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The Work of the Louisiana Supreme Court for the 1939-1940 Term: A Symposium

Authors
Clyde W. Thurmon, Harriet S. Daggett, J. Denson Smith, Joseph Dainow, Jefferson B. Fordham, Wex S. Malone, and Dale E. Bennett

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The Work of the Louisiana Supreme Court for the 1939-1940 Term*

This year's symposium covers the work of the Supreme Court of Louisiana during the judicial term just completed—from October 1939 to September 1940. As in previous surveys the object is to examine the activities of our highest appellate court and to give a panoramic topical consideration of the cases decided.

I. STATISTICAL SURVEY

During its 1939-1940 term, there were 437 cases docketed in the supreme court. Two hundred and twelve, or 48.5% 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, 181 were either granted or refused. On the other hand, the supreme court disposed of 220 cases through written opinions. Thus, as can be observed in Table I, a total of 401 cases or 91.8% of the total number docketed, were actually disposed of. This can be compared with 89%, the corresponding figure for the 1938-1939 term. The result is an average of 57.3 matters per court member. In addition, a total of 103 applications for rehearing

* This symposium has been contributed by the members of the faculty of Louisiana State University Law School as follows: Procedure and Mandate—Clyde W. Thurman; Family Law, Successions, Trusts, Partition, Community Property, and Mineral Rights—Harriet S. Daggett; Conventional Obligations, Sale, Lease, and Insurance—J. Denson Smith; Property, Security Contracts, Prescription, and Conflict of Laws—Joseph Dainow; Public Law—Jefferson B. Fordham; Criminal Law and Procedure—Wex S. Malone; Banking and Negotiable Instruments, Bankruptcy, Corporations, Torts, and Workmen's Compensation—Dale E. Bennett.

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.

2. This figure was obtained from the Official Daily Court Record showing the cases docketed in the supreme court from October 3, 1939, to September 28, 1940.

3. See Tables VII, VIII. This information was gathered from the Official Daily Court Record.

4. This figure includes all cases for the 1939-1940 term officially reported in Volumes 193, 194, 195, and 196 of the Louisiana Reports.

5. Cf. The Work of the Louisiana Supreme Court for the 1938-1939 Term, supra note 1, at 31. For the corresponding figures during the 1937-1938 term see The Work of the Louisiana Supreme Court for the 1938-1939 Term, supra note 1, at 315.

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were considered. Although rehearings were granted in only nine instances, a substantial portion of the court's time must be devoted to their consideration.

There was a total of 173 cases appealed from the district courts throughout the state. Of this number, 56.6% of the judgments were affirmed, 22.5% were reversed and 20.9% were modified or otherwise disposed of. The corresponding figures for the 1937-1938 and 1938-1939 terms show that 67% and 53.5% respectively of the judgments were affirmed, while 20% and 14% respectively were reversed and 13% and 32.5% were modified or otherwise disposed of.

Table V shows that the bulk of litigation reaching the supreme court was based on appeals from the district courts, such appeals accounting for 78.6% of the reported cases (as compared with 78% and 85% for the 1937-1938 and 1938-1939 terms), while only 7.3% came upon writs of review to the courts of appeal (as compared with 12.7% and 7.4% for the 1937-1938 and 1938-1939 terms), and 11.4% on supervisory writs to the lower courts (as compared with 7.1% and 5.8% for the two preceding terms).

Table VI gives a geographical analysis of appeals from the district courts. It reveals that the Parish of Orleans gave rise to 21.4% of the cases so appealed (as compared with 21.3% and 24.3% for the 1937-1938 and 1938-1939 terms). The Parish of Caddo provided 13.3%; East Baton Rouge Parish sent 7%; Ouachita—4.6%; Jefferson—4%; and the other parishes supplied the remaining 49.7%.

Only sixteen cases reached the supreme court on writs of review to the courts of appeal. Of these, only 43.7% were affirmed, 50% were reversed, and 6.3% were modified or otherwise disposed of. The corresponding figures for the 1937-1938 and the 1938-1939 terms show that 26.5% and 67% of the cases brought on writs of review were affirmed, while 58.8% and 11% were reversed, and 14.7% and 22% were modified or otherwise disposed of.

6. During the 1937-1938 term, 163 applications for rehearing were filed, The Work of the Louisiana Supreme Court for the 1937-1938 Term, supra note 1, at 315; and during the 1938-1939 term, there were 150 applications for rehearing, The Work of the Louisiana Supreme Court for the 1938-1939 Term, supra note 1, at 31.
7. See Table VII.
8. See Table II.
9. See Tables II, III.
Since many of the cases obviously involve more than one legal point, the classifications in Table IV are adopted arbitrarily for the purpose of topical analysis. Consequently, the tabulation is based upon the principal subject matters to which the decisions relate. It is especially significant that the greatest number of cases dealt with Criminal Law and Procedure, such cases amounting to 21.4% of the litigation decided in written opinions. The next largest groups were: Practice and Procedure—16.4%; Conventional Obligations—6.4%; Taxation—5%; Municipal Corporations—4.5%; Mineral Rights—4.1%; Successions and Donations—4.1%; Elections—3.6%.

JAMES A. BUGEA*

* Research Assistant, Louisiana State University Law School.

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TABLE I

VOLUME OF JUDICIAL BUSINESS

| Cases disposed of with written opinions | 220 |
| Applications for writs filed during 1939-40 term | 212* |
| Application for writs considered | 181 |
| Applications for writs pending | 31 |
| Applications for rehearings disposed of | 103 |
| Cases docketed during 1939-1940 term (excluding writ applications) | 227 |
| Total matters docketed during 1939-40 term | 437 |
| Total cases handled by the court (excluding rehearing applications) | 401 |
| Grand total of matters handled by the court (including rehearing applications) | 504 |

* 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.

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TABLE II

DISPOSITION OF LITIGATION

| Affirmed | 98 |
| Affirmed in part and reversed in part | 4 |
| Affirmed in part, reversed in part and remanded | 1 |
| Amended and rendered | 1 |

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1941] WORK OF LOUISIANA SUPREME COURT 269
### TABLE II (Continued)

<table>
<thead>
<tr>
<th>Dispositions</th>
<th>On Appeal from District Courts</th>
<th>On Appeal from City Courts</th>
<th>On Certiorari or Rehearing Appeals</th>
<th>On Supervisory Write to District Courts</th>
<th>On Certified Questions of Appeal</th>
<th>On Original Jurisdiction</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amended in part, affirmed in part and remanded</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Amended in part, reversed in part, and affirmed</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Amended and affirmed</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>12</td>
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<tr>
<td>Annulled and dismissed</td>
<td>5</td>
<td></td>
<td></td>
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<td>5</td>
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<tr>
<td>Appeal dismissed ex proprio motu</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Certified questions answered</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Exceptions of no right of action overruled</td>
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<td>1</td>
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<tr>
<td>Motion to dismiss appeal granted</td>
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<tr>
<td>Motions to dismiss appeal refused</td>
<td>6</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Motion to dismiss appeal granted in part, refused</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td>1</td>
</tr>
<tr>
<td>Motion to remand refused</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Reversed and judgment of lower court reinstated</td>
<td>1</td>
<td></td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Reversed and rendered</td>
<td>18</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>21</td>
</tr>
<tr>
<td>Reversed and rendered transferred to courts of appeal for lack of jurisdiction</td>
<td>2</td>
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<td></td>
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<td></td>
<td>2</td>
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<tr>
<td>Writs made peremptory</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td>10</td>
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<tr>
<td>Writs recalled</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>TOTALS</td>
<td>173</td>
<td>2</td>
<td>16</td>
<td>25</td>
<td>2</td>
<td>1</td>
<td>220</td>
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</tbody>
</table>

### TABLE III

**DISPOSITION OF CASES REVIEWED ON WRIT OF CERTIORARI FROM COURTS OF APPEAL**

<table>
<thead>
<tr>
<th>Dispositions</th>
<th>Parish of Orleans</th>
<th>First Circuit</th>
<th>Second Circuit</th>
<th>TOTAL</th>
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<td>Affirmed</td>
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<td>1</td>
<td>3</td>
<td>7</td>
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<tr>
<td>Amended and rendered</td>
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<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Court of appeal reversed and judgment of lower court reinstated</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
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<tr>
<td>Reversed and remanded</td>
<td>3</td>
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<td></td>
<td>3</td>
</tr>
<tr>
<td>Reversed and rendered</td>
<td>1</td>
<td>1</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>TOTALS</td>
<td>9</td>
<td>3</td>
<td>4</td>
<td>16</td>
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TABLE IV

TOPICAL ANALYSIS OF DECISIONS

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<th>Topic</th>
<th>Cases</th>
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<tr>
<td>Administrative Law</td>
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<tr>
<td>Alimony</td>
<td>2</td>
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<tr>
<td>Banking and Negotiable Instruments</td>
<td>1</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>1</td>
</tr>
<tr>
<td>Community Property</td>
<td>7</td>
</tr>
<tr>
<td>Conflict of Laws</td>
<td>2</td>
</tr>
<tr>
<td>Constitutional Law</td>
<td>2</td>
</tr>
<tr>
<td>Conventional Obligations</td>
<td>14</td>
</tr>
<tr>
<td>Corporations</td>
<td>1</td>
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<tr>
<td>Criminal Law and Procedure</td>
<td>47</td>
</tr>
<tr>
<td>Divorce</td>
<td>3</td>
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<tr>
<td>Drainage Districts</td>
<td>1</td>
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<tr>
<td>Elections</td>
<td>1</td>
</tr>
<tr>
<td>Eminent Domain</td>
<td>2</td>
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<td>Insurance</td>
<td>6</td>
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<td>Lease</td>
<td>3</td>
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<tr>
<td>Liens and Privileges</td>
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<tr>
<td>Mandate</td>
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<td>Mineral Rights</td>
<td>9</td>
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<td>Minors, Tutorship</td>
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<td>Mortgages</td>
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<td>Municipal Corporations</td>
<td>10</td>
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<td>Partition</td>
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<td>Practice and Procedure</td>
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<td>Property</td>
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<td>Public Records</td>
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<td>Road Districts</td>
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<td>Sales</td>
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<td>Successions and Donations</td>
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<td>Suretyship</td>
<td>1</td>
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<td>Taxation</td>
<td>11</td>
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<td>Torts and Workmen's Compensation</td>
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<tr>
<td>Trusts</td>
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</table>

TOTAL ........................................ 220

TABLE V

JURISDICTIONAL ORIGIN OF CASES

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<tr>
<th>Type of Case</th>
<th>Cases</th>
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<tr>
<td>Appeals from district courts</td>
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</tr>
<tr>
<td>Appeals from city courts</td>
<td>2</td>
</tr>
<tr>
<td>Appeal from recorders' court in the City of New Orleans</td>
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<tr>
<td>On writs of review from courts of appeal</td>
<td>16</td>
</tr>
<tr>
<td>Questions certified from courts of appeal</td>
<td>2</td>
</tr>
<tr>
<td>On supervisory writs to district courts</td>
<td>25</td>
</tr>
<tr>
<td>Original jurisdiction of supreme court</td>
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TOTAL ........................................ 220
TABLE VI

GEOGRAPHICAL DISTRIBUTION OF APPEALS FROM DISTRICT COURTS

A—By Parish

<table>
<thead>
<tr>
<th>Parish</th>
<th>No. of Cases</th>
<th>Parish</th>
<th>No. of Cases</th>
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<tbody>
<tr>
<td>Acadia</td>
<td>4</td>
<td>Orleans Civil</td>
<td>35</td>
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<tr>
<td>Allen</td>
<td>1</td>
<td>Orleans Criminal</td>
<td>2</td>
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<tr>
<td>Ascension</td>
<td>1</td>
<td>Ouachita</td>
<td>8</td>
</tr>
<tr>
<td>Avoyelles</td>
<td>5</td>
<td>Plaquemines</td>
<td>1</td>
</tr>
<tr>
<td>Bienville</td>
<td>3</td>
<td>Pointe Coupee</td>
<td>1</td>
</tr>
<tr>
<td>Bossier</td>
<td>2</td>
<td>Rapides</td>
<td>3</td>
</tr>
<tr>
<td>Caddo</td>
<td>23</td>
<td>Richland</td>
<td>3</td>
</tr>
<tr>
<td>Calcasieu</td>
<td>4</td>
<td>Sabine</td>
<td>1</td>
</tr>
<tr>
<td>Claiborne</td>
<td>2</td>
<td>St. Bernard</td>
<td>1</td>
</tr>
<tr>
<td>De Soto</td>
<td>1</td>
<td>St. James</td>
<td>1</td>
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<tr>
<td>East Baton Rouge</td>
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<td>East Carroll</td>
<td>1</td>
<td>St. Martin</td>
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<td>St. Tammany</td>
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<td>Grant</td>
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<td>Tangipahoa</td>
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<td>Iberia</td>
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<td>Terrebonne</td>
<td>3</td>
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<tr>
<td>Iberville</td>
<td>1</td>
<td>Union</td>
<td>1</td>
</tr>
<tr>
<td>Jackson</td>
<td>2</td>
<td>Vermilion</td>
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<td>Jefferson</td>
<td>7</td>
<td>Vernon</td>
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<td>Jefferson Davis</td>
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<td>Washington</td>
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<td>Lafayette</td>
<td>1</td>
<td>Webster</td>
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<td>Lafourche</td>
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<td>West Feliciana</td>
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</tr>
<tr>
<td>La Salle</td>
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<td>Winn</td>
<td>3</td>
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<tr>
<td>Lincoln</td>
<td>4</td>
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</tr>
<tr>
<td>Morehouse</td>
<td>2</td>
<td></td>
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</tr>
<tr>
<td>Natchitoches</td>
<td>3</td>
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<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
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<td>173</td>
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B—By Judicial District

<table>
<thead>
<tr>
<th>Judicial District</th>
<th>No. of Cases</th>
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<td>First District (Caddo)</td>
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<td>Second District (Claiborne, Jackson, Bienville)</td>
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<td>Third District (Lincoln, Union)</td>
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<td>Fourth District (Ouachita, Morehouse)</td>
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<td>Fifth District (West Carroll, Richland, Franklin)</td>
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<td>Sixth District (East Carroll, Madison, Tensas)</td>
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<tr>
<td>Seventh District ( Catahoula, Concordia)</td>
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<td>Eighth District (Caldwell, Grant, Winn, La Salle)</td>
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<td>Tenth District (Natchitoches, Red River)</td>
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<td>Eleventh District (De Soto, Vernon, Sabine)</td>
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<td>Thirteenth District (Evangeline)</td>
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<tr>
<td>Fifteenth District (Acadia, Lafayette, Vermilion)</td>
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<tr>
<td>Sixteenth District (St. Mary, Iberia, St. Martin)</td>
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<tr>
<td>Seventeenth District (Terrebonne, Lafourche)</td>
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</tr>
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<td>Eighteenth District (Iberville, West Baton Rouge, Pointe Coupee)</td>
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<td>Nineteenth District (East Baton Rouge)</td>
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<td>Twentieth District (East Feliciana, West Feliciana)</td>
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### TABLE VI (Continued)

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<th>No. of Cases</th>
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<tr>
<td>Twenty-Third District (Assumption, Ascension, St. James)</td>
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<td>Twenty-Fourth District (Jefferson, St. John the Baptist, St. Charles)</td>
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<td>Twenty-Fifth District (St. Bernard, Plaquemines)</td>
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<tr>
<td>Twenty-Sixth District (Bossier, Webster)</td>
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<tr>
<td>Twenty-Seventh District (St. Landry)</td>
</tr>
<tr>
<td>TOTAL</td>
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<tr>
<td>Orleans Civil District</td>
</tr>
<tr>
<td>Orleans Criminal District</td>
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<tr>
<td>TOTAL</td>
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### TABLE VII

**DISPOSITIONS OF APPLICATIONS FOR WRITS AND REHEARINGS**

<table>
<thead>
<tr>
<th>Granted</th>
<th>Refused</th>
<th>TOTAL</th>
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<tr>
<td>Applications for rehearings</td>
<td>9</td>
<td>94</td>
</tr>
<tr>
<td>Applications for writs</td>
<td>37</td>
<td>144</td>
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<tr>
<td>TOTALS</td>
<td>46</td>
<td>238</td>
</tr>
</tbody>
</table>

* 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**

<table>
<thead>
<tr>
<th>Granted</th>
<th>Refused</th>
<th>Pending</th>
<th>TOTAL</th>
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</thead>
<tbody>
<tr>
<td>Supervisory writs to lower courts</td>
<td>16</td>
<td>25</td>
<td>23</td>
</tr>
<tr>
<td>Writs of certiorari to courts of appeal</td>
<td>21</td>
<td>119</td>
<td>8</td>
</tr>
<tr>
<td>TOTALS</td>
<td>37</td>
<td>144</td>
<td>31</td>
</tr>
</tbody>
</table>

### TABLE IX

**DISENTS**

<table>
<thead>
<tr>
<th>With Opinion</th>
<th>Without Opinion</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>O'Neill, C. J.</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>Fournet, J.</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Higgins, J.</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Land, J.</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Odom, J.</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Ponder, J.</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Rogers, J.</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>TOTALS</td>
<td>16</td>
<td>21</td>
</tr>
</tbody>
</table>

* 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—30.
II. CIVIL CODE AND RELATED SUBJECTS

A. FAMILY LAW

Nullity of Marriage

The case of Sunseri v. Cassagne\(^1\) came to the supreme court as a suit to annul a marriage because of the alleged negro blood of the wife. The court remanded the case in order to allow an examination of certain certificates from the office of the Recorder of Births and Marriages for the Parish of Orleans which the wife claimed to be contrary to fact.\(^2\) When the case again reached the supreme court, they very properly took the view that the real issue was still what it had always been—namely, to determine whether or not the wife was in reality a member of the negro race. The court reluctantly arrived at this conclusion, which was not changed on the rehearing. The original certificates in question indicated the white race. However, they were found to have been informally annotated "colored" by an employee of the Recorder's office, who was severely and properly reprimanded for this officious, bureaucratic, and dangerous act. Nevertheless, the evidence as a whole showed the wife to belong to a negro family, though her associates and friends in New Orleans were white. The court's patience and care in this troublesome matter, in hearing the case three times and striving to achieve justice, is a heartening thing. The pitiful and partially successful attempt on the part of the defendant and her relatives to lift themselves to a higher caste versus the proper attempts of the man to protect himself and his posterity from this social stigma is a moving story of human affairs. The court throughout the three hearings consistently used the words "traceable amount of negro blood" rather than the old test of "appreciable amount." In this situation doubtless the amount was not "appreciable," and yet relief for this white husband was certainly necessary. The dangers of the test of the instant case are obvious, yet it cannot be said that the issue under these facts should have been determined otherwise under the old phrase. If every court takes the responsibility of such a situation as seriously, certainly no fears need be entertained on any score that justice to all will not be achieved as nearly as humanly possible.

1. 195 La. 19, 196 So. 7 (1940).
2. See The Work of the Louisiana Supreme Court for the 1938-1939 Term (1939) 2 LOUISIANA LAW REVIEW 31, 38 (Sunseri v. Cassagne, 191 La. 209, 185 So. 1 (1938)).
Separation from Bed and Board

In the case of *Gann v. Pflueger* the court affirmed a judgment for separation from bed and board on the ground of abandonment. The husband maintained that he had returned to the marital domicile in answer to the summons. The court went very thoroughly into the physical appointments as well as the emotional environment of the home of the husband's family, to which the husband was inviting the wife to return, a domicile in which she had been very unhappy and from which the couple had removed prior to the institution of the suit.

Alimony of $45 per month pendente lite was granted; the husband was receiving a salary of $175 per month, plus rentals from two pieces of property, which, however, were not paid for.

In the case of *Hattier v. Martinez* a wife was granted a separation from bed and board on the ground of cruel treatment. She had been non-suited in a first attempt, and thereafter a reconciliation had been tried which was brief and a complete failure. General abuse, face slapping, and other indignities were proved. A threatening note showing the husband's cruel and vindictive nature seemed to weigh heavily with the court. The husband's threat to "get even" was made good by an attempt to blacken the character of the wife during the trial with evidence which the court did not believe. Custody of a small daughter was awarded the wife, who was making her home with her parents. The supreme court found the demand for alimony pendente lite not to be before them, as it had been fixed by rule in the lower court and did not constitute a part of the judgment from which the appeal was taken and which was reversed.

Reconciliation

The case of *Collins v. Collins* involved a judicial evaluation of facts necessary to constitute a reconciliation, or condonation of fault, after the filing of a suit for separation from bed and board. The wife proved cruel treatment and was granted a separation from bed and board by the lower court. On appeal, however, the supreme court reversed this judgment because a tryst had been kept by the wife at which an incident, which Chief Justice O'Niell was pleased to term an "affaire d'amour," took place. Since the wife continued the suit thereafter, went through

3. 194 La. 885, 195 So. 345 (1940).
4. 197 So. 146 (La. 1940).
5. 194 La. 446, 193 So. 702 (1940).
the trial, obtained judgment, and answered the appeal, it may
well be that the brief period of forgiveness, said by the wife to
have resulted from threats on her life by the husband, is a flimsy
basis upon which to found a reestablishment of a real marriage.
However, at least a waiting period was provided by the court
during which a sober and considered reconciliation might be
effected, which all the philosophical commentators upon mar-
riage agree is a good thing. The case would, on the legal side,
seem to settle the query as to whether or not one episode of this
nature will constitute a reconciliation sufficient to bar a decree
of separation.

Alimony

The case of *Fortier v. Gelpi* involves a full discussion of the
amount of alimony which a husband must pay to a wife whom
he has divorced, under the four-year act of 1932, after twenty
years of married life. Originally, the alimony had been fixed at
$155.38 per month. The present suit by the husband was for re-
duction, as he had acquired a second wife, who had borne a
daughter. He alleged, of course, that his income had been reduced
and that his first wife's sons were no longer minors, so did not
have to be supported—certainly a doubtful statement in the
present economic era. The husband was making a salary of
$416.66 per month, plus a rent-free apartment. The first wife was
wholly supporting her mother and partly supporting her two
major sons by the plaintiff. The case is an interesting study in
family budgeting and the quantum of evidence necessary for
this type of legal presentation. The husband felt that he should
be relieved entirely of alimony, apparently because he had mar-
rried again. The court disabused his mind of this conclusion but
said that his second marriage might “be considered as a factor
in determining his ability to pay.” The court also said that in
fixing the amount of the first wife’s “pension” the test is, “not
what it takes to support the divorced wife in the manner in
which she has been accustomed to live, but what will provide
her with maintenance.”

The law provides for the *marital portion* an amount which
is to be awarded to either spouse left in “necessitous circum-
stances” by the death of a “rich” consort. In interpreting these
relative and elastic terms, the court has announced that the pur-
pose of the law is to prevent a spouse from being suddenly left in comparative poverty after having become accustomed to a different scale of living. This law is of Roman origin and was first instituted to protect the divorced wife. It is interesting to note that if death removes the husband a different idea of the wife's rights prevails than that announced in this case where the husband departed voluntarily; though in neither situation is the wife at fault. Doubtless, this is just one of the many penalties a wife should pay for not "keeping her man" after she has him!

The greater interdependence of families as the struggle for economic existence grows keener puts more and more responsibility for solving the insoluble upon an overburdened court, with little help in this type of question from the legislature or anyone else.

The suit of Alexander v. Jackson involved a claim for alimony by a wife against whom a judgment for divorce had been rendered under the two-year act. The question of fault was handled just as it might have been in any ordinary suit for separation from bed and board, or divorce, except that the question was presented in the negative form of "not being at fault." Both parties tried to prove each other at fault. The court was more impressed with the credibility of the wife's witnesses and the corroboration and weight of her testimony, so "reached the conclusion . . . [she] was not at fault." The husband made $160 per month as a mail carrier. The wife was working, but for a very slight wage, and had long been in very poor health, as the result of a miscarriage. There were no children. Alimony was fixed at $30 per month. The maximum under Article 160 of the Civil Code would have been $53.33 1/3, so she was awarded just a little over one-half of this possibility. She would have done better under the Workmen's Compensation Act! The vagaries of alimony allotments may have to be solved ultimately by a similar statutory scale!

Custody of Child

The case of State ex rel. Landry v. Robin involved a contest between a father and maternal grandparents for the custody of a baby girl, whose mother had died. On the first hearing, the court

7. See Daggett, The Community Property System of Louisiana (1931) 98 et seq., and cases cited.
8. 197 So. 510 (La. 1940).
10. 193 La. 789, 192 So. 349 (1939).
decided, with two justices dissenting, that the district court should be upheld in its conclusion that the infant should be left with the grandmother. On the second hearing, the court ordered a remand in order that the father's fitness and financial ability to care for the child might be investigated—preferably by a woman field worker for the Department of Public Welfare, who would visit both homes and then report her findings. The same two justices again dissented. Underlying the law stated by all members of the court in the case ran the governing principle of the child's best interests. The court's recognition of their grave responsibility in this case, their extreme care and patience, is the most powerful safeguard for a child and renders him far safer than could any mere statute. The rule that the parent takes the child of right, unless his unfitness is shown, is simple in its statement, but difficult of application, as shown by this case. A recitation of the purely factual matters involved would serve little purpose in this résumé.

The case of Guillory v. Dupuy11 affirmed a judgment in the wife's favor for separation from bed and board on grounds of cruel treatment, and an award of custody of the one remaining minor boy to this mother of twelve. The boy had been trained by his older brother, with the consent of his parents, to be a jockey. He had now completed his apprenticeship and was a very successful rider. It was "conceded by counsel that the father's sole motive in instituting the proceedings was to determine who would have the custody and control of the minor and reap the benefit of his earnings as a jockey."12 The charges of "unfitness" of the mother and older brother to have custody were adjudged to be without foundation.

Tutorship

In the case of Globe Indemnity Company v. Aetna Casualty & Surety Company13 a father, as natural tutor, took out a bond with the Aetna Surety Company to insure to the minor his "faithful administration." The bond was given, under authority of Act 223 of 1920 as amended by Act 68 of 1924, Act 106 of 1924, and Act 283 of 1926, in place of a general or special mortgage. The natural tutor later bought his children's share of the community property, as he had a right to do, and took a ten thousand dollar

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11. 197 So. 240 (La. 1940).
12. 197 So. at 241.
bond with the Globe Indemnity Company to secure the "payment of the purchase price with interest." The natural tutor went bankrupt and was removed from the tutorship, and the dative tutor collected from the Globe Indemnity Company. This suit was entered by the Globe Indemnity Company to recover from the Aetna Company one-half of the amount paid by the Globe, plus one-half of the expenses incurred in defending the suit successfully brought by the dative tutor against the Globe Company. The Aetna Company pleaded that "the bonds furnished were not to secure the same debt nor were the plaintiff and the defendant the sureties for the same debtor—the bond furnished by the plaintiff securing an adjudication liability and the bond given by the defendant securing an administration liability." On a rehearing, reversing the first conclusion of the supreme court, the lower court was sustained and the Aetna's plea held good. The court said:

"Under the provisions of Article 3058 of the Revised Civil Code, one surety cannot recover against another surety unless the two sureties were bound for the same debt and the same debtor. The Aetna Company was the surety for Pecastaing, not as the parent and co-owner of his minor children, but as their natural tutor. The Aetna Company was surety not for any specific amount but for the faithful administration of the tutor. The Globe Company's liability did not depend upon any act of maladministration but was an unconditional guarantee that the price of the adjudication, with interest, would be paid. Therefore, concluding that the plaintiff and the defendant were not sureties for the same debtor and the same debt, and that the defendant is not liable to the plaintiff, the judgment of the district court should be affirmed."

Since the removal of the natural tutor was for "unfaithfulness of administration," the distinction is difficult, but certainly the only sum owed the minors by the unfaithful tutor at the close of his administration was the purchase price of the property adjudicated to him, which the Globe had specifically guaranteed. Furthermore, greater protection seems to be given the minors by this decision, if it does not result in a failure by natural tutors to give bond at all. Bond by natural tutors is optional, and minors

16. 193 La. at 751, 192 So. at 243-244.
may be left without any protection in cases where the natural tutor has little or no realty upon which the legal mortgage can fasten. It is hoped that the legislature will remedy this defect.

In the case of Cox v. First National Bank in Arcadia the facts were that one Mrs. Caskey became the administratrix of her deceased husband's estate and natural tutrix of her minor children. She mismanaged her trust as tutrix and was removed. The dative tutor then brought action against the Bank of Arcadia, claiming property in the latter's possession as being that of the minors, improperly disposed of through various manipulations of the tutrix. It was held that since the tutrix had never filed an accounting of her administration of the estate of the husband, this action was prematurely brought, as it is impossible to ascertain what property belongs to minors until the estate from which they are inheriting is settled. All rights were, of course, reserved to the minors to bring forward their claims at the proper time, but "‘where the same person is administrator, and also tutor of a part of the heirs, his possession of the estate must be held to be as administered,’" and the minors' portion, which is residuary, may be accounted, obviously, only after ascertainment.

B. Property*

Accession in Relation to Land; Reimbursement for Improvements

The right of accession in relation to land is based upon the principle that "the ownership of the soil carries with it the ownership of all that is directly above and under it." Consequently, when improvements are made by a person who does not own the land, the ownership of these improvements may accede to the real owner of the land. If the person who made the improvements was a possessor in good faith, the owner must keep the improve-

17. 197 So. 616 (La. 1940).
* Problems in property law are generally linked up with other issues; therefore, in addition to the cases discussed under this heading, see also under Mineral Rights, Municipal Corporations, etc.
2. As defined in Art. 503, La. Civil Code of 1870: "He is a bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of."
   See also Art. 5451, La. Civil Code of 1870: "The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another."
ments and "reimburse the value of the materials and the price of workmanship, or . . . a sum equal to the enhanced value of the soil." If the person who made the improvements was not a possessor in good faith, "the owner of the soil has a right to keep them or to compel this person to take away or demolish the same."4

In Venta v. Ferrara5 the plaintiffs, who had been declared the owners in a prior suit,6 wanted the defendant to demolish all the improvements which the latter had placed upon the land. However, since the defendant had purchased the property from a recognized realty company by a deed which apparently conveyed good title, the court found that he had been a possessor in good faith by all the tests of Articles 503 and 3451 of the Revised Civil Code. Consequently, the plaintiffs were obliged to keep the improvements, and the case was remanded (1) to permit them to elect their choice of paying either the value of the improvements or the enhanced value of the land, and (2) to permit the introduction of evidence regarding the value of the choice elected.

Natural Servitude of Drainage

Between neighboring properties there exists a natural servitude of drainage whereby the lower property must "receive the waters which run naturally from the estate situated above."7 In Adams v. Town of Ruston8 the plaintiff complained that the defendant was taking undue advantage of the location of the respective properties and was making the natural servitude of drainage more burdensome by permitting waste water emptied from the town swimming pool to flow over the plaintiff's land. The court could not but find that the defendant's acts had made the servitude more burdensome on the plaintiff's land, and the only serious question concerned the kind of remedy to be granted.

4. Ibid.
5. 195 La. 534, 196 So. 550 (1940).
7. Art. 660, La. Civil Code of 1870: "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude.

"The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water.

"The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome."
8. 194 La. 403, 193 So. 688 (1940). It should be noted that in the published report of this case there is a typographical error whereby Article 660 is cited erroneously as Article 600 in the syllabi and in the text of the decision.
On the strength of one of its earlier decisions, and bolstered by a decision of the Supreme Court of the United States, the court maintained that the matter of issuing an injunction was discretionary and that it must be considered on the basis of balancing the respective interests involved. In the present case, the court concluded that the additional burden was not sufficient to warrant the granting of an injunction and that since the injury caused was negligible it could be adequately compensated in damages.

Dedication to the Public

A question regarding the dedication to the public of certain streets in New Orleans came up in Richard v. City of New Orleans. The main substance of this case is discussed elsewhere in the present article. The point raised here is with reference to the "title by dedication" of which the court speaks. It is not clear whether the concept meant is absolute ownership of the land or merely the servitude of the right of way. Apart from the absence in the record of proof that there had ever been any public use of the streets, the court did not consider the fact of non-user for over a hundred years. If a servitude had been created by the alleged original dedication, it would have been lost by prescription. In conclusion, the opinion states that the original owner would be "estopped by his conduct... from denying the public character of the strip of ground in dispute" and that the same limitation must apply to his heirs. If there is any basis for an estoppel, it would be an estoppel to deny the intent to dedicate. Since there must be something in addition to an intention

11. 197 So. 594 (La. 1940).
13. 197 So. 594, 599 (La. 1940).
16. 197 So. 594, 604 (La. 1940).
17. For the general proposition that there must be an intent to dedicate, the court cites (197 So. at 599) one authority: Dillon, Municipal Corporations (5 ed. 1911). It does not appear why there is no reference to Louisiana authorities, e.g., Bomar v. City of Baton Rouge, 162 La. 342, 110 So. 497 (1926), and the cases cited therein.
in order to complete a dedication to the public, it is not clear how even an admitted intent to dedicate can establish the public character of the ground. The conflict between the estoppel against the heirs of the owner and the prescription against the city is not discussed.

