that the will is filed for probate,[7] even against a nonresident complainant who received no actual notice, provided of course that all the probate proceedings were conducted properly and in good faith.

The suspension of prescription liberandi causa was questioned in *Ohio Oil Company v. Cox.*[8] As a result of certain transactions there were several owners of fractional interests in the mineral rights of a certain tract of land. There had been no operations for over ten years and the landowner claimed the extinction of the entire servitude for non-use.[9] However, the court held that there had been a suspension of the prescription in favor of all the fractional co-owners because certain interests had become vested in minors through inheritance. Liberative prescription does not run against minors,[10] and this suspension operates in

2. Art. 3548, La. Civil Code of 1870.
3. Art. 3544, La. Civil Code of 1870.
4. 197 La. 500, 2 So. (2d) 3 (1941).
5. 197 La. at 503, 2 So. (2d) at 4, citing Louisiana Oil Refining Corp. v. Gandy, 168 La. 37, 121 So. 183 (1929).
6. 197 La. 259, 1 So. (2d) 513 (1941).
7. Succession of Dancie, 191 La. 518, 186 So. 14 (1939).
8. 196 La. 193, 198 So. 902 (1940). See also in section on Mineral Rights, supra p. 188.
9. Arts. 789, 3546, La. Civil Code of 1870.
10. Art. 3554, La. Civil Code of 1870; Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931).

favor of all other co-owners.[11] Article 3478[12] deals only with the ten year acquisitive prescription and has no bearing upon liberative prescription.

In *Dixon v. Federal Land Bank of New Orleans*[13] the validity of a sheriff's sale was attacked on the ground that a curator ad hoc had been appointed to represent the debtor as if he were a nonresident, whereas he was present within the state and should have received personal service. This amounts to an "irregularity" of which the defendant could have availed himself, but his right to do so was barred by prescription. Article 3543[14] "is, in a sense, a statute of repose, intended to quiet and give stability to land titles and to creat confidence in judicial sales."[15]

Acquirendi causa

Possession is indispensable for acquisitive prescription but it takes less to meet the requirement for the ten year prescription in good faith than it does for the thirty year prescription in bad faith. Thus, where a plea of thirty year prescription could not be maintained because there was not a sufficient showing of actual physical possession of swamp timber land, the court did maintain the plea of ten year prescription for which the cutting and removal of timber with public indications of acting as owner was a sufficient possession.[16]

An unusual possession problem came up in *Chapman-Storm Lumber Company, Incorporated v. Board of Commissioners.*[17] The state adjudicated a property for taxes and later conveyed it

11. Art. 802, La. Civil Code of 1870.

12. Art. 3478, La. Civil Code of 1870, as amended by La. Act 64 of 1924: "He who acquires an immovable in good faith and by just title prescribes for it in ten years. This prescription shall run against interdicts, married women, absentees and all others now excepted by law; and as to minors this prescription shall accrue and apply in twenty-two years from the date of the birth of said minor; provided that this prescription once it has begun to run against a party shall not be interrupted in favor of any minor heirs of said party."

13. 196 La. 937, 200 So. 306 (1941).

14. Art. 3543, La. Civil Code of 1870, as amended by La. Act 231 of 1932: "All informalities connected with or growing out of any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women or interdicted persons."

15. Dixon v. Federal Land Bank of New Orleans, 196 La. 937, 952, 200 So. 306, 311 (1941).

16. Long v. Chailan, 196 La. 380, 199 So. 222 (1940); Dupuy v. Joly, 197 La. 19, 200 So. 806 (1941). In *Long v. Chailan,* the court also had occasion to apply Article 3519 which provides that prescription is not interrupted by the filing of a suit which is later abandoned.

17. 196 La. 1039, 200 So. 455 (1941).

by statute[18] to the defendant. However, the plaintiff produced good title and showed that the tax adjudication had been null and void because of a dual assessment. The defendant's plea of ten year prescription was dismissed and the court held that the statute of conveyance could not have been intended to abrogate the codal regulations on acquisitive prescription and therefore the defendant could not have been vested "with a fictitious physical possession of the property."[19]

On the subject of "just title" the court had occasion to repeat that the requirements may be satisfied by a sale which excludes warranty. Such a stipulation does not constitute notice of a limited title.[20]

A similarly liberal attitude exists with regard to a deed in which the description of the land does not accurately identify the property. In *Snelling v. Adair*[21] the court held that the deed may be a just title translative of property and that parol evidence may be admitted to establish the complete identification of the tract regarding which the parties transacted. This is not a reformation or alteration of the deed.

Ward v. South Coast Corporation[22] was a petitory action in which the plaintiffs produced satisfactory evidence of title and the defendants pleaded the acquisitive prescriptions of ten years and thirty years. The defendant's title went back through a sheriff sale in 1927 to a conveyance in 1892. Since there was nothing in the record to show that the disputed tract was included in the 1892 deed, that transaction cannot be the basis of a ten year prescription or even of a thirty year prescription which requires no color of title. The 1927 sheriff sale did specifically include the tract in dispute, and might have been a "just title" but at that time the property was in the hands of the state under a tax forfeiture of 1903 and this prescription does not run against the state. The ten year prescription might have commenced to run after the property was redeemed in 1938 but that question need not be considered because of insufficient lapse of time.[23]

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18. La. Act 97 of 1890.

19. Chapman-Storm Lbr. Co., Inc. v. Board of Commissioners, 196 La. 1039, 1051, 200 So. 455, 459 (1941).

20. Dupuy v. Joly, 197 La. 19, 28, 200 So. 806, 810 (1941), following Screen v. Trainor, 172 La. 51, 133 So. 359 (1931) and Land Development Co. of La. v. Schultz, 169 La. 1, 124 So. 125 (1929).

21. 196 La. 624, 199 So. 782 (1940).

22. 3 So. (2d) 689 (La. 1941).

23. There is no mention or discussion in this case of La. Act 310 of 1936 [Dart's Stats. (1939) §§ 8455.2, 8455.3] which provides that there shall be no

III. TORTS AND WORKMEN'S COMPENSATION

A. TORTS

The Protection Afforded by Torts Rules

The interest which the owner of property abutting on a public way has with respect to the condition of the highway and sidewalk was brought into focus recently in *Baird v. Thibodo*.[1] The defendant, acting under public authority, damaged the public sidewalk fronting plaintiff's property and later replaced it with an inferior substitute. The plaintiff sought to recover damages equal to the difference between the value of the original walk and the value of the substitute. Recovery was properly refused. The plaintiff was not entitled to any such sum as he demanded, for he owned neither the walk nor the property upon which it was laid.

It is interesting to conjecture as to what disposition would have been made of the case had the plaintiff sought compensation for the resulting depreciation in the value of his property.

It is commonly said the owner of abutting property has only limited rights with respect to the condition of the public way. He is entitled to access to the way, light and air, lateral support, and the right to have the highway open to the public.[2] These rights, however, arise by reason of the public nature of the way. Furthermore, most of the cases in which they have been recognized involved nuisances caused by the activities of a public utility, and the activity was harmless apart from the injury which was occasioned thereby to the plaintiff.

Should the same limitations apply where, as here, the defendant's conduct is independently wrongful toward a third person? *A* buys an expensive lot adjoining the estate of a neighbor, *B*, whose grove of shade trees enhances the value of *A's* land. *A* cannot complain if *B* destroys his own shade trees or gives someone else permission to do so, for *B's* privilege to deal with his land as he sees fit is superior to *A's* claim to pleasant surroundings.[3]

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interruption or suspension of prescription against property which has been adjudicated or forfeited to the state for taxes and later redeemed by a purchaser who was in good faith and had a just title. This statute might seem to cover the facts of the case, but on proper analysis it is not applicable and the omission of its reference is therefore correct. For fuller discussion of this point, see Note (1942) 4 LOUISIANA LAW REVIEW 335.

1. 197 La. 688, 2 So.(2d) 180 (1941).

2. 29 C.J. § 263 (highways). See Walker v. Vicksburg, S.&P. R.R., 52 La. Ann. 2036, 28 So. 324 (1900).

3. Compare the spite fence cases. The modern tendency is to allow recov-

Suppose, however, that *C* enters unlawfully upon *B*'s land and destroys the trees. Is it not fair that *A*, as well as *B*, should have a cause of action? In such a case *C* has no countervailing interest to assert either on his behalf or on behalf of *B*.[4] It is not a sufficient answer that *A* has no "property" interest in the destroyed trees.

In the present case, if it is true that the substitution of an inferior sidewalk was a wrong against the city which owned the way, a plausible argument can be presented that Baird should recover for the depreciation in the value of his property.

Negligence—Traffic and Transportation

The current belief that carelessness can be successfully classfied as ordinary negligence or gross negligence was given a severe jolt in the case of *Law v. Osterland*.[5] The plaintiff attempted to cross West Front Street in Olla, Louisiana, when she was struck by the defendant's car which was going about fifty miles per hour —twice the speed allowed by the town speed limit. The time was shortly after dark, and the plaintiff testified that after looking she either did not see the car, or, if she saw it, she was confident she could cross before it reached her. The court of appeal found that if the defendant had been alert he would have discovered the peril of the plaintiff in time to avoid the accident.[6] Four approaches were available for permitting recovery. The court might have held: (1) The plaintiff was not contributorily negligent; (2) the plaintiff was contributorily negligent, but the defendant was guilty of gross negligence; (3) both parties were negligent, but the defendant had the last clear chance; (4) both parties were grossly negligent, but the defendant had the last clear chance. The second of these appears to conform substantially to the facts, and is certainly the least embarrassing theory to administer, affording a minimum chance of reversal. The court of appeal, however, took the fourth position—both parties were *grossly* negli-

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ery for fences erected by one upon his own land for no useful purpose and solely to injure a neighbor's enjoyment of light and view. Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937). If, however, the structure serves any useful purpose, the malice of the owner in building it is insufficient to give an action. Kuzniak v. Kozminski, 107 Mich. 444, 65 N.W. 275 (1895).

4. In one respect this is a stronger case for recovery than the spite fence situation, for the absence of usefulness of defendant's conduct is emphasized by the fact that it is tortious as to *B*. On the other hand, the plaintiff's claim to advantageous surroundings in the supposed case is not a claim which is accorded as complete legal protection as the claim to light and air.

5. 198 La. 421, 3 So.(2d) 680 (1941).

6. Law v. Osterland, 3 So. (2d) 674 (La. App. 1941).

gent, but the defendant had the last clear chance. This theory placed in the foreground the idea, previously announced in *Jackson v. Cook*,[7] that where a defendant, through reasonable vigilance, could have discovered the plaintiff in time to avoid injuring him, the latter can recover even though his contributory negligence "continued down to the time he was struck." The ambiguous language of that portion of the rule in the *Jackson* case in quotations above is certain to give continued difficulty to the courts of Louisiana. In the *Jackson* case the plaintiff was drunk upon the highway when he was struck. If his negligence consisted in his condition of helplessness brought about by his own fault, that negligence did continue down to the last moment. On the other hand, the plaintiff, although negligent, was *helpless* all during the time when Cook could have seen him and saved the situation. Does the doctrine of the *Jackson* case go farther than these facts demanded? Does it apply to a situation such as here, where both plaintiff and defendant had equal opportunity to avert the accident up until the final moment?[8] If so, Louisiana has abandoned the doctrine of last clear chance and has substituted the so-called Humanitarian Doctrine of Missouri[9] in its place. How can it be said that a defendant had a *last* clear chance when all during the time that the chance existed the plaintiff had an equal chance? In such a case it appears that the parties are in the same situation and the ordinary rule of contributory negligence should preclude recovery.[10]

It is doubtful that the supreme court intended to lay down so broad a rule in the *Jackson* case. That case was properly decided upon its facts. The defendant clearly had the last chance to avoid the accident despite the fact that the plaintiff's fault was

7. 189 La. 860, 181 So. 195 (1938).

8. An affirmative answer is assumed in Note (1941) 15 Tulane L. Rev. 480.

9. Missouri stands alone in permitting recovery where neither party can be said to have had a superior opportunity to avoid the accident. Otis, The Humanitarian Doctrine (1912) 46 Am. L. Rev. 381; Clark, Tort Liability for Negligence in Missouri (1916) 12 Law Series, Mo. Bull. 25; Gaines, The Humanitarian Doctrine in Missouri (1935) 20 St. Louis L. Rev. 113. There are indications that the courts of Missouri are not satisfied with the operation of the rule, and a movement toward the doctrine of last clear chance is apparent. Becker, The Humanitarian Doctrine (1938) 3 Mo. L. Rev. 392.

10. Prosser, Handbook of the Law of Torts (1941) 414. A.L.I., Restatement of Law of Torts (1934) §§ 479(a), 480. The latter section permits recovery by an inattentive plaintiff who up until the last could have saved himself had he been vigilant, if, but *only* if, the defendant *saw* the plaintiff in his position of peril. This situation should be carefully distinguished from the one under consideration where neither party was aware of the peril but *both should* have been aware of it and neither was helpless. In the former situation the defendant's position is superior; in the latter it is not.

operating up until the final impact. It is hoped that the incautious phrase, "continuing negligence," will be clarified in later decisions.

In the present case the supreme court avoided the issue by holding that the plaintiff was not negligent at all. Thus we have a single piece of conduct judged by two appellate tribunals; one court concludes that it exceeded even the ordinary concept of carelessness and must be classified as reckless; the other court declares that it met the standard expected of reasonably careful persons. It is interesting to observe that under either view the conclusion is the same—judgment for plaintiff.

It is generally stated that it is the duty of a driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead. This statement, however, establishes a requirement so rigid when applied to night driving that the recognized exceptions to it have deprived it of much significance. Particularly is this true where the rule is invoked by a negligent defendant as a ground for his defense of contributory negligence. In *Gaienne v. Cooperative Produce Company*[11] the defendant's truck was parked at night partly upon the shoulder and partly upon the concrete of busy Highway 71 which runs west from Baton Rouge. There was satisfactory evidence that the position of the truck was such that the headlights were not cast upon the highway, and there was no tail light. While so parked the truck was struck in the rear by a car driven by the plaintiff. The latter sustained serious injuries. The defendant claimed that if the plaintiff had observed the requirement set forth above he could have observed the truck. The court, however, refused to apply the rule to the plaintiff. It pointed out that the plaintiff was obliged to dim his lights upon approaching other vehicles, which materially shortened the scope of his vision, and that the truck was so situated as to create a hazard for others who were driving prudently. At the time of the accident the plaintiff's car was going only about twenty-five miles per hour. The decision was clearly correct upon the facts of the case. Any other result would mean that night driving involves a standard of care which would make ordinary travel impossible.

Defamation

The field of defamation is one of the most confused areas of torts law. The cases are difficult to administer, and much legal-

11. 196 La. 417, 199 So. 377 (1940).

istic sleight of hand—such as the elusive concept of "malice"—has been brought to play in the decisions. When rules of substantive law do not allow the courts sufficient elasticity in dealing with defamation problems which must be highly individualized, a resort to procedural innovations can be expected. Thus we find the Louisiana Supreme Court asserting recently that in suits for libel and slander the preponderance of proof required is greater than in other civil actions.[12] The court asserted by way of justification that suits for defamation partake of the nature of criminal charges. This rationale is difficult to appreciate. Although a criminal action can be instituted for defamation, the same is true of careless driving, conversion, fraud, and most other recognized torts.

The court relied upon a statement in the earlier case, *Sterkx v. Sterkx*.[13] It might also have cited *D'Echaux v. D'Echaux*.[14] It is interesting to note that in all three controversies the action involved members of a single family group as plaintiff and defendant.[15] It will readily be appreciated that controversies of this type are particularly difficult to administer.

The privilege of the press to comment upon matters of public interest was reaffirmed by the supreme court in a recent decision.[16] The plaintiff, a former law student at Louisiana State University, had printed sensational articles in a school publication at a time when the political affairs of the state were the subject of heated comment in the press. Later, upon the plaintiff's passing the bar examination, his photograph and reminders of his past conduct were given prominent publication in the defendant paper. The only substantial error in the report was the statement that the plaintiff had been saved from a penitentiary term by the governor. In truth he had been given only a jail sentence. The remainder of the objectionable matter in the article consisted of strong language and untempered comment. These, the court held, related to matters of public interest, and it was not prepared to regard the comment as exceeding permissible boundaries.

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12. Dickerson v. Dickerson, 197 La. 907, 2 So.(2d) 643 (1941).
13. 138 La. 440, 70 So. 428 (1915).
14. 133 La. 123, 62 So. 597 (1913).
15. In the *Dickerson* case the suit was instituted by one brother against the other; in the *Sterkx* case the suit was by a femme plaintiff against her father-in-law; while the *D'Echaux* controversy involved the daughter-in-law and mother-in-law relationship.
16. Kennedy v. Item Co., Ltd., 197 La. 1050, 3 So.(2d) 175 (1941).

Nuisance

There is considerable conflict of opinion as to whether or not a carefully managed funeral home is a nuisance when established in a residential area or a transitory zone (partly residential and partly business or industrial).[17] The problem was before the Louisiana Supreme Court last year in *Moss v. Burke & Trotti, Incorporated.*[18] From the facts it appears that the funeral home was established in a transitory zone dedicated to both residential and business uses. The plaintiff's prayer for an injunction was refused. The opinion went somewhat farther than was essential under the facts, and appears to hold (1) that a funeral parlor is not a nuisance per se; (2) that, since no physical annoyance was involved, such an establishment may be operated in a residential neighborhood.[19] However, considerable attention was given to the evidence respecting the nature of the neighborhood, and the implications of the opinion are not clear. By dictum the court recognized the power of a municipality to exclude similar establishments by zoning ordinance, and stated that violation of such an ordinance would be ground for injunctive relief.[20]

B. Workmen's Compensation

The Louisiana Workmen's Compensation Act, like that of many other states, affords no protection for the employee against occupational diseases. This has frequently made it necessary for plaintiffs in compensation suits to urge upon the courts a very free version of the term "accident." This tendency is very noticeable where the alleged injury is to the heart. Where overexertion causes a collapse of the heart, recovery is usually allowed, even though the employee had previously suffered from a cardiac ailment.[21] From this situation the cases grade off gradually until finally we reach the claim where the employee's previous heart trouble merely manifests itself at a time when he is engaged in his employment, and no connection with his duties can be shown.[22] Between these extremes the possible situations

17. Annotations: Undertaker's Establishment as Nuisance, (1923) 23 A.L.R. 745, (1926) 43 A.L.R. 1171, (1933) 87 A.L.R. 1061.

18. 198 La. 76, 3 So.(2d) 281 (1941).

19. 3 So.(2d)) at 285.

20. 3 So.(2d) at 284.

21. Wright v. Louisiana Ice & Utilities Co., 19 La. App. 173, 138 So. 450 (1931).

22. Kirk v. E. L. Bruce Co., 190 So. 840 (La. App. 1939), and cases cited therein.

are numerous. Recently, in *Nickelberry v. Ritchie Grocery Company*[23] the employee, while engaged in moving boxes, sacks and other heavy articles, suffered choking sensations and was thereafter unable to continue his work. The court was satisfied that the plaintiff's disability had come on gradually and progressively and was not caused by his employment. The decision appears to be in line with previous holdings, and nothing was said in the opinion which can be regarded as a contribution to this field of law which is in great need of legislative attention and reconsideration.[24]

IV. PUBLIC LAW

A. Constitutional Law

While the reader will find some constitutional questions discussed elsewhere in the public law section of this symposium, several momentous constitutional decisions of the last term demand special notice.

The Amending Process

The Constitution of the United States is and that of Louisiana should be[1] pre-eminently a political document, which is to be distinguished as such from mere statute law. In this perspective there is small wonder that judicial review of legislation, with all the legalistic trappings of the business of adjudicating controversies which attend the process, has only too often permitted redetermination in the judicial forum, and upon the framework of a private contest, of political matters previously acted upon by the electorate or the political branches of the government or both. I hold the bar accountable for this; the judges are by training and experience but products of the bar and the ideas that prevail in their decisions largely come from the advocates who appear

23. 196 La. 1011, 200 So. 330 (1941).

24. See also the following cases decided during the past term and not discussed herein: Carlino v. United States Fidelity & Guaranty Co., 196 La. 400, 199 So. 228 (1940); Robinson v. Atkinson, 3 So.(2d) 604 (La. 1941).

1. The Louisiana Constitution, like those of many sister states, is fraught with statutory matter. Colloquially speaking, it includes about everything but the proverbial kitchen sink. As amended down through 1940, it covers over two hundred and fifty printed pages of ordinary size, whereas the Federal Constitution and amendments, including all obsolete provisions, occupy less than twenty such pages! That is roughly the length of the 1941 draft of the Model State Constitution prepared by the Committee on State Government of the National Municipal League.

before them. We of the bar have literally come to have a vested interest in judicial review. The whole tremendous subject calls for thorough re-examination which should await only the return of calmer times.

Witness what has been occurring in Louisiana—a new administration takes over the state government and initiates important political changes, some of which receive electoral approval as constitutional amendments, notably the amendment concerning the reorganization of the executive department. But that does not mean that the political outs are licked, not so long as (1) they can get into court and (2) they can convince the courts that compliance *vel non* with the constitutional provisions governing the amending process is justiciable, not strictly political, matter. It is now common knowledge that they in fact prevailed on both points in *Graham v. Jones*.[2] The vehicle upon which they rode into court was the familiar taxpayer's suit for an injunction against the alleged illegal expenditure of public funds. Long before the Federal Supreme Court decided, in *Frothingham v. Mellon*,[3] that a taxpayer of the Federal Government had not a sufficient interest to give him standing to challenge the lawfulness of federal spending the Louisiana court had taken a like position as to state outlay.[4] But this stand was substantially reversed in 1930[5] and positively repudiated in the *Graham* case. Almost anyone pays something in the way of state taxes and can thus qualify as plaintiff. Thus, the way is paved for litigious sniping at political decisions made in the democratic way.

In support of the conclusion on "judiciality" the court quoted from two well-known law digests and cited a third. The opinion does not, however, mention, in this connection, the significant Federal Supreme Court case of *Coleman v. Miller*,[6] in which the high court recently held two aspects[7] of the federal amending process to be so far political as to be beyond the judicial purview and in which four judges, speaking through Mr. Justice Frankfurter, took the position that the entire amending process is poli-

2. 198 La. 507, 3 So. (2d) 761 (1941).

3. 262 U. S. 447, 43 S. Ct. 597, 67 L.Ed. 1078 (1923).

4. Sutton v. Buie, 136 La. 234, 66 So. 956 (1914).

5. Borden v. Louisiana Board of Education, 168 La. 1005, 123 So. 655 (1929). See also Saint v. Allen, 169 La. 1046, 126 So. 548 (1930).

6. 307 U.S. 433, 59 S. Ct. 972, 83 L.Ed. 1385, 122 A.L.R. 695 (1939).

7. That is, the question whether a state which has once rejected a proposed amendment may later ratify and that whether a proposed amendment may be lost by mere efflux of time where Congress in initiating it has set no time limit upon ratification.

tical, not justiciable, business. There is reason to suppose that Mr. Justice Jackson, who appeared as Solicitor General for the United States, amicus curiae, in that case, also entertains this view.[8]

The principal reliance of Chief Justice O'Niell and Mr. Justice Odom, in dissenting, was upon the theory that the attack upon the amendment came too late, that it was not admissible after the election. They conceded that such an attack should be judicially entertained prior to submission to the voters. This position has much to commend it but it does provoke the question—would not a judicial determination before the election be an advisory opinion because at that stage the future of the proposal is conjectural? So it is with a measure in the legislative mill. Why, moreover, interfere with the political process of amending the constitution and at the same time continue to refuse to interfere with the legislative process where it is alleged that constitutional requirements as to the latter have been violated?[9]

Once it has been determined that the questions raised are for the court one may well have no quarrel with the outcome although some of the reasoning supporting the decision is more difficult to defend. With respect to the point that the joint resolution initiating the amendment failed to specify the election at which the proposal was to be submitted (an obvious inadvertence) there is much to be said for the view of the dissenting judges that the evident failure of the irregularity to affect the election result took all the sting out of it.[10] It will be remembered that the constitution contemplates submission of a proposed amendment at the time of an election for representatives in the legislature or in Congress; here the actual submission was at the next such election. On the other hand, the court's conclusion that the proposal violated the requirement of separate submission where more than one amendment is to be submitted is at least as supportable as a contrary view. The term "amendment" has anything but a relatively precise content. It is reasonable to suppose, however, that it relates not to the form but to the subject

8. The writer has not had access to the government's brief but he has been told by one who assisted in the preparation of that brief that Mr. Jackson took the Frankfurter view.

9. It is obvious that a court will not interpose in this latter situation.

10. Compare the line of cases rejecting attacks on local bond elections grounded on procedural irregularities where there was no showing that the result was affected. State ex rel. O'Keefe v. Board of Liquidation, City Debt, 163 La. 843, 112 So. 894 (1927); McCann v. Mayor and Councilmen of Morgan City, 173 La. 1063, 139 So. 481 (1932).

matter of amendments because there is an obvious reason for presenting unrelated matters in such wise that each may be considered on its merits. The amendment's abolition of the legislative bureau, an adjunct of the legislature, was, for example, rather remotely related to executive reorganization. It is true that the attorney general was affected, but his participation is hardly the same matter as the proposition whether the legislature shall have the assistance of a legislative bureau.

Although the joint resolution, admittedly, did not have to have a title the court deemed it permissible to emphasize its use of the plural "amendments" with reference to executive reorganization and to fiscal administration. It pointed also to the provision made in the body of the resolution for an administrative code and a fiscal code. But if the administrative code and the fiscal code are but germane parts of a larger plan of executive reorganization surely that substance should govern a mere verbalism. And it is not readily perceived why a unified system of fiscal administration is not a highly appropriate phase of a plan of executive reorganization. The statement in the opinion, moreover, that the joint resolution provided for the adoption of the codes in question in violation of the prohibition in Section 18 of Article III of the Constitution against the adoption of a code by reference is patently in error; that provision can be altered by constitutional amendment and there was to be no adoption by reference in any event.[11]

The provision of the amendment repealing Article XVI-A of the Constitution, and thus revoking the grant of authority by Section 9 thereof to levy taxes to service outstanding Caernarvon Break reparation bonds was also deemed not sufficiently germane. But, be that as it may, that provision, if taken literally, ran afoul the contract clause of the Federal Constitution because it, by taking away authority to provide for payment of the bonds, impaired their obligation.[12]

A petition for a rehearing was denied but the court modified the injunction to conform to the fact that its decision was confined strictly to the amendment and that the validity of the administrative and fiscal codes had not been passed upon. The opinion, on application for rehearing, stated that the court was with-

11. This criticism is made in the dissenting opinion of Chief Justice O'Niell in Graham v. Jones, 3 So. (2d) 761, 789 (La. 1941).

