Procedure: Civil Procedure

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Two years ago the Louisiana State Law Institute, which had spent more than a decade of continuous work in the redaction of the *Louisiana Code of Civil Procedure*, issued its statement of policy\(^1\) with respect to the continuous revision of the new procedural code:

"In any revision of the law as comprehensive as the Louisiana Code of Civil Procedure and its implementing legislation, it was inevitable that errors, hiatuses, and obscurities would exist and come to light only in the years following their adoption. Additionally, it is evident that procedural rules designed to function in the light of existing social and economic conditions might prove unworkable when these conditions changed. For these reasons, at the time of the submission of this procedural revision to the Legislature, the continuous study and revision thereof in the future was recognized as necessary by, and adopted as the future policy of, the Law Institute."

This policy was put into effect immediately upon the adoption of the procedural revision, some five months before it went into effect. The Reporters on the project invited professional criticism, the pointing out of errors therein, and suggestions for its improvement. As a result during the first year following the adoption of the Code of Civil Procedure, the Reporters received through correspondence, telephone calls, and personal conversation hundreds of complaints and suggestions for changes in the procedural rules. All of these were carefully considered. In the vast majority of instances, these complaints and suggestions had no merit, and were due entirely to professional unfamiliarity with the provisions of the new code and its implementing legislation; and, in most instances, those offering the complaints and suggestions were finally convinced of their lack of merit.

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However, a number of very constructive criticisms and sound suggestions were received in this manner, leading the Reporters to recommend to the Council of the Institute, in their First Annual Report on the Code of Civil Procedure, the amendment of a few code articles. As a result, the Council recommended to the legislature, through the drafting of the bill which was ultimately adopted as Act 23 of 1961, that sixteen articles be amended and one new article added to the new procedural code. These amendments corrected six errors and hiatuses in the code, four of which were so serious as to produce considerable damage had they not been removed when they were. Six code articles were amended solely for purposes of clarification; two were changed to accord with subsequent legislation; and one was amended to change a procedural rule which had been in effect for some years prior to, and which had been retained in, the new code.

The following year the Reporters continued to receive criticism and proposed changes from the Bench and Bar, but in nothing like the volume of the preceding year. Lawyers and judges had been studying the code and were becoming increasingly familiar with its provisions, with the result that complaints resulting from misunderstanding dropped off appreciably. Each objection and suggestion received by the Reporters was studied carefully, and the meritorious ones submitted to the Council for its consideration. As a result, the Council recommended to the legislature, through the draft of the bill which was adopted as Act 92 of 1962, the amendment of nine articles and the addition of five new ones. Of the nine code articles thus amended, two removed hiatuses in the code which had been discovered during the preceding year; while six amendments merely provided desirable clarification. An amendment of one

2. The four serious errors and hiatuses were removed through the amendment of La. Code of Civil Procedure arts. 42, 1913, 1974, 3004, 3195, and 3307 (1960). Two less potentially dangerous hiatuses were removed through amendment of id. arts. 2121 and 4541.

3. Id. arts. 44, 1438, 2299, 2417, 4548, and 4922.

4. Id. arts. 3121 and 3122 were amended to conform to the amendment of La. R.S. 9:1581 through 9:1590 (1950) by La. Acts 1960, No. 497, creating the office of public administrator of East Baton Rouge and Jefferson Parishes.

5. Id. art. 1362, placing witnesses who live or who are employed out of the parish, but within twenty-five miles of the court, on the same basis as witnesses residing or employed within the parish, insofar as witness fees and expenses are concerned.

6. Id. arts. 74 and 4342.

7. Id. arts. 801, 1092, 2643, 3306, 4371, and 4554.
article,\(^8\) and the five new articles added\(^9\) represented procedural growth to meet changing conditions more effectively. One other article was amended by the legislature itself;\(^10\) and this only after committee amendment to embody identical recommendations submitted by the Law Institute and the Judicial Council.

No recommendations concerning the new procedural code were submitted to the legislature by the Law Institute during 1963, as nothing indicated the urgency of code amendment justifying a request for legislative action during a fiscal session.

A few proposed changes are now under consideration by the Council of the Institute; and while this study will not be completed for several months, it is reasonably safe to predict that the Institute will recommend the amendment of a few additional code articles at the 1964 legislative session.

Three years have now elapsed since the new procedural code became effective, and during this period its provisions have been subjected to the acid test of actual use in judicial crucibles. Two matters of significance have occurred during this period. First, gradually during this period the new code has won general professional acceptance, with an occasional caustic criticism emanating from some attorney seeking a scapegoat for the loss of his case. Second, with but rare exceptions, the courts' application of the provisions of the new procedural code has indicated both a complete understanding of its rules and a sympathy for its objectives. A study of the procedural decisions of the appellate courts of Louisiana during the past term will demonstrate this second point rather convincingly.

**JURISDICTION**

At the present time, the Achilles' heel of Louisiana civil procedure is jurisdiction *in personam* over nonresident individuals and partnerships.\(^11\) The Law Institute is presently working

\(^8\) *Id.* art. 2087.

\(^9\) *Id.* arts. 3291-3294, and 4643.

\(^10\) *Id.* art. 156 was amended by Acts 1962, No. 409, to permit a judge whose recusal was sought, or who recused himself, on any ground other than an interest in the case to appoint a lawyer domiciled in the judicial district having the qualifications of a district judge to try the case.

\(^11\) On this point, see *Jurisdiction Under the Louisiana Code of Civil Procedure*, 35 Tul. L. Rev. 501, 513 (1961). Louisiana, however, has tapped the full potential of jurisdiction *in personam* over foreign corporations. *Id.* at 510-13.
on a proposed special statute to close in this hiatus, for submission to the 1964 legislative session.\textsuperscript{12}

Figuratively speaking, this vulnerable heel was pierced by the lance of the garnishee in \textit{Consolidated Credit Corp. v. Johnston}.\textsuperscript{13} Seeking to enforce its judgment through garnishment of the debtor's salary or commissions, the plaintiff garnished the debtor's employer, an individual operating a used automobile lot in Baton Rouge. The notice of seizure and garnishment process were served on the garnishee's general manager (who through a curious coincidence just happened to be the judgment debtor himself), the garnishee not being present in the state at the time. The garnishee promptly challenged the court's jurisdiction \textit{in personam} over him, alleging and proving that he was domiciled in Jackson, Mississippi.\textsuperscript{14} The trial court overruled this exception and rendered judgment against the garnishee, ordering him to pay to the sheriff periodically the non-exempt portion of the debtor's salary or commissions. The Court of Appeal, First Circuit, reluctantly reversed this judgment on appeal, and held that as the garnishee had not been served personally, the trial court had no jurisdiction over him. Under the present law, the decision of the appellate court is unquestionably correct. The silver lining to this cloud is that this unfortunate result will almost certainly be changed within the year.

The judgment under supervisory review in \textit{Corley v. Rowan}\textsuperscript{15} was rendered prior to the effective date of the Code of Civil Procedure, but the ruling of the appellate court would have been the same if the case had been governed by the pertinent rule of the new procedural code.\textsuperscript{16} Three of the defendants sued in that case first filed an exception of \textit{lis pendens}; but through an ex parte petition subsequently obtained an order striking the names of two or these defendants from the exception on the ground

\textsuperscript{12} This proposed statute is an adaptation of the pertinent provisions of the Uniform Interstate and International Procedure Act.

\textsuperscript{13} 152 So. 2d 399 (La. App. 1st Cir. 1963).

\textsuperscript{14} Under \textit{LA. CODE OF CIVIL PROCEDURE} arts. 42(5) and 2412 (1960), the court would have had jurisdiction over the garnishee had he been served personally with the garnishment process. Unfortunately he was not. \textit{LA. R.S. 13:3471(1)} (1950), as amended by \textit{La. Acts 1960, No. 32, § 1}, afforded no help in this case, since it applies only to foreign corporations.

\textsuperscript{15} 146 So. 2d 271 (La. App. 2d Cir. 1962).

\textsuperscript{16} \textit{Cf. LA. CODE OF CIVIL PROCEDURE} art. 7 (1960). However, the hyper-technical requirement that a defendant challenge the personal jurisdiction of the court first, and then plead alternatively his other declinatory and dilatory objections has been eliminated by \textit{id.} arts. 925 and 928.
that, as to them, the exception had been filed in error. Plaintiff subsequently ruled these defendants into court to show cause why the order should not be annulled, but the trial court discharged her rule. Under supervisory writs, the Court of Appeal, Second Circuit, held that the filing of the exception constituted an appearance which submitted these two nonresidents to the trial court's jurisdiction in personam; and that the court could not be deprived of its personal jurisdiction over them through any withdrawal of the exception.

**Venue**

The pattern of the rules of jurisdiction ratione personae adopted by the Code of Practice consisted of the general rule of suit at the defendant's domicile in article 162, followed by articles containing permissive and mandatory exceptions thereto. The Louisiana decisions since 1940 interpreting these articles had scrambled their rules with those governing jurisdiction ratione materiae, by holding that those provisions of the Code of Practice regulating jurisdiction ratione personae couched in mandatory language were exclusive and could not be waived. This led to a very considerable amount of confusion and uncertainty with respect to the rules providing the locus for the institution of suit. Drastic surgery was required for the removal of the judicial gloss which had accumulated over the code articles regulating jurisdiction ratione personae.¹⁷

On no section of the Code of Civil Procedure did the Law Institute spend more time and devote more meticulous care than on the articles governing venue. The redactors sought to eliminate confusion in the application of the rules of venue with those governing jurisdiction by: (1) the deliberate use of "may" and "shall" in the venue articles;¹⁸ (2) adopting a rule of statutory construction that the word "may" is to be interpreted as permissive, and "shall" as mandatory;¹⁹ and (3) providing a formula to prevent any conflict when cases fell within the application of two or more code provisions.²⁰

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¹⁹. La. Code of Civil Procedure art. 5053 (1960). See also La. R.S. 1:3 (1950), which voices the same rule.

