The Work of the Louisiana Legislature for the 1977 Regular Session: A Student Symposium

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INTRODUCTION

The production of new law has reached such a state of the art that the output of the 1977 regular session of the legislature is unmatched by any session in the history of the state. Of the 2780 bills introduced during the session, 759 were signed into law by the governor and forty-five were vetoed.¹ Few areas of the Louisiana law were left untouched by those enactments. Despite the magnitude of this session’s activities, many additional major changes in the law may be expected before sine die adjournment of the next regular session if the committees charged with revision complete their assigned tasks during the interim.²

Unlike the 1976 regular session, in which the legislature labored under intensive pressure from the forces of labor and industry, there was no matter before this session to sustain the attention of either house for more than few days. The lack of overriding issues should not lull the practitioner into a false sense of security. Many significant changes were achieved that will affect the day-to-day practice of law. Most notably, the

¹ Figures are taken from disposition tables compiled by the Louisiana Legislative Council published in Resume, 1977 Louisiana Legislature iii. For a statistical breakdown of the legislature’s action, see the footnotes to this Introduction at note 7, infra.

² One of the most far reaching studies will be that undertaken by the committee assigned the task of developing an “equal management” system in the community property laws of the state under authority of Senate Concurrent Resolution No. 54, 1977 regular session. The task of considering the equal management system is assigned to Senate Committee on the Judiciary A and the House Committee on Civil Law and Procedure who are to be assisted by an advisory committee nominated by the deans of the law schools of the state and appointed by the President of the Senate and the Speaker of the House. See the Matrimonial Regimes section of this symposium, 38 LA. L. REV. 84 (1977), for a discussion of the debate over community property laws during the 1977 session.

long anticipated changes in the Civil Code, originally commissioned in the 1940's, have now begun to ease to fruition. The major work of revision in Book II of the Civil Code has been completed, the title of Things being the only casualty of the session. This Book should be completed by the end of the next session. A number of constitutional mandates were met

3. Civil Code Revision was assigned to the Louisiana Law Institute by Act 335 of 1948.
6. The defeat of House Bill 213 marks the first time in the history of the Louisiana Law Institute that a "book" bill, one proposing a major change in the law, has ever been defeated. See the property section of this symposium, 38 LA. L. REV. 62 (1977), for a discussion of the property revision and especially the rejection of House Bill 213.
7. These mandates will be discussed in the section on Louisiana Constitutional Law of the forthcoming symposium on the work of the Louisiana appellate courts for the 1976-77 session.

### DISPOSITION OF LEGISLATIVE INSTRUMENTS
#### 1976 REGULAR SESSION

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a) Data summarized in this table is taken from disposition tables compiled by the Louisiana Legislative Council and published in Resume, 1977 Louisiana Legislature, iii-v.
b) Joint Resolutions are instruments which propose amendments to the constitution. They follow the same processes as bills [LA. CONST. art. III § 15(A)]. They are also included in the total bill counts for both houses.
with legislation in the session and the process of executive reorganization stands nearly complete. 8 The legislative response to problems in the area of criminal justice has produced a new discovery law, 9 sentencing procedures, 10 a theft of crawfish law 11 and an enhanced punishment for those criminals who commit crimes of violence on senior citizens. 12

The analysis which follows in an attempt to put the work of the session in perspective, to analyze its impact on the day-to-day operation of the law and to suggest ways the legislation failed to address the problems it was meant to correct. Practitioners should also be alerted to problems being considered in interim by committees since it is expected that major legislation for the next session will be drafted as a result of their hearings and studies.

**ODD YEAR SESSIONS**

The Louisiana Constitution of 1974 abolished the 1921 Constitutional provisions providing for "fiscal sessions" in odd numbered years. 13 The only vestige of the prior system is the prohibition against the enactment of new or increased taxes in the regular session occurring in odd numbered years. 14 This system, which allows odd year special session consideration of tax increases, was criticized in the press as a violation of constitutional intent when as the 1977 regular session drew to a close the governor announced that he would call a special session to deal with the question of an increase in taxes. 15 The criticism is without a constitutional foundation

c) Resolutions do not require the signature of the governor but are forwarded to him for informational purposes.
d) Introductions include all bills and resolutions including bills and resolutions reported by substitute.
e) Approval of simple resolutions by house of origin constitutes final adoption.
f) All vetoes sustained either in session or by declaration of no necessity for a veto session as provided in La. Const. art. III, § 20(c).

14. LA. CONST. art. III, § 2(A) states in part: "No measure levying a new tax or increasing an existing tax shall be introduced or enacted during a regular session held in an odd-numbered year."
15. The 1977 regular session of the legislature adjourned sine die on July 11, 1977, and an extraordinary session was convened by the governor on August 7, 1977, under the authority of art. 3, § 2(B) for purposes enumerated in the proclamation of the governor.
since the prohibition is directed only at regular sessions. The rationale on which the section is postulated is that in a special session, even one following closely on the close of a regular session, both public and legislative attention would be focused on the narrow issue of taxes and related matters.\textsuperscript{16}

A number of revenue raising measures were considered in the regular session when various fees for services rendered by the state were raised.\textsuperscript{17} The increase in these service charges is clearly distinguishable from prohibited tax increases in that the matter considered is not a tax. One of the bills not subject to that type of analysis provided for the repeal of a tax credit granted by statute to those state industries who utilize natural gas in their production process.\textsuperscript{18} Some discussion prior to final passage of the bill centered on the application of Article VII, § 2 requiring a two-thirds vote of the elected members of each house before an “existing tax exemption” may be repealed.\textsuperscript{19} In the case of the natural gas tax credit, the issue was more properly approached under the provisions of Article VII, § 14(D) which provides, “... things of value of the state ... heretofore granted by prior state law ... shall so remain for the full term as provided ... unless the authorization is revoked by law enacted by two-thirds of the elected members of each house of the legislature prior to the vesting of any contractual rights ...”.\textsuperscript{20}

The function of that section of the new constitution was to validate practices existing at the time of the section’s adoption which would become invalid under the new charter.\textsuperscript{21} The existing tax credit fell within the scope of “grandfathered” provisions, because it may be properly construed as a credit or property or simply as a thing of value.\textsuperscript{22} Since the credit was granted validly under the 1921 constitution, it continued by its own terms until repealed by a two-thirds vote.\textsuperscript{23} The procedures utilized in implementing the tax credit were such that a serious question was presented regarding the constitutionally permissible effect date of the act.

\textsuperscript{19} LA. CONST. art. VII, § 2.
\textsuperscript{20} Id. art. VII, § 14 (D).
\textsuperscript{21} Id.; 9 Documents of the Louisiana Constitutional Convention of 1973 at 2888-91.
\textsuperscript{22} La. R.S. 47:7 (1972) (prior to 1977 amendment). The latest increase in the credit was created prior to the adoption of the 1974 constitution.
\textsuperscript{23} Id.
since there existed vested contractual rights in the credit for the current year. For this reason, the effective date of the act is January 1, 1978.24

Thus the Speaker of the House was correct in his ruling that final passage of the bill would require a two-thirds vote of the elected membership or seventy votes in the House of Representatives.25 In addition, the bill by its terms avoided the potential problems of violating the vested contractual obligations earlier granted in the natural gas tax credit act.26

A. Edward Hardin

PRIVATE LAW

PERSONS

SEPARATION, DIVORCE, AND ALIMONY

The 1977 regular legislative session produced several important pieces of legislation dealing with family law and related areas. Primary among these is Act 735 which adds, as a tenth ground for judicial separation, living apart for six months accompanied by the presence of irreconcilable differences.1 The enactment requires that both spouses execute an affidavit stating that they have voluntarily lived apart for the required period and that irreconcilable differences between them make the common life impossible.2


2. A separation judgment cannot be rendered solely on the basis of the required affidavit since it would amount to a mere summary judgment, prohibited in actions for divorce or separation. LA. CODE CIV. P. art. 969. The jurisprudence is unsettled as to whether a spouse’s testimony alone, though uncontroverted, supplies the “preponderance of evidence” necessary for issuance of a separation decree. Some cases indicate that corroboration is required: Harman v. McLeland, 16 La. 26 (1840); Ellois v. Ellois, 145 So. 2d 123 (La. App. 4th Cir. 1962). But see Rosen v. Rosen, 218 La. 245, 49 So. 2d 1 (1950); Chamblee v. Chamblee, 340 So. 2d 378 (La. App. 4th Cir. 1976); Seeling v. Seeling, 133 So. 2d 161 (La. App. 4th Cir. 1961). Since “fault” is not an issue (thus the problems engendered by the Fulmer case, discussed at notes 9-11, infra, are not present) and collusion is unlikely, it is suggested that the affidavit itself should be held sufficient corroboration of one spouse’s testimony for a separation judgment under Civil Code article 138(10).
This legislation is apparently designed to reduce the number of separation suits based on the defendant spouse’s fault. Under Civil Code article 138(9), the spouses must wait a full year after voluntarily separating before either can file suit and obtain a separation without proving the other’s fault. During this delay, the community of gains, generally tacitly contracted, remains in existence which may lead to uncertain and sometimes inequitable results upon final dissolution and division of the community. The husband retains legal authority and responsibility for any children of the marriage although the wife may have actual care and control of them. Also, until a suit for separation is filed, there can be no judicial determination of the amount of monetary support owed to the wife or children. Moreover, final divorce based on living apart for one year following judicial separation is delayed an additional year. Because of these delays, it is often more expedient for one spouse to seek an immediate separation based on fault even though both may actually prefer to avoid airing their grievances in a public forum.

Prior to the decision in Fulmer v. Fulmer, there was little reason for a defendant spouse to litigate the issue of fault in situations in which both spouses desired a separation. But Fulmer held that if the wife obtains a fault-based separation judgment, the husband is precluded from rearguing her pre-separation fault should she thereafter seek alimony after divorce. The spouse’s dilemma is obvious: he or she can allow judgment to be rendered in favor of the other, obtaining the desired separation but perhaps assurance (or forfeiting, if the wife is the defendant) the wife’s right to...
alimony; or he or she can avoid Mr. Fulmer's fate by showing his or her freedom from fault, thereby foregoing, in many cases, the immediate legal separation both may want. 11

Thus, *Fulmer* indirectly reduced the possibility of collusive separation judgments at the cost of increased litigation and the additional animosity, delay, and expense that it entails. Obviously, the combined result of the tendency to seek an immediate separation based on fault and of the *Fulmer* rule is contrary to the legislative policy favoring reconciliation. Act 735 should indeed induce more couples to wait the necessary delay to obtain a "no-fault" separation,12 thereby eliminating much of the litigation which *Fulmer* has spawned. However, a delay much shorter than six months would virtually assure the demise of suits based on fault,13 thus "eliminating the unseemliness of a public trial in which the parties hurl accusations...at one another,"14 and would not be fatal to the policy favoring reconciliation.15

11. Civil Code article 141 alleviates the problem to some extent by mandating that a separation be granted even when both spouses are shown to be guilty of legal fault. However, it is of no aid if the defendant spouse, spurred by *Fulmer*, disproves his own fault but is unable to place legal blame on the other. Furthermore, a mutual fault judgment, grounded on proof by each of the other's misconduct, hardly encourages reconciliation.

12. It can be argued that the requirement of an affidavit, signed by both spouses, attesting that "irreconcilable differences" exist between them implies that the separation is grounded on mutual fault. Support for this view might lie in the fact that Louisiana's other "no-fault" statutes merely require the spouses to live apart voluntarily for a time and require no showing that the marriage is irretrievably broken. See LA. CIV. CODE art. 138(9); LA. R.S. 9:301, 302 (1950). However, since the legislature has already provided for mutual fault separations in Civil Code article 141, this interpretation seems to render the new act superfluous. Furthermore, a wife who might be unsure of her need for alimony in the future would be unlikely to sign the affidavit since it would amount to a judicial confession of fault on her part and, presumably, *Fulmer* would apply.


15. The justification for any delay between actual separation and filing suit is the hope that the parties will "cool off" and reconcile during that time. However, as discussed in the text above, the long delay may actually influence one spouse to file for an immediate separation grounded on fault and lead to increased hostility between them. It is important to remember that a separation judgment does not dissolve the marriage and the parties are free to resume their life together if they so choose. Even the community property regime, which they probably contracted, can be easily reestablished. LA. CIV. CODE art. 155. It is suggested that the one-year
In Act 702 the legislature has finally repealed the requirement that the losing party in a separation suit wait one year and sixty days before filing for a divorce based on the prior judgment. If this Act is effective despite being in apparent conflict with Act 448, either party may now sue one year after the separation judgment becomes final. The old rule seemed to serve no valid purpose and the change should be welcomed.

**Child Custody**

Act 448 eliminates the language in Civil Code article 157 which required the custody of children after separation or divorce to be awarded to the prevailing party unless their "greater advantage" would be served by placing them with the other spouse. Although this language seems to establish a presumption, the courts have not treated it as such. Instead, they have consistently based the award on "the best interests of the child or children" (the same rule specified by Act 448), and have generally preferred the mother over the father. It can be argued that this amendment was intended to do away with the so-called "maternal preference" rule since it specifically directs that custody be granted to "the husband or the wife." However, the courts have made it clear that the rule of decision is the welfare of the child and the maternal preference is only an evidentiary presumption based upon traditional, if antiquated, notions that children are generally better cared for by their mother. Furthermore, if wait, generally necessary before filing a divorce action, furnishes ample time for the spouses to resolve their differences and sufficiently promotes the policy favoring reconciliation.


18. LA. CIV. CODE art. 157 (as it appeared prior to Act 448 of 1977).


22. See cases cited in note 19, supra. In order to forbid any presumption
the legislature was attempting to abolish the maternal preference rule, it is
difficult to explain why Civil Code article 146, which provides that
custody pending a separation or divorce suit should normally be given to
the mother, was not similarly amended.

The same Act also requires that custody hearings ancillary to divorce
or separation be heard by the judge in chambers. Although article 2595
(1950) of the Code of Civil Procedure indicates that summary proceedings
for original grants of custody or changes in custody may be heard in
chambers, custody hearings generally have been conducted in open court.
In an effort to comply with the intent if not the letter of the law, at least
one court has begun excluding all persons not directly involved in the
custody case being litigated from the courtroom.

Finally, Act 448 amends the last paragraph of Revised Statutes 9: 302
to conform with the change made in Civil Code article 157, but fails to
reduce the waiting period of one year and sixty days found in the statute’s
first paragraph. Thus it is in apparent conflict with Act 702 which
repealed the additional sixty day delay for the loser in a separation suit, but
did not alter the last paragraph as it appeared in the pre-1977 version.
This is an obvious legislative oversight and, logically, the courts should
give effect to both changes made in the prior law. There is also some
authority indicating that the Louisiana Law Institute may have a composite
printed as the new Revised Statute, and thereby implement the changes
made by both Acts. In any case, it is suggested that the conflict should be
legislatively resolved during the next regular session.

JURISDICTION TO ENFORCE SUPPORT DUTIES

Under an addition to the “long-arm” statute, Louisiana’s courts may
now exercise personal jurisdiction over non-residents to enforce duties of
support owed to children, spouses, and former spouses who are domiciled in Louisiana. The cause of action must arise out of the support obligation and the defendant must have formerly resided in Louisiana with the person to whom support is owed.29 Martin v. Martin,30 which held that failure to pay support is not an offense as contemplated by the long-arm statute, is thus legislatively overruled. Since the statute requires seemingly sufficient "minimum contacts,"31 and the cause of action centers in an area in which the state has a manifest regulatory interest,32 it should withstand possible challenge as a violation of due process of law. In conjunction with Act 462,33 the new enactment should significantly increase the scope and availability of relief afforded persons in need of monetary support due from others.34

Louisiana's Uniform Reciprocal Enforcement of Support Act, providing another means to collect support from a non-resident, has been revised to conform with the latest version recommended by the National Conference of Commissioners on Uniform State Laws.35 Although some minor procedural changes have been made and many provisions have been rewritten and clarified, the new statute does not substantively differ from the prior version. Two new provisions worthy of note, however, require the prosecuting attorney to seek diligently to locate the obligor or his property within the state,36 and allow attorneys for the Department of

30. 250 So. 2d 491 (La. App. 3d Cir. 1971).
33. See text at note 38, infra.
34. Formerly, other than possible relief through the district attorney's office under the Uniform Reciprocal Support Enforcement Act, LA. R.S. 13:1641-98 (Supp. 1977), a Louisiana resident could enforce a duty of support owed to him by a nonresident only by suing him in another state or, in two other limited instances, by suit in a Louisiana court. If a Louisiana court has previously obtained personal jurisdiction over the defendant for purposes of determining his support obligations to the plaintiff, that same court retains "continuing jurisdiction" to change a previous award or to render an executory judgment for arrearages. Imperial v. Hardy, 302 So. 2d 5 (La. 1974); Anthony v. Anthony, 288 So. 2d 694 (La. App. 4th Cir. 1974). If the defendant owns property in Louisiana, quasi-in-rem jurisdiction may also be available. de Lavergne v. de Lavergne, 244 So. 2d 698 (La. App. 4th Cir.), writ refused, 258 La. 357, 246 So. 2d 680 (1971).
35. LA. R.S. 13:1641-98 (Supp 1966), as amended by 1977 La. Acts, No. 610. The Act generally provides that a verified petition for support or arrearages, when filed in this state, may be forwarded to the state where the obligor resides. A court of competent jurisdiction in this latter state may then render or enforce support decrees against the obligor under the substantive law of his state of residence.
Health and Human Resources to prosecute the action should the district attorney refuse or neglect to do so.\footnote{37}

Act 462 provides that the court may award attorney's fees when it renders an executory judgment for past-due child support or alimony.\footnote{38} House Bill 113, which also passed the legislature, but was vetoed by the governor, would have made the award mandatory.\footnote{39} The enacted version appears fairer since it allows the judge to consider any excuse for nonpayment that the defendant may be able to offer before condemning him to pay the plaintiff's legal fees. The new statute should have a threefold effect. First, it should make legal representation in suits for arrearages more readily available since an attorney will now be able to collect his fee from either the obligor or the obligee. Second, the obligee normally will not have to pay his attorney out of the arrearages collected, thus conserving funds he or she may desperately need. Finally, the fear of additional liability, beyond the support payments in arrears, may help prompt some recalcitrant obligors to comply with support decrees.

\textbf{ADOPTION}

Under Act 659,\footnote{40} after a child is adopted the original birth certificate and adoption decree are to be sealed in an envelope by the state registrar. The envelope can only be opened by court order, issued on its own motion or that of the adopted child, adoptive parents, or the registrar. Only compelling reasons can justify issuing such an order, and disclosure of the information may be made only to the extent necessary to satisfy those reasons.\footnote{41} Thus, the dictum in \textit{Spillman v. Parker}\footnote{42} which suggested that an adopted child had an unqualified right to see his original birth certificate is rejected by Act 659.\footnote{43} The Act also provides that the hearing on a motion to open the envelope must be held in chambers and that all records of the proceeding are to be sealed and kept strictly confidential.\footnote{44}

\footnotesize{\begin{itemize}
\item \footnote{37} LA. R.S. 13:1672C (Supp. 1977).
\item \footnote{41} LA. R.S. 40:81A (1950), \textit{as amended by} 1977 La. Acts, No. 659. It is not clear what is meant by "only to the extent necessary" to satisfy the compelling reasons for granting the order. Beyond the names of the adopted child's biological parents and their addresses and some personal data about them as of the time of his birth, there seems to be little else to learn from the original certificate or adoption decree.
\item \footnote{42} 332 So. 2d 573 (La. App. 4th Cir. 1976).
\item \footnote{43} \textit{Id.} at 576.
\item \footnote{44} LA. R.S. 40:81C (Supp. 1977).
\end{itemize}}
OTHER ACTS

Two other acts of this session affect family law. Act 192 allows a tutor to use certificates of deposit in state or federally chartered banks as security for faithful performance of his duties. Finally, the legislature has again reenacted Civil Code article 95 to validate all marriages, violative of its prohibitions, entered into prior to the effective date of this reenactment.

PROPERTY

Four bills containing revisions of Civil Code articles on property were introduced in the 1977 legislative session upon the recommendation of the Louisiana State Law Institute. House Bill 216, containing provisions on Predial Servitudes, was passed after several substantive changes were made; House Bills 214 and 215, containing provisions on Boundaries and on Building Restrictions, respectively, were passed with little modification; and House Bill 213, containing redefinitions of Things, was killed by the House Committee on Civil Law and Procedure. Revisions of complete titles of the Civil Code occur infrequently, and each proposed change or enacted provision requires a careful examination of the principles of Louisiana law which are affected.

PREDIAL SERVITUDES

The major work submitted to the legislature by the Louisiana State Law Institute during this session was House Bill 216, enacted as Act 514, a revision of Book II, Title IV on Predial Servitudes. The revision was


1. The legislature rejected the provisions of proposed articles 654, 660, 661, 662, 663, and 666, relative to the public use servitude (see text at note 11, infra), and the abuse of right theory (see text at note 26, infra). Instead, the legislature decided to retain present articles 665, 667, 668, 669 and 707, which cover these areas. This action made the article numbers of the remainder of the bill, which was passed, non-sequential and conflicting. The Louisiana State Law Institute, acting pursuant to the provisions of LA. R.S. 24:253, corrected this problem by retaining existing articles 665, 667, 668 and 669 with their respective article numbers, redesignating existing article 707 as 666, and redesignating proposed articles 664, 665.1, 667.1, 668.1, 669.1 and 707.1 as articles 660, 661, 662, 663, 664 and 707 respectively. This symposium will refer to articles as they were finally numbered, with the exception of articles which were rejected, which will retain their proposed numbers.
primarily to clarify the substance of the existing title, by replacing awkward or obscure language with more readable language to express succinctly the underlying principles of law.\textsuperscript{2} Articles which contained examples were eliminated and flexible language substituted.\textsuperscript{3} The Law Institute and the legislature are to be commended on this work, which brings the concepts of the law closer to the understanding of the citizenry, rather than leaving the law shrouded in the obscurity of archaic terms.

The revision did include substantive additions and changes. New article 670 contains provisions for buildings built in good faith which encroach on the land of another. While another article adequately deals with constructions built totally on the land of another,\textsuperscript{4} no provisions covered the situation where the building merely encroached upon the neighbor’s land.\textsuperscript{5} Article 670 allows the person who did not know that his construction was encroaching on neighboring property to acquire a predial servitude on the land on which he has encroached. However, the encroacher obtains the servitude only if the true owner did not complain of the encroachment before substantial completion of the construction and if the encroacher pays the full value of the servitude taken as well as any damages which the true owner has suffered.\textsuperscript{6} This article reflects an admirable balancing of the societal interests in protecting both the good faith builder and the true owner.

The new provisions of article 707 eliminate the troublesome and sometimes specious distinctions previously made between continuous and discontinuous servitudes,\textsuperscript{7} while retaining and clarifying the distinctions

\textsuperscript{2} For example, new article 646 replaces in two short sentences the ideas contained in former articles 646, 647, 648 and 649. The article provides, “A predial servitude is a charge on a servient estate for the benefit of a dominant estate. The two estates must belong to different owners.” This clarity of thought and succinctness of terminology is a great improvement on the comma-ridden articles on which the new article is based.

\textsuperscript{3} Article 662 combines the ideas found in former articles 692-95, and eliminates outmoded examples such as “necessaries,” while retaining the concept that a work built near another’s property should be built in such a way as not to injure the neighbor’s property. Other favorites of Code perusers, such as the servitude of drip, have been eliminated as terms, although the principles have been retained in a streamlined form. See \textit{La. Civ. Code} art. 664, \textit{as amended} by 1977 La. Acts, No. 514.

\textsuperscript{4} \textit{La. Civ. Code} art. 508.

\textsuperscript{5} In the early case of \textit{Gordon v. Fahrenberg & Penn}, 26 La. Ann. 366 (1874), the Louisiana Supreme Court was unable to find any law applicable to this area, and resorted to its equity powers under Civil Code article 21 for a solution.


\textsuperscript{7} For an illustration of the problems of this differentiation, see \textit{Nash v. Whitten}, 326 So. 2d 825 (La. 1976). \textit{See also} Yiannopoulos, \textit{Predial Servitudes;}
between apparent and nonapparent servitudes. The scheme for acquiring apparent servitudes by acquisitive prescription is systematized in articles 739 to 743 and the method of extinguishing these servitudes is found in articles 753 and 754. An important clarification is found in article 759 which provides, "A partial use of the servitude constitutes a use of the whole." This provision indicates that the servitude, apparent or not, on a tract of land may be preserved as long as any part of the servitude is used, and is consistent with both the jurisprudence in the area and the principle that servitudes are indivisible.

New article 716 abolishes the right of the grantee of a servitude from a co-owner to bring an action against the other co-owners to partition the property.

