Louisiana Legislation of 1946: Civil Procedure

Henry G. McMahon
weighted in favor of the amendment as it will prove to be expeditious in the great majority of cases and will relieve the heirs of the long wait and commerce tieup of property which in but a small percentage of cases would after all have proved to have been unnecessary. The result will be like unto the court's application of Article 77 in decisions where property accruing to absentees after their existence became unknown was involved. The safeguards for this situation are found in Articles 78 and 79. The question of provisional possession will also be removed when direct descendants are involved under Article 77. The difficulties of Article 76, reading "Whoever shall claim a right accruing to a person whose existence is not known, shall be bound to prove that such person existed at the time when the right in question accrued, and until this be proved, his demand shall not be admitted," appear to be unaffected by the amendment.

CIVIL PROCEDURE

HENRY G. MCMAHON*

Abatement of Actions. Since 1825 the positive law of Louisiana has provided that "Actions do not abate by the death of one of the parties after answer filed." Despite this sweeping language, it was held in *Chivers v. Roger* that when a beneficiary designated by the pertinent code provision brought an action to recover damages for wrongful death and died after answer filed, the right of action was not transmitted to plaintiff's heirs. The action was held to have abated upon the death of plaintiff. Although the Chivers case has been followed in Louisiana, the state courts have never extended the rule beyond the precise factual limits of the case. The probabilities are that the sole

11. See Succession of Williams, 149 La. 198, 88 So. 791 (1920).
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1. Art. 21, La. Codes of Practice of 1825 and 1870.
2. 50 La. Ann. 57, 23 So. 100 (1898).
5. Both before and after the Chivers decision, the supreme court held that if plaintiff had obtained judgment on his claim for wrongful death, and died pending defendant's appeal therefrom, the action did not abate. Vincent v. Sharp, 9 La. Ann. 463 (1854); Castelluccio v. Cloverland Dairy Products Co., 165 La. 606, 115 So. 796 (1928). To the same effect: Williams v. Campbell, 185 So. 683 (La. App. 1938). In Durbridge v. State, 117 La. 841, 42 So. 337.
purpose of Louisiana Act 239 of 1946 was the legislative overruling of *Chivers v. Roger,* although there is a possibility that a greater accomplishment was intended. The 1946 act, which expressly is made applicable to pending as well as subsequent actions, provides “that there are no exceptions to the rule that an action does not abate by the death of one of the parties thereto after issue joined.” The all-inclusive language of this legislation will call for an alertness from the court to avoid absurd consequences in the field of “strictly personal obligations,” and of rights which are purely personal to a plaintiff and terminate with the latter’s death. In certain border-

(1906), where plaintiff was authorized to sue the state to recover on bonds allegedly issued under unconstitutional statutes, plaintiff died pending his own appeal from a judgment for defendant, and the court allowed the substitution of plaintiff’s heirs as parties plaintiff, refusing to apply the rule of the *Chivers* case. In the latest case on the subject, plaintiff sued out an appeal from a judgment rejecting his claim for wrongful death, and obtained judgment by a divided court on the appellate court’s first hearing. Plaintiff died pending action on defendant’s application for rehearing, and a divided court held that the action had not abated on plaintiff’s death, and re-instated its original decree to the extent of awarding judgment to plaintiff’s heirs. Foy v. Little, 197 So. 313 (La. App. 1939) noted in (1940) 15 Tulane L. Rev. 135.

6. In the field where the greatest application of the rule might be expected, actions for wrongful death, the *Chivers* case “represents the only set of circumstances under which an action in Louisiana abates with the death of the plaintiff after answer filed.” Oppenheim, The Survival of Tort Actions and The Action for Wrongful Death—a Survey and a Proposal (1941) 16 Tulane L. Rev. 386, 412; Voss, The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana (1932) 6 Tulane L. Rev. 201, 233.

7. *Chivers v. Roger,* 50 La. Ann. 57, 23 So. 100 (1898), was relied on in *System Federation No. 59 of Railway Employees’ Department of A. F. of L. v. Louisiana & A. Ry. Co.,* 57 F. Supp. 151 (D. C. La. 1944), where the sole heir of a former railroad employee brought suit to enforce an award of the National Railroad Adjustment Board, and the court held that the right sought to be enforced, under the substantive law of Louisiana, was personal to the deceased employee. Apparently, plaintiff made an effort to throw the case under the rule of *Castelluccio v. Cloverland Dairy Products Co.,* 165 La. 606, 115 So. 796 (1928) by analogizing the award by the National Railroad Adjustment to plaintiff’s intestate to a judgment, but the court held that such an award was too vague as to be incapable of enforcement. A remote possibility exists that the 1946 legislation may have been sponsored by organized labor in an effort to overthrow what it felt to be the unsatisfactory result of the federal case.

8. Defined to be obligations which “none but the obligee can enforce the performance, or when it can be enforced only against the obligor.” Art. 1997, La. Civil Code of 1870. One illustration of the “strictly personal obligation” given by the Civil Code is the annuity. Art. 2004, La. Civil Code of 1870. A much more common one is usufruct. Art. 607, La. Civil Code of 1870. Since the substantive right would terminate upon the death of the obligor or obligee, even if judicially recognized by judgment, the courts should experience no difficulty in concluding that the 1946 statute was not intended to convert strictly personal obligations into heritable ones.

