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RECONCILIATION AND THE RE-ESTABLISHMENT OF THE COMMUNITY

The reassertion¹ of the rule that a reconciliation, after a judgment of separation from bed and board, does not re-establish the community of property between spouses again presents the question of its soundness. To the average layman, the rule in the very nature of things would not seem to exist. To the lawyer, some doubts as to its legal and logical foundations may well appear.

A judgment of separation from bed and board does not dissolve the marriage,² but it dissolves the community of property.³ The policy of the law, in providing in certain instances for separation⁴ rather than for immediate divorce,⁵ is to encourage the resumption of the marriage relation by giving the spouses an opportunity to become reconciled.⁶ This policy is presumed to be effectuated by the statutory provisions which declare *inter alia* that a certain period of time must elapse after a judgment of separation before the matrimonial bond may be completely dissolved;⁷ and that a reconciliation of the spouses, whether after the institution of the action⁸ or after a judgment,⁹ shall operate to extinguish the action or the judgment respectively.¹⁰ It is further provided that an action for separation based on causes arising prior to the reconciliation shall also be extinguished by the happening of that event.¹¹ A new suit must therefore be grounded on

1. Reichert v. Lloveras, 188 La. 447, 451, 177 So. 569, 570 (1937). Concerning similar aspects of this problem in other jurisdictions, see Comment (1932) 20 Calif. L. Rev. 294; Note (1932) 76 A.L.R. 284. Cf. Butler v. Bolinger, 16 La. App. 397, 133 So. 778 (1931).

2. Art. 136, La. Civil Code of 1870; McNeely v. McNeely, 47 La. Ann. 1321, 17 So. 928 (1895); Stallings v. Stallings, 177 La. 488, 148 So. 687 (1933).

3. Arts. 123, 136, 155, La. Civil Code of 1870; Williams v. Goss, 43 La. Ann. 868, 9 So. 750 (1891); Conrad v. Conrad, 170 La. 312, 127 So. 725 (1930); Butler v. Bolinger, 16 La. App. 397, 133 So. 778 (1931). Cf. Brown v. Tauzin, 185 La. 86, 168 So. 502 (1936).

4. Art. 138, La. Civil Code of 1870.

5. Art. 139, La. Civil Code of 1870. Cf. La. Acts 25 of 1898, § 1, and 56 of 1932, § 1 [Dart's Stats. (1932) § 2209].

6. Perkins v. Potts, 8 La. Ann. 14 (1853); Mack v. Handy, 39 La. Ann. 491, 2 So. 181 (1887); Martin v. Martin, 151 La. 530, 92 So. 46 (1922); Butler v. Bolinger, 16 La. App. 397, 133 So. 778 (1931). Cf. Art. 89, La. Civil Code of 1870.

7. Art. 139, La. Civil Code of 1870. Cf. La. Acts 25 of 1898, § 1, and 56 of 1932, § 1 [Dart's Stats. (1932) § 2209].

8. Art. 152, La. Civil Code of 1870. Spring v. Mendoza, 171 La. 461, 131 So. 299 (1930). Cf. Art. 154, La. Civil Code of 1870.

9. Succession of Liddell, 22 La. Ann. 9 (1870). See Von Hoven v. Weller, 38 La. Ann. 903, 904 (1886); Linzay v. Linzay, 51 La. Ann. 630, 635, 25 So. 308, 310 (1899). Cf. Art. 152, La. Civil Code of 1870.

10. Contra: New York, see Note (1930) 8 N.Y.U.L.Q. Rev. 326; Note (1933) 85 A.L.R. 420, 423.

11. Art. 152, La. Civil Code of 1870; Bienvenu v. Her Husband, 14 La. Ann.

causes arising subsequent to the reconciliation, but the privilege is reserved to make use of the former causes to corroborate the new allegation.¹² To further effectuate this policy of preserving the marriage, a reconciliation also has other effects. A judicial grant of alimony *pendente lite* is extinguished.¹³ In some jurisdictions, with certain limitations,¹⁴ it operates to annul a property settlement of the spouses.¹⁵ Thus, after a reconciliation the only remaining effect of the Louisiana judgment of separation from bed and board is the dissolution of the community.¹⁶

The Civil Code does not define what acts of the parties constitute a sufficient reconciliation to bar an action for separation or to annul a judgment to that effect. Although theoretically a reconciliation is subjective,¹⁷ it has been held that a conclusive presumption attaches wherever the court finds the following factors present: (1) a mutual forgiveness—with complete knowledge of the marital offense on the part of the injured spouse, and an express or implied acceptance by the offender, *and* (2) a voluntary resumption of the marriage relation and marital cohabitation.¹⁸ Forgiveness has been distinguished from forbearance,¹⁹ and a reconciliation has been held to have the same effect in Louisiana that condonation or forgiveness has in common law

386 (1859); *Schaub v. Schaub*, 117 La. 727, 42 So. 249 (1906). Cf. *J.F.C. v. M.E., His Wife*, 6 Rob. 135 (La. 1843).