Gurtler, Hebert & Co. v. Marquette Cas. Co.\textsuperscript{21} is a dour reminder of the validity of Robert Burns’ famous observation that “The best laid plans o’ mice and men gang aft agley.” There, the plaintiff subcontractor sought to enforce his recorded privilege at the domicile of the defendant rather than in the parish where the immovable affected by the privilege was situated. The defendant excepted to the venue on the ground that the action was one \textit{in rem} and that the property was situated in another parish. The trial court held the venue improper and dismissed the suit. On appeal, the plaintiff argued that both R.S. 9:4812 and article 72 of the Code of Civil Procedure provided the venue for the enforcement of the privilege, and that both used the permissive “may,” rather than the mandatory “shall.” Insurmountable obstacles to any acceptance of this argument by the appellate court, at least insofar as it concerned R.S. 9:4812, were a recent Supreme Court decision rejecting this argument\textsuperscript{22} and the obvious impossibility of construing “may” as permissive with respect to both the venue and the parish where the privilege might be recorded. In view of this, the appellate court held that, to avoid any conflict between the statutory and code provisions, the word “may” in the latter should be construed as mandatory, rather than as permissive. The judgment appealed from was affirmed.

There is little doubt that the result reached by the appellate court was correct; but if the language and reasoning of the appellate court is followed in subsequent cases, a very considerable amount of damage will be done to the venue articles in the new procedural code. The appellate court should have reached this result through the application of the jurisprudential rule that when a special statute creates a substantive right and also provides the venue for its enforcement, the venue so provided is exclusive and the general rules of venue have no application.\textsuperscript{23} Further, the court misinterpreted the language “The said privilege \ldots may be enforced by a civil action in any court of competent jurisdiction in the parish in which the land is situated” of R.S. 9:4812.

\ldots Although the statute uses the permissive word ‘may,’

\begin{itemize}
\item \textsuperscript{21} 145 So. 2d 145 (La. App. 4th Cir. 1962), noted 33 La. L. Rev. 779 (1963).
\item \textsuperscript{22} Rathborne Lumber & Supply Co. v. Falgout, 218 La. 629, 50 So. 2d 295 (1950).
\item \textsuperscript{23} The pertinent statutes and cases are discussed in Note, 23 La. L. Rev. 779, 781 n17 (1963).
\end{itemize}
it is submitted this is permissive only with reference to plaintiff's *choice of enforcing or not enforcing* the privilege; the legislature did not use the word 'shall' because this would require judicial enforcement to perfect the privilege. The word 'may,' therefore, modifies the substantive right and not the venue. Consequently, if a plaintiff choose to enforce the privilege, he *must* bring the action in the parish wherein the land is located.

"On the other hand, Article 72 of the Code of Civil Procedure is specifically a venue provision and creates no substantive right. Hence the word 'may' modifies only the venue and the venue is therefore optional unless otherwise provided by law."24

Under article 165(9) of the Code of Practice, if the defendant did "anything for which an action for damage lies," a suit to recover these damages could be brought in the parish where the damage was done. This language was so broad that very properly the Louisiana courts had consistently held that it included an action to recover damages for breach of contract.25 This rule proved difficult to apply in actual practice, so in the redaction of the Code of Civil Procedure the counterpart of this code provision was limited to an "action for the recovery of damages for an offense or quasi offense."26

In *Chronister v. Creole Corp.*,27 plaintiff sued defendant to enforce the return of a rental deposit and to recover damages for his wrongful eviction from the leased premises prior to the termination of the lease. This suit was brought in the parish where the rented property was situated, but which was not the domicile of the defendant. Accordingly, defendant excepted to the venue. The trial court overruled this exception; and in due course rendered judgment ordering the return of the rental deposit and otherwise rejecting the plaintiff's demands. On appeal, this judgment was affirmed. The Court of Appeal, Fourth Circuit, held that the plaintiff's claim was *ex contractu* in part (for the return of the deposit) and *ex delicto* in part

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26. La. Code of Civil Procedure art. 74 (1960). This article was amended by La. Acts 1962, No. 92, § 1, but only to extend the article to an action to enjoin wrongful conduct.
27. 147 So. 2d 218 (La. App. 4th Cir. 1962).
(for damages for the wrongful eviction); and that consequently the suit was properly brought in the parish where the defendant's wrongful conduct occurred.

Under the peculiar facts of the case, the appellate court's decision was proper. However, the defendant might have successfully maintained its objection to the venue of the action ex contractu had it also excepted to its cumulation with the action ex delicto. A plaintiff may cumulate plural actions against the same defendant only if each "of the actions cumulated . . . is brought in the proper venue."28

**Actions**

**Abatement**

Probably the most difficult of all intruders to expel from the civil law of Louisiana has been the common law doctrine of abatement and revival of actions, which the Livingston committee in the early nineteenth century did its best to exclude completely,29 but which seeped into Louisiana law interstitially in subsequent years.30 The hope of the Louisiana State Law Institute was to administer the coup de grace to this hypertechnical doctrine through the new procedural code and its implementing legislation.31

Considerable justification for this hope was afforded by the decisions of the appellate courts of Louisiana during the past term. Only two cases, both of transitional importance only, were decided in this area.32 Both held that the 1960 amendment of article 2315 of the Civil Code could not be given retroactive application.

**Abandonment**

In *Tucker v. Tucker*33 the plaintiff wife obtained a judgment of divorce which reserved the rights of the parties to a community settlement. Shortly thereafter an inventory of the com-

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30. Ibid.
32. Blanks v. Chisesi, 142 So. 2d 45 (La. App. 4th Cir. 1962) and Gross v. Hartline, 144 So. 2d 424 (La. App. 4th Cir. 1962).
33. 150 So. 2d 665 (La. App. 4th Cir. 1963).
munity property was filed in the divorce proceeding, to which the wife filed an opposition. This opposition was fixed for trial and continued at various times. More than five years later, the wife filed suit to partition the community property, and was met with an exception of *lis pendens* based on the pendency of the prior proceeding to partition. The trial court sustained this exception and dismissed the wife's suit; but on appeal this judgment was reversed. The Court of Appeal, Fourth Circuit, held that the failure of the parties to take any prosecutive or defense step in the first action to partition the community automatically had resulted in its abandonment, and hence it did not preclude the plaintiff's subsequent suit for a partition.

**Pleading**

*The Petition*

Since at least 1825 the rule in Louisiana has been that the service of citation interrupts prescription; and more than three decades ago this was broadened legislatively to include an interruption by the filing of suit in a court of competent jurisdiction. Both rules were retained in consolidated form in the legislation implementing the procedural code revision. One of the difficult questions raised by these rules is whether the service of citation on, or the filing of suit against, a wrong defendant interrupts prescription against the proper defendant, when the two are so closely associated, connected, or related as to warrant the inference that the proper defendant knew of the act interrupting prescription. To this question, the courts of Louisiana have been giving an increasingly liberal answer. There is also a procedural facet to this problem as to whether, through an amendment of the petition, the proper defendant may be substituted for the one sued erroneously. Under the regime of the Code of Practice, there was considerable doubt whether such a substitution could be made after the filing of an answer. Under

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39. See *La. Code of Practice* art. 419 (1870) and cases discussed in *Mo-
the new procedural code it seems clear that this substitution of defendants can be effected through an amendment of the petition allowed by the trial court, regardless of whether an answer has been filed or not. ⁴⁰

All facets of the problem were presented in Brooks v. Wiltz. ⁴¹ The plaintiff sued Elsworth G. Wiltz to recover damages for injuries resulting from a gunshot wound allegedly inflicted by the defendant. Elsworth A. Wiltz filed an answer, denying generally the allegations of the petition. Sometime later plaintiff amended her petition to substitute Ellis G. Wiltz as the defendant, in lieu of his twin brother, Elsworth A. Wiltz. Since more than a year had elapsed between the shooting and the amendment of the petition, the substituted defendant excepted to the amended petition on the ground of prescription. The trial court sustained this exception and dismissed the suit; but on appeal this judgment was reversed. The Court of Appeal, Fourth Circuit, held that since both brothers were represented by the same attorneys, the service of citation on the original defendant was sufficient to interrupt prescription against the substituted defendant.

