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mature" recordation is "at worst, a relative nullity. . .cured"[36] by the defendant's failure to appeal suspensively. The use of *City Electric* as a precedent was particularly surprising since that case was not concerned with recordation of a judgment but rather dealt with the filing of a garnishment petition, clearly a step taken in execution of the judgment.[37]

Thus, the court in *Hillebrandt* came full circle in its analysis that had begun by treating substantive Civil Code rights differently from Code of Civil Procedure rules involving execution. By distinguishing the previous cases on their facts and by relying upon *City Electric*, the court fell into the trap of looking to the procedural rule for judgment execution, rather than the articles of the Civil Code creating mortgage rights which are the proper tools for the resolution of the issue.

In the important area of property rights, the great need for certainty can best be fulfilled by a return to the *Chaffe* court's interpretation of the legislative intent. The recordation of a judicial mortgage is not an act in execution of the judgment; rather, recordation establishes a substantive right granted by the Civil Code that should remain in effect unless cancellation is warranted by a reversal of the judgment.[38] The debtor is amply protected because there can be no seizure and sale of his property until the judgment becomes final and executory. Accordingly, recordation should be considered effective if accomplished at any time following the trial court's rendition of judgment, regardless of whether an appeal is taken.

Stephen K. Peters

ADVISORY OPINIONS AND THE REQUISITES OF JUSTICIABILITY IN LOUISIANA COURTS

The concept of justiciability has traditionally been thought to

36. Associates Financial Serv. Co. v. Hillebrandt, 250 So. 2d 75, 79 (La. App. 3d Cir. 1971).

37. *Kimber-Murphy Mfg. Co. v. Vestal, Inc.*, 43 So. 2d 508 (La. App. 2d Cir. 1949) also blurred the distinction between recordation and execution of a judgment in dicta which incorrectly analogized a premature seizure by a judgment creditor, truly an act in execution of the judgment, to recordation of a non-executory judgment. The *Hillebrandt* court disposed of *Kimber-Murphy* as well as *Charlton, Cluseau* and *Denny* as involving "*execution* of judgments, with which we are *not concerned* herein." 250 So. 2d at 79.

38. LA. CIV. CODE art. 3381 provides for erasure of the inscription of a judgment which is later reversed on appeal.

embody two separate but closely related requirements. One, addressing the nature and form of the controversy, is that the case be appropriate for judicial resolution. Accordingly, courts have generally required that parties be adverse and that the case present genuine issues concerning actual questions of law.[1] The other requirement arises out of the doctrine of separation of powers and prohibits courts from sitting as forums for controversies that are constitutionally allocated to the other branches of government.[2]

The rendition of an advisory opinion trenches upon both of these requirements. First, the matter before the court may not be sufficiently concrete for adjudication.[3] Further, an advisory opinion addresses issues in advance of a dispute and declares what the law will be in the future, thereby usurping a legislative function.[4]

1. *See* Louisiana Independent Auto Dealers Ass'n v. State, 295 So. 2d 796, 801 (La. 1974); Petition of Sewerage and Water Bd., 248 La. 169, 175, 177 So. 2d 276, 278 (1965); State v. Board of Supervisors, 228 La. 951, 955, 84 So. 2d 597, 600 (1955). The requirement of truly adverse parties, however, is not a universal rule. *See* LA. CODE CIV. P. arts. 2881 and 3031 authorizing non-adversary proceedings in matters of probate jurisdiction under express authority granted in La. Const. art. VII, § 35 (1921).

2. *See* First Municipality v. Pease, 2 La. Ann. 538, 543 (1847): "The judicial action is put forth in favor of absolute, positive legal rights . . . [which] must be separated by a distinct line of demarcation from those which are subject to the action of other branches of government, the interference of which must be avoided." *See also* State v. Vallery, 212 La. 1095, 34 So. 2d 329 (1948); Durrett Hdwe & Furn. Co. v. City of Monroe, 199 La. 329, 5 So. 2d 911 (1942); State *ex rel.* Cruse v. LaSalle Parish School Bd., 35 So. 2d 608 (La. App. 2d Cir. 1948); State *ex rel.* Pleasant v. Hardy, 157 So. 130 (La. App. 2d Cir. 1934).