In Humphreys v. Bennett Oil Corporation\textsuperscript{18} there was quite a different problem regarding dedication. The defendant had drilled oil wells on a cemetery ground and justified its operation on the basis of a mineral lease from the owner of the land and the church association.\textsuperscript{19} The court found, however, that there had been a dedication of that plot of ground for "church and cemetery purposes" which inured to the benefit of the public in whose favor it was made and constituted a property restriction even upon the owners.

**Title Deeds**

In the event of discrepancy, the diagram or map attached to a deed controls the description of the property.\textsuperscript{20}

In Gipson v. Gipson\textsuperscript{21} the plaintiff had executed a quitclaim deed relinquishing his interests to the record landowner. The assignee of a mineral lease granted by the landowner was held to be a privy in title to the quitclaim deed and was therefore permitted to plead an estoppel against the plaintiff who contended that he had been induced by fraud to make this quitclaim deed.

**C. Successions**

**Court Costs**

The case of Succession of Taulli\textsuperscript{1} is a contest over court costs and is well summarized by the syllabus of the reporter:

"Where main purpose of executor, in qualifying as dative testamentary executor of his aunt’s will and in instituting suit, was to secure recognition of himself and his sisters as the owners of certain property as heirs of their aunt, and to recover certain cash, and decree dismissing the suit placed all

\begin{thebibliography}{9}
\bibitem{18} 197 So. 222 (La. 1940).
\bibitem{19} To prevent the recurrence of such a situation, Act 81 of 1940 was passed making unlawful the use of cemetery grounds in any mineral operations. See The Louisiana Legislation of 1940 (1940) 3 *Louisiana Law Review* 98, 117.
\bibitem{20} Casso v. Ascension Realty Co., 195 La. 1, 196 So. 1 (1940).
\bibitem{21} 193 La. 807, 192 So. 355 (1939).
\end{thebibliography}
costs of the proceedings on succession of deceased husband, the 'costs' referred to were the usual statutory costs of court, and items of attorney's fees, executor's commission, and expense of printing briefs were not 'court costs' contemplated thereby, nor did they come within accepted meaning of the term 'costs of court.'”

Collation

The case of Naudon v. Mauvezin was a suit by grandchildren to compel their uncle to collate sums advanced by his father during his lifetime. The prescription of five years from date of death of donor was successfully pleaded by defendant. A notarial act of partition had been executed within the five year period set forth by Article 1413 of the Code. The action was not for a rescission of partition nor for a reduction of a donation but for collation, as was clearly shown by the pleadings, and hence Articles 1413 and 3542 were not pertinent.

However, the case seems to have been overruled sub silentio within a very brief time by the decision in Himel v. Connely. The court properly refused to apply Article 3542 to an action to compel collation, leaving the prescriptive period for this action an open question. The French theory that the action will lie while an action to partition exists is not altogether satisfactory in Louisiana, under different collation statutes and when applied, for example, to an insolvent succession, coupled with the fact that creditors of the deceased may not bring the action to collate.

In the Succession of Diez the facts were that a deceased father had had four children by his first wife and eight by his second. After his second marriage the deceased had conveyed certain lands to the children of his first marriage “to settle all matters of his first wife’s succession” and to compensate these children for valuable services rendered him by them. The children of the second marriage maintained that this transfer was a donation and that the substance of it should be collated. The notarial act was examined, evidence was admitted, over objection, to "verify the recitals in the notarial act and to show that the trans-

2. 193 La. at 751-752, 192 So. at 244.
3. 194 La. 739, 194 So. 766 (1940).
5. Himel v. Connely, 197 So. 424 (La. 1940), noted in (1941) 3 LOUISIANA LAW REVIEW 460.
6. 194 La. 1089, 195 So. 613 (1940).
7. 194 La. at 1094, 195 So. at 614.
fer evidenced by the act was supported by adequate consideration,” and the settlement was held to be a valid dation en paiement.

The issue of the case of Succession of Henderson was whether one of the children of the testatrix had or had not received, as recited in his mother’s will, more than his share of the estate before the mother’s death. The court reviewed all of the facts and figures and found that the plaintiff had received more than his share. It was suggested that since the defendants could not collect the notes given to the deceased by the plaintiff, because of his bankruptcy, the defendants’ proper procedure would be to ask the court to enforce the provisions of the mother’s will, which they had a right to do.

Prescription

The case of Smith v. Tyson was a companion to the six cases decided under the title of Tillery v. Fuller and “would have been consolidated with those cases had issue been joined at the time.” In Tillery v. Fuller it was decided:

“... that the rights of plaintiffs to accept a succession as against the co-heir who has accepted were barred by the prescription of thirty years, unless in a particular instance prescription may have been suspended long enough by the minority of an heir.”

The plaintiff in the instant case pleaded suspension of prescription under the doctrine contra non valentem agere non currit prescriptio, since she was a nonresident and ignorant of her rights during the period when she might have exerted them. The court reviewed the jurisprudence and decided against her plea. There was “no contention that her inability to act was brought about by the ill practices of the defendants,” and the court’s judgment was that mere passivity on the part of defendants did not “arrest the course of prescription, in the total absence of allegation or proof of machinations upon their part lulling plaintiff into a false security.”

8. 197 So. 267 (La. 1940).
9. 193 La. 571, 192 So. 61 (1939).
12. Ibid.
13. 193 La. at 578, 192 So. at 63.
14. 193 La. at 580, 192 So. at 64.
Disinheritson

The case of *Succession of Lissa* set forth the doctrine that when a child is disinherited for cause in a parent’s will, the disinherison is of no effect “unless the facts upon which the disinherison is founded are proved contradictorily with the presumptive heir sought to be disinherited.” A judgment of the lower court placing the other heirs in possession according to an agreement whereby they had partitioned the property, ignoring entirely the rights of the disinherited one, who was not made a party to the proceedings, was declared null.

Wills

In the case of *Succession of Blossom* the court held the following will valid as not containing a prohibited substitution under Article 1520 of the Civil Code:

New Orleans, La.
Feb. 18—1930.

I give and bequeath to Annie Baker, my adopted daughter, now at Elwyn, Pa., the usufruct of my property—and at her death I wish this property to be equally divided between Evelyn B. Kern of Toledo Ohio—and George D. Marshall of Shreveport, Louisiana. This is wholly written and signed and dated by me.

(Signed) Emma H. Baker.

Numerous cases were reviewed as a guide to the interpretation of the will. The court decided the document intended a gift to the adopted daughter of the usufruct, with naked ownership in the other two legatees. The gift of naked ownership was thought to be a conjoint legacy, and since one of the two had predeceased the testator, the other took all. Since the adopted daughter was a forced heir, and the only one, her legitime was one-third of the estate. The daughter had entered an alternative plea in the event the will was declared valid, asking for one-third of the estate. The court’s final statement appears in these words:

“It is further decreed that ... the adopted daughter of the testatrix, is entitled to one-third of the succession and that ... [the conjoint legatee] is entitled to the naked ownership of the remaining two-thirds. . . .”

15. 195 La. 438, 196 So. 924 (1940).
17. Succession of Lissa, 196 So. 924, 926 (1940).
18. 194 La. 635, 194 So. 572 (1940).
19. 194 La. at 637, 194 So. at 573.
20. 194 La. at 647-648, 194 So. at 577.
Since it was perfectly valid for usufruct to be left to one, with naked ownership in the other, and it was so held, it does not appear why the legatee of the naked ownership should receive two-thirds of it and the adopted daughter full ownership of one-third, with usufruct of the remainder, if that is the meaning of the final statement. If the value of the usufruct was found to be one-third or more of the estate, why should it be necessary to depart from the will? If not, why the division indicated? May not the forced portion be received in usufruct? The 1938 trust act provides that the legitime may be left under common law trust. Under the Code articles as interpreted by a very old case it may not be left under civil law trust—i.e., usufruct.

The case of Succession of Butterworth\(^21\) is of particular interest, since it deals with Article 1589 of the Code, which states the rule on erasures found in olographic testaments, an article upon which the jurisprudence has been scant and far from satisfactory. A most careful review of materials is presented here in a full opinion; distinctions between revocations of the instrument as a whole and the effect of erasures in the body are made—a matter rather vaguely treated in some preceding decisions—and a most considered judgment is made, which is adhered to in the rehearing. The testimony of handwriting experts was admitted and “like the testimony of other witnesses . . . considered by the Court and accorded the weight to which it is entitled in view of the facts and the common knowledge of mankind.”\(^22\) The bequest in question was marked out with double ink lines, the ink being the same as that used in writing the will. The lines evidenced a curved characteristic appearing in the handwriting. It was concluded that these erasures were “approved by the testator,”\(^23\) and hence the bequest was “considered as not made,”\(^24\) it being considered unnecessary that the testator expressly approve the erasures in writing. A notation made by the commissioners drafting the Code of 1825 to the effect that the article in question was placed in the Code to “prevent the mutilation” was relied upon.\(^25\)

The case is also of interest because it evidenced a creation of a trust in an olographic will and a rule taken by the trustee

\(^{21}\) 195 La. 115, 196 So. 39 (1940), noted in (1941) 3 LOUISIANA LAW REVIEW 468.
\(^{22}\) 196 So. at 41.
\(^{24}\) Ibid.
\(^{25}\) Projet of the Civil Code of 1825, I La. Legal Archives 214.
under the new trust act, though the matter of the trust was not an issue.

Trusts

In *Hagerty v. Clement* an informal trust was created in a will under Act 107 of 1920. The trustee later turned over the property to the beneficiaries with the consent of all concerned. Plaintiff, who had not only agreed but urged the trustee to transfer the property to himself and the other beneficiaries, then sued the trustee, claiming a breach of trust, damages, and a reconstitution of the trust, without offering to return the money which he had received. It was held that he had no case in law or equity. The case presents an excellent discussion of Louisiana trust laws, the restatement, et cetera.

Partition

In *Wetherbee v. Lodwick Lumber Company* a partition of realty was sued for. The defense was that the plaintiff was not the owner of an undivided interest. Title was tried and it was held that the plaintiff in the partition suit was an owner, after which partition was ordered. The defendant did not enter a suspensive appeal; hence the judgment became executory, and in due course the property was sold at public sale and bought in by the defendant in the present suit. The defendant in the original partition suit took a devolutive appeal and won on the title question, after the partition sale. He asked to have the sale set aside, and the court held that the sale was valid as it was a judicial sale and fully transferred ownership. "The validity of sales made in the execution of judgments after they become executory is not affected by a subsequent reversal of the judgment on devolutive appeal." The plaintiff's right to an accounting from the corporation which had been declared not to have been a valid co-owner was reserved.

The interesting points of procedure, warranty, et cetera, are discussed elsewhere in this résumé under the appropriate headings.

In *Hollingsworth v. Caldwell* plaintiff sued for partition by

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27. 195 La. 230, 196 So. 330 (1940), noted in (1941) 3 Louisiana Law Review 465.
28. 194 La. 352, 193 So. 671 (1940).
29. 194 La. at 369, 193 So. at 676.
30. 195 La. 30, 196 So. 10 (1940).
licitation of a tract of land in Ouachita Parish. The land was appraised at $2,628.50. The plaintiff, after confirmation of default, obtained an order to sell "at public auction to the last and highest bidder, for cash, regardless of appraisal." Plaintiff bid in the property for $115. After costs and attorney's fees were paid, $4.10 was left for defendants. In answer to a rule by plaintiff to homologate, the defendants sought to annul the sale, alleging fraud, false representations, et cetera. Upon the second hearing the court ordered a new sale upon an equitable ground, as the gross inadequacy of the price was so glaring. The supreme court reversed the judgment and held that the judicial sale of partition was definitive. The court grounded their conclusion largely on the *Wetherbee* case, discussed previously in this résumé. There are many points of difference. The *Wetherbee* case left the original co-owner with relief. It involved a matter of title and the failure to take a suspensive appeal. There were no glaring inequities apparent on the face of the proceedings of the *Wetherbee* case. Here the issue was pursued in the homologation proceedings of the partition sale. The plaintiff and general entrepreneur of the whole affair was the buyer of the property. He paid $115 for property worth $2,628.50, out of which costs and attorney's fees had to be paid. There was no collateral attack alluded to by the court but a direct attack in homologation. The defendants, owners of one-half, were left with $2.05 and no relief of any other kind. The distinction made as between partition and the sale to partition seems unsatisfactory and unwarranted under these facts. The cases cited for the inapplicability of Articles 1374, 1375, and 1376 do not support or discuss this distinction. It would seem that a partition by licitation would have to be concerned with the sale rather than the simple mathematics involved in dividing a sum into parts.

*Haas v. Reese* is a companion suit to *Amerada Petroleum Corporation v. Reese*, which disposes of the issues herein. The court said:

"The fact that the plaintiff in this case acquired royalty deeds from seven of the co-owners, in addition to mineral leases from three of them, without the consent or concurrence of the other co-owners, does not make any difference in the

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31. 196 So. at 11.
33. 195 La. 376, 196 So. 564 (1940).
34. 195 La. 359, 196 So. 558 (1940).
result, for the reason, as explained in the Amerada case, that where property is held in indivision between several co-owners, none can confer rights on the entirety of the common property without the consent of all the others."  

_Delta Drilling Company v. Oil Finance Corporation_  was a suit for a partition of a lease having no producing well. Estoppel was pleaded, based on an alleged agreement not to partition until all the oil and gas had been produced and sold. The court examined the contract, found it to be nothing more than an operating contract, and hence overruled the estoppel and remanded the case  with ample authority of Code articles and previous decisions.

**D. CONVENTIONAL OBLIGATIONS**

The principle that reformation of a written contract to express the true intent of the parties may be allowed where there was mutual mistake in its confection occupied the court in three cases. In _Smith v. Tullos_ and _Tate v. Ludeau_ reformation was allowed. In both mutual error was convincingly shown. In the third case, the plaintiff failed to sustain the burden of proving such error by clear and convincing evidence. Articles 1826 and 1955 of the Civil Code were relied on as well as numerous cases from other jurisdictions.

_Metcalf v. Monsour_ was a suit to annul a series of transfers of a tract of land for fraud and misrepresentation. In rejecting the plaintiff's demand, the court applied the well settled principle requiring exceptionally strong proof to sustain a charge of fraud. To the same effect was the decision in _McGinty v. McGinty_ where the court, although refusing to set aside the sale in toto, did allow annulment insofar as a portion of the land was concerned. This was based on a finding that the description of this

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35. 196 So. at 564.  
36. 195 La. 407, 196 So. 914 (1940).  
1. 195 La. 400, 196 So. 912 (1940).  
2. 197 So. 612 (La. 1940). In this case there was error in the preparation and execution of a lease through the innocent substitution of one form in lieu of the one contemplated by the parties.  
4. 197 So. 235 (La. 1940).  
portion was written into the act of sale after it was signed and without the consent of the vendor.

An attempt to set aside a sale of realty on the ground of lesion beyond moiety failed in Abbott v. Lawrence. The court applied the established principle that to justify rescission on the ground of lesion beyond moiety the evidence must show conclusively that the value of the property on the date of the sale was in excess of twice the amount paid for it by the defendant. The decision was based on Articles 1860 and 1861 of the Civil Code.

In Highland Realty Company v. Feraud the court allowed specific performance against the defendant's contention that the plaintiff did not have a good and merchantable title. Plaintiff traced his title through a partition sale. In finding it unobjectionable the court applied the rule that where property is ordered sold for the purpose of effecting a partition, it passes in its entirety, regardless of what the deed to the purchaser may recite, or of any inaccuracy in a map annexed thereto.

Bandel v. Sabine Lumber Company was a suit for specific performance together with damages caused by the defendant's granting a mineral lease on property he had agreed to sell to plaintiff by a bond for deed contract. The lease was granted subsequent to the time the plaintiff had made the agreed payments entitling him to a conveyance. The judgment of the lower court granting specific performance only was amended by the supreme court to include damages measured by the consideration paid to the vendor for the lease. This claim for damages for breach of the executory contract was held to be a personal action prescribed by ten years.

On the basis of past decisions, a reluctance on the part of the court to find a stipulation pour autrui might justifiably be claimed. Indeed, the court has said that there must be practically an express declaration to support such a finding. No such reluctance seems to have been felt in the case of Pelican Well & Tool Supply Company v. Johnson. There the plaintiff, a creditor,
claimed to be the beneficiary of such a stipulation. His debtor, in agreeing to allow more time to the defendant for the payment of the purchase money under a contract of sale, expressed himself as follows: "'provided titles have by that time been accepted by your attorney and provided further, you will, on or before ten days from this date, pay the Globe Supply Company his [sic] claim . . . and the Earl H. Carter claim . . . , together with the other bills we owe against our former operations on said lease. . . .'" The writing further provided that, "Your signature of acceptance hereto will constitute a contract between us, and the same shall become a part of our former contracts above mentioned." Plaintiff was the holder of one of the "other bills" mentioned. Defendant's contention was that payment of the bills named, including plaintiff's, was merely a condition on which the extension would be allowed and not a promise binding on him. The court found, however, that a promise was intended and allowed recovery under Articles 1890 and 1902 of the Civil Code. The case may be indicative of a relaxation of the earlier and stricter view.

The rule that parol evidence is admissible to resolve an ambiguity in a written agreement governed the case of *Hamill v. Moore.*

In *Blakewood v. Town of Franklinton* the plaintiff sought to recover $6,447.43, alleged to be due him for professional services rendered as a civil engineer. On finding that the parties had not formally agreed on the compensation for such services the court allowed recovery on a quantum meruit basis. The principle applied is well settled.

The case of *Cooley v. Meridian Lumber Company* involved a difficult problem of interpretation with respect to a deed conveying "all the timber standing, being and growing on and upon" certain land, and allowing the vendees fifty years for the removal thereof. The defendant claimed the right to all the merchantable timber produced during the period granted for the removal. In rejecting this contention the court found, first, that a sale of "timber" means a sale of merchantable timber, and, second, that the merchantable timber covered by the deed should be determined as of the date of the contract. The Chief Justice felt that

13. 194 La. at 993, 195 So. at 516.
15. 195 La. 391, 196 So. 909 (1940).
16. 197 So. 255 (La. 1940).
the majority opinion amounted to making a contract for the parties different from the one they had made for themselves. He supported this position by (1) referring to certain subsequent conduct of the landowner suggesting what the latter considered the contract to cover, (2) the rule of Article 2474 of the Civil Code imposing the risk of ambiguity upon the seller, and (3) an earlier Louisiana case which he regarded as being directly in point. The majority opinion contained an extensive examination of cases from other jurisdictions as well as from Louisiana.

The principle that a contract should be read as a whole in order to determine the true meaning of any particular provision was applied in *Dufrene v. Bernstein.*\(^\text{17}\) In *Thurston v. Mitchell\(^\text{18}\) the evidence adduced was held sufficient to show that the consideration was the sum claimed by the plaintiff, and not the smaller sum paid by the defendant.

In *Cerami v. Haas\(^\text{19}\) it was held that recordation by the offeree of a promise to sell royalty interest was an act constituting a sufficient acceptance thereof. The court therefore dismissed the offeror's action in jactitation to have the document erased from the conveyance records upon finding that he himself had never offered to perform. The offeror's remedy was said to be an action for specific performance pursuant to Article 2462 of the Civil Code. Of course this should not be taken as denying a vendor's right to have such a contract resolved for nonperformance by the purchaser after proper demand.

### E. COMMUNITY PROPERTY

In the *Succession of Bell\(^\text{1}\) a widow and widower, each having children, contracted a marriage of which no children were born. The first community of the husband had not been partitioned. This suit was brought against the man, who had survived both wives, by a child of his second wife's first marriage to settle the second community. The husband had bought out his children's interest in the first community and had included in some of the titles a recital that he was buying with his separate funds, but failed to say so in another. The settlement was effected according to the following well established rules:

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17. 197 So. 236 (La. 1940).
18. 194 La. 1037, 195 So. 531 (1940).
19. 197 So. 752 (La. 1940).
1. 194 La. 274, 193 So. 645 (1939).
“... It is so well established in the jurisprudence of this State that property purchased by the husband during the community without declarations in the title showing that that price paid was the separate funds of the husband and that it was his intention to acquire the property for the separate benefit of his estate, or words to that effect, that it is unnecessary to cite authorities to that end.”

“In order to preserve the title in the separate estate of the husband, it is necessary to recite two things in the deed: First, that the price is paid with the separate funds of the husband; and, second, that it is the husband’s intention to acquire the property for the benefit of his separate estate, or words to that effect.”

“There is no fixed rule or standard of proof required to establish that the contribution of the separate funds of the husband has been used to benefit the community. To establish such a claim it must be shown with reasonable certainty that the community still had the benefit of the contribution at the time of its dissolution, and that the separate funds were not wasted by the husband or disposed of for his separate benefit.”

In the case of In re F. H. Koretke Brass & Manufacturing Company, an injunction suit was brought by plaintiff to prevent her former husband and his two aunts from depriving her of her one-half of the community, the judicial partition of which was pending. The community property consisted of the assets of a business operated by her husband under the name of a corporation the charter of which had expired before any of the community assets were acquired. The husband and aunts had instituted so-called liquidation proceedings and had themselves appointed commissioners without bond. The court granted the injunction, making the following statement:

"'In the absence of any judicial precedent set by our own courts, we are disposed to follow the weight of authority established by the courts of other jurisdictions and to hold that, when a charter of a corporation expires by limitation of time as fixed in the charter, the corporation is thereby dissolved"
and ceases to exist, and is without any corporate power either de jure or de facto.'

The case is of interest chiefly for the corporation rules, which are discussed elsewhere in this symposium. The right to partition community property after dissolution of the community and the right to enjoin in proper cases are, of course, well recognized. It is important to note, however, that the relief was given under Article 303 of the Code of Practice, which is much broader in scope than Articles 149 and 150 of the Civil Code. The blanket clause "or from doing some other act injurious to the other party" appearing in Article 303 of the Code of Practice took care of this unusual procedure of the husband, which might have been hard to fit technically into the more specific clauses dealing with community property.

The suit of *Carter v. Third District Homestead Association* arose as a mandamus proceeding by a wife against the homestead association to compel the latter to issue her a duplicate stock certificate and pass book representing certain shares of stock issued in her name, the evidence of which the husband refused to turn over to her, as he claimed that the stock was purchased with community funds. The issue was, of course, between husband and wife. The question was grounded on an interpretation of Acts 120 of 1902 and 140 of 1932, permitting married women to buy stock in building and loan associations, the contention of the wife being that these acts also made the stock her separate property regardless of the source of the funds. It was so held. That being the case, the wife had a right to insist under statute and well established jurisprudence that her separate property be turned over to her, even during the existence of the community. The husband had no right to collect the possible debt that the separate estate of the wife owed to the community until the latter estate was dissolved. The case of *Viguerie v. Viguerie*, thought to be out of line with these well established principles, was overruled. It would appear from the rehearing of the *Viguerie* case that the court merely denied that the wife had a privilege on the movables, and hence dismissed her writ of injunction, and not that she did not have an action against her husband for restitution of her separate property. Be that as it may, the conclusion

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6. 196 So. at 919.
8. 197 So. 230 (La. 1940).
9. 133 La. 406, 63 So. 89 (1913).
reached in the case under discussion is undoubtedly correct and is heartening to the student of community property, who has been rightly disturbed of late because of confusion of jurisprudence.

In the case of *Investors Homestead Association v. Anglada* the plaintiff asked for a deficiency judgment against the husband of the borrower, whose property had been put up for security, and under sale had not brought the amount of the loan. The property had been acquired by the wife by inheritance, a fact known to plaintiff. The husband had signed "to authorize the wife." The usual transaction of selling to the loan company and then rebuying so that the loan company would have the benefit of a vendor's privilege as well as of a mortgage to secure the loan was gone through with. The theory of the plaintiff's suit was that by virtue of this performance, the property had been acquired during the marriage, hence was community property and the loan a community debt. The court very properly held the property and debt to be separate property of the wife and refused to hold the husband or community for the deficiency. Any time a deficiency judgment is defeated, progress has been made in the present trend toward some equitable method of spreading the risk of economic "depressions." The loan company in this case felt that they had sufficient security when they made the loan or they would not have accepted it. Since the borrower lost her piece of property in its entirety, on a low market, the lender only shared in a loss which was the fault of neither party. Obviously, the case was not decided on these grounds but on the purely statutory regulations of community and separate property. The court suggested that had the husband not limited his signature by the express words "to authorize," the result might have been different. It might be well to heed this warning in conveyancing. Over the defendant's objection, a letter from the husband was introduced by which the loan company wished to prove a new transaction to which the husband himself had subscribed. The supreme court found that the letter had been properly admitted under the parol evidence rule, but that it was not a promise to pay by the husband, as he was acting throughout the affair as his wife's agent—a matter which he was permitted to explain in his testimony. The decision is unquestionably correct and satisfactory in both law and equity.

The suit of *Womack v. McCook Brothers Funeral Home* was

10. 193 La. 596, 192 So. 69 (1939).
11. 194 La. 296, 193 So. 652 (1940).
brought by a surviving widow to recover a one-half interest in community property sold by the administrator of her husband's succession to pay funeral expenses and taxes, without notice to her. The supreme court stated that since the wife's half of the property could not be sold to pay the husband's funeral expenses and since taxes are not debts, the sale of plaintiff's one-half of the community was a nullity and not an informality cured by two years' prescription under Article 3543 as amended by Act 231 of 1932. However, plaintiff had claimed the residue from the administrator's sale of the succession property as a necessitous widow, and though she later withdrew the claim, she was thus precluded from denying that the administrator's sale had been legally conducted.

In Rawlings v. Stokes\textsuperscript{12} a husband domiciled in Mississippi acquired a piece of property in Louisiana during the existence of his marriage, which was subsequently terminated by divorce. The property in Louisiana was unquestionably community property. Preceding the divorce the spouses executed a mortgage trust agreement, and the wife accepted a note for fifteen thousand dollars, secured by Mississippi property, as a full settlement of all present or future claims against her husband or his estate. Later, the husband gave a note secured by the Louisiana property in dispute. The husband subsequently became a bankrupt. The present plaintiff bought in the Louisiana property at a foreclosure sale and brought an action to settle the question of whether or not the divorced wife had ever been divested of her one-half interest in the property. Having found that she had not released it, nor lost it by prescription of ten years, since there had been no title translative of her interest upon which to ground this plea nor any facts to create an estoppel against her, the court gave lengthy attention to the plea that she had been divested of title for failure to formally accept the community in 1922, at the time of the dissolution of the community by divorce. Article 2420, setting forth this rule, was not specifically repealed by statute until 1926, a few weeks after the decision of the Phillips case\textsuperscript{13} deciding that Article 2420 had long been abrogated by Act 4 of 1882. The court affirmed the distinction set forth in Lyons v. Veith\textsuperscript{14} and held that retroactive effects of the Phillips case might properly be given in husband and wife situations, but not

\textsuperscript{12} 194 La. 206, 193 So. 589 (1940).
\textsuperscript{14} 170 La. 815, 129 So. 528 (1930).
in contracts made on the faith of Article 2420 as interpreted by the court prior to the Phillips case. No contract here had been made until after the specific repeal of Article 2420; hence the wife was held to have retained title to the undivided one-half of the property.

F. PARTICULAR CONTRACTS

Sale

Act 124 of 1906 allows an attorney to acquire an interest in the subject matter of a suit, proposed suit or claim, in payment of his professional fees. The recent case of Hope v. Madison presented to the court for the first time the question of the validity of such a transfer when made after the suit has been filed. The court felt no hesitancy in holding the 1906 act applicable. It thus appears that transfers in payment of attorneys' fees have definitely been taken out of the scope of the articles of the Code dealing with litigious rights.

The cases of Mizer v. Tennant and Lee v. Perkins also called for the application of Act 124 of 1906. In both, however, the contracts of employment were entered into before the litigation was begun. The latter case presented the additional problem of a transfer by the defendant to a third party during the pendency of the suit. In an earlier opinion the court had remanded the case to permit the plaintiffs to avail themselves of the provisions of Article 2652 of the Civil Code on the subject of litigious redemption. At the time this was done the supreme court was not apprised of the fact that the mineral interest involved in the suit had been retransferred to the defendant prior to the filing of the motion to remand. Relying upon an earlier decision, the court, on the present hearing, ruled that the retransfer placed the status of the mineral interest in the same position as before the original transfer. This being true, there remained no basis for litigious redemption.

1. Dart's Stats. (1939) § 455.
2. 194 La. 337, 193 So. 666 (1940). This case is also discussed in the section on Procedure, infra p. 362.
3. A discussion of contingency fee contracts, and especially La. Act 124 of 1906, may be found in a Comment (1939) 1 LOUISIANA LAW REVIEW 593, 605-607.
4. 197 So. 748 (La. 1940).
5. 197 So. 607 (La. 1940).
6. 192 La. 1049, 190 So. 126 (1939).
In Wetherbee v. Lodwick Lumber Company, which is a sequel to the recent case of Continental Securities Corporation v. Wetherbee, the court correctly stated that the principle of Article 2453 and the doctrine of Richardson Oil Company v. Herndon have no application to a sale on execution pending a devolutive appeal.

Lease

In the Succession of Gravolet, a lessor intervened, claiming the sum of $2,160 for the remaining nine years of a ten year lease, and also recognition of its lessor's lien and privilege. In opposition, it was contended that under Act 190 of 1926, the lessor's privilege arising under "any lease on any building used wholly or in part for mercantile purposes" does not extend, in case of the failure or death of the lessee, for any period longer than six months after such event. The property leased consisted of a tract of land on which there were no buildings at the time the original lease was made, although at the time of the execution of the second lease (the one in litigation) several buildings had been erected and were owned by the lessee and used in his shrimp canning and oyster business. It was held that the second lease covered the land only, and that therefore the 1926 act was inapplicable. In answer to the contention that the insolvency of the succession operated to mature the rent for the remaining nine years of the lease the court relied on the fact that Article 2054 of the Civil Code applies only to cases where the insolvency has been judicially declared. The lease was also held subject to sale by the administratrix.

The case of Selber Brothers v. Newstadt's Shoe Store grew

8. 194 La. 352, 193 So. 671 (1940). This case is also discussed in the section on Partition, supra p. 283.
9. 187 La. 773, 175 So. 571 (1937), noted in (1933) 12 Tulane L. Rev. 308.
10. La. Civil Code of 1870. This article provides that:
"The thing claimed as the property of the claimant can not be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment.
"Nor shall it be lawful for debtors or third possessors of property, subject to a mortgage of any kind, to transfer or alienate such property, pending an action to enforce the mortgage, and any transfer or alienation made in contravention of the provisions of this article, shall have no effect as against the plaintiff, or plaintiffs, in such pending action." See also La. Act 22 of 1904 (Dart's Stats. (1939) §§ 6552-6554).
11. 157 La. 211, 102 So. 310 (1924).
12. 197 So. 572 (La. 1940).
14. 194 La. 654, 194 So. 579 (1940).
out of a contract of lease where the rent was based in part on the gross sales of the lessee. In reversing the judgment of the lower court sustaining an exception of no cause of action, the supreme court found an implied obligation in the lessee to conduct the business with fair regard for the interest of the lessor, and remanded the case to the lower court to determine whether the lessee had violated this obligation by changing the character of the business conducted in the leased premises. Articles 1903 and 2711 of the Civil Code were found applicable.

Rhodes v. Sinclair Refining Company\(^\text{15}\) was a suit to recover damages for the alleged unlawful ejectment of the plaintiff from a service station he was operating under a lease from defendant. The evidence sustained the trial court's finding that defendants did not forcibly and unlawfully eject plaintiff from the leased premises, but that plaintiff voluntarily relinquished the station. Only this question of fact was involved.

The case of Hill v. American Co-operative Association\(^\text{16}\) was a suit by an officer of a corporation to recover salary claimed under an alleged contract. Finding an existing contract for a period of a year and a discharge, without cause, during such period, the court allowed recovery of the balance of the salary for the term of the contract.\(^\text{17}\)

**Mandate (Agency)**

In Oliphant v. Town of Lake Providence\(^\text{18}\) the court of appeal certified to the supreme court the question of liability vel non of the town on an agreed statement of facts. The Town of Lake Providence owned and operated the light and water utilities plant and had employed one Chaney as general superintendent. He was required to be ready at all times, whether day or night, to respond to all calls connected with his duties. To facilitate the discharge of these duties the town furnished him an automobile which was kept at his residence at night. On the night of January 3, 1936, Chaney, accompanied by his son, drove to a garage to get his personal car. While at the garage, he entered into a discussion regarding the purchase of tires for a truck which the town owned. The authority to purchase materials for the department was included in his duties. He directed his son to drive the

\(15\) 197 So. 575 (La. 1940).
\(16\) 197 So. 241 (La. 1940), noted in (1940) 3 LOUISIANA LAW REVIEW 235.
\(17\) Art. 2749, La. Civil Code of 1870. The principal point at issue in this case is discussed in the section on Corporations, infra p. 350.
\(18\) 193 La. 675, 192 So. 95 (1939).
town car back to his home and store it for the night. While driv-
ing the car to the place directed he struck and injured the plain-
tiff. The question certified was the legal responsibility of the
town for negligence of the driver. On rehearing, with three judges
dissenting, the court reversed its previous decision and exoner-
ated the town from liability basing its decision on the case of
James v. J. S. Williams & Son, to the effect that, when an em-
ployee has taken his employer's vehicle out for the personal use
or convenience of the employee, he is not acting any more within
the scope of his employment when he is returning the vehicle
than when he is taking it out. The fact that the superintend-
ent's duties required him to be ready at all times to respond to
an emergency call, that he incidentally performed a service re-
lating to his employment, and that he had possession of the car
at all times was not determinative of the issue. The substance of
the holding of the court is that when the agent took the car on
a mission wholly his own and completely outside the scope of his
employment, he did not re-enter the master's work on the return
trip. The court did not pass on the question as to when the liabil-
ity of the master re-attaches in case the agent is sent out on a
mission for the master and, while out, deviates from the scope
of his employment and goes on a private mission.