12. Von Hoffman v. City of Quincy, 71 U.S. 535, 18 L.Ed. 403 (1867).

out jurisdiction to give advisory opinions or render declaratory judgments. This reference to declaratory judgments is unfortunate; there can be no question at this late day that a declaratory judgment proceeding involves genuine justiciable matter and is not properly to be classed with advisory opinions.[13]

In the *Graham* case the court had no difficulty in distinguishing *Guillory v. Jones*,[14] decided earlier in the term. In 1940 the voters ratified an "amendment" to Section 31 of Article VII, the constitutional provision which divides the state into judicial districts. The proposition was, in effect, so to amend the section as to create a Twenty-Eighth District and vacate the offices of judge and district attorney in the Twenty-Seventh District. The change was contested by the ousted judge on the ground, among others, that two amendments had been submitted in one proposition; but that the two changes were germane seems clear enough, whatever one may think of the device of ripper legislation.

Act 324 of 1938 was entitled "An Act

> "To re-define the limits of the Buras Levee District as created by Act 18 of 1894; to prescribe certain powers and duties of the Board of Commissioners thereof; and to repeal all laws in conflict herewith."

Section 1, after providing that the limits of the district should be taken as having comprised certain territory, ordained "that all lands not heretofore conveyed to said levee district shall henceforth be conveyed to it, according to all the terms and provisions of the relative granting statutes." Section 2 granted certain powers to the governing board of the district and Section 3 was a repeal provision. The constitutionality of the statute was attacked in *Airey v. Tugwell*[15] on the grounds, among others, that the body of the act was broader than its title and embraced more than one object and that the act attempted to revive and reenact an earlier law simply by reference in violation of Sections 17 and 18 of Article III of the Constitution. The State Auditor and the Registrar of the State Land Office, presumably acting on the theory that the act required that all lands within the confines of the district then owned by the state be conveyed to the district, purported to transfer to the district certain lands which had been adjudicated to the state for nonpayment of taxes. With respect

13. Borchard, Declaratory Judgments (2 ed. 1941) c. 5.
14. 197 La. 165, 1 So. (2d) 65 (1941).
15. 197 La. 982, 3 So. (2d) 99 (1941).

to one such tract suit was timely brought against the State Treasurer and others to have the transfer to the district nullified and for redemption of the land under Act 47 of 1938, which permitted such redemption up to noon of December 31, 1938, in the case of adjudication for the nonpayment of taxes for 1936 and previous years where title still remained in the state. The lower court decided that title was still in the state because Act 324 of 1938 was unconstitutional in its entirety and gave judgment for the plaintiff. The supreme court upheld the decision on the merits but set aside the judgment insofar as it held the act unconstitutional in respects other than its relation to the transfer of state lands to the district. The above-stated objections to the act were both regarded as sound by the court but the provisions which fell within the title were regarded as separable because they could be given substantial operative effect apart from the invalid provision.

The accepted theory in this state is that the title of an act marks its scope.[16] A provision concerning the granting of state lands to a levee district is hardly within the reach of a title which refers simply to the limits of the district and the powers and duties of its governing board. The reference in that clause to the "provisions of the relative granting statutes" was deemed to relate to Section 11 of Act 18 of 1894, which was the law creating the district. That section, however, insofar as it granted to the district lands adjudicated to the state for nonpayment of taxes, had been repealed by Act 237 of 1924.[17] Thus the situation was one in which a dead part of the 1894 act was sought to be revived by reference, which is the sort of thing proscribed by Section 18 of Article III of the Constitution.

During the 1939-1940 term the court held unconstitutional a 1938 amendment to the statute concerning the assessment to the shareholders for ad valorem taxation of the capital stock of banks.[18] The amendatory act provided that the assessment should not exceed the par value of the bank shares plus any amount by which the bonds, declared surplus, undivided profits and contingent reserves of a banking institution should exceed the par value of the common capital of the institution. This was held to create a tax exemption not within the exclusive list of exemptions set

16. Kleinpeter v. Ferrara, 179 La. 193, 153 So. 689 (1934).
17. Dart's Stats. (1939) § 8480 et seq.
18. Hibernia Nat. Bank in New Orleans v. Louisiana Tax Commission, 195 La. 43, 196 So. 15 (1940), discussed in The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 338.

out in Section 4 of Article X of the Constitution, since it involved an arbitrary rule which would operate to exclude part of the value of bank shares from taxation. The First National Bank of Shreveport paid, on behalf of its shareholders in accordance with the statutory scheme, the tax for 1939 upon an assessment made in accordance with the 1938 act. After the adverse decision on constitutionality the assessor for the parish, acting pursuant to an order of the Louisiana Tax Commission, made up a supplemental assessment lifting the aggregate assessments of bank shares for 1939 to such amounts as would accord with the governing statute as it read prior to the 1938 amendment. Then followed the procedural steps contemplated by the back tax statute.[19] On September 10, 1940, the tax collector notified the bank by registered mail of delinquency under the assessment and when the bank failed to pay he and the city tax collector of Shreveport brought summary suits to compel payment.[20]

It was contended upon behalf of the bank that the 1938 act was constitutional as to national banks on the theory that the legislature derived its authority to tax their shares from the congressional consent to such taxation; but the court quite adequately disposed of that point by characterizing the action of Congress as a mere waiver of immunity; the power of taxation being exerted was that of the state with respect to a subject which, but for the congressional consent, would have enjoyed immunity. The act was deemed inseparable, in any event, in view of the obvious legislative policy to tax all bank shares alike and of the absence of a separability clause. It is worthy of observation in this connection that where an inequality in taxation is, in effect, forced upon a state by reason of a federal immunity the state tax law should not for this reason be regarded as violating the uniformity clause of the state constitution.[21]

The second contention of the defendant, that the 1938 act

19. La. Act 170 of 1898, § 12, as amended by La. Act 69 of 1908 [Dart's Stats. (1939) § 8333].

20. Flournoy v. First National Bank of Shreveport, 197 La. 1067, 3 So. (2d) 244 (1941).

21. The uniformity required is doubtless substantially the same as that exacted by the equal protection clause of the Fourteenth Amendment. See Fox v. Standard Oil Co. of N. J., 294 U.S. 87, 102, 55 S. Ct. 333, 339, 79 L.Ed. 780, 790 (1935). And a state tax discrimination attributable to a Federal immunity is not a denial of equal protection. Union Bank & Trust Co. v. Phelps, 288 U.S. 181, 53 S. Ct. 321, 77 L.Ed. 687, 83 A.L.R. 1438 (1933). The pertinent provision of Section 1 of Article X of the Louisiana Constitution simply exacts uniformity; many state constitutions require "equality and uniformity" of taxation.

and what was done under it were valid prior to the declaration of unconstitutionality, was also rejected. The court applied the old notion that a statutory provision in conflict with the constitution is void *ab initio*. It was recognized that there might be exceptions to this rule where there had been a change in the position of the parties and it was inequitable to disregard the statute or where it would be impossible for the court to undo what had been done and restore the parties to a "reasonable position." The present case was not regarded as exceptional in view of the legal and natural obligation to pay the taxes involved and the fact that the defendant was being treated just as it would have been had the statute not been enacted. The court noticed the significant decision of the United States Supreme Court in *Chicot County Drainage District v. Baxter State Bank*,[22] but appeared to regard it as a mere recognition of an exception to the *ab initio* principle. That case, however, means more; it represents a repudiation of the notion of "retroactive invalidity." The high court there substantially modified *Norton v. Shelby County*,[23] which is noted for its classic statement of the *ab initio* principle. It held that a decision rendered by a federal court in a case where its jurisdiction depended upon a statute, which was subsequently held unconstitutional in another case, was, nevertheless, *res adjudicata* as to a party to the case even though the constitutional question was not expressly raised. The Court recognized with some realism that a statute may very well have operative effect for some purposes before an adverse decision on constitutionality. Indeed, can it not well be maintained that a statute may have some operative effect even after an adverse decision on constitutionality since, strictly regarded, the decision of the court does not strike down the statute but simply treats it as unenforceable for purposes of the case? The court is not a super-legislature; its business is adjudication and it is appropriate for a court to dispose of a constitutional question only for purposes of deciding a case properly before it. To illustrate this point reference may be made to the minimum wage law for women and children in the District of Columbia which was held unconstitutional in 1923.[24] In 1937 the court overruled this decision in a case in which a similar act of the State of Washington was upheld.[25] It seems to

22. 308 U.S. 371, 60 S. Ct. 317, 84 L.Ed. 329 (1940).

23. 118 U.S. 425, 6 S. Ct. 1121, 30 L.Ed. 178 (1886).

24. Adkins v. Children's Hospital, 261 U.S. 525, 43 S. Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238 (1923).

25. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L.Ed. 703 (1937). The act upheld in this case had been on the books since 1913.

the writer altogether clear that the cloud overhanging the act of Congress involved in the earlier case was thereby removed and it stood as a valid, enforceable statute, if it had not been repealed in the meantime. This could not be, however, if we were compelled to treat the adverse decision on constitutionality in 1923 as at that time striking the act down because once dead it could be resuscitated only by congressional re-enactment. The sterile fiction that the earlier interpretation of the Constitution having been found erroneous is now to be treated as though never made is hardly an answer to this. At best, the Louisiana court's theory that an act held unconstitutional is void *ab initio,* subject to exceptions based on equitable considerations, is open to the logical objection that the very conception of initial nullity does not permit of exceptions; it is very much like saying that although a man is dead he may for some purposes be considered to be among the living.

The back tax statute requires an assessor to assess back taxes for not more than three years upon property omitted in the assessment of a year or in any way erroneously or improperly assessed. It was the theory of the bank in the *Flournoy* case that the supplemental assessment was a mere revaluation of property already assessed and thus that there was no omission and no improper or erroneous assessment. In disposing of this point the court reasoned that since the tax officials had no authority to effect a new tax exemption administratively the original omission to include in the assessment part of the taxable value of the bank shares was at least an improper or erroneous assessment, if not an omission of property from assessment. Act 18 of the Second Extra Session of 1934 was deemed inapplicable because it relates to changing and correcting valuations and not to the matter of assessing property which has been omitted or improperly or erroneously assessed. Defense counsel insisted that the position taken by the court put the taxpayer in an unhappy situation because he might be compelled to pay back taxes where he had paid too little in reliance in good faith upon a statute and the determinations of the assessing authorities, whereas a taxpayer who has voluntarily paid too much by mistake may not recover the amount of the overpayment, at least where the funds have not been held intact and cannot be identified.[26] The court suggested that such a contention should be addressed to the legislature. Chief Justice O'Niell and Justice Odom dissented.

26. Central Savings Bank & Trust Co. v. City of Monroe, 194 La. 743, 194 So. 767 (1940), discussed in The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 333.

B. TAXATION

Property Taxes

The Orleans Parish School Board won two substantial tax victories in the supreme court during the last term. It was held in *Parker v. Cave*[27] that the board was not bound by the percentage of assessed valuation taken by the City of New Orleans for tax purposes, namely eighty-five per centum, but was free to levy its seven mill tax upon one hundred per centum of the assessed valuation of taxable property. Section 1 of Article X of the Constitution makes the state assessment the valuation for local purposes but authorizes the taxing authorities of "a local subdivision" to adopt a different percentage of the state valuation for purposes of local taxation. Section 16 of Article XII of the Constitution provides that the Orleans Parish School Board shall levy annually a maximum tax of seven mills "on the assessed valuation of all property within the City of New Orleans assessed for City taxation" and that the city shall have the school tax entered on its tax rolls and collected "in the manner and under the conditions and with the penalties and interest prescribed by law for city taxes." It is required that "the money thus collected shall be paid daily to said Board." A taxpayer paid under protest the school tax levied upon one hundred per centum of the assessed valuation and sought to recover the difference between the school tax levied on that basis and upon eighty-five per centum of the assessed valuation. He contended that Section 16 of Article XII rendered the percentage of assessment taken for city purposes controlling as to school purposes and pointed out that in the past the school board had confined itself to the city percentage. But the court was unable to find anything in Section 16 of Article XII which qualified, as to the board, the authority given a local subdivision by Section 1 of Article X to adopt its own percentage of the state valuation. Section 16 of Article XII identifies the parish school tax base with that of the city and provides for collection of school taxes by the city in like manner as city taxes, but that does not govern the percentage of assessed valuation to be used for school tax purposes, else the governing authorities of the city would be empowered by determining the percentage of assessed valuation to be used for that purpose to exercise a large measure of control over the rate of taxation for school purposes. The court regarded the constitutional language

27. 198 La. 267, 3 So. (2d) 617 (1941).

as so unambiguous as to exclude resort to the doctrine of contemporaneous construction.

In September, 1936, the Commission Council of the City of New Orleans adopted an ordinance authorizing the Commissioner of Public Finance to deduct one per centum of all property tax collections by the city and providing that the amounts deducted be used to defray the cost of collection. The city applied this ordinance to tax collections for the Orleans Parish School Board. After several years that board sought by mandamus to compel the city and the Commissioner of Public Finance to pay over daily all moneys realized from the collections of its tax and for a judgment for the amount previously withheld under the ordinance.[28] The board relied upon the requirement of Section 16 of Article XII of the Constitution exacting daily payments to the board of tax moneys collected. The pertinent provisions of that section have already been outlined in the discussion of the *Cave* case.[29] The judgment for plaintiff was affirmed. The constitutional provision meant, said the court, that the entire amount collected be paid over daily to the board: "*The* money *thus* collected" meant the full amount collected. It was taken to have been the design of the constitutional provision that the city collect the school board's taxes along with its own since some provision had to be made for school tax collections and the function could be performed by the city without hardship or extra cost.

Tax Sales—Redemption—Annulment

The continuing insecurity of tax titles in Louisiana is a strong invitation to the bar to insist upon a thorough reconsideration of the constitutional and statutory provisions governing tax sales. At the last term of the court there were probably even more than the usual quota of cases involving attacks upon tax titles based upon this or that alleged defect or irregularity at some stage in the process of assessment, levy and collection of property taxes. It cannot be gainsaid that the number of such attacks which prove successful contributes materially to the insecurity of land titles in the state, whatever be the equities of the given case.

There is no constitutional limitation, says the court, upon the power of the legislature to determine what disposition shall be made of property adjudicated to the state for non-payment of

28. Orleans Parish School Board v. City of New Orleans, 198 La. 483, 3 So. (2d) 745 (1941).

29. 198 La. 267, 3 So. (2d) 617 (1941).

taxes. Thus, it has recently been decided that the legislature may exact, as a condition upon which redemption of adjudicated property may be had, payment of taxes for an intervening tax year.[30] The constitution exempts "all public property" from taxation.[31] This provision appears to make public ownership, not devotion to a public use, the test.[32] If this be so, property adjudicated to a town cannot be taxed so long as the town holds it.[33] But there remains the question whether payment of an amount equivalent to taxes for the period the property was held by the town could be exacted in the exercise of plenary legislative power in the premises. There is no apparent obstacle other than the constitutional provision as to redemption, which does not call for the payment of taxes imposed during the intervening years, but the court has held squarely that the redemption provision applies only to tax sales to private purchasers and does not apply to adjudications to the state or other taxing authority.[34] While there is certainly basis in the language of the constitution for this conclusion, it is interesting to observe that the court treats the "prescription" provision of the same section of the constitution as applicable to adjudications to the state or other taxing authority although that provision on its face appears to relate to the same sort of sales as the redemption provision.[35]

Carruth v. Hollister[36] calls for but passing mention. Act 161 of 1934 authorized redemption of lands adjudicated "prior to the passage of this Act" by instalment payments of the actual defaulted taxes. The purview of an amendatory statute, Act 14 of

30. Perrin v. Kevlin, 198 La. 636, 3 So. (2d) 900 (1941).

31. La. Const. of 1921, Art. X, §4.

32. Cases arise, of course, where the basic question is whether a given activity engaged in upon the governmental level is really public and in such a case a favorable conclusion automatically puts property held and used for the purpose in the exempt category. State ex rel. Porterie v. Housing Authority of City of New Orleans, 190 La. 710, 182 So. 724 (1938).

33. The attorney general, in an opinion of November 3, 1934, concluded that state and parish taxes are not collectible on property adjudicated to a municipality so long as the latter so holds it but his opinion was rested on statutory grounds; he thought the situation was the same as had the adjudication been to the state. Report and Opinions of the Attorney General of Louisiana (April 1, 1934 to April 1, 1936) 1162.

In one sense the adjudicated property is being used for a public purpose, namely, the collection of public revenue.

34. Police Jury of Parish of Jefferson Davis v. Grace, 182 La. 64, 161 So. 22 (1935).

35. The "prescription" clause follows close upon the heels of the redemption provision and instead of employing language suggestive of application to a different kind of tax sale uses the redemption period as the primary span upon which the period of limitation is based.

36. 198 La. 212, 3 So. (2d) 592 (1941).

the Fourth Extraordinary Session of 1935, in terms extended the time of redemption; its title, however, declared its object to be to extend the provisions of the prior act "for a specified time." The court interpreted the act, as amended, to apply only to lands adjudicated before the time of original enactment. Thus a purchaser from the sheriff made at a sale conducted under those statutes, after a default in the instalment payments with respect to lands adjudicated in 1935, could not maintain a suit to reform the tax deed because the adjudication followed the passage of the 1934 law.

In 1909 a certain lumber company was assessed for 1880 acres of timber land, which was the total acreage it owned, but the description was erroneous in that it included in part 320 acres of another owner and left out 320 acres which belonged to the company. By a supplemental assessment the latter 320 acres were assessed to certain predecessors in title of the company and in 1910 were adjudicated to the state. In the meantime the company had paid its 1909 taxes in blissful unawareness of this error. In 1911 the state conveyed the adjudicated lands to a levee district board which in 1937 executed a mineral lease on the tract to an oil company. The lumber company thereafter brought suit to "remove cloud from title" by having the adjudication to the state, the transfer to the levee district board and the mineral lease declared null.[37] The supreme court affirmed a judgment granting the relief prayed. The upshot of the decision was that the tax sale resulting in the adjudication to the state related to property on which the taxes had been paid and thus was expressly beyond the operation of the three year constitutional "prescription" provision.

Since the 320 acres in question had been correctly assessed to the true owners for the years following 1909 and since it did not appear that the state or its transferee had taken open and hostile possession of the property it may be assumed that the tax debtor did not realize the true situation until arrangements looking to the oil and gas exploitation of the land were made in 1937. On this basis the case is not one of a party having slept on his rights while the interests of third parties intervened with the effect of rendering it inequitable to permit the invalidity of the adjudication to be attacked. The point in the case of principal interest

37. Chapman-Storm Lumber Co., Inc. v. Board of Com'rs for Atchafalaya Basin Levee District, 196 La. 1039, 200 So. 455 (1941).

for present purposes is the idea, supported by previous decisions,[38] that an erroneous description on the assessment roll does not preclude the operation of the constitutional provision, which makes the "prescriptive period" provided for in the constitution inapplicable to a tax sale of property upon which the taxes have been paid, if the tax debtor can show that prior to the adjudication he had paid for the tax year in question the taxes on all of the taxable property he owned.

The two companion cases of *Gottlieb v. Babin*[39] and *Le Blanc v. Babin*[40] may appropriately be considered together. Both were suits to set aside tax sales, made to the defendants, of undivided interests in certain land in Ascension Parish containing 995.38 acres, more or less. The sale was for 1932 taxes. The Gottliebs derived their one-half interest in the land by inheritance from their brother; his succession was closed and they were placed in possession of all of his estate in 1928. In 1932 the interest in question was assessed to "Heirs of Saul J. Gotlieb, Louis Gotlieb & Mrs. Rosalie G. Moise, Baton Rouge, La." The property was described as follows:

No. of Acres	
497.69	245.47 Undiv. ½ Int. In W. ½ of Sec. 4 & S.E. ¼, Sec. 4-9-2.
	81.20 Undiv. ½ Int. In S.E. ¼, Sec. 5-9-2.
	89.63 Undiv. Int. In W. ½, Sec. 33-8-2.
	81.39 Acs. Und. ½ Int. In S. E. ¼, Sec. 33-8-2.

Notice of tax delinquency for 1932 was forwarded by the sheriff by registered mail addressed to "Heirs of Saul J. Gotlieb, Baton Rouge, La." It was receipted for by *X* whom the plaintiff alleged was not their agent and was without authority to act in any way for them. The opinion recites that the Gottliebs did not receive actual notice and that there was no evidence to show that *X* was their agent. The sheriff did not make out a process verbal as required by statute, the pertinent provisions of which are set out below.[41]

38. See cases cited by the court in 200 So. at 457.
39. 197 La. 802, 2 So. (2d) 218 (1941).
40. 197 La. 825, 2 So. (2d) 225 (1941).
41. "The state tax collector for the city of New Orleans as well as in

In the *Le Blanc* case it appeared that J. Burton LeBlanc, J. E. Le Blanc and W. H. Le Blanc owned the remaining one-half interest in the land in question. It was listed on the assessment roll for 1932 in the name of "Le Blanc, Burton, et als., St. Gabriel, La." Their interest was described as follows:

No.of Acres
497.69
163.65 Acs. W ½ of Sec. 4-9-2.
81.82 Acs. SE ¼, Sec. 4-9-2.
81.20 Acs. SE ¼, Sec. 5-9-2.
11.39 Acs. SE ¼, Sec. 33-8-2.
89.63 Acs. Frc. W ½ Sec. 33-8-2.

In their case, the sheriff had forwarded a notice of delinquency by registered mail addressed to "J. Burton Le Blanc, et als., St. Gabriel, La." It was receipted for by *Y*, who was the assistant postmaster in St. Gabriel and the manager of a store of J. Burton Le Blanc and J. E. Le Blanc. *Y*'s testimony was to the effect that he did not customarily pay taxes on property owned by the Le Blancs in the parish and had nothing to do with the matter. He said he did not know what was in the registered package and he did not remember delivering it nor did J. Burton Le Blanc remember receiving the notice. There was no affirmative showing of actual delivery to J. Burton Le Blanc.

In each case a judgment dismissing the suit was reversed and judgment rendered by the supreme court for the plaintiffs annulling the tax sale on the condition that the plaintiffs make reimbursement to the defendants as required by Section 11 of Article X of the Constitution. The assessments were considered

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other parishes of this state, shall send to each taxpayer by registered mail the notice prescribed in section 50 of this act, provided that in cities containing a population over fifty thousand persons the state tax collector or ex officio state tax collector, may either send this notice by registered mail or may make a personal or domiciliary service on the taxpayer. After the state tax collector or ex officio state tax collector shall have completed the service of the notices herein required, either by mail or by personal or domiciliary service, he shall make out a process verbal stating therein the names of delinquents so notified, their post-office addresses, a brief description of the property, the amount of taxes due and how the service of notice was made, which proces verbal shall be signed officially by him in the presence of two witnesses and filed in the office of the clerk of court in parishes of this state other than the parish of Orleans for recording and preservation, and in the parish of Orleans shall be filed in the office of the state tax collector for the city of New Orleans and preserved for record. Said proces verbal shall be received by the courts as evidence." La. Act 179 of 1898, §51, as amended by La. Act 235 of 1928 and La. Act 194 of 1932 [Dart's Stats. (1939) § 8439].

illegal and void because of improper description of the property involved. The parties in interest did not, as the court pointed out, own any specific number of acres but simply had undivided interests in the land and the assessor had no authority to assign any particular acreage to them. Such an unauthorized acreage assessment did not afford a valid basis for a subsequent tax sale of the undivided interests of the parties.

With respect to the question whether the assessments were invalid because not made in the names of the record owners the court concluded that the objection was clearly well taken in the *Gottlieb* case since the record owners there held in their individual right whereas the assessment made to them as heirs of Saul J. Gottlieb was an assessment of his estate, which no longer existed. This strikes one as rather formalistic; the listing did show the names of the true owners and made it clear that they were the real parties in interest. It is not perceived how they could be prejudiced by it. In the Le Blanc case the assessment sufficiently identified J. Burton Le Blanc as an owner but was defective in failing to name the other Le Blancs.

In each case it was held that the notice of delinquency was invalid. The Gottliebs received no actual notice and the formal notice was served upon one not shown to be their agent. It was addressed, moreover, to the "Heirs of Saul J. Gotlieb" without naming them. The notice of delinquency in the *Le Blanc* case was sufficiently addressed so far as J. Burton Le Blanc was concerned but did not name the other Le Blancs. This was deemed clearly bad as to the latter and want of sufficient proof of actual delivery of the notice to J. Burton Le Blanc was held to invalidate the formal notice as to him.

While the court recognized that a taxpayer who had consistently and knowingly permitted his property to be assessed in an improper name might be estopped to rely upon the defect after a tax sale the additional factors of invalid description and illegal notices of delinquency were taken to preclude the application of the doctrine of equitable estoppel in these cases.

What the *Gottlieb* and *Le Blanc* cases appear to boil down to is simply this—delinquent taxpayers can at any time before the constitutional "prescriptive" period has run take full advantage of technical defects in the assessment and collection proceedings even though there is nothing to show that they had in

any wise been misled or otherwise prejudiced, subject to a limited application of the doctrine of equitable estoppel.

Several recent cases involved attacks upon tax sales after the constitutional "prescriptive" period had run.

The property involved in *Jackson v. Irion*[42] had been listed for 1926 taxes as follows:

"Jackson, Willis
"One City Lot at Eola"

The tax sale was made in 1927 and the heir of Jackson brought suit in 1939 to have it annulled. It appeared that Eola was a small unincorporated settlement, that Jackson owned only one lot there and that his lot was easily identified by resort to extrinsic evidence. Under those circumstances a judgment sustaining a plea of "peremption" under the constitutional provision and the plea of prescription for ten years was affirmed. With respect to a situation where the listing was so imperfect that satisfactory identification of property could not be made even by resort to extrinsic evidence the court is committed to the view that the constitutional provision as to "prescription" does not apply.[43]

One notes in passing that in the *Jackson* case the court speaks of this constitutional provision as one relating to peremption. This is interesting because in the other pertinent cases that have come to the attention of this writer the provision is spoken of as one relating to prescription.[44] It would seem to be a matter of some consequence to the bar to know into just what category the provision falls because it would, doubtless, have some bearing upon the pleadings in a given case and upon such questions as whether the running of the period might be interrupted.[45]

H purchased a thirty-five acre tract of land at a tax sale in 1901. The tax deed to *H* was regular in form and recited compliance with all legal requirements as to sale. For some unexplained reason, the property was assessed to *A* in 1902 and adjudicated to the state in 1903 for the nonpayment of his 1902

42. 196 La. 728, 200 So. 18 (1941).