12. Art. 153, La. Civil Code of 1870; *Cass v. Cass*, 34 La. Ann. 611 (1882); *Shoeffner v. Shoeffner*, 158 La. 933, 105 So. 18 (1925); *Reichert v. Lloveras*, 188 La. 447, 451, 177 So. 569, 570 (1937). Cf. Art. 154 La. Civil Code of 1870 (same exceptions apply to divorce action).

13. See Arts. 119, 148, 152, La. Civil Code of 1870; *Player v. Player*, 162 La. 229, 232, 110 So. 332, 333 (1926). This seems to be an exception to the general rule: Note (1926) 40 A.L.R. 1227, 1239; Note (1933) 85 A.L.R. 420, 423; Note (1930) 8 N.Y.U.L.Q. Rev. 326.

14. Note (1926) 40 A.L.R. 1227; Note (1932) 27 Ill. L. Rev. 315; Note (1933) 85 A.L.R. 420.

15. *Dillon v. Dillon*, 103 Neb. 322, 171 N.W. 917 (1919); *Rose v. Rogers*, 264 S.W. 954 (Tex. Civ. App. 1924); *Ward v. Ward*, 81 Mont. 587, 264 Pac. 667 (1928). Cf. *Nichols v. Her Husband*, 7 La. Ann. 262 (1852); Art. 2446 (1), La. Civil Code of 1870; Note (1926) 40 A.L.R. 1227; Note (1932) 27 Ill. L. Rev. 315; Note (1933) 85 A.L.R. 420.

16. *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910). See Arts. 123, 136, 155, La. Civil Code of 1870; *Williams v. Goss*, 43 La. Ann. 868, 9 So. 750 (1891); *Conrad v. Conrad*, 170 La. 312, 127 So. 725 (1930); *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (1931).

17. Maille, *Divorce Laws of the State of Louisiana* (1884) 85.

18. *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Vicknair v. Terracina*, 164 La. 117, 113 So. 787 (1927); *Spence v. Spence*, 162 La. 4, 110 So. 68 ((1926)). Cf. Maille, *op. cit. supra* note 17, at 85; *Turnbull v. Turnbull*, 23 Ark. 615 (1861); *Odom v. Odom*, 36 Ga. 286 (1867).

19. *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Terrell v. Boarman*, 34 La. Ann. 301 (1882); *Balfe v. Balfe*, 165 La. 283, 115 So. 489 (1928); *New v. New*, 186 La. 1017, 173 So. 748 (1937).

jurisdictions.²⁰ It may be doubtful whether a single act of marital cohabitation should be deemed sufficient to constitute a reconciliation,²¹ but when other factors are present, the social implications together with the recognized public policy of preserving the marriage unite to furnish a sufficient "reconciliation"²² for the courts to seal the marriage against dissolution.

Although the rule reasserted in the recent case of *Reichert v. Lloveras*²³ appears to be settled,²⁴ namely, that after the occurrence of a reconciliation the sole remaining effect of the judgment of separation is the dissolution of the community, an analysis of the *rationale* employed by the courts in formulating this principle fails to disclose any serious obstacle which would have prevented a different conclusion. Since the judgment from which the dissolution of the community flowed has become annulled in this manner, should not that dissolution also be vitiated? Otherwise, to retain the dissolution of the community under such circumstances appears to be permitting a separation of property in a manner not recognized by the Civil Code²⁵ or by the jurisprudence involving the action for separation of property *per se*.²⁶ There is no adequate reason either in law or logic why the Supreme Court of Louisiana today might not formulate the contrary rule, especially since it need not be bound by the common law doctrine of *stare decisis*.²⁷ The present principle was not founded upon any specific article of the Code or upon any specific statute—nor can it be so based today—but was evolved from an application of the familiar principle of statutory construction embodied in the maxim *inclusio unius est exclusio alterius*. By this process of reasoning the Supreme Court took the position that, since the redactors of the Civil Code did not include provision for the re-

20. *Hill v. Hill*, 112 La. 770, 36 So. 678 (1904).