3. Louisiana courts have long looked with disfavor upon rendition of advisory opinions. At no time was this inclination more evident than shortly after the passage of the Uniform Declaratory Judgments Act. *See* LA. CODE CIV. P. arts. 1871-83. One disputed issue was whether the act authorized the judiciary to render opinions on hypothetical or academic questions which previously would have been deemed too abstract for judicial resolution. In *State v. Board of Supervisors*, 228 La. 951, 955, 84 So. 2d 597, 599 (1955), the Louisiana supreme court stated: "The Uniform Declaratory Judgments Act has not the magical effect of changing the . . . basic tenants [of justiciability]. In truth, to contrive the statute as extending jurisdiction to the courts to validate legislative actions or otherwise render advisory opinions would effect an unconstitutional enlargement of the grant of judicial power which is restricted to real controversies." *See also* Abbott v. Parker, 259 La. 279, 249 So. 2d 908 (1971); Stoddard v. City of New Orleans, 246 La. 417, 165 So. 2d 9 (1964); Orleans Parish School Bd. v. City of New Orleans, 238 La. 748, 116 So. 2d 509 (1959); Graham v. Congregation of St. Rita Roman Catholic Church, 146 So. 2d 666 (La. App. 4th Cir. 1962); Guerriero v. City of Monroe, 136 So. 2d 305 (La. App. 2d Cir. 1961).

4. *See* Stoddard v. City of New Orleans, 246 La. 417, 165 So. 2d 9 (1964); State v. Board of Supervisors, 228 La. 951, 84 So. 2d 597 (1955). *See also In re* Gulf Oxygen Welders' Supply Profit Sharing Plan & Trust Agreement, 297 So. 2d 663, 672 (La. 1974) (Summers, J., dissenting).

The Louisiana supreme court, in *In re Gulf Oxygen Welders' Supply Profit Sharing Plan and Trust Agreement*,[5] recently reevaluated these concepts of justiciability, and may have forged a new and different pattern for future adjudication. The trustee of a profit sharing trust applied to the district court, under authority granted in the trust code,[6] for an interpretation of his responsibilities under the trust instrument. The district court dismissed the suit on the ground that the statute authorizing the trustee's application unconstitutionally required the court to render an advisory opinion. On appeal, the supreme court reversed, holding that the statute in question did not require actions prohibited by the Louisiana constitution of 1921.

Before *In re Gulf*, Louisiana courts had taken the position that "[c]ourts of justice are to decide real contests; they are never to be used as instruments to work injustice, wound the feelings or affect the interests of others, through the intervention of fictitious or uninterested parties."[7] In establishing the requisites for such "real contests," the courts had insisted that cases present issues which were not moot, abstract, or hypothetical[8] and that no issues be judicially considered before they had materialized.[9] Accordingly, advisory opinions were forbidden as contrary to traditional notions of justiciability[10] and as violative of provisions of the 1921 constitution which were interpreted by the courts as incorporating the prohibition against rendition of advisory opinions.[11]

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5. 297 So. 2d 663 (La. 1974).

6. The trust code provision under consideration was LA. R. S. 9:2233(B) (Supp. 1964) which provides: "A trustee may apply for instructions in ex parte proceedings. The order issued therein will protect a third party relying on the order, but will not exonerate a trustee from liability to a settlor or beneficiary."

7. Livingston v. D'Orgenoy, 1 Mart. (O.S.) 87, 95 (La. 1810). *See also* Duffy v. City of New Orleans, 49 La. Ann. 114, 21 So. 179 (1896); State *ex rel.* Howard v. Burbank, 22 La. Ann. 298 (1870).