43. Morris v. Hankins, 192 La. 504, 188 So. 155 (1939).

44. For cases decided during the last term see Skannal v. Hespeth, 196 La. 87, 198 So. 661 (1941); Chapman-Storm Lumber Co., Inc. v. Board of Com'rs for Atchafalaya Basin Levee Dist., 196 La. 1039, 200 So. 455 (1941); Ward v. South Coast Corp., 198 La. 433, 3 So. (2d) 689 (1941).

45. For a recent case in which the issue, prescription versus peremption, was acute, see Harris v. Traders and General Ins. Co., 4 So. (2d) 24 (La. App. 1941).

taxes. *A* redeemed in 1938 and quitclaimed to the heirs of *H*. The heirs of *H* sued third parties, who claimed to own the property, to try title under Act 38 of 1908.[46] The suit was later converted into a petitory action. The defendants contended that the tax sale to *H* was void because the assessment and sale had been in the name of the New Orleans Pacific Railway Company which did not own the land. The record disclosed that the land had been patented to "No. Pac. Ry. Co." in 1885. In subsequent years it was clearly assessed to the New Orleans Pacific Railway Company. Defendants' counsel argued that the abbreviated title just quoted referred to the Northern Pacific Railway Company. Defendants were unable to show that they or their authors in title had a record title at the time of the sale to *H* in 1901 but they did show a record title dating from 1927 based upon the foreclosure sale in that year under a mortgage from a certain sugar company which in terms covered the land in question. The defendants claimed to have possessed the property since the foreclosure sale in 1927 and, accordingly, relied on the prescription of ten years as well as thirty years prescription acquirendi causa. Defendants contended that the assessment to *A* and subsequent adjudication to the state were invalid because he did not own the property. The supreme court in affirming the judgment for the plaintiffs concluded, first, that *H* was the record owner in 1902. The contention that the New Orleans Pacific Railway Company had not been the owner of the land was not taken very seriously; certainly, it should have been easy to resolve the ambiguity as to the identity of the patentee in favor of the New Orleans Pacific instead of the faraway Northern Pacific. As a matter of fact the "Northern Pacific Railway Company" was not organized until 1893; it was the successor to the "Northern Pacific Railroad Company."[47] The court further held that the constitutional provision as to prescription cured the irregularity involved in assessing the property to *A*. This meant that until redemption by *A* in 1938 the state was the owner of the land, and that spoiled the defendants' pleas of prescription because, as was pointed out by the court, prescription does not run against the state.

In 1923 certain land in Bossier Parish was sold for 1922 taxes to *Y* under an assessment in the name of the heirs of *X*. *Y* took possession at once. In 1924 *Y* obtained a monition judgment to

46. Ward v. South Coast Corp., 198 La. 433, 3 So. (2d) 689 (1941).

47. This appears from the official report of the case of Northern Securities Co. v. United States, 193 U.S. 197, 203, 24 S. Ct. 436, 48 L.Ed. 679 (1904).

cure informalities in the sale. In 1925 he conveyed to *M*. *M* was a co-owner with *X* of the land at the time of the tax sale. The conveyance to him recited a consideration of $1,000. In 1927 the widow and heirs of *M* were put in possession under a district court judgment closing *M*'s succession. A little later they executed a mortgage on the property, which was recorded. Later when *S*, an interested party, paid certain amounts in default under the mortgage she was subrogated to the mortgagee's rights as to the payments. In 1935 she foreclosed and *J* bought in the property. *J* brought an action of slander of title against the heirs of *X* which was converted into a petitory action.[48] It appeared that years after the tax sale the land became valuable for oil and gas purposes. The heirs of *X* contended that the tax sale to *Y* was invalid because it was made under an illegal assessment and because no notice of tax delinquency was given. This view was rejected by the court. It said that the prescriptive period provided by the constitution does not run against the tax debtor so long as he remains in physical possession but that the purchaser had immediately taken such possession in this instance and the alleged defects were cured by prescription. The dictum as to the prescription not running while the tax debtor is in actual possession finds no literal support in the language of the constitution; the governing provision simply ordains that no tax sale shall be annulled (with one exception not pertinent here) unless suit is instituted within a limited time. It is not clear what possession has to do with the matter.

The heirs of *X* contended that there was in fact no consideration for the transfer from *Y* to *M* and that his acquisition enured to their benefit as co-owners. A plea of estoppel against the heirs of *X* was sustained by the trial court and upheld on appeal in view of the long period that had elapsed, the fact that the interest of third parties had intervened and the increase in the value of the property. The court recognized that a tax debtor may, on equitable grounds, redeem from a co-owner who has purchased at a tax sale even if the period of redemption provided by law has expired, but confined the application of this equitable principle to a reasonable time after the redemption period. This conception is of particular interest to one trained in the English equity tradition because it is so closely analogous to a constructive trust, which is a remedial device used by courts of equity in

48. Skannal v. Hespeth, 196 La. 87, 198 So. 661 (1940).

cases, among others, involving exploitation of fiduciary or confidential relationships.[49]

Westwego Canal & Terminal Company v. Pitre[50] was before the court during the 1939-1940 term.[51] The suit was one primarily for the annulment of a tax sale which on appeal the defendant conceded to be void for want of notice of tax delinquency to the tax debtor. The case was sent back to the trial court in order that the judgment annulling the tax sale might, as required by the constitution, be conditioned upon reimbursement to the defendant of the price and all taxes paid by her after the tax sale together with interest at the rate of ten per centum per annum upon the respective payments from the date of each. When the case got back to the trial court plaintiff sought to amend its petition by including an allegation that the sale was null and void *ab initio* because made in violation of the statute. The trial judge ordered the supplemental petition stricken from the record and gave judgment as directed. The supreme court, in effect, affirmed the judgment and pointed out afresh that the only exception to the constitutional requirement of reimbursement to the tax purchaser is a sale annuled on account of the taxes having been paid prior to the date of sale.

In two other cases, decided at the last term, which involved annulments of tax sales, the court adjudged that the plaintiffs pay the tax purchasers the amount of the taxes for which the property was sold (which was the purchase price), plus the amount of the taxes paid by the tax purchasers in each of the intervening tax years, together with interest at ten per centum per annum upon the amount paid for each tax year from the date of such payment.[52] The requirement of reimbursement of the amount of taxes paid during the intervening years between a tax sale and annulment appears to accord with the governing constitutional provision. The constitutional language as to redemption from a tax sale, however, definitely does not contemplate the payment of the taxes for intervening years because it expressly grants the tax debtor the privilege of redemption upon "paying the price given, including costs and five per cent penalty thereon,

49. See, for example, Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928).

50. 197 La. 374, 1 So. (2d) 550 (1941).

51. Westwego Canal & Terminal Co. v. Pitre, 195 La. 107, 196 So. 36 (1940), discussed in The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 334.

52. Gottlieb v. Babin, 197 La. 802, 2 So. (2d) 218 (1941); Le Blanc v. Babin, 197 La. 825, 2 So. (2d) 225 (1941).

with interest at the rate of one per cent per month until redeemed."

Income Tax

The 1934 income tax law contained a familiar general provision permitting deductions for losses by individuals incurred in transactions for profit even though unconnected with trade or business. Deductions for losses from sales or exchanges of "capital assets," however, were limited to the amount of the gains from such sales or exchanges. But "capital assets" were not defined. The 1936 act speaks to the point; it defines the term to include all property of the taxpayer, whether or not connected with his trade or business, except stock in trade. *T* deducted from gross income in her return for 1934 a large amount representing losses she had sustained in the sale of certain bonds which she did not hold or sell in connection with any trade or business. The Board of Tax Appeals ruled that this was a loss from a sale of capital assets and thus deductible only to the extent of the gain from such sales. The district court annulled the decision of the board and ruled for the taxpayer on the theory that "capital assets" must be given their ordinary meaning, namely, fixed or permanent assets connected with trade or business. In affirming, the supreme court agreed with the district judge that the term had not acquired a technical meaning for income tax purposes to be ascribed to its use in the 1934 law.[53] It was unfortunate that the provision of the 1934 act as to capital losses did not define the term "capital assets." It is obvious, on the other hand, that the act did provide for the taxation of capital gains in the sense of gains from the sale of property, whether connected with trade or business or not. This is suggestive that it was the legislative intent that the subject matter of capital losses be as broad as that of capital gains. It is not evident what point there would be in limiting deductions in the case of business assets but not in that of simple investments.

By way of compromise of the state's claim for back taxes for the years 1932, 1933 and 1934, aggregating $129,265.89, the *X* Company paid on October 1, 1935, the sum of $26,468.94 which was accepted in full payment of the back taxes. In its income tax return for its fiscal year ending February 28, 1936, the company, which kept its books on an accrual basis, took a deduction for the amount of this payment. This was disallowed and a deficiency

53. Rathborne v. Collector of Revenue, 196 La. 795, 200 So. 149 (1941).

assessment made. The disallowance of the deduction was sustained by the supreme court on the theory that the amount paid was deductible as taxes if deductible at all and that on the accrual basis taxes are to be deducted from gross income for the tax year in which they accrued.[54] The court rejected the idea that the deduction could be justified under the heading of ordinary and necessary business expenses; taxes are not debts in the ordinary sense of the term and the compromise, moreover, presupposed a liability for the taxes. It would not do, the court reasoned, to insist, as did the company, that there was no legal liability because were that true there could be no legal deduction for the payment. The settlement was not open to collateral attack in any event.

License Taxes

Is a colporteur who goes about selling religious tracts a peddler? The supreme court has answered the question in the negative for purposes of the Louisiana peddlers' license tax.[55] The statute defines a peddler as one, other than a manufacturer who sells to dealers for resale, who goes from place to place selling the merchandise he carries and delivering it at the time of sale or soon after or without returning to the base of operations between the taking and actual filling of orders. The court reasoned that the act was designed to protect merchants who have a fixed place of business and are subject to property and occupational license taxes, but Jehovah's Witnesses were not competing with such merchants and thus the sale of their literature was not within the purview of the statute. This conclusion rendered unnecessary consideration of attacks upon the constitutionality of the taxes as applied to the relator. The result should appeal to the tolerant, but looked at legalistically it presents an interesting bit of statutory interpretation—if religious tracts offered for sale are merchandise, as one might well suppose, a colporteur is literally within the statutory definition of peddler[56] and resort to guesswork as to what provoked the legislation of doubtful warrant.[57]

54. A. Wilbert's Sons Lumber & Shingle Co., Inc. v. Collector of Revenue of Louisiana, 196 La. 591, 199 So. 652 (1941).

55. State ex rel. Semansky v. Stark, 196 La. 307, 199 So. 129 (1940).

56. A similar statutory definition of peddler was held to apply to a colporteur in Commonwealth of Massachusetts v. Anderson, 272 Mass. 100, 172 N.E. 114, 69 A.L.R. 1097 (1930). His books and tracts were regarded as merchandise for purposes of the statute.

57. Relator contended that if the act applied his freedom of religion, of speech and of the press were being abridged. But would this be so since the tax was not aimed at religious or other publications, and was not dis-

The constitution authorizes license taxes upon persons and corporations pursuing "any trade, business, occupation, vocation or profession . . . except . . . those engaged in mechanical, agricultural or horticultural pursuits or in operating saw mills."[58] So far as this sort of taxation is concerned the individual "mechanic" would appear to be able to build up a considerable business and remain free of the tax so long as he continued to work at his trade, instead of confining himself to management and supervision,[59] and did not incorporate.[60] *X* was engaged in repairing, refinishing and upholstering old furniture. He had a gross of over $16,000 in 1936 and again in 1937, and in each of those years paid his six employees around $5,500. One employee served as telephone girl at his shop and also made out the bills. Another was a bookkeeper who worked one day a week. Three others worked with him on the furniture and the sixth was a truck driver who worked in the shop when not picking up or delivering furniture. *X* valued his machinery at $1,000. He worked regularly in the shop except for an occasional excursion to make estimates. The supreme court concluded that *X* was engaged in a mechanical pursuit and thus dismissed a proceeding brought by the state to collect a license tax from him.[61] From the court's review of the earlier cases one would suppose that despite an owner's manual pursuit of his trade the exemption would vanish at some vague point to be fixed by the court when the case arose by reference to the size of the business, in terms of the capital and staff employed and the volume of business done.

Excises

The Louisiana court does not subscribe to the famous Marshall dictum that the power to tax is the power to destroy.[62] By Act 137 of 1934 the legislature imposed a license tax upon the privilege of collecting any valuable consideration for rights, royalties or rents on copyrighted music books, recorded music

criminatory? Certainly an ordinary book dealer may be subjected to an occupational license tax. The objection was overruled in Commonwealth of Massachusetts v. Anderson, 272 Mass. 100, 172 N.E. 114, 69 A.L.R. 1097 (1930). See also Commonwealth v. Pascone, 308 Mass. 591, 33 N.E. (2d) 522 (1941), distinguishing recent important United States Supreme Court decisions.

58. La. Const. of 1921, Art. X, § 8.

59. The earlier cases discussed in the opinion in State v. Regenbogen, 197 La. 769, 2 So. (2d) 207 (1941), make it clear enough that if his function is managing he is not within the exempt class.

60. State v. Up-To-Date Shoe Repairing Co., Inc., 175 La. 917, 144 So. 714 (1932).

61. State v. Regenbogen, 197 La. 769, 2 So. (2d) 207 (1941).

62. M'Culloch v. Maryland, 17 U.S. 316, 431, 4 L.Ed. 579, 607 (1819).

for mechanical reproduction or radio programs. The tax was $5,000 for each parish in which such collections were made or attempted, payable to the parish. *T* was indicted for violating the statute. The average amount he collected per parish in 1939 was about $1,000. The court did not find it necessary to cite any case authorities to support its conclusion that the tax was a denial of due process of law under the Fourteenth Amendment because it was, in effect, a prohibitory measure which deprived persons of the right to carry on inoffensive businesses.[63] That was enough to dispose of the matter. The tax was doubtless vulnerable on other counts—possibly as a discriminatory burden upon copyrights[64] and much more clearly as a similar burden upon the interstate commerce involved in the broadcasting of radio programs.[65]

One of the best known and most discussed cases of the last term was that of *Mouledoux v. Maestri*[66] in which the New Orleans sales tax was upheld. Certain taxpayers had sought to enjoin the collection of the tax on the ground that its imposition was *ultra vires* and unconstitutional. By its charter the city is authorized to impose any and all kinds and classes of taxes that are necessary for the proper operation and maintenance of the municipality and are not expressly prohibited by the constitution. Reference to that plenary grant of power was the answer to the charge of *ultra vires,* unless Act 82 of 1940, which repealed the state sales tax, had the additional effect of repealing the charter grant insofar as it covered sales taxes. That act expressly repealed the state's sale tax law and also "all laws or parts of laws as may conflict herewith, including all ordinances of any municipalities" passed pursuant to the state sale tax law. The latter act expressly authorized city sales taxes at rates not to exceed one per centum in cities of over 400,000. It could be said that this act simply granted cumulative authority and on that

63. State v. Lucas, 196 La. 299, 199 So. 126 (1940).
As to offensive businesses, on the other hand, see Sonzinsky v. United States, 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (1937), citing earlier cases; and United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (1939).

64. The gross receipts tax upheld in Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S. Ct. 546, 76 L.Ed. 1010 (1932), was not discriminatory with respect to copyrights.

65. Presentation of programs necessarily involves interstate commerce. Would not a prohibitory tax on the furnishing of material for a broadcast unduly obstruct that commerce? See Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U.S. 650, 56 S. Ct. 608, 80 L.Ed. 956 (1936).

66. 197 La. 525, 2 So. (2d) 11 (1941).

basis would be so far consistent with the city charter provision that its repeal would not affect the charter. The only hitch was the one per centum maximum; the charter did not, of course, fix any maximum. But the court was satisfied that the general statute was cumulative despite this inconsistency.

The objection that the plenary grant involved an unconstitutional surrender or abandonment of taxing power was obviously not serious; delegation of taxing powers to local units of government is no abdication of the power but instead is the granting of it to an agency of government for purposes within the total governmental objectives of the state. It was argued that the tax was a license tax and that since the state no longer imposed such a levy the city could not do so because the constitution forbids municipal license taxes in excess of those imposed by the state. The court, however, interpreted this constitutional provision to refer simply to occupational license taxes. This position drew strength from the character of the levy as a consumer's tax collected by the dealer for the taxing authority. Such a levy is, moreover, in its practical characteristics a consumption tax and thus to be regarded as an excise.

The ordinance established a bracket system under which there was no tax on sales of from one cent to twelve cents, a tax of one cent on sales from thirteen cents to sixty-two cents, and so on. The charge that this violated the uniformity clause of Section 1 of Article X of the Constitution was rejected. The court might have confined itself to the point that that section applies only to property taxes but it went on to point out that the brackets applied alike to everyone and that there was no distinction or classification made in terms of who happened to be the purchaser. The economic fact that a sales tax is regressive, especially where a bracket system is employed, is hardly a constitutional infirmity.

C. Municipal and Other Public Corporations

Police Power

The local option law authorizes the police jury of a local option parish to provide for prohibition of the liquor business by ordinance and penalties for violation in order to make local option in the parish effective. The Police Jury of Jackson Parish, in which local option had been voted, adopted an ordinance making it unlawful to sell or keep for sale defined alcoholic beverages or

intoxicating liquors. In a prosecution under the ordinance charging the unlawful keeping of intoxicating liquor for sale the defendants moved to quash the bill of information on the principal ground that prohibition against keeping for sale was not authorized by the statute.[67] After conviction and before sentence defendant moved in arrest of judgment on the ground that the ordinance did not and could not legally prohibit the possession of intoxicants. The overruling of the motion was sustained on appeal. The supreme court was quick to point out that the prohibition did not relate to the simple possession of intoxicants but to the keeping of liquor for sale. As for the statutory authority for the ordinance it was deemed enough that the police jury was given the power to make prohibition effective; the ban on keeping liquor for sale was simply a device for controlling sale. The difficulty with the court's reliance upon the provision as to making prohibition effective is that the statute does not in terms authorize any action that might be appropriate to render the prohibition effective but simply authorizes provision "for such prohibition by ordinance," supported by penal sanctions. Be that as it may, however, the keeping of liquor for sale is so intimately related to the sale itself that the power to prohibit the former is almost a necessary incident of the power to prohibit the latter.

Section 22A of Article XIV of the Constitution authorizes the Commission Council of the City of New Orleans to create a Vieux Carré Commission for the purpose of preserving buildings of architectural and historical value located in the old French Quarter. Among other things, the section requires an owner to submit to the commission plans for alterations or additions to any existing building "any portion of which is to front on any public street in the Vieux Carré section." The ordinance creating the commission required the submission to it of full plans of proposed alterations to any building, fronting on any public street in the area, relating to the appearance, color, texture of material and architectural design of the "exterior, including the front, sides, rear and roof." Without complying with the ordinance, a property owner whose building fronted upon a street in the French Quarter proceeded to enlarge and reconstruct a small lavatory attached to the rear of his building.[68] From a conviction of violating the ordinance the property owner appealed to the supreme court. He alleged that the ordinance was unconstitutional because the pertinent consti-

67. State v. Emerson, 197 La. 783, 2 So. (2d) 212 (1941).
68. City of New Orleans v. Impastato, 198 La. 206, 3 So. (2d) 559 (1941).

tutional provision gave the commission jurisdiction only in respect to the erection and alteration of the front portion of the exterior of a building. The attack was rejected. The word "exterior" as used in the constitutional provision was interpreted to mean all of the outer surfaces of a building and not simply its front portion. The ordinance, moreover, was adequately supported by certain broad language of the constitutional provision empowering the commission council, in order to achieve the constitutional purpose, to confer upon the commission such powers and duties as it should deem fit and necessary.

The judicial animus against repeal by implication has been particularly strong in situations where a later general law was put forward as repealing by implication a special act.[69] It is certainly a sound proposition, however, that if the later general law is a comprehensive one designed to occupy the whole field an inconsistent prior special law must give way. The supreme court has decided that Act 240 of 1926, the general municipal zoning law, is a measure of this character.[70] Thus, the provisions of that act, requiring a public hearing on a proposed zoning ordinance, prevailed over a pre-existing Baton Rouge charter provision which exacted no such requirement. An ordinance of the city which was not subjected to such a hearing was regarded as so far invalid as to offer no legal barrier to the construction of a commercial building in an exclusive residence area sought to be established by the ordinance. Mandamus was awarded a property owner to compel the issuance of a building permit for the construction of a commercial building in the affected area. It is a matter of some interest that in a later case during the term, involving the general receivership act, it might likewise have been concluded that the statute before the court was one designed to occupy the whole field, but the point was not mentioned.[71]

Municipal Finance

Section 33 of Article XIV of the Constitution authorizes the police jury of a parish to issue parish bonds to provide funds for the "erection and maintenance of industrial plants for the conversion or processing of raw farm or agricultural products . . . when authorized by a majority vote of the property taxpayers . . .

69. Crawford, The Construction of Statutes (1940) §314; Sutherland, Statutes and Statutory Construction (2 ed. 1904) § 274 et seq.

70. State ex rel. Chachere v. Booth, 196 La. 598, 199 So. 654 (1941).

71. Foster v. F. H. Koretke Brass & Mfg. Co., 198 La. 402, 3 So. (2d) 668 (1941), discussed in Note (1942) 4 LOUISIANA LAW REVIEW 332.

who are qualified to vote under the Constitution and laws of this State." By its own terms the amendment is "self-operative." A bond election was held in Tangipahoa Parish under this provision on a proposition substantially paraphrasing the constitutional language as to purpose except that it referred to but a single plant. A taxpayer sought an injunction against the issuance of the bonds on several grounds.[72] There was no affirmative showing in or supporting the election proceedings that a majority of the qualified electors, as distinguished from those actually voting, voted favorably at the election. That a majority of the qualified electors was required was evident, so the court rested upon that ground alone in reversing a judgment for defendant and remanding the case for further hearing on the point without prejudice to the plaintiff's other objections. A rehearing was granted on the strength of a certificate of the register of voters, attached to the application of the defendant, concerning the number of qualified voters from which it was clear that a majority had voted "yes."[73] This opened for consideration plaintiff's other objections, one of which, that the election proposition did not indicate the nature of the proposed plant, was regarded as fatal without more. No authority was cited to support this conclusion; it was rested simply upon the theory that the determination of the nature of the plant was for the electors, whereas the generality of the statement of purpose here amounted to a delegation of that authority to the police jury. The constitutional provision required that the bond election be conducted as nearly as possible in accordance with the provision of the general municipal bond law.[74] That law does not require particularity of statement as to purpose; it simply prescribes a form of ballot on which a space is left for insertion of a statement of purpose. The court has held that "the paving and improving" of sidewalks, a paraphrasing of the pertinent language of the municipal bond enabling provision of the constitution,[75] was a sufficient statement of purpose.[76] The statement under scrutiny is scarcely less definite and it is not clear on what

72. Schultz v. Police Jury, Tangipahoa Parish, 196 La. 359, 199 So. 215 (1940).

73. This limited reception of evidence by an appellate court is noteworthy. Since there was little risk of prejudice to the other party it was a sensible ruling much to be applauded.

74. La. Act 46 of 1921 (E.S.) [Dart's Stats. (1939) § 8854 et seq.]. The form of ballot is prescribed by Section 16, as amended by La. Act 6 of 1940 (E.S.)§ 3 [Dart's Stats. (Supp. 1941) §8869].

75. La. Const. of 1921, Art. XIV, §14 (b).

76. Judice v. Village of Scott, 168 La. 111, 121 So. 592 (1929).

basis any more exacting requirement can be said to govern the situation.

By ordinance, adopted March 8, 1932, the Mayor of Kentwood was authorized to borrow $3,500 from the Bank of Kentwood and all of the general fund revenues of the town were pledged to the payment of the loan. The mayor did borrow the money at a time which does not appear and executed and delivered to the bank the town's eight per cent note, dated June 16, 1933, and bearing an endorsement that it was secured by 1933 revenues. Attached, however, was a copy of the March 8, 1932, ordinance. The bank failed. Later the amount of a liquidating dividend was credited pro rata to the town's general account and to its sinking fund account with the bank. In an action on the note the bank's liquidator had judgment less a credit for the full amount of the dividend.[77] In reconvention the town had prayed judgment for the amount of the dividend. The supreme court was not impressed with the grounds of defense, namely, that the mayor was not authorized by the ordinance to execute the note in a later fiscal year or to pledge the revenues of a later year and that no means were provided for payment as required by statute.[78] It thought that the fact that 1932 revenues did not come in until 1933 explained the discrepancy between the ordinance and the note. This, however, overlooks the vital fact that the references were to tax, not calendar, years. It is not clear, in any event, that there is statutory authority for borrowing in a subsequent fiscal year in anticipation of the collection of revenues of a previous one.[79] Recovery should be had in any event, the court concluded, under Article 1965 of the Civil Code to prevent unjust enrichment. The important countervailing consideration, that to permit recovery despite legal irregularities is to encourage such practices, was not mentioned. In the original opinion it was said that the bond-

77. Brock, State Bank Com'r v. Town of Kentwood, 196 La. 318, 199 So. 133 (1940).

78. La. Rev. Stats. of 1870, §2448 [Dart's Stats. (1939) §6662].

79. La. Act 136 of 1898, §20, as amended [Dart's Stats. (1939) §5422] provides in paragraph Seventeenth: "To meet current expenses the mayor and council may borrow money, but in so doing the debt so incurred, added to the current debt of the year, shall not exceed the sum which the levy of the taxes for the year may raise."

Under La. Act 79 of 1916, as amended by La. Act 84 of 1921 (E.S.) [Dart's Stats. (1939) §§ 5742-5745] it is clear that the tax anticipation borrowing authorized by the statute must be done during the year the revenues of which are being anticipated and that certificates of indebtedness issued in evidence of such borrowing must mature not later than March 1st of the following year.

holders interested in the sinking fund were not before the court and their interests could not be asserted by the town. It is not evident why the town was not the legal owner of the claim against the bank, whatever the beneficial interest of the bondholders.[80] A rehearing on this phase of the case was denied because, for all that appeared, the bonds might have been retired and the claim thereby become the undedicated property of the town.

Stated rather elliptically, *Hinkle v. City of West Monroe*[81] was a case in which the city was held generally liable to the assignee of a paving contractor for the balance due on the contract, for attorney's fees and for an amount which the plaintiff had advanced to meet the cost of several actions to enforce special assessments against the owners of abutting property, which were unsuccessful because the assessments had not been laid in accordance with statute. Under the enabling statute and the contract, the work, other than the paving of intersections, was to be paid for solely from special assessments. The assessments had, in proper sequence, been laid after the paving had been completed and accepted.