In Cason v. Cecil it was held that the actions of an agent,
though not expressly authorized, are binding upon the principal
if the facts show an implied agency resulting from the conduct
of the principal. In this case the owners of certain mortgage notes
placed them in the hands of the bank for collection. Being un-
able to collect one of the notes from the debtor when it became
due their authorities informed the owners of that fact and
recommended a sale of the note to a third person as a means of
collecting the bank's money. The court found that the conduct of
the owners, who had full knowledge of the facts, in assenting to
this recommendation and receiving the money derived from this
sale estopped them to deny the authority of the agent to make
the sale.

19. Fournet, Ponder and Higgins, J.J. dissenting. Cf. dissenting opinion,
193 La. at 700, 192 So. at 104, reaffirming the decision rendered on the first
hearing and distinguishing the cases relied upon by the majority on rehear-
ing from the case at bar.
20. 177 La. 1033, 150 So. 9 (1933).
22. For a discussion of the question of re-entry, see Comment (1939) 14
Tulane L. Rev. 72.
23. 194 La. 41, 193 So. 362 (1940).
Security Contracts

Suretyship. The making of erroneous charges by the creditor against the debtor's account does not impair the surety's rights against the debtor, and the surety is not entitled to a release. However, the court granted the surety's alternative prayer for an accounting to show the extent of his liability under the contract.

Privileges. The validity of a materialman's lien and privilege on several oil leases and oil wells was disputed in Mercantile National Bank v. J. Thos. Driscoll, Inc. Materials and supplies were furnished in connection with the operation of several leases, but the materialman filed only a single lien in globo covering all the supplies. However, the several leases were all owned and operated by the defendant and all the supplies were purchased under one open account. For these reasons, the court held that the filing of the single lien was a sufficient compliance with the law. This decision was carefully distinguished from other cases where the filing of separate liens was required because there were separate and distinct contracts for supplies or because the supplies were furnished for the properties of different owners. In the present case the court also held that an overstatement in the notice filed would not preclude the lien claimant from establishing a less extensive claim.

Shreveport Long Leaf Lumber Company v. Wilson was a suit for the recognition and enforcement of a materialman's lien. The plaintiff contended that the one year prescription had been interrupted by the filing of the present suit in accordance with the provisions of Act 298 of 1926. However, the court held that the 1938 amendment—which became effective after the recording of the lien and before the filing of the suit—was exclusively a remedial change in the procedure for preventing prescription, and since there had not been a timely reinscription, as required by the 1938 act, the lien had been prescribed.

Mortgages. Where the holder of a series of promissory notes secured by a single mortgage sold one of the notes to a third

28. 197 So. 566 (La. 1940).
party, the court applied the settled rule that, if the foreclosure proceeds are insufficient to pay all the outstanding notes in full, the original holder cannot compete in the distribution.\textsuperscript{31}

In \textit{Hite v. Charbonnet}\textsuperscript{32} the purchaser of mortgaged property had assumed the mortgage and thereby became personally bound for the mortgage debt. This mortgage as against the original owner was not reinscribed\textsuperscript{33} until nineteen years after its first recording. The court held, on rehearing, that the absence of timely reinscription had not affected the existence of the mortgage as between the parties, and that it still ranked first because it had been reinscribed prior to the recording of the plaintiff's mortgage as against the purchaser. Consequently, since the purchaser who assumed the original mortgage is treated as a party to it, the judicial sale under a previous foreclosure suit had been valid.

**G. MINERAL RIGHTS**

\textit{Cheramie v. Moore}\textsuperscript{1} was a suit to cancel a lease on the ground of fraudulent representations on the part of the lessee, an English speaking individual, to the lessor, a French speaking individual. It was alleged that the lease was for one year only instead of ten as appeared in the instrument, signed by lessor's cousin for lessor, who touched the pen and made his mark. After a thorough review of the testimony, the court decided that the judgment of the lower court was correct in finding no fraud and refusing cancellation.

The case of \textit{Gailey v. McFarlain}\textsuperscript{2} is of particular interest because it settled a question which may have been considered doubtful—i.e., whether reversionary interests in mineral rights may be dealt with. The answer was affirmative, but it was held in this case, under the court's interpretation of the instrument alleged to have conveyed the reversionary interest, that such a sale was not intended and did not take place. The facts of the case were that one McFarlain, owner of a ten acre tract, sold one-half of his mineral rights in the land and leased the other half. Later, he

\begin{itemize}
  \item \textsuperscript{31} Cason v. Cecil, 194 La. 41, 193 So. 362 (1940). For discussion on priorities in assignments, see Note (1937) 11 Tulane L. Rev. 656. See also discussion of this case under the section on Banking and Negotiable Instruments, infra p. 348.
  \item \textsuperscript{32} 193 La. 581, 192 So. 64 (1939).
  \item \textsuperscript{33} Art. 3369, La. Civil Code of 1870.
  \item 1. 194 La. 415, 193 So. 692 (1940).
  \item 2. 194 La. 150, 193 So. 570 (1940), noted in (1940) 2 \textit{Louisiana Law Review} 752.
\end{itemize}
executed the deed, "the key instrument in this controversy," wherein he again sold mineral rights. After the leases on the tract had expired and ten years had elapsed without exercise of the rights of the claimants, McFarlain's lessee's assignees, under a new lease from McFarlain, started producing oil, and the present controversy began. That McFarlain could have sold the mineral interests which reverted to him was admitted. That he did not was a matter of interpretation of the deed. The court stressed the fact that in the deed he had warranted but one-sixteenth, which certainly would not logically have happened if the instrument purported to convey the whole mineral interests, claimed to have been sold as a reversionary right.

The case indicates that the reversionary interest is an incident to the ownership of the land and hence would follow the land, unless excluded in a subsequent sale. This point was not at issue, of course, as McFarlain was still the owner of the land. The court's analysis of the Bodcaw Lumber Company case seems to point the way, however. The phrase in the deed of the Bodcaw case, "All other rights held therein by said vendor," was said to have conveyed the reversionary interest. That such interest might be excluded, however, seems to follow.

If these observations are followed through, it could happen that a reversion might be held in abeyance indefinitely. For example, L, a landowner, sold his mineral interest to P, and after nine years sold his reversionary interest to X. During the tenth year of the original term of the servitude, oil was produced by P, but only a shallow pool was opened. This deposit was exhausted after eight years and the location abandoned by P. Eleven years thereafter, drilling a deep strata was in contemplation. To whom would the mineral rights belong? The problem might easily be further complicated if the land should change hands in the interim.

Chief Justice O'Niell, in a very brief opinion, concurred in the result of the case under discussion and made the statement that:

"... it matters not whether the deed from McFarlain to Triche, dated July 20, 1926, did or did not convey the so-called reversionary interest, because, if that interest was so conveyed it was subject to the prescription of ten years; and it matters not whether the ten years should be reckoned from that date or

from September 26, 1922; because, in either event, the ten years expired before this suit was filed."

This observation would point the way toward a ten year limitation upon the holding of a reversionary interest and bring this idea also within the general restriction of ten years for the holding of inactive mineral rights now prevailing for all other types—a highly desirable result under the civilian policy of tenure.

The question of the case of *Lynn v. Harrington* was framed in an action in jactitation brought by the landowner against the authors in title, who had reserved the mineral rights, and their lessees. The plea was that the ten years’ prescription liberandi causa had run because the well completed by the lessee prior to the end of the ten year period was unsuccessful. There was a suggestion that the well had been drilled without a “reasonable prospect of success” with the thought of holding the mineral servitude rather than of bringing in a producer. The court found that the “well was not drilled as a mere gesture by the mineral owners to preserve a servitude, but by the owner of a mineral lease under an obligation to substantially develop with due diligence.”

The well established rule that the “right to the continued use of the servitude retained is not dependent upon the successful outcome of the exploiting, unless it be made so by contract” was applied and prescription was held to have been interrupted. The discussion indicates more stress than usual in the pleadings on the purpose and motivation of the search. The court’s résumé of the evidence shows more attention paid to formations, sands, et cetera. Judge Fournet’s estimate of “expert testimony” remains the same. He finds “that their opinions are very fallible.”

In the case of *Levy v. Crawford, Jenkins & Booth* the defendants, landowners, leased their whole tract to the Atlas Oil Company, which assigned to the Gulf Refining Company part of the lease, covering a middle portion of the tract of land upon which the Atlas Company took the original lease. Subsequently, the landowners transferred the surface rights in the whole tract to plaintiff’s predecessors in title and retained all the mineral rights. Production on certain parts of the tract was continuous,

4. 194 La. 150, 174-175, 193 So. 570, 579 (1940).
5. 193 La. 877, 192 So. 517 (1939).
6. 193 La. at 881, 192 So. at 518.
7. 194 La. 757, 194 So. 772 (1940).
but no drilling had ever taken place upon the strip in contest. Plaintiff's theory was that the division of the original lease by the Atlas Oil Company made prior to the sale of the land had created three servitudes, that due to this fact prescription of non-user had run against the undeveloped tract—non-contiguous to the producing tract. The court very properly pointed out that when the sale of land was made, the reservation of all the minerals was made in the instrument upon the whole contiguous area, and hence that production upon any part had preserved the servitude as a whole, irrespective of the leasing plan.

The case of *Tyson v. Surf Oil Company* was a suit to cancel a mineral lease on grounds of abandonment and failure to pay royalty (rent). The alleged abandonment was a cessation of production through failure to operate during a period of at least a month. The reason given for the "temporary shut down" by the plaintiff was that the wells were being "surreptitiously" operated "through by-passing the gas around the meter." The reason given by the defendants was that they were looking for a market, as the former purchaser of the product had gone out of business. Neither of these statements of reason for cessation of operations appears to have been proved. In ruling against the plea of abandonment, the court said:

"After the primary term of the lease has expired, in order to cancel the lease, there must be some evidence that the wells thereon are no longer capable of producing oil or gas in paying quantities; or that the lessee, in closing down the wells, has done so with intention of abandoning same."

The court also refused cancellation because of failure to pay the rent royalty. A situation, as in this case, where rent royalty is to be fixed by the amount of production and is reasonably disputed does not give rise to cancellation for nonpayment as in cases where the amount of the rent is not in question.

This case is of particular interest because of strong statements to the effect that a lease gives the same right as does a servitude, and because of approved quotations from previous cases to the same effect. Furthermore, the court discussed the matter of whether Act 205 of 1938 is solely a procedural change affecting the remedy only, or whether it is also a substantive change. The latter opinion is expressed by Justice Rogers, con-

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8. 195 La. 248, 196 So. 336 (1940).
9. 196 So. at 341.
10. Dart's Stats. (1939) §§ 4735.4-4735.5.
curring in the decree, but differing from the majority in his view about this act.

The court interpreted the original lease together with the subsequent unitization agreement as being divisible by their terms, and hence found that the assignment of a part should be considered as an independent lease subject to rescission without effecting a cancellation of the whole agreement.

*Hightower v. Maritzky*\(^{11}\) was a successful suit to have mineral rights declared forfeited by prescription. The plaintiff inherited the land, upon which a one-fourth mineral right had been sold. The defendants set forth five pleas against forfeiture by prescription of ten years' non-use.

The first plea was that since the landowner in his sale of the servitude had retained the right to lease without the consent of the servitude owner and to retain delay rentals, surface rentals, bonuses, and cash considerations for leases to be made, he was in fact the agent of his grantee, holding for his grantee, and that the latter could not acquire against him. The court disposed of this contention by labelling the prescription in question liberandi causa, to which the rule invoked does not apply, and further by pointing out that by established oil and gas jurisprudence this type of contract is not one constituting a mandate. The mere fact that if the power to lease was exercised and production ensued, the benefit of the lease would inure in part to the servitude owner did not make the landowner the agent of the servitude owner. Of course, the reference to this prescription as being liberandi raised the old query of the *Sample v. Whitaker* cases,\(^{12}\) a question which cannot be discussed in the brief space allowed for this résumé.

The second plea was that the limitations of the grant of the servitude raised an obstacle to the use of the servitude and hence suspended the running of prescription under Article 792 of the Code. The court answered by explaining that this article applies only to obstacles which the servitude owner can "neither prevent nor remove," and further that the restriction upon the use of the servitude was contractual—voluntarily written into the grant—and that restrictive stipulations are legal and to be distinguished

\(^{11}\) 194 La. 998, 195 So. 518 (1940), noted in (1940) 2 *Louisiana Law Review* 755.

\(^{12}\) Sample v. Whitaker, 171 La. 949, 132 So. 511 (1930); Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931); Sample v. Whitaker, 174 La. 245, 140 So. 36 (1932).
from attempts to lengthen the prescriptive period, a matter of public policy. All of this doctrine is most logical under the articles on servitude and is intellectually satisfying but for the thought that if the servitude is so restricted as to preclude any use of it, as in this case, it automatically ceases to be a servitude as that concept is understood and becomes something else—an idea precluded under the reasoning of this decision.

The third plea, an alternative, was that an acknowledgement had interrupted the prescription. The alleged acknowledgment appeared in the following language used in deed of sale of the land:

"It is especially agreed and understood by all of the parties hereto that at this time ¼ of all the minerals in and under the above described land has been sold, and that the vendors herein expressly reserve to themselves, their heirs and assigns, ½ of all the oil, gas and other minerals in and under the above described land that they now own in same, and this reservation is especially considered in fixing the price of this sale.'"14

Under the settled jurisprudence the court held this statement to have been a mere recognition of the outstanding rights and applied the well known "intention" test against the defendants.

The fourth plea, another alternative, was that the plaintiffs, by signing joint leases and pooling agreements, had effected an extension. The court found that the plaintiffs who signed did not know that the defendants would join and hence no suspension or extension resulted. It is significant that the court discussed the Bremer case14 in terms of extension. However, the reader's enthusiasm in this observation is somewhat dampened by the fact that the court goes on to talk about "suspension or extension" without distinguishing terms or results.

The fifth plea raised a new and interesting discussion. It was contended that since the plaintiff's father had granted this one-fourth mineral interest after the death of his wife and since her half of the community interest had been inherited by plaintiffs, use of the grant was suspended under Article 783 of the Code until the co-owners ratified the grant by recognizing it in the subsequent deed of sale. The court declared that the article does not state that prescription is suspended, but only that the right to use is suspended until consent of the coproprietors is secured

—a matter of obstacle again, which could have been removed by suit to partition. The court stated that Articles 740 and 741 "leave no doubt" but that the situation contemplated in Article 738 refers but to the suspension of the use of the right and not to suspension of prescription. There remains grave doubt in the writer's mind. If the right to use does not come into being until consent of the coproprietor is secured, how could the right be said to be prescribing? It would appear that Articles 740 and 741 are but protective devices against the grantor and that none of the group bears upon the idea of loss by prescription of non-user. An analogous idea appears with regard to the leasing of property not owned. The ruling on this plea may be nothing more than further application of the usual and highly commendable policy of refusal to recognize artifices whereby the flat ten year prescriptive period could be lengthened or evaded.

*Amerada Petroleum Corporation v. Reese*15 was a suit to set aside a partition proceeding because plaintiff, holder of a mineral lease signed by only part of the many co-owners of the land, had not been made a party to the proceedings. The court, in a most logically reasoned and thoroughly documented opinion, held that the lessee was not a necessary party to partition proceedings between co-owners of the land. Act 205 of 193816 was analyzed in terms of both its text and the motivation of its enactment. The court said:

"Of course the legislature did not intend by its adoption of the act to grant to the mineral lessee the same right of ownership in and to the property leased as that of his lessor, so that he would be permitted to institute a partition proceeding against his lessor or against the owner of the property under lease to him, or vice versa. . . ."

The plaintiff's plea of deprivation of a valuable right was answered by the statement that he knew the insecurity of his situation when he took a lease from only part of the co-owners of the land. Hardship, of course, has never been a valid plea, even by a co-owner of the land against another co-owner who desires partition, and the hardship hitherto experienced will doubtless be found to have been negligible in comparison to that which may result from the application of Act 336 of 1940, which overrules by legislative fiat the case under discussion. Royalty has been

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15. 195 La. 359, 196 So. 558 (1940).
16. Dart's Stats. (1939) §§ 4735.4-4735.5.
17. 196 So. 558, 559 (La. 1940).
sold in Louisiana, for example, to the 119,317/5,000,000ths and to
the 3,340,909/11,000,000ths. The difficulties, if not impossibilities,
involved in making every holder of a mineral interest, as defined
in Act 336 of 1940, a party to a partition suit and paying off these
parties under the terms of this act are startling, if anything more
than sham representation is to be secured.

This act (amending Article 741 of the Civil Code), together
with Article 740, raises many interesting questions. Will it be
regarded as a procedural change only? This was the view taken
by the court in the case under discussion with respect to Act 205
of 1938. If it is to be regarded as going to the substance, will it
be held unconstitutional? Will the act be interpreted, together
with Article 740, as giving the right to sue for partition to holders
of royalty interests and lease interests as well as to servitude
owners? If so, again, would it be constitutional?

The case of Martel v. Hunt is concerned with a claim of
children for their mother's community share of property sold by
their father after their mother's death and during their minority.
The prescription point of the case is most interesting and will be
discussed under the appropriate heading in this résumé. The
acquirendi prescription of ten years' good faith was pleaded by
the subsequent vendees and failed for sufficient evidence of cor-
poreal possession. The court said:

"... the only character of possession which they claim he had
at that time, or which anyone ever had, was the possession
incidental to the cutting and removal of trees from the land."29

Civil possession is not discussed, though the good faith of
the vendees with acquisition by deed transitive of property is
conceded. The question of the possession of the plaintiff's father
and his predecessor in title is unanswered and raises many points
of interest.

Since plaintiffs were declared owners of their individual por-
tion of this land, they were properly awarded their share of the
oil produced from it less the exploration cost expended by the
lessee in good faith. Satisfaction in this result is marred by the
court's discussion of oil as a fruit. Obviously, oil is not a fruit,"born and reborn of the soil," as has been squarely held. In the

18. 197 So. 402 (La. 1940), noted in (1940) 3 Louisiana Law Review 244.
20. 197 So. 402, 405 (La. 1940).
case under discussion had the court applied their references to oil as a fruit, under the articles, the award would have gone to the possessor in good faith, while they very properly gave it to the owner of the land.

The lessees pleaded their warranty from their lessors, and the court found that as a matter of evidence the lessees did not rely upon the warranty clause in the lease when they explored for oil, and hence should not hold their lessors for the damages caused by their eviction. The court's common sense conclusion and failure to apply Article 2696 flatly to a situation which it was never expected to meet, is praiseworthy. The idea that these damages were definitely not contemplated under Article 1934 seems sound. The language of the court follows:

"It is common knowledge that the expense of mining operations is enormous; and it is for that reason that land owners do not ordinarily explore their own lands for minerals but, in order to have them explored, are willing to let them out to those engaged in that business, who have capital which they are willing to risk on such ventures. It is unbelievable that any sane person would, for an insignificant cash bonus and one-eighth of the minerals, lease his land for mining purposes if he thought by so doing he was assuming an obligation which might result in worse than bankruptcy to himself or his heirs in case his title should fall.

"And it is unreasonable to assume that the lessee in this case risked the heavy expense of drilling this well on the lessors' bare warranty of title. No concern managed by experienced business men would do that. So far as this record discloses, there was practically nothing behind the lessors' warranty. All the lessors seemed to have owned was a small tract of almost worthless land, so that their warranty amounted to almost nothing as compared with the expense of drilling. Surely the Texas Company did not stake its investment on the faith of the warranty."22

The case of Sittig v. Dalton23 was a suit to set aside five leases and was met with an exception of no cause and no right of action and was dismissed by the lower court. In each lease a rider appeared to the effect that a well must be started within ninety days and drilling diligently prosecuted to a depth of 8,500 feet.

22. 197 So. 402, 412 (La. 1940).
23. 197 So. 423 (La. 1940).
A well was started within the period but was abandoned at 5,000 feet. Another one was promptly started and abandoned at 916 feet. The court held that the lease expired by its own terms and overruled the exceptions. The following clause of the lease was pleaded by defendants:

"'... and in the event Lessor considers that operations are not being conducted in compliance with this contract, lessee shall be notified in writing of the facts relied upon as constituting a breach hereof and lessee shall have sixty (60) days after receipt of such notice to comply with the obligations imposed by virtue of this instrument.'"24

The court held that this clause had "reference to drilling operations during the term of the lease" and had "no application to the expiration of the term."

The case of Brown v. Sugar Creek Syndicate25 was a suit by landowners to have a pooling agreement and various royalty and mineral rights and leases cancelled. Fraud and misrepresentation, together with lack of consideration, were urged against the pooling agreement. It was shown that there was no fraud or misrepresentation in the confection or signing of the agreement. It was further shown that there was valid consideration in that the right to litigate many important issues was compromised and the plaintiff had gained by the transaction and had accepted benefits from the contract over a period of years. Hence he was not only bound by the contract but estopped to plead its invalidity. The compromise was necessary mainly because the landowners had sold more royalty than they had—a factual situation which apparently is not unusual.

The plea that the well was not profitable was disproved. The plea that an implied obligation to drill more wells had been broken was premature, as there had been no demand for further development.

H. Prescription

Liberandi Causa.

A preliminary but decisive issue in many prescription cases is not a problem of prescription but a matter of identification of the cause of action on which the suit is brought.1 Thus where Charity

24. 197 So. at 424.
25. 197 So. 583 (La. 1940).
Hospital of Louisiana is by statute subrogated to its patient's right of action for compensatory damages (to the extent of reasonable hospital and medical charges), it was held that the hospital's right of action is purely ex delicto. The one year prescription against tort actions was therefore applicable.

Questions of interruption and suspension of prescription were raised in *Meridian Fertilizer Factory v. Collier*. A foreclosure suit was instituted against the third possessor of mortgaged property more than five years after the maturity of the mortgage notes, and some time after the bankruptcy of the principal debtors. The defendant's plea of prescription was dismissed on the grounds that the listing of the debt on the trustee's schedule was a sufficient acknowledgment to interrupt prescription, and that the filing of the petition in bankruptcy had the effect of suspending prescription. In view of the fact that the present suit was instituted less than one year after the trustee's sale of the property, there was no need to consider when prescription began to run again after the interruption or the suspension.

In *Himel v. Connelly* the court decided that the five year prescription against actions for the reduction of excessive donations was not applicable to a claim between coheirs for the collection of a gift received by one coheir as an advance of her share of the inheritance.

**Acquirendi Causa**

An indispensable positive factor for acquisitive prescription is the claimant's physical possession of the property. The Civil Code provides in some cases for the retention of civil possession as the continuation of a preceding physical possession. However, it was stated clearly and correctly in *Culpepper v.*

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2. La. Acts 230 of 1932 and 298 of 1938 [Dart's Stats. (1939) §§ 4390.5-4390.6, 1067.3-1067.7].
4. Peart v. Rykoski, 197 So. 605 (La. 1940), noted in (1940) 15 Tulane L. Rev. 150.
5. 193 La. 815, 192 So. 358 (1939).
7. 197 So. 424 (La. 1940, noted in (1941) 3 Louisiana Law Review 460. See also discussion in sections on Successions, supra p. 284, and Procedure, infra p. 368.
Weaver Brothers Lumber Corporation that an original owner or possessor cannot retain civil possession "if he suffers an adverse claimant to hold actual or physical possession as owner of the estate." \(^1\)

In Martel v. Hunt\(^2\) the defendants pleaded acquisition of the property by the ten year prescription based on just title and good faith.\(^3\) The evidence showed a deed translative of the property and the good faith of those who claimed under it. However, the possession incidental to the cutting and removing of timber from the land does not in itself constitute a sufficient corporeal possession to support the ten year acquisitive prescription.\(^4\) In addition, "there must be such external signs of possession as to indicate clearly that the possessor holds control and dominion over the property."\(^5\)

Harrill v. Pitts\(^6\) involved a question of ten year acquisitive prescription, and the decision depended upon the establishment of the necessary factors of just title and good faith. On these points it was held (1) that a deed which contains a reservation of an unidentified part of the property is not for this reason defective, and may be a just title; (2) that good faith is presumed under Article 3481 of the Civil Code, and the burden of proving the contrary was not discharged in the present case because the record contained no positive evidence that the vendee in a 1925 sale (M. T. Atkins to A. C. Pitts) had knowledge of the undisclosed marital status of the original owner in a 1903 sale (Mrs. N. E. Drake to M. T. Atkins).

A disputed boundary case led to the plea of ten year acquisitive prescription in Hunter v. Forrest.\(^7\) However, a deed which does not accurately describe the property in question cannot be the basis for such a prescription because it is not translative of title. Moreover, this prescription is not applicable in boundary cases.\(^8\)

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\(^1\) 194 La. 897, 195 So. 349 (1940).
\(^2\) 194 La. at 902, 195 So. at 350. This is directly in accord with Article 3444, in fine: "unless a third person has usurped or taken from him the possession. . . ."
\(^3\) 197 So. 402 (La. 1940). See also discussion under Mineral Rights Section, supra p. 310.
\(^6\) 197 So. 402, 407 (La. 1940).
\(^7\) 194 La. 123, 193 So. 562 (1940).
\(^8\) 197 So. 649 (La. 1940).
III. TORTS AND WORKMEN'S COMPENSATION

A. TORTS

Malicious Prosecution

In Eusant v. Unity Industrial Life Insurance & Sick Benefit Association the defendant insurance company, acting upon advice of counsel, had caused a forgery prosecution to be instituted against the plaintiff. Three weeks later the district attorney had nolled the bill of information because of insufficiency of evidence. The plaintiff then filed a suit for malicious prosecution and was awarded damages in the sum of $250 by the lower court. The supreme court reversed this judgment, finding that there was neither “malice” nor “lack of probable cause,” both of which were essential to a cause of action for malicious prosecution. Justice Fournet stressed the generally accepted principle that where a party has made a full and fair presentation to his attorney of all the facts known to him or which he could have ascertained with reasonable inquiry and then acted honestly and in good faith upon the advice received, “the absence of malice is established, the want of probable cause is negatived, and the action for malicious prosecution will not lie.” Justice Rogers, dissenting, did not disagree with the legal generalizations of the majority opinion, but differed from it as to the applicability of the principles to the facts of the instant case. He stressed the fact that the plaintiff was an old negro woman unable to write, and that no effort had been made to contact a country agent of the company who was indicated by a notation on the policy as a possible source of information. He then concluded that the defendant company could not have honestly believed the plaintiff guilty of forgery, but had caused her arrest and prosecution “in order to coerce her to desist from prosecuting her suit to recover the avails of the policy.” Neither the majority nor dissenting opinions are subject to criticism, assuming their respective conclusions of fact to be justified. The writer tends to favor the atti-

1. 195 La. 347, 196 So. 554 (1940).
2. The two elements of “malice” and “want of probable cause” are not clearly separable. They are usually stated and discussed conjunctively, as was done in the principal case for “lack of probable cause” is evidence of “malice.”
tude expressed by Justice Fournet when he reaffirmed the proposition that "actions for malicious prosecution 'have never been favored, and in order to sustain them a clear case must be established.'"\(^5\) Criminal law enforcement is partially dependent upon the willingness of the citizenry to assist in bringing about the prosecution of those violating the criminal statutes. This duty would become unduly burdensome if the courts adopted an overly liberal attitude in civil actions for malicious prosecution.

Nuisance

Although courts have generally held that the drilling and operation of oil and gas wells is a lawful business and not a nuisance per se,\(^6\) yet under certain circumstances it may become a nuisance.\(^7\) In the case of *Dodd v. Glen Rose Gasoline Company*\(^8\) the petitioners, a husband and wife, had filed suit praying for damages and injunctive relief, alleging that defendant's use of a six-point flare, through which waste gases were passed and ignited, constituted a nuisance, in that it threw off tremendous heat and smoke, caused great vibration and noise, and drew up sand, dirt, and other impurities which were deposited on the house and furniture of petitioners. It was further alleged that petitioners were unable to sleep at night or to live under ordinary conditions, that their house had become practically worthless, and that the wife's health and been seriously impaired. Prior to trial, however, defendant had voluntarily discontinued the use of the flare and had erected a 150 foot stack or vent to carry off the gas without burning. Petitioners' supplementary petition averred that the stack also constituted a nuisance. The trial court awarded damages but refused to issue an injunction. The supreme court, on reviewing the record, found that inasmuch as the health of Mrs. Dodd had improved to a marked degree after removal of the flare, the stack did not constitute a nuisance, and that the flare, if a nuisance, had been abated. The court raised the award of damages so as to fully compensate petitioners for past injuries suffered as a result of the flare, but there is no indication in the opinion as to whether the court would have been willing to grant injunctive relief had the defendant persisted in maintaining it.

\(^6\) 4 Summers, Oil and Gas (Perm. ed. 1938) 17, § 654, n. 54.
\(^7\) Kirkbride v. Cline, 64 Ohio St. 556, 61 N.E. 1144 (1901); Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co., 34 Okla. 775, 127 Pac. 252 (1912); McGregor v. Camden, 47 W.Va. 193, 34 S.E. 936 (1899).
\(^8\) 194 La. 1, 193 So. 349 (1940).
The allowing of damages indicates, although the court refused to specifically so find,9 that there had been a nuisance. However, even when a nuisance is found to exist, courts often balance the conveniences, with the result that the complaining landowner is relegated to an award of damages.10 In the case of drilling operations, the general public has an interest in the development of mineral resources which may be more important than the right of the adjoining landowner to demand complete protection from disturbance.11 However, injunctive relief should be granted where the drilling operations are causing unnecessary disturbance, which could be alleviated by using more improved methods.

**Ultimate Carrier's Liability for Damage in Transit**

In the case of Bancroft v. Yazoo & M.V. R.R.12 a shipment of paper was delivered in a damaged condition. The shipment had passed over several transportation lines but it was not shown upon which of these lines the damage had occurred. The court held the defendant, the last carrier, liable, declaring that it is necessary to prove only that the initial carrier received the shipment in good condition and that it arrived damaged. Liability in the instant case is specifically covered by the Interstate Commerce Act.13 Prior to 1927 this act imposed liability upon the initial carrier, but not upon the terminal carrier.14 The supreme court's decision is in express accord with the present statute. Earlier inconsistent decisions in cases involving interstate carriers15 were rendered obsolete by the change in the act.

**Aggravation of Existing Condition**

Where an injury caused by an act of defendant aggravates an "existing condition" of the injured party, the defendant is liable for the full extent of the damages.16 In Peppers v. Toye

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9. "The flare itself had been removed when this case was tried on May 12, 1988, and, if a nuisance at all, had already ceased to exist. . . ." (Italics supplied.) (194 La. at 14, 193 So. at 353.)
12. 194 La. 115, 193 So. 481 (1940).
15. The following cases held only the initial carrier liable: Vincent & Hayne v. Yazoo & M.V.R.R., 114 La. 1021, 38 So. 816 (1905); Duvall v. Louisiana Western Ry., 135 La. 189, 65 So. 604 (1914); Hall v. Houston East & West Texas Ry., 9 La. App. 577 (1929).
Brothers Yellow Cab Company, the plaintiff, a passenger in defendant's taxicab, suffered minor injuries in a traffic accident. A few days later a condition of the intestines, previously dormant, became active, necessitating confinement for several months. The court held that in order to escape full liability the defendant must prove that the flare-up of the pre-existing condition was a mere coincidence arising independent of the accident.

Irrespective of the question of foreseeability, it is the general rule that a plaintiff must establish a causal connection between injury inflicted and damages sought to be recovered. The instant decision represents an exception to that rule. It recognizes a presumption that a dormant state would ordinarily remain dormant, thus shifting the burden of proof and requiring the defendant to show that there was no causal connection. This is in line with prior Louisiana cases.

B. WORKMEN'S COMPENSATION

Hazardous Occupations

In Rayburn v. De Moss it was held that a carpenter, engaged by the operator of a small dairy to rebuild a barn and injured in the course of his employment, could not recover compensation under the Louisiana Workmen's Compensation Act. The court merely declared that the operation of a dairy was not hazardous per se and that the services of the carpenter were entirely disassociated from the hazardous aspects of the dairy business. The court distinguished the case of Staples v. Henderson Jersey Farms, where the services were rendered in connection with the operation of mechanical dairy equipment. However, the true test is not the nature of the particular duties of the employee, but the nature of the trade, business, or occupation of the employer; also, the duties of the employee must be in the course of the hazardous aspects of the business. Admitting that the operation of

17. 198 So. 177 (La. App. 1940).
1. 194 La. 175, 193 So. 579 (1940).
2. La. Act 20 of 1914 as amended [Dart's Stats. (1939) §§ 4391-4432].
3. 181 So. 48 (La. App. 1938).
a dairy may be a hazardous occupation,\(^5\) the court correctly decided that the carpenter in the instant case could not recover.