9. Such as the plaintiff’s right to the custody of children, *Succession of Deshotels,* 144 La. 580, 80 So. 883 (1919); or his right to be appointed admin-
line circumstances, the applicability of the statute may present extremely close cases.10

Two rules of statutory construction are provided by the 1946 act, the first requiring that no prior statute be construed as an exception to the rule announced, and the second to the effect that no future legislation shall be interpreted as embodying an exception to the prohibition against abatement unless specially and specifically so provided. The 1946 statute differs slightly from its code counterpart. The latter's prohibition against abatement applies "after answer filed"; while the statutory inhibition becomes effective "after issue joined." In this respect, the 1946 act is somewhat broader in application than the pertinent article of the Code of Practice.11

istrator, executor, tutor or curator, Succession of Coco, 183 La. 517, 164 So. 326 (1935).

10. As would be presented by the death of plaintiff after issue joined in a suit filed by a surviving wife without issue of the marriage to recover the "widow's homestead" allowed by Art. 3252, La. Civil Code of 1870, as amended, or to recover the marital fourth under Art. 2382, La. Civil Code of 1870, as amended. Both of these rights, allowed by code provisions which have been recognized as being in pari materia, are recognized as personal rights which ordinarily are not transmitted to the surviving spouse's heirs. Comment (1943) 18 Tulane L. Rev. 290, 298. It has been held that the widow's claim to the $1,000 allowance is not transmitted to her major heirs upon her death, even if her claim had been previously reduced to judgment [Succession of Tugwell, 43 La. Ann. 879, 9 So. 499 (1891)]; and while there is a possibility that presently it might be held that such a judgment is a property right transmissible to plaintiff's heirs [Castelluccio v. Cloverland Dairy Products Co., 165 La. 606, 115 So. 796 (1928)], there seemed little doubt but that prior to 1946 an action therefor would have been held abated by plaintiff's death if the claim had not been reduced to judgment. In Succession of Piffet, 39 La. Ann. 556, 2 So. 210 (1887) it was held that if the surviving spouse had judicially demanded the marital fourth prior to his death, his rights were transmitted to his heirs by inheritance. The rationale of this case, transmission by inheritance, was overturned in Succession of Justus, 44 La. Ann. 721, 11 So. 95 (1892); but strangely enough the Piffet case itself was not overruled, but approved to the extent of having its facts distinguished from those in Succession of Justus. See also Succession of Andrus, 197 La. 931, 935, 178 So. 624, 629 (1937).

Hence, the applicability of the 1946 statute may be drawn in question when a plaintiff dies after issue joined in an action to recover the widow's homestead, and possibly in an action to recover the marital fourth. In the Chivers case, Succession of Tugwell was relied on because of the recognized analogies of the respective points presented. No aid is afforded by the argument that the 1946 act is procedural, and there was no legislative intent to overturn rules of substantive law. The difficulty is that the recent act can be given no effect whatsoever without resultant modification of substantive rules. In view of the all-inclusive language of the 1946 statute, where will the courts draw the line?

11 Under ordinary process, the cause is at issue: (1) when the defendant has answered, Art. 357, La. Code of Practice of 1870; (2) when a dilatory exception (properly speaking) has been filed, Art. 357, La. Code of Practice of 1870; Diamond T. Motor Trucks v. Heck, 13 So.(2d) 512 (La. App. 1943); see Self v. Great Atlantic & Pacific Tea Co., 178 La. 240, 251, 151 So. 193, 196 (1933); (3) by the taking of a default, Art. 360, La. Code of Practice of 1870; and (4) by participating in the trial without objection, where
Judicial Sales. Louisiana Act 74 of 1946 amends two articles of the Code of Practice\(^\text{12}\) so as to provide more definite rules for the appointment of the two appraisers to value the property to be sold,\(^\text{13}\) to fix the fees thereof,\(^\text{14}\) and in the event of a disagreement as to values to permit the officer conducting the sale to appoint a third appraiser whose decision shall be final.\(^\text{15}\)

Jactitory Actions. In these actions, also known as actions of slander of title, “The defendant may deny the possession [of plaintiff]; or he may deny the slander, thereby waiving title; or he may admit the slander and claim title in himself, in which event the action is converted into a petitory one, with the defendant sustaining the burden of affirmative proof of his alleged title, as a plaintiff.”\(^\text{16}\) The issue of plaintiff’s lack of a requisite possession might have been raised in several ways. If there was a deficiency of allegation in the petition, it might have been tendered through the exception of want of possession,\(^\text{17}\) or by exceptions of no right and no cause of action,\(^\text{18}\) and disposed of preliminarily by a trial of the exceptions.\(^\text{19}\) If the allegations of the petition were sufficient on this point, theoretically the issue of plaintiff’s possession might be presented by the exception of want of possession; but as a practical matter, no advantage was gained by defendant thereby, as the courts would not try the factual issue presented by the exception preliminarily, but would

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\(^{\text{12}}\) Arts. 671 and 674, La. Code of Practice of 1870.

\(^{\text{13}}\) By amendment of Art. 671, La. Code of Practice of 1870, the written notice to be served upon the parties to appoint an appraiser is broadened so that it may be served upon the party, his counsel or an attorney appointed by the court to represent him. The time for serving such notice is shortened from ten days prior to the sale to three days (exclusive of holidays).

\(^{\text{14}}\) The fees of the appraisers are to be fixed by the officer conducting the sale at not less than $4.00 nor more than $10.00. A larger fee may be fixed by the court after a hearing, or may be paid if agreed to in writing by all litigants. Art. 671, La. Code of Practice of 1870, as amended by La. Act 74 of 1946.

\(^{\text{15}}\) Art. 674, La. Code of Practice of 1870, as amended by La. Act 74 of 1946. Prior to such amendment, the code provision required the appointment of an umpire by the appraisers, or by the sheriff if they could not agree on a selection.