In the numerous cases of this character in which general liability has been imposed on a municipality (1) for its failure to impose valid assessments and thereby lay the legal basis for the fund from which the contractor is to look for payment or (2) for its improper diversion of the fund, recovery has been rationalized by some courts on a tort theory and by others in terms of implied contract.[82] Here the court employed the latter theory. The award

80. Doubtless a Louisiana court would not be free to declare that the municipality occupied the position of a trustee but surely it would recognize municipal control with respect to place of deposit and application of the fund to bond principal and interest.

81. 196 La. 1078, 200 So. 468 (1941).

82. See Bessemer Investment Co. v. City of Chester, 113 F. (2d) 571 (C.C.A. 3rd, 1940), and Note (1931) 44 Harv. L. Rev. 610. Sometimes a trust theory has been used where the municipality improperly diverted funds collected. See, for example, Blackford v. City of Libby, 103 Mont. 272, 62 P. (2d) 216, 107 A.L.R. 1348 (1936).

Nothing was said in the *Hinkle* case about the possibility of reassessment. If that had been in order the city could have contended that the plaintiff should first have sought specifically to compel a reassessment by mandamus. Such a view has been embraced by some courts. Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, 51 A.L.R. 966 (1926). The criticism of this position in Note (1931) 44 Harv. L. Rev. 610, that it involves compelling resort to extraordinary remedies ahead of ordinary ones is hardly valid. The situation is one where the design is to put the burden on the property owners specially benefitted, not the general taxpayers, and a suit to impose the burden on the latter is, in fact, a seeking of extraordinary relief, whereas resort to remedies to effect payment from the special source as contem-

of damages for the breach is of particular interest in this case; it included the full amount of the legally unenforceable assessments, ten per centum attorney's fees in the case and the amount advanced to cover the cost of abortive actions to enforce assessments. The theory as to attorney's fees was that the contractor could have recovered them in enforcing valid assessment liens, and the theory as to the last item was that the outlay was made necessary by the city's failure to lay valid assessments.

Another interesting aspect of the *Hinkle* case was the court's ruling that the city's acceptance of the benefits of the contract estopped it to attack the constitutionality of the enabling statute. Article 1965 of the Civil Code was cited. There is a technical answer to the unjust enrichment notion, namely, that the property owners, not the city, were enriched, but it is only partly valid in substance because the improvement involved community benefits.[83] There was, moreover, the additional point that the city had no standing to raise the constitutional questions because it was not prejudiced by them.

So far as appears from the opinion in *Pugh v. Police Jury of Livingston Parish,*[84] the only attack made upon a parish bond issue, voted in 1936, for courthouse and other purposes, was a general charge that the act authorizing a change in the parish seat was unconstitutional and that all proceedings relating to the

plated is essentially the pursuit of normal redress. It is well not to forget that the effect of holding the municipality generally liable is to subject the parties specially benefitted who had voluntarily paid their assessments to an added, unfair burden.

83. In Bessemer Investment Co. v. City of Chester, 113 F. (2d) 571, at 574 (C.C.A. 3rd, 1940), Judge Clark noted three criticisms of the view that the responsibility should not be thrown upon the general taxpayer, as follows:

"In the first place, it leaves out of account the fact the improvement bond defaults are often the result of administrative bungling in the levy and collection of assessments. Analogy to the doctrine of respondeat superior requires that the general taxpayers answer for the negligence of their elected representatives. Second, the interest of general taxpayers in maintaining municipal credit is underestimated. The average investor is not apt to make fine distinctions between a city's reputation for meeting improvement bonds, and its reputation for meeting general obligations. Yet, even if such a distinction is made, the general taxpayer does not escape potential harm. As a possible future special assessee, he may have to pay the price of past improvement bond defaults in the correspondingly increased cost of improvements so financed. See Bickner, Washington's Default Bonds Not To Be Redeemed, 16 National Municipal Review 493. Third, too close a correspondence is assumed to exist between the fact of the improvement being made and the fact of a benefit to the special assessees. Emphasis on that benefit postulates a lack of unjust enrichment to the general taxpayers. But the benefit, especially of paving, is in reality often neither restricted to the special assessees nor in any way commensurate with the amount of their assessments."

84. 196 La. 1025, 200 So. 450 (1941).

change and the issuance of bonds to finance improvements at the new parish seat were thereby rendered nugatory. The action was a taxpayer's suit to nullify the proceedings relating to the removal of the parish seat and the bond issue and to restrain the police jury from accepting bids for bonds. The police jury filed exceptions of no cause and no right of action and pleas of prescription. With respect to the bond issue, the court in sustaining the pleas simply relied upon the constitutional short statute of limitations which is, of course, given very sweeping effect. If the only basis for attack upon the bond issue was the general charge that the statute relating to the removal of the parish seat was unconstitutional, the exception of no cause of action would have been sufficient without the plea of prescription. And the court very properly held with respect to the proceedings for the removal of the parish seat that a mere general charge of unconstitutionality did not suffice to present a constitutional question. Since a judicial inquiry into constitutionality should not and will not be made on any shotgun basis, he who attacks constitutionality must be specific; in addition to citing "chapter and verse," he should allege wherein the provision invoked has been violated. The statute in question authorized the removal of the parish seat from Springfield to some central point on a named railway, and provided that after a favorable vote on the question of removal an election should be held on the location of the new parish seat. The statute was silent as to how the police jury should submit the proposition concerning the location of the new parish seat to the voters. The police jury determined that the towns of Doyle and Livingston were suitable locations and that they were centrally located on the railway specified by the statute. The plaintiffs contended that this improperly restricted the choice of the voters. The court took judicial notice of official maps which disclosed that the two towns were within the specified zone and concluded that there was nothing in the act to prevent the police jury from suggesting them as being acceptable.

Miscellaneous

At the request of the City of Bogalusa the United States undertook to provide a six-foot channel in the Pearl River from its mouth to a point between Bogalusa and Poplarville, Mississippi. To meet the conditions exacted by the government the Commission Council of the city adopted a resolution guaranteeing to save the United States harmless from all claims for damages that might

result from the construction and maintenance of the project, including claims arising from the isolation of property. At the request of the city the government instituted expropriation proceedings to acquire certain needed lands. A property owner whose access was alleged to have been destroyed by the project but who was not a defendant in any of the expropriation cases, although one of them affected her land, sued the city on the theory that, in condemning, the government was acting for the city and that by its resolution the city had assumed responsibility for damages of the sort claimed.[85] The supreme court affirmed a judgment dismissing the suit on an exception of no cause of action. Since the government was acting in its own right under the commerce clause the agency theory was clearly unacceptable. As for the effect of the resolution the court concluded that the city had assumed only a secondary liability as a guarantor. While the point was not presented one wonders what authority the city had to act as guarantor. It is true that the constitution[86] authorizes a municipality to donate land to the United States for the improvemen and maintenance of navigation of natural waterways but contracting as a guarantor is another matter; the power will certainly not be implied from the general and ordinary powers of a municipality.[87]

D. Public Officers

A and *B*, holding office as parish school board members, also served, respectively, as a clerk in the office of the clerk of the district court and clerk of a city. *C* and *D*, both police jurors, held at the same time the positions of city tax collector and member of a parish waterworks board of commissioners, respectively. *E*, a district court clerk, served at the same time as mayor of a town. All were charged with violating Act 259 of 1940, the dual office-holding statute.[88] The pertinent language of the act is reproduced below.[89] The trial court dismissed the informations on the grounds

85. Cooper v. City of Bogalusa, 195 La. 1097, 198 So. 510 (1940).

86. La. Const. of 1921, Art. IV, §12.

87. See The Louisiana State Bank v. The Orleans Navigation Company, 3 La. Ann. 294 (1848). Dillon, Municipal Corporation (5 ed. 1911) § 814.

88. State v. Coulon, 197 La. 1058, 3 So. (2d) 241 (1941).

89. La. Act 259 of 1940. Section 1 reads, in part: "and no person holding or exercising any office, position or employment of profit in one of the three departments of government of the State of Louisiana shall hold or exercise another office or position or employment of profit in that department or in any other department of the State of Louisiana or in any parish, municipality or Board, Commission or subdivision of the State."

(1) that they did not charge a violation of law and (2) that Act 259 of 1940 was unconstitutional. Since the first ground was deemed well-taken the supreme court quite correctly held that there was no occasion to pass on the constitutionality of the act and accordingly set aside the judgment in that respect. Affirmance on the first ground was rested on the view that the statute applied only to persons who held (1) a position of profit in a state department and (2) either another such state post or a local position of profit. All the positions held by the defendants were considered to be attached to local subdivisions or local boards or commissions created by the legislature. The opinion fails to explain why a district court clerk and his assistants do not, as such, hold employment of profit in the judicial department of the state, although, admittedly, their functions are to some extent localized. While that circumstance is far from controlling it may be noted that the office of district court clerk is created by the article of the constitution which relates to the "judiciary department."[90]

In two tenure cases the contract clause of the Federal Constitution was unsuccessfully invoked. Section 33 of Article III of the Constitution provides for six year terms for district court judges. Section 31 of that article was so amended in 1940 as to oust the incumbent judge of the twenty-seventh district before the end of his term. His challenge of the ouster was rested in part on the contract clause and an asserted denial of due process of law. But election or appointment to a public office does not involve a contractual relationship in the sense of the contract clause[91] and the idea that one may have a vested interest in a public office is altogether unacceptable. The court readily rejected both points.

A civil service employee of the Board of Commissioners of the Port of New Orleans was summarily dismissed in 1940. He had been such an employee since 1918. The civil service law governing his employment was repealed in 1935. He sought mandamus to compel the board to reinstate him and to pay him his salary from date of discharge.[92] The 1915 act established a merit system with competitive examinations and provided that

90. La. Const. of 1921, Art. VII, §66 et seq. Limited judicial power may be conferred upon clerks of district courts. La. Const. of 1921, Art. VII, §§ 37 and 66.

91. Higginbotham v. City of Baton Rouge, 190 La. 821, 183 So. 168 (1938), aff'd 306 U.S. 535, 59 S. Ct. 705, 83 L.Ed. 968 (1939).

92. State ex rel. Munsch v. Board of Com'rs of Port of New Orleans, 198 La. 283, 3 So. (2d) 622 (1941).

those who passed their examination and were employed should hold their positions during good behavior and would be removable only for cause. It did not call for any sort of formal contract of employment. It was the relator's theory that he had a contract of employment, the obligation of which was unconstitutionally impaired by the repealing act. But the court did not agree; the adoption and application of the merit system was a matter of governmental policy, not of contract or inducement to contract; there was no contract of employment in the sense of an agreement involving reciprocal obligations. Whether a teacher employed under the teacher's tenure law is in a stronger position is another matter. The pertinent Federal Supreme Court decisions were cited by the court in this case.

While he was regularly employed at a substantial salary by the State Department of Revenue *X* represented the Collector of Revenue in a suit in which judgment was obtained against an oil company for a large sum for delinquent gasoline taxes, including ten per centum attorney's fees. The tax statute provided for penalties and ten per centum attorney's fees on both taxes and penalties "in all cases wherein an attorney is called on to assist in the collection." With a change of administration he was relieved of his post; and fearing that the entire amount of the judgment representing attorney's fees would be paid to the Director of Revenue (formerly and now again Collector of Revenue) and by him into the State Treasury and thus placed beyond the attorney's reach, the latter sued to enjoin the oil company from paying the sum to the Director.[93] The Director of Revenue was joined as a defendant. The statute authorized the employment of private counsel to represent the responsible state official in any proceeding under the act which he might deem advisable. Since the complaining attorney would have been defeated for all practical purposes once the money got into the State Treasury the court regarded the resort to injunction as proper and in fact the only recourse of any value.

The objection that the judgment in the tax suit was *res adjudicata* as to the state's right to collect and retain the amount for attorneys' fees was not acceptable to the court. It thought, citing earlier cases, that the effect of the statutory provision as

93. Daspit v. Sinclair Refining Co., 198 La. 9, 3 So. (2d) 259 (1941). One aspect of the case involving the possible interest in the fee of two other attorneys regularly employed by the state, who participated in the case, will not be discussed here.

to attorneys' fees was to give the attorneys the right to the fee even though embodied in the judgment and that it was too late to go into the question whether strictly private counsel should have been employed instead of attorneys regularly on the state pay roll.

The Director of Revenue also relied on Section 3 of Article IV of the Constitution, which forbids the legislature to grant or authorize any extra compensation to a public officer, agent or servant. But the court took the position that that prohibition applied only where the granting of extra compensation would be at the expense of the state whereas here the burden was imposed upon the oil company. Is it not conceivable that this provision was designed as much to establish a policy of protecting the public service against exploitation for private gain as to protect the fisc itself? The court decided that it was too late to object on general considerations of public policy, since the Collector of Revenue had passed that question when the regularly employed attorneys were assigned to the case. Surely, however, the action of a state administrative official does not bind the court in weighing pertinent circumstances bearing upon the question whether a discretionary[94] remedy like injunction shall be granted. It is not uncommon for courts of equity in our sister states to refuse injunctive relief for the protection of an interest which runs counter to public policy.[95]

In November, 1939, District Judge Cage of New Orleans, having reached the age of eighty, duly notified the governor that he was taking advantage of the retirement provision of the constitution. His term ran through the calendar year 1940. The governor, after pointing out that it was the constitutional duty of the judge to continue to serve until his successor was inducted into office, requested him to continue to perform the duties of the

94. The availability of injunctive relief in Louisiana is tempered, for example, by the equitable doctrine of balancing the interests of the parties. Gibson v. City of Baton Rouge, 161 La. 637, 109 So. 339 (1926); Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934); Adams v. Town of Ruston, 194 La. 403, 193 So. 688 (1940), discussed in The Work of the Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 280, 281.

95. See, for example, American University v. Wood, 294 Ill. 186, 128 N.E. 330 (1920) (injunctive relief denied a fraudulent chiropractic school against competitive use by discharged employee of its list of actual and prospective students; protection of the public, not the clean hands maxim, was the reason). The *Daspit* case, of course, was far removed from fraudulent practices; the purpose of the present reference is simply to illustrate the point that equitable remedies may be withheld in the public interest, apart from the state of the case as between the parties.

office for some months in view of the fact that a state-wide primary election was in the offing, which was a circumstance not conducive to the unbiased selection of a person to fill high judicial office. The constitution provides that in the case of a vacancy in the office of district judge where the term has less than a year to run a successor shall be appointed by the governor with the advice and consent of the Senate and that where the unexpired term is one year or more the governor shall call a special election at which a successor shall be chosen. Section 6 of Article XIX provides that all state officers, except in cases of impeachment or suspension, shall continue to discharge the duties of their offices until their successors shall have been inducted into office. Along in March, 1940, when Judge Cage's term had less than a year to run and when the Senate was not in session, the governor appointed another person to succeed him. Judge Cage refused him possession of the office and the latter brought suit under the intrusion into office statute.[96] It was argued that since the general holdover clause, unlike the retirement provision, appeared in the 1913 Constitution it was not contemplated that the holdover clause apply to vacancies created only by retirement. But the Constitution of 1921 was a complete organic instrument properly to be construed as a whole and since the holdover clause contained no exception as to vacancies created by retirement it definitely applied to them. Accordingly it was held that Judge Cage had the right to continue to discharge the duties of his office until a successor was inducted and that he had standing to challenge the authority by which any one claimed to be a successor.

In the disposition of the case on the merits the point as to the application of the holdover clause to the retirement provision was developed further. From 1928 to 1938 the latter provision had a special holdover clause and a clause governing the method of filling retirement vacancies. They were eliminated by amendment in 1938 and a provision added to the effect that such a vacancy should be filled "as now or may hereafter be, provided by law." Despite this provision, it was concluded that the effect was not to prevent the application of the general holdover clause to vacancies caused by retirement; the elimination of the special holdover clause was deemed a companion piece to the abrogation of the special clause governing the filling of retirement vacancies since three classes of judges were involved and the method pro-

96. State ex rel. Williams v. Cage, 196 La. 341, 199 So. 209 (1940).

vided elsewhere for filling vacancies was not the same in those three classes. The provision as to filling vacancies as "provided by law" was taken to have been used in its broad sense and thus to include constitutional as well as statutory regulation. Counsel raised a difficult question as to whether that general constitutional provision applied to judges in the Parish of Orleans but, unlike the situation with respect to certain other sections of the judicial article of the constitution, there was no express exclusion and long practical construction supported the application of the provision to Orleans Parish.

E. Elections

The candidates for the Democratic nomination for elective offices of the Town of Westwego sought mandamus to compel the governing body of the town to select election commissioners to serve at the polls in the primary on April 8, 1941, in accordance with law and particularly Act 46 of 1940.[97] It is not possible to indicate briefly the pertinent substance of that act and the earlier primary election law.[98] Suffice to say that the later act does not expressly apply to municipal primaries in this respect, that its repealing clause is confined to laws on the same subject and those in conflict with the act and that, as pointed out by counsel, in a number of respects the provisions of the act on the subject were either incomplete or unworkable as to municipal primaries. The supreme court concluded that the earlier act governed. A judgment sustaining exceptions of no cause or right of action and dismissing the proceeding was reversed and the case sent back for trial since, so far as appeared on the pleadings, the method actually followed in selecting election commissioners did not comply with the governing statute.

In order for a person whose name is not authorized to be printed on the official ballot as the nominee of a political party or as an independent candidate, to qualify as a candidate for any office he must file with the clerks of the district courts in the parish or parishes where the election is to be held, at least ten days before the general election, a statement containing his name as a candidate and his consent to be voted for.[99] At the general

97. State ex rel. Rosenstock v. Democratic Municipal Executive Committee of Town of Westwego, Parish of Jefferson, 197 La. 469, 1 So. (2d) 697 (1941).

98. La. Act 97 of 1922, as amended by La. Act 110 of 1934.

99. La. Const. of 1921, Art. VIII, §15.

election held April 16, 1940, the persons who polled a majority of the votes for one justice of the peace office and two offices of constable in St. Bernard Parish were "write-in" candidates. There was one candidate for each office whose name was printed on the ballots. Each of them contested the election on the principal ground that the "write-in" candidates did not file the required statement a full ten days before the election.[100] What they had done was to post the statements, addressed to the clerk of court, by registered mail on April 5, 1940. They were received at his office the next morning, a Friday, by his daughters, who were not deputies, while the clerk was away on a week-end fishing trip which took him from the office early on the fifth. He received the statements on the seventh and filed them a day later. In each case a judgment for contestant was reversed and the suit dismissed. The court assumed for purposes of the case that April 5 was the last day for filing without going into the question whether it was required that the ten clear days intervene. It then proceeded to rest the matter upon the circumstance that the write-in candidates had been denied a part of the legally available time for filing and, that being the case, the resort to registered mail within that period was deemed a filing with the clerk as of the time of mailing. If, as assumed, ten clear days were intended and both terminal days are to be excluded in the computation, the write-in candidates did not actually get their statements to the proper place for filing before the deadline. It has properly been said that the law will not require a futile thing but the extreme logic of that notion as applied to a case like the present would be to relieve the candidates even of the burden of mailing the statements before the deadline because it would avail nothing.

Roy v. Board of Supervisors of Elections of the Parish of Lafayette[101] was an action by certain officers of the City of Lafayette for an injunction against the holding of an election to recall them from office. They contended that, so far as the City of Lafayette was concerned, the recall of officers was governed by its charter and not the general law under which the election being attacked was called and that even if the general law were applicable the recall petitions were defective for want of suffi-

100. Nunez v. Plaisance, 196 La. 926, 200 So. 302 (1941); Campo v. Acosta, 196 La. 935, 200 So. 305 (1941); Perez v. Harstell, 196 La. 936, 200 So. 305 (1941).

101. 198 La. 489, 3 So. (2d) 747 (1941).

cient legal signatures of qualified electors. In response to a rule to show cause the defendants filed exceptions of no right or cause of action, exceptions to the jurisdiction of the court ratione materiae and an answer containing a general denial. The trial court sustained all the exceptions and dismissed the suit. Review was sought by certiorari and prohibition under the supervisory powers of the supreme court. That court set aside the judgment of the district court, overruled the exceptions, made the rule to show cause absolute and remanded the case for decision on the merits of the questions presented.

The court found no merit in the reliance of the plaintiff upon the city charter, which provided that in a recall election an officer sought to be recalled should run as a candidate, in view of the fact that the general law was enacted pursuant to a constitutional provision authorizing the legislature to pass recall enabling laws subject to the requirement that the sole issue tendered at any recall election should be whether the officer should be recalled.

On the other hand, the defense objection that an injunction will not issue to prevent the holding of an election was rejected in view of the provision in the general law to the effect "That nothing herein contained shall be construed to deny to any officer recalled, or whose recall is sought, under the provisions of this act, the right to contest any such recall, or any proceedings had in relation thereto, in any Court of competent jurisdiction, for fraud or other illegality." The negative terminology of this provision was not overlooked but stress was laid upon the nullifying effect of treating it as not making injunctive relief available. It is not clear why this would be true so long as the officer could have the legality of the election adjudicated after it had taken place. If the court's interpretation of the statute is correct, however, its next point, that it was immaterial that the officers had no property rights in their offices, is entirely sound.

In support of the attack upon the sufficiency of the signatures to the recall petitions it was alleged that there were numerous signatures made by mark in the case of persons unable to write which were not witnessed as required by the statute. The statute provided that with respect to such signatures the circulator of the petition should in each case affix the name of the person "provided he does so in the presence of two witnesses who should also sign their names as witnesses to said mark." The nub of the

objection was that the circulator in each of these instances acted as a witness whereas the act required that there be two persons other than the circulator serving as witnesses. The court accepted this objection as well-founded. The point seems fairly clear on the face of the statute.

F. EXPROPRIATION

In 1907 property of *X* was duly appropriated for use as a parish jail site. The president of the police jury had instituted the proceeding under a resolution authorizing him to purchase for not over $6,500 and to bring suit for expropriation in the event that the land could not be purchased. *X* had refused to sell. It was adjudged that "the title of" the land vest in the parish free from encumbrance upon payment of the amount of the award. *X* acknowledged receipt of that amount as "payment in full of purchase price" of the land. In 1928 the use of the land as a jail site was ended. The heirs of *X* sought to recover the land and the amount of its revenues since 1928.[102] A judgment dismissing the suit was affirmed; the character of the interest acquired in expropriation is (subject to the governing provision of statute) to be determined by the adjudication in the particular case and here the judgment unambiguously vested full title, not merely a servitude, in the parish.

Section 2 of Article I of the Constitution requires, generally, that private property shall not be expropriated save for public purposes and "after just and adequate compensation is paid." If the costs of an expropriation proceeding were imposed upon the owner despite his willingness from the outset to sell at a fair price surely he would be denied the just and adequate compensation guaranteed him by the constitution. On the other extreme, it is equally clear, as the court has recently held,[103] that the burden of such costs may be imposed upon an owner who insists upon an excessive figure. It was held that it was not necessary even that a tender of a fair price be made because it would have been unavailing and thus pointless. It is but a reasonable incident to the power to expropriate that proper means be employed to minimize administrative costs and one such means is

102. Maguire v. Police Jury of Caddo Parish, 197 La. 247, 1 So. (2d) 92 (1941).

103. Louisiana Highway Commission v. Bullis, 197 La. 14, 200 So. 805 (1941).

the sanction of court costs where the owner acts unreasonably as to price in the negotiations for purchase. But one can readily visualize troublesome situations. The owner's price might not be termed unreasonable although more than the amount subsequently awarded in expropriation proceedings. A rule that subjects him to costs in such a case would tend to impair his freedom of negotiation in insisting upon what he regarded as a fair price. It is hardly convincing to tell him, in retrospect and in the language of Article 2638 of the Civil Code, that he had refused a tender of the "true value" of the property because valuation is a highly relative matter of judgment that is conspicuously lacking in both clear-cut criteria and predictable results.

A parish school board constructed a new building which extended over the line of the school grounds onto adjoining private property. Thereafter it began proceedings to condemn about six acres of the tract encroached upon.[104] The board actually owned thirteen acres, but ten were across a highway from the school. The petition alleged the inadequacy of the three acre tract for school building and playground purposes and that the six acres sought were the only suitable property to meet this need. The board's allegation that it encroached by mistake was denied by the defendant. He also denied that there was any need for the land by the board. In reconvention he alleged that the improvements built on his land became his property and if expropriation was to be granted he should be paid their value as well as that of the land. The question of necessity was not considered before the empaneling of the jury but, apparently, the evidence on the subject was submitted along with that as to value. The verdict and judgment awarded defendant $1200 for the land alone, which was the sum claimed by him for it. In his testimony defendant did not explain his opinion that the land was worth $200 per acre and the top figure of the three persons called as experts by the board was $25 per acre. The board appealed on the issue of value. The supreme court reduced the award to $50 per acre; it remarked that it went that high in deference to the members of the jury. In answering the appeal defendant rested his claim to compensation for the improvements primarily upon Article 508 of the Civil Code, which gives an owner an election to claim encroaching structures or require their removal in cases involving bad faith. The court did not suggest that Article 508 is inapplic-

104. Ouachita Parish School Board v. Clark, 197 La. 131, 1 So. (2d) 54 (1941).

able as against a party which has the power to expropriate. Nor did it resort to the notion that after expropriation proceedings were begun it was too late to make an election unless a condemnation judgment were denied. It reasoned that the defendant had no such election because, by force of the expropriation judgment, he no longer owned the land itself. But this is to say that the judgment below was to be regarded as definitive despite review on appeal and thus to foreclose one of the very questions at issue! Doubtless the real flaw in defendant's claim was that Article 508 requires an owner electing to keep encroaching structure to make reimbursement for the materials and workmanship and, as the court pointed out, that had not been done or offered here. The amount to be reimbursed would certainly roughly offset the sum claimed for the structures by the defendant. The circumstance that compensation should have been made before the taking was regarded as no obstacle to expropriation. Finally, the court was satisfied on the issue of necessity; the traffic hazard explained away the alleged availability of the board's ten acre tract across the road.

Louisiana Highway Commission v. Hays[105] calls for only brief notice. In an expropriation proceeding brought by the Highway Commission to secure a right of way consisting of 2.11 acres, the jury awarded $109.20 without indicating what part represented the value of the land taken and what part consequential damages. The judgment was to like effect. It was shown by a preponderance of the evidence that the land was only worth from twenty dollars to thirty-five dollars per acre and thus the verdict must have involved an allowance for consequential damages. Since there was no persuasive proof of substantial damage to the remaining property of the landowner, the supreme court was not prepared to upset the award of the jury.