Where the employer is engaged in both hazardous and non-hazardous business, the court must arbitrarily determine to which of these the services of the injured employee appertain. In the case of *Robichaux v. Realty Operators*\(^6\) the employer company owned and operated three sugar factories and also cultivated sugar cane on its plantations to supply these factories. The plaintiff was employed in gathering the sugar cane into piles for the loader to pick up and take to the mills. Chief Justice O'Niell, writing for a unanimous court, reasoned that as the cane had been stripped, topped, and severed from the soil, it was a finished product so far as the farming or agricultural process was concerned and was completely prepared for delivery to the mill before plaintiff's services began. He therefore concluded that the employment was in the manufacturing end and not in the farming end of the employer's occupation,\(^7\) and therefore specifically hazardous under the Workmen's Compensation Act.\(^8\) The court's holding that the gathering of the sugar cane into piles was connected with the manufacturing end of the employment, although somewhat arbitrary, was in line with an enlightened policy of liberally construing the scope of the Louisiana Workmen's Compensation Statute.\(^9\)

**Aggravation of Pre-existing Injury**

*Robichaux v. Realty Operators*\(^10\) also reaffirms the settled rule that an employee is not to be denied the benefits of workmen's compensation when the accident is shown to have aggravated an existing injury which alone might eventually have caused the disability.\(^11\) In the instant case the plaintiff workman had a callous growth on his hand which was developing into an abscess and which had been caused or aggravated by chopping wood for household use. While piling sugar cane, he suffered a blow on his hand which aggravated the growth thereon, and, as

\(^{5}\) Staples v. Henderson Jersey Farms, 181 So. 48 (La. App. 1938), held that a general dairying business requiring mechanical equipment was a hazardous occupation.

\(^{6}\) 195 La. 70, 196 So. 23 (1940).


\(^{8}\) La. Act 20 of 1914, § 1(2)(a) [Dart's Stats. (1939) § 4391] lists under hazardous occupations “sugar houses, sugar and other refineries . . . .”

\(^{9}\) Mayer, Workmen's Compensation in Louisiana (1937) 25, and cases cited 78n.

\(^{10}\) 195 La. 70, 196 So. 23 (1940).

\(^{11}\) 196 So. at 25-26.
a final result, the amputation of a finger was necessary. The court, under the beforementioned rule, correctly decided that the workman was entitled to compensation for the loss of his finger.

Refusal to Submit to Operation

The case of Simmons v. Blair\textsuperscript{12} again raises the problem of the reasonableness of the plaintiff's refusal to submit to an operation. The injury was to the plaintiff's knee, and the medical testimony as to whether the operation was a simple one unattended by appreciable risk or pain was conflicting. The supreme court, expressly following its prior decision in Bronson v. Harris Ice Cream Company,\textsuperscript{13} reversed the ruling of the court of appeal requiring plaintiff to submit to an operation as a condition precedent to the recovery of compensation and awarded compensation. The holding in the instant case is in accord with the liberal attitude of the court with respect to the reasonableness of an injured workman's refusal to permit an operation.\textsuperscript{14}

Right of Spouse Living Apart to Compensation

In Robinson v. Standard Oil Company of Louisiana\textsuperscript{15} the widow of a deceased employee sued for payments under the employees' benefit plan providing for continuance of payments to his widow or other dependents for one year after the death of the employee. The husband and wife had been driven by stress of circumstances to separate, both being ill and the husband being financially unable to maintain the wife. The court, however, found that they were living together as a matter of law, since there was no intention on the part of either to sever their marital relationship.\textsuperscript{16}

IV. PUBLIC LAW

A. MUNICIPAL AND OTHER PUBLIC CORPORATIONS

Police Power

A familiar restriction upon municipal legislation is the requirement of consistency with the general laws and policy of the

\textsuperscript{12} 194 La. 672, 194 So. 585 (1940).
\textsuperscript{13} 150 La. 455, 90 So. 759 (1922).
\textsuperscript{14} Mayer, Workmen's Compensation in Louisiana (1937) 73-74.
\textsuperscript{15} 194 La. 904, 195 So. 351 (1940).
The principle was invoked as one ground of decision in City of Minden v. David Brothers Drug Company, where the court declared invalid a city ordinance drastically regulating the sale of intoxicating liquors for medicinal purposes. The city was a local option dry area. Among other things the ordinance forbade a pharmacist to fill a prescription for intoxicating liquor for medicinal purposes without a municipal permit unless the nature of the patient's ailment was stated on the prescription. The Local Option Law expressly provided that it did not authorize a local unit to prohibit the sale of liquor when prescribed by a physician as a medicine and made the defense that a sale was of that character, when offered in a prosecution under the act or an ordinance adopted pursuant to it, depend upon the good faith of the prescription and sale. The act forbade the issuance of state liquor licenses in dry municipalities except to druggists for sale on prescription. The special charter of the city contained a general welfare clause and a grant of authority "to prohibit the manufacture and sale of intoxicating liquor, and to regulate the use and possession of same, for beverage purposes," subject to federal and state constitutions and statutes. In addition to the consistency requirement, the court relied upon a want of statutory authority to enact the ordinance. The Local Option Law did not grant it and the gist of the matter as to the city charter might have been expressed by resort to the maxim "inclusio unius est exclusio alterius"; the express charter grant related to beverage purposes which indicated an intent to exclude medicinal and any other uses.

The proposed initiative ordinance involved in State ex rel. Sutton v. Caldwell would not, the court determined, violate the consistency requirement. Act 61 of 1920 requires fire departments in cities of ten thousand or more to be divided into two platoons constituting a day and a night force. The proposed ordinance of the City of Shreveport provided that maximum hours for the uniformed force should be 144 during any 14 day period, except for extraordinary emergencies, required 15 days annual leave with pay for every fire department employee and set maximum hours for alarm system operators at eight per day for a maximum

2. 197 So. 505 (La. 1940). The court regarded the provisions of the ordinance as inseparable, despite the presence of a separability clause, and struck down the whole measure although defendant was charged simply with violating the section requiring a permit.
3. 197 So. 214 (La. 1940).
of six days per week. The court interpreted the statutory requirements as legal minima with which the proposed ordinance would not conflict because it would not forbid what the statute permitted or the converse but would simply impose additional requirements in line with the purpose of the act. The governing body of the city had raised this point as one ground of defense to a mandamus proceeding to compel submission of the initiative measure to a referendum. While no exception is taken to the immediate ruling, one wonders how far the ratio decidendi carries us. Suppose, for example, that the initiative measure contemplated a three platoon system. This would be in line with the objective of the statute and does not involve anything expressly forbidden but it does contain a structural inconsistency out of harmony with the working plan of the act.

By proceeding to pass upon the validity of the proposed ordinance the court avoided ruling upon the standing of the governing body of the city to question its validity. Logically, it would appear that the question as to the standing of a defendant to raise an objection should be dealt with before considering the objection on the merits. It is interesting to observe that what we have here is something akin to an advisory opinion since the court has proceeded to pass upon the validity of a proposed local legislative measure when its enactment is still highly conjectural.4

It is an ancient rule, carried over into public law, that corporate by-laws must be reasonable.5 In the field of municipal police regulation the same circumstances may be subject to the application both of this rule and of the constitutional guaranty of due process of law.6 Such a situation was presented in City of New Orleans v. Southern Auto Wreckers.7 The case involved a prosecution for violating a New Orleans ordinance which required that an open junk yard be enclosed by a "substantial feather-edged board fence not less than seven (7) 1" x 12" 'Nominal Size' feather-edged boards high, nailed horizontally across 4" x 6" 'Nominal Size' wood posts on 8' 0" centers and set three feet

4. The court, in passing, cited two California cases and one Nevada case supporting the standing of a municipal governing body to refuse to refer an initiative measure to the voters because of its asserted invalidity. On the merits it is not enough to make the obvious point that the voters have no power to validate; the question is as to whether the inquiry into validity should be reserved until there is an actual enactment to pass upon.

5. See generally 2 Dillon, Municipal Corporations (5 ed. 1911) § 587.

6. Where the ordinance is enacted pursuant to specific statutory authority, however, the question is solely one of constitutionality. State ex rel. City of Lake Charles v. St. Louis, I. M. & S. Ry., 138 La. 714, 70 So. 621 (1916).

into the ground." The title and preamble indicated that its purpose was to prevent obstruction of sidewalks as a safety measure. The court held that the ordinance violated the due process of law clause of the state constitution on the ground that an inflexible requirement of a particular kind of fence, when other types would serve the purpose efficiently, was arbitrary and unreasonable. The court refused to consider the possible aesthetic justification for the ordinance because it had been adopted as a safety measure. But why should not such a factor have been weighed? It was a related matter, and beauty is recognized as at least a legitimate incidental police power objective.

By Act 10 of the first extraordinary session of 1934, entitled "An Act To limit and regulate the imposition, levy and collection of taxes, licenses and excises by municipalities and parishes; and to repeal all laws or parts of laws in conflict," the legislature forbade any municipal tax, license or excise of any character upon any property or business or the performance of any act whatsoever, not taxed by the state, without express and special legislative authority, and flatly forbade the imposition and collection of such a tax under any police, implied or inherent powers of any municipality. A Shreveport parking meter ordinance, which required a meter deposit (five cents per hour) for parking as a means of recouping part of the cost of the regulation, was declared invalid in City of Shreveport v. Brister, because it fell within the prohibition of the statute. The meter charge was deemed a license tax or fee that was expressly covered by the act, even though an exertion of the police power, and was not sustained by the existence of a like state exaction and express and special legislative authority for its imposition. The city was prosecuting Brister for violating the ordinance. Further consideration was given the question affecting the validity of the ordinance in Monsour v. City of Shreveport, a property owners'

10. 194 La. 615, 194 So. 566 (1939).
11. The city attacked the validity of the act under the requirement of Section 16 of Article III of the state constitution that every law shall embrace but one subject and have a title indicative of its object. In rejecting the point the court relied upon the proposition, laid down in earlier cases, that a general indication of the subject of enactment calculated to put one on reasonable notice to dig into the purview or body of the measure was enough. It was assumed without elaboration that the inclusion of restrictions on both tax and police measures did not involve dual subject matter.
12. 194 La. 625, 194 So. 569 (1940).
and taxpayers' suit to enjoin the enforcement of the ordinance, but the court adhered to its original conclusions. Act 10 was, of course, anathema to the municipalities and parishes of the state and the 1940 legislature not only repealed it outright but also passed an act authorizing municipalities of over 12,500 to install and operate parking meters and exact charges for parking on their streets.

Act 275 of 1928 conditions the issuance of a municipal or parish permit to operate a garage or oil station upon the submission by the applicant of a petition to the governing body accompanied by the written assent of a majority of the property owners within three hundred feet of the proposed location of the business. By its express terms the act will take effect in a municipality or parish only when put into effect by an ordinance of the governing authority. It is required that notice of intention to take such action be published for not less than thirty days in the official journal of the parish. Dumestre v. Police Jury, Parish of Jefferson, was a suit for an injunction against the enforcement of such a parish ordinance. Dumestre had erected a garage and oil station without a permit. It appeared that notice of intention to enact the ordinance was not published until twenty-five days before it was adopted. The court treated the defect as jurisdictional and granted a permanent injunction. The possibility that there was substantial compliance was not discussed. The statutory ground of decision rendered it unnecessary to consider an attack on the constitutionality of the statute. It may be observed in passing, however, that, while some years ago the court upheld a property owners' consent provision in a zoning ordinance in

13. La. Act 70 of 1940.
14. La. Act 231 of 1940. It should be noted that the act requires designation by ordinance of the streets to be affected. This honors the rule of non-delegability of legislative power to administrative officers applied in City of Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925). But see State ex rel. Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936).
15. 197 So. 209 (La. 1940). The provision of the act as to publication requires that there be "publication so to do" but it is clear that what was meant was, in substance, "publication of notice of intention so to do."
16. Cf. State ex rel. Sutton v. Caldwell, 197 So. 214 (La. 1940), where a less troublesome departure from a statute was disposed of on the theory of substantial compliance.
17. State ex rel. Diekason v. Harris, 158 La. 974, 105 So. 33 (1925). No mention was made of State v. Garibaldi, 44 La. Ann. 809, 11 So. 36 (1892), where a property owner's consent provision as to the establishment of private markets was stricken down as an invalid delegation of municipal police power. There was no express statutory authority for the ordinance exacting such consents.
reliance upon the well-known Cusack case,\textsuperscript{18} the enactment under scrutiny presents greater difficulties because it applies to the location of a filling station in unzoned rural as well as urban areas where such businesses could not constitutionally be proscribed. That factor projects more sharply the constitutional question whether formulated in terms of delegation of legislative power to property owners or of the reasonableness of such a device in regulating the use of property, rural and urban alike.

\textit{Municipal Finance}

The fact that the constitutional debt limit provisions hardly deserve the name is emphasized by the situation presented in Houssiere v. City of Jennings.\textsuperscript{19} Houssiere (presumably a taxpayer of the city) sought to enjoin the delivery of three issues of city bonds and the levy of special taxes for their payment. One issue was for constructing drains, a second for opening, constructing, paving and improving streets and the third for the construction of waterworks and sewerage extensions and improvements. The constitutional limit upon bond issues is ten per centum of taxable values for each authorized purpose of issue and, since Section 14 (f) of Article XIV of the constitution treats each of the purposes of the bond issues in this case as separate purposes, each issue was to be considered separately in determining whether the limit would be exceeded. On that basis the proposed plus outstanding bonds for each of the purposes would have been within the limit. The court went on to point this out, although, as it indicated, the city’s plea of the bar of the constitutional “short statute of limitations”\textsuperscript{20} was enough to defeat the plaintiff. The issuance of the bonds would bring the city’s debt up to a total of $664,000 against an assessed valuation of $2,216,370. There had been voted about the same time, moreover, an issue of $220,000 of bonds of a road district coterminous with the city. Even assuming substantial under-assessment, the bonded debt of the city would amount to a large percentage of taxable values, apart from the debt of overlapping units. Obviously the requirement of electoral approval is no adequate control. Does not the subject invite thorough reconsideration?\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472 (1917).
\item Houssiere v. City of Jennings, 197 So. 750 (La. 1940).
\item La. Const. of 1921, Art. XIV, § 14(n). The provision bars questions of power as well as those of a procedural character.
\item To establish effective controls the problem should be approached from
\end{enumerate}
\end{footnotesize}
Palmer v. Mayor and Board of Aldermen of Town of Ponchatoula involved an attack by a property owner upon a paving assessment under Act 92 of 1934, as amended, upon a number of grounds, all of which are worthy of notice. The contention that the governing body of the town went ahead with the paving improvement over the protests of a majority of the property owners affected was rejected because the statute clearly permitted the governing authorities to proceed despite protests. There was no constitutional right to a hearing on the question of benefits because the assessment was not levied on the basis of a special determination of benefits but was, as required by statute, imposed on the basis of the familiar front-foot rule, which amounted to a legislative determination of benefits.

A second ground of contest, that it was ultra vires to lay the assessment and impose an assessment lien before the paving had been completed, was also answered by the language of the statute, which made it plain that the assessment should be laid after a contract for the work was awarded upon the basis of an estimate of the total costs by the engineer for the municipality.

A third objection, that the unit cost of the paving as fixed by the governing body was excessive, was supported simply by an allegation that a neighboring municipality was constructing pavement of as good a quality for a substantially lower estimated unit cost. There was no charge of fraud or collusion and the point was properly rejected by the court as a mere conclusion of the plaintiff not well pleaded.

It was contended further that to impose a paving assessment of $728 upon the property of plaintiff, which was assessed for ad valorem taxation at $300, was confiscatory and thus constituted a taking of her property without due process of law in violation of the state constitution. To silence this point, the court had merely to refer to earlier Federal Supreme Court decisions upholding paving assessments according to the front-foot rule without inquiry as to benefits. It might be added that the only basis for an attack upon the constitutionality of the assessment in such a case would be that the legislative determination of benefits by

the standpoints of the over-all debt of a given local governmental unit and of the debts of over-lapping units which burden the same taxable property. 22. 197 So. 697 (La. 1940).
22a. Matters of this sort are within the discretion of the governing authority and the courts will not interpose in the absence of fraud, gross abuse of power or oppression. McCann v. Mayor and Councilmen of Morgan City, 173 La. 1063, 139 So. 481 (1932).
means of the front-foot rule was, with respect to the contestant, arbitrary and thus a denial of substantive as distinguished from procedural due process of law.

Finally, the court rejected the contention that it was necessary that the paving certificates to be issued in anticipation of the collection of the paving assessments should have been approved by the State Bond and Tax Board before the proceedings for their authorization were taken. While there is no quarrel with this result, the court's disposition of the point involved a verbal inadvertence which should be explained. In saying that the certificate from the Board is not necessary "before the issuance of the paving certificates but is necessary only before the sale of such certificates," the court undoubtedly meant to refer to "authorization" and not to "issuance."

The upshot of the decision in State ex rel. Howard Kenyon Dredging Company v. Miller Gravity Drainage District Number 3 is that Act 227 of 1928, which authorized the incurring of additional indebtedness and the levy of additional taxes by gravity drainage districts for the purpose of completing systems of gravity drainage already eighty per centum completed, was not retroactive and thus provided no authority for the payment of a default judgment, rendered before the act was signed, against such a district for extra work on a gravity drainage project.

Taxpayers sought, in Sharp v. Police Jury of Parish of East Baton Rouge, an injunction restraining the police jury from issuing $75,000 of so-called excess revenue bonds to finance the construction of two parish incinerators and $25,000 of bonds to finance the equipping and furnishing of a library building owned by the City of Baton Rouge. Under an agreement of indefinite duration but terminable by either party at the end of a police jury fiscal year, on ninety days notice to the opposite party, the governing body of the city had authorized the police jury and the latter had undertaken to occupy and operate the property as a parish-wide library at parish expense. Section 14 (e) of Article XIV of the state constitution authorizes excess revenue bonds of a parish "for the purpose of constructing and maintaining highways or public buildings for the parish" and similar bonds of a

23. 193 La. 915, 192 So. 529 (1939).
25. The petition as well as the opinion of the court refer to operation of the library jointly by the parish and the city but the agreement between them called for operation by the parish alone.
municipality "for all municipal improvements." The proceeds of the library bonds were to be used largely in the purchase of books. The question whether the incinerators would be public buildings within the meaning of the constitutional provision turned upon whether "public" related to use by the public or devotion of the property to a public use. The chief objection to a choice of the latter meaning would derive from the contrast between the broad constitutional authorization to municipalities and the narrower one to parishes. With respect to the library bonds the district judge took the somewhat doubtful position that authority to finance construction included authority to finance the purchase of books. The supreme court planted one foot on the surer ground that the grant of authority covered maintenance as well as construction. But it is difficult to accept the ruling that the library bonds were to be issued for constructing or maintaining a library building for the parish. The phrase "for the parish" suggests a parish public building, not a city building under the temporary control of a parish obtained by contract. "Maintaining" refers to the same subject as "constructing" and surely it was not contemplated that parish bonds be issued to finance the erection of a parish building upon city property upon which a parish had a one year lease. The constitutional provision relates solely to finance. No question was raised concerning the power to construct and maintain; presumably there was unmentioned statutory authority for the intergovernmental agreement and for the parish projects.

Finally, plaintiffs contended that the revenues relied on by the police jury in determining the millage available for funding into bonds included revenues not "reasonably certain of collection legally" contrary to statute. The point that the chain store tax should not be considered because it might be repealed or changed at any time was summarily rejected. And the two cent gasoline tax, imposed by Act 87 of 1936, as amended, one cent of which goes to the parishes, was declared constitutional, and thus eligible for inclusion in the calculation of revenues. The court did not discuss the possibility that Section 22(a) of Article VI and Section 1 of Article VI-A of the constitution should be construed together as covering the whole field of such taxation contemplated by the constitution with the effect of excluding any additional levy.

Miscellaneous

Section 25 of Article XIV of the constitution, as amended in
1928, provides that the City of New Orleans shall levy a special ad valorem tax of not exceeding three mills on the dollar, in addition to such other taxes as the city was or might thereafter be authorized to levy, for the maintenance of a double platoon system in the fire department and a triple platoon system in the police department of the city. It requires that one-half mill of the tax be applied to a fire department pay increase and a like amount to a police department pay increase. While the city levied the tax each year it did not segregate the proceeds, and after August, 1930, it reduced the pay of the men and officers in the fire department below the equivalent of their salaries before the constitutional provision was adopted plus the avails of one-half mill of the special tax. Members of the fire department who had suffered the situation to go on for years without protest obtained, in Ziemer v. City of New Orleans, a judgment restoring their salaries to the amount received before the constitutional provision was adopted plus the avails of one-half mill of the special tax, but their claim for back pay on that basis was denied on the ground of laches. The effect of the decision was to require the city to keep up its appropriations for the fire department salaries on the old basis and, in addition, to apply the required portion of the special tax to the purpose. The court held that that part of the proceeds of the special tax dedicated to fire department salaries should be apportioned per capita between the officers and men. It may be, as the court said, that such a basis of allocation was fair and equitable, but there remains the question whether the apportionment was a matter left by the constitution to the municipal authorities and thus placed beyond the judicial purview.

The court had occasion during the term to rule that the general bond of a parish treasurer did not cover his special duties as treasurer of a road district in view of the requirement of the pertinent statute that a road district treasurer give a special bond. This ruling left it unnecessary for the court to pass upon some extremely interesting questions concerning the liability of the treasurer on his bond with respect to certain lost, misplaced or stolen bonds of the road district.

At the last term the court decided that under the local option liquor law a parish-wide election to determine whether the

26. 197 So. 754 (La. 1940).
27. Road District No. 1 v. Fidelity and Deposit Co., 197 So. 252 (La. 1940).
28. La. Act 17 of 1935 (1 E.S.) [Dart's Crim. Stats. (Supp. 1939) §§ 1362.41-1362.47].
parish would go dry might be called and held despite the fact that at previous local option elections two wards of the parish had adopted prohibition and rejected the notion that, since the unity of the parish had been broken, separate local option elections would have to be held in all of the wards if it was sought to make the whole parish dry. 29 This seems fairly clear under the statute. In the resolution calling the parish-wide election in this instance, the police jury provided that the result should not affect the then status of the two dry wards. The court found it unnecessary to pass upon the validity of this provision since the liquor dealers contesting the election had not been doing business in those wards and the provision was deemed separable. The provision did not appear on the ballots but that does not foreclose the matter if it was recited in the election notice, a matter as to which the opinion is silent, because it could hardly then be said that the provision was not an integral part of the proposition voted upon by an elector who relied upon the notice.

City of Shreveport v. Kahn 30 was a slander of title suit by the city against a number of persons with respect to property that the city had purchased for and devoted to park uses. The deeds to the city recited that the conveyances were for park purposes only. Oil was discovered in the vicinity and the city had agreed to lease the property for oil development. The city relied upon a letter from one of the defendants to the prospective lessee stating that the property had been sold to the city for park purposes only and that he and another of the defendants expected to protect their interests. While the court held that the city had failed to make out a case, the city substantially achieved its purpose because two of the defendants embodied a reconventional demand in their answers for an injunction against the city's leasing the property for oil and gas development, which was rejected. The proposed lease had been carefully drawn to the end that the grounds around each oil well and tank on the leased land should not be unsightly and in order that the oil and gas operations would not be permitted to endanger the public and interfere materially with the use of the park as a whole for park purposes. It was held that the defendants were not entitled to an injunction because, even assuming that the property could not be diverted

30. 194 La. 55, 193 So. 461 (1939). But see Anderson v. Thomas, 166 La. 512, 117 So. 573 (1928) (large auditorium in ten-acre park deemed inconsistent with park use and construction enjoined at suit of taxpayer).
from park uses there was no actual diversion of the property to other purposes since the oil and gas operations would not substantially interfere with park uses. The case suggests an understandable judicial disposition not to give rigid effect to legal principles affecting the use of property where economic developments press for recognition. It also significantly illustrates the need for declaratory judgment procedure in Louisiana.

The facts in Richard v. City of New Orleans\textsuperscript{31} were too long and complicated to permit of extended restatement. The contest concerned the ownership and control of a strip of land in the city which had been used for about one hundred years down to 1935 as a right-of-way for the Pontchartrain Railroad Company. Plaintiffs claimed as heirs of the man who had granted the right-of-way and the city claimed that he had previously dedicated the land as a street by designating it as such on a plan of a subdivision called Faubourg Franklin which he filed as public record with a notary public and by reference to which he had conveyed two of the squares in the area to other parties. After the railroad discontinued the use of the property the city proposed to open it as a street. This was an action for slander of title against the city in which owners of land adjoining the strip intervened as defendants. The court's conclusion that there was an intention to dedicate appears warranted by the facts as outlined in the opinion. But unless what was done amounted to a statutory dedication, no acceptance of which is required,\textsuperscript{32} it would appear to be essential, so far as the city and the public generally are concerned, as distinguished from those who bought by reference to the plan and their successors, that there be an acceptance of the dedication. There is nothing in the report to indicate that the case was one of statutory dedication or that there had been an acceptance.

B. EMINENT DOMAIN

Two recent decisions involving condemnation by the Housing Authority of New Orleans are not easy to square. The first case, Housing Authority of New Orleans v. Weis,\textsuperscript{1} involved the taking of certain inferior residence property in a colored residence area, for which a jury of freeholders, after inspection, awarded $5,300. In holding that this amount was manifestly in-

\textsuperscript{31} 197 So. 594 (La. 1940).
\textsuperscript{32} As to statutory dedication see Arkansas-Louisiana Gas Co. v. Parker Oil Co., 190 La. 957, 183 So. 229 (1938).
\textsuperscript{1} 195 La. 224, 196 So. 328 (1940).
adequate and increasing the allowance to $6,000, the supreme court relied chiefly upon the fact that a relatively higher price had been voluntarily paid by the Authority for adjoining property which was only half as deep and rented at a somewhat lower figure than the property in suit, which brought $75.00 per month. The award in the second case, *Housing Authority of New Orleans v. Polmer*, 2 was $3,000 for similar property in a colored area which rented for $50.00 per month. The court refused to disturb the award and strongly emphasized the governing rule that an appellate court should not amend such an award unless based upon a palpable error or so obviously inadequate or excessive as to suggest favoritism. It went on to say that in the matter of estimating values courts and text writers agree that more discretion is vested in the fact-finding tribunal in condemnation proceedings and correspondingly less in the appellate court. No mention was made of the *Weis* case. It is not readily perceived why this conception of judicial restraint was not applicable to the *Weis* case.

C. Taxation

Property Taxes

Perhaps the most interesting tax decision of the last term is to be found in the case of *Hibernia National Bank in New Orleans v. Louisiana Tax Commission*. 1 There the court held unconstitutional as purporting, in effect, to create a tax exemption not within the inclusive list of exemptions set out in Section 4 of Article X of the constitution, a statute concerning the assessment of the capital stock of banks for ad valorem taxation. The act provided that the assessment should not exceed the par value of such shares of stock plus any amount by which the combined declared surplus, undivided profits and contingent reserves of a banking institution exceeded the par value of the common capital of the institution. What this provision amounted to was an enactment that the assessment should not exceed the aggregate of the declared surplus, undivided profits and contingent reserves of a bank where those items totaled more than the par value of its capital stock. It seems evident that this was not a genuine rule for the guidance of the tax commission in making an assessment, but was an arbitrary rule which would operate to exclude part

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2. 197 So. 247 (La. 1940).
1. 195 La. 43, 196 So. 15 (1940).
of the value of bank shares from taxation. The court illustrated
the matter by reference to homestead exemptions; in both situa-
tions the exemption takes the form of rendering property free
from taxation to the extent of a part of its value.

A not unusual application of the general principle that one
who pays taxes voluntarily by mistake of law may not thereafter
recover the amount erroneously paid is to be found in Central
Savings Bank and Trust Company v. City of Monroe.\(^2\) The bank
had made an error of law in failing to take a certain lawful ded-
duction in computing the city tax on its capital stock for the
years 1933-1937. It discovered the error in 1939 and, upon the
city's refusal to repay the amount of taxes attributable to the
error, it brought suit to recover that amount. The money paid
had obviously been absorbed in the fiscal operations of the city
in prior years and was not still held intact and thus subject to
recovery without real prejudice to the city. The bank sought to
establish a basis for recovery by pointing out that the amount
could be repaid out of city utility revenues without any extra
burden on the taxpayers, but such revenues, as the court indi-
cated, enter into the budgetary operations of the city, and for
the court to order repayment out of those particular revenues
would be an unwarranted interference with the orderly adminis-
tration of municipal business.

It was decided in American Homestead Company v. Zemur-
ray\(^3\) that one who bought property in reliance upon a tax re-
search certificate issued by a city through its proper officer was
entitled to rely upon it as conclusive evidence that all city taxes
on the property had been paid as against a subsequent purchaser
at a tax sale by the city in view of the provision of Section 74
of Act 170 of 1898, which makes such a certificate conclusive evi-
dence of the payment of all taxes therein certified to be paid. In
view of the established rule that a sale of property for taxes
which had been paid is an absolute nullity and the conclusiveness
of the certificate as against proffered testimony as to nonpay-
ment, the purchaser who relied upon the certificate was, in this
case, adjudicated the owner and the tax sale decreed to be null
and void.

\(^2\) 194 La. 743, 194 So. 767 (1940). As indicated in the opinion, the court
has in earlier cases developed the conception that laws governing the col-
lection of taxes are \textit{sui generis} and constitute a system to which the quasi
contract and other general provisions of the Civil Code have little or no
application.

\(^3\) 195 La. 37, 196 So. 13 (1940).
Section 11 of Article X of the state constitution provides that "No judgment annulling a tax sale shall have effect until the price and all taxes and costs are [sic]\(^4\) paid, with ten per cent per annum interest on the amount of the price and taxes paid from date of respective payments, be previously paid to the purchaser. . . ." Westwego Canal and Terminal Company v. Pitre\(^5\) was a suit to annul a tax sale and enjoin the defendant from taking possession or interfering with plaintiff's possession of certain land. The plaintiff did not tender or offer to refund to the tax purchaser the price of the sale with interest and costs. The defendant denied in her answer that the tax sale was null and asked an accounting of revenues of the property from the date of the filing of the petition until she was permitted to take possession, but made no claim in the alternative that she be reimbursed the price of the tax sale with interest and costs. On appeal she conceded that the tax sale was void because no notice of delinquency had been given the tax debtor. It was obvious that she was not entitled to an accounting of profits. As for reimbursement the court held that it was not enough for the court below to give judgment for the plaintiff and simply reserve to the defendant such right as she might have to reimbursement and sent the case back in order that the amount due her could be determined and the judgment so revised as to be conditioned upon reimbursement to her in accordance with the constitutional provision.

The court was faced, in First Federal Savings & Loan Association of Shreveport v. Blanchard,\(^6\) with the question whether the claim of a mortgagee, under a mortgage which expressly provided that the mortgagee might pay taxes where the mortgagor failed to pay and extended the security of the mortgage to the claim for reimbursement for such a payment, was subject to the three year period of prescription applicable to tax liens or was governed by the ten year period relative to personal actions not otherwise prescribed. Act 170 of 1898, as amended, permits such payment by a mortgagee and provides for subrogation or transfer of the tax lien. The act expressly provides that payment of the tax by a person other than the tax debtor, such as the mortgagor, shall not be deemed a payment or satisfaction.

\(^4\) Prior to the 1932 amendment of the section this provision was grammatical but by that amendment the verb "are" was inserted after the words "all taxes and costs." Literally the provision is now meaningless but it is, of course, proper to resort to interpretation.

\(^5\) 195 La. 107, 196 So. 36 (1940).

\(^6\) 197 So. 280 (La. 1940).
of the tax. In holding that the ten year prescriptive statute governed, the court concerned itself primarily with interpreting the statute, but it did point out that there was nothing in the contract between the mortgagor and the mortgagee which precluded the latter from obtaining subrogation to the tax lien while preserving his right of action against the former personally. It occurs to the writer that the whole matter hinged upon an interpretation of the act of mortgage—surely there was a payment of the taxes by the mortgagee within the meaning of that document. The obtaining of the benefit of the statute with respect to subrogation to the tax lien might well be deemed incidental to that payment and not inconsistent with the mortgage.

Use Tax

Act 2 of 1938, generally known as the Public Welfare Revenue Act, imposes a tax upon the use in this state of each item or article of tangible personal property as well as a sales tax on sales at retail. In writing the use tax provisions into the statute the legislature doubtless was taking its cue from the decision of the Supreme Court of the United States in Henneford v. Silas Mason Company in which that Court upheld a similar tax imposed by the state of Washington. The Louisiana tax was held, in State ex rel. Cooper v. Pape, to apply to the use of an automobile purchased in Texas on March 3, 1939, by a resident of Texas, and brought by her to Alexandria on March 15, 1939, where she joined her husband. He was employed by the contractor on a public works job which was expected to keep him there until near the end of the year. She did not attack the validity of the act but relied upon her asserted nonresidence. Like the Washington statute, the Louisiana act provides that the tax shall not apply to the use of an article upon which a like tax equal to or greater than the amount imposed by the act had been paid in another state. So far as it appeared Texas exacted no such tax. But, unlike the Washington act, the Louisiana act does not except from its operation the use of an article brought into the state by a nonresident for his use or enjoyment while in the state. There can be little doubt, therefore, that there was taxable use in Louisiana in this case within the meaning of the statute.