\(^{\text{16}}\) Comment (1938) 12 Tulane L. Rev. 254, 256 (1938).


refer the exception to the trial on the merits. Usually, the issue of plaintiff's possession was raised through the answer's denial of plaintiff's allegations, and disposed of at the trial of the case on its merits.

Act 241 of 1946 modifies this procedure by requiring that the issue of plaintiff's possession (whether in fact or as a result of deficiency of the petition's allegations) be raised by an exception filed in limine litis; and providing that, unless so presented, such defense will be waived upon joinder of issue. Nowhere does the statute expressly require that this exception be tried preliminarily, rather than referred to the merits, but such a practice would seem definitely in accord with the general legislative intent. If so, the effect of this statute should prove conducive to a more expeditious and orderly prosecution of jactitory actions. If the exception of want of possession is maintained, it terminates the suit; if overruled, in the great majority of cases the defendant will assert title in his answer, thus immediately converting the case into a petitory action.

Private Sale of Minor's or Interdict's Property. Act 209 of 1932 provides the procedure for selling property, or the undivided interest therein, owned by a minor or interdict. Section 7 thereof, expressly limited to cases where property in which a minor or interdict had an interest was to be sold to effect a partition, afforded machinery for the appointment of a tutor or curator for a minor or interdict not having such representative,

20. Dalton v. Wickliffe, 35 La. Ann. 355 (1883); Craig v. Lambert, 44 La. Ann. 885, 11 So. 464 (1892); Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153 (1906); Labarre v. Burton-Swartz Cypress Co., 126 La. 982, 53 So. 113 (1910). In Arrowsmith v. Durell, 14 La. Ann. 849 (1859), the factual issues raised by the exception were tried preliminarily; but in Dalton v. Wickliffe, 35 La. Ann. 355, 356, the court refused to accept the case as precedent, holding that the exceptions were tried irregularly without objection by plaintiff.

21. In such cases if plaintiff fails to show the requisite possession, the suit is dismissed. Patterson v. Landry, 112 La. 1069, 36 So. 857 (1904); South Louisiana Land Co. v. Riggs Cypress Co., 119 La. 193, 43 So. 1003 (1907); Labarre v. Burton-Swartz Cypress Co., 126 La. 982, 53 So. 113 (1910); Comment (1938) 12 Tulane L. Rev. 254, 259. If the answer tenders the sole issue of plaintiff's possession, and the proof establishes the latter, the judgment quiets plaintiff in his possession and orders defendant to bring suit in revendication within a delay fixed by the court. Riley v. Kaempfer, 175 So. 884 (La. App. 1937); Comment (1938) 12 Tulane L. Rev. 254, 259. See Siegel v. Helks, 186 La. 506, 172 So. 768 (1937). The same type of judgment is rendered if defendant fails to answer and default judgment is taken against him. Siegel v. Helks, supra. A more streamlined procedure is sanctioned by Sherburne v. Iberville Land Co., 192 La. 1091, 190 So. 227 (1939), holding that after judgment on the issue of plaintiff's possession, defendant might still convert the action into a petitory one by asserting title in a supplemental answer, and was not obliged to present its action in revendication in a separate suit.
without the necessity of convoking a family meeting to make appropriate recommendations.

Louisiana Act 71 of 1946 amends and re-enacts this Section 7 of the 1932 statute. Two changes are effected by the amendatory legislation. First, the section is broadened so as to make its provisions applicable to any prospective sale, whether sought to be made to effect a partition "or for any other purpose." Second, the amendment provides that any foreign guardian of the minor or interdict, properly recognized by the Louisiana courts, may represent the incompetent.

It is by no means certain that this amendatory legislation was necessary, as the probabilities are that the same results could have been obtained under then existing statutes. However, the express provisions of the amendatory legislation go far toward removing in certain cases even the slight risk which title attorneys cannot afford to take.

CONSERVATION

In General

Act 137 of 1946. The State Soil Conservation Committee was voted an appropriation of a quarter of a million dollars for the purchase of machinery and equipment to assist the various conservation districts in the work of soil conservation and erosion control, in co-operation with the United States Department of Agriculture and other federal agencies.

22. The procedure sanctioned by La. Act 209 of 1932, § 1 [Dart's Stats. (1939) §§ 4844-4847.5] is available not only for sales made to effect a partition, but is applicable to all sales which appear to the tutor or curator to be "to the advantage of the minor or interdict." Cf. Cormier v. Thibodeaux, 20 So. (2d) 621, 623 (La. App. 1945), where the question was presented with respect to La. Act 77 of 1928, the majority of which was repealed by the 1932 statute. However, the appointment of a tutor or curator could be made under the provisions of Section 7 only when the sale was to be made to effect a partition.


24. Regardless of the reason for the sale, the tutor or curator might have been appointed under La. Act 47 of 1934, § 2 [Dart's Stats. (1939) § 4854.2], and the property might have been sold under the other sections of the 1934 statute. With respect to the foreign guardian acting as tutor or curator, it appears reasonably certain that the same results could have been obtained under the provision of the 1934 statute just cited and Articles 363 and 415 of the Civil Code.

1. La. Act 370 of 1938 [Dart's Stats. (1939) §§ 57.7 et seq.].
Mines and Minerals

Act 338 of 1946. Under the provisions of Act 162 of 1940\(^2\) all state agencies as defined therein\(^3\) were authorized to lease for mineral purposes through the State Mineral Board any lands belonging to them. Section 4 of the act relative to the leasing of Sixteenth Section lands belonging to school boards, provided that all funds realized from such leases should be paid to the school boards of the parishes wherein such lands were situated and credited to the current school fund of the parish. As amended by this act, the section in question permits the leasing of lands, exclusive of Sixteenth Section lands, granted to any particular school board, but it is further provided that the funds realized from such leases are to be paid to the board holding title to the land, to be credited to a special fund and applied to the uses and purposes for which the grant was made. So that, where a particular school board has acquired property for a particular purpose, it may grant mineral leases thereon, provided the proceeds thereof are used for the particular purposes for which the land was originally acquired.