G. Miscellaneous

Section 6 of Article IV of the Constitution forbids the passing of a local or special law unless there had been a prescribed publication, in the affected locality, of notice of intention to apply for its enactment.[106] Section 35 of Article III ordains that whenever the legislature shall authorize suit against the state it shall pro-

105. 198 La. 117, 3 So. (2d) 438 (1941).

106. It also requires the evidence of the publication to be exhibited in the legislature before enactment and a recital in the act that the required notice had been given.

vide a method of procedure and the effect of the judgments that may be rendered. Act 206 of 1934 simply authorized *X* to sue the state for injuries she had sustained while in the confines of a state institution and "permitted" the state to stand in judgment on the matter. In her action, brought under the act, the trial court sustained exceptions to the jurisdiction based on the asserted invalidity of the act under the constitutional provisions just noticed.[107] The supreme court affirmed because the statute clearly violated Section 35 of Article III by failing to provide a procedure and the effect of such judgment as might be rendered. One fails to perceive, however, wherein the requirements of that section are "sacramental," as the court would have us believe. They look more like stumbling blocks for the claimant. But the court considered Section 6 of Article IV inapplicable because a waiver of state immunity was not a law within the contemplation of that section. It is true that an act of the sort in question may have no particular local significance. On the other hand, it is more than a mere waiver of immunity, because, if for no other reason, it must provide a method of procedure and the effect of judgments.[108]

V. COMMERCIAL LAW

A. CORPORATIONS

Receiver for Defunct Corporations

In a previous decision[1] the Louisiana Supreme Court held that where a corporation's charter has expired a receiver should be appointed pursuant to the provisions of Act 26 of 1900.[2] This statute merely provides for the appointment of a receiver for a defunct corporation, but does not provide any special procedure. In *Elchinger v. F. H. Koretke Brass and Manufacturing Company, Limited*,[3] the court held that the legislature intended that such receivership should follow the procedure set out in Act 159 of 1898,[4]

107. Lewis v. State, 196 La. 814, 200 So. 265 (1941).

108. This is a circumstance not involved in Hood v. State, 120 La. 806, 45 So. 733 (1908), the case relied upon by the court. There, the governing provision of the Constitution of 1898 (Art. 192) expressly covered the matter of procedure and effect of judgments.

1. In re F. H. Koretke Brass & Mfg. Co., 195 La. 415, 196 So. 917 (1940), discussed in The Work of Louisiana Supreme Court for the 1939-1940 Term (1941) 3 LOUISIANA LAW REVIEW 267, 350.

2. Dart's Stats. (1939) §§ 1219, 1220.

3. 196 La. 962, 200 So. 314 (1941).

4. Dart's Stats. (1939) §§ 1209-1218.

a general statute regulating the practice of appointing receivers for corporations. The court applied Section 4 of that statute[5] in allowing an appeal from an ex parte order appointing a receiver for a corporation whose charter had expired, and then applied Sections 2 and 8 of that statute[6] in holding that the order appointing the receiver was void because of a failure to enter notice of the petition in the receivership order book ten days prior to the order of the appointment.

In *Foster v. F. H. Koretke Brass & Manufacturing Company*[7] the present manager of this much litigated corporation, who was a considerable stockholder, was appointed as a "temporary receiver," without notice and without the application being entered upon the receivership order book. While the ex parte appointment of a temporary receiver was not provided for in Act 159 of 1898, it was held to be authorized and controlled by general equitable principles. Mr. Justice Rogers pointed out that prior to the adoption of the general receivership statute, Louisiana courts had possessed and exercised an inherent right, without special statutory authority, of appointing receivers. This included the power to appoint a temporary receiver, in the cases of urgent necessity, to maintain the status quo until a permanent receiver could be appointed. Such a receiver must necessarily be appointed promptly and without the notice and hearing incidental to the appointment of a permanent receiver. Thus while the appointment of a permanent receiver must follow the procedure and formalities set out in Act 159 of 1898, the appointment of a temporary receiver is to be governed by those equity principles which were applied prior to the enactment of the general receivership statute. Chief Justice O'Niell, dissenting, argued that all Louisiana receiverships should be governed by the general statute, and that the majority were not justified in adopting the ex parte "temporary receivership" from the general equity jurisprudence of common law states.[8]

B. Insurance

As is usually the case, the court had before it over the past year some nice questions in the field of insurance where disputes are not uncommon. Perhaps the most interesting was that pre-

5. Dart's Stats. (1939) § 1212.
6. Dart's Stats. (1939) §§ 1210, 1216.
7. 3 So. (2d) 668 (La. 1941).
8. See note criticizing the holding, infra, at 332.

sented in *Randazzo v. Insurance Company*.[1] Following a change of ownership in the insured premises, which were subject to a mortgage, the company was not notified of the change either by the new owner or the mortgagee, who held the policy. Later the policy was renewed in the name of the original owner, the company still being in ignorance of the change of ownership. The premiums were paid by the mortgagee who was in turn reimbursed by the plaintiff, the new owner. The premises having been destroyed, when the company denied plaintiff's claim for recovery of the proceeds, less the amount of the mortgage, this suit was filed in which plaintiff asked that the policy be reformed so as to name the plaintiff as the insured and that recovery be granted of the amount claimed. Apparently the only defense made by the company on the merits was that plaintiff was not entitled to recover because he was not the named owner of the property nor the insured under the policy and that there was no mutual error. Reformation was allowed. The court found that the insurance agent erroneously assumed that there had been no change in the ownership of the property when the policy was renewed, and that plaintiff and mortgagee intended to have the premises covered and the insurer likewise intended to cover them. It was accordingly held that there was mutual error.

This decision may be said to represent the dissatisfaction that has been felt in many jurisdictions with the early English rule of *Rayner v. Preston*[2] which rested on the doctrine that the insurance policy is a personal contract and does not run with the land.[3] Louisiana accepted the rule, however, in *King v. Preston and Hall*,[4] where it was held that the vendee of insured property could not recover from the vendor the insurance money collected by him following the destruction of the premises. This was also on the theory that the insurance contract is strictly personal. The disagreement with the rule of *Rayner v. Preston* springs from the fact that it does not accord with the notion held by the ordinary layman, be he business man or not, that when insured property is sold the insurance protection passes with it to the purchaser. To make the meaning of the transaction in the market place prevail in the courtroom the English Parliament changed the rule by statute.[5] The present case in effect modifies the rule in Louisi-

1. 196 La. 822, 200 So. 267 (1941).
2. L. R. 18 Ch. 1 (1881).
3. See Vance, Handbook of the Law of Insurance (2 ed. 1930) 659 et seq.
4. 11 La. Ann. 95 (1856).
5. Law of Property, 1925, 15 Geo. 5, c. 20, § 47.

ana by straining[6] to find mutual error justifying reformation although in fact the insurance company never intended to contract with the vendee when it renewed the policy at the request of the mortgagee in ignorance of the fact that the property had been sold. In basing its finding of mutual error on the proposition that the company intended to cover the particular property and the vendee and mortgagee intended to have it covered, although the company thought it was insuring another man who it also thought was the owner of the property, the court actually departed from the view that the insurance contract is strictly personal, and embraced the idea of the market place—that such a policy runs with the land. Of course, the company might yet complain that it should be privileged to choose whom it wishes to insure.

The case of *Hammon v. Occidental Life Insurance Company*[7] arose over a term policy. The unsatisfactory feature of renewable term insurance is the fact that the premium cost increases from term to term and may reach the point where the burden is too much for the policy holder to carry. The insured made this discovery at the end of the first term and thereupon allowed his policy to lapse.

One who purchases an ordinary life policy subjects himself to the necessity of paying a higher premium during the early years of the policy in order that as his age increases there may be no corresponding increase in the premium payments required to keep the policy alive. To some, such a policy of insurance is found objectionable because there is always the possibility of the termination of the life insured before the policy has run for any considerable period, in which event the insured will have paid to the company a premium greater than the cost to the latter of providing the insurance. A person who does not think that it is sensible to pay a level premium over his life expectancy may purchase term instead of life insurance. In this event, the premium is leveled for the chosen term only, and consequently the payments are considerably less. It is because of the excess payment over the cost of insurance in a level premium life policy during its early years that legislatures generally have compelled the payment of a surrender value by the company or the purchase by it for the insured of extended term insurance or a paid-

6. Cf. Doniol v. Commercial Fire Ins. Co., 34 N. J. Eq. 30 (1881); McClintock, Handbook on Equity (1936) 162 et seq.

7. 3 So. (2d) 694 (La. 1941).

up policy, if there is a forfeiture for nonpayment of premium at a time when such a surrender value exists. It is of course true that even in the case of a ten-year term policy, for example, the premium paid by the insured during the first half of the period would be greater than would be the payment required for the purchase of insurance in like amount covering those particular years of his life. Yet on the other hand, the amount that he will pay for the last half will, by the same token, be considerably smaller than actual cost for those years. Supposedly therefore, in the case of term insurance, if the policy is continued in effect throughout the term, the insurer gets no more than the total cost (including loading for administration expense) of providing the insurance for such period. Apparently there would be no excess constituting a surrender value in such a policy at the end of the term.

In the instant case the insured purchased a $3000 policy labeled "Natural Premium; Convertible" carrying a yearly premium of $39.15 for the first ten years, and providing a schedule under which the amount would be increased at the end of such period and succeeding periods, according to the attained age of the insured. At the end of the original ten year term the insured notified the company that he had decided to let the policy lapse because he felt that the premium payments for the term then to begin were "out of all reason." About nine months thereafter he was killed. Two and a half years later the present suit was instituted, the beneficiary claiming that the policy was in force at the time of the insured's death by virtue of Act 193 of 1906.[8] This act applies to life policies "other than a term policy for twenty years or less" and requires that the reserve on such a policy, where a forfeiture occurs for nonpayment after three years, shall be applied, in the absence of an election by the insured, to continue the insurance in force at its full amount so long as the surrender value will purchase nonparticipating temporary insurance. The majority opinion accepted this argument and remanded the case to the lower court for determination of the surrender value which would then be applied to the purchase of paid-up insurance with the result that the policy might be found to have been continued in force until insured's death. This view was taken apparently because the court believed that the policy was a life policy under the mentioned statute in that it

8. Dart's Stats. (1935) §§ 4115-4117.

was for a term in excess of twenty years. In support of this conclusion the court found that there was no provision in the policy for renewal or exchange at the end of any period, but rather that the policy constituted a "single contract providing for yearly premiums which are graduated at fixed intervals according to the age of the insured," and was therefore a life policy within the meaning of the statute. Judge Odom, dissenting, disagreed with the majority concerning the wording of the policy provisions relating to exchange or renewal and concluded that the policy was a term policy for less than twenty years. On the basis of the provisions set out in the opinion, he seems to have been correct. The Chief Justice also dissented.

Although it is difficult to understand how such a policy would have a surrender value at the *end* of any term, the majority of the court must have been convinced that there had been some overcharge by the company for the insurance for the whole term, otherwise the case would not have been remanded for the purpose of determining the reserve. This thought, however, seems at odds with the fact that the premium rate was $13.05 per thousand, a very low figure. Term policies in excess of twenty years were undoubtedly included in the coverage of Act 193 of 1906 because of the fact that a level premium over such an extended term would in many cases be almost as great as a premium leveled over the life expectancy of the insured, and consequently, because such a policy would contain a reserve during a large portion of the term. Although the application of the act seems questionable, this will result, at first blush, in the imposition of no actual hardship on the company unless it had charged Hammon more than it should have for the ten years his policy was in force. Yet, even in such an event, the calculations of the company on such policies may be upset. Furthermore, what will be the effect of an application of the act to like policies where nonpayment occurs at the end of, say, four years? Have the companies counted on this?

An insured who had sent in a request for cancellation of a fire policy twenty-five days before the property was destroyed brought suit against the insurance company in *Eicher-Woodland Company, Incorporated v. Buffalo Insurance Company,*[9] seeking recovery on the policy. His position was that the cancellation had never been effected because (1) the notice to the agency

9. 3 So. (2d) 268 (La. 1941).

which had issued the policy was not notice to the company, and (2) the mortgagee under a simple loss payable clause had not consented to the cancellation. The court found that the facts would not sustain the first contention and, as to the second, decided that consent of the mortgagee was not necessary and that a valid cancellation had been accomplished. On the second point this case follows the trend discernible in earlier cases[10] of ignoring the mortgagee under an ordinary loss payable clause, both with respect to the termination of his interest in the policy by a violation of the provisions thereof by the mortgagor and also with respect to the power of the insured and insurer to adjust the loss without his knowledge or acquiescence. The present case was put on the ground that under such a clause the mortgagee is merely an appointee to receive payment, and that it does not have the effect of in-any way limiting the power of the mortgagor over the policy or the incidents thereof. Incidentally, the mortgagee had apparently been paid by the debtor plaintiff. Although a clause of the kind here involved is to be distinguished both from the union mortgage clause and from a provision that the loss, if any, shall be payable to the mortgagee, there is yet a lack of harmony in the cases wherein its effect has been considered.[11]

In *Dreher v. Guaranty Income Life Insurance Company*,[12] the court found that the insured, by electing to accept stock in payment of dividends due, had discharged the company from its statutory obligation to apply such money to the purchase of a paid-up policy in the absence of an election of one of the options specified in the policy. The option provisions were held to limit the power of the insured to accept payment in stock if he so desired.

The policy of liberal construction of the insurance contract in favor of the insured was followed in *Powell v. Liberty Industrial Life Insurance Company*,[13] where the insured, an inmate of an insane asylum, was held covered by a provision calling for the payment of benefits when the insured is necessarily confined to bed, instead of a provision covering sickness that does not confine the insured to bed, but does confine him strictly to the house. The basis of the court's decision was that the expression "con-

10. Officer v. American Eagle Fire Ins. Co., 175 La. 581, 143 So. 500 (1932); In re Clover Ridge Planting & Mfg. Co., 178 La. 302, 151 So. 212 (1933).

11. See 29 Am. Jur. §§ 552-555, 1253.

12. 196 La. 326, 199 So. 135 (1940).

13. 197 La. 894, 2 So. (2d) 638 (1941).

fined to bed" expresses the "degree of disability necessary" for recovery under such provision. Such degree was satisfied here because of the insured's insanity. There was one dissent, based on the wording of the two provisions.

The case of *Farr v. Pacific Mutual Life Insurance Company*[14] involved the interpretation of an educational insurance rider to determine whether the amounts payable under the policy should go to the beneficiary named in the policy itself or the one mentioned in the rider. The court decided in favor of the latter view on the basis of the language employed in the rider and of the rule that the specific controls the general.

VI. EVIDENCE

Two different techniques are employed in Louisiana in applying rules of evidence. In criminal cases, where the common law trial by jury obtains,[1] these rules perform their traditional common law functions of regulating the admissibility. In civil causes, where ordinarily there is no jury trial,[2] the rules of evidence determine "the weight to be assigned to the evidence."[3] Consequently, one may expect to find a greater difficulty in the application of these rules in criminal cases than in civil causes. In the past session, this greater difficulty is demonstrated by the fact that twenty of the twenty-two opinions involving the subject of evidence were rendered in criminal cases.

Witnesses

The majority of the cases touching upon this phase of the subject involved nothing more than the application of well settled principles. Thus three cases[4] pointed out that under Article 461 of the Code of Criminal Procedure the sole test of the qualifications of a witness in a criminal case was whether he was a person of "proper understanding." Convicted and sentenced felons were held competent witnesses.

The proper method for the impeachment of witnesses by

14. 197 La. 111, 200 So. 865 (1941).

1. La. Const. of 1921, Art. 1, § 9.

2. "Because of the power conferred upon the appellate courts in Louisiana to review the findings of fact of a jury [La. Const. of 1921, Art. 7, §§ 10, 29], jury trials are comparatively rare and infrequent in civil cases." McMahon, Louisiana Practice (1939) 823, n. 5.

3. Daggett, Dainow, Hebert and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana (1937) 12 Tulane L. Rev. 12, 27.

4. State v. Robertson, State v. Coleman, 196 La. 982, 200 So. 320 (1941); State v. Henry, 3 So. (2d) 104 (La. 1941).

showing prior and contradictory written statements was involved in *State v. Sims*.[5] There, the defendant was prosecuted for the theft of an automobile. An accomplice, who testified for the state, admitted that he had signed a prior written statement and was cross-examined along the lines of some of the facts set forth therein. In argument to the jury, defense counsel stated that the witness' testimony was contradicted by this statement. The answering remarks of the district attorney, pointing out that the latter had never been introduced in evidence, were held proper.

In *State v. Childers*,[6] the defendants were prosecuted for forging and uttering an instrument purporting to be the last will and testament of Jennie Bonner. Over the objection of the defendants, an attorney was permitted to testify that after the death of the alleged testatrix one of the defendants had consulted him, asked that he prepare a purported will for the deceased, and had offered to share in the anticipated ill-gotten gains. This witness further testified that he immediately rejected the offer of employment and escorted the defendant out of his office. One of the grounds for reversal relied on by defendants was that this evidence was inadmissible, as being a privileged communication between client and attorney. The court properly overruled this contention and pointed out that one settled exception to the privilege obtains where the client consults his lawyer to learn how to plan, execute, or perpetrate a fraud or crime.[7]

Exclusion and Selection of Evidence

Five cases involved the presentation of "real evidence," or what Professor Wigmore terms "autoptic proference." Of these, three[8] apply elementary principles in sanctioning the use of photographs when shown to have been taken accurately, to be a correct representation of the subject in controversy and where they tend to illustrate any material fact in the case or to shed light on the facts at issue. In a fourth case,[9] the clothing worn by the de-

5. 197 La. 347, 1 So. (2d) 541 (1941).

6. 196 La. 554, 199 So. 640 (1940).

7. "The privileged communication [doctrine] may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society. The law does not make a law office a nest of vipers in which to hatch out frauds and perjuries." The attorney may be innocent, as he was in this case, and still the guilty client must let the truth come out. Gebhardt v. United Railways of St. Louis, 220 S.W. 677, 679, 9 A.L.R. 1076, 1080 (Mo. 1920).

8. State v. Henry, 3 So. (2d) 104 (La. 1941); State v. Scott, 3 So. (2d) 545 (La. 1941); State v. Johnson, 3 So. (2d) 556 (La. 1941).

9. State v. Richey, 3 So. (2d) 285 (La. 1941).

ceased at the time of the homicide was held admissible to show the location and nature of the deceased's wounds and the position of the parties when the fatal shooting occurred. In the fifth case involving this phase of the subject,[10] the defendant appealed from a verdict and sentence for stealing a steer belonging to the prosecuting witness. The latter had lost a steer and later found one in the defendant's pasture which he claimed as the lost animal. This steer was taken from the defendant's pasture by the sheriff and delivered to the prosecuting witness. In the course of the trial, at the request of the prosecution and with no objection from the defense, the jury were taken out to view two steers which the prosecuting witness had brought to the courthouse in a truck. No authentication of either steer as the one taken by the sheriff and delivered to the prosecuting witness was made during the trial. The verdict and sentence were annulled under a holding that the steer was not admissible in evidence by means of a view by the jury without such authentication.

Three cases involved the admissibility of evidence tending to prove crimes or criminal acts other than those with which the defendants were charged. In *State v. Childers*[11] the defendants were prosecuted for forging and uttering an instrument purporting to be the last will and testament of Jennie Bonner executed before seven witnesses. Over the objections of the defense, a witness testified concerning a conspiracy to forge, and the forging, of a "will" purporting to have been executed before five witnesses, before the forging of the instrument for which the defendants were prosecuted. The exceptions reserved to the admission of this testimony were overruled by the appellate court under authority of Articles 445 and 446 of the Code of Criminal Procedure, permitting such evidence of an independent act to show intent. These code provisions are declaratory of the rule both in Louisiana[12] and at common law.[13] The identical principles were applied in *State v. Meharg*,[14] where the defendants were found guilty of a murder

10. State v. Foret, 196 La. 675, 200 So. 1 (1941).

11. 196 La. 554, 199 So. 640 (1940). Another point in this case is discussed supra, p. 266.

12. State v. Jackson, 163 La. 34, 111 So. 486 (1927).

13. At common law the exceptions to the general rule of exclusion make such evidence admissible when it tends to establish: (1) motive, (2) intent, (3) absence of mistake or accident, and (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. People v. Thau, 219 N.Y. 39, 113 N.E. 556, 3 A.L.R. 1537 (1916).

14. 196 La. 748, 200 So. 25 (1941).

committed in an effort made to escape from prison. Evidence that some of the defendants were carrying guns and that they had kidnapped several motorists and had used their cars was held admissible as to these defendants. These other crimes were held closely connected with the murder and to constitute a part of the general attempt to escape.

On the other hand, evidence of other crimes was held inadmissible in *State v. Linhardt*,[15] where the defendant was prosecuted for attempted blackmail by threats to publicly charge the prosecutrix of unchastity. Evidence of other transactions between the defendant and the prosecutrix tending to show other crimes committed by the defendant were held admitted erroneously. Since such actions had no connection with the crime charged and merely tended to prejudice the defendant and to confuse the issues, the conviction was reversed.

Four cases involved an application of the "hostile demonstration" rule of Article 482 of the Code of Criminal Procedure.[16] In one,[17] the appellate court found that the trial judge had properly excluded defendant's evidence tending to show the dangerous character of the deceased or his threats against the accused. The only evidence affording a foundation for its introduction was the defendant's testimony as to a prior altercation which he had with the deceased four years before the commission of the crime. The contradictory statements made by the defendant while attempting to lay the proper foundation for this evidence was deemed sufficient to justify its exclusion. In another,[18] the court similarly held the evidence of a hostile demonstration offered by the defendant was not sufficient to warrant the admission of any threats against the accused.[19]

There was "no doubt [but] that the deceased was the aggressor in the difficulty in which he was killed" in *State v. Vernon*.[20] However, after the defendant had drawn a pistol and had fired one shot at the deceased, the latter discontinued the assault and attempted to flee. The fatal shots were fired by the accused there-

15. 3 So. (2d) 552 (La. 1941).

16. "In the absence of proof of hostile demonstration or of overt act on the part of the person slain or injured, evidence of his dangerous character or of his threats against accused is not admissible." Art. 482, La. Code of Crim. Proc. of 1928. Note (1940) 2 LOUISIANA LAW REVIEW 376.

17. State v. Scott, 3 So. (2d) 545 (La. 1941).

18. State v. Carter, 197 La. 155, 1 So. (2d) 62 (1941).

19. The testimony of the defendant on this point was contradicted by that of reliable eye-witnesses which was believed by the trial judge.

20. 197 La. 867, 2 So. (2d) 629 (1941).

after. Since the defendant was charged only with manslaughter, and the circumstances made it clear that the defendant at the time of the homicide was not acting in self-defense, evidence as to threats made by the deceased was held properly excluded.

The defendant, in *State v. Flournoy*,[21] was convicted of murder and appealed. She took the stand in her own behalf and started to testify that she had been engaged in a continuous fight with the deceased for about an hour before the killing and that in this fight the deceased had been the aggressor. The prosecution objected to this line of testimony on the ground that no overt act by the deceased at the time he was stabbed had been shown. The jury was retired and the accused was allowed to continue her testimony. Upon its completion, the trial judge ruled that no overt act had been established, and excluded all of the defendant's testimony. In making this ruling, the trial judge took into consideration the testimony of two witnesses for the state who had testified earlier in the trial, none of which was included in the transcript sent to the appellate court. The defendant tried unsuccessfully to take the testimony of other witnesses to be annexed to her bill of exceptions. The trial judge's ruling on the question of the overt act was held subject to review on appeal, and since all of the evidence on this issue was not available to the appellate court, the verdict and sentence were annulled and the case remanded for a new trial. It would appear that the reversal should have been pitched on the broader ground that this evidence was admissible without any showing of hostile demonstration or overt act of the deceased at the time of the killing.

One case presented a question of the relevance and materiality of the evidence sought to be introduced. In *State v. Sims*,[22] a conviction for the theft of an automobile was appealed from. One of the principal witnesses for the prosecution was a federal agent who had investigated the facts to determine whether there had been any violation of the Dwyer Act. The refusal of the trial judge to compel this witness to answer whether his investigation had led to an indictment under the federal statute was held proper, since the return of a federal indictment was irrelevant and immaterial.

Only one case involved any question of expert testimony. In

21. 196 La. 1067, 200 So. 464 (1941).
22. 197 La. 347, 1 So. (2d) 541 (1941).

an expropriation suit,[23] it was held that the opinion of a witness, even though not qualified as an expert, was admissible if the witness knew the location of the property, was familiar with its physical characteristics and its adaptability for certain purposes, and had some knowledge of real estate values gained by experience and observation.

The rule against hearsay was invoked in *State v. Willie*,[24] where the defendant was prosecuted for incest with his daughter. The prosecutrix was asked to identify a letter which was shown to her, and replied that it was one written by her to her mother, who was then in the Charity Hospital in New Orleans. The state offered this letter in evidence and was met by the objection that it was purely a self-serving declaration. The overruling of this objection by the trial judge presented the principal assignment of error relied upon on appeal. In sustaining the trial judge, the organ of the appellate court said:

> "As said by the Court in State v. Nailor, 146 La. 51, 83 So. 347: 'The contents of a letter written by a third person concerning accused cannot be read to the jury, being hearsay, unless the person who wrote the letter is produced to testify and to be cross-examined.' "[25]

This quotation is not from the opinion in the *Nailor* case, but rather from an editorial headnote; and the precedent relied on nowhere supports the extreme position taken by the court here.[26] One exception to the rule against hearsay recognized by well-considered cases and reliable text writers is in prosecutions for rape;[27] and the extension of this exception to include incest would

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23. Louisiana Highway Commission v. Grey, 197 La. 942, 2 So. (2d) 654 (1941).

24. 196 La. 181, 198 So. 897 (1940).

25. 196 La. at 185, 198 So. at 899.

26. "The objection was to the contents of the letter being read to the jury. The contents of the letter were plainly hearsay, and therefore inadmissible. No one could testify that he heard some one say that the accused was in a certain place at a certain date. If *such evidence* were to be placed before a jury, the person who wrote the letter referred to must be produced to testify and to be cross-examined." (Italics supplied.) Sommerville, J. in State v. Nailor, 146 La. 51, 53, 83 So. 374, 375 (1919). "Such evidence" does not refer to the contents of the letter.