The major opposition faced by this bill stemmed from two major substantive changes, both of which were rejected by the legislature. The Law Institute proposed a new article 660, which would have replaced present article 665. The new article would have limited the servitude burdening riparian estates to the "making and repairing of levees," thus suppressing the language "roads, and other public or common works"
found in the existing article. The proposed limitation on the public's servitude raised significant questions of law and public policy.

Louisiana courts have guarded the public's right to use the shores of navigable rivers from early times. Early decisions enunciated the view that the servitude should be given the broadest construction, because "[t]he public is a great usufructuary...." Later cases have consistently held that riparian ownership is inherently subject to a broad public servitude for constructing levees, roads and other works such as wharves. The state or other public agency does not need to compensate

13. The proposed restrictions raised the question whether the legislature had the power to limit the existing servitude. Article VII, section 14 of the 1974 Louisiana Constitution provides, in part, that "things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private." The existing servitude is certainly a "thing of value" and the limitation of the servitude could be considered a donation to the class of riparian owners, who would stand to benefit, either by greater freedom in the use of their land or by compensation when their land was used for purposes other than levee construction. See note 20, infra. If this analysis is correct, however, the legislature would have no power to extinguish or modify the existing servitudes in favor of the public. The correctness of these propositions is not at issue; rather the argument is presented to illustrate the kind of fundamental legal and policy questions which develop when a Civil Code revision is attempted.

14. In Municipality No. 2 v. Orleans Cotton Press, 18 La. 122 (1841), the supreme court exhaustively reviewed Spanish, French and Roman law, and held that the riparians owned the batture, although the public had the right "to establish wharves and other conveniences which commerce may require." Id. at 228.

15. Pulley & Erwin v. Municipality No. 2, 18 La. 278, 285 (1841). The court also stated that the examples given in the Civil Code of public uses were merely illustrations, not restrictions, on the types of public use. The court stated, "They [the public] have the right to all the profit, utility, and advantages it [the batture] may produce, and can make works and improvements to increase revenues." Id. at 285.

16. In Delaune v. Board of Commissioners, 230 La. 117, 87 So. 2d 749 (1956), the court summarized:

It is the well-established law and jurisprudence of this State that a servitude in favor of the public is imposed upon the land adjacent to navigable rivers and streams for the purpose of constructing and repairing levees, roads and other public or common works.

It is equally well settled that land burdened with this servitude may be taken for the purpose of making or repairing public levees without compensation and that such appropriation violates neither Section 2 of Article I of our Constitution, forbidding the taking or damaging of private property except for public purposes and after just compensation is made... nor the due process clause of the 14th amendment of the Constitution of the United States for the reason that riparian ownership is subject to the superior right of the public to the space necessary for levees, roads and the like.

230 La. at 123-24, 87 So. 2d at 751 (authorities omitted). See also Jeanerette Lumber and Shingle Co. v. Board of Commissioners, 249 La. 508, 187 So. 2d 715 (1966);
the riparian owner when it exercises its rights under article 665, since the state is not expropriating or taking private property through the power of eminent domain. On the contrary, it is appropriating or using a legal right which has burdened and limited all riparian ownership since the earliest days of Louisiana and subject to which the present owner acquired his title.

The levee aspect of the servitude has been the most closely examined and litigated part of article 665. The United States Supreme Court has upheld the uncompensated levee servitude, finding that the process did not offend the fourteenth amendment. When the Louisiana Supreme Court was called upon to interpret article XVI, section 6 of the 1921 Constitution, requiring the riparian owner to be paid a sum not to exceed the assessed value for the previous year of land used for levee purposes, it held the payment to be "purely gratuitous" because the state already possessed the right to use the property without paying any compensation.

Board of Commissioners v. Baron, 236 La. 846, 109 So. 2d 441 (1959); Dickson v. Board of Commissioners, 210 La. 121, 26 So. 2d 474 (1946); Audubon Park Commission v. Board of Commissioners, 153 So. 2d 574 (La. App. 4th Cir. 1963). Other cases express the idea that the construction of public works is part of the police power of the state, and that no compensation is owed because the damage is "damnum absque injuria . . . ." Warriner v. Board of Commissioners, 132 La. 1098, 62 So. 157 (1913); Ruch v. City of New Orleans, 43 La. Ann. 275, 9 So. 473 (1891).


18. The Louisiana Supreme Court, in Ruch v. City of New Orleans, 43 La. Ann. 275, 280, 9 So. 473, 475 (1891), stated that "the riparian owner enjoys his property sub modo, i.e., subject to the right of the public to reserve enough space for levees, public roads, and the like. Over this space the front proprietor never acquires complete dominion. It never passes free of this reservation by a deed to a purchaser." This language has been quoted with approval by the United States Supreme Court in Eldridge v. Trezevant, 160 U.S. 452 (1895) and by later Louisiana Supreme Court decisions. Dickson v. Board of Commissioners, 210 La. 121, 26 So. 2d 474 (1946); Peart v. Meeker, 45 La. Ann. 421, 12 So. 490 (1893). See also Hathorn v. Board of Commissioners, 218 So. 2d 335 (La. App. 3d Cir.), writ refused, 253 La. 881, 220 So. 2d 461 (1969).


The general language of the article concerning other public or common works has not been the basis of comprehensive legislation or extensive litigation. The 1974 Constitution specifically classifies only levee use as appropriation and this provision may be interpreted to give the riparian owner the right to due process and just compensation when his land is used for public purposes such as wharves or docks.\(^{21}\)

No cases have been found which decided the merits of the issue of the state's free use of riparian estates for non-levee purposes,\(^{22}\) although the supreme court did hold in *Hebert v. T.L. James & Co.*,\(^ {23}\) that the servitude imposed by the Civil Code was "not intended to serve the public for any purpose other than that which is incident to the nature, navigable character, or use of the stream,"\(^ {24}\) and therefore did not grant the public the right to the free use of riparian lands for general road purposes. Other recent cases recognize that riparian owners are allowed to construct works on the shores or batture of navigable streams as long as the constructions do not seriously obstruct or prevent the public use of the river or banks.\(^ {25}\)

The problems presented by this proposal are primarily economic. If the public has no servitude on the riparian estate to build public works such as wharves without compensating the riparian owner, it can certainly acquire the necessary land by expropriation. The cost of compensating the riparian owner could be prohibitive if the expected revenue from a facility designed primarily to promote commerce were insufficient to warrant the acquisition. The riparian owner would stand to benefit, either because he would be paid full market value for land without a servitude burdening it,


\(^{22}\) The issue was presented in *City of New Orleans v. Board of Commissioners*, 148 So. 2d 782 (La. App. 4th Cir.), writ refused, 244 La. 204, 151 So. 2d 493 (1963), in which Judge Yarrut, in his concurring opinion, stated that, "The servitude claimed by the Dock Board to build wharves and docks over which it will have complete dominion and control, is equivalent to appropriation. In view of the lack of clear constitutional or statutory authority, or necessary implication, giving the Dock Board such paramount right, the Dock Board has no such right at this time." *Id.* at 788. However, this was merely a concurring opinion, and the issue was not reached in the majority opinion, which held that the property in question was not burdened by the article 665 servitude, because the servitude was extinguished by confusion when the state acquired ownership of the property. *Id.* at 786.

\(^{23}\) 224 La. 498, 70 So. 2d 102 (1953).

\(^{24}\) *Id.* at 508, 70 So. 2d at 106.

or because he would be in the desirable position of being able to develop his riparian estate for commercial purposes. The legislature rejected this policy change and chose instead to retain the existing servitude provisions.

The Louisiana State Law Institute also proposed a revision of the Civil Code articles regarding the relief available to those injured by the activities an owner has performed or is about to perform on his own land. The proposed system of regulation of an owner’s use of his land was based on the civilian concept of abuse of right, a doctrine recognized in Louisiana jurisprudence. The rejected articles contained provisions defining the abnormal use of property and the unreasonable use of an estate, as well as provisions for the protection of servitudes and prevention of unlawful activity through injunctive relief.

The principle that certain activities by an owner may constitute a violation of the obligations which the owner owes to his neighborhood has

26. This concept was first introduced into the jurisprudence by the Louisiana Supreme Court in *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206 (1919) and has been applied in several later cases. See *Cueto-Rua, Abuse of Rights*, 35 LA. L. REV. 965, 1004-13 (1975).

27. Proposed article 661:
   Abnormal use of property
   An act, activity, or work of a property owner that, under the circumstances existing when it is done, exceeds the normal exercise of the right of ownership constitutes an abuse of the right.
   An abuse of the right of ownership that may cause damage to another or deprive him of the enjoyment of his property subjects the property owner to civil responsibility.

28. Proposed article 662:
   Unreasonable use of estate
   An unreasonable use of an estate that causes damage to property or excessive discomfort to persons of normal sensibilities by the diffusion of smoke, dust, vapor, noise, heat, vibrations, odors, and the like, may be enjoined. Damages may be recovered without regard to defendant’s negligence.
   Whether the use of an estate is unreasonable is determined in light of the nature of the neighborhood, governmental regulations, local customs, and the attending circumstances.

29. Proposed article 654:
   Protection of Servitudes
   Predial servitudes may be protected by personal and real actions. They may also be protected by mandatory and prohibitory injunctions without regard to the limitations of Article 3601 of the Code of Civil Procedure.

30. Proposed article 663:
   Injunction
   Injunction lies when an act, activity, or work on property is prohibited by governmental regulations or local customs, or when there is clear and convincing evidence that Article 662 will be violated.
been accepted in Louisiana. Most opponents of the measures did not object to the principle; their opposition was to the principle's wide scope of application. One view was that the new provisions would enable any person to bring an action for damages or injunction, not just neighboring landowners. Current jurisprudence has already recognized that actions for injunctive relief may be brought by non-owners such as lessees or tenants, but has not recognized the right of all persons who have somehow been adversely affected to bring such actions.

The major opposition to the revision was based on the provisions for injunctive relief. Opponents pointed out that proposed article 663 would have provided for mandatory injunctions when any activity is prohibited by governmental regulation. Their feeling was that the language "governmental regulation" was entirely too broad, since many activities are potentially within the prohibitions of some local, state or federal regulation and litigation would necessarily occur to resolve the applicability of the governmental regulation to the activity. The delay would be costly and, in many cases, unnecessary. Essentially, the opponents felt that the language of the provisions was so broad as to allow injunctions which were no more than harassments.

31. In the recent case of *Dean v. Hercules, Inc.*, 328 So. 2d 69, 72 (La. 1976), the Louisiana Supreme Court held that "it is clear that the right of ownership is subject to limitations imposed by law." Excellent summaries of the jurisprudence in this area are found in Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Articles 667-669 and 2315 of the Civil Code*, 48 Tul. L. Rev. 195 (1974) and Yiannopoulos, *Violations of the Obligations of Vicinage: Remedies Under Articles 667 and 669*, 34 La. L. Rev. 475 (1974).

32. Opponents pointed out that proposed article 661 merely requires that the abuse of right may cause damage to another, and that the article does not require proof of damage to another property owner. However, the comments to article 661 indicate an intention that a property owner would bring the action, even though those introducing the revision conceded that the courts would probably be required to decide whether the action could be brought by any party who has been damaged. A policy decision to expand the class entitled to bring the action would reflect cognizance of the non-owner status of many citizens, whose right to a healthy and safe environment should not depend on their economic condition. However, since predial servitudes are by definition burdens on estates imposed on or in favor of the land itself, the desirable expansion of this right of action to non-landowners should be properly placed in another area of the Code, perhaps in the title on quasi-delicts.

33. A lessee was given injunctive relief in *Salter v. B.W.S. Corp.*, Inc., 290 So. 2d 821 (La. 1974). Note that in *Lombard v. Sewerage & Water Board*, 284 So. 2d 905 (La. 1973), the supreme court found that the activity which causes the injury need not necessarily be one performed by the owner. The court reasoned that the word "proprietor" as used in the Civil Code, was not merely a substitute for the word "owner." *But see id.* at 917-18 (Barham, J., concurring).

34. Tenants whose health and safety were threatened were given injunctive relief in *Robichaux v. Huppenbauer*, 258 La. 139, 245 So. 2d 385 (1971).
An exhaustive examination of the relief already available, either in the form of damages or injunction, under articles 667 and 669 exceeds the scope of this symposium.35 Moreover, the recent cases indicate that the law is far from settled.36 However, it is evident that the injunctive relief currently available37 is much harder to obtain than the relief that would have been available under the proposed articles. The legislature evidently decided that the harm of increased injunctive relief outweighed the benefits which would have been derived, and left the development of this increasingly important area to the courts and to future legislation.38

BOUNDARIES

Act 169 contains a revision of the Civil Code and Code of Civil Procedure articles relative to the boundary action.39 The language and


37. In Salter v. B.W.S. Corp., Inc., 290 So. 2d 821, 825 (La. 1974), the Louisiana Supreme Court stated, "We find the availability of injunctive relief in an action predicated on C.C. article 667 is controlled by C.C.P. 3601. C.C. 667 does not specifically provide for injunctive relief; thus an injunction is only available under this article upon a showing of irreparable injury." The court added in a footnote, "We expressly do not decide the circumstances under which an injunction will issue in cases involving interference with conventional servitudes or under a positive legal servitude, such as C.C. 665." Id. at 825 n.2. The court then referred to Poole v. Guste, 261 La. 1110, 262 So. 2d 339 (1972) in which an injunction was granted to prevent interference with a natural servitude of drain. Justice Barham's concurrence in Salter, presents the position that Civil Code article 667 is a positive legal servitude and that injunctive relief should be available to prevent interference thereunder. Id. at 825-27. In the recent case of Moreland v. Acadian Mobile Homes Park, Inc., 313 So. 2d 877, 884 (La. App. 2d Cir.), writ denied, 319 So. 2d 442, 443 (La. 1975), the Second Circuit Court of Appeal held that the power to grant an injunction to prevent the owner of a dominant estate from increasing the burden of drainage on a servient estate was discretionary, and that the trial court did not abuse its discretion by awarding damages rather than an injunction.

38. The important policy considerations present in this area necessitate careful legislative directives. The proposed articles may have contained ambiguities creating potentially inequitable results; however, the increasing awareness of the public's right to a satisfactory environment dictates that the legislature institute a more comprehensive method of achieving this end, rather than leaving the task to the piecemeal and often inconsistent approach of the judiciary.

39. Act 169 repealed Title VI, Of New Works, articles 856 through 869, of Book II of the Civil Code. The provisions of articles 861, 862 and 863, dealing with works
procedures of the former articles were cumbersome and caused problems when the courts insisted on strict conformity to all procedures. The revision was primarily one of clarification and codification of the existing law and jurisprudence. For example, a clear distinction is made between a boundary and a boundary marker, thereby eliminating the confusion resulting from the poor English translation of the French text of the Civil Code of 1825. A more complete definition of “fixing the boundary” is also provided.

Several substantive changes were made. Under the prior articles, a lessee had no right to bring a boundary action, but did have a right to compel his lessor to bring the action. The revision specifically limits the lessee’s right to demand that his lessor bring the action to situations in which the lessee’s rights are threatened. A boundary may now be fixed extrajudicially even if one of the owners is a minor or an interdict.

The procedure for extrajudicial boundary determinations is simplified; the adjacent owners, or those who possess as owners, merely sign an agreement describing the boundary between them. The agreement is an act translative of title, having the effect of a compromise, and serves

obstructing public places, navigable river beds or banks, buildings encroaching on public places and municipal construction of navigation facilities on public places, respectively, were to be transferred by House Bill 213 into the title on Things. When action was deferred on House Bill 213, an unwanted lacuna developed. Act 188 transferred the texts of these articles into La. R.S. 9:1111, 1112 and 1113 respectively, thus allowing their continued existence and facilitating the implementation of the Civil Code revisions expected next year. See 1977 La. Acts, No. 188, § 6.

For an example of this strict adherence to technicalities, see Alcus v. Elliser, 310 So. 2d 663 (La. App. 1st Cir. 1975). For a general discussion of the procedures formerly required, see Heck, Fixing Limits, and Surveying Land, 28 LA. L. REV. 625 (1968).

Compare the French and English versions of articles 822 and 828 of the Civil Code of 1825. The French word “bornes” corresponds to boundary markers, not to the boundary itself.


LA. CIV. CODE art. 823 (prior to 1977 revision).

LA. CIV. CODE art. 831 (prior to 1977 revision).

LA. CIV. CODE art. 787, as amended by 1977 La. Acts, No. 169. This article as amended conforms closely to the French text of article 827 of the Civil Code of 1825.

LA. CIV. CODE art. 789, as amended by 1977 La. Acts, No. 169. Since the boundary action necessarily affects the rights of the incompetent, the tutor or curator must obtain court authorization to participate in the boundary action.

Id. If one of the owners is the State of Louisiana, however, the provisions of La. R.S. 41:1131 still apply, since this statute was specifically excepted from the general repealing provisions of section 4 of Act 169.

to convey ownership to the parties up to the designated line.\textsuperscript{49} The boundary line may be specifically described in the agreement, or the parties may agree that a survey or placement of boundary markers shall constitute the boundary line.\textsuperscript{50} An action claiming error in the agreement may be brought unless the ten year liberative prescription has run.\textsuperscript{51} If the boundary markers have been erroneously placed by one of the contiguous owners alone, or not in accordance with a written agreement fixing the boundary, the error can be rectified unless a party has acquired ownership by thirty year acquisitive prescription.\textsuperscript{52}

If an action is brought to fix the boundary judicially, the court is given discretion to appoint a surveyor to determine the boundary "in accordance with the prevailing standards and practices of his profession indicating the respective contentions of the parties,"\textsuperscript{53} thus eliminating the formalities required in former articles 834 through 837. The judicial determination has the effect of res judicata and can be attacked only for fraud, and then only if an action is brought within one year of the judgment.\textsuperscript{54}

**Building Restrictions**

Act 170 contains new provisions regulating building restrictions.\textsuperscript{55} No similar articles were previously contained in the Civil Code;\textsuperscript{56} rather,

\begin{itemize}
\item \textsuperscript{49} LA. CIV. CODE art. 789, comment (c), \textit{as amended by} 1977 La. Acts, No. 169.
\item \textsuperscript{50} LA. CIV. CODE arts. 789, 795 and the comments thereunder, \textit{as amended by} 1977 La. Acts, No. 169. The principle is that the parties may describe the boundary line in whatever manner they wish. Problems may arise when the parties agree that a survey shall be the line, since "survey" may refer either to a survey description of the boundary or to the boundary markers placed by the surveyor. In any case of confusion of this sort, the intent of the parties is determinative.
\item \textsuperscript{51} LA. CIV. CODE art. 795, and comment thereunder, \textit{as amended by} 1977 La. Acts, No. 169.
\item \textsuperscript{52} LA. CIV. CODE arts. 795-96, and comments thereunder, \textit{as amended by} 1977 La. Acts, No. 169. It would seem that if the parties had agreed in writing that the placing of boundary markers, either by themselves or by a third party, should create the boundary between them, an action claiming error would be barred by the ten year prescription rather than the thirty year prescription.
\item \textsuperscript{53} LA. CODE CIV. P. art. 3692, \textit{added by} 1977 La. Acts, No. 169. This provision will become part of the Code of Civil Procedure rather than the Civil Code.
\item \textsuperscript{55} LA. CIV. CODE arts. 775-83, \textit{as amended by} 1977 La. Acts, No. 170. This act repealed Title V of Book II, articles 823-55, relative to fixing limits and surveying lands, and substitutes a new Title V, Building Restrictions.
\item \textsuperscript{56} Articles 856 through 869 of the present Civil Code do contain provisions
building restrictions were the product of jurisprudence. Fortunately, the jurisprudence was not consistent and the need for uniform law in this area was apparent. The new title presents a unified approach to the subject. Conceptually, building restrictions are recognized to be "real rights likened to predial servitudes." The rules of predial servitudes apply except where contrary to the nature of building restrictions. For example, a building restriction can impose an affirmative duty on an owner, while a predial servitude cannot. The title also contains the procedures required to establish, enforce, interpret and terminate building restrictions. The concepts underlying these procedures are not new, but the act serves the valuable function of systematizing the law in this increasingly important area.

THINGS

Action on House Bill 213, containing revisions of Book II, Title I of the Louisiana Civil Code, was deferred indefinitely by the House Committee on Civil Law and Procedure on May 16, 1977. The deferral was regulating new works; however, these articles do not contain principles broad enough to regulate the complex area generally known as building restrictions. LA. R.S. 9:5622 did contain some regulations in this area. This statute was repealed by Act 170 in order to ensure that the Civil Code provisions would be the authoritative and comprehensive source of regulation.

57. The leading case is Queensborough Land Co. v. Cazeaux, 137 La. 724, 64 So. (1915). For other cases and analysis, see A. Yiannopoulos, 2 Louisiana Civil Law Treatise, §§ 104, 114 & 124 (1966).
59. The area in question is limited to those building restrictions imposed by a subdivision developer or other individual wishing to restrict the subsequent use of real property. 1977 La. Acts, No. 306, contains the procedures to be followed by municipalities in creating restrictions via zoning regulations, including requirements for notice, creations of a board of adjustment and appeals procedures.
60. LA. CIV. CODE art. 777, as amended by 1977 LA. Acts, No. 170:
Building restrictions are incorporeal immovables and real rights likened to predial servitudes. They are regulated by application of the rules of predial servitudes to the extent that their application is compatible with the nature of building restrictions.
62. LA. CIV. CODE art. 651, as amended by 1977 LA. Acts, No. 514. This article corresponds to article 655 of the Civil Code of 1870.
63. LA. CIV. CODE art. 775, as amended by 1977 LA. Acts, No. 170.
64. LA. CIV. CODE art. 779, as amended by 1977 LA. Acts, No. 170.
67. At the same time, the committee set up an interim study committee to work with the Louisiana State Law Institute and other interested persons to solve the problems of the proposed revision. Another revision will probably be offered in the next regular session.
prompted primarily by opposition to the changes proposed by the Louisiana State Law Institute to articles 451, 455 and 457 of the present Civil Code, which define the seashore and the banks of navigable rivers.

The proposed replacement of article 451 provided that "seashore is the land between the mean low water stage and the mean high water stage of the sea." Accurate determination of any seashore involves many problems, and the determination of the seashore of Louisiana has already caused protracted litigation in both federal and state courts. Part of the difficulty results from the definition presently given that seashore is "that space of land, over which the waters of the sea spread in the highest water, during the winter season." This language was borrowed from Roman sources and referred to the Mediterranean Sea, which reaches its highest level in the winter. The highest level of the sea in Louisiana is reached during the summer, and thus the definition is not well suited to Louisiana. Nevertheless, Louisiana courts have chosen to follow the letter of the law rather than its spirit and have limited the seashore to the highest ordinary level in the winter, rather than the highest ordinary level during the higher summer level.

The revision would have corrected this problem but would also have created new ones. The term "stage" has a technical meaning and is customarily used to describe the height of riverwaters, not the level of the sea. By setting a lower boundary on the seashore, any existing public rights to use the sea bottom would have been restricted. The upper

69. A. SHALOWITZ, SHORE AND SEA BOUNDARIES 3-14 (1962).
71. See, e.g., A. K. Roy, Inc. v. Board of Commissioners, 238 La. 926, 117 So. 2d 60 (1960). For earlier cases dealing with the seashore see Buras v. Salinovich, 154 La. 495, 97 So. 748 (1923); Burns v. Crescent Gun & Rod Club, 116 La. 1038, 41 So. 249 (1906); Morgan v. Negodich, 40 La. Ann. 246, 3 So. 636 (1888).
73. Note, Seashore in Louisiana, 8 TUL. L. REV. 272, 274 (1934).
74. A. YIANNOPOULOS, 2 LOUISIANA CIVIL LAW TREATISE 28 (1967).
75. See cases cited in note 71, supra.
77. Although Civil Code article 450 provides that the sea is a common thing, "the ownership of which belongs to nobody in particular," the courts have indicated that the word "sea" refers to the waters of the Gulf of Mexico, rather than to its bottom or bed, with the result that the sea water was considered a common thing while the seabed was a public thing owned by the state of Louisiana. LA. R.S. 49:3 provides that the State of Louisiana owns the waters of the Gulf as well as the beds
boundary of the seashore would have been the *mean* high water mark, not the highest ordinary level, which might have led to an assertion of ownership by bordering landowners in some cases. Even though these problems could have been resolved by litigation, the committee felt that the better solution was to defer action and to allow more time for study and correction of the problems raised.