A very interesting application of the use tax was involved in Saenger Realty Corporation v. Grosjean. The plaintiff was

8. 194 La. 890, 195 So. 346 (1940).
9. 194 La. 470, 193 So. 710 (1940).
seeking to recover an amount paid under protest under the use tax statute with respect to the use of a motion picture film exhibited at its theater in New Orleans. It obtained a copy of the master negative of the film from a distributor, in accordance with the usual practice of distribution, under a contract to pay a certain amount per week to exhibit the film. The statute defines tangible personal property as personality which is in any wise perceptible to the senses. The tax is imposed upon the lease or rental of such property as well as upon use. The tax was upheld on the ground that the film was tangible personal property which the plaintiff had leased for use. It is doubtful that the tax could be avoided by framing the contract as a royalty agreement with respect to a limited copyright license, which is an intangible interest, since, regardless of the character of the agreement, the film would be tangible personal property and its use within the state would be enough to subject it to the operation of the statute.

License Taxes

Best and Company, the operator of a large New York department store, had its representative display samples and take orders at a Shreveport hotel for interstate shipment directly to the purchasers subject to acceptance in New York, without any authority on the part of the representative to deliver any merchandise or accept payment. The company's Louisiana activity was simply the first step in interstate transactions and in an action by the state to recover a license tax upon the privilege of engaging in that activity by any one not a regular retail merchant in the state the court had no choice but to declare that the applicable provisions of Act 33 of 1938 imposed an unconstitutional burden upon interstate commerce. While the recent decisions of the Federal Supreme Court disclose a tendency to uphold nondiscriminatory taxation of interstate commerce, at least where it is not calculated to result in a heavier burden

11. See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940), and companion cases, upholding the New York City sales tax as applied to sales negotiated in New York and completed by interstate shipment to New York. These cases are discussed in Note (1940) 2 LOUISIANA LAW REVIEW 737. The license tax cases are distinguished in the opinion in the Berwind-White case. (309 U.S. at 55-56, 60 S.Ct. at 397, 84 L. Ed. at 576.)

Since our manuscript was handed to the printer, the United States Supreme Court has declared a very similar North Carolina tax invalid as applied to a like activity of the same concern involved in the Louisiana case. The court considered the tax discriminatory against nonresident merchants. Best & Co. v. Maxwell, 61 S.Ct. 334 (1940).
by reason of like taxation by other states, the tax here was clearly discriminatory; the license tax on intrastate retail business is graduated on the basis of gross sales and runs only to $500 for sales up to $499,000, whereas the tax complained of was $250 for each 60 days of display of goods regardless of the amount of sales.

Gasoline Taxes

The ruling in Sharp v. Police Jury of Parish of East Baton Rouge that the two cent gasoline tax which is allocated in part to the parishes was constitutional has already been adverted to in the discussion of the cases relating to municipal finance.

There appears to have been some confusion as to the meaning of the provision of the gasoline tax statutes allowing in the computation of the tax in each instance a deduction of three per centum of the total gallonage to enable the dealer to cover his losses in handling the motor fuels. The question that has been debated is whether the taxes are imposed upon the total gallonage manufactured, or imported into the state for sale, use or consumption in the state less an allowance of three per centum of that total, or upon the total gallonage actually sold, used or consumed in the state less such allowance. The supreme court was emphatic in adopting the first alternative in State v. Sinclair Refining Company. There is not space to review its extended discussion of the provisions of the statutes provoked by the existence of confusing language and actual inconsistencies. What its interpretation boils down to is that the taxes are not to be paid upon motor fuels "when sold, used or consumed in the State" but upon motor fuels "to be sold, used or consumed in this State." The words first quoted are the language of Section 22 of Article VI of the constitution. It is to be noted, moreover, taking Act 34

12. See Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939), in which a Washington occupation tax on the commissions of a Washington sales agency received in the business of getting orders for and supervising interstate shipments of Washington fruit was declared invalid. For a discussion of the recent cases see Lockhart, State Barriers to Interstate Trade (1940) 53 Harv. L. Rev. 1253.


14. An argument in support of the validity of the tax could be grounded upon Section 7 of Article XVIII of the constitution, which authorizes the legislature to levy taxes to effectuate its authority to establish a system of economic security and social welfare without qualification except as to ad valorem taxes, but for the fact that the gasoline tax statute, Act 87 of 1936, expressly authorizes the use by a parish of up to half of what is allocated to it under the act for any public purpose.

15. 195 La. 288, 196 So. 349 (1940).
of 1934 as a sample, that both the title and levying clause of each of the statutes refer to the tax as one upon motor fuel "sold, used or consumed in the State." This brings us abruptly up against a nice constitutional question—does not the constitutional provision contemplate a consumers' tax? Can the question be disposed of on the theory that what the court was talking about was the measure, not the subject, of the tax? It is elementary, of course, that that interpretation which leaves a statute consistent with organic law is to be favored.

**Corporation Franchise Taxes**

At its 1938-1939 term the court upheld a statute which imposed a franchise tax on corporations and provided that the tax should be a first lien upon the property of the corporation although the effect was to give the tax lien priority over an existing mortgage and vendor's lien. The court then made plain that it was expressing no opinion on the question whether the holder of a mortgage which contained the pact de non alienando might protect himself in such a situation by bringing an action quasi in rem. This question was presented to the court at the last term and answered adversely to the mortgagee in *State v. J. Bodenger Realty Company*. It seems fairly obvious that the method of enforcing the lien does not go to the constitutional question because it does not govern priorities. The mortgage and vendor's lien in that case were created by authority of Section 9 of Act 120 of 1902, relating to building and loan associations, as amended by Act 280 of 1916, which provides that such a vendor's privilege and mortgage shall have priority over all other liens, charges, privileges, encumbrances and mortgages upon the property recorded or arising in any manner subsequent to the recordation of the vendor's privilege and mortgage. But the court thought that this provision referred simply to priority over other liens, charges and encumbrances arising out of transactions between individuals or private corporations. The question still remains, however, whether or not a statute of this sort by giving the tax lien supporting a corporation franchise tax, not a property tax,

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priority over an existing mortgage does not amount to taking the mortgagee's property, that is, his first-ranking security interest, to satisfy the tax imposed on the mortgagor.\textsuperscript{19}

**Severance Taxes**

Section 9 of Act 140 of 1922, which imposes a state severance tax, provides that every person purchasing any natural resources severed from the soil or water under contracts requiring the purchaser to make payment directly to the owners of the natural resources shall deduct from any amount due the owner the amount of the severance tax before making such payments and account to the Supervisor of Public Accounts for such deductions. *State v. J. W. Jeffries Lumber Company*\textsuperscript{20} was an action by the state to recover severance taxes on timber bought by the defendant from persons who hauled it to the mill and sold it there without previous negotiations or contract. The statute required that, except as otherwise provided, the making of the reports of the tax and the payment of it should be by those actually engaged in severing natural resources. They were required to deduct from the value of the product severed the proportionate amount of the tax owed by each of the owners of such natural resource at the time of severance. It is evident that the draftsman was thinking in terms of such natural resources as oil and gas, which are commonly severed by royalty-paying lessees, and thus the problem of interpretation was rather artificial as to such things as timber. The court concluded that the reference in Section 9 to the owners of natural resources meant the owners referred to in the provision just outlined, namely, the owners at the time of severance, and on that basis held that the defendant was not liable. Mr. Justice Land dissented on the ground that the reference in Section 9 to the owners of natural resources was unqualified as to the time of ownership, which indicated a legislative intention to render the provision applicable to all purchasers whether initial or subsequent. The court's conclusion is certainly a salutary one from the standpoint of those engaged in dealing with natural resource products. The state, moreover, is not left entirely unprotected, because the statute imposes a lien good even against bona fide purchasers with notice which will survive until the identity of the property is lost.

\textsuperscript{19} Viewed in that light there may well be a distinction between the power to tax and the power to impose a tax lien on property. Surely the latter power does not carry so far as to permit the imposition of a lien upon A's property to secure payment of a tax against B.

\textsuperscript{20} 193 La. 646, 192 So. 85 (1939).
In 1938, the Louisiana legislature created the Milk Commission with authority to make and impose regulations necessary to secure a pure and wholesome supply of milk. These regulations were enforced as misdemeanors punishable by fine and imprisonment. A distributor of milk was prosecuted for failing to post a bond as required by a commission rule. The Supreme Court reversed the conviction, finding the statute invalid as an attempted delegation of legislative power to define a crime. Mr. Justice Ponder dissented, noting that delegating legislative powers to administrative bodies is generally permissible if the exercise is governed by a sufficient standard. This principle is consistent with the United States Supreme Court's decision in United States v. Grimaud.

In Barnett v. State Mineral Board, an action to enjoin a mineral lease, the State Mineral Board defended on the basis that title was still vested in the state because of the instrument of conveyance. The court held that title was vested in the plaintiff under the conveyance from a levee board.

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2. 193 La. 824, 192 So. 361 (1939).
from the state to the levee board was signed only by the state auditor and not by both the state auditor and the register of the state land office as required by statute. The judgment of the lower court recognized the plaintiff as owner of the land apart from the mineral rights therein. The supreme court annulled this judgment and granted judgment for the plaintiffs, recognizing them as the owners of the land, including the mineral rights, and permanently enjoining the State Mineral Board from leasing those rights. While it may have been that, upon a proper construction of the statute pursuant to which the conveyance from the state to the levee district was made, the execution of the instrument by the state auditor alone was legally sufficient, the court chose to place reliance upon a curative statute, passed in 1926. That act had to be squared with Section 4 of Article IV of the Constitution of 1921, which requires that in all cases of the sale of state lands (with an exception not material here) the mineral rights shall be reserved. The court observed that the statute did not convey any right of property but was merely one of repose and thus concluded that it did not run counter to the constitutional provision. It went on to declare, however, that assuming that the conveyance from the state had been so defective that title remained in the state, still the curative act would be effective. This conclusion is not free from logical difficulties. In examining it one may pretermit the question as to whether or not the constitutional provision applies only to sales and thus not to gratuitous transfers to political subdivisions. Strictly speaking, the alleged defect in the conveyance from the state to the levee district was either fatal or not; if it was fatal no title passed. Thus it would seem that if the constitutional provision was applicable to this sort of conveyance from the state to the levee district the curative act would, under those circumstances, be abortive under the principle that the legislature may validate or ratify anything that it could have authorized in the first instance if, and only if, it still has power to grant such authority.

The State Mineral Board is a creature of Act 93 of 1936. The question arose, in Placid Oil Company v. Hebert, whether the power of the board under that act to let mineral rights in lands belonging to the state or title to which is in the public, applies to the streets of a town operating under Act 136 of 1898. The

5. See the discussion of this aspect of the case in Note (1940) 14 Tulane L. Rev. 631.
7. 194 La. 788, 194 So. 893 (1940).
court answered the question in the negative, pointing significantly
to the circumstances that the act expressly authorized the board
to lease mineral rights with respect to the beds of parish roads,
but was silent as to the streets of a municipality.

It was also held in another case decided during the last term,
*State v. Humble Oil & Refining Company,* that Act 93 of 1936
did not transfer from the parish school boards to the State Min-
eral Board the authority to lease the mineral rights in so-called
sixteenth section lands, the revenues of which are dedicated by
Section 14 of Article XII of the constitution to school purposes.
The authority of the parish school boards depends upon the pro-
visions of Act 100 of 1922. The court referred to that statute as
a special one which, of course, made it easier to hold that the act
was not repealed by a later general law. It is not clear just what
the basis was for labeling the earlier statute a special act. The
decision is fully supported, however, by the point, made in the
opinion, that the later act was open to the interpretation that it
did not repeal the earlier one, and the adoption of that interpre-
tation was necessary to avoid holding it unconstitutional in view
of its requirement that the revenues from leases by the State
Mineral Board go into the general fund of the treasury which
would defeat the "trust" imposed upon sixteenth section lands
for school purposes.

E. Elections

The court has been quite commendably persistent in its view
that in order to state a cause of action in an election contest it
is not enough for the petition to allege in general terms such
matters as that there had been fraud, intimidation, assault, brib-
er and irregularities in the manner of conducting the election.
Such allegations are regarded as mere conclusions of the pleader.1
*Landry v. Ozenne*2 and *Molero v. Rowley*3 were primary election
contests involving the Democratic nomination for sheriff in the
parishes of Iberia and St. Bernard, respectively. In the *Landry*
case in particular the petition contained a plethora of allegations
which practically ran the gamut of misconduct on the part of
election officials and third parties, but it did not clearly and with

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8. 197 So. 140 (La. 1940).
9. See, for example, Third District Land Co. v. Geary, 185 La. 508, 169 So.
   528 (1936).
2. 194 La. 853, 195 So. 14 (1940).
3. 194 La. 527, 194 So. 7 (1940).
particularity specify acts of misconduct in the absence of which the election would have resulted favorably to the contestant. The court reiterated the proposition that the election officials are presumed to do their duty. The *Molero* case merits no special comment.

Several interesting questions confronted the court in *Bell v. Guenard*. Plaintiff and defendant were opposing candidates in the Democratic primary for the office of clerk of court. The results as promulgated by the party executive committee for the parish showed 910 votes for the defendant and 909 for the plaintiff. In addition to an inadequate general allegation about certain ballots which had been cast for him being rejected as spoiled, plaintiff alleged that by error in the tabulation of votes in one precinct the total recorded for him was one short and that in another precinct a ballot voted for him was rejected as spoiled for the sole reason that there was a mark in the box opposite the name of each of two candidates running for nomination as representative in the legislature. As to the first point a recount showed that plaintiff was right. The court upheld the recount even though defendant objected that the ballot box had not been properly safeguarded. It appeared that the box had been left sealed in a record vault in the courthouse which was open to the public. The key to the box had been dropped in it through the slot in the top and the slot covered over and the box carefully sealed by the commissioners of the election. The trial judge inspected the box when it was brought into the court room and satisfied himself that it had not been tampered with. The court held that under those circumstances it was not error to permit the box to be opened and the ballots inspected. With respect to the plaintiff's second point, the court held that the marked ballot was spoiled and thus properly rejected since the mark might reasonably be deemed to serve the purpose of identification. The desirability of a strict rule on this subject, where the voter is protected by a privilege of returning a torn, soiled or defaced ballot to the election officers and getting a fresh one, is quite evident. There is some doubt, however, about the existence of such a privilege in primary elections in view of the fact that provision for it in the 1906 primary law was removed in 1912 and has not reappeared in any subsequent primary law.\(^5\)

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4. 194 La. 956, 195 So. 504 (1940).
The net result was that there was a tie and thus neither party was nominated. Since the facts as to whether the ballot was spoiled were alleged by plaintiff it would appear that his petition failed to state a cause of action unless it is enough to allege facts making out a tie. But the court did not view the matter in this light; it assumed that he alleged a cause of action grounding a prayer to have him decreed the nominee.

Act 46 of 1940 authorizes any qualified elector to file objections with a party executive committee against candidacies. It requires in the section dealing with the filing of notices that, where in the statute it is provided that objections, protests, and the like, be filed with a party committee or party officer, the objection or other paper be filed with the chairman of the proper committee and permits such filing with the secretary of the committee where the chairman is not available or refuses to accept the document. Villermin v. Republican Executive Committee for the Third Congressional District was a suit by a registered Republican voter against the committee to annul its ruling rejecting a protest the plaintiff had filed against the candidacy of a certain person for the nomination by the Republican party to Congress. Plaintiff relied on the primary election law and the registration law in attacking the ruling on the ground that the candidate had switched from the Democratic party less than six months before filing his application to become a candidate. But the court found it unnecessary to go into this problem because the objections had not been filed with the chairman of the committee as required by the statute. They had simply been filed with the secretary and the chairman advised by long distance telephone. A similar suit brought by a registered Democrat was consolidated with the Villermin suit for trial, but the same defect in the service of the objections obtained there and the court thus did not have to pass on the interesting question whether the statute permitted "any qualified elector" who was a member of a different political party to file objections.

Long v. Martin and Long v. Looney were contests over the Democratic nomination for secretary of state. The person who won the primary died some weeks before the date fixed for the second primary for other state offices. It devolved upon the state central committee of the party to nominate someone for secretary.

6. 197 So. 743 (La. 1940).
7. 194 La. 797, 194 So. 896 (1940).
8. 194 La. 811, 194 So. 900 (1940).
of state, and at a meeting of the committee held shortly after the second primary, Long was selected by majority vote. A day or two later at a meeting called for the purpose of declaring and certifying to the secretary of state those nominated at the second primary, the committee, a quorum being present, amended the call for the meeting to cover such other matters as might come before the committee and thereafter adopted a resolution annuling Long's nomination and a further resolution selecting Gremillion as the nominee for the office of secretary of state. A few days later a new state central committee, whose members were elected at the primary, met and adopted a resolution nominating Gremillion for secretary of state. The court held that in the absence of fraud, since there was no statutory prohibition and no restriction of the power of the committee to rescind the selection of a nominee and to make a new selection, the court could not question the committee's action in changing the nomination at any time before the name of the nominee was printed on the official ballot. It did not find it necessary to determine the effect of the ratifying action of the new committee. The court disposed of the case with remarkable dispatch in order to "beat the deadline" for printing the ballots for the general election. If the circumstance that the meeting at which the nomination was changed was a special meeting without a perfect attendance had adverse significance because the action taken was not within the call, the result can nevertheless be supported on the theory that the action of the new committee was effectual to nominate Gremillion.

The relators in State ex rel. Graham v. Republican State Central Committee of Louisiana sought mandamus to compel the committee to certify their names as qualified candidates for nomination for Governor on the Republican ticket in the 1940 primary. Objections to their candidacies on the principal ground that they were dummy candidates had been sustained by the committee on October 30, 1939. The primary election law provided, in effect, that no appeal should be taken from the action of the committee to a court unless taken within two days. This suit was filed on November 2, 1939. One of the intervening days, November 1, 1939, was a legal holiday. The trial court upheld the plea of prescription, but nevertheless, with respect to the merits, found that the evidence before the committee was insufficient to sustain the charge that the relators were dummy candidates. The supreme court annulled the judgment insofar as it sustained the

plea of prescription on the ground that even though the statute was silent on the subject the intervening legal holiday should not be counted in computing the prescriptive period because a contrary interpretation would involve consequences too absurd to be deemed within the contemplation of the legislature. The reasoning of the court applies as well to Sundays as to legal holidays. After disposing of this point favorably to the relators, the court went on to decide the case for them on the merits on the basis of the facts as found by the trial judge in view of the summary character of the suit and the necessity for its prompt disposition.

F. MISCELLANEOUS PUBLIC LAW CASES

Section 16 of Article III of the state constitution requires that a statute have a title indicative of its object. This is a much less exacting requirement than that embodied in many state constitutions, which is, in substance, that a statute have a title clearly expressing the subject of enactment. At all events, the court has rather emphatically taken that view of the matter. This is exemplified by State ex rel. California Company v. Jefferson & Plaquemines Drainage District. The statute under scrutiny in that case related to the collection of taxes and the disposition of property sold for nonpayment of taxes in the drainage district, but its title did not identify the district; it merely referred to "said drainage district." The court first held that this did not meet the constitutional requirement, but after reconsideration on rehearing concluded that it did on the ground that the title was not so defective as to be calculated to deceive a person interested in the subject matter of the act. Mr. Justice Rogers dissented on the ground that to meet the constitutional requirement the title must, without extrinsic aids, be in itself indicative of the subject of the enactment.

The court handed down a very wholesome decision, in State ex rel. Wogan v. Clements, with respect to the access of citizens and taxpayers to public records. In that case certain parties who

10. In State ex rel. State Pharmaceutical Ass'n v. Michel, 52 La. Ann. 936, 27 So. 565 (1900), the court adopted the view that where Sunday is not mentioned and the period allowed by law for action is longer than a week an intervening Sunday is to be included in the computation, but that where the period is less than a week the converse is true. The case involved the constitutional period under the then existing constitution of the state for action by the Governor on a bill passed by the legislature.

1. 194 La. 312, 193 So. 657 (1940). See also City of Shreveport v. Brister, 194 La. 615, 194 So. 566 (1939), discussed supra, p. 323.

2. 194 La. 812, 195 So. 1 (1940).
sued as registered voters and taxpayers obtained mandamus against the conservation commissioner requiring him to give them access to the records and books of his department. The suit was begun on August 28, 1939. The case was decided by the supreme court on March 11, 1940. The principal defense was that at the time of the application by relators the records in question were in the custody of the Supervisor of Public Funds. The so-called Public Records Act, which provides for access to public records, expressly ordains that it shall not apply to records in the custody or control of the Supervisor of Public Accounts unless otherwise provided by law. In this instance the Supervisor of Public Accounts did not remove the books and papers of the conservation department from their usual places but had his assistants use them there, and conservation employees made use of them as usual except for such interruptions as were entailed by reference to those records from time to time by the assistants of the Supervisor of Public Accounts. Under those circumstances the public records of the department were, in the opinion of the court, in the custody and control of the conservation commissioner and thus subject to the examination of the plaintiffs as provided by statute. There were three separate concurring opinions, the burden of each of which was that the majority was wrong as to who had custody and control of the records, but that since the Supervisor of Public Accounts had retained control for an unreasonable time those records had, by the time the court was ready to dispose of the case, become subject to public inspection because the law contemplated simply that the Supervisor’s freedom from such inspection be for a reasonable time only. It seems rather clear that the concurring judges hit upon a less satisfactory rationalization than the majority both because the “reasonable time” limitation is not spelled out in the statute and because, even if it were in general terms, what was a reasonable period would be a question of fact in a given case not to be decided summarily by an appellate court without a trial of the issue. It is interesting to note, in passing, that at the 1940 extraordinary session of the legislature a very salutary measure making the records of the State Bond and Tax Board open to public examination was enacted.  

The overworked and rather vulnerable classification of the

3. La. Act 5 of 1940 (E.S.).
powers of a state as (1) governmental and (2) proprietary4 was resorted to in applying the doctrine of estoppel to state officers and, in effect, to the state itself in State ex rel. Shell Oil Company v. Register of State Land Office5 and Reeves v. Leche.6 There is no quarrel with the decisions, however, because the matters sought to be relied upon were procedural defects, of a minor character at that, in publishing invitations for bids for state mineral leases, and clearly did not go to the power of the state officials to act. It appears, moreover, that the doctrine is applied quite liberally in this jurisdiction against the state and its subdivisions.

The 1938 amendment to Section 1 of Article XI of the state constitution increased the exemption of homesteads from seizure and sale from two thousand dollars to four thousand dollars. It was quite correctly decided in Daniel v. Thigpen7 that the amendment was an unconstitutional impairment of the obligations of a mortgage and a chattel mortgage contracted before its adoption. It was also held that to enforce his security a creditor did not have to prove that the value of the homestead exceeded the two thousand dollar exemption since the exemption merely precludes forced sale for a sum less than two thousand dollars and does not give the homesteader an absolute right to prevent a sale.

V. COMMERCIAL LAW
A. BANKING AND NEGOTIABLE INSTRUMENTS

Purchase and Discharge Distinguished

The principal issue in Cason v. Cecil1 was whether the present holder of a certain mortgage note had “purchased,” or had “paid off and discharged” the instrument. The note in question was past due and had been left with a bank to be “taken up” by the bank or any other party who would put up the necessary money. The full balance due was paid by one of the bank’s customers,

4. If the exploitation of the mineral interests owned by the state were strictly proprietary then it would appear that the activity, and doubtless the income from it, would be subject to federal taxation under the doctrine of South Carolina v. United States, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261 (1905), and Ohio v. Helvering, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934).
5. 193 La. 883, 192 So. 519 (1939).
6. 194 La. 1070, 195 So. 542 (1940).
7. 194 La. 522, 194 So. 6 (1940).
1. 194 La. 41, 193 So. 362 (1940) (rehearing denied Jan. 9, 1940). Another question in the case as to the rights upon foreclosure, of the purchaser of one in a series of mortgage notes, is discussed supra, p. 302.
who clearly contemplated an investment, and the note was turned over to him. The court properly treated the transaction as a "purchase" of the note, stressing the fact that the person taking up the note was neither a party to the paper nor in any way bound for its payment. While stating that the "purchase" or "discharge" issue was a fact question of intention, Justice Odom reiterated the well settled and logical rule that when one who is not a party to a negotiable paper pays for it and receives the paper, the presumption is that he has bought it and has not paid off and discharged it.  

**Accommodation Maker**

While an accommodation maker is primarily liable to a holder in due course, he is only secondarily liable as between himself and his co-makers. However, in *Bank of Baton Rouge v. Hendrix* it was held that an accommodation maker who was sued on the instrument could not call the accommodated parties in warranty. If forced to pay the note, he must bring a separate action to secure reimbursement from his co-makers.

**B. Bankruptcy**

The general provision in the Chandler Act that title to a bankrupt's property vests in the trustee upon his appointment must be read along with the requirement that the trustee must, within ten days after his qualification, record a certified copy of the order approving his bond in each county (parish) where the bankrupt has immovable property. Such document, when recorded, shall impart the same notice as the recording of a deed or other instrument affecting title. In *Derryberry v. Matterson* an owner of Louisiana land had been adjudged a bankrupt in New

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4. 194 La. 478, 193 So. 713 (1940).
5. Art. 379, La. Code of Practice of 1870, was held to be inapplicable because there was no express contract of warranty. See further discussion of this point, infra 359.
4. 193 La. 624, 192 So. 78 (1939), noted in (1940) 2 LOUISIANA LAW REVIEW 543.
York, but the trustee had failed to promptly file the necessary papers in this state. The court held that a purchaser who had innocently relied upon the local records in buying land from the bankrupt, subsequent to adjudication but prior to any recordation of the order approving the trustee's bond, secured a good title. This decision is in line with the intendment of the Bankruptcy Act, and accords with the policy of this state that acts affecting title to immovable property must be recorded in order to be effective as to third persons.

C. CORPORATIONS

Dissolution of Corporation with Expired Charter

The corporate existence may be terminated by expiration of the stated period of corporate existence. The corporation ceases to exist and is without any power to transact corporate business but continues to own its property until actual distribution pursuant to law. The dissolution provisions of the Business Corporation Act of 1928 do not provide for this contingency. In the case of In re F. H. Koretke Brass & Manufacturing Company the court held that the only applicable procedure for judicial liquidation of the affairs of an already defunct corporation is a receivership, as provided for by Act 26 of 1900. The procedure set out in the receivership statute must be closely followed. In the instant case the order appointing the so-called liquidator was set aside on the grounds that the court had signed it without waiting the necessary ten days after entry in the receivership book, and without compliance with the requirement that the liquidators furnish bond.

Waiver of By-Law Provisions

In Hill v. American Co-operative Association the corporate directors had entered into a contract employing a comptroller for

5. Beach v. Faust, 2 Cal. (2d) 290, 40 P. (2d) 822 (1935); Vombrack v. Wavra, 331 Ill. 508, 163 N.E. 540 (1928). See also Section 21(f) of the Chandler Act, supra note 3.
3. 195 La. 415, 196 So. 917 (1940).
5. La. Act 159 of 1898, § 8 [Dart's Stats. (1939) § 1216].
7. 197 So. 241 (La. 1940), noted in (1940) 3 LOUISIANA LAW REVIEW 235.
a fixed term. This was clearly prohibited by a by-law stating that such officer should be appointed to serve "during the pleasure of the board." Justice Fournet pointed out that the articles of incorporation expressly empowered the board of directors "to make, alter and change" the by-laws, and declared that this included the power to waive those adopted. Thus it was concluded that the resolution of the board of directors, appointing the plaintiff as comptroller for a period of a year, modified and prevailed over the inconsistent by-law providing for terminable appointments. The court was careful to distinguish the situation where, as is the case unless the articles otherwise provide, the power to make and amend by-laws is vested in the stockholders. In this latter situation it had previously been held that by-law requirements could not be waived by the board of directors.

D. INSURANCE

Two cases involved insurance contracts containing the usual permanent and total disability provision. In *Harris v. New York Life Insurance Company* the court found that such a provision does not require that the insured shall be rendered absolutely helpless, but is satisfied if he is unable to perform the substantial and material acts necessary in the transaction of his regular business or occupation in the usual and customary way. *Patterson v. Metropolitan Life Insurance Company* was a case involving a claim by the beneficiary for disability benefits due to the loss of his hearing. (The loss was eighty per cent in one ear; seventy per cent in the other.) The court recognized that the worker was

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9. 197 So. 241, 245. Section 29, I, of the Business Corporation Act, La. Act 250 of 1928 [Dart's Stats. (1939) § 1109, I] provides, "The shareholders of a corporation may make and alter by-laws not inconsistent with the law or the articles; or, if the articles so provide, the board of directors may make and alter by-laws, subject to the power of the shareholders to change or repeal the by-laws so made. . . ."


However, even where the by-law making power rests solely with the shareholders, by-laws may be totally abrogated through continued disregard by the directors, with the acquiescence of the shareholders. Grand Valley Irr. Co. v. Fruita Imp. Co., 37 Colo. 483, 86 Pac. 324 (1906); Blair v. Metropolitan Sav. Bank, 27 Wash. 192, 67 Pac. 609 (1902); Huxtable v. Berg, 98 Wash. 616, 168 Pac. 187 (1917).

1. 197 So. 579 (La. 1940).

2. 194 La. 105, 193 So. 478 (1939).
totally disabled within the meaning of the policy, although he was an able-bodied, healthy individual of thirty-three years of age who might obtain some laboring work foreign to his usual occupation.

In *Muse v. Metropolitan Life Insurance Company* the policy considered by the court provided indemnity against loss of a hand by severance at the wrist. The court refused to allow recovery to an assured whose hand, although virtually torn into pieces, nevertheless still had the thumb and first and second fingers hanging by a small amount of skin attached to the palm. Although the court recognized the injured hand as being useless, it found that such an injury did not come within the provisions of the policy. The ruling was based upon the wording of the policy showing a clear intention to cover only the loss of the use of the hand through a complete physical loss of the member.

In *Clesi v. National Life Insurance Company* the supreme court had under consideration a policy recognizing degrees of sickness. Full indemnity was provided for a sickness so serious as to confine the insured to the house, whereas only partial indemnity was allowed where the insured was disabled from work or business, but was not prevented from leaving his house. On finding that the insured had failed to prove total confinement to his house, the court properly limited recovery to partial indemnity.

Act 256 of 1912 provides that the payment of death benefit certificates or policies issued by fraternal societies is restricted to the group of persons enumerated in the act. In *Seeberry v. District Grand Lodge Number 21* the plaintiffs were the heirs of a deceased member and claimed the proceeds of a death benefit certificate, notwithstanding the association’s by-laws which provided for a reversion to the association in the absence of a surviving eligible designated beneficiary. The named beneficiary had been their mother, who had died before the insured. While the plaintiffs were among those enumerated in the act, the association itself was not made a permissible beneficiary thereunder. The defendant advanced the contention that its by-laws were valid, and not in conflict with the prohibitions contained in the act against beneficiaries outside the designated classes. This was treated by the court as an attempt by a mere manipulation of

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3. 193 La. 605, 192 So. 72 (1939).
4. 197 So. 413 (La. 1940).
6. 194 La. 666, 194 So. 583 (1940).
words to make the association a beneficiary in violation of the act.

In the case of *Curran & Treadaway v. American Bonding Company of Baltimore* the plaintiff sued on a fidelity bond to recover indemnity for a loss resulting from an act of embezzlement by an employee. The defendant contended that its liability had terminated prior to the embezzlement in question because the employer had previously given a check to the guilty employee to enable him to make good a shortage in his accounts with another party. A provision of the bond was that "This bond shall terminate upon discovery by the employer . . . of any fraudulent or dishonest act on the part of such employee, whether in the service of the employer or otherwise." In rejecting this defense, and awarding the plaintiff judgment, the court said:

"It is to be observed that while every act of embezzlement involves a shortage, every shortage does not involve an act of embezzlement . . . Thus, it has been held that an employee who becomes indebted to his employer through mistake or carelessness, or using funds of the employer for his personal use with no intent to defraud, is not guilty of embezzlement and therefore of a dishonest act within the meaning of a fidelity bond." 8

**VI. PROCEDURE**

The procedural field of law, supposedly only a means to an end, was a prolific source of litigation during the 1939-1940 term of court. As usual, a majority of the cases were disposed of by the application of elementary principles of law and require only passing comment. However, several cases were of far reaching effect and are worth notation for future reference.

**Parties**

*Amerada Petroleum Corporation v. Reese* 1 reaffirmed the well settled rule that all coheirs or owners in indivision of property to be partitioned must be made parties to the proceedings in such an action and the failure to make anyone a party vitiates the partition as to all. However, the court held that a mineral lessee, the owner of a real right since the passage of Louisiana

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7. 193 La. 763, 192 So. 335 (1939).
8. 193 La. at 770, 192 So. at 337.
Act 205 of 1938, was not a necessary party to the proceedings and had no interest to complain about irregularities therein.  