Act 370 of 1946. Act 93 of 1936\(^4\) created the State Mineral Board composed of the governor and four other members to be appointed by him, with authority to lease, for mineral purposes, lands belonging to the state and political subdivisions thereof. Under Section 7 of the act,\(^5\) the minimum of royalties to be stipulated in any such leases was fixed at one-eighth of all oil and gas produced, seventy-five cents for each long ton on sulphur, ten cents per ton on potash and one-eighth on all other minerals produced. Ten per cent of the minimum royalties provided for and received from such leases was required to be placed into a special road fund to be accumulated and withdrawn by the Department of Highways exclusively for the building of concrete roads and bridges in the parishes in which the lands leased were situated. The 1946 act merely amends this section to authorize the department to construct not only concrete roads and bridges but also black top and other hard surfaced roads.

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\(^2\) La. Act 162 of 1940, § 4 [Dart's Stats. (Supp. 1946) § 4728.4].
\(^3\) State agencies defined in the act include: Levee, drainage, road, and school districts, school boards, commissions, parishes, municipalities, state universities and colleges, and penal or eleemosynary institutions.
\(^4\) La. Act 93 of 1936 [Dart's Stats. (1939) §§ 4725.1 et seq.].
\(^5\) La. Act 93 of 1936, § 7, as last amended by La. Act 92 of 1940 [Dart's Stats. (Supp. 1949) § 4726.7].
Wild Birds and Game Quadrupeds

Acts 22, 332, and 284 of 1946. The statute regulating the taking of wild birds and game quadrupeds has been amended by these acts. The open season for deer hunting has been changed from November 15th to January 1st, to November 1st to January 10th; foxes are now included in the definition of "outlawed" animals; the price of hunting licenses for residents has been increased to two dollars, and for non-residents to twenty-five dollars. Besides the foregoing, some innovations of relative importance have been added. In order to facilitate the enforcement of the provisions making it unlawful for any one to have in his possession any game after the close of the open season, it is now required that the operators of cold storage plants wherein the game might be stored make a report. This report must be made within ten days from the storing and must set forth the number of birds or other game stored and the names of the persons storing them. Also, new penalties, and a new procedure for the enforcement thereof, have been substituted. Formerly, the act provided for a fine of from twenty-five to five hundred dollars or imprisonment for not more than six months or both. The act now provides for a civil suit in the name of the people, by the Commissioner of Wild Life and Fisheries, for the recovery of a penalty of twenty-five dollars for the first offense, one hundred dollars for the second, and two hundred dollars for the third offense with revocation of license. The act further confers jurisdiction on justice of the peace courts, as well as on municipal and district courts in the parish where the "offense is committed" to enforce the penalty provisions, and provides that the suit may be brought in any court having jurisdictional amount, regardless of the domicile of the defendant. Furthermore, the defendant is not permitted to except to the venue, unless he declares in what parish the alleged violation was committed.

Manifestly, the suit to enforce the penalty provisions is criminal in nature, and it may be objected, at least, that the statute attempts to confer jurisdiction on justice of the peace courts, in violation of the constitution.

6. La. Act 273 of 1926 [Dart's Stats. (1939) § 2925 et seq.].
12. La. Code of Practice of 1870, Art. 9, defines a civil action as one which is brought for private purposes. "The term "civil action" embraces
Fish and other Aquatic Life

Acts 67, 107, and 108 of 1946. A statute of 1936\(^{13}\) prohibited the seining of fish for commercial purposes in Lake Providence; still another prohibited commercial fishing altogether.\(^{14}\) The restrictions against seining have been lifted by Act 67; and the statute closing the lake to all commercial fishing has been repealed by Act 108 of 1946. On the other hand, Lake Bruen, in which seining for commercial purposes was already prohibited,\(^{15}\) has been closed altogether by Act 107 of 1946. The Department of Wild Life and Fisheries is charged with the enforcement of the statute, and violations are punishable by fine or imprisonment or both.

Act 118 of 1946. The use of seines, nets or webbing for fish-

from its natural import, every species of ‘suit’ not of a criminal kind, and comprehends every conceivable cause of action, whether legal or equitable, except such as are ‘criminal’ in the sense that the judgment may be a fine or imprisonment ....” Gillson v. Vendome Petroleum Corporation, 35 F. Supp. 815, 819 (D. C. La. 1940). La. Const. of 1921, Art. VII, § 48, confers criminal jurisdiction on justices of the peace as committing magistrates only, and the legislature is prohibited from conferring them with jurisdiction in the trial of criminal offenses and misdemeanors. State v. Mackles, 161 La. 187, 108 So. 410 (1926).