Bertucci Bros. Const. Co. v. Succession of Mitchell ⁴² presented an extremely important point concerning the amendment of the petition. When the evidence presented by plaintiff proved a right of action in one of its partners rather than in plaintiff partnership, counsel for plaintiff asked for and obtained leave of court to amend the petition so as to conform to this proof by dictating the amendment orally into the record. This oral amendment met the instant objection of defendant, but it was allowed by the trial court and judgment was rendered for plaintiff. On appeal, this judgment was reversed, and the case was remanded for further proceedings. The Court of Appeal, Fourth Circuit, held that any amendment of the petition must be in writing and served on the defendant. Even though there is considerable doubt of the validity of the precedent relied on by the appellate court, ⁴³ this oral amendment effected a substitution

⁴⁰. MAHON, LOUISIANA PRACTICE 43 et seq. (1956 Supp.)
⁴¹. See LA. CODE OF CIVIL PROCEDURE arts. 1151 and 1153 (1960) and Stewart v. Maloney Trucking and Storage, Inc., 147 So. 2d 62 (La. App. 4th Cir. 1962).
⁴². 144 So. 2d 413 (La. App. 4th Cir. 1962).
⁴³. Caddo Parish School Board v. Pyle, 30 So. 2d 349 (La. App. 2d Cir. 1947) held that a trial court had no right to permit an oral amendment of the petition during trial; and that any such amendment had to be in writing, filed
of parties plaintiff and under the precise facts of the case the appellate court's decision is sound. However, if the language of this decision is extended further in future cases it may cause considerable damage to our procedural rules.

Article 1154 of the Code of Civil Procedure, in part, provides that:

"... If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

This rule does not fit the facts of this case, as the evidence offered by plaintiff proved a right of action in some one other than the plaintiff and counsel for defendant did not object to the evidence for this reason. However, the efficacy of this code rule is pitched on the assumption that the pleading may be amended orally during the trial by dictating the amendment into the record. Of course, if the objecting party is entitled to a continuance to enable him to meet this evidence, the trial court should grant it. Otherwise, if the objecting party insists on his pound of flesh, the trial court should grant a short recess to have the amendment typed, filed, and served on counsel for the objecting party while in court.

Exceptions

The more detailed rules governing the exceptions in the new procedural code seem to be working more effectively than the jurisprudential rules which they replaced. The past term failed to yield the bountiful harvest of cases involving the exceptions which prior terms invariably produced.

The opinion of the Court of Appeal, First Circuit, in *State v. Preferred Accident Insurance Co. of N. Y.*, contains a very able differentiation of the functions of the objection to procedural and served on the opposing party. However, the Supreme Court granted certiorari to review this holding, and prior to argument the case became moot and was dismissed for this reason. *Id.* 212 La. 481, 32 So.2d 897 (1947).

*44. 149 So.2d 632 (La. App. 1st Cir. 1963).*
capacity and that of no right of action. There, a foreign corporation licensed to do business in Louisiana asserted several subrogated claims against the ancillary receiver of an insolvent foreign insurance company. All of these claims arose out of and were connected with the business done in this state by the insurer. In the trial court the receiver moved to dismiss these claims on the ground that, under the Uniform Insurers Liquidation Act, only a citizen of Louisiana could assert a claim against funds in the hands of the ancillary receiver. This motion and other defenses were overruled by the trial court, which rendered judgment in favor of the claimant. On appeal, inter alia, the receiver's motion to dismiss was renewed. The claimant opposed it on the ground that the so-called motion to dismiss was actually an objection to the procedural capacity of the claimant which should have been asserted through the dilatory exception filed prior to answer. The appellate court pointed out that, since this motion challenged the claimant's right to recover rather than its procedural capacity to sue, this motion was actually the objection of no right of action which could be asserted at any time. However, this motion to dismiss was overruled on the ground that a foreign corporation which qualifies to do business in Louisiana thereby acquires all of the rights of a domestic corporation.

Evidence may be adduced on the trial of exceptions raising certain of the procedural objections; and this evidence may include the testimony of an adverse party taken under cross-examination. A question which has long remained unanswered is whether an adverse party who is a nonresident may be compelled to appear personally in court to be cross-examined. In Cattle Farms, Inc. v. Abercrombie the trial judge refused to order a nonresident defendant to appear for cross-examination at the trial of the peremptory exception raising the objection of no right of action. The Court of Appeal, Fourth Circuit, issued supervisory writs to consider the validity of this ruling of the trial court, among others. After argument, these writs were recalled and the appellate court held that there was no authority for compelling an adverse party who was a nonresident to appear for cross-examination in open court.

46. See LA. CODE OF CIVIL PROCEDURE arts. 930 and 931 (1960).
47. Id. art. 1634.
48. 146 So. 2d 689 (La. App. 4th Cir. 1962).
49. The Supreme Court subsequently issued a writ of certiorari to review
The remaining four cases in this area involved *res judicata*. In one, the intermediate appellate court reversed the judgment of the trial court sustaining the peremptory exception pleading this objection. The first suit, which was pleaded in bar, was an action by the plaintiff small loan company against its former manager to recover on his oral promise to pay the amount of a loan which he had approved if the borrower did not. The second suit, between the same parties, was one for an accounting because of the defendant's alleged breach of his fiduciary relationship in making the same loan. The majority of the appellate court held that the causes of action in the two suits were different, hence the judgment in the first suit did not bar the second action.

The result reached by the Court of Appeal, First Circuit, in *Bowman v. Liberty Mut. Ins. Co.* seems to be the correct one. However, the reasons which it assigned for its judgment against one of the plaintiffs clashes with fundamental legal theory and is quite apt to cause damage in the future. In *Bowman*, the appellate court held that the judgment of a federal district court rejecting the wife's demand against the employer for damages caused by its employee's negligence was *res judicata* of her demand against the employee in the second suit. This holding violates the cardinal requirement of *res judicata* in civilian jurisdictions that the two suits be between the same parties. *Res judicata* would not apply in such a situation even in Anglo-American jurisdictions, although the second action would have been barred by its companion doctrine, estoppel by judgment.

*Bowman* appears to be the exact opposite of *McKnight v. State*, an earlier case decided by the same intermediate appel-
late court. There, the judgment rejecting a wife's claim against a highway policeman for damages for the wrongful death of her husband allegedly through the policeman's negligence was held *res judicata* of her subsequent action against the state to recover damages for wrongful death of her husband on the same grounds. This holding was likewise improper, since the defendants in Mrs. McKnight's two suits were different. However, the dismissal of Mrs. McKnight's second suit was proper. The judgment rejecting her demand against the highway policeman would have deprived the state, had it been cast in the second suit, of obtaining indemnity from its negligent employee. In *Bowman*, the situation is reversed—the employee has no right to obtain indemnity from his employer, and hence was not prejudiced by the judgment in favor of the employer.

Compromises "have, between the interested parties, a force equal to the authority of things adjudged." Probably because of this language, the decisions of the Louisiana courts prior to the adoption of the new procedural code permitted a defendant to plead a compromise through the exception of *res judicata*. No provision of the Code of Civil Procedure precludes any continuance of this practice, so it was held in *Bowden v. State Farm Mutual Automobile Ins. Co.* that a defendant may now plead compromise through the peremptory exception urging the objection of *res judicata*.

It was the settled jurisprudence for years that plaintiff may not collaterally attack a compromise pleaded by the defendant, but must bring a direct action to annul it. This jurisprudence was not called to the attention of the Court of Appeal, First Circuit, in *McNabb v. Foodtown, Inc.*, where the decision of the trial court refusing to permit a collateral attack on the com-

57. LA. CIVIL CODE art. 3078 (1870).
59. 150 So. 2d 655 (LA. App. 3d Cir. 1963). See also Long v. Globe Indemnity Co., 144 So. 2d 275 (LA. App. 1st Cir. 1962).
60. Succession of Rousse, 144 LA. 143, 80 So. 229 (1918) and case cited therein; Tschirge v. Land-O-Lakes Developers, 98 So. 2d 270 (LA. App. 1st Cir. 1957); Wholesale Distributing Co. v. Warren, 84 So. 2d 250 (LA. App. 2d Cir. 1955). See also Benson v. Metropolitan Cas. Ins. Co. of New York, 79 So. 2d 345 (LA. App. 2d Cir. 1955).
61. 143 So. 2d 144 (LA. App. 1st Cir. 1962).
promise was reversed; and the appellate court held that, since replicatory pleadings are prohibited, the plaintiff may collaterally attack a compromise pleaded through the peremptory exception. The appellate court could have given effect to the prior jurisprudence, and yet have attained the ends of justice, by reversing the case to permit plaintiff to amend his petition so as to also seek the nullity of the compromise, as it did in Hampton v. B. M. McNabb Contractor, Inc.62

**Motion for Summary Judgment**

This procedural device has been needed in Louisiana so badly and for such a long time that, after it was made available by the new procedural code,63 a professional temptation to use it could no more be resisted than could the irresistible impulse of a child to play with a new Christmas toy. Perhaps this accounts for the very high proportion of summary judgments reversed by the appellate courts during the past term, with reversals in ten cases64 and affirmances in but three.65 Now that the appellate courts have made it quite clear that this "Sudden Death" playoff is not to be used except in cases where clearly there are no genuine issues of fact, this device may be used more sparingly in the future. No useful purpose would be served by discussing all of these cases, as the decision in the great majority of them turns on the particular facts involved.

Villavasso v. Lincoln Beach Corp.66 presented some interesting questions with respect to the use of the motion for summary

64. Walmsley v. Pan American Petroleum Corp., 144 So. 2d 627 (La. App. 4th Cir. 1962); Villavasso v. Lincoln Beach Corp., 146 So. 2d 7 (La. App. 4th Cir. 1962); Touchet v. Firemen's Ins. Co. of Newark, N.J., 146 So. 2d 441 (La. App. 3d Cir. 1962); McDonald v. Grande Corp., 145 So. 2d 441 (La. App. 3d Cir. 1962); Haspel v. Treece, 150 So. 2d 120 (La. App. 4th Cir. 1963); Ellis v. Johnson Lumber Co., 150 So. 2d 338 (La. App. 3d Cir. 1963); Vallier v. Aetna Finance Co., 152 So. 2d 112 (La. App. 3d Cir. 1963); Sachse Electric, Inc. v. Graybar Electric Co., 152 So. 2d 304 (La. App. 1st Cir. 1963).