27. "For peculiar reasons, the complaint of the victim of this diabolical outrage and crime [rape] is received as evidence. Such a victim must *at once* make complaint, or she will be suspected of consent. The instincts of human nature, revolting at this unnatural and heinous crime, compel the victim to cry out and denounce its foul perpetrator; and such complaint, made under the smart and indignation of such a cruel injury, has been received by the courts as evidence. But even in such cases the evidence is confined to the

have been preferable to the broad holding of the court in this case.

Six cases involved the admission or use of voluntary confessions by defendants in criminal cases. In one,[28] well settled principles justified the admission. In *State v. Meharg,*[29] several of the defendants made voluntary confessions which were taken down and transcribed by a stenographer, but not signed by the confessing defendants. The action of the trial judge in permitting the stenographer to be called as a witness and to testify, refreshing her memory by the use of her original shorthand notes, was held proper. In *State v. Henry,*[30] the alleged confessions were made by defendant to her paternal aunt. To establish the voluntary nature of the confession the prosecution showed merely that it was not induced by promises or threats. Under a holding by the appellate court that the confession is voluntary in law if, and only if, it was made voluntarily in fact, the conviction was reversed. Two cases presented the propriety of the district attorney covering the alleged confession in his opening statement. In one,[31] the fact that he gave certain details of a purported written confession in his opening statement was held to be harmless error. Similarly, in the other case on this subject,[32] the action of the prosecuting attorney in reading the alleged confession in the course of his opening statement was held not to be reversible error. In two cases,[33] the alleged written confessions were attacked by the defendants as having been procured through the use of third degree methods. The testimony in both cases amply sustains the court's position that no force or improper methods were employed by the police in securing the confessions. Both cases, however, present the serious social problem as to whether confessions secured by police officers from one under arrest should ever be allowed in evidence.[34]

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new complaint, and no detailed statement of the transaction is permitted to go in evidence." Haynes v. Commonwealth, 28 Gratt. 942, 947 (Va. 1877).

28. State v. Guidry, 3 So. (2d) 542 (La. 1941).

29. 196 La. 748, 200 So. 25 (1941). The case is discussed, as to another point, supra, p. 267.

30. 196 La. 217, 198 So. 910 (1940).

31. State v. Johnson, 3 So. (2d) 556 (La. 1941), discussed, as to another point, infra, p. 284.

32. State v. Hutton, 3 So. (2d) 549 (La. 1941).

33. Ibid.; State v. Calloway, 196 La. 496, 199 So. 403 (1940).

34. See Report on Lawlessness in Law Enforcement (1931) 4 National Commission on Law Observance and Enforcement Reports. In England the rules of court forbid the cross-examination of accused persons under arrest, and a violation of the rule justifies the trial judge in rejecting any statement

Parol Evidence Rule

The basic provision of the positive law of Louisiana on this subject prohibits the use of parol evidence "against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, *or since.*" (Italics supplied.)[35] The italicized language has caused considerable difficulty to the courts of this state. The code provision in question is merely declaratory of civilian rules of evidence consecrated by some of the provisions of Article 1341 of the French Civil Code; and the italicized language was intended to prohibit the use of parol evidence to prove any subsequent oral agreement to modify or rescind a prior written contract.[36] An early Louisiana case[37] applied this language in the identical manner which the redactors intended. However, the parol evience rule of the common law, recognized and explained by the numerous American legal compendiums which grace the shelves of Louisiana lawyers, kept striving for recognition. In *Salley v. Louviere*[38] the common law rule was adopted, the early Louisiana case to the contrary being "differentiated." Apparently, no effort was made by the court to determine the genesis of the pertinent code provision. The language "or since" was interpreted to prohibit only oral statements made by the parties after the execution of the contract as to what was said by them prior thereto or contemporaneously therewith. The decision in *Salley v. Louviere* was confirmed in *Tholl Oil Company v. Miller.*[39] One of the major results of the Compiled Editions of the Civil Codes of Louisiana now being published by the Louisiana State Law Institute will be to minimize the possibility of the origins of such code provisions being overlooked in the future.

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of defendant so procured. It does not, however, require such rejection if there was no promise or threat. Rex v. Voisin, 1 K.B. 531 (1918).

35. Art. 2276, La. Civil Code of 1870.

36. 12 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1922) 331, § 763; 8 Huc, Commentaire Théorique et Pratique du Code Civil (1895) 363 et seq., § 287; 5 Marcadé, Explication Théorique et Pratique du Code Civil (7 ed. 1873) 105, § 11; 7 Planiol et Ripert, Traité Pratique de Droit Civil Français (1931) 865 et seq., nos 1527 et seq.

37. Sharkey v. Wood, 5 Rob. 326 (La. 1843).

38. 183 La. 92, 162 So. 811 (1935).

39. 3 So. (2d) 97 (La. 1941).

VII. CRIMINAL LAW AND PROCEDURE

A. CRIMINAL LAW

Forgery of F. H. A. Completion Certificates

The difficulties inherent in a criminal statute which resorts to specific enumeration as a means of defining the scope of the offense was illustrated by the recent case of *State v. Mason*.[1] The Louisiana forgery statute[2] specifies a long list of documents which may be the subject of that offense. The information charged the defendant with forging and uttering a "completion certificate" in connection with an F.H.A. loan. The defendant argued that the certificate in question was not within the forgery statute since it was not one of the instruments enumerated therein. The court held that it was unnecessary that the instrument in question be specified in the forgery statute under its common name, and concluded "that it is a receipt for goods and for a note and that its purpose is to grant an acquittance or discharge for, or upon the payment of money or the delivery of goods, which are among the classes of instruments mentioned in the forgery statute."[3]

The supreme court's liberal attitude in interpreting the forgery statute was clearly justified, for the enumeration of certain instruments by usual name should not be construed as exclusive, and should not prevent the court's interpreting the more general phrases of the statute so as to include instruments not listed by name. Such difficulties of interpretation as confronted the court in *State v. Mason* might be avoided if the offense of forgery were defined only in broad terms, as the false making or altering, with intent to defraud, "of any signature to, or part of, any writing purporting to have legal efficacy."[4] The enumeration of certain instruments by their common name encourages the defense, which was properly rejected in the instant case, that the legislature intended to exclude all others.

Murder—"year and a day rule"

In *State v. Moore*[5] the Louisiana court again[6] applied the

1. 197 La. 965, 2 So. (2d) 895 (1941).
2. La. Act 136 of 1934 [Dart's Crim. Stats. (Supp. 1941) §936].
3. 197 La. 965, 969, 2 So. (2d) 895, 896 (1941). The court relied on the analogous case of State v. Woods, 112 La. 617, 36 So. 626 (1904), where a "school warrant" was held to be synonymous with an "order for payment of money," and thus within the forgery statute.
4. See Art. 73, Proposed Criminal Code for the State of Louisiana.
5. 196 La. 617, 199 So. 661 (1940).
6. The rule had previously been applied in State v. Kennedy, 8 Rob. 590 (La. 1845).

familiar common law rule that a homicide 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. This rule originated at a time when it was difficult to ascertain the true cause of death if a substantial period of time intervened. With modern developments in medical science, the only justification for this arbitrary rule no longer exists and its abolition has been frequently urged.[7] There is no good reason why a person who intentionally kills another should escape punishment for his offense because of the fact that the victim did not die within "a year and a day." Ample protection is furnished by the requirement that the state must prove beyond any reasonable doubt that the injury inflicted was a cause of the death. The Louisiana decision is not surprising, however, in view of the fact that the Crimes Act of 1805[8] denounced murder as a crime, without defining it; and Section 33 of that act instructed the courts to look to the common law of England for a definition.

B. Criminal Procedure

Venue—Receiving Stolen Goods

In *State v. Blotner*[1] the court applied the general rule that the proper venue for the prosecution of a receiver of stolen goods is in the parish in which the property is received, although the larceny was committed in another parish. In Connecticut[2] and Texas[3] a receiver may be tried either where he is found with the goods in his possession or in any county in which the party guilty of the principal crime (larceny) may be tried. There are numerous reasons for a statute also permitting the trial of a receiver in the parish where the principal felony is committed. There is efficiency and economy where one district attorney can prosecute both the thief and the receiver. A necessary element of the crime is that the goods have been stolen, and this can best be shown where the theft was committed. Such practical considerations have influenced the jurisdictions enacting special statutes.

7. Clark and Marshall, Law of Crimes (4 ed. 1940) 286, § 235. See Notes (1941) 19 Chi.-Kent. Rev. 181, (1935) 19 Minn. L. Rev. 240, (1941) 15 Tulane L. Rev. 306, (1934) 10 Wis. L. Rev. 112.

8. La. Act 50 of 1805.

1. 197 La. 192, 1 So. (2d) 74 (1941).

2. State v. Ward, 49 Conn. 429 (1881).

3. Tex. Ann. Code Crim. Proc. (Vernon, 1926) art. 200; Mathis v. State, 133 Tex. Cr. 367, 111 S.W. (2d) 252 (1937); Giles v. State, 133 Tex. Cr. 454, 112 S.W. (2d) 473 (1938).

Prescription

Article 8 of the Code of Criminal Procedure, as re-enacted by Act 21 (2 E.S.) of 1935, provides that, except in certain enumerated serious offenses, no one shall be prosecuted unless an indictment, information or affidavit has been "filed within one year after the offense shall have been *made known* to the judge, district attorney, or grand jury having jurisdiction." In *State v. Oliver*[4] defendant had been indicted for an embezzlement committed over a year before. The indictment had properly negatived prescription, thus throwing the burden on defendant to show that the offense had been made known to a proper officer more than one year before the indictment was returned.[5] In holding that the prescriptive period had run before the indictment was filed, Justice Higgins relied upon the well settled interpretation of Article 8 that actual knowledge of the commission of the offense was not necessary in order that the prescriptive period should begin to run. It is enough that the proper officers have such information or knowledge as to put them upon inquiry. They are then charged with the knowledge of whatever such inquiry would have disclosed.[6] In the case at bar the district attorney had notice that the check for funds due the parish had been made out to defendant personally, and that he had apparently cashed it without depositing the funds in the parish treasury or using them to repair a road as contemplated. Such facts, reasoned Justice Higgins, were sufficient to put the district attorney on inquiry, and the slightest investigation would have revealed the fact that the money had been embezzled. Dissenting Justice Odom agreed with the majority of the court as to the principles of law involved, but differed as to their application to the facts presented. He contended that knowledge that the defendant had received the funds in question was not knowledge, or a sound basis for imputing knowledge, that the money had been misappropriated.

Grand Jury Procedure

In *State v. Mahfouz*[7] it was held that the chief deputy clerk of court might properly serve as a "disinterested witness" to the drawing of the grand jury, despite the fact that the clerk of court was acting on the jury commission.

4. 196 La. 659, 199 So. 793 (1940).
5. State v. Posey, 157 La. 55, 101 So. 869 (1924).
6. State v. Perkins, 181 La. 997, 160 So. 789 (1935).
7. 197 La. 216, 1 So. (2d) 82, 84 (1941).

Under Section 56 of Article VII of the Louisiana Constitution and Article 23 of the Code of Criminal Procedure, the attorney general and his assistants are empowered to intervene in a civil or criminal prosecution, if they regard such intervention necessary for the protection of rights and interest of the state. One of the powers granted to the district attorney is that of acting as legal advisor to the grand jury, at the request of that body.[8] In *State v. Ardoin*[9] the attorney general, at the request of the grand jury, had assigned one of his special assistants to advise them in place of the district attorney. These proceedings had resulted in the indictment of defendants, and the validity of the indictments depended upon the authority of the attorney general to relieve and supersede the district attorney. Counsel for defendants argued that such authority was restricted to cases where a criminal prosecution had already been commenced by the district attorney. The supreme court unanimously rejected this argument and held that the attorney general had authority, under Section 56 of Article VII of the Louisiana Constitution and Article 23 of the Code of Criminal Procedure,[10] to supersede the district attorney as advisor of the grand jury when requested by that body to do so.

Negroes as Jurors

The question of race discrimination in the selection of jurors was again raised in the case of *State v. Pierre*.[11] Appellant, a negro convicted of murder, had reserved a bill of exceptions to the trial judge's ruling refusing to quash the indictment. The motion to quash alleged, among other grounds,[12] a fraudulent scheme of the

8. Art. 18, La. Code of Crim. Proc. of 1928.

9. 197 La. 877, 2 So. (2d) 633 (1941).

10. The court held that the express proviso added to Article 17 by the amendment of Act 24 of 1934 (1 E.S.), empowering the attorney general to supersede the district attorney in proceedings instituted by him, was inserted by way of clarification, as such power already existed under Article 23 of the Code of Criminal Procedure and Section 56 of Article VII of the Louisiana Constitution.

11. 3 So. (2d) 895 (La. 1941). For a complete history of the *Pierre* case see Pierre v. State, 306 U. S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939), noted in (1939) 1 LOUISIANA LAW REVIEW 841, which reversed the conviction that was upheld by the Louisiana Supreme Court in State v. Pierre, 189 La. 764, 180 So. 630 (1938). The United States Supreme Court held that there was a violation of the due process clauses of the United States Constitution (Amend. XIV) and of the Louisiana Constitution of 1921 (Art. I, §2) because negroes had been systematically excluded from the general venire from which was drawn the grand jury that had returned the indictment against the defendant for the murder of a white man.

12. The motion to quash also alleged a scheme to discriminate against the defendant by packing the general venire list with persons incompetent

jury commissioners to discriminate against the defendant by excluding negroes from the general venire list. Defendant alleged that there were only fifty-two negroes on the general venire list of three hundred, despite the fact that over forty-nine per cent of the parish population were negroes. This, argued the defendant, did not afford him a proper percentage of negroes on the list. The court held that the United States Supreme Court decision in *Pierre v. State*[13] did not hold, as appellant had contended, that a negro defendant was entitled to a jury composed of a proportionate percentage of negroes. However, it is still definitely settled that, where the defendant is colored, an intentional and systematic exclusion of negroes from jury service because of their race or color is a denial of the "equal protection of the law" guaranteed by the Fourteenth Amendment.[14]

Examination of Jurors

A number of questions involving the examination of prospective jurors arose in the much publicized and litigated case of *State v. Henry*.[15] One of the grounds which was relied upon for reversal of the first conviction in the *Henry* case concerned the *voir dire* examination of prospective jurors. Defense counsel had not been permitted to ask the prospective jurors if they had any conscientious scruples against rendering a qualified verdict (guilty without capital punishment) in a proper case. This was a converse of the well settled rule that the state may question prospective jurors as to conscientious scruples against capital punish-

to serve because of their hostility to the defendant, their relationship to parish officials hostile to the defendant, or former service on grand juries that had previously indicted defendant or petit juries that had previously convicted him. The court held that defendant had failed to prove these allegations.

13. 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).

14. On the question of what constitutes an "intentional and systematic exclusion" of negroes, see Note (1941) 20 Tex. L. Rev. 104. Speaking of a continued absence of negroes from the grand jury, the writer declares, "It has been held that proof of a two-year period is insufficient, and that proof of a seven-year period is sufficient, but the exact dividing line between periods indicating discrimination and those not indicating discrimination has not been drawn."

It is interesting to note that in the case at bar there were 52 negroes on the general venire list of 300, 5 negroes on the grand jury panel of 20, 2 on the grand jury of 12, and 1 on the petit jury of 12.

15. 196 La. 217, 198 So. 910 (1940) and 197 La. 999, 3 So. (2d) 104 (1941). The defendant in the *Henry* case was twice convicted of murder and the death sentence imposed upon her. Both times defense counsel appealed, setting out numerous substantial errors; with the result that the Louisiana Supreme Court set the verdict and sentence aside and remanded the case for a new trial. The trial irregularities urged in the first *Henry* case are discussed, infra at page 281.

ment. The refusal to permit defense counsel to ask this question was held to constitute reversible error. Justice Higgins clearly and succinctly stated the law:

> "To be impartial jurors in this case they should have been free of any scruples or personal opinions which would have prevented them from imposing either the death penalty or life imprisonment. If they had conscientious scruples against the infliction of capital punishment they were subject to challenge for cause by the state. Article 352, Code of Criminal Procedure. If they would impose only the death penalty in a murder case they were likewise subject to challenge for cause by the defendant."[16]

Upon a re-trial of the *Henry* case,[17] the scope of proper questioning in regard to the prospective jurors' attitude toward capital punishment and qualified verdicts was re-examined from another angle. After asking prospective jurors whether they had any conscientious scruples against voting for a death verdict, the district attorney went further and asked each of them, "In the same case where you were satisfied that defendant was guilty beyond any reasonable doubt and were convinced considering all the facts and circumstances that the defendant was not entitled to a qualified verdict, or mercy, would you vote for such a verdict?" Justice Odom held that it was reversible error to permit such questions, and declared that the purpose of such a question was to commit the jury in advance to render a capital verdict in case he found the defendant guilty and that there were no mitigating circumstances. He pointed out that the jury's power, under Article 409 of the Code of Criminal Procedure, to render a verdict of guilty "without capital punishment" in a capital case, is absolute and "may be exercised by the jury without regard to the circumstances under which the crime was committed. Even though a jury may be convinced, after hearing the evidence, that the crime was an atrocious, revolting one, it still has the power to limit the extreme penalty." Justice Odom distinguished between permissible questioning to determine if prospective jurors *could not* render a capital verdict without offending their conscience, and the questions propounded in the instant case, wherein the district attorney went further and asked whether they *would* render a verdict calling for capital punishment if the de-

16. 196 La. at 236, 198 So. at 916.
17. State v. Henry, 197 La. 999, 3 So. (2d) 104 (1941).

fendant were found guilty and there were no mitigating circumstances.[18]

An added ground for reversal in the second trial of the *Henry* case was the court's refusal to sustain defendant's challenge of a certain prospective juror for cause. The venireman in question had admitted having an opinion as to the guilt or innocence of the accused, and was not certain that he could disregard that opinion. The court declared that where a prospective juror has formed an opinion as to the guilt or innocence of the accused, he may be competent if he could and would lay aside that opinion after hearing the testimony in the case, but where, as in the instant case, he is not sure that he can lay it aside, he is not a competent witness.

Questions involving the method and effect of accepting jurors were raised and passed upon. Article 358 of the Code of Criminal Procedure provides that jurors shall be first tendered to the prosecution for examination and, if accepted, then tendered to the defense. In the second review of *State v. Henry*[19] the court held that the tendering of jurors to defense counsel for examination was a tentative acceptance of them, and that the state was not required to formally announce its acceptance. Also, after the jurors were tendered back by defense counsel, the district attorney was permitted to challenge seven of them peremptorily. Here the court followed the express provisions of Article 358 of the Code of Criminal Procedure. While neither side has a *right* to challenge jurors who have been accepted by both sides, the court, within its discretion, *may permit* either side to challenge a juror peremptorily up to the time that the jury is empanelled.

Indictment and Information

Only two cases dealt with the form and contents of an indictment or information. In *State v. Cooper*[20] the defendant, who was convicted of robbery, contended that the wording of the indictment was so confusing and "so jumbled up" that it had no meaning. In the indictment the verbs were placed after and far remote from the nouns to which they referred. In upholding the indictment the court stated:

18. Justice Odom concluded 197 La. at 1011-1012, 3 So. (2d) at 108-109, "The law does not contemplate that counsel on either side should question prospective jurors in capital cases as to the kind of verdict they would favor under any given state of facts or circumstances, and the court should not permit such questioning."

19. 197 La. at 1025, 3 So. (2d) at 113.

20. 197 La. 1040, 3 So. (2d) 118 (1941).

> "We are not yet prepared to annul indictments and bills of information for not being written in a style more modern or more readable than that which characterizes most of them today. So long as the wording of a bill of indictment or information is understandable and unambiguous it should not be held to be invalid for want of a better style of expression."[21]

This case, while correctly decided, indicates the need for modernization and clarification of style in criminal pleading.

In *State v. Emerson*[22] the court held that an information for keeping intoxicating liquor for sale was not defective because it did not state the alcoholic content of the liquor.

Continuance—Lack of Experience in Criminal Cases

Article 320 of the Code of Criminal Procedure declares that the "granting or refusing of any continuance is within the sound discretion of the trial judge." An interesting point in this regard was raised in *State v. Henry*.[23] Attorneys assigned subsequent to arraignment to defend the alleged murderess had been given twenty-five days for preparation of the defense. They moved for a continuance upon the grounds that their law practice, of five and fourteen years respectively, had been confined entirely to civil cases, with the result that a considerable amount of research was necessary in order to give them a working knowledge of criminal law and procedure; and that a large part of their time was absorbed in pressing civil cases the consideration of which could not be postponed. The Louisiana Supreme Court approved the trial court's refusal to grant special indulgence to counsel because of their lack of experience in criminal law, declaring that "counsel for defense in this case, by their industry and intelligence, made up for whatever experience they lacked in the actual practice of criminal law." Justice Higgins pointed out that "the only legal qualification of counsel assigned in a capital case for the defense of an accused is that he shall have at least five years actual experience at the bar."[24] He also declared that other existing professional engagements did not constitute legal grounds for the granting of a continuance.

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21. 197 La. at 1043, 3 So. (2d) at 119.

22. 197 La. 783, 2 So. (2d) 212 (1941). Defendant was charged with keeping intoxicating liquor for sale in violation of a police jury ordinance.

23. 196 La. 217, 198 So. 910 (1940).

24. 196 La. at 228, 198 So. at 913. See Art. 143, La. Code of Crim. Proc. of 1928.

State v. Henry—A Panorama of Trial Irregularities

State v. Henry[25] was a much publicized case arising out of a cold-blooded killing. In order to carry out a preconceived plan to rob a bank, defendant and her partner in crime hitch-hiked a ride, robbed their benefactor of his car and worldly goods, and then shot him while he was on his knees begging for his life. Although a plea of not guilty was entered, there was little doubt that the defendant, Mrs. Henry, would be found guilty; and the best that defense attorneys could seriously hope for was a qualified verdict, calling for life imprisonment. The newspapers and the populace clamored for the death penalty. The district attorney, and the hundreds of spectators who crowded into the courtroom, felt that the defendant should receive a capital verdict. They were not disappointed when the verdict was returned. Justice probably prevailed; but, in the fever heat of public sentiment, the conduct of the trial involved an amazing number of irregularities. When these were brought to the attention of the Supreme Court of Louisiana, a unanimous decision reversing and remanding was inevitable. Concurring, Justice Odom declared, "This court must, in the interest of the orderly administration of justice, express its disapproval of the loose and highly prejudicial procedure which the record shows was tolerated."[26]

The irregularity which most impressed Justice Odom was the fact that the trial judge, knowing the aroused state of public opinion, permitted the courtroom to be overcrowded and made no serious effort to check hostile demonstrations of the audience or to counteract the prejudice necessarily resulting therefrom. Justice Odom recognized that outbursts and manifestations may occur without amounting to reversible error, but declared that it was the duty of a trial judge to promptly check such outbursts and instruct the jury to disregard them.

Justice Higgins, speaking for the court, discussed a number of other irregularities which had been called to its attention. One concerned questionable trial tactics of the district attorney. In asking for the death penalty, one of the assistant district attorneys had declared that due to political manipulations of parole and pardon boards, a criminal sentence for life was often released after serving only a few years. In holding that this was reversible error, the court followed a similar decision in *State v. John-*

25. 196 La. 217, 198 So. 910 (1940).
26. 196 La. at 264, 198 So. at 925.

son,[27] where the district attorney had declared that the law permitting a qualified verdict was "a farce" because those sentenced to life imprisonment were usually turned loose after a comparatively short time. It is interesting to compare the companion case of *State v. Burks*,[28] where it was held proper for the district attorney to tell the jury that he was going to ask the judge to charge them on the law with respect to pardon and paroles "and that the average term served by prisoners sentenced to life imprisonment is not more than ten years." In the *Burks* case, the statement made was not nearly as strong as in the *Henry* case, and no effort was made to impute misconduct and political influence to the pardon and parole boards.

Also, the widow and seventeen-year old daughter of the victim had been paraded in immediately after the jury was sworn and seated with the state's counsel, within the rail and facing the jury during the trial. This was done for the publicly announced purpose of arousing the sympathy of the jury in aid of the state's case. The court held this to be reversible error[29] and purported to distinguish a closely analogous Alabama case[30] where the parading of a widow and five small children of the deceased before the jury was not considered a ground for reversal. The points of distinction were that, (1) in the instant case the special prosecutor had announced his intention to prejudice the jury by a newspaper statement; (2) the trial judge, in the case at bar, permitted the bereaved family to sit inside the rail, while in the Alabama case, they were required to sit outside the rail; and (3) the verdict in the instant case was murder, while the Alabama court, in declining to review the matter, had expressly considered the fact that the verdict was only manslaughter. Whether or not our supreme court sufficiently distinguished the case from a sister jurisdiction, which had been urged upon it as controlling, presents a neat question. The all-important consideration is that the court has taken a very definite stand against the use of any questionable tactics by district attorneys. Justice Higgins took pains to re-emphasize the proper role of the district attorney as an impartial servant of the law of the state, whose primary purpose should be the furtherance of justice, and not conviction. The opinion quotes from Justice

27. 151 La. 625, 632, 92 So. 139, 142 (1922).
28. 196 La. 374, 377, 199 So. 220 (1940).
29. 196 La. 217, 253, 198 So. 910, 921 (1940).
30. Swindle v. State, 27 Ala. App. 549, 176 So. 372 (1937).

Sutherland of the United States Supreme Court, who, in referring to the function of the district attorney, said, "He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[31] The court further stressed this duty of impartiality when it condemned the use of a special assistant district attorney who had been employed by the deceased's family to demand a capital verdict.[32]

In view of the numerous errors affecting substantial rights of the accused which had been committed during the trial, the court expressly declared that it did not deem it necessary to decide that any particular irregularity, standing alone, would have been sufficient reason for an annulment of the verdict and sentence and the granting of a new trial. Probably such conduct as the use of the deceased's family in an effort to influence the jury might not, by itself, justify a reversal. However, taking that along with other instances of over-zealous activity by the district attorney, the court was certainly justified in its decision.

Conduct of the District Attorney

Several decisions involved alleged irregularities in the opening statement.[33] In *State v. Shuff*[34] an objection to the opening statement of defense counsel was sustained on the ground that the statement was not confined to facts which might be proved by admissible evidence. The supreme court, in holding that there was no error, pointed out that the scope and extent of the opening statement is within the discretionary control of the trial judge, and that a conviction will not be set aside for error in the exercise of such discretion unless the rights of the defendant are plainly violated.

31. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

32. 196 La. at 230, 198 So. at 914. Justice Higgins declared "In the case of State v. Tate, 185 La. 1006, 171 So. 108, we held that a prosecuting attorney must be impartial in conducting a criminal case since he is a quasi-judicial officer, that he represents the state, and the state seeks justice only, and that it is as much the duty of the district attorney to protect the defendant under his constitutional and statutory rights as it is to see than no guilty party escapes."