In this connection, it must be observed that Act 408 of 1946 proposes a constitutional amendment to be submitted to the electorate in November, 1946, which, if adopted will confer on justices of the peace, concurrent criminal jurisdiction with district courts of all misdemeanors involving violations of the conservation laws regarding the taking of fish and game resources of the state. But it must be noted that the proposed amendment does not contain any reference whatsoever to the legislation conferring jurisdiction on these courts, nor do the particular statutes contain a reference to the proposed amendment. Under the jurisprudence as it existed prior to the adoption of Article 21, § 2, of the Constitution of 1921, it was well settled that an act which, at the time of its passage is null and void, cannot be given validity and effect by the adoption of a new constitution, or a constitutional amendment, unless the amendment clearly shows that it is to have a retrospective effect, or unless it confirms or ratifies the prior legislation. Etchison Drilling Co. v. Flournoy, 131 La. 442, 59 So. 867 (1912). Article 21, § 2, of the Constitution of 1921 provides that whenever the legislature submits amendments to the constitution, it may, at the same session, pass laws to carry them into effect to become operative when the proposed amendments have been ratified. Whether or not the above article of the Constitution makes it unnecessary for the legislation to refer to the amendment, or vice versa is doubtful. The article merely empowers the legislature to enact enabling legislation to become operative upon adoption of the amendment, but it would appear that the requirement that this intention be clearly expressed is still necessary. Peck v. City of New Orleans. 199 La. 76, 5 So. (2d) 508 (1941).

However, whether or not these provisions in the statute are constitutional seems to be immaterial, since upon the adoption of the amendment the courts will have been vested with jurisdiction, and any subsequent actions brought will be automatically sanctioned, the proposed amendment being from its very nature self operative.

13. La. Act 197 of 1936 [Dart's Stats. (1939) § 3041.4].
14. La. Act 303 of 1938 [Dart's Stats. (1939) § 3041.8].
15. La. Act 197 of 1936 [Dart's Stats. (1939) § 3041.4].
ing in Bogue Chitto River is now prohibited by this act. Violations are declared to be misdemeanors punishable by a fine of twenty-five dollars or imprisonment for not more than sixty days for the first offense, fifty dollars and/or ninety days for each subsequent offense.

Acts 96, 97, and 382 of 1946. Two new fish preserves were created at this past session of the legislature. The Department of Wild Life and Fisheries was authorized to acquire the waters known as Horseshoe Brake and Horseshoe Lake, both in the Parish of Morehouse, for the purposes of establishing preserves there.16 In addition, the act creating the Bayou Pierre fish preserve has been amended so as to increase the members of the commission governing it from three to nine.17

Act 120 of 1946. The statute creating the Northwest Louisiana Game and Fish Preserve was amended to provide for the creation of a commission to be domiciled in the Parish of Natchitoches, composed of three members to be appointed by the governor. The commission is to operate under the Department of Wild Life and Fisheries and it has the authority to promulgate rules and regulations for the control of the preserve.

Act 87 of 1946. Closed seasons in certain enumerated parishes for the fishing of black bass, striped bass or crappie were established by the “fish law” of 1942.18 This provision has been deleted by this act, but at the same time it confers authority on the Commissioner of Wild Life and Fisheries to declare closed seasons on all species of fish in any waters throughout the state, upon evidence that the fish is being depleted through overfishing and that such fishing is detrimental to the interests of the state.

Acts 78, 196 and 210 of 1946. The “fish law” was further amended as follows: the limit on striped bass and bar fish has been increased from fifteen to twenty-five;20 all netting and tackle used for fresh and salt water commercial fishing must now be tagged by the Department of Wild Life and Fisheries, and failure to have it properly tagged is presumptive evidence of the illegal use thereof;21 in addition to the prohibition against commercial fishing with spears, poisons or explosives, it is now unlawful to

17. La. Act 382 of 1946.
18. La. Act 191 of 1926 [Dart's Stats. (1939) § 3168 et seq.]
21. Id. at §§ 17 and 18.
fish with guns, bows and arrows or traps;\textsuperscript{22} wholesale and retail dealers, as well as consumers of frogs must dispose of any frogs in their possession within ten days after the close of the open season;\textsuperscript{23} nonresident licenses were raised from five to ten dollars, with no provision being made for "tourist" licenses which were good for four days and cost two dollars.\textsuperscript{24}

But perhaps the most significant amendments to this statute are the provisions imposing restrictions on commercial fishing as follows: For all vessels engaged in commercial salt water fishing, or in buying or transporting fish, a license must be procured, and all vessels so licensed are presumed to be used exclusively in Louisiana and in Louisiana waters and are deemed to be taking salt water fish solely in the waters of Louisiana. All fish taken are conclusively presumed to have been taken in Louisiana, on which the state severance tax must be paid. Should the owner of a licensed vessel desire to fish outside Louisiana waters he must so notify the Department of Wild Life and Fisheries, whereupon his license is to be suspended not to be reissued for the rest of the year. Furthermore, no vessel is to be licensed unless its owner is a citizen of the state and a resident thereof for the preceding two years, and unless the vessel itself is registered as a Louisiana vessel. An exception is made, however, in the case of nonresidents who are citizens of a state with which a reciprocal agreement has been entered into.\textsuperscript{25} Provisions are made for the seizure of vessels and other vehicles used in taking or transporting fish taken in violation of the statute, and penalties are provided for the recovery of which a "civil suit" to be instituted in the name of the people of the state by the Commissioner of Wild Life and Fisheries is authorized, the suit to be brought before justice of the peace courts, municipal or district courts of the parish where the offense is committed. District courts in parishes bordering the Gulf of Mexico are vested with jurisdiction to try cases arising from violations occurring in the coastal waters of the state.\textsuperscript{26}

\textsuperscript{22} Id. at § 19.
\textsuperscript{23} Id. at § 22.
\textsuperscript{24} Id. at § 25.
\textsuperscript{25} Id. at § 26.
\textsuperscript{26} In this connection it is to be noted that 411 of 1946 is a proposed constitutional amendment to be submitted to the electorate in November, which if adopted will invest the different district courts in all parishes bordering in the Gulf of Mexico concurrent jurisdiction to enforce the statutes regulating fish and game laws, where the violation occurs in the Gulf, within the territorial waters of the state. By Act 409 of 1946, also, a proposed amendment would invest district courts with appellate jurisdiction on ap-
These provisions are also found in Act 78 of 1946, amending the statute regulating the taking, processing, transportation and sale of shrimp.