Even more difficulty was encountered with proposed article 456, providing that, "the banks of navigable rivers are private things subject to use for purposes that are incidental to navigation. The bank of a river is the land lying between the ordinary low and ordinary high stage of the river." This article would have replaced present articles 455 and 457. Since the

and shores which are within the boundaries of Louisiana. Professor Yiannopoulos states that the result of the jurisprudence and the law is that the sea, both waters and bottom, must be regarded as a public rather than a common thing. A. YIAN-

NPOULOS, 2 LOUISIANA CIVIL LAW TREATISE § 27 (1966). In *United States v. Louisiana*, 363 U.S. 1 (1960), the United States Supreme Court held that by the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C.A. §§ 1301-1315, the United States quitclaimed to the state of Louisiana the lands underlying the Gulf of Mexico within three geographical miles of its coast line, which is defined under the Act as "the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." The determination of the applicable baselines led to extended litigation, which finally ended in 1975. See *United States v. Louisiana*, 422 U.S. 13 (1975). The state owns this area within the three mile limit, and is forbidden to alienate it by the provisions of article 9, section 3 of the 1974 Louisiana Constitution. However, the question remains concerning what area of the seabottom is affected by the public use provision of article 452, which declares that the public has free use of the seashores. The proposed lower boundary of the seashore would clarify the limit of the public's right, since the right only applies to the seashore. This clarification would also terminate any contention that the public right to use the seabottom freely extends as far as the state boundaries. The seabottom below the boundary of the proposed article would have been subject exclusively to state control and regulation.

78. The proposed upper boundary of mean high water may or may not be the same as the existing boundary, depending on many factors. If the new boundary is below the existing boundary, the adjacent landowners would have a claim to the area of which the state has effectively renounced its ownership. If the new boundary is above the existing boundary, the adjacent landowners might claim that their property was being taken without compensation, in contravention of article 1, section 2 of the 1974 Louisiana Constitution. Additionally, the state would be required to compensate the landowners for public facilities, such as beaches, which were to be constructed in the area above the mean high water level, in order to comply with the above mentioned constitutional provision.

79. *L.A. CIV. CODE* art. 455:

The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to
present text of article 455 provides, in part, that the “use of the banks of navigable rivers or streams is public . . . .”, the proposed article would have limited existing public rights, unless the term “river” is inclusive of “streams.” The Civil Code differentiates the two terms and one recent supreme court decision also recognized a difference.

the trees which are planted there, to unload his vessels, to deposit his goods, to dry his nets, and the like.

Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands.

The banks of a river or stream are understood to be that which contains it in its ordinary state of high water; for the nature of the banks does not change, although for some cause they may be overflowed for a time.

Nevertheless on the borders of the Mississippi and other navigable streams, where there are levees, established according to law, the levees shall form the banks.

The term “banks” in the above article is a mistranslation from the French text of the Code of 1825. The ramifications of this mistranslation are discussed in note 100, infra.

80. LA. CIV. CODE art. 455. See note 79, supra, for the full text of article 455.
81. LA. CIV. CODE art. 509, for example, provides in part:

Other articles containing language distinguishing river and stream are articles 455, 457, 511, 512, 517, and 518. The French texts of articles 453 and 665 use the broad expression “rivieres navigable” or navigable streams to apply to the general propositions of public ownership and public use. An authoritative dictionary of French legal terminology, published at approximately the same time as the Civil Code of 1825, defines a “fleuve” or river as a large stream which has its mouth in the sea, and a “riviere” or stream as any body of water formed by springs or run-off rivulets, which flows through a naturally created bed. BIRET, VOCABULAIRE DES CINQ CODES, LIBRAIRIE TOURNACHON-MOLIN (Paris 1826). Streams are either navigable, floatable but non-navigable or neither floatable nor navigable. Streams discharge into rivers which discharge into the sea. Id.

82. In State v. Placid, 300 So. 2d 154 (La. 1974), on rehearing, the Louisiana Supreme Court examined the jurisprudence classifying certain bodies of water as lakes. The court noted that “[i]n State v. Erwin, supra, this Court was concerned with the classification of Calcasieu Lake in Cameron Parish as a lake, river or stream.” Id. at 173. The court also provided characteristics which were to be used in “stream classification.” Id. at 175.

Justice Barham, who dissented from the original opinion in the case, but joined the majority in the rehearing opinion, stated in his dissent, “it is of particular importance to note here that our words river and stream come from the French words fleuve and riviere. Fleuve is a river like the Mississippi, the Red, the Black, and the Atchafalaya. Streams are those smaller bodies of running water, which according to the French, carried some kind of flotation.” Id. at 170. This decision
though the comment to the proposed revision indicates that no such change was intended,\textsuperscript{83} comments are not the law and are not intended to be considered as part of the law.\textsuperscript{84} In addition, although the courts have constantly rejected the argument that the public use of banks under article 455 includes all purposes, they have consistently recognized that the use does include those purposes which are incident to both the nature and the navigable character of the waterway.\textsuperscript{85} The jurisprudence has never specified the purposes allowed under the article,\textsuperscript{86} but it is clear that the restrictive language of the proposal would have placed limitations on the existing rights of the public.\textsuperscript{87}

and the cases examined therein indicate to this writer that the courts do recognize a conceptual difference between lakes, rivers and streams, although the judicial categorizations of lakes and streams have been inconsistent. Stream is a broader, more inclusive category, containing all waterbodies that meet the "pertinent characteristics" test set out in \textit{State v. Placid}. \textit{Id.} at 175. The elimination of the general language "or streams" from present article 455 can only lead to the conclusion that proposed article 456 would have limited the scope of existing public rights. If the intent of the lawmakers is to preserve the status quo, while eliminating unnecessary wording, the law should retain the general category of streams and eliminate the more limited term river; otherwise the terminology of the Code will be subverted in a manner which could only restrict public rights.


\textsuperscript{84} LA. R.S. 1:13 (1950). Section 2 of House Bill 213 would have provided that "the Comments in this Act are not intended to be considered as part of the law and are not enacted into law by virtue of their inclusion in this Act."

\textsuperscript{85} Hebert v. T.L. James & Co., 224 La. 498, 70 So. 2d 102 (1953); Lyons v. Hinckley, 12 La. Ann. 655 (1856); Carrollton R.R. v. Winthrop, 5 La. Ann. 36 (1850); Parish of Jefferson v. Universal Fleeting Co., 234 So. 2d 88 (La. App. 4th Cir. 1970). Certain public uses of the banks of navigable streams, such as fishing, are cognizable as part of the nature of the stream. These uses would no longer be freely permitted unless the courts were able to find that fishing is incidental to navigation.

\textsuperscript{86} Professor Yiannopoulos states that the uses listed in article 455 are illustrative rather than exclusive. Yiannopoulos, \textit{The Public Use of the Banks of Navigable Rivers in Louisiana}, 31 LA. L. REV. 563, 571-74 (1971).

\textsuperscript{87} It may be that the public presently has no right to fish from the shore into the stream. Dictum in \textit{Warner v. Clarke}, 232 So. 2d 99 (La. App. 2d Cir.), \textit{writ refused}, 255 La. 918, 233 So. 2d 565 (1970) indicates that the public has no right to hunt or fish upon the land between the levees and the Mississippi River, and it is certain that trespass statutes such as LA. R.S. 14:63 have effectively denied landward access to many river banks. However, much sport fishing and commercial fishing, such as crawfishing, is done from boats, even though the nets or traps are placed on the area jurisprudentially defined as the banks. If the public's right to use the banks is limited to purposes incidental to navigation, these fishermen would face potential trespass charges if they attempted to use the banks for fishing, unless fishing is declared incidental to navigation. The difficulty in obtaining permission from riparian owners to use the banks as well as the difficulty of ascertaining the boundary between the ordinary low water mark and some other low water stage...
The proposed definition of the banks would have resolved long-standing problems. In the early case of *Morgan v. Livingston*, the Louisiana Supreme Court decided a case involving the ownership of the land known as the batture. No article corresponding to article 457 existed in the 1808 Civil Code and the language corresponding to present article 455 indicated that the riparian owner had ownership of the shore (rivage) of the river or stream, although his ownership was subject to the servitude for public use. The court, lacking a Civil Code definition, cited Roman and Spanish sources and stated that "the bank is that space which the water covers, when the river is highest in any season of the year." The court continued by pointing out that the bank is part of the river, the other parts being the bed and the water. However, the court did not delimit the bank from the bed. The redactors of the Projet of the Civil Code of 1825, including the same Livingston involved in the *Morgan* case, felt that a definition of the banks was necessary to ascertain the area burdened with the servitude of public use, and offered a definition consistent with the decision in *Morgan*. The legislature, however, expressly rejected the proposed definition and substituted the word "lits" or beds, thereby ensuring that the state, not the riparian owner, would own the land normally covered by the river or stream in its ordinary stage of high water. The banks would necessarily be located above the ordinary high

would seriously hamper the efforts of commercial fishermen, as well as the many sport fishermen, to fish in the streams of Louisiana.

88. 6 Mart.(O.S.) 19 (1819).
89. 3 LA. LEGAL ARCHIVES, pt. 1, at 259 (1940).
90. Id. at 257-59.
91. 6 Mart.(O.S.) at 229.
92. Id.
93. Flory, Edward Livingston's Place in Louisiana Law, 19 LA. HIST. Q. 32-49 (1936); W. HATCHER, EDWARD LIVINGSTON, JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT 139-89, 251 (1940). Hatcher notes that Livingston aroused the wrath of the citizenry of New Orleans by his batture activities, which led to his celebrated confrontation with Thomas Jefferson. Hatcher observes that the batture controversy probably caused Livingston to lose at least two public elections. Id. at 193, 229. One can only suppose that the Legislators were well aware of the public's view toward Livingston and perhaps political expediency was a consideration in their decision to reject the Projet wording, since the adoption of the bank terminology could have helped Livingston in his batture battles.
94. 1 LA. LEGAL ARCHIVES 36 (1940).
95. 1 LA. LEGAL ARCHIVES pt. 3, at 259 (1940).
96. LA. CIV. CODE art. 453 provides, in part:

Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation: of this kind are navigable rivers, seaports, roadsteads and harbors, highways and the beds of rivers, as long as the same are covered with water.
water line, which is consistent with the Code provisions97 regarding its use.98 Unfortunately, the English translation of the article used the word banks instead of the correct translation of beds, and later courts have followed this mistranslation, even though the supreme court has often held that where a discrepancy exists between the French and English texts of the Civil Code of 1825, the French text must be considered as controlling.99 The result has been that decisions such as State v. Richardson100

97. See note 79, supra.

98. The courts have always had difficulty in resolving the bed/bank problem because of the fluctuating nature of Louisiana streams. In the early case of Henderson v. Mayor, 3 La. 563 (1832), the court found that article 448 (now article 457) provided a definition of banks and levees as banks. The court stated that "[a]ccording to this definition, all the space between the levees and the natural banks of the river at low water, which in most places, is annually inundated at certain seasons of the year, must be alternately a part of the bed or a part of the bank, according to periodic changes, between the highest and lowest stages of the water." 101 Id. at 567.

This theory of ownership was perhaps feasible in the nineteenth century, and does solve many of the problems of fluctuation; however, the theory became unworkable when the discovery of oil in the twentieth century necessitated a determination of the surface ownership in order to determine the ownership of the minerals located below. It is clear that the early decisions favored the public's rights. In McKeen v. Kurfust, 10 La. Ann. 523 (1855), the court stated: "The appellants contend for too literal an interpretation when they say that the public have no servitude upon the shore above the ordinary high water line, which constitutes, strictly speaking, 'the bank!'" 102 Id. at 524.

The Court continued by finding that when the water is at the ordinary high stage, the public is not denied the right to deposit goods on the banks, which are under water, but can deposit them on the shore above the high water line. Other early cases such as Pulley & Erwin v. Municipality No. 2, 18 La. 278 (1841), and Bass v. State, 34 La. Ann. 494 (1882), contain language supporting the interpretation that the banks are the area which contain the river in its ordinary state of high water, although the cases do not delimit the beds from the banks. These decisions seem to favor the mistranslation of article 457 but the issues presented did not necessitate a holding that the riparian owned the land above the low water mark. The twentieth century cases which embraced this view are discussed in note 102, infra.

99. The supreme court stated in Phelps v. Reinach, 38 La. Ann. 547, 551 (1886) that "[i]t is well settled that when there exists a discrepancy between the English and French texts of the Code of 1825, the latter prevails." This principle was restated in the later case of Straus v. City of New Orleans, 166 La. 1037, 1051-52, 118 So. 125, 130-32 (1925). In the very recent case of Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976), the supreme court reexamined the language of a Civil Code provision and found that the French text and the concept contained therein expressed the law, not the English expression found in the 1825 or 1870 Code article. See also Note, 3 LA. L. REV. 452 (1941). But see Yiannopoulos, The Public Use of the Banks of Navigable Rivers, 31 LA. L. REV. at 563, 569 n.36, for the suggestion that the mistranslation was intentional and designed to conform the text of the law to the
and *Wemple v. Eastham*\textsuperscript{101} have ensured that the riparian owner, not the state, would receive the mineral revenue from the area between the high and low water marks. The proposed revision would have dispelled doubts on the validity of the interpretation that the banks are the area between the mean high and mean low water marks by codifying the jurisprudence.\textsuperscript{102}

text of the Projet. The Louisiana Supreme Court adopted a similar view in *State v. Richardson*, 140 La. 329, 72 So. 984 (1916), when it rejected the argument that the French text of article 457 was controlling, because the English mistranslation was necessary to resolve difficulties in construing the term "bed" with the other provisions of the article. The court failed to explain what the difficulties were, nor why such difficulty should allow the court to take a position contrary to the clear wording of the controlling text. The court did cite the *Morgan* decision, but that case was decided before the article defining the bed (bank) was enacted. See text at note 91, *supra*.

\textsuperscript{100} 140 La. 329, 72 So. 984 (1916). The state of Louisiana claimed, as owner, the royalty revenues from the area below high water mark of a navigable river, relying in part on the language of the French text of article 455 (see text at note 95, *supra*). The supreme court rejected this argument in one sentence and then held that although the state of Louisiana had gained title to all the land below the highwater mark of navigable waters within the state when it entered the Union, the state had enacted laws which granted to riparian owners the banks of the rivers. 140 La. at 350, 72 So. at 991. No argument is made against this contention; however, the definition of the banks set forth in the subsequent decision of *Wemple v. Eastham* (see text at note 101, *infra*) and indirectly given in *State v. Richardson* was contrary to both the express law and the jurisprudence existing at the time. See text at note 102, *infra*. The effect of these decisions was to overrule jurisprudentially the legislative intent expressed in article 457. See text at note 94, *supra*.

\textsuperscript{101} 150 La. 247, 90 So. 637 (1922). The supreme court stated:

The bed of a navigable river—that is, the land which the state holds in her sovereign capacity—is only the land that is covered by the water at its ordinary low stage. The land lying between the edge of the water at its ordinary low stage and the line which the water reaches at its ordinary high stage—that is, the highest stage that it usually reaches at any season of the year—is called the bank of the stream, and belongs to the owner of the adjacent land, subject to the right of the public to use the bank, to land and unload boats, to dry nets, etc. 150 La. at 251, 90 So. at 638. This definition was followed in *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931).

\textsuperscript{102} Serious doubts exist as to the correctness of the present jurisprudence. Federal law clearly holds that the bed of a river extends to the high water mark. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). However, the United States Supreme Court, in the recent decision of *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 97 S. Ct. 582, 587 (1977), stated, """[a]lthough federal law may fix the initial boundary between fast lands and the riverbed at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission, and is not subject to later defeasance by operation of any doctrine of federal common law."" This decision leaves the determination of riparian rights entirely up to the states, and overrules the prior holding of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).
Even though the committee felt that the problems contained in the bill were too great to be corrected without major revision, no objection was made to some aspects of the bill. For example, proposed articles 462 to 471 would have abolished the confusing category of immovables by

The controlling French text of the Code of 1825 clearly defines the beds as the area up to the high water mark. See note 99, supra. Nineteenth century courts had difficulty in applying the Civil Code articles. See note 98, supra. In the early part of the twentieth century but before the discovery of oil, the Louisiana Supreme Court found in three cases that the high water mark was the delimitation between the bed and the banks of navigable rivers, and that the area below the high water mark was owned by the state, subject only to the rights of the riparian owner to claim the accretion which had built up on the bed sufficiently to be distinguishable above high water. Perry v. Board of Commissioners, 132 La. 415, 422, 61 So. 511, 513 (1913); Board of Commissioners v. Glassel, 120 La. 400, 405-06, 45 So. 370, 372 (1907); Minor's Heirs v. City of New Orleans, 115 La. 301, 311, 38 So. 999, 1003 (1905). These decisions, as well as the express legislative intent, were overruled jurisprudentially. See notes 100-01, supra. It should be noted that the jurisprudence holds that the bed of a lake extends to the high water mark, and that the state owns this bed. Miami Corp. v. State, 186 La. 784, 173 So. 315 (1936), cert. denied, 302 U.S. 700 (1937). Although lakes have a relatively stable water level, the analogy is important. In the recent case of Gulf Oil Corporation v. State Mineral Bd., 317 So. 2d 576 (La. 1975), the Louisiana Supreme Court decided a case involving the ownership of the bed of a navigable lake. The court stated that "it is readily apparent that the navigable water bottoms we consider were lands held by the State for the people and were not subject to alienation. There was no original authority to transfer title and therefore there could be no ratification of any attempt to create title in another . . . . Because of the equal footing doctrine, states subsequently admitted to the Union likewise acquired the beds of navigable waters, but only in the capacity of trustee for the interest of the people of the state." Id. at 588-89. The court held "that patents conveying state property to private individuals are ineffective insofar as they purport to alienate the beds of navigable waters, and that Act No. 62 of 1912 did not have the effect of ratifying such absolutely null transfers." Id. at 592. The court then expressly overruled prior decisions to the contrary. This holding is consistent with the decision of the United States Supreme Court in Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892), in which the Court decided that the legislature of Illinois did not have the power to cede its ownership to lands underlying Lake Michigan because the state only had dominion over the land in its capacity as trustee for the people of Illinois. Civil Code article 453 provides that the beds of navigable rivers are public things, as long as they are covered with water, and the controlling text of article 457 defines these beds in a manner consistent with the problem of fluctuating water levels of the river, since the beds are covered with water at least part of the year. The Gulf Oil Corporation rationale provides definitive support for the conclusion that the beds of the rivers, being beds of navigable waters, are owned by the people of Louisiana, and that the legislature, as trustee of the people, has never had the power to alienate this public property. Any attempt by the legislature or the courts to grant the ownership of the beds to a private person or class of persons is an absolute nullity, which cannot be cured by the passage of time. In this light, the holding of Wemple v. Eastham is incorrect, and the people of Louisiana own the land below the high water mark of navigable rivers and streams.
destination and substituted more precise and workable definitions of immovables and movables. The Law Institute is expected to propose another revision of this title in the next regular session of the legislature, and these same problems and policy issues will necessarily be raised.

SERVITUDES FOR NONPROFIT CORPORATIONS

Act 234 provides for the creation of a servitude which may be granted to a nonprofit corporation chartered for the "furtherance of educational, charitable or historical purposes." The servitude is not a predial servitude because it is not granted in favor of another estate; rather, it is a limited personal servitude. The grantor may grant the servitude on any immovable property or part thereof, and may include the right to "alter, improve, renovate, and maintain the immovable property." The right of access necessary for the exercise of the servitude is automatically a part of the grant. The grantor has the option of making the servitude binding on subsequent owners of the property, and, if he exercises this option, the servitude becomes extinguishable only by non-use, since the act specially provides for the transfer of the servitude to another similar nonprofit corporation if the original grantee is dissolved. This servitude allows the grantor to take advantage of Internal Revenue Service deductions for donations and provides a means to ensure the preservation of historical buildings.

104. 1977 La. Acts, No. 234, adding LA. R.S. 9:1252. The provisions were not added to the Civil Code; instead they were placed in title 9 of the Revised Statutes.
107. The act provides that the servitude will be transferred to another similar nonprofit corporation, to the State of Louisiana or to the parish or municipality in which the immovable property is located in the event that the original grantee is dissolved. 1977 La. Acts, No. 234, adding LA. R.S. 9:1252.
109. See 26 U.S.C. §§ 170(f)(3)(A), 2522(a)(2), 2522 (c)(2); 16 id. 1285 (1970). The new servitude is comparable to the common law easement of facade. The new law thus gives an incentive to landowners to participate in the socially beneficial practice of preserving buildings with historical value, even though the building itself need not be of such value as long as the non-profit corporation is established for the required purposes.
110. It is not necessary that the immovable property have any historical value for the servitude to be granted, as long as the grantee is a corporation meeting the required standards.
Act 489 amends Civil Code article 446 by adding procedures for the transfer of immovable property owned by nonprofit unincorporated associations. Article 446 already allowed unincorporated associations the right to own immovable property, but the jurisprudence made transfer extremely difficult.\textsuperscript{111} The new law removes the judicially imposed barriers, which had placed some immovable property out of commerce,\textsuperscript{112} by authorizing the transfer of such property by a resolution adopted by a majority of the association members present at a meeting called specifically for this purpose. Other provisions require notice of the meeting by publication on two separate days at least fifteen days prior to the date of the meeting.\textsuperscript{113} The resolution of transfer may designate an agent to effectuate the transfer of title.\textsuperscript{114}

\textsuperscript{111} The supreme court, in \textit{United Bhd. of Carpenters and Joiners of Am., Local No. 1846, Inc. v. Stephen Broadcasting Co.}, 214 La. 928, 938, 39 So. 2d 422, 425 (1949), held that an unincorporated association could only transfer immovable property “pursuant to charter, constitution, bylaws, rules or regulations, under which the association is organized and governed and exists . . . .” This rule was followed in \textit{Jennings v. Lester}, 76 So. 2d 91 (La. App. 2d Cir. 1954) and \textit{Rock Zion Baptist Church v. Johnson}, 47 So. 2d 397 (La. App. 1st Cir. 1950). The difficulty which arose was that many such associations were not organized under any charter or constitution, and even those that had a charter or constitution had no provisions regarding transfer of property. The result was that once an unincorporated association acquired real property, the property was often removed from commerce even if the association desired to transfer its title.

\textsuperscript{112} In the unusual case of \textit{Levy v. BonFouca Hunting Club}, 223 La. 832, 838, 67 So. 2d 96, 98 (1953), the court restated its position that “real estate belonging to an unincorporated association must be disposed of pursuant to a resolution duly adopted by the entire membership in accordance with its constitution and by-laws . . . .” (emphasis added) and that this rule did not apply when the association had no constitution or by-laws authorizing such a transfer. The court recognized that this rule often made transfer impossible since the association involved in the litigation, like many others, had no constitution, and that, even if it did, the requirement of authorization by all members would be unattainable in light of the realities of death and dispersion of the original membership. The court then allowed transfer of the immovable property, which had been in receivership for eighteen years, holding that “it was the duty of the court under its equity jurisdiction to authorize the sale of the property.” 223 La. at 838, 67 So. 2d at 99. It is certainly preferable to have specific law dealing with such situations, rather than relying on the courts to exercise their extraordinary equity powers.

\textsuperscript{113} The publication must be in the official journal of the parish in which a majority of the members reside, or in a newspaper of general circulation if there is no official journal. \textsc{La. Civ. Code} art. 446, \textit{as amended by} 1977 La. Acts, No. 489.

\textsuperscript{114} It should be noted that the provisions of Act No. 489 apply only to nonprofit unincorporated associations such as churches or hunting clubs. Presumably unincorporated associations for profit will have provisions for transfer of real property in their charter or constitution, or adopt some form of organization other than an unincorporated association.
RIGHTS OF WAY TO ENCLOSED LAND

Act 187 repealed the provisions of Revised Statutes 48:731, 732 and 733, which contained procedures to obtain a right of way to enclosed land. These statutes had been declared unconstitutional and the act does not affect the Civil Code articles relative to obtaining such a right of way.

MATRIMONIAL REGIMES

Only one act concerning matrimonial regimes was passed by the legislature in 1977, and its effect on the community of gains may be termed more apparent than real. Act 483 amends two articles of the Civil Code to state clearly that a judgment of divorce effects a dissolution of the community retroactive to the date on which the original petition in the action was filed. This enactment is a second attempt by the legislature to clarify this area of the law after the confusion caused by Tanner v. Tanner, a 1956 supreme court decision which declared the community of gains to be dissolved only as of the date of the rendition of a judgment of separation or divorce. Although arguments may be made that Act 483 was unnecessary, the intent of the legislature to eradicate any possible vestiges of Tanner is commendable.

115. In Brown v. Terry, 103 So. 2d 541, 543-46 (La. App. 1st Cir. 1958), the First Circuit Court of Appeal affirmed the trial court holding that these statutes violated the separation of powers doctrine by purporting to confer on police juries powers clearly reserved to the courts by section 1 of article VII of the 1921 Constitution. This decision was followed in Morgan v. Culpepper, 324 So. 2d 598 (La. App. 2d Cir. 1975).