In Eubanks v. New Amsterdam Cas. Co., 153 So. 2d 86 (La. App. 1st Cir. 1963), a summary judgment in favor of all three defendants was affirmed as to one and reversed as to the other two. The summary judgment which was affirmed by the intermediate appellate court in Kay v. Carter, 142 So. 2d 836 (La. App. 3d Cir. 1962) was reversed by the Supreme Court under a writ of certiorari. Id., 243 La. 1095, 150 So. 2d 27 (1963).

66. 146 So. 2d 7 (La. App. 4th Cir. 1962).
judgment. There; after the jury had retired to reach its verdict, counsel for one of the defendants orally moved for a summary judgment, but requested the court to reserve its ruling until after the jury had returned its verdict. The jury subsequently disagreed, was unable to reach a verdict, and was discharged. Counsel for the defendant then urged the court to grant his prior oral motion for a summary judgment, but the court demurred. Eight days later counsel for the defendant filed an ex parte written motion for a summary judgment, and the court then dismissed the suit as to that defendant. On appeal, the Court of Appeal, Fourth Circuit, properly reversed this summary judgment. The new procedural code requires that the motion for summary judgment be a written contradictory one and that the adverse party be given at least ten days, notice of it.6

Further, on the new trial, plaintiff had the right to submit additional evidence to the second jury.8

Reconventional Demand

The new procedural code changes the law in this area in two rather important respects in permitting the filing of exceptions69 and in requiring the filing of answers70 to reconventional demands. One of the two cases in this area decided by the appellate courts during the past term is an effective demonstration of the greater workability of the new code rules.71 The other, recognizing the necessity for the filing of an answer to a reconventional demand, held that a reconvener waives an answer thereto when he goes to trial without taking a preliminary default on the reconventional demand.72

Third Party Demand

Three of the cases decided in this area during the past term

67. LA. CODE OF CIVIL PROCEDURE art. 966 (1960).
69. LA. CODE OF CIVIL PROCEDURE art. 1034 (1960).
70. Id. art. 1035.
71. Webb v. Hammond, 144 So. 2d 283 (La. App. 1st Cir. 1962), where the trial judge, applying the former procedural rule, sustained the objection of the defendant in reconvention to the introduction of any evidence to support the reconventional demand on the ground that it was vague. On appeal, under the facts found by the majority of the court, the judgment was reversed, with Herget, J., dissenting.
were important, but possess transient significance only. These held that, although the accidents involved happened prior to the effective date of the 1960 amendment of article 2103 of the Civil Code, the defendants could enforce contribution between joint tortfeasors through the third party demand in all suits filed after the effective date of the code amendment.

_Breaux v. Texas & Pacific Ry._ appears to have prophetic value in indicating the future use of the third party demand as a device for the distribution of accidental losses among the parties legally responsible. There, the plaintiff tutor sued the defendant railway to recover damages for the wrongful death of the minors' father in a grade crossing accident. The defendant railway called in the plaintiff tutor as a third party defendant in the effort to enforce contribution against the estate of the minors' deceased father, of which the minors had been put in possession judicially under benefit of inventory. The trial court sustained the plaintiff's exception and dismissed the third party demand. In the exercise of its supervisory jurisdiction the Court of Appeal, First Circuit, partially reversed this judgment. While recognizing that the minors were not personally liable for their father's obligations, the appellate court held that the defendant could call in the father's estate as a third party defendant, through the tutor of the minors.

_Emmons v. Agricultural Ins. Co.,_ decided by the Court of Appeal, Fourth Circuit, had twin holdings of extreme importance to the present subject. First, it held that a defendant could not enforce contribution against a co-defendant unless the latter was called in as a third party defendant. Second, it held that when only one of two defendants is cast and only that de-

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The same result was reached during the prior term in Brown v. New Amsterdam Cas. Co., 136 So. 2d 283 (La. App. 3d Cir. 1961), and id., 136 So. 2d 286 (La. App. 3d Cir. 1961), and both cases were affirmed by the Supreme Court under certiorari. Id., 243 La. 271, 142 So. 2d 796 (1962).

74. _LA. CIVIL CODE_ art. 2103 (1870), as amended by _La. Acts_ 1960, No. 30, § 1, which went into effect on January 1, 1961.

75. 147 So. 2d 683 (La. App. 1st Cir. 1962).

76. "Third party practice is one of the most effective improvements in the administration of civil justice made in recent years, but its use is not completely free of difficulty. One of the minor irritants in the use of third party practice is that a litigant sometimes meets himself coming back. Here is an illustration of this petty difficulty," _McMAHON & RUBIN, PLEADINGS AND JUDICIAL FORMS_ ANNOTATED, 10 _LSA-CODE OF CIVIL PROCEDURE_ 429, note 3 (1963).

77. 150 So. 2d 94 (La. App. 4th Cir. 1963).
fendant appeals, his appeal does not bring up for review that aspect of the judgment in favor of his co-defendant. Both holdings appear to the writer to be erroneous, and both are in conflict with the prior decision of *Vidrine v. Simoneaux*,78 decided by the Third Circuit.

Long prior to the 1960 code amendment which permits a defendant to enforce contribution through the third party demand, one of two defendants cast solidarily had the right to enforce contribution against the other.79 The purpose of this code amendment was to *broaden*, rather than restrict, the substantive right to enforce contribution between tortfeasors. The appellate court pitched its holding on the language of the code amendment “whether or not the third party defendant was sued by the plaintiff initially”;80 but the court missed the purpose of this language. It was not intended to require a defendant to call his co-defendant as a third party defendant in order to enforce contribution, but rather to *permit* him to protect himself against the danger of the plaintiff discontinuing the suit against the co-defendant prior to judgment.

**DEPOSITIONS AND DISCOVERY**

One of the chronic complaints of news media throughout the country is that its reporters are not protected by any privilege and may be compelled legally to disclose their confidential sources of information. This issue was presented in Louisiana for the first time in *Miller, Smith & Champagne v. Capital City Press.*81 This was an action to recover damages for an allegedly libelous article published by the defendant. For discovery purposes, the plaintiff took the deposition of the reporter who had written the article; and during the taking of the deposition the reporter was asked to disclose the identity of the “absolutely reliable source” of the information on which the article was based. The reporter refused to answer this question, and in due course was ordered by the trial court to do so. Defendant then applied to the Court of Appeal, Fourth Circuit, for supervisory writs to set aside this order. After the issuance of alternative

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78. 145 So. 2d 400 (La. App. 3d Cir. 1962).
80. LA. CIVIL CODE art. 2103 (1870), as amended by LA. ACTS 1960, NO. 30, § 1.
81. 142 So. 2d 462 (La. App. 1st Cir. 1962).
writs, the submission of the entire record, and argument of counsel, the appellate court recalled its writs. Plaintiff was held entitled to this information for discovery purposes. The Supreme Court refused to review the decision of the intermediate appellate court.

Under the new procedural code, a trial court cannot compel the production or inspection of any part of a writing prepared by an expert for use at the trial which reflects his mental impressions, conclusions, opinions, or theories.\textsuperscript{82} Despite this prohibition, the Court of Appeal, First Circuit, held in \textit{State v. Riverside Realty Co.},\textsuperscript{83} an expropriation case, that the deposition of the state's expert realtor could be taken by the defendant for discovery purposes; and that this expert would be required to answer all \textit{questions of fact} regarding his appraisal of the property, and the method and manner used in making his appraisal. The fact that he had to refer to written memoranda which he had prepared to answer these questions did not preclude the plaintiff's right to such information for discovery purposes. This case followed a Supreme Court decision of the prior term.\textsuperscript{84} Both appear to be completely sound.

The discovery devices could easily become instruments of oppression and injustice were it not for the very effective controls made available to the courts to prevent imposition and abuse.\textsuperscript{85} \textit{Dawson v. Lindley,}\textsuperscript{86} a medical malpractice suit, illustrates the effective use of these controls. There, an able and conscientious trial judge relieved the defendant physician of the necessity of answering five of forty-seven interrogatories propounded by plaintiffs; relieved the defendant pharmaceutical manufacturer of the necessity of answering ninety-eight of one hundred and two interrogatories; and further narrowed the breadth and generality of the remaining four interrogatories propounded to the latter defendant. Plaintiffs invoked the supervisory jurisdiction of the Court of Appeal, First Circuit, to coerce the trial court into requiring answers to all interrogatories propounded by them. After argument, the appellate court recalled its alternative writs, and affirmed the action of the trial court limiting and restricting these interrogatories. The facts

\textsuperscript{82} \textit{La. Code of Civil Procedure} art. 1452 (1960).
\textsuperscript{83} 152 So. 2d 345 (La. App. 1st Cir. 1963).
\textsuperscript{85} \textit{La. Code of Civil Procedure} arts. 1452, 1454, 1473, 1491, and 1496 (1960).
\textsuperscript{86} 143 So. 2d 150 (La. App. 1st Cir. 1962).
of the case are too involved, the plaintiffs' interrogatories too numerous, and the objections of the defendants too varied, to be capsuled into the limited space available. It suffices to say, for present purposes, that all convincingly support the view of both courts that most of these numerous interrogatories constituted an abuse of the plaintiffs' privilege to compel discovery. This decision should have a wholesome effect on the future use of the discovery devices, serving as a caveat of the intention of the courts to utilize these controls whenever necessary to prevent oppression.