33. Article 333 of the Code of Criminal Procedure, which sets forth the order of procedure in a criminal trial, provides that the district attorney shall make an opening statement "explaining the nature of the charge and the evidence by which he expects to establish the same." It is optional whether defense counsel shall make a statement.

34. 3 So. (2d) 278 (La. 1941).

In *State v. Childers*[35] it was held proper to permit the district attorney in his opening statement to the jury to read the statutes defining the offense with which the defendant was charged.

In *State v. Hutton*[36] and in *State v. Johnson*[37] the district attorney read the confession of the defendant to the jury in his opening statement. This procedure was objected to on the ground that at the time the opening statement was made the question of the admissibility of the confession had not been passed on. In both cases, the court held that, since the confession was properly introduced in evidence later in the trial, no error had been committed which prejudiced the defendant. In cases where the admissibility of a confession is in doubt the district attorney must proceed cautiously in his opening statement. If he fails to refer to the confession, he cannot later introduce it in evidence.[38] If he reads the confession in his opening statement, and for some reason it proves inadmissible as evidence, there would be a reversible error.[39]

Article 374 of the Code of Criminal Procedure provides that it is not permissible, in the examination of a witness, "to propound a question which assumes as true that which the jury alone are charged with finding or which assumes as proven facts which have not been proven." In *State v. Wilburn*,[40] a manslaughter case, the defendant urged that the killing was in self-defense, and claimed that a cut on his back had been inflicted by the deceased. The state contended that defendant cut himself or had someone else do it. In cross-examining the defendant, the district attorney asked, "No but you have a lot of henchmen around your place that could have done it, haven't you?"[41] The court held that this was a true query and was not an assumption that defendant kept other persons around to assist him in violating the law.

State v. Smith[42] applied Article 381 of the Code of Criminal Procedure, which provides that "counsel may argue to the jury both the law and the evidence of the case but must confine themselves to matters as to which evidence has been received, or of

35. 196 La. 554, 199 So. 640 (1940).
36. 3 So. (2d) 549 (La. 1941).
37. 3 So. (2d) 556 (La. 1941).
38. See Note (1940) 3 LOUISIANA LAW REVIEW 238.
39. See State v. Cannon, 184 La. 514, 520, 166 So. 485, 487 (1936).
40. 196 La. 113, 198 So. 765 (1940).
41. 196 La. at 118, 198 So. at 766.
42. 196 La. 652, 199 So. 791 (1940).

which judicial cognizance is taken." In that case the district attorney argued that the jury might infer from the evidence, as *he* did, that the deceased was robbed upon his first visit to defendant's house, and was killed when he later returned to recover his money. There was no evidence to support this inference by the district attorney. Counsel for defendant objected and moved for a new trial; but the trial judge merely instructed the jury to disregard the remarks if they were not borne out by the evidence. The supreme court held that the trial judge erred in refusing to grant a new trial because of the injury sustained by the defendant as a result of these remarks by the district attorney. Justice Ponder pointed out that the effect of this type of improper argument could not be cured by the trial judge's charge to disregard the remarks.

State v. Shuff[43] was a prosecution for larceny of a heifer. The trial judge had refused to instruct the jury to disregard the assistant district attorney's statement that, "there has been cattle stealing going on in that community for quite a while, for years," on the ground that such an instruction would place the court in the position of commenting on the evidence. The jury had been instructed to disregard statements that were not relevant to the evidence, and the assistant district attorney had been told to confine himself to the evidence in the record or logical conclusions that might be drawn therefrom. The supreme court held that the trial court's ruling and instruction were proper.

The district attorney's reference to defendant's saloon as a "negro joint" was held not to have injured the defendant in *State v. Wilburn*,[44] since the trial judge immediately instructed the jury to disregard the remark and cautioned the district attorney not to use the expression again.

Conduct of the Judge

Article 384 of the Code of Criminal Procedure provides that the judge "shall have the right to instruct the jury on the law but not on the facts of the case." In *State v. Richey*[45] there was evidenced tending to show that the third time defendant shot the deceased was while he was lying face down and helpless on the ground. The trial judge's charge to the jury contained a statement that the shooting and killing of an assailant after he had

43. 3 So. (2d) 278 (La. 1941).
44. 196 La. 113, 198 So. 765 (1940).
45. 3 So. (2d) 285 (La. 1941).

been disarmed and while he was standing with his back to the slayer would be murder and not justifiable in self-defense; and that if a person inflicted a wound upon another while acting in self-defense and afterwards inflicted another after his antagonist had declined all further combat and was fleeing from him, and each wound was sufficient to have produced death, he might be adjudged guilty of murder in inflicting the last wound. The supreme court held that this charge did not constitute a comment on the facts of the case.

State v. Childers[46] reiterated the rule that it is not improper for a trial judge to make remarks in the presence of the jury, giving his reasons for admitting or excluding evidence, or stating the purpose for which evidence is offered or admitted.

In *State v. Sims*[47] the trial judge refused to give certain special charges to the jury, on the ground that they were covered by the general charge. The court held that since the general charge was not in the record, no request having been made that it be given in writing, the refusal of the trial judge to give the special charges was not subject to review.

Recusation of Judge

Article 303 of the Code of Criminal Procedure lists the causes for which a judge may be recused. This article was considered in *State v. Hutton.*[48] The defendant Elie Hutton and his younger brother, Willie Hutton, had broken into a warehouse with the intent to steal. Willie was tried first before Judge O'Hara, who stated in the course of the trial, that if Elie Hutton, who was thirty years old, should be convicted, he should receive a heavier penalty than nineteen year old Willie. When Elie Hutton was brought to trial he sought to have Judge O'Hara recused on the ground that he was "interested in the cause" within the meaning of Article 303. Judge O'Hara had stated in his per curiam that he was not acquainted with the defendant, knew nothing whatsoever about him until these cases were brought before him, and that he had no interest whatsoever in the outcome of the trial. In upholding Judge O'Hara's refusal to recuse himself, the supreme court pointed out that to have " 'an interest in a cause,' " within the meaning of Article 303, " 'some fact must exist that leads to the conclusion that it is to the judge's personal advan-

46. 196 La. 554, 199 So. 640 (1940).
47. 197 La. 347, 1 So. (2d) 541 (1941).
48. 3 So. (2d) 549 (La. 1941).

tage, whether he would be influenced by such advantage or not, to decide the case or to seek to bring about a decision therein, for or against one of the parties to it, without reference to the law and evidence.' "[49]

Right of Defendant to be Confronted with Witnesses

In *State v. Wilburn*,[50] which was a manslaughter prosecution, a complete hospital record, the hospital chart of the deceased and a report of death signed by the hospital superintendent, were introduced in evidence to prove the cause of death of the deceased. The court held that this did not violate the provisions of the Code of Criminal Procedure[51] and of the Louisiana Constitution[52] which grant the accused the right to be confronted with the witnesses against him. The evidence presented was held not to be a "witness" within the meaning of those provisions.[53]

Bill of Exception—Motion for a new Trial—Motion in Arrest of Judgment

Only well settled points of law in regard to bills of exception, motions for new trial, and motions in arrest of judgment were considered by the supreme court during the last term.

Failure of the defense attorneys to have bills of exception signed by the trial judge was considered in two cases. *State v. Seiley*[54] held that a motion for a new trial could not be based on unsigned bills of exception, and *State v. Childers*[55] held that after an appeal had been taken it was too late to have the case remanded to have a bill of exception presented to the trial judge for his signature.

In *State v. Robertson*[56] there was a discrepancy in the statement of counsel for the defense in his bill of exceptions and that made by the trial judge in his per curiam. The court accepted the statement of the trial judge.

Article 509 of the Code of Criminal Procedure, which lists the reasons for granting a new trial was involved in several cases. In *State v. Carter*[57] the court again repeated the general rule that

49. 3 So. (2d) at 551.
50. 196 La. 113, 198 So. 765 (1940).
51. Art. 365, La. Code of Crim. Proc. of 1928.
52. La. Const. of 1921, Art. I, § 9.
53. State v. Hayden, 171 La. 495, 131 So. 575 (1930), was cited as authority for this holding.
54. 197 La. 405, 1 So. (2d) 675 (1941).
55. 196 La. 554, 199 So. 640 (1940).
56. 196 La. 982, 200 So. 320 (1941).
57. 197 La. 155, 1 So. (2d) 62 (1941).

a motion for a new trial, based on an allegation that the verdict is contrary to the law and evidence, presents nothing for review by the supreme court. Compare, however, the case of *State v. Wilson*,[58] where the defendant was granted a new trial because there was no evidence at all of a certain fact, the proof of which was essential to a valid conviction. The rule that newly discovered evidence which is merely cumulative is not a good ground for a new trial was applied in *State v. Wilburn*.[59]

To avail as a ground for a new trial, any irregularity in proceedings, not patent on the face of the record, must be objected to at the time of its occurrence and a bill of exceptions reserved to the adverse ruling of the court upon such objection. In *State v. James*[60] defense counsel had moved for a new trial on the ground that the accused was insane at the time of the trial. The supreme court held that the failure to object and reserve a bill of exceptions to the trial court's ruling that defendant was sane operated as a waiver of such objection and an acquiescence in the court's ruling.[61]

The motion in arrest of judgment was discussed, and Articles 517 and 518 of the Code of Criminal Procedure[62] were applied in two cases. In *State v. Carter*[63] it was held that defendant's motion in arrest of judgment had been properly overruled for failure to specifically point out "any substantial defect patent upon the face of the record." *State v. Seiley*[64] held that a motion in arrest of judgment based on purely incidental questions arising during the progress of the trial and upon defects which could not be "ascertained without an examination of the evidence," had been properly overruled.

Habitual Offenders—Effects of Pardon

In *State v. Childers*[65] the question was again raised as to whether a person who had been convicted and then pardoned

58. 196 La. 156, 198 So. 889 (1940).
59. 196 La. 113, 198 So. 765 (1940).
60. 196 La. 459, 199 So. 391 (1940).
61. As a makeweight factor, the court pointed out that, in its opinion, the evidence did show the defendant to be sane. See 196 La. at 464, 199 So. at 392.
62. "Art. 517. A motion in arrest of judgment lies only for a substantial defect, patent upon the face of the record."
"Art. 518. No defect that is merely formal, or cured by verdict, or that can not be ascertained without an examination of the evidence, is good ground for arresting judgment."
63. 197 La. 155, 1 So. (2d) 62 (1941).
64. 197 La. 405, 1 So. (2d) 675 (1941).
65. 197 La. 715, 2 So. (2d) 189 (1941).

would, if he were subsequently convicted of other offenses, be considered a second offender and within the Louisiana Habitual Offender statute.[66] The court reaffirmed a prior holding[67] that a full pardon, granted during or after the serving of a sentence for a felony erases the offense and restores the individual offender to the status which he enjoyed prior to conviction. Thus it was held that the defendant in the case at bar, who had been previously convicted and then pardoned, could not be charged as a second offender.

VIII. PROCEDURE

Exceptions, Rules and Motions

In a proceeding by the Attorney General[1] to remove a district judge from office, the defendant excepted to the sufficiency of citation and service. Prior to the filing of the exception the defendant judge, without reservation, had moved for an enlargement of the time within which to plead; and similarly without reservation, had cross-examined one of plaintiff's witnesses, whose testimony was taken in advance of trial. The declinatory exception was overruled by the court without any consideration of the questions which it attempted to present. The recognized rule that any general appearance waives all defects in the citation and service was applied.[2]

Five cases involved questions concerning the dilatory exceptions (properly speaking). The exception of misjoinder of parties was involved in two of these cases.[3] Both applied the conventional test of whether the petition shows that the parties joined have a common interest in the subject matter of the suit. The first of these cases[4] gave added sanction to the practice of cumulating contrary and inconsistent demands in the petition, if presented by distinctive alternative allegations.

Two lines of Louisiana decisions on the subject of nonjoinder of parties exist simultaneously and apparently are contradictory.

66. La. Act 15 of 1928 [Dart's Crim. Stats. (1932) §§ 709-711].
67. State v. Lee, 171 La. 744, 132 So. 219 (1931).
1. Under the provisions of La. Const. of 1921, Art. IX, §§ 1, 5.
2. Stanley v. Jones, 197 La. 627, 2 So.(2d) 45 (1941).
3. Board of Com'rs of Orleans Levee Dist. v. Shushan, 197 La. 598, 2 So.(2d) 35 (1941); Seybold v. Fidelity & Deposit Co. of Maryland, 197 La. 287, 1 So. (2d) 522 (1941).
4. Board of Com'rs of Orleans Levee Dist. v. Shushan, 197 La. 598, 2 So. (2d) 35 (1941).

The first holds that the exception of nonjoinder is a dilatory exception which is waived unless filed in limine.[5] The second is to the effect that the absence of necessary parties, although not excepted to by defendant, must be noticed *ex mero moto* by the court.[6] In *De Hart v. Continental Land & Fur Company,*[7] these two principles clashed. Some of the heirs of the alleged owners of certain lands sued to recover damages caused by the defendant's trespass thereon. No exception alleging the nonjoinder of the plaintiffs' coheirs was filed by the defendants; but after the trial and before the rendition of any judgment, the defendants moved to reopen the case for the purpose of allowing them an opportunity to compel plaintiffs to make their coheirs parties to the suit. This motion was overruled by the trial judge on the ground that the objection was waived by the defendants' failure to file the exception in limine. On appeal, it was held that "according to the technical rules of pleading, the ruling was correct." Nevertheless —and curiously enough—the appellate court also held that under the circumstances disclosed by the record, the trial judge's action in overruling the motion was an abuse of his discretion. The actual result reached by the case seems sound; but it is unfortunate that the supreme court did not take advantage of its opportunity to throw some much-needed light on the subject of the exception of nonjoinder of parties.[8]

In another case,[9] the defendant excepted to the nonjoinder of a third person. The allegations of fact in the exception of nonjoinder were ambiguous. On the one hand, these allegations were susceptible of the construction that the third party alone was liable to plaintiff on the cause of action asserted; and on the other, they might be interpreted to mean that both defendant and the third party were liable. The trial judge's maintaining of the exception was held erroneous under either construction. If the defendant was not liable to plaintiff, this was a matter of defense which could be urged only in the answer; and if the defendant and the third party were both liable, the liability was a solidary

5. Moore v. Gray, 22 La. Ann. 289 (1870); Carolina Portland Cement Co. v. Southern Wood Distillates & Fiber Co., 137 La. 469, 68 So. 831 (1915). On this point, see McMahon, Parties Litigant in Louisiana—III (1939) 13 Tulane L. Rev. 385, 410.

6. See cases cited in McMahon, Louisiana Practice (1939) 413, n. 73.

7. 196 La. 701, 200 So. 9 (1940).

8. The subject is discussed briefly in McMahon, Louisiana Practice, 413, n. 73; and in greater detail in McMahon, supra note 5, at 401-411.

9. Huguet v. Louisiana Power & Light Co., 196 La. 771, 200 So. 141 (1941).

one and plaintiff was under no necessity of suing both obligors together.

In *Gast v. Gast*,[10] the plaintiff, after securing a judgment against the defendant, ruled a third party into court to show cause why a mortgage given the latter by the judgment debtor should not be annulled. The grounds of nullity urged were that it was a mere simulation, and if not, then a fraudulent preference. To this rule the defendant filed an exception of no right of action, apparently to urge the objection that neither the action in simulation nor the revocatory action may be instituted under summary process. The trial judge's action in maintaining this exception insofar as the revocatory action was concerned was reversed. The proper method of objecting to the summary process was held to be the dilatory exception to the mode of procedure. The exception of no right of action could not urge any objection to the summary process, which was deemed waived by the failure of the defendant to interpose the proper exception in limine.

Four cases dealt with peremptory exceptions. Of these, one applied the trite rule that for the purposes of the trial of the exceptions of no right and no cause of action, the facts set forth in the petition and annexed documents must be accepted as being true.[11] Another case applied the general rule that ordinarily matters of affirmative defense cannot be raised through the medium of exceptions of no right and no cause of action.[12] The defense that the charter of the corporate defendant did not empower it to borrow money was held to be one which should have been raised by the answer.

In a third case, the exception of the prescription of three and five years, leveled at a suit for an accounting and liquidation of a partnership, was overruled.[13] The action was held barred only by the prescription of ten years, which had not yet run its course. In the last of the cases involving peremptory exceptions, the court overruled a plea of res judicata.[14] The code requirements[15] of the identity of the demand, cause of action, parties and qualities were held sacramental. A judgment of separation on the ground of the cruel treatment of his wife by a husband was held

10. 197 La. 1043, 3 So. (2d) 173 (1941).
11. Carruth v. Hollister, 198 La. 212, 3 So. (2d) 592 (1941).
12. Stafford's Estate v. Progressive Nat. Farm Loan Ass'n, 198 La. 122, 3 So. (2d) 532 (1941).
13. Joyner v. Williams, 197 La. 43, 200 So. 815 (1941).
14. Lloveras v. Reichert, 197 La. 49, 200 So. 817 (1941).
15. Set forth in Art. 2286, La. Civil Code of 1870.

not res judicata of the question of whether the two year separation was due to the fault of the wife, in a subsequent suit for divorce brought by the husband on the ground of living separate and apart for more than two years.

The code provision dealing with the abandonment of the suit because of the plaintiff's failure for a period of five years to take any steps in its prosecution came up for its annual reexamination in *Sliman v. Araguel.*[16] There, the only action taken within this period which might be construed as steps in the prosecution of the suit was the plaintiff's effort to obtain an agreed statement of facts from the defendant, and the continuance of the trial by consent at the request of counsel for defendant. The pertinent code provision again was construed as requiring a formal move before the trial court with the intention to hasten judgment. Neither the extra-judicial action of the plaintiff in attempting to seek an agreed statement of facts nor his consent to the defendant's request for a continuance were deemed sufficient to bar defendant's motion to have the suit dismissed on the ground of abandonment.

Production of Evidence

Three cases presented the same issues with respect to the reasonableness of subpoenas *duces tecum.*[17] In all, the Attorney General and the District Attorney of Orleans Parish petitioned the Criminal District Court of that parish for an open hearing[18] for the purpose of investigating complaints that certain trapping and mineral leases on public lands had been procured fraudulently by certain corporations and individuals. Summonses to various individuals to appear at such hearing and subpoenas *duces tecum* for the production of the records of certain corporations were prayed for by petitioners and issued by the court. In all three cases the subpoena *duces tecum* was a blanket one which described no particular records, but ordered the production at one time of all the books, records and documents of the corporation. In each case the corporation, through the custodian of its records, moved to quash and suppress the subpoena *duces tecum.* Among the grounds relied on in such motion was a contention that the subpoena *duces tecum* was "arbitrary, capricious and confisca-

16. 196 La. 859, 200 So. 280 (1941), noted in (1941) 3 LOUISIANA LAW REVIEW 835.

17. In re Louisiana Coastal Lands, 197 La. 701, 2 So. (2d) 184 (1941); In re Delta Development Co., 197 La. 712, 2 So. (2d) 188 (1941); In re Suburban Coast Realty Co., 197 La. 713, 2 So. (2d) 189 (1941).

18. Under the provisions of Art. 156, La. Code of Criminal Procedure, as amended by La. Act 24 of 1934 (1 E.S.).

tory, thereby violating the Fourth and Fourteenth Amendments of the Federal Constitution, and Section 7 of Article 1 of the Constitution" of Louisiana. Such motions were overruled by the trial court, and the corporations invoked the supervisory jurisdiction of the supreme court. Under an application of the rules on the subject consecrated by the provisions of the Code of Practice and the jurisprudence interpreting them, the supreme court held the subpoenas *duces tecum* unreasonable and remanded the cases to the trial court for the modification thereof. Mr. Chief Justice O'Niell concurred in the result; but stated that since the investigation was in the nature of a criminal proceeding, the rules of the Code of Practice were inapplicable.

The Trial

Well settled principles of law were applied in one case[19] involving a litigant's right to a continuance. In the trial below the relator instituted an action to set aside the entire proceedings in the matter of the liquidation of a corporation. On the day fixed for the trial the relator, through his counsel, moved for a continuance because of his serious illness and confinement to a hospital. Counsel for the liquidator resisted such motion and indicated his willingness to admit that the relator, if present, would testify to the facts outlined by relator's counsel.[20] The trial judge overruled the motion and relator applied for supervisory writs to review such ruling. The liquidator moved to recall the supervisory writs on the ground that relator having secured a full measure of relief by the supreme court's order staying proceedings, only a moot question was presented. After reiterating the rule that the right to a continuance on the ground of a litigant's absence was a matter resting within the discretion of the trial judge, the higher court held that the question presented had become moot and recalled the alternative writs.

An interesting set of facts was presented in, and a useful precedent was set in, *Clifton v. Tri-State Transit Company of Louisiana.*[21] As a result of a collision between a bus operated by

19. In re Westwego Moss Co., 196 La. 168, 198 So. 893 (1940).

20. "When one of the parties to a suit prays for continuance on account of the absence of one or several of his witnesses, the adverse party may require him to disclose on oath what facts he intends to prove by such witnesses; and if such party admit those facts, or if he merely admit, that the witness would, if present, swear to such facts, the court shall proceed to the trial, as if such witness had been examined; . . . ." Art. 466, La. Code of Practice of 1870.

21. 197 La. 222, 1 So. (2d) 84 (1941).

the defendant and an automobile, three passengers on the bus received personal injuries and the operator of the automobile sustained personal injuries. In four different suits filed in the district court having territorial jurisdiction over the situs of the accident, all of the injured persons asserted demands against the defendant bus line and its insurance carrier for damages. A large number of defendant's witnesses lived in Texas and in distant parts of Louisiana. The aggregate of the claims exceeded the maximum limit of the defendant's casualty policy. On these grounds the defendant ruled the various plaintiffs into court to show cause why the four suits should not be consolidated for trial. The trial judge overruled the motion to consolidate, and to review this decision the defendant invoked the supervisory jurisdiction of the supreme court. The latter vacated the ruling complained of, made the alternative writ of mandamus peremptory, and ordered the consolidation of the cases. Since all of the cases involved the alleged negligence of the operator of the bus and would require consideration of the same evidence, the reviewing court held that a multiplicity of trials and unnecessary delays and expenses would be avoided by the consolidation.

A code article[22] provides that the judicial confession "amounts to full proof against him who has made it." This provision, as well as its jurisprudential companion, "estoppel," was invoked in one case[23] by the plaintiffs, who sued their mother to be recognized as the full owners of certain property alleged to have been the separate property of the plaintiffs' father. The defendant mother contended that, in truth and fact, the property belonged to the community which had existed between plaintiffs' father and herself, and hence that defendant was the owner of a half interest therein. In an inventory taken some years before, in connection with the mother's application to be confirmed as natural tutrix of her children, the property in question had been listed as the separate property of her husband. *Inter alia,* plaintiffs in the instant case relied upon this fact as constituting a judicial confession of, and as estopping defendant from contesting, the full ownership of the property by the plaintiffs. The contention of estoppel was overruled by the supreme court on the ground that the plaintiffs had not been deceived or prejudiced by this recital in the inventory. The well settled rule consecrated by the code provision relied on operates only as to judicial confessions made

22. Art. 2291, La. Civil Code of 1870.
23. Sanderson v. Frost, 198 La. 295, 3 So. (2d) 626 (1941).

in the litigation in which it was invoked, and was applied to dispose of the principal contention of plaintiffs.

Appeals and Appellate Procedure

One of the most important code provisions on this subject denies the right of appeal to any litigant against whom a judgment has been rendered, if he shall have confessed judgment or shall have executed it voluntarily.[24] The only case on this phase of the subject presented a question of voluntary execution. Plaintiffs were unsuccessful in the trial court in asserting their claim against their mother to be decreed the full owners of certain property, the judgment recognizing the half interest of the defendant. Following an appeal from this judgment, plaintiffs acted jointly with the defendant in granting to a third person the right to cut timber on the land and accepted one-half of the proceeds of this contract. These facts were urged by the appellee in her motion to dismiss the appeal as constitutiong a voluntary execution of the judgment appealed from. This motion to dismiss the appeal was overruled by the appellate court for the reason that such actions by the appellants did not constitute the unconditional, voluntary and absolute acquiescence in, and abandonment of the right to appeal from, the judgment of the trial court which the code provision contemplates.[25]

Five cases presented questions as to the appellate jurisdiction of the supreme court, to which all had been appealed. In the first of these,[26] it was held that the supreme court had no jurisdiction to entertain an appeal from an order appointing an administrator of a succession where the value of the entire estate was less than $2,000. In the second,[27] plaintiff attempted to obtain the review of a judgment rejecting his claim for $98 against a succession. Prior to the filing of the appellant's petition in the lower court a judgment homologating the administrator's tableau of distribution had become final, leaving only $30 for further distribution. The appeal was dismissed under a holding by the supreme court that, since the fund to be distributed was not in excess of $2,000, it had no jurisdiction over the appeal. In the third case,[28] the appellant had filed suit to rescind a sale of land on two alternative causes of action: first, to resolve the sale for nonpayment of the $600

24. Art. 567(1), La. Code of Practice of 1870.
25. Sanderson v. Frost, 198 La. 295, 3 So. (2d) 626 (1941).
26. Succession of Lecompte, 196 La. 287, 199 So. 122 (1940).
27. Succession of Banker, 197 La. 229, 1 So. (2d) 87 (1941).
28. Templet v. Babbitt, 196 La. 303, 199 So. 127 (1940).

purchase price; and in the alternative, to annul it on the ground of lesion beyond moiety under allegations that the land was worth more than $2,000. Plaintiff was compelled by the trial judge to elect which of these demands he would prosecute, and chose to proceed on his first cause of action. Subsequently, the latter was dismissed under the defendant's exceptions of no right and no cause of action. From this judgment plaintiff appealed, and defendant moved to dismiss the appeal on the ground that there was nothing in the record to show that the supreme court had appellate jurisdiction. The record was held to establish affirmatively the jurisdiction of the court. Since the appeal presented for review the order compelling plaintiff to elect, as well as the judgment rejecting his first demand, the court could accept the allegation in the petition as to the value of the land. The fourth case[29] presented, in effect, merely an issue as to whether more than $2,000 was involved, and the appellate court held that both the affidavits filed in the appellate court and the evidence introduced below showed clearly that more than the jurisdictional amount was involved in the appeal.