116. The Civil Code articles on right of ways for enclosed lands are articles 699-703.

1. 1977 La. Acts, No. 483, amending LA. CIV. CODE arts. 155, 159. The amended version of article 159 follows the provisions of article 155 which limit the retroactive effect of the dissolution with respect to attorney’s fees and costs in the litigation and to rights validly acquired between the action’s commencement and the judgment’s recordation. On the vagaries of the last exception, see Louisiana Legislation of 1962: A Symposium—Civil Code and Related Legislation, 23 LA. L. REV. 41, 42 (1962).
3. 229 La. 399, 86 So. 2d 80 (1956).
5. Certainly one could argue that the language of article 159 prior to its
Although numerous bills were introduced to revise the Civil Code provisions on matrimonial regimes, action in this area was deferred until next year. However, two different schemes for revising the law came into focus during the session.

The first scheme would give to each of the spouses, _inter sese_, the right to manage community assets which are produced by his individual effort, skill, or industry. However, as between a spouse and third persons, each spouse would be entitled to administer, encumber, or alienate community immovables with the title in his name individually, any movables registered in his name, or any movables in his possession. Upon dissolution, each spouse would account for the community assets that were under his administration and would reimburse the other for any community property used to satisfy separate obligations. Each spouse could also renounce his interest in the community assets which had been under the other spouse's administration.

The second scheme emphasized a system of "equal management" of community assets. Under such a regime either spouse would have the authority to acquire and dispose of community assets, and his creditors could enforce their claims against his separate property and all community assets, even those which could not have been alienated without the consent of both spouses. Between the spouses, however, exceptions were made for certain acts which required the consent of both parties, such as the alienation, incumbrance, or lease of immovables or of movables registered in the names of both husband and wife. Both proposals would have permitted either spouse to give written authorization to the other to act alone for such matters. Renunciation of the community upon dissolution amendment incorporated the provisions of article 155: "The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board. . . ." LA. CIV. CODE art. 159. However, problems which could arise through a strict construction of article 155 were recognized in Comment, _Judicial Dissolution of the Marital Community in Louisiana_, 49 TUL. L. REV. 167, 175 (1974). The retroactive effect of the divorce judgment was also recognized by the Louisiana Supreme Court, albeit in dictum. Malone v. Malone, 229 La. 759, 763, 257 So. 2d 397, 398 (1972).

7. Id.
8. Id.
9. Id.
11. Id.
12. Id.
13. Id. However, House Bill 247 would have made such authorization revocable at any time, whereas House Bill 1278 would have made the authorization.
is not provided for under the equal management scheme and would appear theoretically impossible since both spouses would have participated in the management of the community assets. Although the legislature failed to enact any revision of Book III, Title VI, Senate Concurrent Resolution 54 demonstrates that the concept of equal management is in its ascendancy.\textsuperscript{14} This resolution requests the Senate Committee on Judiciary, section "A", and the House Committee on Civil Law and Procedure to establish a ten member subcommittee to draft a revision implementing the concept of equal management.\textsuperscript{15} In drafting its proposals, the subcommittee is to consider the equal management systems established in several western states\textsuperscript{16} "in order to profit by their experience and to incorporate into the proposed bill the basic concept of equal management common to these states."\textsuperscript{17} The subcommittee is to be aided by a six-member advisory committee composed of three men and three women,\textsuperscript{18} and must submit its proposed bill to the legislature at least two months before the beginning of the 1978 regular session.\textsuperscript{19}

SECURITY DEVICES

The most important legislation affecting the laws governing security devices is Act 251\textsuperscript{1} which regulates mortgages given on rural property. Rural property is defined as a tract of land, forty acres or larger, located in an unincorporated area, from which at least seventy-five percent of the income produced is derived from agricultural or livestock use or mineral production.\textsuperscript{2} The law provides for maximum limits on penalties assessable

\textsuperscript{15.} Id.
\textsuperscript{16.} Id. The resolution lists Arizona, California, Idaho, Nevada, New Mexico, and Washington.
\textsuperscript{17.} Id.
\textsuperscript{18.} Id. Two members are to be appointed by the president of the Louisiana State Bar Association, and four members will be selected by the Speaker of the House of Representatives and the President of the Senate from lists supplied to them by the deans of the state's law schools.
\textsuperscript{19.} Id.

\textsuperscript{2.} LA. R.S. 9:5321(2) (Supp. 1977).
should the mortgagor make a partial or full prepayment of the secured debt. However, the Act does not apply to mortgages securing loans made for consumer or agricultural purposes which do not exceed twenty-five thousand dollars in amount.  

Generally, the parties to a conventional mortgage can agree to prepayment penalties in any amount. Thus the purpose underlying Act 251 seems to be to facilitate repayment of secured debts by rural mortgagors as quickly as possible by eliminating overly burdensome prepayment penalties. Profits from farming, ranching, and mineral operations can fluctuate greatly and the new law will make it economically feasible to liquidate all or large parts of mortgaged debt during profitable years. This will free the property for use as security during less productive times when additional capital may be needed.  

Act 369 amends the statute which confers a privilege for the price of the parts installed or service performed upon automobiles or other machinery. The Act provides that if an estimated price for the work is given, the repairman must obtain authorization to exceed the estimate for the privilege to secure the difference between it and the final price. However, Civil Code article 3217(2), which gives an artisan a privilege on the thing repaired as long as it remains in his possession, was not similarly amended. Thus, in noncredit transactions, the repairman still has a privilege on the thing for the full amount of the price without obtaining authorization to exceed the estimate.

Act 253 extends the right to file a claim under the Public Works Act to architects or engineers employed by the owner and to consulting

5. See, e.g., id. 6:826C (1950).
6. 1977 La. Acts, No. 369, amending LA. R.S. 9:4501 (1950). Act 102 of 1976 provided that a written estimate must be given if repairs would exceed one hundred dollars in cost in order for the privilege to secure the portion of the price over that amount. Also, written authorization to exceed the estimate was required. However, the provisions of that Act were suspended until sixty days after the adjournment of the 1977 regular session and thus never became effective. 1976 La. Acts, La. H. Con. Res. No. 244.
7. It is not clear whether authorization to exceed an estimate was necessary under the prior version. But cf. Blanchard v. Donaldsonville Motors Co., 176 So. 669 (La. App. 1st Cir. 1937); Mahfouz v. Yawn, 31 So. 2d 295 (La. App. 2d Cir. 1947).
8. See, e.g., Thompson v. Warmack, 231 So. 2d 636 (La. App. 3d Cir. 1970). In addition, the “artisan’s privilege” conferred by the Civil Code does not prescribe in ninety days as does the statutory repairman’s privilege.
engineers hired by the general contractor or subcontractors.\textsuperscript{9} The Public Works Act confers a right of action against the general contractor or his surety for payment for materials furnished or work performed in the course of construction. The contractual defense of lack of privity is not available to the contractor or surety against those authorized to file under the statute.\textsuperscript{10} However, the amendment specifically provides that the architect or engineer hired by the owner is not protected by the surety bond and has no claim to any funds owed to the contractor or subcontractor by the owner.\textsuperscript{11} Thus, it is difficult to fathom what, if any, additional protection is actually given to these employees of the owner.\textsuperscript{12}

Act 311 provides that all judgments against individuals, in favor of the state, in a principal amount of $3,000 or less shall prescribe ten years from the date signed by the trial judge or rendered by an appellate court.\textsuperscript{13} In addition, the statute now provides that all liens or privileges in favor of the state, which secure claims of three thousand dollars or less, will prescribe in ten years or when the secured claim expires, whichever is shorter.

Several other Acts of the 1977 legislative session alter statutes dealing with secured transactions. Act 226 clarifies a statute, enacted last year, which regulates the designation of a keeper in the event of foreclosure on property subject to a conventional mortgage.\textsuperscript{14} The law now specifies that the owner must be named keeper of mortgaged buildings, containing four or fewer dwelling units, which he occupies as his home. Act 340 allows savings and loan associations to take their own shares or savings accounts in pledge as additional security for loans secured by immovable property.\textsuperscript{15} Under the new law, the association may set a minimum percentage of the loan amount which must be secured by the appraised value of the immovable and can secure the remainder of the loan with the pledged shares or savings.\textsuperscript{16} Act 65 provides that certified mail may be used to serve the owner with notice of a claim under the Private Works Act.\textsuperscript{17}

\textsuperscript{12} These employees already have a limited privilege on the construction project itself under LA. CIV. CODE art. 3249.
\textsuperscript{16} Prior to the 1977 amendment, the immovable property had to have an appraised value equal to, or exceeding, the loan amount. LA. R.S. 6:835 (1950) (as it appeared prior to Act 340 of 1977).
689 provides that service of notice on a savings and loan association, required at least ten days before petitioning for judicial sale of property mortgaged to the association, must be made by certified or registered mail.18

TRUSTS AND ESTATE PLANNING

THE MARITAL PORTION

Under the Louisiana Trust Code, the legitime of a forced heir may be placed in trust.1 Now, under similar provisions, the legislature has authorized that the marital portion of the surviving spouse in necessitous circumstances2 may also be placed in trust.3 The net income accruing to the surviving spouse must be paid at least once a year.4 The trust may place restrictions upon the alienation of the marital portion, and its term cannot exceed the life of the surviving spouse.5 The provision allows an unconditional income interest in trust, with income payable at least annually for the life of the beneficiary, to satisfy the marital portion to the same extent as would the full ownership out of trust. Upon termination of the portion of the trust that affects the marital portion, the principal must be delivered to the surviving spouse or his heirs.6 Similarly, the creation of a usufruct in trust or unconditional income in trust, without an interest in principal, payable at least annually for a term or for the life of the beneficiary satisfies the marital portion to the same extent as would a usufruct not in trust for the same term.7 Finally, a provision of a trust instrument that is incompatible with the provisions of the Act shall be reformed to comply with the Act.8 The new provisions will allow the trust, with its safety and convenience of management, to be used to satisfy the marital portion as well as the legitime.


5. Id.
FEDERAL ESTATE MARITAL DEDUCTION CLAUSES

The Tax Reform Act of 1976 increased the maximum marital deduction to the greater of $250,000 or fifty percent of the value of the adjusted gross estate qualifying as a transfer. Because the legislature realized that many testators, although using a formula clause, may not have intended to leave more than one-half the estate (the limit under prior law) to their spouses, the Act provided a three year transition rule. For decedents dying between January 1, 1977, and January 1, 1979, the increased estate tax marital deduction will not apply to transfers resulting from a will executed or a trust created before January 1, 1977 which contain a marital deduction formula clause unless the formula clause is amended after December 31, 1976 and before the decedent’s death and the state of decedent’s residence does not enact a law which would construe the formula clause as referring to the increased marital deduction as amended. Act 512 of 1977 provides that any maximum marital deduction clause contained in any testament, donation, or trust executed prior to January 1, 1977 is to be interpreted as referring to the marital deduction allowed by the Tax Reform Act of 1976. Thus, decedents who die between January 1, 1977 and January 1, 1979, and who executed wills, donations, or trusts prior to January 1, 1977, will have their formula bequests automatically revised. It is possible that the law will hurt some decedents due to the increased credit under the new law, or decedents who are no longer capable of altering their will or trust to take advantage of the new provisions because of mental or physical infirmities.

OTHER ISSUES

Act 526 defines “real estate investment trust” and provides that an entity which loses its federal tax status as such may retain its rights and duties as such a trust under state law.

There was an attempt in the legislature to exempt the annuities paid by the United States government to most retired federal civil service workers from Louisiana individual income taxes. Although House Bill

977 failed to pass in the session, the legislature did memorialize Congress to amend the Internal Revenue Code to exempt state retirement income received by retirees over the age of sixty-five years from federal income taxes.\textsuperscript{14}

The legislature refused to enact a provision for a "living will" which allows an individual to decide in advance whether he wants his life to be artificially prolonged by life support systems.\textsuperscript{15}

CORPORATIONS

Act 730\textsuperscript{1} adds yet another group to the ranks of those professions now able to do business in corporate form.\textsuperscript{2} Professional nursing corporations may now be organized by one or more natural persons if all are duly licensed to practice nursing in Louisiana. The new law limits the liability of shareholders for debts of the corporation but not for their individual negligent or wrongful conduct. As with other professional corporations, only common stock may be issued and officers and directors must be shareholders. The corporation must solely engage in the practice of nursing and can hold property only for that use or for investment.

Act 210\textsuperscript{3} significantly clarifies and perhaps broadens the exemption given to corporations, and partnerships with limited liability, from the state's usury law.\textsuperscript{4} The statute now provides that such entities, whether foreign or domestic, may agree to pay interest in excess of the legal


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4. LA. CIV. CODE art. 2924.
maximum and neither they nor any co-maker, guarantor, or endorser to the agreement may thereafter assert a claim or defense of usury. In addition, any partnership composed solely of corporations and/or limited partnerships is clearly exempted by the 1977 amendment. Although such a result might have been reached under the prior law, the clarification should make financing of high-risk ventures by such partnerships somewhat easier.

Act 139 prohibits the articles of incorporation or bylaws of a nonprofit corporation from requiring a higher percentage of the members' voting power to overrule a change in the bylaws made by the board than the percentage of directors necessary to effectuate that change. Although the directors may still be given the power to make, amend, or repeal bylaws, the percentage of members required to override any change can be no greater than that needed for the directors to exercise their power.

If the articles of incorporation or amendments thereto are acknowledged or executed by authentic act, they will be given retroactive effect to the date of acknowledgment or execution if timely filed with the Secretary of State's Office. Act 408 extends the delay allowable between acknowledgment or execution and filing to five days, exclusive of holidays, for amendments to the articles of both business and nonprofit corporations. The Act also changes the delay for filing the original articles of incorporation to five days for nonprofit corporations.

Medical corporations may now do business under any name they choose, provided the name is approved by the Secretary of State and clearly identifies the firm as a medical or professional corporation. The prior law required that the corporate name be the full or last name or names of a present or former shareholder or shareholders or predecessor partnership. Presumably the medical corporation now has as much freedom in choosing a name as a business corporation and is subject to the same limitations.

5. If the maker is exempt, usury may not be pleaded by the co-maker, guarantor, or endorser, whether or not it is, itself, an exempt entity. L.A. R.S. 12:703 (1950), as amended by 1977 La. Acts, No. 210.
FINANCIAL INSTITUTIONS

Substantial changes in the laws governing state chartered credit unions were made by the enactment of Act 165. The maximum par value of a share in the credit union has been raised to twenty-five dollars. More flexibility has been provided for payment of dividends to shareholders and interest on accounts by allowing the credit union to establish different types of shares and accounts and to vary the amount and frequency of payments to each type. The Act also raises from $8,000 to $15,000 the maximum amount which can be lent to a single member and extends the maximum term to eight years. First mortgage real estate loans can now be made in amounts up to $45,000. Finally, executors, tutors, public officials, and other fiduciaries are empowered to invest funds held by them in credit unions without obtaining court authorization. On the whole, Act 165 should serve to promote the growth of credit unions in the state by making them more competitive with other financial institutions.

Act 690 amends one of several confusing and inconsistent statutes governing the ability of a financial institution to deal with property of a decedent, minor, or interdict which is in its possession. Under present laws, a bank must transfer money or any other property deposited in the name of a deceased person, minor, or interdict, to a properly identified representative of the estate or incompetent (or an heir or heirs recognized as such in a judgment sending them into possession). Apparently the bank is conclusively immunized from any potential liability, either to the state for unpaid inheritance taxes or to adverse claimants of the property.

9. Id. 6:66 (1950), 66.1 (Supp. 1975), 66.2 (Supp. 1976); id. 47:2413 (1950). The fact that these statutes say the bank "may" transfer the funds does not mean that it may refuse to do so when demand is made by an heir or representative who furnishes the documents required by their provisions. Thorn v. Whitney Nat'l Bk., 326 So. 2d 606 (La. App. 4th Cir. 1976).
transferred,\textsuperscript{11} if the clerk of court has certified the copy of the judgment of possession or letters issued to the representative presented to the bank.\textsuperscript{12}

However, the situation is quite different if the depository is a savings and loan association. First of all, the association may release any of a decedent’s money or other property in its possession to a validly appointed succession representative or to heirs with a valid judgment of possession without potential inheritance tax liability.\textsuperscript{13} But Act 690, by deleting the reference to “money or other property” of the depositors which appeared in the pre-1977 version, seems to restrict the statute’s shield from potential liability of the association to adverse claimants, solely to transfers of the contents of safety deposit boxes.\textsuperscript{14} Furthermore, since the statute as amended expressly authorizes only the transfer of those contents, an argument can be made that a tutor or curator now needs a judgment of homologation, as well as his letters of appointment, to withdraw an incompetent’s funds from a savings and loan.\textsuperscript{15}

It is difficult to understand why it should be potentially more hazard-

\begin{itemize}
\item Transferring funds or other property to a successor representative or heirs sent into possession by a Louisiana court is exempt from inheritance tax liability.
\end{itemize}

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\item Cf. LA. CODE CIV. P. arts. 4270, 4554. Withdrawal of funds seems to qualify as a “change in the investment” of the incompetent’s funds. If so, absent express authority to the contrary conferred by statute, a judgment of homologation seems necessary. However, the heir’s judgment of possession and the succession representative’s letters would seem to entitle them to possession in any case. See LA. CODE CIV. P. arts. 3062, 3191, 3211.
\end{itemize}
ous for a savings and loan association to transfer property of a decedent, minor, or interdict than it is for a bank. The inconsistent provisions seem to be the result of piecemeal revisions made over the years in response to particular problems. Absent evidence that these complex, incongruous statutes are justified, the legislature should act to bring them into accord and clarify the law in this area.

Another significant Act of the past session gives the commissioner of financial institutions the power to issue "cease and desist" orders to state banks engaging in, or those which he reasonably believes are about to engage in, unsound or illegal banking practices.16 A notice, fixing the hearing date and relating the facts upon which the alleged violation is based, is to be mailed to the bank. A hearing is held and, if the evidence establishes a violation, the order may be issued. The bank may appeal the order to a review board and/or to the district court of the parish where the bank is located.

Act 201 requires that the bank itself obtain and maintain a fidelity bond covering each officer or employee who controls or handles bank funds before allowing him to begin work.17 The new law differs from the former version by allowing either individual, schedule, or blanket bonds to be used and placing the duty to obtain the bond on the bank rather than the individual officer or employee.18 Act 209 provides an exception to the bond requirement for banks which are members of mutual surety companies.19

Other legislation enacted in 1977 affecting financial institutions includes an Act which makes it clear that the state and its political subdivisions may invest public funds in savings and loan associations.20 Another Act defines a "target company" as any issuer of securities, domiciled or having its principal place of business in Louisiana, with assets in excess of fifteen million dollars.21 Finally, a semantic change has been made in Revised Statutes 6:766 to allow a depositor in a savings and loan full freedom to deal with an account standing in his own name.22

PUBLIC LAW

ADMINISTRATIVE LAW AND PROCEDURE

AGENCY ADMINISTRATION

One of the most significant bills affecting agency procedure was Senate Bill 244,¹ introduced to amend the Louisiana Administrative Procedures Act.² The bill proposed to strengthen the legislature’s control over administrative agencies by requiring legislative oversight committees to approve any rule changes proposed by the agencies.³ This would have been a great departure from the present law under which agency rule changes are viewed by the committees, but a committee report on the proposals is not dispositive and other elements of Louisiana society are heard in the rule making process.⁴ The bill passed both houses of the legislature but was vetoed by the governor.⁵

However, many other acts important to the internal administration of agencies were signed by the governor. Two acts have the effect of concentrating more power in the office of the legislative auditor and thereby centralizing more of the state’s auditing. Act 487 permits the auditor to examine the books of all quasi-public and private agencies which receive state funds.⁶ Act 485 increases the auditor’s duties by giving him new authority over the audits conducted by municipalities.⁷

Another important change in the state administration is brought about by Act 440 which alters the procedure for obtaining fund transfers within

⁵. Baton Rouge State-Times, July 29, 1977, at 1-B.
⁷. 1977 La. Acts, No. 485, amending La. R.S. 24:517(A) (Supp. 1976). Under the new law, the municipalities must submit copies of their annual audits and copies of audits and actuaries prepared for the audits of any municipal retirement system which obtains state funds. The auditor is authorized to establish guidelines for the certified public accountants in the preparation of these audits, and may also veto the audits submitted to him by the municipalities if they do not conform to these guidelines. However, the guidelines may not be inconsistent with the Municipal Audit and Accounting Guide.
an agency.\textsuperscript{8} Prior law provided that transfers of funds from one category to another had to be approved by either the governor or the commissioner of administration.\textsuperscript{9} The present enactment relieves the governor of this duty and allows the commissioner to approve unilaterally transfers which amount to $20,000 per month, but requires the commissioner to secure the Legislative Budget Committee's approval for any larger amounts.\textsuperscript{10} Transfers approved by both the commissioner and the committee are permitted only upon a showing that the unit's operations are or will be impaired without the transfer, but there is some question whether such a showing must be made to the commissioner if he alone may authorize the transaction.\textsuperscript{11} Funds appropriated for salaries may not be transferred.\textsuperscript{12}

The procedures for acquiring and disposing of state property were also altered in some respects by recent acts. The legislature banned the purchase or lease of luxury automobiles by the division of administration\textsuperscript{13} or any other state agencies in Act 511.\textsuperscript{14} The Act further forbids purchasing standard vehicles with luxury options as well as adding luxury equipment to vehicles already purchased.\textsuperscript{15} However, certain well established accessories or options such as automatic transmission, air conditioning, and power steering and brakes, are still allowed,\textsuperscript{16} and special exceptions

\begin{itemize}
\item\textsuperscript{9} La. R.S. 39:57 (Supp. 1956) (prior to the 1977 amendment).
\item\textsuperscript{10} Id., as amended by 1977 La. Acts, No. 440. The act also changes the allotment period from quarterly to monthly.
\item\textsuperscript{11} "[B]ut such transfers shall only be made when sufficient evidence is presented to both the commissioner of administration and the Legislative Budget Committee or its successor, by submitting the request and evidence of the need for the change to both parties at the time of the initial request indicating that the operations of the unit are being or will be impaired without such transfer. . . . provided, however, that the division of administration by unilateral action may approve . . . ." La. R.S. 39:57 (Supp. 1956), as amended by 1977 La. Acts, No. 440.
\item\textsuperscript{12} Id. Their transfer would be deemed unauthorized and would be charged against appropriations for the following year.
\item\textsuperscript{13} 1977 La. Acts, No. 511, adding La. R.S. 39:364. The division of administration had already been placed under a similar prohibition by Executive Order 76-8.
\item\textsuperscript{14} 1977 La. Acts, No. 511, adding La. R.S. 39:364. Luxury cars are defined as those vehicles weighing more than 4500 pounds, with a wheelbase over 121 inches in length, or a V-8 engine with a displacement of more than 360 cubic inches.
\item\textsuperscript{15} Id. Luxury equipment includes: automatic or electric powered seats, windows, antennas, and locks; automatic speed or cruise controls; sun-roofs; vinyl or hardtopped roofs; spoked or sportscar hubcaps; citizen band radios; dual or multi-colored exteriors; tilting or telescopic steering wheels; tape players; and stereo radios.
\item\textsuperscript{16} Id. State cars may also have AM-FM radios, tinted windows, and electric rear window defrosters.
\end{itemize}
are made for the governor, lieutenant governor, and law enforcement agencies. Handicapped state employees may also have special safety equipment in their vehicles. A related concern is expressed in Act 638 which provides that all passenger sedans purchased by the division of administration, with a few exceptions, must have mileage ratings of at least twenty miles per gallon according to the standards promulgated by the Environmental Protection Agency. Both Acts require the division of administration to buy American-made automobiles.

Act 599 removes the division of administration from the position of sole agent for selecting and purchasing data processing services and equipment. This responsibility is placed in the Data Processing Coordinating and Advisory Council, a body appointed by the governor and composed of representatives of six executive departments, the division of administration, and two state universities. The council has all the powers formerly exercised by the division of administration as well as new authority to develop long range plans for uses of data processing equipment and services by state agencies, and a corresponding duty to report to the legislature on the current state of data processing use by state agencies and to make recommendations for future utilizations.