The Court of Appeal, First Circuit, held in Voisin v. Luke that the pendency of exceptions does not relieve a defendant of the necessity of answering timely the plaintiff's request for the admission of facts. The only way in which such a request can be suspended was held to be that provided by the pertinent code article — by written objection.

APPEALS

Generally

In justice to the appellate court which decided La Fleur v. Dupuis, it should be pointed out that this decision is based squarely on a prior appellate decision. If these two decisions were sound, this writer would recommend an immediate amendment of the new procedural code to overturn them legislatively, as they are so technical as to be completely unworkable. Their invalidity, however, can be demonstrated readily. In Dupuis, the trial court sustained defendant's dilatory exception pleading the vagueness and generality of the petition, and ordered plaintiff to amend his petition. Plaintiff declined to do so, so the trial court rendered judgment dismissing the suit. Plaintiff appealed from this judgment, and on appeal challenged the validity of the trial court's order to amend. The appellate court refused to consider this point, holding that the appeal did not bring up for review the interlocutory order requiring amendment. In both of these decisions, the appellate courts overlooked the rationale of the procedural rule applied. The reason for the prohibition against an appeal from an interlocutory judgment which does

87. 151 So. 2d 99 (La. App. 1st Cir. 1963).
88. LA. CODE OF CIVIL PROCEDURE art. 1496 (1960).
89. 147 So. 2d 724 (La. App. 3d Cir. 1962).
not cause irreparable injury is not to preclude any appellate review thereof, but rather to prohibit fragmentary appeals. An interlocutory order which causes no irreparable injury is reviewable under the appeal taken from the final judgment in the case.\textsuperscript{91} The interlocutory order in \textit{Dupuis} requiring amendment of the petition should have been reviewed under the appeal from the final judgment dismissing the suit.

The Court of Appeal, First Circuit, overruled the motion to dismiss the appeal in \textit{Voisin v. Luke},\textsuperscript{92} where the defendant appealed from an order of the trial court setting aside his answers to plaintiff's request for admissions of facts on the ground that they had not been filed timely. Since the effect of the trial court's order was that the pertinent facts alleged in the plaintiff's petition were taken to be confessed, the motion to dismiss was properly overruled. The able organ of the appellate court wrote an excellent opinion which is open to only a single, narrow bit of criticism. The twin classifications of judgments as final and interlocutory and of the latter as those which cause irreparable injury and those which do not is complicated enough. In \textit{Voisin} the appellate court, following the leading case of \textit{Cary v. Richardson}\textsuperscript{93} decided by the Supreme Court eighty years ago, recognized a third classification — one "which is assimilated in character to a final judgment." In the \textit{Richardson} case, this third classification was necessary as the court was faced with a code definition of final judgments as those which "decide all the points in controversy between the parties."\textsuperscript{94} This definition has been broadened under the new procedural code: "A judgment that determines the merits \textit{in whole or in part} is a final judgment."\textsuperscript{95} The line of demarcation between final and interlocutory judgments, of necessity, will be quite shadowy in some cases. Once a court has decided that the judgment appealed from causes irreparable injury, it is not necessary for it to go further and classify the judgment as being either final or interlocutory.\textsuperscript{96}

\textsuperscript{92} 142 So. 2d 815 (La. App. 1st Cir. 1962).
\textsuperscript{93} 35 La. Ann. 505 (1885).
\textsuperscript{94} LA. CODE OF PRACTICE art. 539 (1870).
\textsuperscript{95} LA. CODE OF CIVIL PROCEDURE art. 1841 (1960).
\textsuperscript{96} Compare Succession of Liessa, 194 La. 328, 193 So. 663 (1940), where the Supreme Court held that an ex parte judgment of possession in a succession proceeding which failed to recognize one of the heirs caused irreparable injury,
Because of the difficulties experienced in the past from the commencement of delays from the rendition of judgment, in the redaction of the Code of Civil Procedure the Law Institute eliminated all references thereto and had the delays for applying for a new trial and appeal commence to run from either the signing, or notice of the signing, of the judgment.97

The Reporters on the Code of Civil Procedure Project were thrown into quite a dither by the decision in C H F Finance Co. v. Smith98 by the Court of Appeal, Fourth Circuit, which approved the ruling below that the delay for appealing from a judgment of a city court runs from the rendition, rather than from the signing, of the judgment. The attention of neither court was called to the fact that such an interpretation of the pertinent code provision99 not only conflicted with two other code articles,100 but actually made it possible for a party to lose his right of appeal from a city court judgment before it ever accrued.101 Fortunately, these points were noted by the Supreme Court, which reversed the case under certiorari.102

Copies of the new procedural code were commercially available prior to its effective date, January 1, 1961. Numerous articles about it have been published in legal periodicals, and the three Reporters conducted a number of institutes throughout the state to explain its procedural changes to members of the legal profession. One change which had been repeatedly called to the attention of the Bar was the reduction of the maximum delay for taking a devolutive appeal from one year to ninety days.103

In view of all this, it is both surprising and disillusioning to note that during the new code’s third year the devolutive appeals

97. Cf. LA. CODE OF CIVIL PROCEDURE arts. 1911-1916, 1974, 2087, 2123 (1960). The necessity for this change is explained in the Preliminary Statement of Chapter 3 of Title VI of Book II of the Code, and in Comment (a) under Article 1911.
98. 146 So.2d 196 (La. App. 4th Cir. 1962). Eight different code articles would have had to be amended to overrule this decision legislatively.
99. “An appeal from a judgment rendered by a city court can be taken only within ten days from the date of judgment or of the service of notice of judgment when necessary under Article 4898 ...” LA. CODE OF CIVIL PROCEDURE art. 4899 (1960).
100. Id. arts. 4831, 4922.
101. Since an appeal cannot be taken from an unsigned judgment, if the judgment is signed more than ten days after rendition, the unsuccessful party would have lost his right to appeal before it ever accrued.
103. By LA. CODE OF CIVIL PROCEDURE art. 2087 (1960).
in eight cases\textsuperscript{104} were dismissed because they had not been taken timely. In a ninth case,\textsuperscript{105} where the devolutive appeal was taken more than nine and a half months after the signing of the judgment, the appellate court overruled the motion to dismiss. The case had been taken under advisement prior to judgment, and the record failed to show affirmatively that the clerk had mailed to counsel notice of the signing of the judgment.

\textit{Procedure for Appealing}

\textit{Orle\'ans Shoring Co. v. Verdun}\textsuperscript{106} re-emphasized the importance of having a note of evidence taken on the confirmation of a default judgment. Prior to appealing devoluto\ively, counsel for defendant unsuccessfully requested counsel for plaintiff to join him in preparing a statement of facts; and then requested the trial judge to prepare this statement. The trial judge was unable to comply with this request, as he did not remember the evidence presented on the confirmation of the default judgment. Under these circumstances, the Court of Appeal, Fourth Circuit, properly reversed the judgment and remanded the case for a trial \textit{de novo}. The case was governed by the provisions of the Code of Practice;\textsuperscript{107} but its procedural rules are identical with the pertinent provisions of the new code.\textsuperscript{108}

The absence of a transcript of the evidence introduced at the trial was the basis of the appellee’s motion to dismiss the appeal in \textit{Succession of Seals}.\textsuperscript{109} The Court of Appeal, Second Circuit, overruled this motion, as the trial judge’s Reasons for Judgment substantially covered all of this evidence and this was sufficient to permit the appellate court to review the issues of law presented by the appeal. Though this decision of the intermediate appellate court was reversed in other respects under a writ of certiorari,\textsuperscript{110} the Supreme Court affirmed its overruling of the motion to dismiss.

\textsuperscript{104} In Broussard v. Broussard, 143 So. 2d 595 (La. App. 3d Cir. 1962); Midwestern Fire & Marine Ins. Co. v. Miller, 143 So. 2d 757 (La. App. 3d Cir. 1962); Wulff v. Mayer, 144 So. 2d 246 (La. App. 1st Cir. 1962); Rolston v. Lafayette Concrete Pipe Co., 144 So. 2d 924 (La. App. 1st Cir. 1962); Scott v. Hunt Oil Co., 147 So. 2d 405 (La. App. 2d Cir. 1962); Stevens v. Daigle & Hinson Rambler, Inc., 148 So. 2d 105 (La. App. 1st Cir. 1962); Spears v. Fourmy, 150 So. 2d 342 (La. App. 1st Cir. 1963); and Chambers v. Russell, 152 So. 2d 349 (La. App. 1st Cir. 1963).

\textsuperscript{105} Wilson v. McNabb, 152 So. 2d 352 (La. App. 1st Cir. 1963).

\textsuperscript{106} 144 So. 2d 474 (La. App. 4th Cir. 1962).

\textsuperscript{107} La. Code of Practice arts. 602, 603 (1870).


\textsuperscript{109} 142 So. 2d 629 (La. App. 2d Cir. 1962).