**Courts**

The jurisdiction of the district court over the person of the defendant was raised in two cases. In *Pittman Brothers Construction Company v. American Indemnity Company* the court held that the domicile, insofar as the service of legal process was concerned, of a foreign surety which had complied with the laws of Louisiana was necessarily at the office of the Secretary of State at Baton Rouge, Louisiana, and unless the nature of the suit against such corporations brought it within one of the exceptions to the general rule it had to be sued at its domicile. This suit was brought against the American Indemnity Company, a foreign surety company, in the Parish of Calcasieu and the court sustained an exception to the jurisdiction of the court ratione personae. In an attempt to bring the case within the exception allowing suits against solidary obligors to be brought at the domicile of any one of them the plaintiff contended that the defendant and the principal in the bond sued upon were in solido obligors. The suit was against the surety alone. The court properly held that in order to come within the exception it was necessary to make all the obligors parties to the suit. The defendant advanced the further contention that the cause of action did not arise in Louisiana and could not be sued upon within this state. The facts did not support this argument.

In *Hargrave v. Turner Lumber Company* it was held that a
Louisiana court could not in a personal action secure jurisdiction ratione personae over a succession opened in Mississippi by service of process upon one of the testamentary executors domiciled in Louisiana who had not taken out ancillary letters of administration in this state. The accepted theory is that the representative capacity of an executor appointed by the court of another state does not extend beyond the jurisdiction of the court which grants it.

In the case of *Derryberry v. Matterson* the defendants contended that the district court for the Parish of Caddo did not have jurisdiction ratione materiae to try an action of jactitation involving immovable property situated in that parish because the property belonged to a bankrupt and the possession of the trustee could not be interfered with by the state court. Finding that the property had been sold by the trustee to the defendant subsequent to the adjudication, the court properly held that the exclusive jurisdiction of the bankruptcy court to protect its possession had ceased to exist and maintained its own jurisdiction.

**Citation**

In the matter of the *Interdiction of Scurto* the supreme court annulled an ex parte order which appointed an administrator pro tempore and ordered an inventory to be taken during the pendency of the interdiction proceedings on the ground that the person proceeded against was neither cited nor notified and was not represented by counsel. It was pointed out that in a suit for interdiction the person sought to be interdicted must be cited and that if an attorney does not appear to represent the alleged incapacitated person the court must appoint counsel. The personal knowledge possessed by the district judge in regard to condition of the person proceeded against did not obviate the necessity of following the requirements of law in an interdiction proceeding.

**Nonresidents**

In the case of *Maddry v. Moore Brothers Lumber Company* the supreme court, in answer to questions certified to it by the
Court of Appeal, Second Circuit, held that an employee could maintain an action under the workman's compensation law against his nonresident employer to recover for injuries sustained in an automobile accident occurring on the highways of this state by service of process upon the Secretary of State as the agent of the nonresident under the provisions of Louisiana Act 86 of 1928 as amended.\textsuperscript{18} The constitutionality of statutes of this nature is sustained on the ground that they bear a reasonable relationship to the essential regulation and policing of the highways of the state.\textsuperscript{14} The cause of action sought to be enforced in this case had its inception in the contract of employment, and the accident was merely a factor giving rise to the occasion for the enforcement of pre-existing contractual rights. Therefore, it would appear that the validity of the statute when so interpreted is questionable on constitutional grounds.

The court, in a per curiam opinion rendered on an application for rehearing, held in the case of Pelican Well & Tool Supply Company \textit{v.} Johnson,\textsuperscript{18} that a personal judgment for costs could not be rendered against a nonresident defendant who was not personally served and over whom jurisdiction had been secured by a writ of attachment.\textsuperscript{16}

\textit{Reid v. Federal Land Bank of New Orleans}\textsuperscript{17} was a suit to annul a deed executed by a sheriff in a foreclosure proceeding by executory process against the succession of the alleged deceased debtor, when, in fact, the debtor was alive but an absentee. The foreclosing creditor, availing itself of the provisions of Act 44 of 1932,\textsuperscript{18} secured the appointment of an attorney to represent the succession of the mortgage debtor and carried the proceeding on contradictorily with him. The court annulled the foreclosure proceedings and the sale effected thereunder on the grounds that the creditor's action not only did not comply with the law but was not even a substantial compliance therewith.

\textsuperscript{13} La. Act 86 of 1928 as amended by La. Act 184 of 1932 [Dart's Stats. (1939) §§ 5296-5298] provides for service of process on the Secretary of State in any action or proceeding against a nonresident motorist growing out of any accident or collision in which said nonresident or his agent may be involved while operating a vehicle on a highway in this state.


\textsuperscript{15} 194 La. 987, 195 So. 514 (1940).

\textsuperscript{16} Cf. Pennoyer \textit{v.} Neff, 95 U.S. 714, 24 L.Ed. 565 (1877).

\textsuperscript{17} 193 La. 1017, 192 So. 688 (1939). Cf. Note (1940) 14 Tulane L. Rev. 629.

\textsuperscript{18} Later amended by La. Act 273 of 1936 [Dart's Stats. (1939) §§ 5021.1-5021.3]
Real Actions

Smith v. Courtney was a suit to partition certain real property wherein the plaintiffs alleged that they acquired their title by inheritance and that the property was unoccupied at the time of the suit. The defendants filed an exception of no cause of action predicated upon the fact that the plaintiffs alleged in their petition the lands were vacant; hence, the only method by which they could establish title was to proceed under Louisiana Act 38 of 1908; and that said act applied only to cases where parties had a recorded title, which fact was negatived by the allegations of the petition. In overruling the exception, the court quoted from the case of Long v. Chailan as follows:

"... where the plaintiff in a suit under the provisions of Act No. 38 of 1908 claims title by inheritance, nothing more in the form of a recorded title can be required of him than that the title which his ancestor had, and which the plaintiff inherited, is a recorded title."

The same rule would be applicable to all real actions where proof of title is required.

In the case of City of Shreveport v. Kahn the court held that in the absence of an answer asserting title the only possible issues that could be raised in a slander of title suit were the possession of the property by the plaintiff and slander of title thereto by the defendant. The action was properly dismissed as to those defendants who did not appear when the plaintiffs offered no evidence to prove the latter element.

In Rawlings v. Stokes the court held that the plaintiff, by cumulating an action of jactitation or slander of title (a branch of the possessory action) with a petitiory action waived the former.

Reid v. Federal Land Bank of New Orleans was a direct action against the seizing creditor and the adjudicatee to annul a judicial sale of land under executory process. The defendant filed an exception of no cause or right of action predicated on the fact that plaintiffs failed to allege any possession either in

22. 194 La. 55, 193 So. 461 (1939).
23. 194 La. 206, 193 So. 589 (1940).
89, 80 So. 210 (1918).
25. 193 La. 1017, 192 So. 688 (1939).
themselves or in any other person. In overruling the exception the court held that a direct action to annul a judicial sale is recognized under our jurisprudence; that though it may partake of the nature of a petitory action, it is not the same; and that an allegation of possession is not necessary to maintain this action of nullity. The court definitely defined the respective field in which each operated. If the error that vitiates the sale is one that renders it merely voidable and not absolutely void, then the sole remedy is a direct action of nullity against the parties to the transaction, and the judgment rendered therein can have no effect against the third possessor. If the error complained of is such as to make the sale an absolute nullity then the petitory action may be brought directly against the possessor of the property. In the latter instance the party may, by making all the parties in interest parties to the suit, cumulate the action of nullity with the petitory action.

Concursus Proceedings

In the case of Hennington v. Petroleum Heat & Power Company of Louisiana26 it was held that "in a concursus proceeding each claimant occupies a dual position of plaintiff and defendant with reference to the other claimants";27 that the respective merits of their claims would have to be tried contradictorily with each other and that one could not gain an advantage over another by securing a confession of judgment with recognition of a privilege from the common debtor.

Summary Proceedings

In the case of Younger Brothers v. Spell28 the defendant filed a motion to dissolve a provisional seizure obtained under the provisions of Act 145 of 1934.29 There was incorporated in the motion a reconventional demand for damages for the wrongful issuance of the writ. The objection was raised for the first time in the appellate court that the claim for damages could be asserted only in an ordinary proceeding and not in the motion to dissolve, which is a summary proceeding.30 The soundness of the

26. 194 La. 188, 193 So. 583 (1940).
27. 194 La. at 196, 193 So. at 586.
objection as a legal proposition is beyond question, but the court properly held that the right to object to the method of procedure had been waived by failure to object thereto in limine and going to trial on the matter.

**Incidental Demands**

*Bank of Baton Rouge v. Hendrix* was a suit by the holder of three promissory notes signed by the defendants and others as makers. One of the defendants, alleging that he was only an accommodation maker, sought to call the other makers in warranty and to have a judgment against them for whatever amount judgment was rendered against him. In dismissing the call in warranty on an exception of no cause and no right of action, the court held that in order to support a call in warranty there must be an express contract or a statutory provision authorizing same. No showing of the existence of either was made. The correctness of the decision as a matter of law cannot be questioned. However, since the objection was based on a procedural technicality and the defendant would have the right to settle the question raised in a separate suit, it would appear desirable to amend the procedural rules of this state to allow a settlement of all controversies in the same suit, thereby avoiding a multiplicity of suits.

**Conservatory Writs**

In *Younger Brothers v. Spell* plaintiff obtained a provisional seizure pursuant to the provisions of Act 145 of 1934, Section 4, under which writ the sheriff seized the drilling rig and equipment of the defendant. A motion to dissolve the writ, together with a reconventional demand for damages, was filed on the grounds, first, insufficiency of allegations of fact to warrant the issuance of the writ, and, second, that the facts alleged were not true. Finding the facts alleged not to be true, the court sustained the motion on the latter mentioned ground. The ruling of the court in this case would indicate that in order to maintain a writ of provisional seizure under Act 145 of 1934 it is necessary to allege fear of removal in the words of the statute and support the same by proof when called upon to do so.

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31. 194 La. 478, 193 So. 713 (1940).
32. 194 La. 16, 193 So. 354 (1939).
34. Cf. La. Act 190 of 1912 [Dart's Stats. (1939) § 2156] and La. Act 12 of 1920 [Dart's Stats. (1939) § 2157] providing that in certain cases of sequestra-
In the case of *Dumestre v. Police Jury, Parish of Jefferson*, the court sustained the right of the plaintiff to enjoin the enforcement of an invalid penal law upon a showing that its enforcement would be highly prejudicial to and would seriously affect his existing property rights. This last mentioned element brings this case within the only exception to the general rule that one cannot test the validity vel non of a criminal law by a civil suit.

**Extraordinary Writs**

The sole issue presented in the case of *Leidenheimer v. Schutten* was the proper procedure to be employed to try title to an office in a private corporation. The court dismissed the injunctive proceedings on the ground that the remedy provided by our law for the trial of such issues was a quo warranto proceeding.

**Pleadings**

The question of proper factual pleadings was raised in several cases. In *State ex rel. Hourguettes v. City of Gretna* the court refused to pass on the constitutionality of a municipal ordinance where its contents were not incorporated in the pleading as an allegation of fact and a certified copy was not attached to the petition or offered in evidence, basing its decision on the well settled principle that the supreme court cannot take judicial cognizance of a municipal ordinance. The court went further and stated that the plaintiffs' allegations of unconstitutionality, not specifying in what respect the ordinance was unconstitutional, were mere conclusions of law and not allegations of fact to be considered in passing upon an exception of no cause of action.
In *Molero v. Rowley* it was held that general allegations of fraud, irregularities, et cetera, without allegations of facts, could not be considered by the court. Obviously, these allegations were conclusions of law and not fact pleadings as required by the Louisiana Code of Practice and the Pleading and Practice Act. Two decisions were rendered by the court holding that in order to state a cause of action in a primary election contest the petition must contain specific allegations of fact setting forth the irregularities complained of and not mere conclusions of law.

In the *Succession of Giordano* the court properly excluded evidence in support of an affirmative defense interposed by the defendant at the time of trial but which had not been specially pleaded in the answer. The court said:

"The purpose of the pleading act is to advise parties litigant of the issues in order that they might have an opportunity to present evidence supporting their contentions. It also prevents a party litigant from springing surprises and catching an opponent at a disadvantage. The defense interposed herein is an affirmative one."

The case of *Womack v. McCook Brothers Funeral Home* was a suit to recover an undivided one-half interest in certain realty which had been sold in the succession proceedings of the plaintiff's deceased husband to pay debts which, in fact, did not exist. The defendant interposed a plea of estoppel predicated on the fact that the plaintiff had intervened in the succession proceedings and claimed the proceeds of the sale and could not now attack it as a nullity. The court applied the well settled rule that "one cannot judicially claim the proceeds of a judicial sale and afterwards attack the sale for nullity," and sustained the plea of estoppel.

In *Lee v. Perkins* the court allowed the plaintiffs to intro-

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43. 194 La. 527, 194 So. 7 (1940).
47. 194 La. 648, 194 So. 577 (1940).
48. 194 La. at 652, 194 So. at 578.
49. 194 La. 296, 193 So. 652 (1940).
50. 194 La. at 302, 193 So. at 654.
51. 197 So. 607 (La. 1940).
duce evidence of fraud to invalidate certain new facts set up in defendant's answer even though the petition failed to affirmatively allege fraud as a basis of the cause of action. This ruling is supported by the rule, enunciated by statute and consecrated by the jurisprudence, that neither replication nor rejoinder is permitted in our pleadings and all allegations of fact contained in the defendant's answer are considered as denied and are open to every objection of law and fact.

Exceptions, Motions, and Rules

In two cases the court reaffirmed and applied the trite principle that all well pleaded allegations of fact must be accepted as true in passing upon an exception of no cause or right of action. In Leidenheimer v. Schutten the court affirmed the elementary rule "that upon the trial of an exception of no cause of action, the exhibits attached to and made a part of the petition must be considered in connection with the allegation thereof." In the case of Perez v. Meraux the court held that in passing on an exception of no cause of action it must consider all the allegations as a whole, that the court could not single out specific articles of the petition and require each to state a cause of action.

The precise scope of the doctrine of res judicata under Article 2286 of the Civil Code was litigated in two cases. Hope v. Madison was a suit to annul a contract transferring certain mineral interests to the defendant on the ground that it violated Article 2447 of the Civil Code prohibiting attorneys from purchasing litigious rights. The lower court sustained an exception of res judicata predicated upon a final judgment rendered in a previous suit between the same parties rejecting the plaintiffs' demands to annul the same contract on the grounds of lack of consideration, misrepresentation and fraud. In the brief and on

55. 194 La. 598, 194 So. 32 (1940).
57. 197 So. 683 (La. 1940).
60. Hope v. Madison, 192 La. 593, 188 So. 711 (1939).
argument in the first suit the plaintiff urged the nullity of the deed on the grounds presented in the second suit, but the court refused to pass upon the question because it had not been properly pleaded. The case squarely presented the question of whether or not the common law doctrine that res judicata includes, not only everything pleaded in a cause, but also that which might have been pleaded, prevailed in Louisiana. In overruling the exception, the court rejected the common law doctrine in favor of the doctrine of the French law, recognizing, however, certain exceptions created by the Louisiana jurisprudence. Under the latter doctrine, the judgment may be pleaded as res judicata only as to the matters in issue and actually adjudicated by the court. There being a lack of identity of issues in the two cases, the plea of res judicata filed in the second case could not be maintained. The exceptions to the rule applied in this case, and recognized by the court are: (1) "That generally a breach of contract or single tort gives rise to but one cause of action, which cannot be divided and made the subject of several suits, and if one suit is brought for a part of the claim, a judgment thereon may be pleaded in bar to a recovery for another portion of the claim in a second suit"; and (2) "that in seeking injunctive relief, a litigant must set out all grounds or reasons therefor which existed at the time of his application"; and (3) "that parties litigant in a petitory action, whether plaintiff or defendant, must set up whatever title or defense they may have at their command or a judgment on that issue will bar a second action based on a right or a claim which existed at the time of the first suit, even though omitted therefrom." In the case of Himel v. Connelly the record showed a total lack of identity of issues. The court applied the same principle and overruled the exception of res judicata but it recognized only two of the exceptions that were stated in the Hope

61. 194 La. 337, 343, 193 So. 666, 667 (1940). It would seem that this is only an apparent but not a real exception since the facts would bring it within the operation of the rule. Cf. P. Oliver & Sons v. Board of Com'rs, 181 La. 802, 160 So. 419 (1935); Comment (1940) 2 Louisiana Law Review 491, 495, n.20, 511.

62. 194 La. 337, 343, 193 So. 666-668 (1940).

63. 194 La. at 343, 193 So. at 668.

64. 197 So. 424 (La. 1940).

65. The court recognized the second and third exception and qualified the second with this statement (197 So. at 427): "But, in injunction suits, the right of the head of a family to claim the homestead exemption is not waived by his enjoining the sale on other grounds without claiming the homestead exemption." Citing Lee v. Cooper, 155 La. 143, 98 So. 869 (1924). The qualification was proper under the jurisprudence of this state. Cf. Comment (1940) 2 Louisiana Law Review 491, 502-503, 525.
case and added another, viz.: that in suits for a partition of property owned in indivision, the parties must assert whatever title they have. 66

State ex rel. Graham v. Republican State Central Committee of Louisiana 67 was a mandamus proceeding brought by two parties to compel the members of defendant committee to certify each of their names to the proper authorities as qualified candidates for nomination for the office of governor. In overruling the exception of misjoinder of parties, the court stated that even though each party sought to be certified as candidates for nomination to the same office, both had a common interest and sought the same relief from the action of the defendant in refusing to certify their respective names and, therefore, were properly joined in the same suit. 68

In In re Perez 69 a petition was filed requesting the appointment of an attorney to institute removal proceedings against a district attorney. The district attorney appeared and filed a petition for recusation of the district judge because of personal interest in the matter, setting forth facts tending to support the charge. The district judge refused to recuse himself, and assigned as his reason the fact that the appointment of the attorney was a purely ministerial duty. The latter ruling was reversed by the supreme court on the ground that the action involved a determination of whether or not the petition seeking the appointment was signed by twenty-five citizens within the district who were taxpayers, which necessarily called for an exercise of discretion and judgment. Hence, it was a judicial and not merely a ministerial function. In outlining the procedure to be followed by the judge when a motion to recuse is filed the court said: 70

"In the case of State v. Nunez, 147 La. 394, 402-405, 85 So. 52, 56, we said:

"'In State ex rel. Tyrell v. Judge, 33 La. Ann. 1293, it appeared that a motion was made to recuse the judge as

66. The exceptions recognized in Himel v. Connely, 197 So. 424 (La. 1940) are in line with the jurisprudence of the state. Cf. Comment (1940) 2 LOUISIANA LAW REVIEW 491, 525.
67. 193 La. 863, 192 So. 374 (1939).
68. The ruling of the noted case is in accord with the general rule allowing a joinder of parties where there is a community of interest. Cf. Gill v. City of Lake Charles, 119 La. 17, 43 So. 897 (1907); Reardon v. Dickinson, 155 La. 956, 100 So. 715 (1924).
69. 194 La. 763, 194 So. 774 (1940).
70. 194 La. at 767-769, 194 So. at 775-776.
having a personal interest in the result of the (civil) suit, and the motion was overruled. After referring to the provisions of the Code of Practice on the subject, this court said:

" "When a refusal has thus been made to the judge's trying the cause on account of interest, that refusal must be respected by the judge. He must either admit his disqualification and enter up the order of recusation or deny it, and thereby raise an issue touching his right to try the case. If he pursues the latter course, it is plain to see that he could not legally decide that issue himself. (Our italics.) Assuming that he is interested as charged, that would prompt him to declare himself not interested, as much as it would move him to follow that interest in the judgment that he would render in the cause.

" "Hence, it is not enough for the judge to disavow an interest, but, where such disavowal is not satisfactory to the party making the challenge, as in the present case, and he insists upon showing such interest in the judge, it evinces an unwarranted exercise of authority in this officer to assume to determine this question, so exclusively personal to himself and affecting his own competency. He should at once recuse himself on this issue and refer it to be tried in the manner pointed out by law. If on such trial the ground is shown to be untenable and the competency of the judge to try the case is decreed, then, and not till then, is the judge authorized to proceed in the case. To hold otherwise would be to render the important right of recusation or challenge nugatory and worthless.""

The right to a position in the adjective law of this state of the so-called rule or motion to strike was questioned in two decisions. The case of Perez v. Meraux was an original proceeding in the supreme court to impeach and remove a district judge. The court summarily overruled a motion to strike certain allegations from the petition on the ground that the laws of this state do not make provisions for such a procedure. In State ex rel. Sutton v. Caldwell the court condemned the action of the lower court in maintaining a "so-called" motion to strike certain articles of the defendant's answer but refused to reverse the

71. State ex rel. Sutton v. Caldwell, 197 So. 214 (La. 1940); Perez v. Meraux, 197 So. 683 (La. 1940).
72. 197 So. 683 (La. 1940).
73. 197 So. 214 (La. 1940).
decision of the lower court, stating merely that the striking out "did not leave the record in any worse condition than that in which it would be if the relators had bided their time and objected to the offering of evidence to support the allegations." However meritorious might be the criticism of the court in the last mentioned case it fails to delete this undesirable practice since the court refused to reverse the decision of the lower court because of this error. The continued tolerance of such encroachments, however slight, has been one of the main factors undermining our once simplified procedure. Such innovations should be nipped at their first inception by drastic action and not merely by verbal spankings. The observation is particularly applicable to this motion or rule since our law provides an adequate remedy. The proper method of procedure is to permit the parties to go to trial and reject, on the objection of the opposite party, all evidence to sustain improper and irrelevant allegations.

In *Rives v. Starcke* the court held that the filing of a plea of prescription of ten years acquirendi causa by the defendant in a petitory action would not prevent a dismissal of the suit by the plaintiff at any time before judgment was rendered, but that a discontinuance under those circumstances would not affect the right of the defendant to proceed with the prosecution of his plea to a final judgment thereon. In arriving at this conclusion the court assimilated the plea of acquisitive prescription to a reconventional demand.

**Sheriffs’ Sales**

In the case of *Daniel v. Thigpen* it was held that a claim

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74. Id. at 215.
78. The right of a plaintiff to discontinue his suit previous to judgment being rendered upon payment of costs incurred is absolute. Cf. Art. 419, La. Code of Practice; Rives v. Starcke, 195 La. 378, 196 So. 657 (1940), noted in (1941) 3 Louisiana Law Review 457.
79. The rule is well settled that a demand in reconvention cannot prevent the dismissal of the suit by the plaintiff at any time before a judgment is rendered but the discontinuance under those circumstances does not prevent the defendant from proceeding with the prosecution of his demand in reconvention to a final judgment. Cf. Rives v. Starcke, 195 La. 378, 196 So. 657 (1940) and authorities therein cited, noted in (1941) 3 Louisiana Law Review 457.
80. 194 La. 522, 194 So. 6 (1940)
of a homestead exemption does not entitle the claimant to prevent a sheriff’s sale but only gives him the right to require that the property be not sold unless it brings more than the exemption, in which event he may claim the amount of the exemption.

In Mercantile National Bank of Dallas v. J. Thos. Driscoll, Inc. the court stated the well settled rule that a valid sheriff’s sale cannot be made unless the bid is sufficient to discharge all special privileges existing on the property which primed the claim of the seizing creditor. In this case the property was adjudicated for a price sufficient to discharge all superior privileges. Therefore, the validity of the sale was upheld.

In Hite v. Charbonnet the intervenor, claiming ownership of a certain property by virtue of an adjudication at a previous sheriff’s sale, was allowed to enjoin a foreclosure proceeding over the objection that he exhibited no formal deed thereto. The court held that the previous adjudication had, of itself, the effect of transferring to the purchaser all the rights of the party in whose hands it was seized.

Continental Securities Corporation v. Wetherbee was a suit for the partition of property. The district court rendered a judgment ordering a partition by licitation. After the judgment of the lower court had become executory (no suspensive appeal having been taken within the time prescribed by law) the property was advertised and sold to the Lodwick Lumber Company, a third person. Subsequent to the sale the defendant perfected a devolutive appeal and the judgment of the lower court was reversed. The defendant then filed a suit against the purchaser to have the partition sale declared a nullity and set aside. In rendering a judgment for the defendant holding the title acquired by it at the sale to be valid the court applied the established rule that “when the appeal does not stay execution, the reversal of a judgment in the appellate court does not avoid the sale made under an execution issuing from the inferior court in virtue of

82. 194 La. 935, 195 So. 497 (1940).
84. 193 La. 581, 192 So. 64 (1939).
86. 187 La. 773, 175 So. 571 (1937).
the judgment." The rule was held applicable to all judicial sales, including sales made to effect a partition of real estate by licitation. The right of the defendant in the original suit and plaintiff in the second suit to an accounting from the plaintiff in the original suit and defendant in the second suit was properly recognized and reserved.

**Trial**

Article 546 of the Code of Practice provides that all final judgments must be signed by the judge, "but he shall not do so until three judicial days have elapsed" after rendition. In the *Succession of Lissa* the contention was made that a judgment signed before the lapse of the three days was an absolute nullity, but the court overruled the argument, stating:

"A judgment prematurely signed is not invalid. It is only ineffective until three judicial days have expired, or until a new trial has been denied if one has been applied for subsequent to the signing of the judgment but within three days after it was rendered. [citing cases]."

**Appeals and Appellate Jurisdiction and Procedure**

In two decisions the supreme court properly held that it had no jurisdiction ratione materiae of an appeal where the amount in dispute, exclusive of interest, did not exceed two thousand dollars. The court refused to dismiss the appeals and

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89. Art. 546, La. Code of Practice of 1870. The last portion of the article provides that except in the Parish of Orleans, all final judgments shall be signed "before the adjournment of the court, for the term at which such cases were tried, and whether three judicial days shall have elapsed or not."
90. 194 La. 328, 198 So. 663 (1940).
91. 194 La. at 334, 193 So. at 655.
92. Buras v. Fidelity & Deposit Co. of Maryland, 195 La. 244, 196 So. 335 (1940); Vogt v. Jannaralli, 195 La. 277, 196 So. 346 (1940).
93. Cf. La. Const. of 1921, Art. 7, § 10. The Vogt case [195 La. 277, 196 So. 346 (1940)] was a joint suit by the husband and wife to recover damages sustained by each as a result of the defendant's tort. The amount claimed by each was less than the minimum amount required to confer appellate jurisdiction on the supreme court but the aggregate amount of both exceeded the requirement. The decision is in accord with the well settled rule that several plaintiffs, having separate and distinct claims, each for a sum below the appellate jurisdiction of the supreme court, cannot by cumulating their demands in one suit, give that court jurisdiction. Cf. Alesi v. Town of Independence, 142 La. 338, 78 So. 792 (1917); Hotard v. Perilloux, 160 La. 752, 107 So. 515 (1926); Shreveport Laundries v. Red Iron Drilling Co., 192 So. 895 (La. App. 1939); Lopez v. Bertel, 198 So. 185 (La. App. 1940). But where the claims are not separate and distinct and recovery on one is dependent upon recovery on the other the appellate jurisdiction is determined by the total sum of both demands. Cf. LaGroue v. City of New Orleans, 114 La. 253, 38 So. 160 (1905).
transferred both cases to the proper court of appeal in accordance with the provisions of Act 19 of 1912. 94

The right to appeal from an interlocutory decree is a constantly recurring question. Article 56695 of the Code of Practice authorizes an appeal from such orders only when they may cause an irreparable injury. The mere statement of the rule shows that each case must necessarily be determined from the facts of the particular controversy before the court. In re Byrne96 evidenced an application for the issuance of supervisory writs to compel the lower court to grant a suspensive appeal from an ex parte order appointing an attorney to institute suit to remove the applicant from the office of district attorney. In denying the writs the court held that, even if the order complained of was an interlocutory decree97 (a concession about which it had serious doubt since the order complained of was rendered prior to the institution of any suit), nevertheless, there was no right to a suspensive appeal therefrom because the order complained of could not cause an irreparable injury98 to the applicant, who would be given ample opportunity to raise the complaints he made when the suit is filed to remove him. In the case of Hollingsworth v. Caldwell99 the court allowed a suspensive appeal from an interlocutory decree which reversed a previous judgment under which certain property had been sold to the appellant and ordered the property readvertised and sold again. The reason for granting the appeal was that a resale of the property might place it in the hands of another person from whom it could not be wrested in the event the judgment was eventually reversed.100 The court said:

"... to entitle a party to an appeal from an interlocutory judgment, it is unnecessary that the injury be absolutely irreparable. It suffices that it may become irreparable by

96. 193 La. 566, 191 So. 729 (1939).
97. Cf. Art. 538, La. Code of Practice of 1870, which reads: "Interlocutory judgments do not decide on the merits; they are pronounced on preliminary matters, in the course of the proceedings." (Italics supplied.)
98. Cf. Art. 566, La. Code of Practice of 1870, which reads: "One may likewise appeal from all interlocutory judgments, where such judgments may cause him an irreparable injury." (Italics supplied.)
99. 193 La. 638, 192 So. 83 (1939).
the final judgment or action of the Supreme Court on the judgment."\textsuperscript{101}

The question of who has a right to appeal from a final judgment was raised in two cases. In the \textit{Succession of Lissa}\textsuperscript{102} the court held that an ex parte judgment placing the heirs in possession of the estate of the deceased was not merely an interlocutory decree but was a final judgment which could be appealed from by any party having an actual interest therein, and that one alleging herself to be an heir but excluded from the judgment had an appealable interest.\textsuperscript{103} In the \textit{Succession of Burg}\textsuperscript{104} the court held that the Recorder of Mortgages for the Parish of Orleans, having been made a party defendant in a rule to cancel certain mortgages from the records of his office is entitled to appeal from the judgment ordering cancellation as a \textit{matter of right}.\textsuperscript{105}

The question of what constitutes voluntary execution of a judgment so as to defeat the right to appeal was raised in two cases. \textit{Road District No. 1 of Jackson Parish v. Fidelity & Deposit Company of Maryland}\textsuperscript{106} was a suit to recover a solidary judgment against the principal and surety on a surety bond. The court denied a motion to dismiss the appeal of the surety company which was predicated on the fact that the principal had acquiesced in the correctness of the judgment of the lower court and had voluntarily executed same\textsuperscript{107} and that, therefore, the judgment having become final as to the principal it was final as to his surety. Obviously, the acquiescence of one of the solidary obligors in the correctness of the judgment of the lower court cannot defeat the right of appeal of the remaining obligors.\textsuperscript{108}

102. 194 La. 323, 193 So. 663 (1940).
103. Cf. Art. 571, La. Code of Practice of 1870, granting the right of appeal to parties aggrieved by the judgment but not a party to the suit.
104. 194 La. 985, 195 So. 513 (1940).
105. By way of dictum the court affirmed the well settled rule that the recorder of mortgages is a necessary party in a proceeding to compel the cancellation of mortgages or other incumbrances. Cf. Cappel v. Hundley, 168 La. 15, 121 So. 176 (1929), and authorities cited therein.
106. 197 So. 252 (La. 1940).
In *State ex rel. Mancuso v. Jefferson Parish School Board* the court held that the reinstatement of a teacher pursuant to a judgment of the lower court was not a voluntary acquiescence therein so as to require the dismissal of a devolutive appeal since the fact that a final judgment had been rendered was discovered too late to take a suspensive appeal and a refusal to comply with the judgment would subject plaintiff to a penalty for contempt of court. The court again reaffirmed the rule that in order that there be an abandonment of the right to an appeal there must be an unconditional, voluntary and absolute acquiescence in the judgment on the part of the appellant.

Several cases presented questions of procedure in taking an appeal. In *Hollingsworth v. Caldwell* the motion to dismiss, predicated upon the fact that appellees had not been made parties to the appeal, was summarily overruled upon a showing that the appeal was taken in open court at the same term of court in which the judgment appealed from was rendered; consequently, no citation of appellees was necessary. In *Buillard v. Davis* the court reaffirmed the rule that where an order for a devolutive appeal is obtained but the appeal is not perfected by furnishing bond, the litigant may at any time within the period allowed for taking an appeal obtain another order for a devolutive appeal and perfect the same by furnishing bond. In three cases the supreme court reaffirmed two well established rules, viz.: first, that an appeal taken after the rendition of the judgment but prior to the signing of a formal judgment must be dismissed either on a motion to dismiss or ex proprio from those in a release or forthcoming bond. Cf. Art. 259, La. Code of Practice of 1870; Fusz v. Trager, 39 La. Ann. 292, 1 So. 535 (1887); *Albert Pick & Co. v. Dickinsons*, 154 La. 1067, 98 So. 669 (1924). 110. 197 So. 509 (La. 1940).


111. The decision in the noted case is in accord with the rule that the payment of a judgment under protest to prevent execution thereon or after the issuance of a fleri facias in execution thereof does not prevent the party from subsequently obtaining and prosecuting a devolutive appeal. *Johnson v. Clark & Meader*, 29 La. Ann. 762 (1877); *Verges v. Gonzales*, 33 La. Ann. 410 (1881); *Louisiana Land & Immigration Co. v. Murff*, 139 La. 808, 72 So. 284 (1916); *Louisiana Power & Light Co. v. Becker*, 11 La. App. 195, 123 So. 193 (1929).


113. 193 La. 638, 192 So. 83 (1939).