A significant change in the acquisition of property and services by the state is made by the Small Business Procurement Act, Act 711 of the 1977 regular session. Under its terms, which supplement state contract laws and only supersede in cases of clear incompatibility, the commissioner of administration must designate up to ten percent of the value of all anticipated state procurements of goods and services as the amount to be awarded to small businesses each fiscal year. However, before a contract is granted the commissioner must determine whether the small business has the production capacity, financial ability, and technical competence to

17. *Id.*
19. *Id.* Exempted vehicles include those purchased for the Department of Public Safety, for major department heads of the executive branch, and for other persons approved by the Joint Legislative Budget Committee.
22. LA. R.S. 39:100 (Supp. 1972), as amended by 1977 La. Acts, No. 599. The six departments are: transportation and development; natural resources; revenue and taxation; public safety; labor; and health and human resources.
23. *Id.*
perform the desired task or supply the needed product.\(^\text{27}\) In the event that it
cannot perform the contract, the commissioner is required to set aside
additional state procurements of an equivalent value to be awarded to other
small businesses\(^\text{28}\) and must thereafter notify the commissioner of
economic development who is authorized to assist the small business in
correcting its deficiencies.\(^\text{29}\) The Act also requires that ten percent of these
awards be made to businesses conducted by socially or economically
deprived persons,\(^\text{30}\) as defined in rules to be promulgated by the commis-
sioner.\(^\text{31}\) The Louisiana Office of Minority Business Enterprise is created
to aid the commissioner in the Act’s administration and to evaluate the
program in annual reports to the governor and legislature,\(^\text{32}\) who must also
hear the commissioner’s report on the program’s financial aspects.\(^\text{33}\)

The disposal of surplus state property was also the subject of regula-
tion by the 1977 legislature. Act 494 authorizes the commissioner of
administration to sell at public auction surplus movable property belonging
to any commission, agency, board, or department of the state.\(^\text{34}\) To
conduct the sale, the commissioner may hire licensed auctioneers who are
to be compensated from its proceeds.\(^\text{35}\) Act 86 permits local school
boards, upon obtaining the approval of the Board of Elementary and
Secondary Education, to sell library books and textbooks which are no
longer in use to any citizen for twenty-five cents or less per book.\(^\text{36}\) These
enactments expedite the disposal of property which is not used and which
costs the state for storage.

**Claims Against the State**

Act 596 effects an important change in the way a small claimant can

\(^{27\text{ Id. 38:2229(B)-(C) (Supp. 1977).}}\)
\(^{28\text{ Id. 38:2229(E) (Supp. 1977).}}\)
\(^{29\text{ Id. 38:2230 (Supp. 1977).}}\)
\(^{30\text{ Id. 38:2229(D) (Supp. 1977).}}\)
\(^{31\text{ Id. 38:2231 (Supp. 1977).}}\)
\(^{32\text{ Id. 38:2230, 2232(B) (Supp. 1977).}}\)
\(^{33\text{ Id. 38:2232(A) (Supp. 1977).}}\) The Commissioner’s report must include the
total number and value of set-aside awards identified during the year, the number
actually awarded, the number awarded to businesses owned and operated by the
economically or socially disadvantaged, and the number of contracts earmarked for
small businesses which were awarded to other enterprises, including therein
the amount bid by the small business and the price at which the contract was awarded.

\(^{35\text{ Id.}}\)
\(^{36\text{ 1977 La. Acts, No. 86, adding LA. R.S. 17:8.1.}}\)

* See also the discussion of Act 596 in the Civil Procedure section of this
have his dispute settled with the state.\(^\text{37}\) Even after the abrogation of sovereign immunity by the Constitution of 1974,\(^\text{38}\) a person settling a claim with the state based on an alleged offense had to be paid from funds appropriated specifically by the legislature.\(^\text{39}\) Act 596 creates the Small Claims Fund in the Department of the Treasury as an aid to the expeditious settlement of claims against the state or its agencies for $2000 or less.\(^\text{40}\) Claimants must fill out forms prepared by the Attorney General\(^\text{41}\) and submit them to the affected state agency which then must investigate and report on any incident which could be the basis for a claim against the state.\(^\text{42}\) These reports are forwarded to the attorney general who must review and prepare a memorandum on each claim which shall include an opinion on liability and amount of damages.\(^\text{43}\) The acceptance of any settlement is binding on both parties unless the settlement has been procured by fraud.\(^\text{44}\) All monies paid in settlement of claims must be accounted for in an annual report made by the attorney general.\(^\text{45}\)

The Act only covers claims for $2000 or less and exempts the state from paying interest, court costs, costs incurred by the claimant in preparing and presenting the claim, punitive damages, and attorney fees.\(^\text{46}\) Moreover the Small Claims Fund may only compensate victims of certain classes of offenses; no claim based on property detention or interference with contract rights can be settled under these provisions, nor can a plaintiff receive damages for assault, battery, false imprisonment or arrest, slander, libel, misrepresentation, malicious prosecution, or abuse of process.\(^\text{47}\) The chief beneficiaries of this enactment may be claimants injured

\(^{38}\) LA. CONST. art. XII, § 10.
\(^{39}\) LA. R.S. 13:5109(B) (Supp. 1976): "Any judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid out of funds appropriated for that purpose by the legislature.
\(^{41}\) Id. 13:5146 (Supp. 1977). The claimant must supply his name, address, a description of the incident and the damages he sustained thereby, and the amount of damages he claims. The form must contain a bold print statement of the penalties for filing fraudulent claims or for making fraudulent statements. Id. 13:5157 (Supp. 1977) ($500 fine and/or six months imprisonment).
\(^{42}\) Id. 13:5146(B)-(C) (Supp. 1977).
\(^{43}\) Id. 13:5146(C) (Supp. 1977).
\(^{44}\) Id. 13:5148 (Supp. 1977).
\(^{45}\) Id. 13:5156 (Supp. 1977).
\(^{46}\) Id. 13:5149 (Supp. 1977).
\(^{47}\) Id. 13:5152 (Supp. 1977). Also exempted from the act's coverage are: claims arising from employees' acts and omissions if they were executing a law,
by a minor act of negligence on a state employee's part, who previously may not have gone to the trouble to file their suits because of the costs of courts and attorneys. 48

Act 704 may expedite the settlement of claims against the Department of Transportation and Development by giving the Department's general counsel the authority to settle claims for less than $1,000,000 without the concurrence of the attorney general. 49 This provision was evidently enacted in recognition of the frequent suits filed against the Department. 50 The Act, however, does not create a special fund to settle claims, and thus the claimant must still wait for an appropriation by the legislature. 51

PUBLIC MEETINGS

The 1977 amendments to the public meetings law may prove significant for the agencies covered by them. Act 707 52 was enacted to clarify some vague areas of the prior law by defining the terms "administrative conference" and "administrative session" 53 and by providing that such conferences and sessions cannot be closed to the public except for the same reasons that an ordinary meeting could be held behind closed doors. 54 The Act permits any public body to dispense with the written public notice of each meeting if the body is required by a bylaw, resolution, ordinance or statute to hold meetings at specified times, dates, and places; hereafter these bodies may give notice once a year of the provision which fixes the time, date and place of all meetings. 55 The Act also

rule, or regulation; claims based upon the exercise of or failure to exercise a discretionary function or duty; claims arising from a tax assessment or collection; claims arising from armed forces activities in times of crisis or natural disaster; claims by members of the state's armed services which are incident to their service; claims for which workmen's compensation benefits are available; and any claim predicated on a strict liability theory.

48. Of the fifty-eight bills introduced to appropriate money to satisfy judgments against the state or to settle claims, only eight were for amounts of $2000 or less. See 1977 La. Acts, Nos. 11, 13, 74, 80, 363, 432, 541, 584.
50. Twenty-one of the fifty-eight appropriations bills introduced to satisfy judgments or to settle claims involved the Department of Highways which was made part of the Department of Transportation and Development by the executive reorganization. See 1977 La. Acts, Nos. 1-3, 5-7, 9-13, 15, 17, 25, 28, 30, 31, 33, 79, 80, 374.
55. Id. 42.7 (Supp. 1976), as amended by 1977 La. Acts, No. 707.
changes the law by permitting the district attorney to enforce the open meeting provisions upon receiving a citizen complaint or on his own initiative. Formerly the district attorney could enforce these provisions only upon indictment by a grand jury.

**DUAL OFFICEHOLDING**

Although prohibitions against dual officeholding were not successful during the regular session, the extraordinary session produced an Act to define, regulate, and prohibit this practice. Act 24 prohibits any person from holding more than one elective office at the same time in federal, state, and local government. The attorney general, district attorneys, and private citizens are authorized to file civil suit for a declaratory judgment to determine whether someone is violating the terms of the Act. Upon finding a violation, the court must declare the office whose term expires first to be vacated and must enjoin the officer from exercising its duties and functions. The Act also requires that all compensation which was received for service in the vacated office in violation of the new law be returned unless the dual officeholder had obtained an opinion from the attorney general stating that the combination of offices did not violate the new law.

**PUBLIC HEALTH REGULATION**

One of the few important remaining functions of state government is to protect the health of its citizens. Several enactments of the 1977 regular session seek to improve the public health in Louisiana by increased regulation, new programs, or stricter licensing requirements for health care professionals. However, other considerations have become intermixed in the legislation bearing on public health, and the result has in some

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56. *Id.* 42:10 (Supp. 1976), as amended by 1977 La. Acts, No. 707. Citizens could always bring citizen suits under Revised Statutes 42:10. The present act adds the proviso that an unsuccessful plaintiff can be forced to pay court costs and reasonable attorney fees if his suit is deemed frivolous.

57. *Id.* 42:10 (Supp. 1976) (prior to the 1977 amendment).


59. *Id.*

60. *Id.*

61. *Id.* The opinion must have been issued prior to the suit for declaratory judgment.

62. *Id.*

* See also the discussion of medical legislation in the Consumer Protection section of this symposium, 38 LA. L. REV. 135, 138-41 (1977).
cases been a trade-off between health improvement and other desired goals.

Food regulation is one method of improving public health and has frequently been used in Louisiana. This year strawberries came under regulation by the creation of the Louisiana Strawberry Marketing Board. Under the new legislation the Board has the power to make rules and ordinances for the processing, marketing, distributing, and storing of the fruits, to establish state grades of strawberries, and to control classification, inspection, grading, and container marking. Yet there is some question whether the chief purpose of this regulation is to improve public health or to improve the financial position of Louisiana strawberry growers. Certainly the Board's composition could suggest that the well-being of consumers of strawberries is secondary, and that the chief aim may be to improve market conditions for Louisiana producers by setting standards too difficult or costly for new or non-resident growers to meet.

A similar conclusion could be drawn about the Louisiana Meat Industry Commission created by Act 351 The Commission's duties include advising the Commissioner of Agriculture, suggesting changes in policy to the state and federal agriculture departments, and hearing grievances about conditions in the meat industry and assisting in their settlement, although the Commission is given no adjudicative powers. The most interesting provision of the Act empowers the Commission to develop a method to assist in the administration of the state meat inspection

66. The Board is composed of eight members appointed by the governor, all of whom must be from Ascension, Livingston, and Tangipahoa parishes, and the Commissioner of Agriculture. The eight appointees must be four growers, the director of the Louisiana Strawberry Festival, one banker with knowledge of the strawberry industry, one person with a financial interest in the strawberry industry, and one consumer with knowledge of the strawberry industry. LA. R.S. 3:473 (Supp. 1974), as amended by 1977 La. Acts, No. 577.
67. A similar combination by the strawberry growers alone would perhaps violate anti-trust laws, but given state sanction the Board's acts are legal under the rule of Parker v. Brown, 317 U.S. 341 (1943).
program and to report to the legislature concerning this method. Since the Commission is clearly controlled by members of the meat industry, it is questionable whether its assistance in meat inspection would be beneficial to the health interests of all Louisiana.

Interest in public health was also overcome by a desire to maintain traditional methods of preparing certain foods. Acts 166 and 290 serve to exempt jambalaya and cochon de lait from the requirements of the state sanitary code and to permit their preparation in the traditional manner for public consumption. Act 166 specifically permits the use of iron pots, wood fires, and preparation in the open for jambalaya. Both acts, however, provide that they shall not be construed to permit the distribution or sale of any unwholesome food.

Public health can also be improved by providing programs for those in particular need of certain services, such as the program for hemophiliacs created in the Department of Health and Human Resources by Act 292. The program is designed to assist those persons suffering from hemophilia who cannot afford the costs of treatment on a continuing basis, even though they receive aid from various types of hospital coverages, Medicaid, Medicare, and other assistance programs administered by the government or private charities. The Act calls for extending financial assistance to hemophiliacs to obtain blood, blood derivatives, and blood concentrates as well as starting educational programs about hemophilia for schools, members of health professions, and the general public.

A similar enactment is the creation of health screening and maintenance programs for elderly persons by Act 654. The program, to be located in existing parish health units, is available to those over sixty.

70. Id.
71. The Commission's members are one cattle producer, one swine producer, one producer of cattle or swine, one auction market operator, two slaughterhouse operators, one meat processor who does not slaughter, one representative of banks and lending institutions, the Commissioner of Agriculture, and one consumer. LA. R.S. 3:712 (Supp. 1977).
73. Id.
74. Id.
76. Id.
77. Id. The act also authorizes the state to participate in the cost of blood processing if such assistance would facilitate supplying blood and blood concentrates and derivatives at an economical cost, thereby increasing the effectiveness of the appropriations for the program.
who either are eligible under Title XX of the Social Security Act or have gross incomes which are less than eighty percent of the median per capita income in Louisiana. All programs centers must have, at the minimum, a licensed physician and registered nurse, a social worker, a health educator, an outreach worker, and a clerical worker. The services furnished by the program fall into two categories: screening services which consist of interviews, physical examinations, nursing and social work evaluations, health education, conferences, referrals, and follow-ups; and diagnosis and referral services which include conferences after the initial physical examination to decide on the best care for the patient, follow-ups on each patient to discover whether additional care is necessary, and referrals to public or private hospitals if additional care is needed.

Legislation was also enacted to improve health care for pregnant women and their infants. Act 721 establishes the Commission on Perinatal Care, a body composed of twenty doctors, one non-voting administrator, two non-voting nurses, and a designee of the Department of Health and Human Resources. The Commission is charged with a large number of duties to advance perinatal care, such as developing standards for certifying obstetrical and neonatal units, creating a pregnancy risk identification system, and establishing regional transport systems for high risk mothers and newborns.

A third method to protect the health of the public is to license persons engaged in health care professions, a practice which Louisiana has frequently followed. Five acts passed in the regular session dealt with

80. Id. 46:162 (Supp. 1977).
81. Id. 46:163 (Supp. 1977). The social worker's duty is to interview the patient and his family, evaluate the patient's special needs, and assess the patient's and family's attitude toward further care. The health educator shall impart basic nutritional education to patients and impress upon them the importance of following the recommended care. The outreach worker is to recruit, train, and supervise volunteer outreach workers.
82. Id. 46:164 (Supp. 1977).
84. Id. Other responsibilities include identifying at an early stage of pregnancy patients with potentially handicapping disorders, developing new methods for patient education, and creating a public health data mechanism for coordinating and monitoring information on risk identification, birth-death linkage, and follow-ups in relation to a person's community of residence and pattern of health care delivery.
license requirements for health care professionals. Act 753 provides for
the certification of physician's trained assistants, a new category of
health personnel who are needed to meet shortages in skilled health care
cased by a growing maldistribution of health services in Louisiana. These assistants must take a program sponsored by a medical school and approved by the State Board of Medical Examiners. An assistant may only perform medical functions while under a doctor's supervision, may not dispense drugs, and may not exercise independent judgment except in emergency situations. Act 595 puts slightly more stringent requirements on the granting of reciprocity licenses to chiropractors who move to Louisiana from other states. Formerly a chiropractor was required only to be licensed by another state and to demonstrate that he had complied with the requirements for licensing in Louisiana to qualify for the reciprocity license. The new legislation permits a license to be granted to the new resident chiropractor only if he graduated prior to 1962 from a chiropractic college recognized by certain chiropractic associations and has practiced for more than ten years. In addition the new resident must be examined by the state board on x-ray procedures and chiropractic principles and practices.

Three acts deal with the causes for which the Louisiana Board of
Medical Examiners may suspend, revoke, or refuse to issue or renew a
doctor's license. Act 498 adds the stipulation that the Board can refuse to license a doctor on the grounds that the licensing authority of another state has in some manner restricted his practice in that state. Act 99, on the other hand, prevents the Board from suspending, revoking, or refusing to issue or renew a doctor's license if he prescribes or administers laetrile to a patient with cancer, provided the doctor informed the patient of the drug's present medical status and obtained the patient's consent in writing.

(89) Id. 37:1360.23 (Supp. 1977).
(93) Id.
(95) 1977 La. Acts, No. 99, adding LA. R.S. 37:1285.1, 40:676. See also the
discussion of this Act in the Consumer Protection section of this symposium, 38 LA. L. REV 135, 140-41 (1977).
99 to some degree demonstrates the influence of other considerations on health legislation; the availability of laetrile to cancer patients had become a rallying point for those who believe that freedom of choice in medical treatment is more important than protecting the public from palliatives which may discourage the use of proven remedies.

Act 525 most clearly demonstrates the interplay of political and philosophical considerations in health legislation. The Act declares that the Board of Medical Examiners may suspend, revoke, or refuse to issue a license to a physician or midwife for failing "to take such measures as may constitute good medical practice, necessary to encourage or sustain the life and health of an aborted viable infant, when the death of the infant results," or for "taking the life of a viable infant aborted alive." 96 This Act may cause all persons performing late abortions to consider after each operation whether the fetus could possibly survive in an artificial life support system, and the consequences of an error in judgment would be so severe that it seems almost certain that the effect of this enactment will be to deter abortion in Louisiana, as was almost assuredly one of the Act's purposes. While the unavailability of abortion by licensed practitioners could possibly result in more women carrying their babies to term, it is also possible that this will increase the number of kitchen-table abortions and arguably impair public health.

Another important duty of state government is to provide for the care of the mentally ill. Act 714, which amends and supplements the state's Mental Health Law, attempts to improve the position of mentally disturbed persons and persons who abuse certain substances. 97 The Act provides for five methods of admission 98 into treatment facilities and establishes different procedures for release for each admission status. 99 Officials of


99. For example, a patient admitted on an informal voluntary basis may leave the facility at any time during the normal day-shift hours of operation; a person admitted on a formal voluntary or on a noncontested basis must make a written
treatment facilities must inform patients in writing of the different procedures for release at the time of their admission, and must allow patients admitted on an involuntary basis to apply by writ of habeas corpus to convert their status to a voluntary one. In addition, during their commitment patients may not be subjected to electroshock therapy or major surgery without the informed consent of voluntarily admitted patients or the consent of a court for those admitted by emergency certificate or committed by judicial procedure.

One of the most significant changes made by the Act involves the procedures for judicial commitment hearings. Under the prior law, these hearings were to be conducted as informally as possible, and little attention was given to the requirements of due process. The new law provides that the hearing is to be conducted in as formal a manner as possible and that the normal rules of evidence must be applied. The respondent has the right to privately retained counsel or to be assigned an attorney from the mental health advocacy service, and may present evidence at the hearing and cross-examine witnesses. A person may be committed only upon a finding by the court on clear and convincing evidence that he is dangerous to himself or others or is gravely disabled. Commitments must be reviewed by the court after sixty days, then after one hundred and twenty days, and subsequently every one hundred and eighty days. Directors of treatment facilities are required to furnish the

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1. See text at notes 100-104, infra.
2. See text at notes 105-106, infra.
4. See text at notes 109-110, infra.
5. See text at notes 111-112, infra.
6. See text at notes 113-114, infra.
7. See text at notes 115-116, infra.
8. See text at notes 117-118, infra.
9. See text at notes 119-120, infra.
10. See text at notes 121-122, infra.
11. See text at notes 123-124, infra.
12. See text at notes 125-126, infra.
13. See text at notes 127-128, infra.
14. See text at notes 129-130, infra.
15. See text at notes 131-132, infra.
16. See text at notes 133-134, infra.
17. See text at notes 135-136, infra.
19. See text at notes 139-140, infra.
20. See text at notes 141-142, infra.
21. See text at notes 143-144, infra.
22. See text at notes 145-146, infra.
23. See text at notes 147-148, infra.
24. See text at notes 149-150, infra.
25. See text at notes 151-152, infra.
26. See text at notes 153-154, infra.
27. See text at notes 155-156, infra.
28. See text at notes 157-158, infra.
29. See text at notes 159-160, infra.
30. See text at notes 161-162, infra.
31. See text at notes 163-164, infra.
32. See text at notes 165-166, infra.
33. See text at notes 167-168, infra.
34. See text at notes 169-170, infra.
35. See text at notes 171-172, infra.
36. See text at notes 173-174, infra.
37. See text at notes 175-176, infra.
38. See text at notes 177-178, infra.
39. See text at notes 179-180, infra.
40. See text at notes 181-182, infra.
41. See text at notes 183-184, infra.
42. See text at notes 185-186, infra.
43. See text at notes 187-188, infra.
44. See text at notes 189-190, infra.
45. See text at notes 191-192, infra.
46. See text at notes 193-194, infra.
47. See text at notes 195-196, infra.
48. See text at notes 197-198, infra.
49. See text at notes 199-200, infra.
50. See text at notes 201-202, infra.
51. See text at notes 203-204, infra.
52. See text at notes 205-206, infra.
53. See text at notes 207-208, infra.
54. See text at notes 209-210, infra.
55. See text at notes 211-212, infra.
56. See text at notes 213-214, infra.
57. See text at notes 215-216, infra.
58. See text at notes 217-218, infra.
59. See text at notes 219-220, infra.
60. See text at notes 221-222, infra.
61. See text at notes 223-224, infra.
62. See text at notes 225-226, infra.
63. See text at notes 227-228, infra.
64. See text at notes 229-230, infra.
65. See text at notes 231-232, infra.
66. See text at notes 233-234, infra.
67. See text at notes 235-236, infra.
68. See text at notes 237-238, infra.
69. See text at notes 239-240, infra.
70. See text at notes 241-242, infra.
71. See text at notes 243-244, infra.
72. See text at notes 245-246, infra.
73. See text at notes 247-248, infra.
74. See text at notes 249-250, infra.
75. See text at notes 251-252, infra.
76. See text at notes 253-254, infra.
77. See text at notes 255-256, infra.
78. See text at notes 257-258, infra.
79. See text at notes 259-260, infra.
80. See text at notes 261-262, infra.
81. See text at notes 263-264, infra.
82. See text at notes 265-266, infra.
83. See text at notes 267-268, infra.
84. See text at notes 269-270, infra.
85. See text at notes 271-272, infra.
86. See text at notes 273-274, infra.
87. See text at notes 275-276, infra.
88. See text at notes 277-278, infra.
89. See text at notes 279-280, infra.
90. See text at notes 281-282, infra.
91. See text at notes 283-284, infra.
92. See text at notes 285-286, infra.
93. See text at notes 287-288, infra.
94. See text at notes 289-290, infra.
95. See text at notes 291-292, infra.
96. See text at notes 293-294, infra.
97. See text at notes 295-296, infra.
98. See text at notes 297-298, infra.
99. See text at notes 299-300, infra.
100. See text at notes 301-302, infra.
101. See text at notes 303-304, infra.
102. See text at notes 305-306, infra.
103. See text at notes 307-308, infra.
104. See text at notes 309-310, infra.
105. See text at notes 311-312, infra.
106. See text at notes 313-314, infra.
107. See text at notes 315-316, infra.
court with reports of the patient's response to medical treatment and must justify any continued involuntary commitment. Commitments may also be appealed devolutively.

The Act creates the Mental Health Advocacy Service, a body governed by a nine member board of trustees which will provide legal services to patients on such matters as admission, commitment, change of status, transfer, and discharge. Counsel provided by the service are assured access to copies of all the patient's records unless the patient objects, but in the event the patient eventually retains private counsel these copies must be destroyed. The attorney may consult with the patient whenever the need arises and the treatment facility must provide adequate space and privacy for these meetings.

Patients in treatment facilities are also benefitted by the greatly expanded rights granted them under the new law. Formerly, patients were assured only of such rights as the right to wear their own clothes, to keep personal possessions, and to spend their own money at canteens, whereas the new Act provides that no patient shall be denied any rights granted under the United States and Louisiana Constitutions solely because he is a patient in a treatment facility. The Act also provides that restraints and seclusion may be used only as therapy or to protect the patient or others, and that they may never be used for punishment or merely for the staff's convenience. Rights to an individualized treatment plan and to periodic review for progress are also recognized. A final provision requires the patient to be released if the treatment facility is unable to provide him with...

108. Id.
109. Id.
110. LA. R.S. 28:64 (Supp. 1977). The trustees are to be the deans or selected faculty members of the state's four law schools, the deans or selected faculty members from the Louisiana State University and Tulane University Medical Schools, the president of the Mental Health Association of Louisiana or his representative, and representatives of the Louisiana Medical Society and the Louisiana State Bar Association.
111. Id.
112. Id.
113. Id.
114. The patient also had the right to apply for a writ of habeas corpus, to be visited in private by his attorney, to request an informal court hearing, and to be diagnosed by a privately retained physician. See LA. R.S. 28:171 (Supp. 1974) (prior to the 1977 amendment).
116. Id.
117. Id.
an active and appropriate medical treatment program. This last provision was apparently inserted to comply with recent decisions of federal courts which have found commitment without adequate treatment to be a violation of the due process clause of the fourteenth amendment.