8. *See* Aucoin v. Dunn, 255 La. 823, 233 So. 2d 530 (1970); State v. Board of Supervisors, 228 La. 951, 84 So. 2d 597 (1955); Jung v. Gwin, 174 La. 111, 139 So. 774 *cert. denied*, 286 U.S. 561 (1932); State *ex rel.* Howard v. Burbank, 22 La. Ann. 298 (1870); Highland Lumber & Supply Co. v. Young, 38 So. 2d 638 (La. App. 2d Cir. 1949); Ramsey v. Fontenot, 36 So. 2d 861 (La. App. 1st Cir. 1948); City of Alexandria v. Wilks, 18 So. 2d 341 (La. App. 2d Cir. 1944).

9. Abbott v. Parker, 259 La. 279, 249 So. 2d 908 (1971); State v. Board of Supervisors, 228 La. 951, 84 So. 2d 597 (1955); Tugwell v. Members of Bd. of Hwys., 228 La. 662, 83 So. 2d 893 (1955); Kelley v. Kelley, 185 La. 185, 168 So. 769 (1936); Duffy v. City of New Orleans, 49 La. Ann. 114, 21 So. 179 (1896).

10. Aucoin v. Dunn, 255 La. 823, 233 So. 2d 530 (1970); Petition of Sewerage & Water Bd., 248 La. 169, 177 So. 2d 276 (1965); Hirt v. City of New Orleans, 225 La. 589, 73 So. 2d 471 (1954); Pettingill v. Hills, Inc., 199 La. 557, 6 So. 2d 660 (1942); *In re* Westwego Moss Co., 196 La. 168, 198 So. 893 (1940).

11. La. Const. art. VII, § 3 (1921) provided: "No function shall ever be attached

The courts further recognized that even if sufficient adverseness existed and a genuine controversy was present, the issue might still be non-justiciable if it involved a political question, *i.e.*, a matter which should be resolved by the executive[12] or legislative[13] branch of government. Conversely, the courts required that neither of the co-ordinate branches of government be allowed to encroach upon matters of judicial prerogative.[14] The 1921 constitution provided that courts could perform only judicial functions,[15] and pursuant to this mandate, Louisiana courts had invalidated statutes authorizing judges to perform duties of a non-judicial nature.[16]

In the instant case, the Louisiana supreme court concluded that the procedure authorized by the trust code provision effectively placed before the court a civil matter appropriate for judicial resolution and sufficiently non-political to satisfy the requisites of justiciability.[17] In considering the validity of the trust code provision, the

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to any court of record, or to judges thereof, except such as are judicial . . . ." Section 35 of the same article provided that district courts "shall have original jurisdiction in all civil matters regardless of the amount in dispute." The courts traditionally read the provisions as requiring the existence of a dispute, in the sense that adverse parties with opposing claims ripe for judicial determination were considered essential to the courts' exercise of general jurisdiction. *See* Louisiana Independent Auto Dealers Ass'n v. State, 295 So. 2d 796 (La. 1974); State v. Board of Supervisors, 228 La. 951, 84 So. 2d 597 (1955).

Whether article VII, § 35 actually required a "dispute" in such a traditional sense is a matter of constitutional interpretation. The provision could have been construed to extend jurisdiction to *all civil matters* with the phrase "regardless of the amount in dispute" being interpreted, not as mandating a dispute in civil matters, but merely as a specification that no minimum jurisdictional amount was to be imposed.

12. *See Nicholson v. Thompson*, 5 Rob. 367 (La. 1843), where the court determined that it was in the discretion of the governor, not the courts, to determine who to appoint to the offices of Master and Warden of the Port of New Orleans.

13. *See Staring v. Grace*, 97 So. 2d 669 (La. App. 1st Cir. 1957) declaring that if the statute in question was constitutional, the courts could not refuse to apply it merely because application in the instant case appeared harsh. The court stressed that only the legislature had the authority to decide which laws were most desirable or equitable. *Id.* at 674.

14. *See* Arkansas Oak Flooring Co. v. United Mine Workers, 227 La. 1109, 81 So. 2d 413 (1955), *rev'd on other grounds*, 351 U.S. 62 (1956); *Ex parte* Steckler, 179 La. 410, 154 So. 41 (1934), *appeal dismissed*, 292 U.S. 610 (1934); State *ex rel.* Parish Bd. of Health v. Police Jury of Calcasieu Parish, 161 La. 1, 108 So. 104 (1926).