21. Cf. 19 *Corpus Juris* 83-87.

22. *Martin v. Martin*, 151 La. 530, 92 So. 46 (1922); *Spence v. Spence*, 162 La. 4, 110 So. 68 (1926). Cf. *Jacobs v. Tobelman*, 36 La. Ann. 842 (1884); *Lewis v. Hurry*, 119 La. 1035, 44 So. 856 (1907).

23. 188 La. 447, 451, 177 So. 569, 570 (1937).

24. *Ford v. Kittredge*, 26 La. Ann. 190 (1874); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910); *Succession of Le Besque*, 137 La. 567, 68 So. 956 (1915).

25. Arts. 2425 et seq., La. Civil Code of 1870 (wife's action for separation of property), 2332, 2392, 2399 (stipulation against a community in a marriage contract), 1991, 2433, 2434 (creditor's rights relative to a separation of property).

26. *Davock v. Darcy*, 6 Rob. 342 (La. 1844); *Wolf & Clark v. Lowry*, 10 La. Ann. 272 (1855); *Caulk v. Picou & Husband*, 23 La. Ann. 277 (1871). See *Daggett*, *The Community Property System of Louisiana* (1931) 57-60.

27. *Daggett, Dainow, Hebert and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana* (1937) 12 *Tulane L. Rev.* 12, 15-24; *Miami Corporation v. State of Louisiana*, 186 La. 784, 799; 173 So. 315, 320 (1937).

establishment of the community after a reconciliation, as is done by the French Civil Code,²⁸ the judiciary was not at liberty to formulate such a rule.²⁹ No consideration was given to the fact that there is no judgment upon which to base a dissolution of the community since the judgment of separation ceased to exist by virtue of the subsequent reconciliation.³⁰ Furthermore, no consideration was given in the cases to the effect of the present rule upon the status of the community property as the economic basis of the marriage and of the family.³¹

The action for separation of property is a privilege accorded to the wife alone and then only in certain specific instances.³² This privilege has been deemed so inviolate that the law has not permitted any circumvention of it either by private agreement³³ or by a sale³⁴ between the spouses. Nothing less than a judgment

28. Art. 1451, French Civil Code: "*La communauté dissoute par la séparation soit de corps et de biens, soit de biens seulement, peut être rétablie du consentement des deux parties.*

"*Elle ne peut l'être que par un acte passé devant notaires et avec minute, dont une expédition doit être affichée dans la forme de l'article 1445.*

"*En ce cas, la communauté rétablie reprend son effet du jour du mariage; les choses sont remises au même état que s'il n'y avait point eu de séparation, sans préjudice néanmoins de l'exécution des actes qui, dans cet intervalle, ont pu être faits par la femme en conformité de l'article 1449.*

"*Toute convention par laquelle les époux rétabliraient leur communauté sous des conditions différentes de celles qui la réglaient antérieurement, est nulle.*"

(Translation—Cachard, French Civil Code, 1930) "A community which is dissolved by a separation, either from bed and board or of property only, can be reestablished by consent of both parties.

"This can only be done by an instrument executed in the presence of notaries, of which a record remains and of which a certified copy is published in the manner set forth in article 1445.

"In such case the community which is reestablished produces its effect from the time of the marriage; things are put back in the same state as if there had been no separation, without prejudice, nevertheless, to the fulfillment of the acts which have been performed during such interval by the wife in accordance with article 1449.

"Any agreement by which the husband and wife reestablish their community under different conditions from those which governed it previously shall be void."

29. Ford v. Kittredge, 26 La. Ann. 190, 194 (1874).

30. Succession of Liddell, 22 La. Ann. 9 (1870). Cf. Arts. 152, 153, La. Civil Code of 1870.

31. Cf. Ford v. Kittredge, 26 La. Ann. 190 (1874); Crochet v. Dugas, 126 La. 285, 52 So. 495 (1910); Succession of Le Besque, 137 La. 567, 68 So. 956 (1915).

32. Daggett, op. cit. supra note 26, at 56-58; Arts. 2425 et seq., La. Civil Code of 1870.

33. Art. 2427, La. Civil Code of 1870; Muse v. Yarborough, 11 La. 521 (1838); Maxwell v. Maxwell, 1 La. App. 413 (1925). Art. 1443 (par. 2), French Civil Code, provides: "Every voluntary separation [of property] is void."