EXECUTIVE REORGANIZATION

The 1974 Louisiana Constitution requires that all agencies, departments, and offices of the executive branch, with the exception of the offices of governor and lieutenant governor, be organized by functions into a maximum of twenty departments by the end of 1977. In compliance with this mandate, the legislature enacted Act 720 of 1975 which created a skeleton system of nineteen departments and commissioned the Joint Legislative Committee on Reorganization of the Executive Branch to study the reorganization and to report any conclusions to the legislature. Suggestions from the committee were embodied in Act 513 of 1976 which designated twenty departments, detailed the organization of the twelve departments which were newly created, and continued the eight departments headed by elected officials.

This extended process of reorganization was completed by the passage of Act 83 of 1977, which expressly organizes the eight departments

118. Id.
119. See Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

1. LA. CONST. art. IV, § 1; art. XIV, § 6.
4. The new departments are: Department of Commerce; Department of Corrections; Department of Culture, Recreation and Tourism; Department of Health and Human Resources; Department of Labor; Department of Natural Resources; Department of Public Safety; Department of Revenue and Taxation; Department of Transportation and Development; Department of Urban and Community Affairs; Department of Wildlife and Fisheries; and Department of State Civil Service. Act 513 created the first eleven departments, but the Department of State Civil Service was created by Louisiana Constitution article X, § 1.
5. The eight departments under the control of statewide elected officials are: Department of Agriculture; Department of Education; Department of Elections; Department of Insurance; Department of Justice; Department of Public Service; Department of State; and Department of Treasury.
headed by statewide elected officials, and slightly amends the organization of the twelve departments created by Act 513 of 1976. In addition, the Act transfers several agencies to the office of the governor in the executive branch,\(^7\) and abolishes two agencies and transfers their duties and responsibilities to the governor himself.\(^8\)

The eight departments under the control of elected officials have one important similarity which distinguishes them from the other twelve departments: all subordinate positions in the former are filled by the officials themselves rather than by the governor.\(^9\) The governor’s broad appointive power over the other twelve departments has been criticized as limiting the flexibility of department heads who must supervise important management personnel whom they have not hired and cannot fire,\(^10\) but it is certainly arguable that such a structure is desirable because the governor is responsible to the voters for the efficient operation of these departments. On the other hand, officials such as the Commissioner of Insurance or the members of the Public Service Commission have their own constituencies and are answerable to the electorate for their departments, factors which militate for giving them the power to appoint their own subordinates, subject to the Senate’s approval.\(^11\)

The structure of the eight new departments is varied to reflect differences in size and complexity among the departments. The Departments of Agriculture, Education, and the Treasury are each headed by an elected official\(^12\) who must appoint a deputy for management and finance\(^13\) and a varying number of assistants to be in charge of the offices in the department.\(^14\) The department head also has the discretion to appoint a deputy

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8. Id. 36:4(B)(2) (Supp. 1977). The agencies abolished are the Public Buildings Board and the Louisiana State Planning Advisory Commission.
12. These officers are the Commissioner of Agriculture, the Superintendent of Education and the State Treasurer. La. R.S. 36:622, 643, 762 (Supp. 1977).
13. These officers are, respectively, the deputy commissioner for management and finance, the deputy superintendent for management and finance, and the deputy state treasurer for management and finance. La. R.S. 36:622, 643, 762 (Supp. 1977). The Department of Education varies somewhat from this scheme since it also contains the Governor’s Special Commission on Education Services, which is responsible for the supervision and administration of state programs for higher education assistance and scholarships, thus somewhat limiting the powers of the deputy superintendent for management and finance. La. R.S. 36:642(D)(2) (Supp. 1977).
officer and to define his duties and functions. The Departments of Insurance and Justice have a similar structure except that no assistants are authorized for these departments since they are not divided into offices by the Act. A third sort of structure is exhibited by the Department of Elections and Registration and the Department of State, which are limited to an elected department head and a deputy whose appointment is mandatory, but whose duties are still defined by the department head. A final method of organization was used for the Department of Public Service. The Public Service Commission serves as the executive head of the department and appoints an executive secretary, who is the chief administrative officer of the department, and an undersecretary who controls the department's management and finances.

A special consideration in any form of reorganization concerns the problems which arise when numerous entities are consolidated into a limited number of departments. Act 83 provides a variety of transfer mechanisms to reflect policy decisions concerning the duties and powers to be retained by agencies which were once largely independent but are now structured into twenty departments. Act 513 of 1976 provided four basic types of transfers which are reenacted by the new Act, and which range in effect from loss of agency power over only certain administrative, budgetary and accounting functions to a complete transfer of agency functions to the department head with the agency serving only in an advisory capacity. The 1976 Reorganization Act also provided for nine specialized types of transfers, all of which are continued in the present

15. Id. 36:625 (deputy commissioner of agriculture), 646 (deputy superintendent of education), 765 (deputy state treasurer) (Supp. 1977). If this deputy official is appointed, he must be the first assistant appointed to the department head pursuant to article IV, section 13 of the Constitution. See, e.g., LA. R.S. 36:643 (Supp. 1977).
17. Id. 36:661(C) (Commissioner of Elections), 741(B) (Secretary of State) (Supp. 1977).
18. Id. 36:663, 743 (Supp. 1977).
19. Id. 36:721(B) (Supp. 1977).
24. Id. 36:803 (licensing agencies), 804 (toll authorities), 805 (Department of Employment Security), 806 (Department of Conservation), 807 (State Mineral Board), 808 (Louisiana Commission on Law Enforcement and Administration of Criminal Justice), 907 (Board of Commerce and Industry), 908 (Board of Directors of Louisiana State Museum), 909 (Board of Commissioners of the Louisiana State Library) (Supp. 1977) (prior to the 1977 amendments).
Act 83, however, adds seven new specialized transfers, of which the most important ones concern college management boards and the Public Service Commission, the Board of Elementary and Secondary Education, and retirement boards.

The special transfer for the college management boards and the Public Service Commission provides that these agencies will continue in their present composition, will retain their duties and powers in all areas, including accounting and budget control, and "shall administer and implement the program authorized... independently of the secretary, the undersecretary, and any assistant secretary." The extraordinary transfer for the Board of Elementary and Secondary Education attempts to delineate the respective spheres of authority of the Board and the Superintendent of Education. Although the Board is assured of its right to employ its own personnel, the transfer provision also specifies that the superintendent shall administer and implement the Board's programs, except as otherwise provided by law or the Constitution, in accordance with the Board's policies and rules. The autonomy of retirement boards within the Department of the Treasury also appears certain, since the transfer provision for these boards provides that the boards will retain their present composition and powers, as well as the exclusive authority and discretion to manage and control the assets of the respective retirement systems.

One obvious consequence of the constitutional mandate for reorganization was the eventual abolition of some state agencies. The duties and powers of abolished agencies are transferred to the designated department heads who may reassign the duties to any office within the department. Act 513 of 1976 abolished sixty-eight agencies, committees, and commis-

26. La. R.S. 36:801.1 (college management boards, the Board of Regents, and the Public Service Commission), 801.2 (Board of Elementary and Secondary Education), 801.3 (retirement boards), 802.1 (agricultural promotion boards), 802.2 (Louisiana Sweet Potato Advertising and Development Commission), 809 (Louisiana Commission on Governmental Ethics and Louisiana Board of Ethics for State Elected Officials), 911 (Louisiana State Arts Council) (Supp. 1977).
27. Id. 36:801.1 (Supp. 1977). This provision is particularly appropriate since the Public Service Commission is the only entity in the Department of Public Service.
28. Id. 36:801.2 (Supp. 1977). This provision is an attempt to follow the delineation of duties expressed in Board of Elementary & Secondary Educ. v. Nix, 347 So. 2d 147 (La. 1977).
29. Id. 36:801.3 (Supp. 1977).
A final step in the executive branch reorganization requires the heads of the eight new departments to submit implementation plans to the Reorganization Committee for approval. Moreover, all departments must continue to submit to the committee annual plans which detail their goals and budget requests in light of the reorganization principles expressed in Act 83.

Four other reorganization bills were submitted to the legislature by the Reorganization Committee, but only two were enacted. House Bill 751, enacted as Act 482, changes the powers of the assistant secretary of the Office of Conservation of the Department of Natural Resources by removing his power to represent the state in matters relating to energy and giving him new authority to establish and collect fees for evaluations made by his office of radiation sources, devices, and shielding equipment. The assistant secretary also loses the duties of preparing energy source studies and conservation plans, but he is given the new responsibility of investigating and monitoring hydrocarbon users and requiring

31. Id. 36:53(D) (Louisiana State Employees Merit Award Board), 651(K) (T.H. Harris Scholarship Foundation Board of Trustees, Louisiana Higher Education Assistance Commission), 651(H) (State Department of Education), 769(E) (Deferred Compensation Commission for State Employees) (Supp. 1977); Id. 36:109(E) (Louisiana State Science Foundation), 509(F) (Board of Public Works, State Board of Highways, Regional Transit Authority, Board of Commissioners of the Regional Transit Authority, Louisiana Expressway Authority, Larose-Lafitte Toll Road Authority, South Central Louisiana Toll Road Authority) (Supp. 1976), as amended by 1977 La. Acts, No. 83. The Louisiana Regional Airport Authority, abolished in 1976, was apparently spared in 1977. Compare LA. R.S. 36:509(F) (Supp. 1976) with LA. R.S. 36:509(F) (Supp. 1977).
32. Id. 36:954(A)(2) (Supp. 1977). In addition, the Commissioner of Agriculture, the Superintendent of Education, and the State Treasurer may submit plans to the legislature to consolidate, merge, or eliminate existing offices or to establish new ones upon a showing that a change would result in efficiency. See, e.g., id. 36:621(C) (Supp. 1977).
33. Id. 36:957 (Supp. 1977).
35. Formerly the Commissioner of Conservation.
them to report to him on the use of hydrocarbons and hydrocarbon products.\(^39\)

House Bill 753, designated Act 667,\(^40\) changes the composition of the State Mineral Board from its present composition of seventeen members\(^41\) by giving the Secretary of the Department of Natural Resources _ex officio_ status.\(^42\) However, at noon on the second Monday of March in 1980, the Board’s composition will change to consist of nine members appointed by the governor with the governor and secretary retaining their _ex officio_ membership.\(^43\) The Act also modifies present leasing procedure by requiring all proposals to be submitted to and examined by the secretary,\(^44\) and by removing the Board’s authority to advertise for lease bids without prior approval by the secretary.\(^45\) Records of mineral leases once kept by the Register of the State Land Office\(^46\) are now kept by the secretary,\(^47\) and all monies received from mineral leases are paid to the office of mineral resources in the Department of Natural Resources.\(^48\)

**Expropriation**

Acts 452 and 453 exclude municipalities from the general expropriation procedure and establish special procedures to be followed by those subdivisions.\(^1\) The acts are not limited to expropriation for electric light, gas, or water works purposes as was the prior law, but extend to all immovable property including servitudes and other rights in or to immov-


\(^42\) _Id._, _as amended by_ 1977 La. Acts, No. 667.

\(^43\) _Id._


able property. Under the new law, the plaintiff in the expropriation proceeding must file a petition in the district court of the appropriate parish describing the property and stating the purpose for the expropriation. All claims for damages are prescribed by two years commencing from the date on which the property was actually occupied and used for the purposes of the expropriation. The procedure for filing the petition and for answering follow the existing general expropriation procedure.

Act 561 provides a method whereby coal or lignite slurry pipeline owners or operators may expropriate private property under the general expropriation laws. It is anticipated that such pipelines will become more common as domestic oil and gas reserves are depleted.

STATE AND LOCAL GOVERNMENT

ELECTIONS

Act 473 revises the method of instigating recall elections of public officers, and provides that no recall petition can seek an election for the recall of more than one official. Furthermore, the number of electors necessary to effectuate a recall petition has been increased from twenty-five percent to thirty-three and one-third percent of the total electors of the voting area. Each person signing the petition must also sign his address as well as his name, or his signature cannot be counted as that of an elector.

Local bond elections are often most confusing to the electorate because voters seldom understand the ramifications of their vote on each bond proposition. In an attempt to alleviate some of this confusion, Act 250 provides that in each election ordered by the governing authority of a local subdivision for the purpose of authorizing the issuance of bonds, the proposition on the ballot submitted to the voters must state the kind and source of revenues which are pledged to retire the bonds.

The Legislature amended the provisions of the election code concerning the publication, distribution, content, and transmittal of campaign

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literature. Acts 513, 544, and 545 provide for the procedure for certain special elections and for the registration of voters in all elections, while Act 588 concerns the method of placing the names of presidential and vice presidential electors in national elections on the ballot. Act 477 revises the qualification requirements, training methods, selection procedures, duties, and compensation of election commissioners and poll watchers.

**Increased Fees**

The Legislature enacted a lengthy series of acts which increases many of the fees charged by state agencies for various services. These increased fees will affect many areas of an attorney’s daily practice, and thus should be noted with care.

DISTRICT ATTORNEYS

In many areas district attorneys and assistant district attorneys may engage in the private practice of law. Senate Concurrent Resolution 15 authorizes the Senate Committee on Judiciary and the House Committee on the Administration of Criminal Justice to establish a joint committee to study the feasibility of prohibiting district attorneys from engaging in the private practice of law. The resolution notes that with all the responsibilities of a district attorney, "the duties and workload [have] risen at such a rate and to such an extent that it is practically impossible for him to efficiently fulfill his duties as district attorney and at the same time engage in the private practice of law." The joint committee must make a written report of its findings to the legislature prior to the 1978 Regular Session, together with any any specific proposals for legislation.

SHERIFFS

Under a consistent line of Louisiana Attorney General's opinions, sheriffs could pay attorney fees for suits brought against them from the sheriff's salary fund only where a final judgment was rendered in favor of the sheriff. Act 58 now allows "reasonable attorney fees for legal services" as a permissible expense from the sheriff's salary fund. The broad language of the amendment might be interpreted as a legislative overruling of the prior opinions of the attorney general, thus allowing public funds to be expended in a suit brought against a sheriff who is found guilty of civil or criminal misconduct. The amendment could conceivably allow sheriffs to employ full-time legal counsel, a practice the attorney general has expressly forbidden under the former law.

HOME RULE CHARTER COMMISSIONS

The Louisiana Constitution allows any local governmental subdivision to adopt a home rule charter. The constitution requires that an election of members of a home rule charter commission shall be called when the local governing authority is presented with a petition signed by not less than ten percent of the electors, or ten thousand electors, whichever is fewer, who live within the boundaries of the affected subdivision.

8. LA. OP. ATTY. GEN. 339 (1960-1962); id. 662 (1948-1950); id. 991 (1946-1948); id. 989 (1946-1948); id. 891 (1936-1938); id. 889 (1936-1938); id. 495 (1924-1026).
11. LA. CONST. art. VI, § 5(A).
12. Id. art. VI, § 5(B).
However, there are no provisions for the method of proposing a home rule charter, the term of office of the commission, or submission of the charter to the electors. Act 145 provides the procedure to be followed for establishing home rule charters by elected charter commissions. Each charter commission member may serve until the charter is either adopted or rejected by a majority of the electors. Once adopted, the charter supersedes any existing charter under which the local governmental subdivision may be operating. The charter must provide for the method and frequency of amending the charter subject to the provisions of the constitution.

STATE AND LOCAL TAXATION

The Louisiana Constitution forbids levying new taxes or increasing existing taxes during a regular session held in an odd-numbered year. Thus the number of bills relative to state and local taxation introduced in the regular session was comparatively small. Nevertheless, several laws of interest were enacted.

SALES TAXES

Louisiana imposes a sales tax on the retail sale of tangible personal property, on the lease or rental of tangible personal property, and on all sales of services. This results in several taxes being imposed on a dealer who leases equipment, for the tax is required to be paid not only on the ultimate sale of the property, but also on the rental payments and at the first use of the equipment when it is withdrawn from inventory for rental. Act 510 exempts retailers who ordinarily purchase certain heavy self-propelled equipment from the use tax, thus eliminating one incident of taxation.

1. LA. CONST. art. III, § 2(A).
2. After this article was prepared for publication, the Legislature convened the 1977 Special Session. Numerous taxes were raised in the session, primarily to fund pay raises for state employees. The most important of these increases are: 1977 La. Acts, Special Sess., No. 1 (adjusting the personal income tax tables); 1977 La. Acts, Special Sess., No. 2 (increasing the corporate income tax).
tion equipment and attachments having a cost to the dealer in excess of three thousand dollars. A similar provision was enacted for the benefit of automobile lessors and lessees. However, Act 447 exempts the rental payments from sales taxes rather than the first use. In order to qualify for the exemption, the lease must be on an automobile or truck for greater than six months and the sales and use tax (imposed on the sales or cost price) must have been paid to the state at the time the vehicle was transferred (or titled) into the state. This exemption, however, applies only to state taxes and not to local taxes, and does not become effective until January 1, 1978.

The legislature failed to enact a controversial bill that would have excluded from sales taxes the sale of services in the furnishing of repairs to tangible personal property when the repaired property was to be delivered to a customer in another state. It was argued that the loss in revenue would have been more than offset by increased business for Louisiana firms in repairing property owned by out-of-state businesses.

**Ad Valorem Taxation**

The Louisiana Constitution requires the Legislature to restructure the ad valorem taxation system of the state, a change precipitated by Levy v. Parker and Bussie v. Long. In 1976 the Legislature enacted provisions concerning valuation and the determination of use value. This year the legislature turned its attention to the constitutional requirement that the

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8. Id. The requirement that the lease be for six months or more was enacted to prevent the exemption of short term daily and weekly leasing that commonly occurs with the national car rental firms.
9. Id. §§ 1, 2.
11. The bill did not consider offshore areas to be "out of state." Id.
14. 286 So. 2d 689 (La. App. 1st Cir. 1973), writs denied, 288 So. 2d 354 (La. 1974). These cases held that the equal protection and due process clauses of the fourteenth amendment were violated because the state did not uniformly assess property of the same class throughout the parishes and the state. See The Work of the Louisiana Legislature—State and Local Taxation, 37 LA. L. REV. 158 (1976).
correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission, and finally by the courts.\textsuperscript{16}

The key to the revision of the ad valorem taxation system is providing an effective enforcement mechanism. Act 385 is a comprehensive and detailed measure aimed at preventing future inequities in property assessment.\textsuperscript{17} All laws relating to the state supervision of local property tax assessments will now be administered and enforced by the tax commission.\textsuperscript{18} The commission has the responsibility to measure the level of appraisals, assessments and the degree of uniformity of assessments for each major class and type of property in each parish throughout the state,\textsuperscript{19} and then to notify in writing the assessor and tax recipient bodies in every parish of the result of its measurements. A public hearing must be held following the notification in order to receive any complaints, and subsequently the commission must publish annual reports of the results of its measurements. The published reports shall constitute prima facie evidence of the uniformity (or lack thereof) that is required by the constitution and statutes. Where the assessment levels of a parish deviate by more than ten percent from the percentage of fair market or use valuation as mandated in the constitution and statutes,\textsuperscript{20} the tax commission shall order the assessor to reappraise all property within the parish (or within one or more property classifications) within one year. The issuance of this order will also be communicated to the appropriate tax recipient body. The Act requires the commission to certify the deficient tax lists for the year in which the order is issued, but the assessment lists for the following year may not be certified \textsuperscript{21} until all deviations or discrepancies are corrected to conform to the constitutional or statutory requirements. This is the real impetus for guaranteeing uniformity, for if the assessment lists are not certified, the tax recipient bodies will be deprived of their property tax revenues. Thus police juries, school boards, parish and city councils, and other tax recipient bodies are expected to exert political pressure on local assessors to conform to the new provisions. The remainder of Act 385 allows the tax

\textsuperscript{16} LA. Const. art. VII, § 18(E).
\textsuperscript{18} Id.
\textsuperscript{19} Id. Under LA. Const. art. VII, § 18, land and improvements for residential purposes are to be assessed at ten percent, and other property is to be assessed at fifteen percent, of fair market value. However, bona fide agricultural, horticultural, marsh, and timber lands are to be assessed at ten percent of use value rather than fair market value.
\textsuperscript{20} See note 19, supra.
commission to make the necessary inspections, investigations, and studies for the adequate administration of its responsibilities pursuant to the new laws.\textsuperscript{22}

Acts 381-384 concern procedural aspects of the new ad valorem taxation system.\textsuperscript{23} Assessments in each parish will be subject to review by a board whose membership shall consist of the governing authority of each parish plus the assessor or his designate as a nonvoting advisory member.\textsuperscript{24} The assessor must complete the preparation and listing on the assessment lists of all real or personal property (Orleans Parish excepted) on or before July 1 of each year.\textsuperscript{25} After each assessor has prepared and made up the lists, the list shall be available for daily inspection by taxpayers and other interested persons for fifteen calendar days. Notice must be given of the availability of the lists for inspection. Following the fifteen day period, the lists are to be certified within three days to the board of review which must proceed to conduct public hearings on the assessments. The board shall consider written or oral complaints during the hearing,\textsuperscript{26} and may make a determination to increase or decrease the assessments in accordance with the fair market or use value. Determinations are final unless appealed to the tax commission, and on the fifteenth calendar day after the board has convened its public hearings, the assessment lists and any changes in connection therewith shall be certified and forwarded to the tax commission.\textsuperscript{27} Within ten days of receipt of the

\textsuperscript{22} L.A. R.S. 47:1837(C)(4). The tax commission may require any taxable entity to make virtually any information available to the commission in order to enforce the assessment laws. All such reports, however, will be confidential and used only for the purpose of securing a correct assessment, and thus not subject to public inspection. The commission may also require the production of books and papers; summon and compel attendance of witnesses, and place them under oath and examine them; and issue subpoenas and subpoenas duces tecum. Failure to comply with any such requirements subject the offender to criminal penalties.

The Act also provides for training programs for assessors, issuing rules and regulations containing minimum standards of assessment performance, devising appropriate forms, and generally fulfilling the requirement to “develop, maintain, and enforce a uniform statewide system for the preparation of assessment lists, tax rolls, and all other necessary forms.”


\textsuperscript{24} 1977 La. Acts, No. 381.

\textsuperscript{25} 1977 La. Acts, No. 382.

\textsuperscript{26} The complainant must have timely filed reports required by 1976 La. Acts, Nos. 702, 705.

certified assessment lists, the tax commission must conduct public hearings to hear appeals of taxpayers or assessors from the action of the board of review. The commission has the power to affirm, reverse, or modify the contested determination of the board. All decisions of the commission are final unless appealed to the district court within thirty days. The assessment lists, together with any changes in connection therewith, shall be certified and returned to each assessor on or before October 15 of each year.\(^{28}\)

The constitution also requires the legislature to set up procedures to compel tax recipient bodies to roll back or roll forward property tax millages to keep receipts generally in line with those prior to the reappraisal-reassessment program.\(^{29}\) Act 617 fulfills this mandate by permitting the Legislative Auditor to review the millages levied by each tax recipient body to determine whether the millages levied are in compliance with law.\(^{30}\) The auditor has the power to order changes in the amount of millage levied if he determines that an error has been made in the adjustment.

This package of bills, together with last year’s legislation, fulfills the requirements of the constitution. The tax commission will inherit much of the power formerly exercised by local assessors, and will in effect become the ultimate arbiter of assessments in the state. Local tax recipient bodies are expected to oversee assessors to be certain that assessments are kept within the limits required by the constitution. It is to be hoped that the new administrative procedures will cure many of the inequities which persisted under the 1921 Constitution.\(^{31}\)

**NATURAL GAS TAX CREDIT**

Act 546 allows every municipality that operates a manufacturing establishment in the state a direct credit for money paid for natural gas against any tax or combination of taxes owed by the municipality to the state or any other taxing authority\(^ {32}\) within the state. The amount of the credit shall be proportionate to the amount of gas used or consumed in


\(^{29}\) LA. CONST. art. VII, § 23.


\(^{31}\) By virtue of the legislation enacted in the past two sessions, the constitutional mandate to revise Louisiana’s system of property taxation has been substantially completed. However, some clarification of the process for judicial review of the decisions of the tax commission is necessary and will probably be made in the next regular session.

Louisiana by the municipality in the operation of the manufacturing establishment at a rate of two cents per thousand cubic feet of gas used or consumed during each calendar year. (Three cents credit is allowed for municipally operated electric generating plants.) The Act sets up a detailed voucher system to be followed in applying for the credit.

REPEAL OF SEVERANCE TAX EXEMPTION

Under prior law, the gas severance tax did not apply to gas consumed as fuel in the operation of a gasoline or recycling plant within the state. Act 548 repeals this exemption, and the prior exemption is now limited to gas consumed in the production of natural resources in the state. 33

The legislature also adopted a resolution34 calling for the Board of Commerce and Industry to review its industrial tax exemption policy to determine whether current policies, regulations, and guidelines provide for the maximum economic advantage to the state. The Board is to report its findings to the Legislature on or before October 15, 1977.