15. La. Const. art. VII, § 3 (1921), cited at note 11, *supra*.

16. *See State ex rel. O'Donnell v. Houston*, 40 La. Ann. 598, 4 So. 482 (1888) declaring a statute authorizing judges to act in the capacity of commissioners unconstitutional under article 92 of the 1879 constitution. *See also In re* Southern Cotton Oil Co., 148 La. 69, 86 So. 656 (1920).

17. *In re* Gulf Oxygen Welders' Supply Profit Sharing Plan and Trust Agreement, 297 So. 2d 633, 666 (La. 1974).

court applied the principle of state constitutional interpretation that, absent a particular constitutional prohibition limiting the legislature's power to act, legislative enactments may not be invalidated on state constitutional grounds.[18] Since the majority found no constitutional provision which barred trust suits of the nature authorized by the statute, the provision was upheld.[19]

It seems clear, however, that *In re Gulf* did not raise a "genuine controversy" as that concept had been previously interpreted.[20] The language of article VII, § 35 of the 1921 constitution which granted original jurisdiction to district courts in civil matters "regardless of the amount *in dispute*"[21] had previously been seized upon by the courts to impose the requirement that a dispute was essential to a valid exercise of general state court jurisdiction.[22] Embodied in this general requirement was the notion that disputes could only be raised by antagonistic parties in an adversary context.[23] However, *In re Gulf*, rather than presenting two adverse parties seeking the resolution of a genuine dispute, merely involved a trustee seeking the advice of the court on how to administer a trust.[24] Since there was no contest involving adversary parties, and hence no real dispute, it would seem that the court would have felt constrained to find a lack of jurisdiction if it had applied the traditional rule.

Additionally, the provision of the trust code, by requiring the judiciary to render advisory opinions, appears violative of article VII, § 3 of the 1921 constitution, which declared that courts are limited to the performance of judicial functions.[25] Compulsory rendition of

18. *See, e.g.*, Kane v. Louisiana Comm'n Governmental Ethics, 250 La. 855, 199 So. 2d 900 (1967); State v. Guidry, 247 La. 631, 173 So. 2d 192 (1965); State v. Macaluso, 235 La. 1019, 106 So. 2d 455 (1958); State *ex rel.* Labauve v. Michel, 121 La. 374, 46 So. 430 (1908).

19. 297 So. 2d at 665. The court stated that there must be a reasonable doubt as to the trustee's powers or duties before a suit may be instituted under the statute. *Id.* at 667. However, it is unclear whether the court viewed a suit authorized by the statute as a "dispute" within the meaning of article VII, § 35 of the 1921 constitution or whether the court, dispensing with the dispute requirement, broadly interpreted the constitutional provision as granting jurisdiction in all civil matters. The court did not stress the existence of a "dispute" and under the traditional view none seemed to exist. Perhaps the better view is that the majority has expansively read article VII, § 35 and is willing to hear "all civil matters" which it considers justiciable. *Id.*

20. *See* cases cited at note 11, *supra.*

21. (Emphasis added.) *See* text of constitutional provision at note 11, *supra.*

22. *See, e.g.*, State v. Board of Supervisors, 228 La. 951, 84 So. 2d 597 (1956); Baddock v. Louisiana State Dep't of Hwys., 142 So. 2d 448 (La. App. 1st Cir. 1962).

23. *See, e.g.*, Petition of Sewerage and Water Bd., 248 La. 169, 177 So. 2d 276 (1965); State v. Board of Supervisors, 228 La. 951, 84 So. 2d 597 (1955).

24. 297 So. 2d at 664.

25. *See* text of constitutional provision at note 11, *supra.*

advisory opinions may disorient the power division between the legislative and judicial branches and may invade the political realm of the legal process. Making law is the responsibility of the legislature, not the courts. The statute tends to blur the distinction and thrusts the courts into the role of lawmakers instead of guardians of the law.