A motion to dismiss the appeal on the ground of lack of jurisdiction was maintained in *State v. Cook*.[30] The appellant unsuccessfully urged a number of contentions in resisting the motion to dismiss. It was argued that the amount involved was more than $2,000 since the truck and trailer decreed forfeited by the trial court was worth more than that amount. This contention was rejected for the reason that at public auction both had brought a price of only $1,201. It was contended further that the supreme court had jurisdiction since the case presented a controversy over the legality of the gasoline tax. Since such an issue had been eliminated by the appellant's payment of the tax before any plea was made in response to the suit, it was held that there was no such controversy at the time the matter was submitted to the trial court for a decision. The last contention that the appeal was in a case involving a forfeiture invoked by a parish, municipality, board, or subdivision of the state and as such within the jurisdiction of the supreme court was held without merit, since the forfeiture was one invoked by the state itself.

In two of the cases[31] where the supreme court held that it was

29. Frierson v. Cooper, 196 La. 450, 199 So. 388 (1940).
30. 197 La. 1027, 3 So. (2d) 114 (1941).
31. Succession of Lecompte, 196 La. 287, 199 So. 122 (1940); State v. Cook, 197 La. 1027, 3 So. (2d) 114 (1941).

without jurisdiction, the appeals were transferred to the proper intermediate appellate court under the pertinent statutory provision.[32] In the third, since no appellate court would have jurisdiction to review the judgment complained of, the appeal was dismissed.[33]

Eight cases presented questions concerning the procedure of prosecuting appeals. Of these, one[34] involved a matter of the diminution of the transcript under peculiar facts and the application of a trite rule. In two of the other cases,[35] the motion to dismiss was leveled primarily at the fact that the order of appeal was not obtained by petition and that citation of appeal was neither prayed for nor served on the appellees. In the first of these two cases,[36] both parties and the court agreed that the case might be tried in vacation and that an appeal was to be granted at the time the court rendered its decision. Some time later a judgment was rendered by the court and subsequently, without the party cast moving or petitioning formally for it, an order of appeal was rendered by the court. The motion to dismiss was overruled on the ground that under this agreement, which was not unusual in the country parishes, the appeal was to be granted without the necessity of a formal motion or petition therefor. In the second of these two cases,[37] there was likewise an agreement by all parties and the court that the matter presented by plaintiffs' rule might be tried during vacation. It was so tried, and a judgment maintaining defendants' exceptions and discharging plaintiffs' rule was rendered by the court in chambers in the presence of counsel for all parties. Immediately thereafter, and while all counsel were still in chambers, an appeal was granted upon written motion of plaintiffs. The motion to dismiss was denied on the ground that, under the agreement of the parties, the court was open on the day fixed not only for the trial of the rule but also to entertain and grant a motion of appeal. Under the facts of the case, citation of appeal upon the appellees was held unnecessary.

Two very interesting cases presented questions concerning the procedure of appealing from an order appointing a receiver.

32. La. Act 56 of 1904 as amended by La. Act 19 of 1912 [Dart's Stats. (1939) § 1427].

33. Succession of Banker, 197 La. 229, 1 So. (2d) 87 (1941).

34. Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768 (1940).

35. Wilson v. Lee, 196 La. 271, 199 So. 117 (1940); Succession of Price, 196 La. 172, 198 So. 894 (1940).

36. Wilson v. Lee, 196 La. 271, 199 So. 117 (1940).

37. Succession of Price, 196 La. 172, 198 So. 894 (1940).

Sklar v. Kahle[38] confirmed the rule of prior jurisprudence that the appointment of receivers or liquidators of partnerships is not governed by the statutory provisions regulating the receivership of corporations.[39] The delays for perfecting an appeal from an order appointing a receiver of a partnership and for filing the transcript in the appellate court were held to be governed by the general statutory law on the subject.[40] Such an appeal would have effect only as a devolutive one. In the other case on this phase of the subject,[41] an interested person who was not a party to the proceedings below presented an affidavit establishing her interest in the matter and appealed suspensively from an order appointing a temporary receiver for a corporation. The appellee moved to dismiss the appeal on the grounds that the appellant was not a party to the proceedings below, that no suspensive appeal from such an order could be prosecuted, and that the order appealed from was an interlocutory one causing no irreparable injury. The court overruled the motion to dismiss under a holding that the appeal was governed by the provisions of the Receivership Act[42] which sanctioned the procedure employed, and not by the general laws governing appeals. In view of the subsequent decision by the court on the merits of the appeal, where it was held that an ex parte appointment of the temporary receiver could be made under the equity powers of the trial court even though the Receivership Act did not contemplate such procedure,[43] the decision here is quite interesting.

One of the modern statutes[44] which has done much to soften the rigors of a few of our rules on the prosecution of appeals provides that no appeal may be dismissed because of any informalities or irregularities of the transcript unless the appellant is given two full legal days to cure the defects complained of. The act in question was involved in two cases. In one,[45] the statute was applied so as to grant appellants additional time for curing the de-

38. 196 La. 137, 198 So. 883 (1940).

39. La. Act 159 of 1898, as amended by La. Act 117 of 1916 and La. Act 7 of 1926 [Dart's Stats. (1939) §§ 1209-1218].

40. Art. 883, La. Code of Practice of 1870; La. Act 106 of 1908 [Dart's Stats. (1939) § 1410].

41. Foster v. F. H. Koretke Brass & Mfg. Co., Ltd., 197 La. 401, 1 So. (2d) 674 (1941).

42. La. Act 159 of 1898, as amended by La. Act 117 of 1916 and La. Act 7 of 1926 [Dart's Stats. (1939) §§ 1209-1218].

43. See the discussion of Foster v. F. H. Koretke Brass & Mfg. Co., Ltd., 198 La. 402, 3 So. (2d) 668 (1941) supra, p. 259.

44. La. Act 234 of 1932 [Dart's Stats. (1939) § 1978.1].

45. Nunez v. Serpas, 198 La. 415, 3 So. (2d) 673 (1941).

ficiencies of the transcript, which contained neither a note of evidence nor a statement of facts. In the other,[46] the act was held not to be applicable to a case where the appellant abandoned the appeal by failing to lodge the transcript in the appellate court on or before the return day or the three days of grace following. The duty of filing the transcript in the supreme court was held to be one imposed upon the appellant and not upon the clerk of court. This case affirmed the already settled rule that the three days of grace are allowed only after the original, and not after an extended, return day.

In *Pittman v. Lilly*,[47] the court followed its prior jurisprudence on both of the points presented by the appellee's motion to dismiss the appeal. A judgment dissolving an attachment, although recognized as an interlocutory one, was again held to be appealable suspensively. The facts that the attachment issued on the ground of the nonresidence of the defendant, that the latter had been cited personally, and that the trial court had found that the defendant actually was a resident of Louisiana were not deemed sufficient to deprive the appellant of a suspensive appeal from the judgment dissolving the attachment. That only a $250 attachment bond was furnished by the plaintiff for the issuance of an attachment of $8,000 worth of property and that only a $25 suspensive appeal bond was furnished by the appellant likewise were deemed insufficient to justify the dismissal of the appeal. The court based the latter ruling on the fact that the appellant had not followed the procedure required by the statute concerning complaints of the defects or insufficiency of a judicial bond and permitting the party furnishing such bond to cure its deficiencies within a fixed delay.

Supervisory Jurisdiction and Procedure

The plaintiff in *Fegan v. Lykes Brothers Steamship Company, Incorporated*,[48] presently is running neck and neck with Bertha Brim Ryan, and appears to have some chance of overtaking eventually the celebrated Myra Clark Gaines, in the race for the title of Louisiana's chief litigant. The point involved here cannot be discussed adequately except in the light of a brief history of this protracted litigation. Plaintiff sued under the Jones Act to recover damages for personal injuries alleged to have re-

46. Aaron v. Mizer, 196 La. 481, 199 So. 398 (1940).
47. 197 La. 233, 1 So. (2d) 88 (1941).
48. 198 La. 312, 3 So. (2d) 632 (1941).

sulted from the negligence of defendant, and also for an award for maintenance and cure. In the court of first instance the trial was by jury, and the latter returned a verdict for $10,000 damages for personal injuries and $4,000 under the claim for maintenance and cure. On appeal, the intermediate appellate court annulled the judgment for damages since it found no negligence of the defendant established, set aside the judgment for maintenance and cure, and remanded the case to the trial court to permit the plaintiff a further opportunity to establish the latter claim.[49] The supreme court issued certiorari to review this decision. In such review it was held that the court of appeal had erred in the consideration of certain evidence,[50] but that its action in remanding the case to the trial court for further trial on the claim for maintenance and cure was correct. The case was remanded to the intermediate appellate court for a further consideration of plaintiff's right to damages for personal injury.[51] On the second trial of the cause in the court of appeal, the latter again held that plaintiff had failed to establish the negligence of defendant and again rejected his demand for damages.[52] The supreme court granted a second writ of review. After holding that the intermediate appellate court had committed another error of law,[53] the supreme court reviewed the facts on this phase of the case[54] and amended the verdict of the jury by reducing the award for damages for personal injuries to $7,000. The request of the plaintiff for a reconsideration of the previous judgment remanding the case to the trial court for hearing on the right of the plaintiff to an award for maintenance and cure was denied. It was held that the judg-

49. Fegan v. Lykes Bros. S. S. Co., Inc., 195 So. 392 (La. App. 1940).

50. The trial judge excluded certain reports of the findings and recommendations of a Marine Board of Investigation and the Director of the Bureau of Marine Inspection and Navigation as being hearsay. These reports were held admissible under the provisions of U.S. Rev. Stat. § 882 (1873), 28 U.S.C.A. § 661 (1928) on the ground of being public documents, but were deemed not binding upon the court if found to be unsupported by other proof. 195 So. at 397. The supreme court held such reports inadmissible under the hearsay rule, particularly so since made in an ex parte proceeding to which plaintiff was not afforded any opportunity to be present or represented. It was further held that the federal statute in question was not intended to abolish the rules against hearsay evidence. 196 La. at 550, 199 So. at 638.

51. Fegan v. Lykes Bros. S. S. Co., 196 La. 541, 199 So. 635 (1941).

52. Fegan v. Lykes Bros. S. S. Co., 199 So. 680 (La. App. 1941).

53. In holding that the regulations of the United States Department of Commerce "recommending" certain procedure and precautions for the use of Lyle guns were not mandatory. 3 So. (2d) at 635.

54. Under authority of the provisions of La. Act 191 of 1898, § 2 [Dart's Stats. (1939) § 1449]. Cf. Pipes v. Gallman, 174 La. 257, 140 So. 40 (1932); Wylie v. Shreveport Railways Co., 176 La. 193, 145 So. 513 (1932).

ments of both the court of appeal and supreme court were final on this phase of the case.[55]

An interesting case involving the use of supervisory writs is *Hattier v. Martinez.*[56] Ordinarily, only the regularity of the proceedings and the jurisdiction of the trial court can be reviewed when a person adjudged guilty of contempt invokes the supervisory jurisdiction of the supreme court. No question of fact can be inquired into. The case under discussion established a needed exception to the general rule. The findings of fact were held to be reviewable under supervisory writs when one of the parents is adjudged guilty of contempt for violating a judgment granting the custody of a child to the other.

State ex rel. Kennington v. Red River Parish School Board[57] presented an important question of supervisory jurisdiction. Stated as tersely as possible, the pertinent facts are as follows: In the trial court relatrix originally applied for a mandamus ordering the defendant to recognize her as a probationary teacher and to pay her monthly salary as such. From a judgment issuing the mandamus the defendant appealed. While this appeal was pending, the defendant board recognized her as a probationary teacher, and accepting the recommendation of its superintendent, dismissed her on the grounds assigned therein, and paid her the sum of $404 due as salary up to the date of discharge. Later the intermediate appellate court affirmed the mandamus judgment appealed from.[58] Thereafter the relator sued for and obtained a judgment for $505 as salary due her for the balance of the school session involved. From the judgment as prayed for the defendant board appealed suspensively to the court of appeal. While this second appeal was pending relatrix ruled the defendant board into the trial court to show cause why it should not be adjudged guilty of contempt of court for its failure to comply with the original judgment. After the service of the rule the board applied to the court of appeal for supervisory writs to prevent the trial of the rule for contempt, alleging that the trial court had been divested of jurisdiction in the second case by the perfection of the appeal, and that the contempt proceedings in effect would preclude the prosecution of the suspensive appeal. The intermediate

55. Fegan v. Lykes Bros. S. S. Co., 198 La. 312, 3 So. (2d) 632 (1941).

56. 197 La. 121, 1 So. (2d) 51 (1941). For a further discussion of this case, see supra p. 173.

57. 196 La. 291, 199 So. 123 (1940).

58. State ex rel. Kennington v. Red River Parish School Board, 193 So. 225 (La. App. 1939).

appellate court refused to grant the relief sought, holding that only the supreme court had the general supervisory jurisdiction necessary to grant the writs applied for.[59] Under an application to the supreme court for the identical relief and on the identical grounds, the latter court granted the desired relief and prohibited the further prosecution of the contempt proceedings.[60] Although the facts present a border-line case of supervisory jurisdiction, it would appear that the decisions of both appellate courts are in accord with the prior jurisprudence.[61]

Enforcement of Judgments

This ordinarily fertile field of procedure produced only one case[62] during the past term. There, the well settled rule that the sale of property under a fieri facias is a nullity where the sheriff had not made a prior seizure was invoked by the heirs of a judgment debtor seeking to avoid a judicial sale of immovable property. The court found as a fact that a seizure of the property had been made by the sheriff and it refused to apply the rule invoked.

Conservatory Writs

Douglas Public Service Corporation v. Leon[63] throws added light on the attachment of the debtor's property on the ground that he has mortgaged, assigned or disposed of his property, or is about to do so, with intent to defraud his creditors. Different from the other two conservatory writs which perform functions analogous to that of the resident attachment,[64] the plaintiff who secures an attachment on one of the grounds mentioned above must prove the actual fraudulent intent of the debtor.[65] Here, the supreme court acknowledged that such an intent is subjective, but

59. State ex rel. School Board of Red River Parish v. Kennington, 197 So. 182 (La. App. 1940).

60. State ex rel. Kennington v. Red River Parish School Board, 196 La. 291, 199 So. 123 (1940).

61. Putnam & Norman, Inc. v. Levee, 179 La. 180, 153 So. 685 (1934), and cases cited therein.

62. Turner v. Glass, 197 La. 721, 2 So. (2d) 191 (1941).

63. 196 La. 735, 200 So. 21 (1941).

64. In the case of provisional seizure to enforce the lessor's privilege, all that plaintiff need allege as to the fraudulent intent of the debtor is that plaintiff "has good reasons to believe that said lessee will remove the furniture or property on which he has a lien and privilege out of the premises, and that he may be thereby deprived of his lien." Art. 287, La. Code of Practice of 1870. In the case of sequestration issued to prevent the defeat of plaintiff's privilege by fraudulent disposition of the property, the fact that it lies within the power of defendant to so dispose of the property fraudulently justifies the allegation that defendant will do so. La. Act 190 of 1912, § 1 [Dart's Stats. (1939) § 2156].

65. Douglas Public Service Corp. v. Leon, 196 La. 735, 200 So. 21 (1941), and cases cited therein.

recognized that this intent could be proved by such objective evidence as the acts and declarations of the debtor and the circumstances of the case. The defendant, who was in straitened financial circumstances if not insolvent, attempted to sell certain real estate on which he operated a junkyard. His efforts to dispose of the property, far from being furtive, were conducted openly. The real estate was placed in the hands of a local broker and advertised in a trade journal. The evidence was held insufficient to establish the fraudulent intent of the defendant, and the judgment dissolving the attachment was affirmed. Attorneys' fees of $500 for dissolving the attachment were held not excessive where the trial of the rule to dissolve took nine days and the attorneys briefed and argued the case on appeal.

The trite rule that attorney's fees will not be allowed for the dissolution of a conservatory writ effected through a trial of the case on its merits was again confirmed.[66]

Extraordinary Writs

Mandamus, the extraordinary writ most commonly employed in Louisiana, was involved in three cases decided during the past term. In one of these,[67] it was again held that it was not the proper remedy to effect the rescission of a recorded option given by relators to a third party to purchase immovables. In the second case,[68] the general manager of a corporation sought to have the latter and its secretary-treasurer compelled to sign a stock certificate evidencing his alleged ownership of certain shares. Following the financial reorganization of the corporation the president subscribed to and paid for three hundred shares of new stock. Under a contract made by the president and relator, the latter was to have one hundred nineteen of these shares transferred to him upon his payment to the former of the full par value and the certificate therefor was to be placed in the hands of the secretary-treasurer of the corporation until such time as relator had fully paid for such shares. The unsigned stock certificate in the name of relator representing these one hundred nineteen shares was left in the stock book in the custody of the secretary-treasurer, and later removed by relator without the knowledge or consent of either the president or the custodian of the stock book.

66. Edwards v. Wiseman, 198 La. 382, 3 So. (2d) 661 (1941). For a further discussion of this case, see supra p. 201.

67. State ex rel. Hymel's Heirs v. Johness, Inc., 196 La. 159, 198 So. 890 (1940).

68. Frank v. Pan American Import Co., Inc., 197 La. 862, 2 So. (2d) 628 (1941).

After only twelve shares had been paid by the relator, he applied for mandamus to obtain the relief mentioned above, contending that the only interest of the corporation was in being paid for the stock and that it was not concerned with the particular source of this payment. The contract in question was argued to be a transaction between individuals in which the corporation was not interested. The court held that no law prohibited the provisions of the contract requiring the secretary-treasurer to hold the certificate in his hands unsigned until the full payment of the price by relator; and since it had been made as an incident of the financial reorganization and in the interest of the other shareholders, mandamus would not lie.

A 1934 statute[69] makes it unlawful for a mineral lessee to withhold royalty payments due, protects the lessee by a presumption that the last record owner is the true owner of the minerals until a suit to test his title has been instituted, and makes mandamus available to enforce the payment of royalties. In the third case,[70] this legislation was invoked as a ground for the application by the last record owner for a mandamus to compel the payment of a disputed balance of royalties alleged to be due relator. Whether the lessee's obligation was to pay the royalties it had paid or the larger sum demanded by relator depended upon the proper interpretation of the lease. Mandamus was denied for the reason that the statute sanctions its use only when the demands sought to be enforced by the writ are limited to amounts definitely fixed in the lease.

Real Actions

Ordinarily, the various real actions are prolific sources of procedural law. The past session, however, produced only two cases within this field and neither can be said to possess any importance as landmarks. In one[71] the right of a railway company to institute the possessory action to be maintained in the possession of the right of way along both sides of its tracks was recognized. The maintenance of a depot and other structures on the land involved, and the inclosure of the latter by fences constructed and kept up by the company, were deemed to constitute a sufficient possession by the plaintiff to sustain the action.

69. La. Act 64 of 1934, as amended by La. Act 24 of 1935 (E.S.) [Dart's Stats. (1939) §§ 4822.1-4822.5].

70. State ex rel. Brown v. United Gas Public Service Co., 197 La. 616, 2 So. (2d) 41 (1941).

71. Texas & Pac. Ry. v. Burch, 197 La. 160, 1 So. (2d) 64 (1941).

The action to establish title[72] was involved in the second case, which held that the plaintiffs who claimed to be the sole heirs of decedent could bring the action without first instituting a direct action to attack an ex parte judgment recognizing defendants' ancestors in title as the sole heirs of the deceased.[73]

Executory Process

Dixon v. Federal Land Bank of New Orleans[74] has been discussed heretofore,[75] but its importance to the subject of executory process justifies the emphasis of a further consideration. The 1926 act[76] permits executory process to be conducted against the surviving spouse alone when employed to enforce a mortgage securing a community indebtedness. A code provision permits substituted process in executory proceedings if the mortgagor "is absent and not represented in the State, or if he can not be found and served after diligent effort, though he may reside within the State."[77] In the *Dixon* case the two provisions were combined. The executory process was brought against the surviving spouse alone, and under an affidavit by counsel for plaintiff that she was absent from the state, service was made upon and all proceedings conducted contradictorily with a curator ad hoc appointed to represent her. The procedure employed by plaintiff was approved by the supreme court. In disposing of a further ground of the nullity of the executory process urged by the deceased's heirs, the court held that the appointment of the curator solely on the alleged absence of the surviving spouse was not an absolute nullity vitiating the entire proceedings if actually she had been present in the state, but was merely a relative nullity cured by the prescription of two years.

The only other case on the subject of executory process applied the settled rule that when a defendant prosecuted only a devolutive appeal from an order of seizure and sale and the property was sold thereunder during the pendency of the appeal, the latter would be dismissed as involving only a moot question.[78]

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72. Sanctioned by La. Act 38 of 1908 [Dart's Stats. (1939) §§ 6549, 6550].
73. Dugas v. Powell, 197 La. 409, 1 So. (2d) 677 (1941).
74. 196 La. 937, 200 So. 306 (1941).
75. Supra, p. 207.
76. La. Act 57 of 1926 [Dart's Stats. (1939) § 9734].
77. Art. 737, La. Code of Practice of 1870, as amended by La. Act 130 of 1920.
78. Unity Industrial Life Ins. Co. v. Dejoie, 197 La. 38, 200 So. 813 (1941).

Miscellaneous

The four disbarment cases decided during the past term present no noteworthy points of procedure.[79]

A number of points were presented in *In re Perez.*[80] Of these only two are of more than passing interest. The first point of importance concerned the proper interpretation to be placed upon the constitutional provision[81] authorizing the district court to appoint an attorney to institute a suit for the removal of the district attorney "on the written request, specifying the charges, of twenty-five citizens and tax-payers" of the district. The trial judge sustained exceptions of no cause of action and to the jurisdiction ratione materiae on the ground that petitioners did not so specify the charges. Under its supervisory jurisdiction the supreme court reviewed such rulings. Holding that there was no necessity for the petitioners to specify the charges with the same degree of clarity and particularity as might be required in a removal petition brought by the attorney so appointed, the supreme court directed the trial judge to make the appointment prayed for. The supervising court further held that the request for the appointment of an attorney sanctioned by the constitutional provision did not contemplate a proceeding had contradictorily with the district attorney.

One case presenting interesting points of receivership procedure[82] has been discussed heretofore.[83] Another decision of interest on this phase of the subject is *In re A.A.A. Auto Wrecking Company.*[84] There, one member of a partnership filed a petition alleging certain acts to constitute a violation of the partnership agreement and prayed for the dissolution and liquidation of the firm.

79. The evidence presented in Ex parte Mundy, 197 La. 850, 2 So. (2d) 624 (1941) was held insufficient to justify either the disbarment or the disciplining of the attorney, as it lacked the reasonable certainty required by law to justify either action. An exception of no cause of action was overruled in In re Novo, 196 La. 1072, 200 So. 466 (1941). "Technical nicety" of pleading was held not essential in disbarment cases. The supreme court, in In re Cummings, 196 La. 493, 199 So. 402 (1940), overruled exceptions of no cause or right of action and a motion for a severance filed by one of the two defendants. The attorney who urged these technical objections neither argued nor briefed his contentions. The two defendants were charged with a fraudulent conspiracy to frustrate the holding of fair bar examinations by the Board of Governors of the State Bar of Louisiana. In the last of these cases, the attorney was disbarred upon proof of his conviction for a felony. In re Comer, 197 La. 397, 1 So. (2d) 673 (1941).

80. 197 La. 334, 1 So. (2d) 537 (1941).

81. La. Const. of 1921, Art. IX, § 6.

82. Sklar v. Kahle, 196 La. 137, 198 So. 883 (1940).

83. Supra, p. 298.

84. 196 La. 722, 200 So. 16 (1941).

On the ex parte application of plaintiff, a third party was appointed judicial liquidator and receiver of the partnership. The defendant partner moved the trial court to vacate its ex parte order appointing the receiver on the ground that it deprived him of his right to have the dissolution of the partnership decreed only after the trial of an action *via ordinaria*. After the overruling of this motion by the trial judge, the supervisory jurisdiction of the supreme court was invoked to prohibit the trial judge the plaintiff, and the receiver from proceeding further under the order of appointment. The relief prayed for was granted by the supreme court after a hearing. The action for a dissolution of a partnership was held to be obtainable in such cases only after the trial of an ordinary action, and plaintiff could not deprive defendant of his right to such a proceeding *via ordinaria* by coupling it with a summary action.

The two remaining cases on the subject of civil procedure both involve the "trial de novo" which is granted by way of an appeal from the judgments of courts of limited jurisdiction in petty causes. In one[85] the supreme court applied the general rule that such appeals are tried as in a court of first instance and held that defendant was entitled to move for the first time in the appellate court to quash the affidavit by attacking the constitutionality of the ordinance which formed the basis of the prosecution. In *Livaudais v. Lee She Tung*[86] the supreme court, under a writ of review, annulled the judgment for plaintiff rendered by the court of appeal. In the trial court plaintiff sued to recover the value of a suit which was stolen by a thief while in the defendant's laundry. In effect, the defendant's answer was a general denial. In the appellate court defendant attempted to file an amended answer which *inter alia* pleaded the defendant's freedom from negligence. On objection by plaintiff, the appellate court refused to permit such amendment for the reasons that it changed the issues and also attempted to present defenses not urged in the trial court. Apparently, evidence to support defendant's lack of negligence also was excluded. The judgment for plaintiff rendered by the court of appeal was annulled under a writ of review. The supreme court held that since the plaintiff's case was predicated on the negligence of defendant, the defense was presented by the original pleadings and the amended answer did not change the

85. City of Minden v. Harris, 196 La. 1021, 200 So. 449 (1941).
86. 197 La. 844, 2 So. (2d) 232 (1941).

issues. A formidable array of authorities in support of the trite proposition that the bailor cannot recover in such cases unless he proves the negligence of the bailee was relied on in support of the court's decision. It is submitted that while the result reached was proper, the reasons for the court's position are not pertinent. What the court apparently overlooked was the settled rule that where the loss occurred while the goods were in the possession of the bailee, the latter has the burden of alleging and proving that the loss occurred without any fault on his part.[87] A new issue *was* presented by the amended answer. However, this was an appeal by trial de novo and in such cases new defenses may be presented in the appellate court.[88]

87. Nicholls v. Roland, 11 Mart. (O.S.) 190 (La. 1822); Scott v. Sample, 148 La. 627, 87 So. 478 (1921); Alex W. Rothschild & Co. v. Lynch, 157 La. 849, 103 So. 188 (1925); Crescent Forwarding and Transportation Co. v. New Orleans Box Mfg. Co., 6 Orl. App. 412 (La. App. 1909).

88. Cf. Saunders v. Ingram, 5 Mart. (N.S.) 644 (La. 1827); Town of Rayville v. Mann, 136 La. 237, 66 So. 957 (1914); City of Minden v. Harris, 196 La. 1021, 200 So. 449 (1941).