ADVANCE SALES TAX

Louisiana has a unique system whereby sales tax must be paid in advance by certain manufacturers or wholesalers. 35 The Secretary of Revenue and Taxation, however, often exempted certain wholesalers from the requirement of having to pay to the state the expected sales tax,36 inasmuch as the law did not clearly define "wholesalers." Act 30437 defines "'wholesaler dealer'" as a dealer fifty percent of more of whose sales are sales for resale. Sales made in interstate commerce or sales where delivery is made outside of the state are not considered retail sales for the purpose of determining whether a person qualifies as a wholesale dealer. 38 However, the Act contains a "'grandfather clause'" excluding any wholesaler whose business had received an exemption identification number and had thus not been required to pay advance sales taxes in 1965. 39 The Act also gives the Secretary of the Department of Revenue and Taxation the authority to promulgate regulations necessary to enforce the Act.

35. LA. R.S. 47:306(B) (1950).
36. Such exemption numbers are called "'W numbers.'"
38. The collection of the tax on motor vehicles, however, will still come under the provisions of LA. R.S. 47:303(B) (1950).
SECOND DEGREE MURDER

Act 657 of 1976, which amended the first and second degree murder statutes, redefined the crime of second degree murder to consist only of felony murder. The penalty for second degree murder was set at life imprisonment at hard labor without eligibility for parole, probation, or suspension of sentence for forty years. First degree murder is defined as "the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm," and carries a penalty of death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Act 694 of 1976 provided sentencing guidelines in accordance with Roberts v. Louisiana.

Act 121 of 1977 adds a second definition of second degree murder: "the killing of a human being when the offender has a specific intent to kill," provided that there are no aggravating circumstances. Thus, a responsive verdict for first degree murder is now possible as long as a specific intent to kill is shown, and there is now a vehicle for plea bargains. The new definition may cause problems, however, since killing with a specific intent to kill, but without aggravating circumstances, is already defined as a species of first degree murder in Revised Statutes 14:30 and article 905.3 of the Code of Criminal Procedure. The effect of

4. Id. 14:30.
5. Id.
   Second degree murder is: . . .
   (B) The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.
10. LA. R.S. 14:30 provides:
   First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.
Act 121 is to establish two different penalties for the same crime without any standard for determining which is appropriate.

THEFT

What is the "value" of an item stolen from a retail store? Act 128 of 1977 adopts "actual retail price of the property at the time of the offense" as the criterion for the value of goods in determining the penalty for shoplifting.\(^1\)

Acts 308 and 349 continue the trend of piecemeal additions to the theft provisions. Act 308 makes the theft of utility service a crime.\(^2\) It would appear that the new provision is unnecessary since the basic theft article\(^3\) is broad enough to cover the theft of utility services. On the other hand, the legislature may have felt that a separate penalty for this crime was justified.

Act 349 makes it unlawful to take commercial crawfish from crawfish farms.\(^4\) The addition of this article may be justified on the basis of our cultural heritage or because it settles the debate over the proper spelling of "crawfish," but it appears otherwise to be an unnecessary addition to the general theft provisions.

JUSTIFIABLE HOMICIDE

Act 655 of 1976 made homicide justifiable in cases where a person reasonably believes a burglar is likely to use any unlawful force against a person in a dwelling.\(^5\) Act 392 of 1977 makes the rule applicable to a place of business as well as a dwelling.\(^6\)

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury. LA. CODE CRIM. P. art. 905.3 provides:

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

One subject which formerly was solely a matter of professional responsibility is now a part of the criminal law as well. Apparently feeling that Bar Association sanctions for solicitation were insufficient in some cases, the legislature passed Acts 758 and 759. Act 758\textsuperscript{17} adds two new sections to the Revised Statutes. The first provides that a law enforcement official who refers an individual to an attorney is subject to removal from office.\textsuperscript{18} The latter provides criminal penalties for wrecker drivers or owners who refer an individual to an attorney.\textsuperscript{19} Act 759 deals with the attorney's role in improper solicitation by providing criminal penalties for an attorney who pays anyone to obtain cases for him.\textsuperscript{20}

**Obscenity**

Act 717\textsuperscript{21} revises the former obscenity article. A thorough discussion of the article is beyond the scope of this symposium, but the major changes can be reported. Subsection (C) was amended to conform to *State v. Johnson*,\textsuperscript{22} which declared part of the former subsection unconstitution-al because it denied equal protection of the law to a certain class of clerical employees.\textsuperscript{23} In addition, a new subsection (H) was added to provide for corporate defendants.

**Sex Offenses**

Act 49\textsuperscript{24} responds to the increased notoriety of male prostitution. Formerly, the prostitution article applied only to women, but as amended, it applies to any "person."\textsuperscript{25} Moreover, the scope of the crime was expanded to include "the solicitation by one person of another with the

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\textsuperscript{18} LA. R.S. 42:1413 (Supp. 1977).
\textsuperscript{19} Id. 14:356.1 (Supp. 1977).
\textsuperscript{22} 343 So. 2d 705 (La. 1977).
\textsuperscript{23} Under the prior statute, the criminal responsibility of non-managerial, non-proprietary theatre and bookstore employees depended improperly on whether a person having managerial duties or a financial interest was subject to immediate arrest and prosecution. State v. Johnson, 343 So. 2d 705, 707-08 (La. 1977).
intent to engage in indiscriminate sexual intercourse with the latter for compensation.\textsuperscript{26} The expansion of coverage may be broader than the legislators intended, since the language appears to be susceptible of an interpretation which would include not only the prostitute but the person who seeks out the prostitute as well.

Revised Statutes 14:43.1, prior to amendment by Act 90 of 1977, also applied only to women. Act 90 amends the article to apply to a forcible rape perpetrated upon a "victim," thus encompassing homosexual rape.\textsuperscript{27}

**INSURANCE**

The impact of laws passed this session on the Louisiana insurance law was significant. Most prominent among the insurance bills passed are the ones requiring motor vehicle liability insurance, limiting stacking of uninsured motorist coverages, and relaxing the Entire Contract Policy Statute. Less sweeping changes were made in several other statutes which regulate funeral, fire, group and health insurance.

**COMPELLSORY LIABILITY INSURANCE**

Act 115 of 1977 requires liability security for every self-propelled motor vehicle registered in the state.\textsuperscript{1} Such security may consist of liability insurance, money or securities deposited with the State Treasurer or liability bonds as defined in the revised statutes.\textsuperscript{2} The statute requires coverage of at least $5,000 for property damage, $5,000 for one person’s personal injury or death, and $10,000 for personal injury or death of more than one person.\textsuperscript{3} All persons registering motor vehicles or applying for inspection stickers must file a written declaration that the vehicle is properly covered and that they intend to maintain such security. Furthermore, the parents or guardians of minors applying for driver’s licenses must declare that all vehicles owned by the family comply with the provisions of the Act.\textsuperscript{4} This legislation significantly affects the Louisiana

\textsuperscript{26} LA. R.S. 14:82(b), added by 1977 La. Acts, No. 49.

\textsuperscript{1} 1977 La. Acts, No. 115, adding LA. R.S. 32:861-863. Motor vehicles used primarily for exhibit and parades are exempted from the legislation.
\textsuperscript{2} LA. R.S. 32:861(B) (Supp. 1977).
\textsuperscript{3} Id. 32:861(A), (C) (Supp. 1977).
\textsuperscript{4} Id. 32:862 (Supp. 1977).
Motor Vehicle Safety Responsibility Law,\textsuperscript{5} which previously provided for suspension of driving privileges and automobile registration only upon failure to furnish, \textit{after} the occurrence of an accident, evidence of insurance sufficient to satisfy resultant liability.\textsuperscript{6} If a driver could not post security, the sole penalty was the suspension of driving privileges and vehicle registration,\textsuperscript{7} which obviously provided no pecuniary benefit to the injured claimant. The new law, while not guaranteeing payment, does mandate a declaration by all owners that they are insured before they may obtain plates or inspection stickers, and also provides criminal sanctions for false declarations.\textsuperscript{8}

\textbf{UNINSURED MOTORIST COVERAGE}

Major changes were enacted in the law regulating uninsured motorist coverage (U.I.M.C.) this summer. Uninsured motorist coverage must be included in all automobile liability policies issued in Louisiana.\textsuperscript{9} Should the insured become legally entitled to recover damages due to the negligence of an uninsured motorist, he may sue and recover from his own insurance company under the provisions of such coverage.\textsuperscript{10} The action is considered \textit{ex contractu} and therefore subject to the prescription of ten years.\textsuperscript{11} Upon payment, the insurer is subrogated to the rights of its

\textsuperscript{5} Id. 32:851-1043 (1950). For an excellent though somewhat dated commentary on the motor vehicle law, see Comment, \textit{Compensation For Motor Vehicle Accident Victims: The Louisiana Motor Vehicle Safety Responsibility Act}, 27 Tul.
L. Rev. 341 (1953). The author clearly distinguishes the deposit of security after accident from the prospective protection afforded under the proof of financial responsibility portions of the motor vehicle law.

\textsuperscript{6} LA. R.S. 32:872(B) (1950). Furthermore, licenses are never to be suspended where the owner is not legally liable for damages. \textit{Id.} 38:873(6) (1950).

\textsuperscript{7} Id. 32:872(B) (1950).

\textsuperscript{8} Id. 32:864 (Supp. 1977). The new provisions overlap somewhat with older law. Thus, a solvent owner who falsely declares that he has the necessary coverage may have his license suspended (\textit{id.} 32:863(B) (1950)), and be convicted of a misdemeanor (\textit{id.} 32:864 (Supp. 1977)). By thereafter posting security as required under LA. R.S. 32:874(A)(3)(b) (1950), he is entitled to a new license as he has demonstrated financial responsibility. It is suggested that the newer provisions should apply in such conflicting situations in order to effectuate the legislative intent to require owners to provide evidence of security before accidents and to establish criminal penalties for those falsely claiming to have done so.

\textsuperscript{9} Id. 22:1406(D)(1)(a) (1976).

\textsuperscript{10} These policies normally contain language whereby the insurer agrees \textit{“To pay all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . .”} E.g., \textit{Booth v. Fireman’s Fund Ins. Co.}, 253 La. 521, 218 So. 2d 580 (1968).

\textsuperscript{11} Until the cases of \textit{Booth v. Fireman’s Fund Ins. Co.}, 253 La. 521, 218 So. 2d 580 (1968), and \textit{Thomas v. Emp. Mut. Fire Ins. Co.}, 253 La. 531, 218 So. 2d 584.
insured against the uninsured tortfeasor. However, the insured may have only a prescribed cause of action to subrogate to his insurer if the one year *ex delicto* prescriptive period has expired. Thus, the insured by his delay may effectively destroy any meaningful subrogation. Although the new legislation will not totally alleviate these inequitable results, Act 444 does reduce the prescriptive period for an insured’s claim under his uninsured motorist coverage from the judicially established ten years to a more reasonable two years.

Last year a bill designed to prevent “stacking” of uninsured motorist coverages failed to gain approval of the senate. This year, a compromise bill was passed which allows an insured to obtain U.I.M.C. to any amount but limits stacking if his injuries exceed that amount. No stacking is allowed in situations where several motor vehicles are covered by the same policy of insurance or where coverage is available under other policies containing U.I.M.C. provisions. An exception to this prohibi-
tion is provided for a claimant injured in a non-owned automobile who may use his own U.I.M.C. as excess coverage to the primary coverage on the non-owned vehicle. However, only one uninsured motorist policy is available as excess above the primary coverage. These changes abruptly end the heady days of stacking by allowing the claimant to stack only one policy and to stack it only if he is injured in an automobile owned by another.

ENTIRE CONTRACT POLICY STATUTE

An amendment to section 628 of the Insurance Code relaxes the requirement that all agreements modifying, extending, or conflicting with a contract of insurance be contained within the four corners of the policy or be physically attached to it. Act 312 permits policy modifications to be "incorporated within the policy . . . by specific reference to another policy or written evidence of insurance." The Act also provides that its provisions shall apply if a policy is coupled by specific reference with another policy of insurance in existence or issued thereafter. In Spain v. Travelers Insurance Co. the Louisiana Supreme Court held that under section 628 an excess insurer could not rely on exclusions in a primary policy which was not attached physically to the excess policy. In 1976, section 628 was amended to overrule the Spain case by exempting excess and reinsurance policies from the statute's operation. Act 312 thus abrogates the specific exemptions for excess and reinsurance contracts and seemingly permits modification of all policies by specific reference to other policies of insurance. A similar enactment provides


20. Id.
22. 1977 La. Acts, No. 312, amending LA. R.S. 22:628 (Supp. 1976). The apparent effect of the Act is to provide that modifications may be incorporated by inclusion in the body of the contract of insurance by physically attaching the written modification, or by specific reference to a policy then existing or thereafter issued.
23. 332 So. 2d 827 (La. 1976).
that any document signed by the named insured of an automobile liability policy which rejects uninsured motorist coverage or selects lower limits shall be conclusively presumed to become part of the policy without regard to actual physical attachment.

**FIRE INSURANCE**

A new section was added to the fire insurance provisions which regulate all insurers issuing fire policies in Louisiana. Under the standard policy the insured, in case of loss, is required to give immediate written notice of loss to the insurer.\(^{27}\) After the notice, but within sixty days of loss, the insured must file a sworn proof of loss detailing the time and origin of loss, the actual cash value of items damaged or destroyed, and other required information relevant to his claim.\(^{28}\) Compliance with these requirements is a prerequisite to a suit under the policy.\(^{29}\) Act 202 states that within thirty days of receiving written notice of loss the insurer must furnish the insured with a suitable “proof of loss” form and advise the insured that sworn submission of the same is required under policy provisions.\(^{30}\)

In another bill, the legislature changed the time when fire policies take effect from noon to 12:01 a.m. Standard Time.\(^{31}\)

**OTHER INSURANCE BILLS**

Numerous minor adjustments were made this session to various insurance regulations. Act 309 reduces the number of employees or members required for the issuance of group life insurance policies from ten to one,\(^{32}\) and thus allows smaller groups and firms to qualify for such policies.

Refunds due insureds for unearned premiums because of cancellation, reduction of coverage or elimination must now be accompanied by interest at the rate of 1 1/2% monthly accruing from thirty days after

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delivery of notice of cancellation. However, health and life policies are excluded from this provision as are policies issued by companies requiring audits, and refunds due by a local agent.

All health and accident insurance policies providing surgical coverage must now pay any claim arising from treatment in "outpatient" hospitals if the service would have been covered as an inpatient service.

The legislature this year effected changes in the law relative to funeral insurance although it defeated similar legislation in 1976. Act 116 requires the insurer to pay one hundred percent of the policy's face value if the beneficiary of a burial policy declines the services for any reason; formerly the required return was seventy-five percent. Perhaps the "cogent example" of Wilson v. Reliable Insurance Company did little to comfort members of the legislature during the past cold winter. The amendment applies prospectively to policies issued after January 1, 1978.

WORKMAN'S COMPENSATION

SECOND INJURY FUND

In 1974 the legislature established a Workman's Compensation Second Injury Fund to reimburse employers or insurers for excess liability when injuries to employees merge with pre-existing permanent physical

34. Id. 22:637.1(A), (B) (Supp. 1977).
35. LA. R.S. 40:2133 (Supp. 1976) defines "ambulatory surgical centers" to which Act 350 applies. They are permanently equipped and staffed facilities for performing surgical procedures which do not provide for overnight stay.
40. 333 So. 2d 680 (La. App. 2d Cir. 1976). The decedent paid premiums for thirty-one years totalling $735.08. Her beneficiary received a cash benefit of only seventy-five percent of the $150.00 cash face value of the policy when it became impracticable due to rising costs for the company to bury decedent.
41. LA. R.S. 22:253(B) (Supp. 1977).
disabilities.\(^1\) Act 267 of 1977 provides a definition of merger which is limited to subsequent injuries proximately caused by the pre-existing injury or made materially or substantially greater than would have resulted had there been no preexisting injury.\(^2\) The time limit for filing claims for reimbursement was extended from 180 days to fifty-two weeks following the first payment of benefits after the second injury.\(^3\) Additionally, spinal fusions and mental retardation were added to the list of permanent partial disabilities.\(^4\) These may be registered with the second injury fund for the benefit of the employer should the employee thereafter receive a subsequent compensable injury which merges with the pre-existing condition.

**OTHER BILLS**

In other workman’s compensation bills, the legislature made minor adjustments in the operation of the Second Injury Board\(^5\) and provided for lump sum settlement of disability benefits if no term had been set for payments.\(^6\) Act 530 provides for reimbursement for actual travel expenses necessary to obtain medical care, rather than computation of mileage geared to the deduction provided in the Internal Revenue Code, section 213.\(^7\) Actual reimbursement of proven travel expenses has long been recognized as compensable under the Louisiana jurisprudence.\(^8\) However, until the legislature tied the expenses to the Internal Revenue Service standard rates in 1976,\(^9\) wide variations in judicial awards resulted.\(^10\) It

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2. Id. 23:1371(C) (Supp. 1977).
6. 1977 La. Acts, No. 40, amending L.A. R.S. 23:1274 (1950). 1975 La. Acts, No. 538, amending L.A. R.S. 23:1221 (Supp. 1968) removed the term for which benefits were payable for injuries causing permanent or temporary total disabilities. Instead, it provided for recovery “during the period of such disability.” It is believed that the 1977 amendment was enacted to confirm the authority of the judiciary to approve lump-sum settlements reached in cases where the durations of the award are uncertain. This authority was not expressly provided under L.A. R.S. 23:1274 (1950), a statute originally designed for approval of discounted lump-sum settlements figured upon awards of a particular duration.
10. E.g., Jack v. Fidelity Cas. Co., 326 So. 2d 584 (La. App. 3d Cir. 1976) (15 cents per mile); Walters v. General Accident & Fire Assurance Co., 119 So. 2d 550
remains to be seen whether a standard measure will evolve under the new act.

Louisiana's workman's compensation law provides that benefits paid to an applicant on the basis of a materially false statement or representation are immediately due upon demand by the administrator, and that the offending applicant is not entitled to further benefits until repayment has been made or until fifty-two weeks have expired from the determination. Act 648 provides that false statements of the reason of separation from employment do not trigger these provisions unless the employer delivers a "separation notice alleging disqualification" to the employee within seventy-two hours of the separation.

CONSUMER PROTECTION

Although no changes were enacted in the basic Louisiana consumer legislation, several acts more readily identified with other fields of law will affect consumers. Among these are the bills concerning Homestead Exemptions, Repairman's Privilege, eyeglass advertising, and the use of prescribed actions as defenses to suit. Also, the Displaced Homemaker Act defies proper classification in another section of this symposium and is briefly discussed here due to its humanitarian purpose.

PRIVILEGES AND EXEMPTIONS

The legislature retreated from the position it took in 1976 concerning the repairman's privilege on automobiles for work, parts, and labor performed. Act 369 abrogates the requirement of written estimates for jobs over one hundred dollars. Authorization to perform work above the cost of the estimate is still required for the repairman to have a privilege on the


1. 1976 La. Acts, No. 102 required that written estimates be furnished consumers for any job exceeding one hundred dollars. Should the job costs exceed the estimate, the repairman was required to obtain written authorization from the consumer in order for his privilege to attach to the excess above the estimate. The act was suspended by 1976 La. Acts, H. Con. Res. 244.
amount that exceeds the estimate, but such authorization need not be written.\(^3\)

In related legislation, the anachronistic exemptions from seizure were somewhat modernized by Act 360.\(^4\) Clothes dryers, living room suites, heating and cooling equipment, and a cow were added to the list of items immune from seizure under any writ or process.\(^5\) The procedure for claiming the constitutionally provided homestead exemption\(^6\) was also clarified in Act 446.\(^7\)

**TRUTH IN LENDING**

Article 424 of the Louisiana Code of Civil Procedure provides that prescribed causes of action may be used as defenses if they are incidental to or connected with the main demand sought to be enforced.\(^8\) However, this article was amended by Act 254 to restrict the scope of protection given to Louisiana consumers.\(^9\) Act 254 provides that prescribed actions arising under the Federal Consumer Credit Protection Act\(^10\) may not be raised as defenses.\(^11\) Therefore, *Termplan Mid-City, Inc. v. Laughlin*\(^12\) and *Reliable Credit Service, Inc. v. Bernard*\(^13\) have been legislatively overruled.\(^14\) In each case, the defendant debtor pled as an affirmative defense a prescribed violation of provisions of the Consumer Credit Protection Act. The Fourth Circuit Court of Appeal determined that such was proper under Louisiana Code of Civil Procedure article 424.

**LOAN PREPAYMENTS**

The legislature limited penalties which may be assessed for partial

\(^3\) See note 1, *supra*.


\(^5\) *Id*.

\(^6\) LA. CONST. art. XII, § 9.


\(^8\) LA. CODE CIV. P. 424.


\(^12\) 333 So. 2d 738 (La. App. 4th Cir. 1976).


\(^14\) For a brief discussion of these two decisions, see *The Work of the Louisiana Appellate Courts For the 1975-76 Term—Consumer Law*, 37 LA. L. REV. 450-54 (1977).
and total pre-payment of loans secured by mortgages of rural property.\textsuperscript{15} Each instrument secured by such property must contain a clause authorizing prepayment of the balance prior to the date of maturity. This act does not apply to consumer credit transactions,\textsuperscript{16} as rebates for such are determined by the "Sum of the Digits" method.\textsuperscript{17} Persons attempting to apply or applying more restrictive prepayment schedules are subject to criminal and civil penalties.\textsuperscript{18}

**EYEGLASS ADVERTISING**

The prohibition against advertising prices for eyeglasses was removed by the legislature this session. Previously the Revised Statutes prohibited the advertising, as free or for a price, of glasses, frames, or contact lenses.\textsuperscript{19} Act 488\textsuperscript{20} now allows such advertising, but retains the prohibition against advertising the prices of contact lenses. Each advertisement must include a statement that the offer covers materials only and does not include vision examinations. Further, it must state whether the offered lenses are clear or tinted, glass or plastic, and the country of manufacture and the identity of the manufacturer of the glasses.\textsuperscript{21}

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\textsuperscript{16} By definition, a "Consumer Credit Transaction" is a consumer loan, credit sale or lease (LA. R.S. 9:3516(11) (Supp. 1972), which by definition are sales, leases or loans not exceeding twenty-five thousand dollars. \textit{Id.} 9:3516(10), (12), (13) (Supp. 1972); See \textit{Symposium, Consumer Protection Legislation} 34 LA. L. REV. 597, 598-604 (1974).

\textsuperscript{17} LA. R.S 9:3527-29 (Supp. 1972). These statutes provide only for rebate of the unearned finance charge upon prepayment in full of precomputed consumer credit transactions.

\textsuperscript{18} LA. R.S. 9:5326 (Supp. 1977). Violators are subject to imprisonment for not more than six months, fines of not more than five hundred dollars, or both.

\textsuperscript{19} The prohibition applied to retail merchants as well as optometrists. Louisiana State Bd. of Optometry Examiners v. Pearle Optical, Inc., 248 La. 1062, 184 So. 2d 10 (1966); State v. Rones, 223 La. 839, 67 So. 2d 99 (1953).


\textsuperscript{21} Pretermining discussion of the retained prohibition of advertising contact lenses, the new act should bring the law within constitutionally permissible regulation of the advertising of professional services and products. In \textit{Bigelow v. Virginia}, 421 U.S. 809 (1975), the Supreme Court recognized that commercial speech is within the protection of the first amendment, abrogating the former distinction of \textit{Valentine v. Chrestensen}, 316 U.S. 52 (1942). Thereafter the Court found prohibitions against advertising certain "routine" professional services violative of the first amendment. Bates v. State Bar of Ariz., 97 S. Ct. 2691 (1977) (attorneys); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (pharmacists). The Court's migration from the "prepackaged" drugs of \textit{Virginia Pharmacy} to the "routine services" in \textit{Bates} suggests that the precise delineation between protected and non-protected commercial advertising of professional services is not yet clear. See Note, 38 LA. L. REV. 259 (1978).
in lower eyeglass prices for Louisiana consumers. 22

DISPLACED HOMEMAKERS

In recognition of the increasing number of persons who find themselves displaced from their role as homemakers due to the death of spouses or dissolution of marriages and who are subsequently unemployed because of a lack of education, training or paid work experience, the legislature enacted the Displaced Homemaker Act, 23 which establishes a service agency to assist such persons. The agency’s function is to counsel displaced homemakers and to refer them to appropriate job opportunities, existing training programs, or service agencies specializing in financial, legal, educational and nutritional advice. The Bureau of Women within the Office of Human Services of the Department of Health and Human Resources administers the program.