There is no doubt but that the statutes are discriminatory against nonresidents, but as to whether the discrimination is valid is only one of several questions which are at once apparent and which in themselves afford sufficient material to warrant independent treatment. At best only a brief analysis of some of the questions involved can be made within the space and time limitations available.

There is no question but that the state may, as owner of all natural resources within its borders, regulate the fisheries and fishing industry in the state, and that it may keep, for the use of its citizens, all the fish taken therein, and even withdraw it from the channels of interstate commerce. Nonresidents therefore may be denied altogether the right to fish within the waters of the state, which may even regulate the taking of fish beyond its territorial waters when such taking interferes or injuriously affects the supply within its borders. Generally, however, a state may not extend the operation of its laws beyond its jurisdictional limits, and it would seem an undue extension of the state's power to regulate fishing beyond its territorial waters, if the statute is sought to apply to persons fishing beyond such waters, simply because they have secured a Louisiana license to fish.

Whether the provisions establishing a conclusive presumption that all Louisiana licensed vessels are engaged in Louisiana waters and that all fish and shrimp taken are taken from the territorial waters of Louisiana is a valid exercise of the regulatory power of the state is doubtful. Due process requires that the offender be permitted a fair opportunity to repel presumptions against him, and statutes which restrict the character of the proof by which the presumption can be rebutted are held violative of the due process clause of the Fourteenth Amendment.

peals from justice of the peace courts involving violations of the conservation laws pertaining to fish and game.

27. State v. Monteleone, 171 La. 438, 131 So. 291 (1930); Vall v. Seaborg, 120 Wash. 126, 207 Pac. 15 (1922).
28. Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928).
31. Ibid.
ment.32 Even more so would be a statute which would deny altogether any proof against the presumption. Another question that necessarily arises is as to the grant of jurisdiction on justice of the peace courts to enforce the penalty provisions of the statute. As heretofore pointed out, similar provisions are contained in the amendment to the wild birds and game statute, and what is there said is applicable here also.33

As it has been pointed out already, residents of reciprocal states are permitted to be licensed in Louisiana, and, under Act 210 of 1946, they will be subjected to the same rules and regulations and will be licensed under the same terms as Louisiana citizens.

CONSTITUTIONAL AMENDMENTS

Thirty-one proposed constitutional amendments were adopted by the legislature during the regular session of 1946. These will be submitted to the electorate for ratification at the regular election to be held November 5, 1946.

Several of these amendments were included in the discussions under the various topics in the foregoing, and only a brief summary of the remaining will be included in the paragraphs that follow. For the purpose of this résumé, topic classifications, rather than numerical order, has been followed.

Bond Issues

Act 393 of 1946 proposes an amendment to Article VI, Section 22, of the Constitution of 1921, by adding a new paragraph authorizing the funding into bonds, the proceeds of the four cents tax on gasoline, benzine, naphtha and other motor fuels, to provide funds for the construction, maintenance, and improvement of highways.

Act 414 of 1946 is also a proposal which would authorize the Board of Liquidation to fund into bonds of the state any surplus of the tax of three-fourths of a mill on the dollar on the taxable property in the state, in order to acquire sufficient funds for the construction and maintenance of the Confederate Memorial Medical Center at Shreveport.

33. See p. 43, n. 12.
Courts

Article VIII, Section 53, of the Constitution of 1921, relative to the juvenile courts, provides that the expenses of these courts should be paid by "the respective parishes in which each exercises its jurisdiction." An amendment proposing that these expenses be now paid in such a manner as the legislature deems proper has been proposed.¹

Drainage and Levee Districts

A proposition to amend Article XIV, Section 35, of the Constitution of 1921 would authorize the Fourth Jefferson Drainage District to issue bonds secured by ad valorem taxation for the purpose of constructing drainage works within the district.²

By another amendment, the Board of Commissioners of the Ponchartrain Levee District would be required to construct levees on the shore of Lake Ponchartrain from the intersection of the Orleans and Jefferson Parish line to the east end of the Bonnet Carre Spillway. Authority to raise the necessary funds through bond issues is also included.³

Forestry

Under Act 399 of 1946, which proposes an amendment to Article VI, Section 2, of the Constitution, the legislature would have authority to empower the different parishes to levy an acreage tax, not to exceed two cents per acre, to promote the practice of forestry. The homestead exemption provided by Article X, Section 4, of the Constitution is extended and made applicable to this tax.

Mines and Minerals

If Act 416 of 1946 which proposes an amendment to Article IV of the Constitution is ratified, all revenues and royalties derived from minerals extracted from points beyond the three mile limit in the coastal waters will be payable into the state treasury as being the property of the state, and dedicated to retire the bonded indebtedness.

¹. La. Act 391 of 1946.
². La. Act 397 of 1946. Enabling legislation to become operative on the ratification of this proposed amendment was also enacted. See La. Act 55 of 1946.
Municipalities and Parishes

Act 386 of 1946 is a proposal to permit the legislature to authorize the different parishes to assume the debts of road, drainage, irrigation, levee and school districts located within the parishes. When these districts are located in more than one parish, authority to assume the proportionate share of their debts will also be conferred.4

By Act 389 of 1946, it is proposed to add a new section to Article XIV of the Constitution, whereby the Parish of East Baton Rouge will have power to adopt, in the manner provided, plans for the self-government of the parish, as well as for the several municipalities within the parish.