115. 197 So. 273 (La. 1940).

motu; and, second, that an illegal order of appeal, even though followed by the execution of an appeal bond in accordance therewith, does not divest the lower court of its jurisdiction over the matter and that it may disregard the illegal order and cure the deficiencies thereof by granting a new order of appeal.\(^{117}\)

In the case of *Dreher v. Guaranty Bond & Finance Company*\(^ {118}\) the court held that the responsibility of filing the transcript of appeal in the supreme court within the time allowed by law rests upon the appellant,\(^{119}\) but where the appellant shows that the transcript was delivered to the clerk within the time allowed by law, together with the filing fee, the appeal will not be dismissed because the filing was not endorsed thereon until after the expiration of the time allowed.\(^{120}\) In receiving evidence in the form of affidavits to prove this fact, the court was acting pursuant to its constitutional grant of original jurisdiction to receive evidence “for the determination of questions affecting its appellate jurisdiction in any case pending before it.”\(^ {121}\)

Act 112 of 1916\(^ {122}\) provides that any party desiring to question the sufficiency or correctness of any bond or surety furnished in connection with any judicial proceeding must serve

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117. In the Succession of Savoie, 195 La. 433, 196 So. 923 (1940), the second rule was recognized by way of dictum.
118. 193 La. 757, 192 So. 248 (1940).
122. La. Act 112 of 1916 as amended [Dart's Stats. (1939) §§ 1921-1930].
notice of his complaint on the adverse party who shall be given an opportunity to furnish a new or additional bond or surety conditioned according to law. In the *Succession of Lissa*\(^{123}\) the court refused to dismiss an appeal on the grounds of the insufficiency of the appeal bond because there was no showing that the appellant had been notified of this fact and given an opportunity to correct the alleged defect.

The court disposed of several issues raised in the case of *Folse v. Dale*\(^{124}\) by the application of well settled principles of law. This was an action for the nullity of the judicial sale of a judgment for the sum of $3,500 and for recognition of plaintiff's right thereto. There was judgment in the lower court as prayed for and the defendants were granted a suspensive appeal. The district judge fixed the appeal bond at three hundred dollars. After receiving two extensions the return date was fixed as November 16, 1939, and the transcript was filed on November 15. On Monday, November 20, the appellee filed a motion to dismiss the appeal predicated on the ground that bond in the sum of three hundred dollars as fixed by the lower court was not in accordance with the provisions of Article 575 of the Code of Practice which requires a bond for one and one-half the amount of the judgment appealed from, the appellee's contention being that the judgment in this case was for $3,500. Appellants objected to a consideration of this motion on the ground that it was filed too late, having been filed on the fourth day after the return date. In disposing of the last mentioned objection the court recognized the well settled rule that a motion to dismiss an appeal for irregularities not relating to the appellant's right to appeal must be filed within three days after the return date and that this delay is not affected by the filing of the transcript in the appellate court before the return date. Although this motion was filed on the fourth day after the return date, the court held that it was timely filed since the third day was a legal holiday; consequently, appellee had all the following day in which to file the motion. In overruling the motion to dismiss the appeal, the court held that the judgment rendered by the lower court was not for a specific sum and repeated the rule that in such cases Article 575\(^{125}\) of the Code of Practice has no application and that it is the duty of the judge to fix the amount of the suspensive appeal bond.

\(^{123}\) *194 La. 328, 193 So. 663 (1940).*  
\(^{124}\) *194 La. 180, 193 So. 581 (1940).*  
\(^{125}\) *Art. 575, La. Code of Practice of 1870.*
In the case of *In re Clover Ridge Planting & Manufacturing Company* the surety on an appeal bond sought to escape liability on the ground that the order granting the suspensive appeal was invalid since the judge did not fix the amount of the bond. The order granted the appeal to the defendant "upon said party furnishing bond with good and solvent security, according to law." The court applied the rule that where a judgment is for a specific sum of money the law fixes the amount of the suspensive appeal bond at one and one-half times the amount of the judgment and overruled the arguments advanced by the surety. The appeal bond actually furnished by the appellant was for a sum less than that prescribed by the law. This was urged as an additional ground for escape from liability thereon. The court stated that there was no prohibition against the parties agreeing to a bond for a lesser amount than the law prescribed. This, in effect, was what the appellee had done by failing to make timely objection to the sufficiency of the bond. Under such circumstances the liability of the surety was properly limited to the amount of the bond actually given.

In *Monsour v. City of Shreveport* the court refused to consider a motion to dismiss the appeal which was filed after the case was argued and submitted.

The question of the jurisdiction ratione materiae of the supreme court was raised in several of the adjudicated cases. In sustaining a motion to dismiss an appeal in the case of *Batts v. Marthaville Mercantile Company* the court stated that there is no right to appeal either to the supreme court or to the court of appeal from a judgment rendered by the lower court where the amount in dispute is less than one hundred dollars, unless the case comes within one of the recognized exceptions. The

126. 194 La. 77, 193 So. 468 (1940).
127. 194 La. 625, 194 So. 569 (1940).
128. 193 La. 1072, 192 So. 721 (1939).
129. Cf. La. Const. of 1921, Art. VII, § 10 (5), conferring appellate jurisdiction in all cases, whatever may be the amount involved: first, "where the constitutionality or legality of any tax, local improvement assessment, toll or impost levied by the State, or by any parish, municipality, board, or subdivision of the State is contested"; second, "where the legality, or constitutionality of any fine, forfeiture, or penalty imposed by a parish, municipal corporation, board or subdivision of the State shall be in contest"; third, "wherein an ordinance of a parish, municipal corporation, board or subdivision of the State, or a law of this State has been declared unconstitutional"; and fourth, "all cases involving homestead exemptions irrespective of the amount involved . . .; except that in cases involving only movable property, the appeal shall lie to the court having jurisdiction of the amount of the value of the property involved."
attempt to maintain the jurisdiction of the court on the ground that the case came within two of the recognized exceptions was summarily overruled with the statement that those issues were not raised or passed upon in the lower court and the record did not support them. Article 7, Section 10, of the Louisiana Constitution confers appellate jurisdiction on the supreme court in all cases "wherein . . . legality of any tax . . . levied by the State . . . is contested . . . ." The case of State ex rel. Cooper v. Pape was a suit to collect a "use tax" on an automobile owned by the defendant. The defense interposed was that the defendant's use of the automobile did not subject her to the provisions of the Louisiana law. The appellate jurisdiction of the supreme court was questioned on the ground that the amount involved was less than two thousand dollars, but the court held that "'where judicial interpretation of a tax statute is necessary to determine whether or not the tax demanded is imposed by law, the question of legality vel non of the tax is raised,'" and the appeal must be to the supreme court regardless of the amount involved.

The extent of the relief which the appellee may secure by an answer to the appeal was involved in several cases. In City of Shreveport v. Kahn the appellants objected to a review of that portion of the judgment of the lower court which was adverse to the appellees on the ground that the appellees, not having appealed, cannot have the judgment disturbed or modified by merely filing an answer to the appeal which was taken only from that portion of the judgment which was adverse to the appellant. In overruling this objection the court held that an appeal brings up the entire judgment and the appellee may secure a re-examination of any portion thereof which adversely affects him by answering the appeal. In Buillard v. Davis

131. La. Const. of 1921, Art. VII, § 10 (5).
132. 194 La. 890, 195 So. 346 (1940).
133. La. Act 2 of 1938, §§ 2, 3, 9 (a), (c) [Dart's Stats. (1939) §§ 8648.5, 8648.6, 8648.12 (a), (c)].
134. 194 La. 890, 897, 195 So. 346, 349 (1940).
136. 194 La. 55, 193 So. 461 (1939).
137. The rule as stated in the case is too broad. The right of an appellee to ask for a change in the judgment by answering the appeal, and without appealing himself, is limited to those modifications that affect only the appellant, and does not authorize any change in the judgment as between the co-appellees, Fields v. His Creditors, 11 La. Ann. 545 (1856); Hottinger v. Hottinger, 49 La. Ann. 1638, 22 So. 547 (1897).
138. 197 So. 273 (La. 1940).
it was held that a defendant who had obtained an order of appeal but failed to perfect same did not thereby waive his right to answer his adversary's appeal. In Blakewood v. Town of Franklinton, the court held that the failure of the appellee to answer an appeal was an admission that it owed the appellant the amount of the judgment rendered by the lower court even though the answer denied owing any amount. In Cox v. First National Bank of Arcadia, the court held that the judgment of the lower court insofar as it was in favor of plaintiff was final as to the defendant who neither appealed nor answered the appeal perfected by the plaintiff.

In Amerada Petroleum Corporation v. Reese, the court again invoked the rule that it could not consider an issue raised for the first time in the appellate court when it was "neither pleaded, presented to, nor passed upon by the lower court."

In the Succession of Lissa, the appellee filed a motion to dismiss the appeal because the record as brought up did not present the matter to the court so that it could pass on the merits of the case. The court applied the well settled rule that the merits of a case cannot be passed upon on a motion to dismiss the appeal and overruled the motion.

The supreme court in the case of Alexander v. Jackson refused to remand a case, in advance of a hearing on the merits for the purpose of receiving further evidence stating that it should first be given an opportunity to determine whether it could pronounce definitely on the cause in the state in which it was. In Sunseri v. Cassagne, the court refused to remand the case to the lower court for the purpose of receiving evidence to impeach the opposing litigant's witnesses on the ground that the testimony was cumulative only and should have been offered on the trial of the case on the previous remand to the lower court for the same purpose. Nor will the appellate court remand the case for the reception of evidence which could only remotely affect the judgment. However, in Townley v. Pomes, the court

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139. 195 La. 391, 196 So. 909 (1940).
140. 197 So. 616 (La. 1940).
141. 195 La. 359, 196 So. 558 (1940).
142. 196 So. at 563.
143. 194 La. 828, 193 So. 663 (1940).
144. 197 So. 137 (La. 1940).
146. 195 La. 19, 196 So. 7 (1940).
148. 194 La. 730, 194 So. 763 (1940).
remanded the case to the lower court for the reception of additional evidence to prevent a miscarriage of justice. Although the appellant had a trial of the case on its merits and an opportunity to present his evidence in the lower court, nevertheless, the omission was found to be the result of the irregular method adopted by the district court in disposing of the case and not because of any fault on the part of the litigant.

In the case of *State ex rel. Wogan v. Clements* the rules of the court were adhered to and the litigants were denied the privilege of presenting oral arguments in a case coming before the court on a writ of certiorari even though both parties had assented thereto on the ground that the case involved matters of vital interest to the public.

*Rhodes v. Sinclair Refining Company* applied the well settled rule that where there is an irreconcilable conflict in the testimony on a factual question the appellate court will not reverse the judgment of the trial court, if the evidence of the successful party when considered by itself is sufficient to sustain the judgment. The court in the case of *Housing Authority of New Orleans v. Polmer* stated and applied the rule that "an appellate court should not amend an award made by a jury of freeholders in a condemnation suit unless the verdict is based upon a palpable error, such as error of calculation, or is so obviously inadequate or excessive as to be suggestive of favoritism."

Paragraph 5 of Rule X of the Court of Appeal of the Parish of Orleans provides that:

"Only one rehearing shall be granted unless some question has been decided, on the rehearing granted, which had not before been considered and the court has reserved the right to make another application."

In the case of *Dumaine & Company v. Gay, Sullivan & Company* the court of appeal on the original hearing rendered a judgment sustaining the exception of no right of action and dismissed the plaintiff's suit. On rehearing that court rendered a second judgment annulling its previous judgment and affirm-
ing a judgment of the district court for the plaintiffs, without
reserving to the defendant the right to ask for a rehearing.
A motion filed by the defendants in the court of appeal asking
for an amendment to the second judgment so as to reserve it
the right to apply for a rehearing was overruled. The defend-
ant secured a review of this last mentioned ruling by the supreme
court. The court held that since the judgment rendered on the
original hearing was on the exception and on the rehearing on
the merits, a wholly different ground from that on which the
first judgment was rendered, the party dissatisfied with the
second judgment was entitled to a rehearing as a matter of right
and without the necessity of obtaining an amendment of the
judgment reserving that right. In arriving at this conclusion the
court construed the above quoted rule of court to mean that
only one rehearing shall be granted to each party to a suit and
has no application where the request "for a rehearing is made
by a party dissatisfied with the judgment on rehearing because
the judgment has reversed or materially changed to his prejudice
the judgment rendered on the original hearing." 156

Supervisory Jurisdiction and Procedure

In two cases 157 the supreme court dismissed applications for
the issuance of supervisory writs upon a showing that the ques-
tions presented had become moot, thus leaving nothing for con-
sideration.

In Long v. Martin 158 the supreme court stated the general
rule that it would not exercise its general supervisory jurisdic-
tion 159 over the lower courts until the litigants have exhausted
their remedies in those courts unless the exigencies of the case
demanded it. 160 The controversy involved an election contest and
finding time of the essence under the facts of this case (the matter
had to be finally adjudicated within a relatively short period of
thirteen days in order to be able to hold the scheduled election),
the court, by the exercise of its supervisory powers, required the

156. 194 La. at 783-784, 194 So. at 781.
157. State v. Hingle, 194 La. 1096, 195 So. 615 (1940); State ex rel. Perez
v. Meraux, 194 La. 1099, 195 So. 616 (1940).
158. 194 La. 797, 194 So. 896 (1940). Cf. also Long v. Looney, 194 La. 811,
194 So. 900 (1940) to the same effect.
159. La. Const. of 1921, Art. VII, § 10, which reads: "The Supreme Court
shall have control of, and general supervision over all inferior courts. . . ."
71, 80 So. 203 (1918); Keiffe v. LaSalle Realty Co., 163 La. 824, 112 So. 799,
63 A.L.R. 82 (1927).
entire proceedings to be brought up before any hearing could be had in the lower court and entered judgment on the merits. Although the reasons advanced by the court probably justified the procedure followed in this case, it is believed that the extraordinary powers should not be exercised in the manner evidenced by this case except in instances of extreme necessity.

Costs

The supreme court in the case of Collins v. Collins\(^{161}\) dismissed a suit filed by the wife for separation from bed and board because of reconciliation of the parties after the date the suit was filed, but, acting pursuant to the provision of Louisiana Act 229 of 1910,\(^{162}\) assessed the costs of court against the matrimonial community on the ground that "It was the husband's fault that provoked the bringing of the suit, and it is as much to his credit as to the wife's that the suit is ended by the reconciliation of the parties."\(^{163}\)

In McCoy v. Arkansas Natural Gas Corporation\(^{164}\) it was held that in order for a party assessed with costs of court which included expert fees to be entitled to a cancellation of the judgment he must pay the fees of the expert witnesses as well as the costs incurred by the litigant in whose favor the judgment for costs was rendered.

VII. CRIMINAL LAW AND PROCEDURE

Venue

The ancient riddle of venue in criminal trials has been a persistent headache to courts and prosecutors during the past year. The latest teasers, for the most part, were raised by defendants in the recent wave of prosecutions for political crimes. On eight separate occasions skillful defense counsel attempted to pass the ball from parish to parish,\(^1\) and in four instances they were successful.

\(^{161}\) 194 La. 446, 193 So. 702 (1940).
\(^{162}\) La. Act 229 of 1910, § 2, provides "all appellate courts of this state shall have the power to tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be deemed equitable."
\(^{163}\) 194 La. 446, 453, 193 So. 702, 704 (1940).
\(^{164}\) 195 La. 82, 196 So. 28 (1940).
\(^1\) State v. Matheny, 194 La. 198, 193 So. 587 (1940); State v. Terzia, 194 La. 583, 194 So. 27 (1940); State v. Todd, 194 La. 695, 194 So. 31 (1940); State v. Coenen, 194 La. 753, 194 So. 771 (1940); State v. Smith, 194 La. 1015, 195 So. 523 (1940); State v. Hart, 195 La. 184, 196 So. 62 (1940); State v. Weiss, 195 La. 206, 196 So. 69 (1940); State v. Leon C. Weiss, 195 La. 208, 196 So. 70 (1940).
According to the present constitution of Louisiana, all criminal trials must take place in the parish where the offense was committed. This mandate presents no difficulty so long as the offense charged was begun, executed, and consummated within the bounds of a single parish. Unfortunately, however, this desirable situation obtains regularly only for such simple offenses as crimes of passion, which are usually begun and completed almost within the instant, or single criminal acts that violate public decency, health, or tranquillity. Major offenses, including nefarious schemes to purloin money or property, misuse of the facilities of communication and transportation, and most of the other modern and complex variations on the devil's theme are nomadic by nature. Modern crime has little respect for parish boundaries and scatters its many component parts throughout the state's entire jurisdiction. An offense is begun in one parish, executed in part in several others, and finally consummated at still a different place. In such cases it is difficult to maintain seriously that there is some one parish in which the offense was committed and demand that the place of trial be accordingly restricted. Yet this is the position which the courts are forced to adopt by reason of the constitutional restriction on venue. Accordingly, the judge must put his finger upon some single part of the crime, which he regards as the "gist" of the offense, and hold that the venue must be laid in the parish where that part took place. In determining what is the gist of the crime, the court attempts, if possible, to ascertain the intention of the legislature. More often, however, the only recourse available is to pass into a legalistic trance wherein the gist of the crime is made manifest by divine revelation.

The recent case of State v. Matheny involved a prosecution under the so-called "dead head" statute, which prohibits any person's allowing his name to be carried on a pay roll and receiving pay for services not actually rendered. The supreme court declared that the gist of the offense is the receiving of unearned pay, and consequently that the defendant must be tried in the place where he received and cashed his paycheck. In another case decided during recent months the indictment was for a violation of Louisiana Act 123 of 1921, commonly known as the

4. State v. Terzia, 194 La. 583, 194 So. 27 (1940).
5. Dart's Stats. (1939) § 7702. See also Bugea, Lazarus, and Pegues, supra note 3, at 149-152.
“double dipping” statute. This act imposes a criminal penalty on any person who, while holding one public office of profit, accepts a second office and thereafter either performs any of the duties or accepts the emoluments of the first office. The defendant’s trial was begun in Morehouse Parish, but a motion to dismiss for improper venue was sustained. The indictment charged that the defendant, a state senator, accepted a second office, and that thereafter he performed the duties of senator and also received the emoluments of that office. The order of the lower court was affirmed on appeal. The duties of a state senator can be performed only in East Baton Rouge Parish where the state capitol is located. Since the performance of the duties of the first office is the gist of the offense, the venue could not be established in Morehouse Parish, the defendant’s place of residence. The emoluments of the office were paid by a treasurer’s warrant drawn and delivered in Baton Rouge, but which the defendant cashed in Morehouse Parish. This, said the court, was not sufficient to entitle the state to place the defendant on trial in the latter parish. Two other cases involving indictments under the same statute and arising on fact situations substantially like those above set forth were similarly disposed of.

The case of State v. Hart7 arose on a prosecution for obtaining money or property by means of the confidence game.8 This case will be discussed in more detail in the paragraphs that follow.9 For present purposes it is sufficient to say that the court held that the crime of which defendant was accused is similar to the offense of obtaining property by false pretense, and that the trial was properly held in the parish where the money or property was received, even though the scheme or artifice was concocted and executed elsewhere.10 Assuming that the analogy to false pretense was proper, the court followed well established precedents in its conclusion on the matter of venue.

In each of the above instances the court found that the gist of the offense was the obtaining of money through some prohibited practice. Even though the receipt of the money be

7. 195 La. 184, 196 So. 62 (1940).
10. The situation that gave rise to State v. Hart, 195 La. 184, 196 So. 62 (1940), also provided the subject matter for State v. Weiss, 195 La. 206, 196 So. 69 (1940) and State v. Leon C. Weiss, 195 La. 208, 196 So. 70 (1940). These cases were similarly disposed of.
regarded as the essence of the crime, the problem still remains: Where were the ill-gotten gains received? Various perplexing fact combinations are possible. A check executed by the victim in parish A is drawn on a bank in parish B. The check is received by the defendant in parish C and deposited for collection in a bank located in parish D. Finally, it is cleared through correspondent banks in parishes E and F. In such a case jurisdiction may be forced to make some astounding inter-parish leaps between banks.

In *State v. Matheny*\(^1\) the court was satisfied by the fact that the defendant received and cashed his checks in Morehouse Parish, although his name was on a public pay roll in Orleans Parish. No point was made of the possibility that the check was drawn on some bank outside Morehouse Parish. Nor did the facts of the case require the court to distinguish the place where the check was received from the place where it was cashed. In fact, the court employed the terms, “receives and cashes” indiscriminately in the conjunctive, and sometimes substituted “salary,” “pay,” or “money” for “paycheck.”

A refinement, however, was required by the facts of *State v. Terzia*.\(^2\) There, as we have already pointed out, the warrant or check was drawn on the state treasury in East Baton Rouge Parish, and was delivered to defendant at that place. However, it was cashed in Morehouse Parish. If cashing the check constituted the gist of the offense, the venue was properly laid in Morehouse. The majority of the court, however, refused to adopt this position. The opinion states:

> “... if the question is raised that the delivery of the warrant was not in itself the receipt of the emoluments and that the receipt depends on the actual cashing of said warrant, then it is the opinion of this Court that it would make no difference as to the location of the various banks or firms through whose hands the warrants would pass as the actual cashing would be done after the warrants were returned to the Auditor's office in East Baton Rouge Parish, and a voucher issued for same, which in turn would be finally cashed by the State Treasurer.”\(^3\)

From this it would appear that the parish in which the

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\(^1\) 194 La. 198, 193 So. 587 (1940).
\(^2\) 194 La. 583, 194 So. 27 (1940).
\(^3\) 194 La. at 586, 194 So. at 28.
The drawee bank is situated constitutes the proper place for venue. The dissenting opinion of Justice Odom urged that venue should lie in the parish where the check was cashed. In support of his view, he cited the earlier case of *State v. Roy*\(^ {14} \) wherein the court had said unequivocally that the place of the drawee bank is not the proper place of venue for the crime of obtaining money by false pretense. The *Roy* case was ignored in the majority opinion. One difference exists, however, between the facts of the *Roy* and the *Terzia* cases; in the former case the defendant both received and cashed the check in a single parish, while in the *Terzia* case the check was received in the parish of the drawee and cashed in a different parish. If this distinction was of importance to the majority, it did not appear in the opinion.

The same problem recurred with variations in the case of *State v. Hart*.\(^ {15} \) The indictment charged that the defendant Hart and several others obtained money from the Louisiana Polytechnic Institute located in Lincoln Parish, by means of falsifying a contract for the construction of a building on the campus of the Institute. It charged that Leon Weiss and others of the defendants were employed by the Institute as architects to supervise the construction work, advertise for bids, prepare the contract, and certify the work done for the purpose of authorizing payment of the contractor. The architects received the bids, and the contract was awarded to Hart's firm. In preparing the contract, the architects, with the aid and assistance of Hart, fraudulently raised the contract price from $264,000,\(^ {16} \) the amount of Hart's bid, to $291,000—an increase of $27,000. The contract provided that payment should be made in installments as the work progressed. The first payments, totalling $260,000 (about 82 per cent of the contract price), were made by checks drawn by the Institute on a Lincoln Parish bank. These were delivered to Hart in Lincoln, but were cashed outside that parish. The balance of the contract price was paid by means of checks drawn on a Lincoln Parish bank, but presumably delivered outside that parish and deposited by Hart to his credit in a bank situated in Vermilion Parish. The indictment was brought in Lincoln. The defendant's ingenious argument was to the effect that no part of the $27,000, which constituted the proceeds of the confidence game, was received by the defendant until the total amount of

15. 195 La. 184, 196 So. 62 (1940).
16. All figures employed in the text are round numbers.
the payments made exceeded the sum of $264,000 (the amount to which Hart would have been entitled if there had been no unlawful deviation from the amount of the bid). From this the defendant concluded that venue was improperly laid in Lincoln, since the state admittedly could not prove that the checks representing payment in excess of $264,000 were either delivered or cashed in that parish. The court's answer to this contention was two-fold. In the first place, each payment accepted by Hart included a proportionate part of the $27,000 loot. Thus 82 percent of the proceeds of the confidence game was represented by checks drawn on a Lincoln Parish bank and delivered in that parish. As to this proportion of the money fraudulently obtained, the court had no difficulty in holding consistently with *State v. Terzia* that the place of delivery, which was also the place where the drawee bank was situated, was the proper place of venue.

The court might well have rested at this point. If a part of the proceeds of the scheme was received in Lincoln Parish, venue in that place would not be defeated by the fact that additional sums were delivered elsewhere. Judicial discretion might have been the better part of valor; particularly is this true in view of the fact that in the opinion the court chose to distinguish the *Roy* case.

"In that case," said the court, "nothing whatever was done by the defendant in Rapides parish, and no money or thing of value was received by him in Rapides parish." This statement appears to confirm the suggestion already advanced—that venue lies in the parish of the drawee bank only if this parish is likewise the one in which the receipt of the check by defendant took place.

The court, however, was not satisfied to rest its judgment solely on the ground above set forth. It held that all payments, including those represented by checks which were both delivered and cashed outside Lincoln Parish, were equally made in that parish. The crime was not completed, said the court, until the checks cashed outside the parish of Lincoln were paid by the drawee bank within the parish. By so holding the court departed from the only plausible point of distinction between the case before it and the *Roy* case. Had this additional and probably unnecessary step not been taken, it would have been possible to

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formulate a fairly definite rule for establishing venue in criminal cases where the receipt of money was the essence of the offense and the medium of making payment was the ordinary commercial check. It might well have been established that the trial must take place in the parish where the drawee bank is situated if delivery also was effected in that parish. If, however, the check was both accepted and cashed in some parish other than that of the drawee bank, the trial must be held where the check was accepted and cashed. As the jurisprudence now stands, any effort to reconcile the cases appears almost futile.

If the case of *State v. Roy* can be ignored and *State v. Matheny* can be disregarded because the point of contention was not there considered, we may timidly hazard the opinion that in all cases venue can be established in the parish where the drawee bank is located. Certainly the latter part of the opinion in *State v. Hart* goes to this extreme, and support for the same position can possibly be spelled out in *State v. Terzia*.

The case of *State v. Smith* must be regarded as sui generis on the venue problem. The indictment was framed in an effort to spell out the crime of embezzlement—an offense to which the facts were not particularly well adapted. Consequently the court's effort to determine the question of venue by resorting to the traditional embezzlement theories and cases fell sorrowfully short of the mark. It appears from the facts that Smith, while president of Louisiana State University, was empowered to draw University funds on deposit. With a felonious intent he drew $75,000 against the University's account in a Baton Rouge bank by means of a check payable to the National Equipment Company. This check was delivered to Monte E. Hart in Baton Rouge. Hart took the check to New Orleans where he presented it to a bank, received $25,000 in cash, and deposited the balance to the credit of the payee. The proceeds were then divided among Smith and his fellow conspirators at various places, all of which presumably were outside East Baton Rouge Parish. The prosecution for embezzlement was begun in Orleans Parish, where the trial court overruled the defendant's plea to the jurisdiction. The case was appealed to the supreme court upon a writ of certiorari. The court reversed the holding of the trial judge.

The conclusion that the trial could be held only in East Baton Rouge Parish was supported along several different lines. Vir-

18. 194 La. 1015, 195 So. 523 (1940).
tually all the conflicting theories with respect to venue for embezzlement were brought into play, and fortunately, in the interest of consistency, all the devious roads happened in this case to lead to Baton Rouge. It was first pointed out that the offense of embezzlement is complete whenever the defendant, who has been entrusted with money or property, forms an intent to convert it to his own use, and has possession with such intent. Later, however, the court held that Smith's offense was not consummated until the drawee bank in Baton Rouge paid out the funds on deposit there when the check was presented for payment, because "the university was never deprived of its property or its control over the money until the check was paid." This raises an interesting question as to who was in possession of the money prior to the time the check was paid—the university, or Smith? If the university was in possession, the offense of withdrawing the money with a fraudulent intent can hardly be regarded as embezzlement. On the other hand, if Smith was in prior possession, the statement quoted above is difficult to understand. The run of mine of embezzlement cases involve the situation wherein a bailee of tangible property violates his obligations and misuses or disposes of the property entrusted to him. The abuse of a physical possession rightfully acquired is the traditional theme. Smith obviously possessed nothing unless it can be said that the power to draw on university funds was property. Even so, no contention was made that Smith embezzled the power. The university funds in question were an undivided part of the assets of a bank, and subject to the exclusive control and management of the bank until withdrawn by a properly executed check.

A presently existing law on the statute books of Louisiana affords the possibility of a comforting refuge from the troublesome problems of venue in criminal trials. Section 988 of the Revised Statutes of 1870, which is a reenactment of Section 12 of Act 121 of 1855, reads as follows:

"When any crime or misdemeanor shall be committed on the boundary of two or more parishes, or within one hundred yards thereof, or within one hundred yards of any other boundary, or shall be begun in one parish and completed in another, it may be dealt with, inquired of, tried, determined and punished in either of the parishes in the same manner

19. 194 La. at 1031, 195 So. at 529.
as if it had been actually and wholly committed therein."
(Italics supplied.)

A history of the treatment accorded this act is outside the scope of the present paper.20 It is sufficient to say that in the case of State v. Moore21 the law was pronounced invalid under Article IX of the Bill of Rights of the Constitution of 1913, which is the same as Article I, Section 9 of the present constitution. When the prosecution attempted to rely on this same act in State v. Smith the court gave its blessing to the Moore case and reasserted the unconstitutionality of the statute.22 However, there is some later evidence that the court is now more friendly disposed toward Section 988. The following interesting dicta will be found in State v. Hart:

"That statute [Section 988], which was enacted originally as Section 12 of Act No. 121 of 1855, was declared unconstitutional, in the case of State v. Montgomery, 115 La. 155, 38 So. 949, but only in so far as the statute undertook to allow a prosecution to be had in a parish other than that in which the crime was committed, provided it was committed within 100 yards from the boundary line of the parish in which the prosecution is had. That constitutional objection has been removed by a provision in Section 9 of Article I of the Constitution of 1921, allowing a prosecution to be had in either parish where the crime was committed within 100 yards from a boundary line between two parishes. But we are not aware of any constitutional objection to the provision in Section 988 of the Revised Statutes, with reference to a crime that was begun in one parish and completed in another."23

It is noteworthy that no reference is made above to State v. Moore, which was a much more sweeping decision than the Montgomery case mentioned by the court. It is not likely, however, that the court overlooked the former decision, which had been reviewed at length in State v. Smith only a few months earlier. Perhaps the pressure of seven difficult cases on criminal venue has forced the court to the exasperated conclusion that a solution of criminal venue problems by the use of fairytale principles isn't all that it is cracked up to be, and that a simple statute

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20. See Comment (1940) 3 LOUISIANA LAW REVIEW 222, 223.
21. 140 La. 281, 72 So. 965 (1916).
which can be upheld without too much straining at the constitutional leash affords the best answer after all.

The outmoded offense of misprision arose from its grave to make its contribution to a perverse season of venue problems. The crime, as denounced by the Louisiana statute, consists of neglecting to disclose to "some committing magistrate or district attorney" the commission of some serious crime of which the defendant has knowledge. It is admittedly difficult to single out some one parish where it can be said that the defendant didn't act. The supreme court in the recent case of State v. Wells concluded that the trial should be held in the parish where the felony which defendant should have reported was allegedly committed. The only alternative was to hold that the defendant could be tried in any and all parishes where he happened to be after learning of the crime.

Criminal Offenses

The construction to be placed upon the term property in the various statutes denouncing the obtaining of property by false pretense has long been a bone of contention in criminal law. The usual interpretation accorded the term excludes labor or services, and this was the view adopted by the Supreme Court of Louisiana in the case of State v. [Bruce] Smith, decided during the past year. The principal point has been considered in detail elsewhere in this review. In passing, however, it is noteworthy that the court, by pretermittting the case on the narrow ground advanced, avoided the necessity of passing on another and equally important problem. The facts were substantially that Smith had secured the services of one Varnell to paint Smith's house at a time when the former was a full time employee of the Louisiana Highway Commission, with Smith as superintendent. It would be interesting to know by what "false pretense" Smith secured Varnell's labor. Did Smith falsely represent to his superiors that Varnell was wanted for public work; or did he merely misuse labor which was to be performed under his supervision? Would the latter practice be a "false pretense" or "fraud," as those terms are traditionally employed in criminal statutes? Perhaps before this question can come before the court we shall have a more comprehensive and explicit body of criminal legislation.

24. 197 So. 420 (La. 1940).
25. 197 So. 429 (La. 1940).
In early law a dog was not recognized as property in the full and unqualified sense of the term. However, it is fairly well recognized today in most jurisdictions that a dog is considered a domestic animal and may be the subject matter of larceny. In the recent case of State v. Chambers the defendant was indicted for the larceny of a dog. He moved to quash the indictment on the ground that no offense was charged. The prosecution relied on Act 107 of 1882, which reads as follows:

“Section 1. From and after the passage of this act dogs owned by citizens of this state, are hereby declared to be personal property of such citizens, and shall be placed on the same guarantees of law as other personal property; provided, such dogs are given in by the owner thereof to the assessor.

“Section 2. No dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls.”

In answer to the defendant’s contention that the dog had not been placed on the assessment rolls as required by Section 2, the court replied that under the provisions of Article 10, Section 4 of the Louisiana Constitution, as amended, domestic animals are now exempt from taxation and that it would now be a vain and useless thing to have a dog assessed. The motion to quash was denied.