\textsuperscript{110} Succession of Seals, 243 La. 1056, 150 So. 2d 13 (1963).
The appellee moved to dismiss the appeal in Portier v. Marquette Cas. Co. on the ground that the record had not been filed timely in the appellate court. To negate any presumption that the delay was imputable to the clerk of the trial court, the appellee showed some few days before the extended return date this clerk had requested counsel for the appellant to send him the filing fee of the appellate court, but that this request had not been complied with until after the return date. The Court of Appeal, Fourth Circuit, properly overruled the motion to dismiss, since appellant had an unexpended balance in its cost deposit with the clerk of the trial court in excess of the filing fee of the appellate court.

Procedure in Appellate Court

The new procedural code provides that a motion to dismiss an appeal because of any irregularity, error, or defect imputable to the appellant must be filed within three days, exclusive of holidays, of the return day or date on which the record is lodged in the appellate court, whichever is later.112 The appellee, in Coastal Transmission Corp. v. LeJeune, moved to dismiss the appeal on the ground that the record had not been lodged in the appellate court timely due to the failure of the appellant to pay the filing fee of the appellate court, but that this request had not tion to dismiss was filed more than a month after the record had been filed in the appellate court, the Court of Appeal, Third Circuit, overruled the motion because it had not been filed timely.

Prior to July 1, 1960, the fourteen-day delay for applying for a rehearing ran from rendition of judgment in the Supreme Court and Court of Appeal for the Parish of Orleans, and from the receipt of notice of the judgment in the Courts of Appeal, First and Second Circuits.115 In an effort to provide uniformity of procedure the Judicial Council, in the 1958 appellate reorganization, recommended the amendment of article III, § 24, 111. 146 So. 2d 48 (La. App. 4th Cir. 1963).
112. LA. CODE OF CIVIL PROCEDURE art. 2161 (1960).
113. 144 So. 2d 759 (La. App. 3d Cir. 1962).
115. As the result of the following language of LA. CONST. art. VII, § 24 (1921), applicable only to the Courts of Appeal, First and Second Circuits: "Notice of all judgments shall be given to counsel of record; and the court shall provide by rule for the giving of notices. No delay shall run until such notice has been given." The last sentence was construed to mean, in Morning Star Baptist Church v. Martina, 150 La. 951, 91 So. 404 (1922) as "No delay shall run until such notice has been received."
of the Constitution, of R.S. 13:4446, and the conformity of language in the new procedural code, which was then being completed. All of this was done to require all of the intermediate appellate courts to give notice of rendition of judgment and to have the delay for applying for a rehearing from this date. This was expressly spelled out in the new rules of the reorganized intermediate appellate courts. After July 1, 1960, when the amendments recommended by the Judicial Council became effective, all of the intermediate appellate courts refused to consider applications for rehearing filed more than fourteen days after the date notice of judgment had been mailed by their clerks.

In Wanless v. Louisiana Real Estate Board the Supreme Court held that this rule of the intermediate appellate courts conflicted with the code and statutory provisions adopted on the recommendation of the Judicial Council, and were therefore invalid. The phrase “notice of judgment has been given to counsel” was interpreted to mean “notice of judgment has been given to and received by counsel.” This decision was followed by the Supreme Court in subsequent cases. As a result, the intermediate appellate courts were forced to amend the rule to conform to these Supreme Court decisions.

The writer cannot help but question the correctness of the Wanless decision; but regardless of this, there can be no doubt of the unfortunate procedural effects which it produced, in depriving the legal profession of a desirable uniformity of procedure, and forcing on the intermediate appellate courts a rule which is sometimes extremely difficult to administer.

116. The language recommended by the Judicial Council was conformed to in La. Code of Civil Procedure art. 2166 (1960).
118. Wanless v. Louisiana Real Estate Board, 140 So. 2d 429 (La. App. 1st Cir. 1962); United Gas Pipe Line Co. v. Town of Washington, 143 So. 2d 613 (La. App. 3d Cir. 1962) and cases cited; Jefferson v. Jefferson, 145 So. 2d 356 (La. App. 3d Cir. 1962); Moreau v. State Farm Mutual Automobile Ins. Co., 146 So. 2d 892 (La. App. 3d Cir. 1962); Funderburk v. Metropolitan Life Ins. Co., 146 So. 2d 710 (La. App. 3d Cir. 1962); State v. Lumpkin, 147 So. 2d 80 (La. App. 2d Cir. 1962); Jones v. United States Fidelity and Guaranty Co., 148 So. 2d 309 (La. App. 3d Cir. 1962); In re Henry, 148 So. 2d 313 (La. App. 3d Cir. 1962); State v. Lumpkin, 147 So. 2d 80 (La. App. 2d Cir. 1962); Jones v. United States Fidelity and Guaranty Co., 148 So. 2d 309 (La. App. 3d Cir. 1962); In re Henry, 148 So. 2d 313 (La. App. 3d Cir. 1962).
122. An intermediate appellate court cannot determine, when it receives a return receipt of the letter containing the judgment which is not signed by counsel
Three cases of interest in this area were decided by the appellate courts during the past term.

The defendant in *League Central Credit Union v. Warman* was adjudicated a bankrupt after the filing of the suit, and subsequent to the confirmation of a default judgment received his discharge in bankruptcy. When plaintiff sought to execute this judgment by garnishment of the judgment debtor's salary, defendant instituted suit to declare the judgment a fraudulent nullity and sought injunctive relief against its enforcement and to prevent his employer from honoring the garnishment. The trial court issued a preliminary injunction as prayed for, and from this the plaintiff appealed. The Court of Appeal, Fourth Circuit, affirmed. The only point raised by plaintiff which had any merit whatever was that the citation in the nullity action was not served on plaintiff, but rather on his counsel of record in the original suit. The appellate court swept this aside, taking the position that the nullity action was an incident of the original suit. The local rules of the trial court in this case completely justified this position of the appellate court.

The plaintiff, in *Blue Bonnet Creamery, Inc. v. Simon*, obtained a default judgment for nine odd thousand dollars on worthless checks issued by defendant for goods and merchandise, and for an additional odd thousand dollars on an open account for cartons and containers furnished defendant. Subsequently, the plaintiff garnished the salary of the judgment debtor in a proceeding brought at the domicile of the garnishee. Thereafter, the judgment debtor was adjudicated a bankrupt, and in the bankruptcy proceeding the Referee ordered the judgment creditor to show cause why the garnishment proceeding should not be dissolved. By agreement of counsel, the garnish-

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123. 143 So. 2d 241 (La. App. 4th Cir. 1962).
125. "Suits or proceedings not in their nature original, but growing out of suits or proceedings previously pending, such as actions of nullity of judgments, or to restrain or regulate the execution of process, mesne or final, in suits previously pending, shall not be docketed as separate suits, but shall be treated as parts of the original suits out of which they arise. . . ." Rule VIII, § 9, of the Civil District Court for the Parish of Orleans (1954). See also LA. CODE OF CIVIL PROCEDURE art. 2006 (1960).
126. 136 So. 2d 443 (La. App. 1st Cir. 1961).
ment was continued in effect and the issue of the release of the judgment by the discharge in bankruptcy was left to the decision of the state court in the garnishment proceeding. In the latter, the trial judge held that the bankruptcy discharge barred the enforcement of that portion of the judgment for cartons and containers, but did not render invalid that part of the judgment for the worthless checks. On appeal, the Court of Appeal, First Circuit, reversed, holding that the continued acceptance by the plaintiff of these worthless checks indicated a credit arrangement, rather than the obtaining of goods through false representations by the bankrupt.\textsuperscript{127} Under certiorari, the Supreme Court reversed the decision of the intermediate appeal court and remanded the garnishment proceedings to the trial court,\textsuperscript{128} on the ground that the evidence introduced was not sufficient to either prove or disprove the dischargeability of the debt represented by the worthless checks.

In \textit{Southern Scrap Mat. Co. v. Commercial Scrap Mat. Corp.},\textsuperscript{129} plaintiff garnished the president of the defendant corporation in the execution of its judgment against the latter. The garnishee answered, denying any indebtedness to defendant. On the traverse of the answers to the garnishment interrogatories, the trial judge concluded that the garnishee and his witnesses were unworthy of belief and rendered judgment against the garnishee for the full amount of the judgment. The Court of Appeal, Fourth Circuit, reduced this judgment against the garnishee to the amount of his indebtedness to defendant definitely established by the evidence. The fact that the garnishee's witnesses were unworthy of belief was properly held not to justify the rendition of a judgment against him for the full amount of the judgment against the defendant.\textsuperscript{130}

**EXECUTORY PROCEEDINGS**

\textit{Allen v. Commercial National Bank in Shreveport}\textsuperscript{131} was an action to annul the judicial sale of three properties and to enjoin interference by the adjudicatee with the plaintiff's possession of them. Originally, to secure a loan of some $28,000, plaintiff

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\item \textsuperscript{127} Blue Bonnet Creamery, Inc. v. Gulf Milk Ass'n, 136 So. 2d 445 (La. App. 1st Cir. 1961).
\item \textsuperscript{128} Blue Bonnet Creamery, Inc. v. Simon, 243 La. 683, 146 So. 2d 162 (1962).
\item \textsuperscript{129} 144 So. 2d 425 (La. App. 4th Cir. 1962).
\item \textsuperscript{130} This accords with the rule of \textit{LA. CODE OF CIVIL PROCEDURE} art. 2415 (1960).
\item \textsuperscript{131} 138 So. 2d 252 (La. App. 2d Cir. 1962).
\end{itemize}
had pledged to the defendant three mortgage notes which he had executed, aggregating some $52,000, each secured by a mortgage on a different property. When this loan was not paid at maturity, the bank sought to enforce each of the three mortgages in a separate executory proceeding, for the full amount of the mortgage notes. The proper demand for payment was made, the proper writ issued, the proper notice of seizure was served, and the proper judicial advertisement of the sale was made in each case. Then plaintiff had the three proceedings consolidated and brought an injunction proceeding to reduce the total amount claimed by the bank to the $28,000 due on the loan. After the trial of the rule for a preliminary injunction, the trial court rendered an order reducing the amount due to the $28,000, ordering the three properties to be sold together and otherwise as advertised. The bank bought the properties in at the judicial sale, and the present suit followed, in which plaintiff sought to annul the judicial sale on the grounds that there had been no demand for payment of the real indebtedness, no notice of seizure of the three properties together, and no advertisement of the sale of the three properties together. The bank's exception of no cause of action was sustained by the trial court, and this judgment was affirmed by the Court of Appeal, Second Circuit. The latter held that the action was actually a collateral attack on the trial court's judgment on the rule for a preliminary injunction, which the present plaintiff had not attempted to modify by appeal or by supervisory writs. Under certiorari, the Supreme Court affirmed both the decision and the reasons assigned by the intermediate appellate court.