The proposed amendment to Article XIV, Section 14, of the Constitution will authorize the legislature to confer upon parochial and municipal corporations authority to acquire, subject to the approval of the Board of Commerce and the State Bond and Tax Board, property for the establishment of commercial and industrial enterprises in order to provide employment during the period of readjustment from a wartime to a peacetime economy. For this purpose, the necessary authority to incur debt, issue bonds, and levy special taxes may also be conferred.5

The Community Center and Playground Districts, created by Act 285 of 1946, would, on the adoption of Act 403 of 1946 as a constitutional amendment, have authority to incur debt to a sufficient amount to acquire lands and purchase or construct the necessary facilities for the establishment of parks, playgrounds and recreation centers.6

Another amendment which would be self operative would authorize the Parish of Jefferson to establish commercial, residential and industrial districts within the parish.7

New Basin Canal and Shell Road

Authority would be granted to the Board of Control of the New Basin Canal and Shell Road, under an amendment proposed by Act 405 of 1946, to sell to the City of New Orleans certain portions of the canal and road property for the construction of the
proposed Union Railroad Passenger Terminal. The City of New Orleans would likewise have the authority to enter into contracts with the proper companies under such terms and conditions as are specified in the amendment for the erection and maintenance of the terminal station.

**Revenue and Taxation**

An additional five thousand dollars homestead exemption from state, parish and special taxes would become effective in favor of honorably discharged veterans of World War II, upon the ratification of the proposed amendment contained in Act 412 of 1946. This is limited, however, to the five years beginning in 1947, and ending with and including the year 1951.

Article VI-A, Section 14, of the Constitution of 1921, which imposes a one cent tax on gasoline and other motor fuels, is to be amended by Act 413 of 1946 so as to exempt from the tax gasoline sold to the armed forces of the United States and gasoline sold to the Federal Government in lots of six thousand gallons or more.

A proposal to amend Article X, Section 4, of the Constitution would authorize the Department of Commerce and Industry to exempt from taxation any new manufacturing establishments, pursuant to contracts entered into with the owners thereof.\(^8\)

Also exempted from all ad valorem taxes for a period of ten years would be aircraft based or operating in the state, as well as hangers, machine shops and other equipment used in connection therewith, provided the proposed amendment to Article X, Section 4, is ratified at the next general election in November.\(^9\)

**Suits against the State**

As previously stated, Act 385 of 1946 proposes an amendment to Article III, Section 35 of the Constitution, which would require the legislature to adopt a uniform pattern when enacting legislation authorizing suits against the state. The legislature would be required to designate the court in which the suit is to be brought and the persons on whom citation is to be served. Otherwise, the procedure is to be the same as in suits between private litigants, except that money judgments will be satisfied only out of monies specially appropriated by the legislature.

Also as previously pointed out, this proposed amendment is

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\(^8\) La. Act 401 of 1946.

nothing more than a legislative recognition of the usual practice heretofore observed by the law makers, prevalent in the majority of other states, of enacting legislation granting permission to sue the state.

This practice of adopting special laws authorizing suits in individual instances is, no doubt, the result of the unwillingness of the legislature to abrogate in its entirety the doctrine of state immunity, which apparently is still a widely accepted principle. However, the disadvantages, both to the individual claimants and to the legislators, which such methods entail, outweigh by far the principles underlying such procedure. To mention but a few, an unduly long period of time must necessarily elapse before final settlement can be made, for it is only during the legislative session, which normally covers but sixty days each biennium, that claims may be presented for adjustment. The volume of individual petitions for relief presented to the legislature at each session must certainly entail a waste of time and effort on committee members appointed to hear and determine the merits of each particular claim. Then again, the fundamental objection is the exercise of judicial functions by committee legislators in recommending claims for legislative action.

While proposing a uniform method to be followed in instituting suits against the state, the legislature might well have provided for a system such as has been adopted in other jurisdictions, following the example of the federal government, in creating special courts of claims.

In New York, a state court of claims is composed of five judges appointed by the governor with jurisdiction to determine claims against the state both on contract and tort, the procedure being similar to that in ordinary civil actions. Of course, this entails an absolute waiver of the state's immunity to suit, but on the other hand, the practical difficulties outlined are thereby avoided.

**Courts and Court Officers**

Of particular importance in connection with the legislation relative to the various courts are the statute creating an addi-

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10. The doctrine of sovereign immunity to suit in tort has been subjected to serious criticism. Borchard, Government Liability in Tort (1924) 34 Yale L.J. 1.
11. Thompson's Laws of New York (1940) 922, Art. II.
12. For a full discussion of the various methods adopted by the different states in settling claims against them, see The Book of the States (1943-1944) 299.
tional judgeship for the Parish of East Baton Rouge and the act abolishing the offices of justice of the peace and constable in the First Ward of Acadia Parish, creating in their stead the City Court of Rayne.

In addition, the legislature created the office of Assistant District Attorney, carrying a salary of fifteen hundred dollars per annum for the Parishes of Bossier and Webster; authorized the appointment of a court reporter for each judge of the fourteenth judicial district; provided for the appointment of a court stenographer in the seventeenth judicial district, and authorized each of the judges of the courts of appeal throughout the state to appoint law clerks, stenographers and such other clerical help necessary for the proper operation and administration of their courts.

For the purposes of nomination and election, the various district courts throughout the state (the Parish of Orleans excepted) are divided into divisions, where there are two or more elective judges, and each candidate is now required to state, at the time of filing his declaration, for what division he intends to become a candidate.