34. Cf. Arts. 1790, 2446, La. Civil Code of 1870; Rush v. Landers, 107 La. 549, 32 So. 95, 57 L.R.A. 353 (1902); Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913); Loranger v. Citizens' Nat. Bank of Hammond, 162 La. 1054, 111 So. 418 (1927).

of separation of property together with the fulfillment of the conditions that must follow its rendition can effect a dissolution of the community.³⁵ In insisting upon a judicial decree the intention of the legislature clearly was to prevent a dismemberment of the community by mutual agreement—this being specifically prohibited by the Code.³⁶ Therefore, the effect of retaining the dissolution of the community and a “separation of goods and effects” after the judgment of separation from bed and board has become annulled by a reconciliation is to accomplish indirectly an end which is reprobated by the law. This cannot be explained away by classifying the result as an exception to the prohibition of effecting a separation of property by mutual consent, for in addition there is no judicial decree of *any kind* upon which to ground such separation.

In order that the judgment of separation of property accomplish the desired results an essential condition is that it must be timely executed.³⁷ The earlier jurisprudence on this subject was in confusion and indicated that where the judgment was accompanied by a decree for the payment of money it was only the money judgment that fell under the tardy execution, and that the judgment of separation of property stood, regardless of whether there was timely execution or not.³⁸ However, the matter has now been clarified so that there is no longer any doubt but that the judgment of separation also falls with the delayed execution in such a case.³⁹ By analogy, does it not logically follow that the dissolution of the community of property flowing from the judgment of separation from bed and board should also fall with the judgment when a reconciliation takes place between the spouses?

By the adoption of a rule which will reinstate the community

35. Arts. 2425 et seq., La. Civil Code of 1870. Cf. Daggett, *op. cit. supra* note 26, at 52, 55, 66-67. For other methods of effecting a dissolution of the community, see Arts. 123, 136, 155, 159, La. Civil Code of 1870.

36. Art. 2427, La. Civil Code of 1870.

37. Arts. 2428 et seq., La. Civil Code of 1870; *Muse v. Yarborough*, 11 La. 521, 532 (1838); *Bertie v. Walker*, 1 Rob. 431, 432 (La. 1842); *Chaffe v. Scheen and Husband*, 34 La. Ann. 684, 690 (1882). Exceptions to this rule obtain where the judgment is accompanied by a decree for the payment of money, and it is clear that an execution would have been a “vain thing” [*Holmes v. Barbin*, 13 La. Ann. 474 (1858)]; and where the judgment of separation *per se* is not susceptible of execution [*Davock v. Darcy*, 6 Rob. 342 (La. 1844); *Jones v. Widow & Heirs of Morgan*, 6 La. Ann. 630 (1851); *Holmes v. Barbin*, *supra*; *Vickers v. Block, Britton & Co.*, 31 La. Ann. 672 (1879); *Carite v. Trotot*, 105 U.S. 751, 26 L.Ed. 1223 (1881)].

38. *Vickers v. Block, Britton & Co.*, 31 La. Ann. 672 (1879); *Chaffe v. Forcheimer*, 35 La. Ann. 205 (1883); *Jones v. Jones*, 119 La. 677, 44 So. 429 (1907).

39. *Larose v. Naquin*, 150 La. 353, 90 So. 676 (1921); Art. 2428, La. Civil Code of 1870.

of property after a judgment of separation from bed and board has been annulled by reconciliation, it is submitted that: (1) a progressive step will be taken toward making the type of community property system obtaining in Louisiana still more equitable in its variations than the types existing in the seven other states of the Union;⁴⁰ (2) the community of property as the economic basis of the family will become more stabilized so as to fully effectuate the object of public policy to preserve the marriage; and (3) since the average layman does not realize that the original community is forever dissolved by a judgment of separation from bed and board because he reasonably believes that the reconciliation has replaced the parties in their previous status in every respect, this injustice to him will be completely eliminated.

The fact that the community is dissolved by the judgment of separation from bed and board becomes even more serious when it is realized that there is at present no recognized mode of re-establishing it. Until 1916 the well-settled prohibition against interspousal contracts⁴¹ caused the courts to conclude that once the community was dissolved, it could never be re-established between the same parties.⁴² Nevertheless, since the passage of the so-called "married women's emancipatory acts,"⁴³ the issue is raised as to whether the spouses may now contract with each other during the marriage in order to re-establish such a dissolved community. The general problem is whether the wife may now freely contract with her husband in any case,⁴⁴ and the Louisiana Supreme Court has held that where the husband and wife have entered into a joint lease of community and separate property to a third person, such a contract is valid⁴⁵—but the court was careful to point out that it was unnecessary in that case to decide whether the emancipatory acts were sufficiently comprehensive to sustain the validity of contracts between husband and wife in any other situation.⁴⁶ Nevertheless, in the light of these acts the judi-

40. Arizona, California, Idaho, New Mexico, Nevada, Texas, and Washington. See Daggett, *op. cit.* supra note 26, at 3, 200-206.