In seven cases between the same parties plaintiff sought to recover deficiency judgments under seven different chattel mortgages. The facts occurred during the regime of the Code of Practice, under which an executory proceeding to enforce a chattel mortgage might have been brought either in the parish of the mortgagor's domicile or in the parish where the motor vehicle affected by the mortgage was situated. These executory proceedings were brought in Orleans Parish, where neither of the mortgagors were domiciled and where none of the mort-

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133. Mack Trucks, Inc. v. Dixon, 142 So. 2d 605 (La. App. 4th Cir. 1962); id., 142 So. 2d 609 (La. App. 4th Cir. 1962); id., 142 So. 2d 610 (La. App. 4th Cir. 1962); id., 142 So. 2d 611 (La. App. 4th Cir. 1962); id., 142 So. 2d 612 (La. App. 4th Cir. 1962).
134. LA. CODE OF PRACTICE arts. 162, 738 (1870).
gaged vehicles were situated. After appraisement, the vehicles were sold by the sheriffs of the parishes where they were situated, under writs of seizure and sale issued by the Orleans Parish court. Thereafter, the present suits were brought at the domicile of the mortgagors to recover the deficiency judgments. These suits were dismissed by the trial court, which sustained the defendants' exceptions of no cause of action, and the Court of Appeal, Fourth Circuit, affirmed. The appellate court held that the executory proceedings were absolute nullities as the court in which they were conducted were not competent; and that since there had been no lawful appraisement of the vehicles, plaintiff was barred from recovering deficiency judgments.

Though the appellate court's decision was valid under the prior jurisprudence, which had scrambled and confused the rules of jurisdiction ratione materiae et personae, it is believed that the result would be different under the rules of the Code of Civil Procedure, which has carefully distinguished the rules governing jurisdiction from those regulating venue. If the defendant in an executory proceeding does not now object to the improper venue by a suspensive appeal or an injunction proceeding to arrest the seizure and sale, the executory proceeding brought in an improper venue would be valid.

**PROBATE PROCEDURE**

By the unconditional acceptance of a succession the heir binds himself personally for the payment of his proportionate part of the obligations of the deceased. For this reason, the law required that in order to accept a succession unconditionally the heir "must be capable of contracting obligations." Further, since the unconditional acceptance of a succession by a competent heir will or may subject him to liability for the deceased's obligations, for more than a century and a third Louisiana law has consistently required the unconditional acceptance of a suc-

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136. Ibid. See also LA. CODE OF CIVIL PROCEDURE arts. 1-10, 41-45, 71-83 (1960).
137. See LA. CODE OF CIVIL PROCEDURE art. 2633 (1960).
139. LA. CIVIL CODE art. 1013 (1870).
140. Id. art. 1004. Minor heirs must always be considered as having accepted the succession with benefit of inventory. Id. art. 977. Cf. LA. CODE OF CIVIL PROCEDURE art. 3004, as amended by La. Acts 1961, No. 23, § 1.
cession to be by all competent heirs; and, if for any reason, one refuses to do so there must be an administration of the succession.\textsuperscript{141} There is one isolated and unfortunate decision by the Supreme Court which held that when the succession was relatively free of debt, none of the creditors were demanding an administration, and the majority of the heirs accepted it unconditionally, all heirs would be sent into possession, even though one demanded an administration.\textsuperscript{142}

Possibly because of this case, a custom had developed in some parts of the state of having all heirs sent into possession when the majority accepted unconditionally and alleged that the succession was relatively free of debt, even though one or more demanded an administration. To make the probate procedure of Louisiana uniform, as well as to avert the potential danger to a dissenting heir posed by this custom, the new procedural code specifically provides that all competent heirs or residuary legatees must accept the succession unconditionally, in order to dispense with its administration.\textsuperscript{143} These code provisions were applied in two cases decided during the past term.\textsuperscript{144} In both, the intermediate appellate courts refused to order that all heirs or legatees be sent into possession without an administration, when one demanded it.

\textbf{REAL ACTIONS AND "FRINGE" ACTIONS}

The cumulation of the possessory and petitory actions in the same suit, even in the alternative, would so royally foul up the procedure of both that it was forbidden by the Code of Practice,\textsuperscript{145} and is even more emphatically prohibited by the new procedural code.\textsuperscript{146} Prior to 1961, such a cumulation resulted in a judicial confession of the possession of the defendant even as to subsequent suits; but this has been relaxed slightly by the new

\textsuperscript{141} \textit{La. Civil Code} art. 1040 (1825); \textit{La. Civil Code} art. 1047 (1870).
\textsuperscript{142} Succession of Weincke, 118 La. 206, 42 So. 776 (1907). The opinion cites \textit{La. Civil Code} art. 1047 (1870) but takes the position that it is "controlled" by \textit{La. Code of Practice} arts. 975 et seq. (1870). Not only were these provisions of the two codes not in conflict, but they related to different subjects. The Civil Code provision requires an administration whenever one of the \textit{heirs} demands it; while the Code of Practice articles required the administration whenever one of the \textit{creditors} demanded it.
\textsuperscript{143} \textit{La. Code of Civil Procedure} arts. 3001, 3004, 3031 (1960).
\textsuperscript{144} Succession of Browne, 142 So. 2d 494 (La. App. 2d Cir. 1962); Succession of Houssiere, 146 So. 2d 483 (La. App. 3d Cir. 1962), certiorari denied by the Supreme Court.
\textsuperscript{145} \textit{La. Code of Practice} art. 54 (1870).
\textsuperscript{146} \textit{La. Code of Civil Procedure} art. 3657 (1960). See also \textit{id.}, arts. 462, 463.
code so as to constitute such a confession only in that suit, and
does not prevent its dismissal and the subsequent renewal of the
possessory action.\textsuperscript{147}

In Coleman's Heirs \textit{v.} Holmes' Heirs,\textsuperscript{148} plaintiffs first insti-
tuted a petitory action, praying to be adjudged the owners of
the property; and then filed a supplemental petition which al-
leged plaintiffs' possession but expressly retained the prayer of
the original petition. Subsequently, plaintiffs filed a second sup-
plemental petition which did not delete any of their prior alle-
gations but added new ones alleging plaintiffs’ ownership and
possession, and prayed that plaintiffs’ possession be recognized
and defendants ordered to assert their pretensions of ownership.
Defendants then excepted on the ground that plaintiffs had not
stated any right or cause of action, and this exception was sus-
tained by the trial judge. On appeal this judgment was reversed.
The Court of Appeal, Third Circuit, held that since plaintiffs
did not, in their second supplemental petition, retain their origi-
nal prayer to be adjudged owners, but on the contrary prayed
for recognition of their possession, the petitory action originally
brought must be deemed to have been abandoned, and there was
no longer any objection to a continuation of the suit as a pos-
sessory action.

The difference between this position of the appellate court
and the dismissal of the action and subsequent institution of the
possessory action is admittedly but a short step, which may not
do any damage in the instant case. However, the writer chafes
at his own limited imagination which prevents him from visual-
izing the difficulties which his own intuitive judgment assures
him will inevitably result from any future projection of this
decision.