In addition to all other qualifications now required by law, Act 273 of 1946 now provides that the judge of the City Court of Jennings must be a qualified attorney duly admitted to the bar and licensed to practice law in the courts of the state.

Particularly affecting the judges of the several district courts (the Parish of Orleans excepted) was Act 230 of 1946, whereby the legislature authorized the reimbursement to them of all future expenses, up to fifteen hundred dollars per annum, incurred for salaries of stenographers, clerks, law books, legal periodicals and the like, in connection with their official duties.

The act governing the general fees to be charged by the several clerks of courts (the Parish of Orleans excepted) has been revised upwards, and in the Parish of Orleans sheriffs are

1. La. Act 50 of 1946.
now authorized to charge, for the appointment of a keeper to property, the actual amount paid by him not to exceed five dollars per each twelve hours.¹

But perhaps the most important acts, from a legal standpoint, are those raising the salaries of the several judges.¹⁰ Does the constitutional requirement that no judge shall be affected in his term of office, salary, or jurisdiction during his term of office¹¹ limit the power of the legislature to pass any laws increasing their compensation? It must be noted that in only one instance does the statute provide for the increase of salary to be effective after the expiration of the terms of the present incumbents.¹²

The question here is not whether the legislature has the authority to change the salaries of the judges,¹⁸ but whether the change can operate or affect the judges presently in office. It is to be observed that the constitution further provides that any legislation which affects the salaries of judges is to take effect only at the end of the term of office of the judges to which such legislation may apply at the time of its enactment.¹⁴

That the constitutional provisions above referred to limits the power of the legislature to “diminish” the salaries of judges during their terms of office is not open to controversy.¹⁵ This was the rule, even in the absence of a constitutional prohibition,¹⁶ the

10. These include La. Acts 153 and 187 of 1946, increasing the salaries of the city court judges of Monroe and Shreveport; La. Acts 6, 59 and 264 of 1946 increasing the salaries of the district judges of the 1st, 4th and 9th districts; and La. Act 24 of 1946, raising the salaries of the judges of the courts of appeal. See supra p. 25.
11. La. Const. of 1921, Art. VII, § 40, as amended by La. Act 386 of 1940, providing: “No elected judge of any court of the state, except as otherwise provided in this Constitution, shall be affected in his term of office, salary, or jurisdiction as to amount, during the term or period for which he was elected; and any legislation so affecting any such judge or court shall take effect only at the end of the term of office of the judges to which such legislation may apply at the time of its enactment ....”
12. La. Act 264 of 1946, raising the salary of the district judges of the 9th judicial district.
16. State ex rel. Moss v. Jumel, 31 La. Ann. 142 (1879). Where the organic law prohibits the “changing” of the salaries of judges during their terms of office, statutes raising or diminishing their salaries have been held to be in contravention thereof: Adams v. Slavin, 225 Ky. 135, 7 S. W. (2d) 836 (1928); State v. Thatcher, 116 Ohio 113, 155 N. E. 691 (1927). Cf. People v. City of Chicago, 360 Ill. 25, 195 N. E. 451 (1935) wherein the prohibition was against either “diminishing or increasing.”

In State ex rel. Bahns v. City of New Orleans, 163 La. 777, 112 So. 718 (1927), a statute raising the salary of the city court judges for the Parish of
theory being that the courts must be independent from the other branches of the government. But whether the constitutional requirement likewise limits the power of the legislature to increase the compensation of judges during their terms of office is a matter subject to inquiry and possible judicial interpretation.

The adjudicated cases by the Louisiana courts are conspicuously silent on this point, the question apparently never having been raised despite the fact that salaries of judges have been increased from time to time (to be effective) during their terms of office.\(^7\)

**Criminal Law and Procedure**

Dale E. Bennett*

Amendments to Criminal Code—Placing Combustibles

The Louisiana Criminal Code of 1942\(^1\) abandoned the traditional method of dividing and subdividing crimes with a special criminal statute for each of the various ways in which a crime of a particular type might be committed. Instead, it provided broad, carefully drafted, general definitions of the basic offenses. For example, the definition of theft in Article 67 eliminated previous technical distinctions and replaced approximately one hundred special stealing crimes whose scope and particular limitations had been a source of much litigation and confusion. A number of bills introduced in the 1946 legislature, which would have reverted to the old practice of having a special statute for each particular way in which a crime might be committed, were rejected as being out of keeping with the spirit and purpose of the Criminal Code. One amendment to the Criminal Code was adopted. Louisiana Act 305, proposed by the Criminal Law Section of the State Bar Association and approved by the Louisiana State Law Institute, re-amended Article 54 of the Criminal Code

Orleans was held unconstitutional on the grounds the statute attempted to direct payment out of the judicial expense fund. No mention, however, was made of the constitutional provision above cited. It would seem, however, that any change made in the salary, whether favorable or unfavorable, would "affect" such salary as well as the judge receiving such salary.

17. Cf. La. Act 3 of 1928 (E. S.) and La. Act 24 of 1928 [Dart's Stats. (1939) § 1429] raising the salaries of the justices of the Supreme Court from $8,000.00 to $10,000.00 and $12,000.00 respectively; La. Act 2 of 1928 (E. S.) [Dart's Stats. (1939) § 1454] raising salaries of the judges of courts of appeal from $6,000.00 to $8,000.00 and La. Act 83 of 1938 [Dart's Stats. (1939) § 1516.1] increasing the salaries of district judges from $5,000.00 to $6,000.00.

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1. Louisiana Act 43 of 1942.