41. See Arts. 1790, 2446, La. Civil Code of 1870; *Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L.R.A. 353 (1902); *Kelly v. Kelly*, 131 La. 1024, 60 So. 671 (1913); *Loranger v. Citizens' Nat. Bank of Hammond*, 162 La. 1054, 111 So. 418 (1927); Comment (1933) 8 *Tulane L. Rev.* 106, 111.

42. *Ford v. Kittredge*, 26 La. Ann. 190 (1874); *Crochet v. Dugas*, 126 La. 285, 52 So. 495 (1910); *Succession of Le Besque*, 137 La. 567, 68 So. 956 (1915).

43. La. Acts. 94 of 1916, 244 of 1918, 219 of 1920, 132 of 1926, 283 of 1928 [Dart's Stats. (1932) §§ 2169-2173].

44. Comment, supra note 41, at 115-117.

45. *Shell Petroleum Corp. v. Calcasieu Real Estate and Oil Co.*, 185 La. 751, 170 So. 785 (1936).

46. 185 La. at 773, 170 So. at 792.

ciary might find sufficient legal reason to sustain the validity of a contractual re-establishment of the community.⁴⁷ However, this method would not be sufficiently remedial for the layman who did not realize the necessity for the execution of such a contract. Furthermore, as one writer has suggested,⁴⁸ the opposing interests of contracting parties leads to law suits; therefore, to allow interspousal contracts would not be in accord with the tenor of the Code which fosters marital harmony.⁴⁹

If the judiciary does not see fit to continue the community after a reconciliation, and if it should not interpret the new emancipatory acts to allow re-establishment of the community by contract, then legislative action is necessary. The following suggestions would provide a proper legislative remedy: (1) to permit a re-establishment of the community by agreement of the spouses as is done in France⁵⁰ and Quebec,⁵¹ or as was suggested in the

47. This would seem possible despite the provision in La. Act 283 of 1928, § 5 [Dart's Stats. (1932) § 2173] which states: "Nothing herein contained shall modify or affect the laws relating to the matrimonial community of acquets and gains." If contracts between husband and wife are possible, there is logical argument for upholding a contractual re-establishment of the community without the necessity for a legislative remedy. The effect of the 1928 emancipatory act being to remove the general *incapacity* of married women to contract as set forth in Articles 1782, 1786 and 1790, such effect should not be extended to override the special interspousal contractual *prohibitions* provided in the Code such as Article 2427 (voluntary separation of community property prior to a dissolution of the marriage) and Article 2446 (interspousal contracts of sale). However, as there is no special interspousal contractual *prohibition* with respect to re-establishment of the community, it is submitted that the 1928 act may be extended to permit an interspousal contract of this nature. Cf. Comment, *supra* note 41, at 115-117. See Thompson-Ritchie Grocery Co. v. Graham, 15 La. App. 534, 536, 132 So. 394, 395 (1931), where there is dictum to the effect that contracts between husband and wife are possible. However, see Art. 1790, La. Civil Code of 1870; *Didier v. Pardue & Pardue*, 144 So. 762, 763 (La. App. 1932) (La. Act 283 of 1928 was not mentioned).

48. Comment, *supra* note 41, at 117.

49. Cf. Arts. 119, 120, 2399, 2404, La. Civil Code of 1870.

50. Art. 1451, French Civil Code. For the English text of the article, see note 28, *supra*.

51. Art. 217, Quebec Civil Code (as amended by 21 Geo. V [1931] ch. 101, § 6): "Husband and wife thus separated [by a judicial separation from bed and board], for any cause whatever, may at any time reunite and thereby put an end to the effects of the separation.

"By such reunion, the husband reassumes his rights, but the consorts remain separate as to property, unless they re-establish community of property in conformity with article 1320."

Prior to the amendment, the last paragraph of the article read: "By such reunion, the husband reassumes all his rights over the person and property of his wife, the community of property is re-established of right and, for the future, is considered as never having been dissolved."