Three related cases decided during the past term, which were
instituted and tried prior to the effective date of the new code,
concern the application of the \textit{lis pendens} statute permitting the
filing of notice of the pendency of a suit affecting the title to
immovable property in the mortgage records of the parish where
the property is situated.\textsuperscript{149} Plaintiff sued in Orleans Parish for
an accounting, alleging the creation of a partnership by oral
agreement to acquire mineral leases and other rights in the name

\textsuperscript{147} See \textit{id.} art. 3657, Comment (c).
\textsuperscript{148} 147 So. 2d 752 (La. App. 3d Cir. 1962).
of defendant, and that defendant fraudulently concealed from plaintiff his acquisition during the existence of this partnership of valuable mineral interests in property in Plaquemines Parish. Plaintiff recorded notice of the pendency of the Orleans accounting suit in Plaquemines Parish, where these immovables were situated. Defendant filed various exceptions to the accounting suit and ruled plaintiff into court to show cause why the notice of *lis pendens* should not be cancelled. The Orleans parish court overruled these exceptions and dismissed this rule. From the latter judgment plaintiff appealed, and the Court of Appeal, Fourth Circuit, affirmed.\(^{150}\)

Following the dismissal of his rule by the Orleans court, defendant instituted suit in Plaquemines Parish to mandamus the clerk of court and the plaintiff in the accounting suit to cancel the inscription of the *lis pendens*. From the judgment of the Plaquemines court making the mandamus peremptory and ordering cancellation of the *lis pendens*, defendant (plaintiff in the accounting suit) appealed. The Court of Appeal, Fourth Circuit, reversed, holding that under the law applicable at the time these two suits were filed, the accounting suit did affect the title to immovables and the notice of *lis pendens* was properly filed.\(^{151}\) Under certiorari, the Supreme Court reversed the decision of the intermediate appellate court.\(^{152}\) The Supreme Court held that since the accounting suit alleged an oral partnership agreement and concealment by the defendant which negated any intention on his part to deliver title, and since the title to mineral interests could not be proven by parol, notice of the *lis pendens* was properly cancelled by the Plaquemines court. The writer believes that this latter decision is the sounder of the two appellate court opinions.

In *Cattle Farms, Inc. v. Abercrombie*,\(^{153}\) a case governed by the procedural rules in effect prior to the new code, the Supreme Court reversed the decision of the Court of Appeal, Fourth Circuit,\(^{154}\) with respect to the function of the exception of no right of action in actions to determine ownership of immovables. The intermediate appellate court had affirmed the judgment appealed from, which sustained this exception after evidence had

\(^{150}\) Pique v. Ingolia, 144 So. 2d 638 (La. App. 4th Cir. 1962).
\(^{151}\) Ingolia v. Lobrano, 144 So. 2d 634 (La. App. 4th Cir. 1962).
\(^{152}\) *Id.*, 244 La. 241, 152 So. 2d 7 (1963).
\(^{153}\) 244 La. 969, 155 So. 2d 426 (1963).
\(^{154}\) *Id.*, 146 So. 2d 689 (La. App. 4th Cir. 1962). Another point in this decision is discussed *supra*, page 302.
been introduced on its trial to refute plaintiffs' alleged ownership of the property. The Supreme Court recognized that generally evidence may be introduced on the trial of the exception of no right of action, but it affirmed its prior holdings that this rule does not obtain when the exception is employed to dispose of the very issue which would be presented on the trial of the case on its merits. The writer heretofore has had occasion to approve of this sound rule of judicial administration, which is necessary to avoid dual lengthy trials of the same complicated factual issues. Nothing in the new code changes this rule except that instead of the exception being overruled as it was in the instant case, it may have to be referred to the merits.

In the writer's opinion, Walmsley v. Pan American Petroleum Corp. is one of the most far-reaching cases decided during the past term. There, the Supreme Court held that an action to remove a cloud from title is not precluded by defendant's possession of the immovables in controversy. The case is discussed elsewhere in this Symposium, so as to avoid repetition it will not be considered again here. However, the writer wishes to record his concurrence in the views there expressed by Professor Hardy.

CONCURSUS PROCEEDINGS

The two cases in this area decided during the past term, both arising from the same facts, are interesting but settled no particularly difficult problem. The common source of both was the death of four persons and the serious injury of a fifth in an automobile accident. The injured person and the survivors of the deceased person filed separate suits to recover damages against the owner of the truck, his insurers, the operator of the truck, and several corporations. The truck owner's insurers, primary and excess liability, in separate proceedings each de-

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156. LA. CODE OF CIVIL PROCEDURE art. 931 (1960) is merely declaratory of the general rule established by prior jurisprudence, and should not be construed as precluding application of the rule of the instant case. Cf. id. art. 929 and Comment (b) thereunder.

157. Under LA. CODE OF CIVIL PROCEDURE art. 929 (1960) and Comment (b) thereunder.

158. 244 La. 513, 153 So.2d 375 (1963), reversing id., 144 So.2d 627 (La. App. 4th Cir. 1962).

159. Supra p. 229 et seq.

posited into the registry of the court the full amount of its liability coverage with accrued interest, impleaded all of the plaintiffs in the damage suits, prayed for a judgment declaring that the amount deposited was the limit of its liability to the parties impleaded, and sought injunctive relief to prohibit the impleaded parties from continuing the prosecution of their suits against it. The trial court granted each insurer the relief it prayed for, but in its judgments recognized the insurers' further obligations to provide a defense for the insured and to pay all courts costs assessed against him.

The defendants appealed these judgments, primarily because of a fear that under the Marionneaux case they might have the effect of releasing all of the other defendants in the damage suits. The Court of Appeal, First Circuit, affirmed both judgments. It pointed out that all the Marionneaux case held was that a compromise with an employee effected a complete release of the employer, even though all rights against the latter were reserved in the compromise agreement; and very properly held that in the instant cases the judgments in favor of the insurers did not prejudice in any way the rights of the plaintiffs in the damage suits against all other defendants.

**FORMA PAUPERIS CASES**

The decisions of the past term which did the greatest amount of damage to the new procedural code were those in *State ex rel. Clark v. Hillebrandt*. Both held that, as a result of the adoption of the new code, a litigant in a forma pauperis case had been deprived of his former right to the compulsory attendance of witnesses at the trial without prepayment of their fees and expense allowances. The majority of both appellate courts saw in the failure of article 5185 of the Code of Civil Procedure to retain expressly the word “witnesses” of its source provision a clear legislative intent to withdraw this privilege from impoverished litigants. Presiding Judge Tate of the intermediate appellate court (who had not participated in the original de-


162. Because it deprived the employer, who was only secondarily liable, of his right to enforce indemnity against the employee, who was primarily liable. In this connection, see the discussion of the somewhat analogous case of *McKnight v. State*, supra p. 303.

cision) dissented from the refusal of his court to grant a re-
hearing; and Mr. Justice Sanders dissented from the decision
of the Supreme Court. Both able dissents pointed to the official
comments of the redactors indicating that no change of the law
on this point was intended, and to other language in the new
code which showed a legislative intent to continue to accord
this privilege to impoverished litigants.

Previously in construing the former R.S. 13:4525, the Su-
preme Court had held that in *forma pauperis* cases the fees,
mileage, and expenses of witnesses had to be advanced by the
police jury of the parish where the case was to be tried.164 How-
ever, one change made in the new procedural code had the effect
of increasing this burden on the governing bodies of the various
parishes. Under the prior law, a witness could not be compelled
to testify personally in court if he lived out of the parish and
more than one hundred miles from the courthouse.165 Under the
new code, any witness residing or employed in the state can be
compelled to testify personally in court in any parish.166 This
change may possibly have been a factor in these decisions.

The original *forma pauperis* act was quite prolix; and be-
cause of this and its numerous amendments, it was replete with
redundancy and repetition. Some of this was eliminated in the
statutory revision of 1950; but further editorial work was neces-
sary to integrate its provisions into the Code of Civil Procedure.
One of the editorial changes so made was the deletion of the
word "witnesses" which, in both the original act and its statu-
tory revision, had been sandwiched in in the enumeration of
public officers, where it stuck out like a sore thumb.

The word "witnesses" was deleted by the code redactors on
the theory that it was definitely included in other language of
the pertinent articles. It is true that article 1353, enunciating
the general rule, provided that "no subpoena shall issue until
the party who wishes to subpoena the witness first deposits
with the clerk of court a sum of money sufficient to pay all fees
and expenses to which the witness is entitled by law." But the
special rule applicable to *forma pauperis* cases is couched in
broad and all-inclusive language in article 5181:

No. 23, § 1. See also La. R.S. 13:3671 (1950), as amended by La. Acts 1962,
No. 69, § 1.
"A person who is unable to pay the costs of court, because of his poverty and lack of means, may prosecute or defend a judicial proceeding . . . in any trial or appellate court without paying the costs in advance, or as they accrue, or furnishing security therefor." (Emphasis added.)

Article 5185 expressly provides that the party permitted to litigate without the prepayment of costs is entitled to the "issuance and service of subpoenas." It also expressly includes certain services about which there otherwise might be some doubt as to whether they would be included in "costs of court," such as the services of a notary or other public officer in issuing certificates and certifying copies of notarial acts and public records. But there can't be the slightest doubt that witness fees and expense allowances are included in this term. Yet two appellate courts of Louisiana saw in the deletion of the repetitious word "witnesses" a clear legislative intent to withdraw from impoverished litigants their right to the free use of witnesses which they have enjoyed for a half-century. This is the strict construction which courts usually reserve for criminal statutes; and certainly not the liberal interpretation which the code itself calls for.167

The rule of the Hillebrandt cases presents no particularly acute problem, as its legislative reversal will be a simple matter. The real threat posed by these decisions is a judicial attitude which regards the deletion of a single word, or any editorial change of language, as necessarily indicating a clear legislative intent to change the law. This makes the task of legislative revision both difficult and dangerous.

CRIMINAL PROCEDURE

Dale E. Bennett*

COURT'S JURISDICTION UNAFFECTED BY ILLEGAL ARREST

In State v. Green1 a defendant prosecuted for unlawful sale of narcotics urged the ingenious argument, by a motion to quash

167. "The articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law, and are not an end in themselves." LA. CODE OF CIVIL PROCEDURE art. 5051 (1960).

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1. 244 La. 80, 150 So. 2d 571 (1963).