The need for a revision of the statutory definition of embracery was made manifest in the recent case of State v. Whitlock. Rhodes was on trial for involuntary homicide. One of the petit jurors was approached by the present defendant, who remarked, “Ben, if you can throw any favors to Jimmy Rhodes, I wish you would.” This request was held not to constitute an embracery as that offense is defined by Section 861 of the Revised Statutes. This section denounces attempts to “awe or corrupt jurors ... by menaces, threats, giving money, or promise of any pecuniary advantage or otherwise....” It is noteworthy that attempts to corrupt jurors through mere persuasion are not included. This deficiency is remedied in Article 362 of the Code of Criminal Procedure. An indictment under this article, however, was not attempted because of the foregone conclusion that dif-

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27. 194 La. 1042, 195 So. 532 (1940).
29. 193 La. 1044, 192 So. 697 (1939).
30. Dart’s Crim. Stats. (1932) § 786.
difficulties with the well known rule laid down in *State v. Rodosta* were certain to be encountered.

Section 853 of the Revised Statutes as amended reads as follows:

"If any person shall knowingly harbor, conceal, maintain or assist any principal offender or accessory thereeto he shall suffer imprisonment at hard labor not exceeding ten (10) years." (Italics supplied.)

This statute, prior to its amendment in 1938, had been construed in *State v. Graham.* The court in that case held that it applied only to the concealment of a person who had committed a burglary. This conclusion was based on the fact that the provision had originally appeared as one of several sections of the act of March 20, 1818, and read:

"... if any person, after any burglary committed as aforesaid, shall knowingly harbor, conceal, maintain or assist any principal offender or accessory thereeto before the fact, every such accessory after the fact, who shall be thereof duly convicted shall be punished for a term not exceeding one year by solitary imprisonment, and by confinement after to hard labor, not exceeding five years." (Italics supplied.)

When the above section was retained as Section 54 of Act 120 of 1855, and again as Section 853 of the Revised Statutes of 1870, it was condensed so as to read substantially as quoted first above, resulting in the unusual phraseology of that section.

At the same time, in 1855, the legislature made separate provision for the punishment of accessories after the fact generally. This led the court in the *Graham* case to the proper conclusion that Section 853 is not applicable to the concealment of any and all criminals.

In 1938 Section 853 was amended. The only changes made, however, were the omission of the words, "before the fact," and an increase of the penalty from five to ten years imprisonment at hard labor. Recently, in the case of *State v. Wells*, the court had occasion to hold that these amendments did not operate to increase the scope of the section, which is still confined to the

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31. 173 La. 623, 138 So. 124 (1931), noted in (1932) 7 Tulane L. Rev. 144.
32. Dart's Crim. Stats. (1932) § 749.
33. 190 La. 669, 182 So. 711 (1938).
34. La. Act of March 20, 1818.
35. La. Act 120 of 1855, § 177.
36. 195 La. 754, 197 So. 419 (1940).
concealment of burglaries. No criticism can be made of the decision. If the legislature intended to expand the field of operation of the section, it is difficult to understand why they should re-employ the old unintelligible language of the original act which obviously requires some unexpressed precedent to complete its meaning.

During past years there has prevailed a situation wherein certain public officers have benefited financially from contracts made by the boards or bodies of which they were members. In most cases the profit has resulted because the contract in question was awarded to a firm or corporation in which the officer held a financial interest. Several variations of this situation are possible. The officer may exert his influence with the fellow members of his board to secure the award of the contract in which he has a financial interest, or he himself may vote in favor of the award. If he has thus actively exerted himself in any way to secure personal profit from the transaction, it is clear that he is guilty of a criminal offense expressly denounced by Louisiana Act 128 of 1906. The only legal obstacle standing in the way of conviction thereunder is the possibility that the object of this statute is not adequately expressed in its title and that the act for that reason runs afoul of the state constitution. This point was recently raised before the supreme court. The case, however, was disposed of on other grounds and the point in question was not considered.

Even where nothing is done to influence the action of the board it still may be desirable policy to prohibit any member from having a private financial interest which could be served by any contract made by the board on which he holds membership. In most cases it is difficult to prove that improper influence was exerted, even if such was the case. Perhaps the best remedy is to prevent in advance the existence of a situation wherein a public officer can hold an interest which may prove to be opposed to the faithful discharge of his public duties. This policy, however, is difficult to implement through the criminal law. The sheer fact that a person is financially interested in a public contract at a time when he is also a public officer undoubtedly affords at best an intangible basis for a prosecution. It is difficult

to see how a public officer could effectively deport himself in order to avoid prosecution. Must he, before assuming office, divest himself of all financial interest in any firm which might deal with his board? Such a burden would be onerous indeed, and would discourage many responsible citizens from participating in public life. Perhaps he should dispose of his interest upon learning that a contract is contemplated, or should resign his public office upon the occurrence of such a contingency. The difficulties here appear to be insurmountable.

Four efforts were made during the past year to punish members of public boards on the sole ground that they were interested financially in contracts made by their boards. In one instance, *State v. De Generes*, the indictment was framed under Section 1 of Act 16 of 1920, which reads as follows:

“That it shall be unlawful for any Police Juror to draw money from his Parish Treasury, either directly or indirectly other than his per diem and mileage except that the Parish Treasurer shall be authorized to pay the official expenses of any officer of the Police Jury or member of the Police Jury, who is acting under authority of the Police Jury.”

The facts as gathered from the indictment were that De Generes was a police juror in Caddo Parish and also was a member of a business firm known as De Generes Brothers. The police jury purchased auto parts from the De Generes concern and paid for the same from the parish treasury while defendant was a member of the jury. A motion to quash the indictment was sustained by the supreme court on the ground that, “in order for a person to be legally charged in an indictment under a statute, he must have been conscious of some intentional act, which was contrary to the provisions of the law.” The court concluded that there was no allegation that the defendant directly or indirectly drew any money from the parish treasury. The fact that he was a member of a concern which profited by the transaction and that he presumably would share in the profits of the sale did not bring him within the purview of the statute. The case of *State v. Williamson* was almost identical on its facts with the *De Generes* case, and was similarly disposed of.

A third case, *State v. Fulco*, presented the same problem
and again the supreme court dismissed the charge. In this case, however, the question arose on the sufficiency of the agreed statement of facts in support of the indictment. The court avoided reference to the broader problem discussed in the De Generes case, and rested its conclusion on the fact that the prosecution failed to show that the defendant had received from the firm any share of the profits of the contract.

A somewhat similar problem was before the court in the case of State v. Abernathy. Abernathy was a member of the Board of Supervisors of Louisiana State University. He was charged with being "directly and indirectly pecuniarily interested in the profits to be expected and derived from the performance of various contracts" alleged to have been made between the university and an office supply company of which Abernathy was an officer and stockholder. There was no charge that Abernathy either voted for the award or did any other act to secure it. The indictment was framed under Section 2 of Act 128 of 1906, which provides:

"That any member of any public board, body or commission created by, and now or hereafter existing under the laws of this State, and charged with either the custody, control or expenditure of any funds or monies derived from taxation, who shall as such member vote to award any contract for the performance of work or the furnishing of labor or materials, or who shall vote to award the custody of any such public funds to any partnership of which he is a member, or in which he is interested, or to any corporation of which he is an officer, or who shall do any other act to secure such award by the board, body or commission of which he is a member to any such partnership or corporation; or who shall be either directly or indirectly pecuniarily interested in the profits to be expected or derived from the performance of any such contract, or the existence of any such custody so awarded, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one thousand dollars, or be imprisoned not less than six months, nor more than one year, or both." (Italics supplied.)

The trial judge prepared a lengthy opinion in which he held

45. 194 La. 559, 194 So. 19 (1940).
46. 194 La. at 561, 194 So. at 20.
47. Dart's Crim. Stats. (1932) § 806.
that Act 128 did not contemplate the situation that gave rise to Abernathy's trial. It appears that the portion of the act set forth above in italics describes merely the interest which the defend-
ant must have in the contract. The offense denounced, however, is voting for the prohibited contract or doing some other act to secure the award. The opinion of the trial court was adopted on appeal. The soundness of the court's conclusion is hardly open to question. It would be virtually impossible to administer the act under the interpretation urged by the prosecution. The case, however, is valuable chiefly because it affords an example of the complications that follow in the wake of artlessly drafted legislation.

Act 78 of 1890\textsuperscript{48} makes criminal the acceptance of a bribe by a state, parochial, or municipal officer. The supreme court held in the case of \textit{State v. Dark}\textsuperscript{49} that a conservation agent of the Louisiana Conservation Commission is an officer within the inten-
tendment of the act. In the opinion Justice Fournet pointed out that conservation agents are vested with power to enforce laws relating to the conservation of the state's resources, that their duties are continuous in nature despite changes of personnel, and that they exercise a portion of the sovereign power of the state. The following portion of the opinion is particularly noteworthy because of its intelligent and understanding statement of the reason for much of the confusion on the part of the courts and text writers with respect to the definition of a public office:

"... the courts have not been able to arrive at a definition that will, faultlessly, fit all cases. They have been compelled, rather, to decide whether, in the case under consideration, the position of a given person comes fairly within the constitu-
tional or legislative intendment and contemplation, their con-
clusions varying, of course, with the different constitutional and legislative provisions in the respective jurisdictions and the nature of the respective cases. For example, a person holding a position in a department of the state government may be a state officer within the intendment of a law that exempts the salaries of state officers from seizure under garnishment proceedings, while, on the other hand, he may not be a state officer within the intendment of a law that makes it possible

\textsuperscript{48} Dart's Crim Stats. (1932) §§ 796-798.
\textsuperscript{49} 195 La. 139, 196 So. 47 (1940).
to test a person's title and right to a state office under quo warranto proceedings.\textsuperscript{50}

The indictment as originally filed failed to specify the public office held by defendants and did not furnish details with respect to the acts of partiality and favoritism with which they were charged. The trial court permitted amendments of the indictment, and its action in so doing was sustained by the supreme court under Articles 252 and 253 of the Code of Criminal Procedure. The court further held that the act under which the indictment was framed was not repealed or superseded by Section 12 of Article 19 of the Constitution of 1921.\textsuperscript{61} In the opinion it was pointed out that this act had been sustained against a similar contention with respect to Article 183 of the Constitution of 1898\textsuperscript{52} and that the present constitution contains no definition of bribery and no prohibition not embraced in the Constitution of 1898.

The Indictment

Although a defendant may be charged in a single count of an indictment both with forging an instrument and thereafter uttering it,\textsuperscript{53} he cannot be charged with the two offenses in separate counts. An interesting problem relative to the above distinction arose in \textit{State v. Obey}.\textsuperscript{54} The defendant was charged in one count with forging a check, and in another count with uttering the same. The prosecution, however, was seeking a conviction only on the count that charged the uttering. Nevertheless, the entire indictment was read to the jury. This, the defendant claimed, was prejudicial and amounted to the admission of evidence of a separate and independent crime. The per curiam of the trial judge stated that after the opening statement of the district attorney, the judge, through special instructions to the jury, explained that the defendant was being tried only for uttering the forged check. The defendant's bill of exceptions was held to be without merit. Since both offenses might have been called to the jury's attention through a properly framed indictment, it is clear that the error complained of was not prejudicial to the defendant.

The power to amend indictments is granted in liberal terms

\textsuperscript{50} 196 So. at 49.
\textsuperscript{51} State v. Dark, 195 La. 160, 196 So. 54 (1940).
\textsuperscript{52} The court cited State v. McGraw, 142 La. 417, 76 So. 822 (1917).
\textsuperscript{54} 193 La. 1075, 192 So. 722 (1939).
by Article 253 of the Code of Criminal Procedure. This article permits amendments both as to matters of form and of substance. Where the state is permitted to amend a defect of substance the defendant's right to a continuance is carefully guarded by the Code. Article 253 is silent, however, on the matter of a continuance after the amendment of a formal defect in cases where the amendment was not made in order to cure a variance between the indictment and the proof. The defendant in the case of State v. Jones\textsuperscript{55} was indicted for murder. On the date of trial the district attorney was granted permission to change the date of the alleged crime from December fourth to December third. The defendant thereafter insisted that he was entitled to a continuance as a matter of law. There was no allegation in the petition of any fact or circumstance tending to show in what respect the defendant was prejudiced by the amendment. The lower court refused the motion for continuance, and this ruling was affirmed on appeal. The granting or refusal of a continuance is a matter within the discretion of the trial judge, and the court's conclusion was sound, unless it can be said that the amendment was as to a matter of substance, in which case it would appear from the language of Article 253 that the court must be satisfied that the defendant's rights will be protected by proceeding directly with the trial. This would appear to imply that in such instance there is a presumption of injury in favor of defendant. Errors of time are generally regarded as formal defects only.

\textit{Prescription}

An indictment or information may negative prescription by alleging that the offense was not made known to the officer or body having jurisdiction until after the expiration of a year from the date of its commission, and less than one year before the filing of the indictment or information; this allegation may be rebutted, however. In State v. Oliver\textsuperscript{56} the defendant attempted to make such a rebuttal after conviction by means of a motion in arrest of judgment and also a motion for a new trial. His offer was rejected on motion in arrest of judgment for the reason that the error was not patent on the face of the record.\textsuperscript{57} However, the refusal of the trial court to entertain the rebuttal on motion for a new trial was held to be reversible error. Article 8 of the Code of Criminal Procedure dealing with prescription

\textsuperscript{55}. 197 So. 249 (La. 1940).

\textsuperscript{56}. 193 La. 1084, 192 So. 725 (1939).

provides that no person shall be "prosecuted, tried or punished" for a prescribed offense. The court had previously stated in an earlier case that the only way to give effect to the word "punished" is to permit the defendant to raise the issue even after conviction.

An interesting point with respect to prescription was raised in State v. Young. In July, 1938, the carcass of a slaughtered cow was found in the woods in Jackson Parish near to the parish line, and the defendant was indicted for cow stealing. The defendant's bond was approved by a judge who presided in the adjoining parish of Winn, because a surety thereon was a resident of that parish. On the trial for the offense in Jackson Parish the defendant successfully pleaded to the jurisdiction by showing that the offense, if committed at all, was committed in Winn Parish. The defendant was indicted in Winn Parish in September, 1939. The indictment alleged that the commission of the offense was not known to any officer or body of Winn Parish who had jurisdiction until April, 1939 (the date of the trial in Jackson Parish). The defendant moved to quash the indictment and showed that the judge who approved the bond knew of the offense first in July, 1938. It was conceded, however, that the judge believed at that time that the offense was committed outside his jurisdiction, in Jackson Parish. The supreme court held that at the time of the disclosure in July, 1938, neither the judge nor any officer of that parish believed that there was jurisdiction to prosecute in Winn Parish. There was no information at that time to serve as a starting point for a prosecution. The motion to quash was properly overruled.

Pleas

Both the Constitution of 1921 and the Code of Criminal Procedure provide in substance that an unqualified plea of guilty to a capital offense cannot be received by the court. In State ex rel. Turner v. Jones the facts appear to be that the defendant, who was charged with murder, entered the plea of "guilty without capital punishment," and was sentenced to life imprisonment. The Clerk of Court stated under deposition that through error he entered the plea as simply "guilty." After serving three years

58. State v. Block, 179 La. 426, 154 So. 46 (1934).
59. 194 La. 1061, 195 So. 539 (1940).
61. 193 La. 714, 192 So. 232 (1939).
of her term, defendant seeks by writ of habeas corpus to procure her discharge on the ground that the plea, as it was entered on the court record, is one which the court was without power to receive. The supreme court properly held that the minutes of the trial court could not be corrected through ex parte affidavits and remanded the case for a proceeding taken contradictorily to determine the true situation and adjust the minutes accordingly.

Although the Code of Criminal Procedure permits the defendant, with the consent of the court, to withdraw his plea of "not guilty" and set up some other plea, this is not an absolute right, and the court is entitled to exercise its sound discretion in the matter. Recently in the case of *State v. Messer* the defendant, who was charged with murder, sought permission to withdraw the plea of "not guilty" and substitute therefor the plea of present insanity and the plea of insanity at the time of the commission of the offense. The trial judge, who had observed the defendant's conduct during a previous trial for the same crime and who had known the defendant for a number of years, refused to allow him to enter the plea of present insanity. This ruling was affirmed by the supreme court. The trial court permitted the plea of insanity at the time of the commission of the offense, but refused to appoint a lunacy commission and submitted the issue of insanity to the jury. The supreme court held that this ruling was proper under Article 267 of the Code of Criminal Procedure, as amended by Act 136 of 1932. The provision of that article, as it now reads, is that the court may appoint a lunacy commission, not that it is required to do so.

The Grand Jury

The position of the grand jury in the hierarchy of the tribunals and officers who administer criminal laws was subjected to a thorough discussion in the case of *State ex rel. De Armas v. Platt*. The controversy leading up to the decision is too well known to require more than a brief summary here. The grand jury of Orleans Parish during the fall of 1939 was engaged in the investigation of state public scandals. Several members of the body felt that their efforts were being impeded by the district attorney who was refusing to afford them the cooperation

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63. 194 La. 238, 193 So. 633 (1940).
64. 193 La. 928, 192 So. 659 (1939).
and information to which they were entitled. As a result, several of their number prepared and signed a petition addressed to the district judge in which they requested that the district attorney be recused and that a special district attorney and assistants be appointed, and that an appropriation of ten thousand dollars for investigative purposes be made. The petitioner, a member of the grand jury, attempted to read this document in open court, whereupon he was admonished not to proceed until the court might have an opportunity to examine it. The jurymen persisted in reading the paper despite the judge's remonstrance. For this he was ordered arrested by the judge and was confined. At the expiration of an hour the judge held the petitioner to have been in contempt of court and discharged him from his office of grand jurymen. The petition in the present case before the supreme court was on writs of certiorari, prohibition, and mandamus to compel the petitioner's reinstatement. The relief was denied, with Justices O'Niell and Odom dissenting.

The legal question before the court was a comparatively narrow one, although its implications were sufficiently profound to prompt the court to extend its discussion over twenty-eight printed pages in the Southern Reporter. All the members of the court agreed that the reading of the petition under the circumstances described was a contempt of court and that the trial judge acted properly in so holding. Whether or not the petitioner's conduct warranted his dismissal as a member of the grand jury gave rise to strong differences of opinion among the justices. Briefly stated, the position of the majority was that a contempt of court is a criminal offense of such a nature as to justify a dismissal for cause.65 Grand jurors are under the control of the judge who impanels them, at least to the extent of requiring them to obey the law.66 The court emphasized the fact that the conduct of the petitioner showed a disrespect for the authority of the trial judge and that the petition read in defiance of the court's order was one beyond the power of the grand jury. The opinion drew much material from previous decisions both in Louisiana and elsewhere to the effect that the return of a presentment which charges no crime and which is designed to cast recriminations on some person who is unable to defend himself because no trial is possible is a pernicious practice outside the

66. This proposition was reaffirmed in State v. Richey, 195 La. 319, 196 So. 545 (1940).
legitimate sphere of the grand jury's activities. However, as the dissenting opinions pointed out, it is difficult to regard as a presentment the unofficial petition of several members of a grand jury made to the court under whose direction it functions and which merely seeks judicial assistance in making more effective the deliberations of the grand jury. The fact that it is necessary to charge the office of the district attorney with offensive conduct and obstructionist tactics in order to demonstrate the need for the relief demanded appears to be beside the point; nor is the fact that the object of the petition was for relief which the judge to whom it was addressed could not grant a matter of any apparent importance. Justice O'Niell pointed out that even though the contempt proceeding should be regarded as a criminal offense, the trial for that offense was not pending at the time of the dismissal. The position adopted by the dissenting minority was confirmed by the 1940 session of the legislature which amended Articles 196 and 210 of the Code of Criminal Procedure in substantial conformity with the views expressed by the chief justice. These amendments have been discussed in detail elsewhere in the Louisiana Law Review.67

The power of the trial court to dismiss grand jurors for cause was again considered by the supreme court in State v. Richey.68 The judge of the district court in Rapides Parish discharged the entire jury on the ground that a charge of a criminal offense had been filed against all members, and was pending. The basis of the pending charge was that the grand jury, contrary to the advice of the district attorney, had returned indictments for embezzlement and a violation of the dual office holding act under facts that could not warrant a conviction of the accused. The return of these indictments was set forth as a violation of Act 254 of 1912,69 known as the "Misdemeanor in Office Act." On appeal the supreme court overruled the action of the trial judge dissolving the grand jury. The charge that the grand jurors had returned an indictment contrary to the advice of the district attorney did not constitute an offense as that term is used in Article 172 of the Code of Criminal Procedure which sets forth the requirements of jurors. In order for a person to be disqualified for jury service on the ground that at the time of his exercising the duties of his office he is charged with an offense,

68. 195 La. 319, 196 So. 545 (1940).
69. Dart's Crim. Stats. (1932) § 801.
the charge must set forth facts that constitute a crime under the laws of the state.

An interesting point with respect to the exclusion of negroes from the grand jury was decided in the recent case of State v. White. The defendant was indicted for murder. The trial lasted two days, during which time not a single bill of exception was reserved, and the jury found the defendant guilty as charged. A motion for a new trial was filed in which the defendant for the first time alleged that negroes were systematically excluded from the grand jury, resulting in a denial of due process and equal protection of the laws, guaranteed by the federal and Louisiana constitutions.

Ordinarily, objections to the constitution of the grand jury must be raised by a proper motion before going to trial, and, if not disposed of at that time, they are regarded as waived. Does an objection to the grand jury which is based on alleged unconstitutional discrimination against negroes differ in this respect from other defects in the makeup of the grand jury? The supreme court answered the question in the negative, and held that the defendant could not raise the point for the first time in a motion for a new trial. In support of this conclusion it cited a decision of the Supreme Court of Arkansas, Hicks v. State of Arkansas, in which the same point had been raised and decided adversely to the defendant. The United States Supreme Court had refused an application for a writ of certiorari, lending some additional weight to the decision. One might plausibly contend that the violation of the right to due process and equal protection of the laws, solemnly conferred by both the state and federal constitutions, is something more than an ordinary defect in the grand jury's organization and personnel. On the other hand, however, the law is interested not only in the protection of the defendant, but in the expeditious administration of criminal justice. If the defendant is afforded a fair opportunity to protect his constitutional rights and neglects to do so, the dictates of fair play do not demand that he first be allowed to take his chance with the ver-

70. 193 La. 775, 192 So. 345 (1939).
72. 143 Ark. 158, 220 S.W. 308 (1920).
73. 254 U.S. 630, 41 S. Ct. 7, 65 L. Ed. 447 (1920). The Louisiana Supreme Court inadvertently stated that the Hicks case was “affirmed by the United States Supreme Court without comment.”
dict, and, failing in that, be permitted to assail the grand jury that indicted him.

The defendant further contended that even though he were not entitled as a matter of right to raise the question for the first time in a motion for a new trial, yet in a capital case the court can and should waive the requirement of timeliness if it can see that a fair trial has not been had and that injustice has been done. The court rejected this argument, and properly. It may be admitted that a systematic exclusion of negroes from the jury deprives a colored defendant of a fair trial. However, the judicial discretion to which the defendant directed his appeal does not obtain for the purpose of allowing the court to weigh conflicting policies of law such as were presented in the present case. These policies were completely resolved when the court first denied the defendant's claim of right. Should it now reverse its position, in effect, under the guise of exercising a discretion? The power to exercise discretion in waiving the normal requirement of timely objection exists in order to enable the court to individualize the facts attendant on the trial of the case under consideration. It is a means whereby the court can personalize the situation and, if necessary, mollify the rigors of criminal procedure. The opinion was not as clear on this point as might be desired. However, the following statement from the opinion appears by implication to support the view advanced above.

"The record in the instant case not only fails to show that a manifest injustice has been done the accused, but, on the contrary, the record is most convincing that the defendant was ably assisted by counsel and received a fair and impartial trial before a most considerate judge. This is clearly borne out by counsel's own admission on the trial of the motion for a new trial that the reason he took no bills of exception during the trial of the case was because 'the Court constantly ruled with me (him).'")\textsuperscript{74}

\textbf{Jurors}

Article 177 of the Code of Criminal Procedure requires that every order for the selecting or drawing of jurors shall be in writing, signed by the judge, and spread upon the minutes of the courts. The supreme court has recently held that this pro-

\textsuperscript{74} State v. White, 193 La. 775, 789, 192 So. 345, 349 (1939).
vision is complied with where the rules of the district court
signed by the two presiding judges and spread upon the court
minutes designate the specific days upon which the regular semi-
annual meetings of the jury commission shall be held.75 The
article does not contemplate the necessity for a special signed
order for each regular meeting of the commission.

The prevailing rule that the incompetency of a juror must
be urged before he is sworn in was successfully invoked by the
prosecution in State v. Peyton.76 On motion for a new trial the
attorney for defendant sought to show that one juror had not
been a resident of the parish of trial for a year next preceding
his service, as required by Article 172 of the Code of Criminal
Procedure. He maintained that his failure to inquire of the
juror's residence on the voir dire was of no consequence, because
the court had made clear to all the jurors the qualifications of
their office and had asked them if they lacked any of those
qualifications, and that the juryman in question had failed to
reply. The court, however, refused to accede to this contention.

Although the incompetency of a juror is an objection which
is not usually available for the first time in a motion for a new
trial, it is nevertheless open to the defendant after verdict to
show that a juror swore falsely and that this fact was ascer-
tained for the first time after verdict.77 This was reaffirmed in
the recent case of State v. Oliver,78 which was remanded in
order that evidence supporting the claim of false swearing might
be heard in support of the defendant's motion for a new trial.

The fact that a juror has been peremptorily challenged on a
criminal trial is not ground for a challenge for cause in a new
trial for the same offense. This was the ruling of the trial court
in State v. Messer79 affirmed by the supreme court during the
last term. The only grounds for disqualification relative to prior
service are set forth in Article 351 of the Code of Criminal Pro-
cedure. These relate to service on a petit jury which had previ-
ously tried the defendant for the same offense, or on a coroner's
jury that investigated a homicide for which defendant is on trial.
The present decision was reinforced by the fact that at the time

76. 194 La. 681, 194 So. 715 (1940).
78. 193 La. 1084, 192 So. 725 (1939).
79. 194 La. 238, 193 So. 633 (1940).
the defendant sought to make the challenge for cause he had not exhausted his peremptory challenges.\

The Trial

The Code of Criminal Procedure seeks to outline an orderly procedure for the trial of criminal cases. Article 333 provides that the reading of the indictment to the jury shall be followed by an opening statement by the district attorney "explaining the nature of the charge and the evidence by which he expects to establish the same." It appears that this requirement was intended by the legislature merely as a step in the outlining of an orderly trial procedure which will furnish some assistance to the jury in its effort to comprehend and evaluate the testimony. Accordingly, the court has manifested a liberal attitude toward allowing the opening statement to be supplemented or amended by the district attorney. It was also pointed out in the recent case of State v. Sharbino that what is said in the opening statement is not to be regarded as having any binding force on the jury, and cannot be regarded as evidence. Hence untrue and prejudicial statements made at this time cannot be regarded as evidence erroneously admitted. The court held that references in the opening statement to matters which later proved to be inadmissible under the rules of evidence did not constitute reversible error.

The right to a speedy trial was discussed in State v. Frith. In that case an information was filed against the defendant for assaulting the district attorney. At the time of the alleged assault the defendant apparently was serving on the grand jury. A few days thereafter the defendant appeared in court, pleaded "not guilty," and requested that the case be set for hearing as soon as possible. The district attorney, however, objected to fixing the date of trial at that time, whereupon the defendant moved to recuse the district attorney and his assistants. About a month

80. Art. 353, La. Code of Crim. Proc. of 1928. In State v. Jones, 195 La. 611, 197 So. 249 (1940), the court held that a prospective juror could not be challenged for cause solely on the ground that he was a son of the coroner who testified for the state.

81. But cf. Note (1940) 3 LOUISIANA LAW REVIEW 238.


83. 194 La. 709, 194 So. 756 (1940), noted in (1940) 3 LOUISIANA LAW REVIEW 238.

84. 194 La. 508, 194 So. 1 (1940).
later the motion for recusation was set for hearing, and the defendant immediately withdrew the motion and filed in its stead a motion for a speedy trial. The trial court reiterated a previous announcement that in the absence of exceptional circumstances the fixing of the date of trial lies strictly within the province of the district attorney, and refused the motion. The defendant then carried his petition to the supreme court through an application for a writ of mandamus. The writ was denied. The refusal of the district attorney to fix the case for trial was not per se a deprivation of the right to a speedy trial, and, further, there is no showing to indicate that the court was then open for the trial of misdemeanor cases. There was no evidence of an unreasonable delay warranting an influence that the prosecution was motivated in its action by extraneous considerations.

In *State v. Pugh* 85 the defendant failed to appear on the day set for his trial and his bond was ordered forfeited. Several days later, however, he appeared in court, waived arraignment, and pleaded "not guilty," whereupon a date for his trial was set. Upon the appointed day it was discovered that one of defendant's witnesses was absent, and the defendant objected to proceeding with the trial. He was informed by the district attorney that the latter felt that the objection was good, but that if a continuance were granted he would not set aside the bond forfeiture already entered. Thereupon the defendant withdrew his objection, proceeded to trial without the witness and was convicted. On appeal the conviction and sentence were annulled and the case was remanded. The supreme court held that the waiver of defendant's objection was produced by coercion.

Most courts have held that a substitution of judges at any time after the jury has been accepted and sworn is reversible error. In Louisiana, however, it has been held without comment that a substituted judge can pass sentence, even though he was not present at the trial and no record was kept of the evidence. 86 During a recent murder trial a special judge presided during the impanelling of the jury, and the presiding judge returned to the bench for the remainder of the trial. The substitution was held not to be reversible error, since the defendant failed to show that his rights were prejudiced thereby. 87 The decision is believed to be sound, and is not out of line with the majority

85. 194 La. 269, 193 So. 643 (1940).
86. State v. Barret, 151 La. 52, 91 So. 543 (1922).
87. State v. Todd, 194 La. 595, 194 So. 31 (1940).
Motion for a new trial on the ground of newly discovered evidence was denied in State v. Moore. The witnesses relied on were present during the trial and were not summoned because the defendant "did not know what their testimony would be." There was no showing of due diligence on the part of the defendant or his attorney in seeking to obtain the evidence before the case went to trial.

Claims of errors in the court's instructions to the jury were conspicuously few during the past term. One case, State v. Jacobs, may be noted, however. The supreme court held that where the criminal statutes provide one penalty for the forgery of an instrument of an amount less than twenty dollars and a higher penalty where the instrument is of an amount in excess of twenty dollars, it is proper for the judge to apprise the jury of the appropriate penalty to be imposed.

Evidence

Several cases deciding points of evidence in criminal trials were before the supreme court during the recent term. Most of these dealt with attempts to exclude items of evidence which were alleged to be irrelevant and prejudicial. These cases do not permit of treatment here. The court also considered three cases in which evidence of previous offenses was held admissible. Such evidence is permitted under the Code of Criminal Procedure for the purpose of showing a criminal intent, the existence of a system or a conspiracy, or to impeach the defendant's credibility. In the case of State v. Martin the court reiterated the rule that a new trial cannot be ordered for every prejudicial statement volunteered by a witness and for which the prosecution is not responsible.

The prosecution successfully invoked Article 487 of the Code of Criminal Procedure for the purpose of impeaching its own witness in the case of State v. Smith. The witness and defendant

88. Note (1940) 2 Louisiana Law Review 742.
89. 194 La. 774, 194 So. 778 (1940).
90. 195 La. 281, 196 So. 347 (1940).
93. 193 La. 1036, 192 So. 694 (1939).
94. 193 La. 665, 192 So. 92 (1939).
had conspired together to commit a robbery. Later the witness confessed to the commission of the crime, but the defendant pleaded "not guilty" and was placed on trial. The witness proved to be hostile and unwilling to testify when placed on the stand, whereupon the district attorney asked him if he had not previously stated in writing that the defendant met him the night after the robbery and described the commission of the offense to him. The witness' answer was admitted over the objection that the statement was made outside the presence of the defendant.

VIII. CONFLICT OF LAWS

Two noteworthy decisions on this subject were handed down during the past term. In General Motors Acceptance Corporation v. Nuss\(^1\) the court annulled a judgment of the court of appeal\(^2\) and brought Louisiana into line with the majority of states\(^3\) which recognize a foreign chattel mortgage without insisting upon local recordation where there has been a surreptitious removal of the property. In Maddry v. Moore Brothers Lumber Company\(^4\) an employee sustained injuries while riding in the defendant's motor vehicle and while acting within the scope of his employment. The court took the unexpected position that jurisdiction could be exercised over a nonresident foreign corporation in a workmen's compensation suit by means of substituted service under the local nonresident motorist statute.\(^5\) Such statutes have been considered as applying only to actions ex delicto arising out of automobile accidents and the constitutionality of the extension in the present case has been questioned.\(^6\)

1. 195 La. 209, 196 So. 323 (1940).
2. 192 So. 248 (La. App. 1939), noted in (1940) 2 Louisiana Law Review 550, and (1940) 14 Tulane L. Rev. 459.
4. 197 So. 651 (La. 1940), noted in (1940) 3 Louisiana Law Review 231.