In re Gulf thus appears to abandon the traditional requirements of justiciability which had barred rendition of advisory opinions. The majority opinion does not indicate the precise limits of the legislature's authority to extend court jurisdiction by statute, but its analysis suggests that any limitation must be at least implicit in the constitution. This approach has disturbing implications. Could the legislature, for example, require the court to determine the constitutionality of every statute passed by it in yearly session?[26] Such a result would certainly unduly enlarge the powers of the judiciary.

The majority in *In re Gulf*, however, appears to recognize that there should be limitations on the legislature's authority to expand judicial power. After finding the trust code provision constitutional, the court examined its purpose and observed that it was not intended to extend jurisdiction "to questions which may never arise or which may arise in the future but have not yet arisen, or as to matters resting within his [the trustee's] discretion."[27] Presumably the court would not have further examined the statutory provision if it had believed that all legislative requests for advisory opinions should be honored.

In re Gulf is probably best viewed in light of the 1974 constitution, which went into effect six months after the decision was rendered.[28] The new constitution omits the phrase, "regardless of the amount in dispute" and thus eliminates the possibility of the courts interpreting the constitution as requiring a "dispute" as a condition precedent to the exercise of jurisdiction.[29] Also, no provision expressly limits the role of the courts to performance of judicial functions.[30] Unhampered by the language of the 1921 constitution that led state

26. *See* Annot., 103 A.L.R. 1087 (1936) for a discussion of the power of state legislatures, absent express constitutional provisions, to authorize or require courts to render advisory opinions upon the request of the governor or of either house of the legislature.

27. 297 So. 2d at 667.

28. *In re Gulf* was decided on July 1, 1974. The new constitution went into effect at midnight December 31, 1974.

29. *See* LA. CONST. art. V, § 16 simply stating that: "Except as otherwise authorized by this constitution, a district court shall have original jurisdiction of all civil and criminal matters."

30. La. Const. art. VII, § 3 (1921) was not totally carried over into the 1974 constitution. *But cf.* LA. CONST. art. II, §§ 1 & 2 cited at note 32, *infra.*

courts to interpret that document as limiting their jurisdiction, the courts now appear to have new flexibility in determining the justiciability of issues before them.[31] However, it should be noted that the new constitution contains language which could serve as a source of constitutional limitation on the power of the courts, despite the absence of express prohibitions. The requirement that courts confine their activities to performance of traditional judicial functions could be implicitly derived from sections one and two of article II of the 1974 constitution which generally set out the division of power among the three branches of government.[32]

Under the new constitution, it would appear that Louisiana courts may no longer insist as a general requirement of jurisdiction that issues be presented in an adversary contest. Still, under the language of *In re Gulf*, the courts have retained the right to dismiss such questions as "may never arise" or "which may arise only at some future time."[33] Further, if the court is faced with a statute requiring it to rule on a matter which it considers inappropriate for judicial resolution, the court may rely on limitations implicit in the 1974 constitution to declare the act unconstitutional.

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CHILD CUSTODY: PATERNAL AUTHORITY V. WELFARE OF THE CHILD

During the existence of her marriage, Mrs. Wood filed a petition for habeas corpus in district court to recover the custody of her two-year-old daughter from the child's maternal grandparents. The court awarded custody to the grandparents based on the "best interest" of the child and its decision was affirmed by the Third Circuit Court of Appeal. On writs to the Louisiana supreme court, plaintiff argued that the district court was without jurisdiction to inquire into the

31. For instance, if a legislative body sought an advisory opinion, judges, following the criterion laid down in the instant case, could refuse to answer on the ground that the issue had not yet arisen, and was therefore not justiciable.

32. LA. CONST. art. II, §§ 1 & 2 provide: "The powers of government of the state are divided into three separate branches: legislative, executive, and judicial. Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." These provisions might well be authority for continued limitation of the court's power to the exercise of judicial functions, either as traditionally understood, or as re-defined in *In re Gulf*.

33. 297 So. 2d at 667.