Art. 1320, Quebec Civil Code (as amended by 21 Geo. V [1931] ch. 101, § 23): "Community dissolved by separation from bed and board, or by separation of property only, may be re-established, with the consent of the parties, in the first case when the consorts have become re-united, but, in both cases, such re-establishment can only be effected by an act before a notary as an

1910 Proposed Revision of the Louisiana Civil Code;⁵² (2) to clearly remove any disabilities attaching to interspousal contracts so far as to enable the spouses to re-establish the community;⁵³ or (3) to change the time when the marriage contract may be made,⁵⁴ in order to accomplish this result.

The most effective remedy, however, would be obtained through a judgment of our highest state court declaring that a reconciliation of the spouses subsequent to a judgment of separation from bed and board operates to replace the husband and wife in the same status in every respect—including the re-establishment of the community of property. No legal obstacle stands in the path of overruling the prior jurisprudence on this subject, especially since the courts of Louisiana need not be bound by judicial precedent. From these considerations it would appear

original, a copy of which is deposited in the office of the court which rendered the judgment of separation, and is joined to the record in the case; and mention of such deposit must be made in the register after such judgment and in the special register wherein the separation is inscribed, pursuant to article 1097 of the Code of Civil Procedure."

Art. 1321, Quebec Civil Code: "In the case of the preceding article, the community so re-established resumes its effect from the day of the marriage; things are replaced in the same condition as if there had been no separation; without prejudice, however, to such acts as the wife may have done in the interval, in conformity with article 1318.

"Every agreement by which the consorts re-establish their community upon conditions different from those by which it was previously governed, is void."

52. Art. 150, *Projet of the Commission on Revision of the Civil Code (1910)*, was inserted as a new article in the proposed new Code and read as follows: "If, after separation from bed and board, the spouses be reconciled, they may re-establish the community under the conditions as it originally existed, by an act to that effect before a notary and two witnesses, duly recorded in the conveyance records of the parish of the domicile of the parties.

"They may even restore the property, or any part thereof, or its proceeds, which belonged to the former community at the date of the judgment, by making a declaration to that effect in the act, and describing the property; otherwise the re-establishment of the community is to take effect from the date of the recording of the act.

"The remarrying of the spouses, after final divorce, will create a new community between them, unless there is a stipulation to the contrary, by the marriage contract. A community dissolved on account of the financial condition of the husband cannot be re-established."

The Commission was appointed under the authority of La. Act. 160 of 1908. For an historical account of the proposal for a revision of the Civil Code of 1870 under the auspices of the Louisiana Bar Association, see (1937) 11 *Tulane L. Rev.* 213, 223-229. The bill embodying the *projet* was rejected in the Legislature at the instance of the Bar Association, not because there was any objection to the particular new article proposed, but upon other grounds. See Special Report, Code Revision Committee (1913) 14 *La. Bar Ass'n Rep.* 345.

53. Cf. Daggett, *op. cit. supra* note 26, at 205.

54. *Ibid.*

that greater justice would be accomplished by overturning the rule reasserted in the principal case.

W. T. PEGUES

JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD*

Since its creation, the National Labor Relations Board has disposed of about a thousand cases. Of this vast number, the Supreme Court of the United States has passed on the Board's exercise of jurisdiction in seven.¹ About forty others have been reviewed by the various Circuit Courts of Appeals.

Although the decisions of the federal courts are of primary importance concerning the permissible area within which the Board may exercise its jurisdiction, nevertheless we may not overlook the attitude of the Board itself toward the scope of its powers.² The expressed intention of the Administrator of the Fair Labor Standards Act to be guided in the application of that act by rulings of the National Labor Relations Board³ gives added emphasis to jurisdictional findings by the Board.

All the cases which have been reviewed by the Supreme Court have been approved insofar as the exercise of jurisdiction by the Board is concerned. Of these, the *Jones and Laughlin Steel Corporation* case is first in importance. In approving the constitutionality of the National Labor Relations Act, the Court gave in broad outline the guiding theory applicable to the test of federal power to control:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial

* Established by the National Labor Relations Act, § 3, 49 Stat. 449, 451 (1935), 29 U.S.C.A. § 153 (Supp. 1938).

1. N.L.R.B. v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937); N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937); Washington, Virginia and Maryland Coach Co. v. N.L.R.B., 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937); Consolidated Edison Co. v. N.L.R.B., 59 S.Ct. 206, 83 L.Ed. 131 (1938); Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954 (1938).

2. See Despres and Myer, The National Labor Relations Board—Decisions of its First Year (1936) 4 U. of Chi. L. Rev. 97.

3. 3 Labor Rel. Rep. 91 (1938).