MEDICAL LEGISLATION*

The medical malpractice insurance system enacted in 197524 underwent minor amendments this year. The position of “Risk Manager,” originally the private insurance company appointed to manage the underwriting authority, 25 has been redefined to comply with the public bid laws of the state in the selection of the manager. 26 Further, the compensation of the company is now subject to approval by the Division of Administration. 27 In other minor changes, applicants for coverage must now submit proof of their inability to obtain insurance from private insurers, 28 and

Williamson v. Lee Optical, 348 U.S. 483 (1955), the Court found that prohibitions against the advertising of eyeglass frames are permissible, and in Head v. New Mexico Bd., 374 U.S. 424 (1963), the Court upheld prohibitions against advertising the cost of prescription lenses. Neither case, however, dealt with the first amendment issue.

premiums for policies issued by the authority are pegged to those of private insurers for similar coverage. Additionally, each policy must now contain a clause limiting the liability of the authority to its reserves.

Medical Review Panel

Changes enacted in the method of allocating the costs of proceedings before the medical review screening board should provide broadened access to such panels by poorer claimants. The fees of the panel must be borne by the prevailing party. Heretofore, no law provided for payment of costs which have been charged to claimants unable to bear such expenses. These costs must now be paid by the health care provider if the claimant establishes under oath that he is unable to pay them. If the claimant thereafter obtains a judgment against the defendant or receives a settlement from him the award shall be offset by the amount of such advance payment.

Emergency Care

Necessary legislation dealing with emergency medical care was passed this session. Act 626 provides for the certification of emergency and advanced emergency medical technicians and for the employment of such technicians by ambulance and ancillary medical service organizations. Broad power to "practice medicine" is granted advanced emergency technicians while rendering emergency care upon the orders of a physician maintaining direct contact with the technicians. The advanced technicians are granted immunity from civil liability for all but intentionally harmful or grossly negligent acts while performing emergency treatment pursuant to physicians' instructions. Hospitals allowing the use of contact or telemetry communication facilities are liable only for grossly

36. Id. 40:1235 (Supp. 1977). Louisiana law appears settled that a person undertaking to provide medical services is subject to the same standards as a physician performing the same service. Butler v. Louisiana State Bd. of Educ., 331 So. 2d 192 (La. App. 3d Cir.), writ denied, 334 So. 2d 230 (1976); Thompson v. Brent, 245 So. 2d 751 (La. App. 4th Cir. 1971); Norton v. Argonaut Ins. Co. 144 So. 2d 249 (La. App. 1st Cir. 1962).
37. These are devices which transmit to a remote location pressure, temperature and
negligent acts by hospital personnel. However, a community standard of skill and care, considering the circumstances of providing emergency instructions, is required of directing physicians.

In other action, the legislation covering malpractice by state employed health care providers was amended to include voluntary professional services rendered in facilities by or on behalf of the state.

Laetrile*

Of the proposals before the legislature this summer, none drew more public attention than the laetrile bill. Act 99 of 1977 provides that the manufacture, sale, possession, and use of laetrile is lawful in this state, with the sale of laetrile's parental form subject to physician's prescription. The Act specifically exempts laetrile from the scope of several statutes which incorporate the findings of federal agencies relative to other vital medical signs thereby allowing physicians to transmit orders to the attending emergency technicians at the scene of an emergency.


40. LA. R.S. 40:1299.38-.39 (Supp. 1975) (as it appeared prior to the 1977 amendment). This legislation was rushed through the legislature in 1975 to diffuse an impending crisis in state provided medical care. It limited the liability of state employed health care providers to $500,000 and established a fund to pay for the defense and satisfaction of any judgments rendered against these employees. See First Checkup, supra note 24. The fund was abolished this year and judgments are paid by legislative appropriation. 1977 La. Acts, No. 744, amending LA. R.S. 40:1299.39 (Supp. 1975).


* See also the discussion of Act 99 in the Administrative Law section of this symposium, 38 LA. L. REV. 96, 106-07 (1977).


43. The manufacture, use, and sale of laetrile is exempt from: LA. R.S. 40:607 (1950) (unnumbered paragraph one, incorporated the findings of any department of the U.S. Government with respect to adulterated food); id. 40:608 (1950) (unnumbered paragraph one, providing the same for misbranded foods); id. 40:617 (1950) (unnumbered paragraph one, findings of misbranded drugs); id. 40:618 (1950) (pharmacopoeia codes). Note that laetrile is subject to all other provisions of the above cited statutes concerning adulteration and labelling.
adulteration, misbranding, and regulation of drugs and provides that the sale, manufacture and use of laetrile shall not be restricted or limited on the grounds that it is ineffective in the prevention or treatment of cancer.

Physicians prescribing or administering laetrile to cancer patients are protected against disciplinary actions by the Louisiana Board of Medical Examiners and from civil action by patients based solely upon such treatment.\textsuperscript{44}

The insulation from Board action is conditioned upon the physician's informing the patient of the present medical status of the drug and obtaining his written consent on forms provided by the Louisiana Board of Medical Examiners.\textsuperscript{45} However, immunity from civil liability under the Act requires only that the physician procure the prescribed consent agreement, with no requirement that the patient be informed of laetrile's medical status.

In similar action, the manufacture, use and possession of saccharin was declared lawful in this state,\textsuperscript{46} and exempted from several statutes incorporating by reference federal findings and regulations.\textsuperscript{47}

ENVIRONMENTAL LAW

COASTAL ZONE MANAGEMENT

Five years ago Congress passed the Coastal Zone Management Act\textsuperscript{1} for the protection and development of the nation's coastal areas.\textsuperscript{2} Under the provisions of the Act, coastal states\textsuperscript{3} are given annual grants to assist them in developing a state coastal zone program which must conform to

\textsuperscript{44} LA. R.S. 37:1285.1 (Supp. 1977).
\textsuperscript{45} Id. 37:1285.1 (Supp. 1977).
\textsuperscript{46} Id. 40:1059 (Supp. 1977).
\textsuperscript{47} See note 43, supra. Saccharin was exempted from these same statutes.

3. Coastal states are those which border on the Atlantic, Pacific, or Arctic oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. See 16 U.S.C. § 1453 (Supp. 1973).
various requirements of the federal act. After the program has been approved by the Secretary of Commerce, the states receive administrative grants to aid them in managing the coastal zone. States are not required to develop a coastal zone program, but only forego certain benefits if they choose to refrain from participation.

After several unsuccessful attempts in past sessions, proponents of coastal zone management prevailed in the legislature this year. Act 705 creates a twenty-one member Coastal Commission composed of the secretary of the Department of Wildlife and Fisheries, one representative from each of the ten coastal parishes, and ten members appointed by the governor to represent ten interest groups. The Commission's chief duty is to establish broad standards and criteria to serve as minimum requirements for state agencies and local governments when they set up management programs over their respective areas of jurisdiction. The Commission's standards must reflect certain policies, such as the interest held by

4. 16 U.S.C. § 1454 (Supp. 1975). The state program must identify the coastal areas subject to the management program; define permissible land and water uses in the zone; make an inventory of areas of particular concern in the zone; identify the legal means for controlling land and water uses; state broad guidelines on the priority of uses in particular areas; and describe the organizational structure which will implement the program. Additional requirements must be met by October 1, 1978. See 16 U.S.C. § 1454(b)(7)-(9) (Supp. 1976).

5. 16 U.S.C. § 1455 (Supp. 1976). These grants may cover up to eighty per cent of the program's administrative costs.

6. 16 U.S.C. § 1451(h) (Supp. 1976): "The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone..."

7. E.g., to participate in the revenues of the Coastal Energy Impact Program, 16 U.S.C. 1456(a) (Supp. 1976), a state must have an approved management plan, be receiving development grants for coastal zone management, or be making significant progress toward developing a management program which conforms to the federal requirements. See 16 U.S.C. § 1456a(g)(1) (Supp. 1976).


10. Id. The ten coastal parishes are Cameron, Vermilion, Iberia, St. Mary, Terrebonne, Lafourche, Jefferson, Plaquemines, St. Bernard, and Orleans.

11. Id. The ten interest groups are: the oil and gas industry; agriculture and forestry; commercial fishing and trapping; sport fishing, hunting, and outdoor recreation; ports, shipping, and transportation; nature preservation and environmental protection; coastal landowners; municipalities; producers of solid minerals; and industrial development. Six of the appointees must be from coastal parishes, and one must be from St. Tammany parish.

state and local governments in protecting the coastal zone and multiple compatible uses of the coastal zone. The management program which the Act creates demonstrates a strong belief that most land use decisions should be made on the local level. Although the Act requires certain state agencies to develop management plans, the bulk of authority in the coastal zone is left with local governments. For example, local governments have jurisdiction over water and erosion control, dredging, effluent, fill and drainage, habitation, and local roads and bridges. Local governments may also adopt regulations for land use which affect the uses controlled by state agencies so long as the local regulations are not in conflict with the jurisdiction of the state agencies.

The Act requires agencies and local governments to institute a permit procedure under which any person desiring to act within the coastal zone must secure a permit from the agency or local government having jurisdiction over the proposed use. After an application is made, the agency may hold a public meeting to obtain the views of interested parties or to develop data on which to base its decision. Any applicant who is not granted a permit may require a public hearing to be held, and the subsequent decision must be based on the evidence presented at the hearing and state the reasons for the decision. If the agency persists in refusing to grant the permit, the applicant may seek injunctive relief from the district court where the proposed use is to take place. The Act also allows agencies or local governments to issue general permits if an independent review of each instance of a particular use appears unnecessary.

13. Id.
14. LA. R.S. 49:213.6 (Supp. 1976), as amended by 1977 La. Acts, No. 705. For example, the Department of Wildlife and Fisheries controls wildlife and aquatic life, the Louisiana Forestry Commission has jurisdiction over forestry matters, and the assistant secretary of the Office of Conservation has control of mineral exploration, production, and transportation.
15. Id.
16. Id.
18. Id.
19. Id.
20. Id. Any adversely affected party may also seek injunctive relief.
21. Id. 49:213.9 (Supp. 1977). However there is clearly some question about the breadth of uses which the Act regulates. The Act was amended to provide that the regulation of the coastal zone would be adjusted by subsequent acts in direct relation to a relinquishment by the Corps of Engineers of its authority over Louisiana wetlands. This retraction of the Corps' authority would require congressional action. See 33 U.S.C. § 1334 (Supp. 1972).
Act 705 contains several provisions preserving the status quo. The Act defines "use" to exclude the construction, maintenance, repair, and normal use of any non-industrial structure "when these activities occur on high ground or on lands which have already been drained or filled." The original bill also excepted fast lands and lands used for agriculture, aquaculture, and silviculture, and these exceptions were expanded in committee to include numerous other uses.

There is some question whether the Act will receive federal approval due to what critics term its inadequacies. Certainly the most obvious area of controversy is the designation of the coastal zone's inland boundary as a line three miles inland from the Louisiana coast as defined in the Submerged Lands Act and established in United States v. Louisiana. Although numerous other boundaries were suggested, the legislature chose the most restrictive boundary proposed. The Act may also fall short of federal requirements by failing to provide for areas of unique biological or ecological value, and by placing undue emphasis on development of the coastal zone.

24. LA. R.S. 49:213.7 (Supp. 1977). Added to the list of exceptions were: uses without a direct and significant effect on coastal waters; hunting, fishing, trapping, and preservation of scenic, historical, and scientific areas as well as wildlife preserves; normal maintenance and repair of existing structures; construction of a single family residence or camp; construction of a private, non-commercial dock with cost or fair market value less than $2500; construction and change of navigational aids; construction of normal protective bulkheads; and emergency construction.
25. A failure to receive federal approval would delay the effect of sections 213.5 through 213.11. See LA. R.S. 49:213.12 (Supp. 1977). Failure to secure approval could also make Louisiana ineligible for the Coastal Energy Impact Program since a rejection of the management program could be construed by the Commerce Department as a failure to make significant progress in developing a coastal zone program. See note 7, supra. The governor has told the Department of Transportation and Development, the agency designated to administer all programs pursuant to the Coastal Zone Management Act of 1972, to prepare a bill for the 1978 session to amend Act 705 in order to bring it into line with the federal law. See 8 COASTAL ZONE MANAGEMENT 34 (1977).
28. E.g., Senate Bill 740, defined the coastal zone to include all the land south of Interstate 12 from the Mississippi state line to Baton Rouge and, from Baton Rouge to the Texas state line, all the land south of Interstate 10, excluding only East Baton Rouge, West Baton Rouge, and Acadia Parishes.
coastal zone and encouragement of multiple uses within it.\textsuperscript{30} The Act may also be faulted for making the adoption of certain management plans discretionary with local governments\textsuperscript{31} and for failing to provide for any review at the state level of these management plans if the local governments decide to adopt them.\textsuperscript{32} Another source of criticism is the provision forbidding the public acquisition of privately owned land without the owner's consent.\textsuperscript{33} The federal act provides that the state must have the authority to acquire private property by expropriation "when necessary to achieve conformance with the management program;"\textsuperscript{34} the Louisiana Act seeks to avoid the effect of this provision by declaring the acquisition of private property unnecessary for the Act's purposes.\textsuperscript{35}

\textbf{GILL NETS}

Another environmental issue which provoked great controversy in the 1977 session concerned the regulation of fishing nets, particularly the monofilament gill net which is considered by some to have caused a depletion in the stock of spotted sea trout and red drum. Act 653 made significant changes in the law on fishing nets and instituted a complete ban on certain types of nets in a large section of the state's waters.\textsuperscript{36}

The new law divides the state's waters by designating a line which roughly follows the Intracoastal Waterway from Texas to the New Orleans area where it then traces segments of the Harvey Canal, Industrial Canal, and Intracoastal Waterway until it follows the Louisville and Nashville Railroad right of way to the Mississippi state line.\textsuperscript{37} The Act then uses this

\begin{itemize}
\item \textsuperscript{31} "A local government may grant regulations for land use . . . ." Id. 49:213.6(B) (Supp. 1976), as amended by 1977 La. Acts, No. 705 (emphasis added).
\item \textsuperscript{32} 15 C.F.R. § 923.22 (1977): "[W]hile individual state programs may have a wide range of interstate, local or areawide agency roles to play, the program will be reviewed closely for assurance that it constitutes an organized and unified program. Consistent with this principle, there must be a clear point of responsibility for the program, although program implementation may be undertaken by several state entities."
\item \textsuperscript{33} Id. 49:213.5(c) (Supp. 1976), as amended by 1977 La. Acts, No. 705: "Acquisition, directly or indirectly of privately owned property is not necessary to achieve the intents and purpose of this Part. No rule, regulation, ordinance, order or standard, the purpose or application of which is to effect an involuntary acquisition or taking of such property shall be adopted, enacted, or implemented pursuant to the provisions of this Part by the commission or any agency."
\item \textsuperscript{34} 16 U.S.C. § 1455(d)(2) (Supp. 1972).
\item \textsuperscript{35} See note 33, supra.
\end{itemize}
boundary line to differentiate mesh requirements for seines, trammel nets, and gill nets. Seines, which are nets that entrap fish when the net ends meet, may have a minimum mesh of two inches square north of the line, and a maximum mesh of not more than one inch square south of the line. Trammel nets, which trap fish in pockets formed by layers of netting material, may have a three-inch square or six-inch stretched minimum mesh in the northern waters, but an inner layer maximum mesh of one-inch square or two-inch stretched is prescribed for the area south of the line. Gill nets have the same requirements as the trammel nets north of the line, but in the southern waters they must have a minimum mesh of two inches square or four inches stretched.

The Act completely bars monofilament gill nets and trammel nets, devices made from a single, untwisted filament, from all waters south of the line as well as Lake Pontchartrain, Lake Maurepas, Lake St. Catherine, Toledo Bend Lake, Lake Calcasieu, and the portion of the Calcasieu ship channel which adjoins the lake. The new law also reduces the maximum length of these nets from two thousand feet to twelve hundred feet. Violations of this section are punishable by a mandatory fine of $500 and revocation of all fishing and gear licenses for one year.

A separate section of Act 653 creates new limits on the daily catch of red drum and spotted sea trout. The two species were in the center of the gill net controversy since many of the opponents of the devices contended that the recent decreases in trout and red drum catch were caused by gill netting. The new law provides that no more than fifty of either species may be caught in one day and allows fishers to have a maximum of two day’s catch in their possession. The Act also prohibits a saltwater sports fisherman from keeping more than two red drum per day which are longer than thirty-six inches. However, the mesh requirements for the waters south of the described line also apply to Lake Pontchartrain, Lake Calcasieu, and Sabine Lake.

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42. Id.
45. Id.
48. Id.
49. Id.
A similar determination to protect Louisiana's fishery resources is displayed by Act 549 which greatly increases the penalties for shrimping by double rig trawls in the state's inside waters during the closed season. The penalties range from a fine of $500 to $750 and a mandatory fifteen to thirty day sentence for a first offense to a fine of $750 to $1000 and mandatory incarceration for ninety to one hundred and twenty days for third and subsequent offenses. Violations shall also be punished by revoking fishing licenses and by confiscating trawls, tackles, and other equipment, and any shrimp found on the vessel.

ENERGY

The legislature responded to the energy program proposed by the Carter administration by passing two important Acts which seek to improve Louisiana's position in energy matters. The Natural Gas Pricing Act of 1977 is a ground-breaking measure which regulates the minimum price of intrastate sales of natural gas under the theory that low prices have encouraged consumption and discouraged production. The Act only applies to new natural gas, which is defined to include all gas discovered after the Act's effective date unless it was sold or to be sold under contracts executed prior to that date or had been committed to commerce by the producer under transactions effected prior to the effective date. The Act also only regulates first sales, which include all transfers of ownership from a producer, including the sale of gas which has been stored in reservoirs or other structures. Two methods for determining a minimum price are established, and the price is to be set at the smaller of the two figures.

52. Id.
53. 1977 La. Acts, No. 650, adding LA. R.S. 30:1001-11. Cf. 15 U.S.C. § 717-717w (1938 & Supp. 1954), the Natural Gas Act of 1938, which provides for regulation of "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for ultimate public consumption . . . , natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. § 717(b) (1938).
56. Id.
57. Id. 30:1004(A) (Supp. 1977).
The first method requires determining the average refiner acquisition cost of imported crude petroleum through statistics supplied by the Federal Energy Administration,58 which cost is then used as a base cost for a certain number of British Thermal Units.59 Under this method of calculation, the price of one thousand cubic feet of natural gas would bear the same proportion to its BTU content that a barrel of imported oil has to its BTU content.60 In determining what the price of imported oil is, the reference is made to the average price on the last day of the calendar month which ended four months prior to the month in which the sale of the new natural gas is contracted.61 The second method for establishing the minimum price requires an examination of the weighted price of all first sales made by producers of a comparable size, excluding any sale which is clearly unusual.62 In this case, data are taken for the first three months of the six month period ending with the month the relevant contract is entered into.63 Under either method of determining the price, the contract price remains the same for one year and then may be reestablished at the lower price calculated under either method.64

The Act requires that copies of all contracts be filed within thirty days of their execution with the assistant secretary for the office of conservation in the Department of Natural Resources.65 This same official has broad

59. LA. R.S. 30:1004(B) (Supp. 1977). A British Thermal Unit (BTU) is defined as "a unit or quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit." Id. 30:1003 (Supp. 1977).
60. Id. 30:1004(B) (Supp. 1977) gives an example of how this pricing works. If 1000 cubic feet of gas is found to contain 1,000,000 BTU's, and a barrel of imported oil contains 5,800,000 BTU's and sells for $12.00, the price of the natural gas should be 10/58 of the oil, or $2.07.
61. Id. Thus, if the contract is entered into on July 8, 1978, the BTU equivalency price is established on the basis of statistics for February 28, 1978.
62. Id. 30:1004(C) (Supp. 1977).
63. The statute states: "[T]he weighted average of the first sale of intrastate natural gas by producers of like kind and quantity . . . within the earliest three months of a six month period beginning with and including the month in which the sale or other transfer of ownership is to be completed." Id. (emphasis added). However, this would require basing a present sale on statistics from future sales and is obviously an error in drafting. The Office of Conservation construes the statute as though "beginning" were "ending." Telephone conversation with Arnold Chauvier, assistant commissioner of conservation, October 15, 1977. Thus, if a contract is entered into on January 1, 1978, records of prices received in July, August, and September 1977 would be checked.
64. Id.
65. Id.
enforcement powers to administer the price regulations,\textsuperscript{66} to investigate possible violations,\textsuperscript{67} and to conduct hearings.\textsuperscript{68} The assistant secretary's most significant power, however, is his ability to reduce the minimum price upon being presented with evidence that its enforcement will result in the producer's gas remaining in the ground, thereby creating undue hardship on the producer.\textsuperscript{69}

The second important enactment relative to energy resources is Act 561 which establishes a regulatory scheme for coal or lignite slurry pipelines.\textsuperscript{70} This Act is designed to assure that coal can reach Louisiana by an inexpensive means of transport if Louisiana industries are required to convert to coal under new federal energy legislation. The Act authorizes pipeline companies which have obtained state licenses from the Department of Natural Resources to expropriate property\textsuperscript{71} in corridors fifteen feet in width\textsuperscript{72} and to lay, maintain, and operate the pipeline and any necessary telephone and telegraph wires.\textsuperscript{73} Only one pipeline can be laid in each corridor unless the landowner permits additional pipelines to be located there.\textsuperscript{74}

The Act contains numerous clauses to protect the interests of Louisiana citizens against the pipeline companies. One provision states that if the

\textsuperscript{66} Id. 30:1007 (Supp. 1977). His powers include the power to make expenditures, to adopt and amend rules and regulations, to employ personnel, to issue and modify orders, to contract for professional services, and to represent the state before federal agencies, and congressional committees, and in all judicial actions.

\textsuperscript{67} Id. 30:1008 (Supp. 1977). The assistant secretary may administer oaths, subpoena witnesses, compel their attendance, take evidence, and require the production of materials he deems relevant to his inquiry.

\textsuperscript{68} Id. 30:1009 (Supp. 1977). Hearings for the promulgation of rules and regulations or for the issuance of orders must be held publicly after at least fifteen days notice except in cases of emergency. All hearings, investigations, and proceedings are to be governed by rules of practice and procedure adopted by the assistant secretary, and the technical rules of evidence are not required.

\textsuperscript{69} Id. 30:1005 (Supp. 1977). However, the assistant secretary must then set a new minimum price for the gas, which must be the highest feasible price.


\textsuperscript{71} LA. R.S. 30:723A (Supp. 1977).

\textsuperscript{72} The corridor is to be seven and one-half feet on each side of a center line, with the right of entrance and exit along the permanent right of way area. During construction the pipeline company may use a working space of one hundred and fifty feet in width, with extra space permitted for road crossings, stream crossings, canal crossings, or pipeline crossings. LA. R.S. 30:723C (Supp. 1977).

\textsuperscript{73} Id.

\textsuperscript{74} Id. 30:724 (Supp. 1977).
pipeline is not built due to the company's inability to secure the necessary state or federal permits, the company has no right to the money it paid to the landowner to acquire the right of way but cannot use the property except for the purpose stated in the judgment of acquisition. A second protection for the local landowner provides that the landowner can sue the company for trespassing on any land outside the construction right of way, and that the landowner's measure of recovery is five times the square foot value of the expropriated land (as measured by the compensation for expropriation) multiplied by the number of square feet trespassed upon by the company. The Act also prohibits the use of any Louisiana water to transport the coal until the assistant secretary of the Department of Natural Resources determines that the area's water supply will not be adversely affected. Local authorities can require that a public meeting be held if they disagree with the assistant secretary's decision that local water supplies can be used. A final protection for Louisiana citizens provides that in the absence of federal or state price controls, contract prices for a pipeline deemed interstate in character cannot discriminate between Louisiana purchasers and those in other states.

NUCLEAR WASTE

By passing Act 193, the legislature took a cautious approach to the disposal of radioactive wastes within the state. The new law prohibits the use of any salt dome as a temporary or permanent storage site for radioactive wastes or materials, and provides for fines of $1000 for each day the violation occurs or for a term of imprisonment up to six months. No tests to determine the feasibility of storing radioactive wastes within Louisiana's geological structures can be conducted unless the local government, Natural Resources Committees of the legislature, and secretary of the Department of Natural Resources are informed of all details concerning the tests. The results of any test conducted under these conditions are then to be reported to the House and Senate Natural Resources Committees which then may recommend removing or continuing the restriction embodied in this Act.

75. Id. 30:723E (Supp. 1977).
76. Id. 30:723I (Supp. 1977).
77. Id. 30:723F (Supp. 1977).
78. Id.
79. Id. 30:723H (Supp. 1977).
81. Id. The person will also be ordered by the court to remove the radioactive material or waste from the salt dome.
82. Id.
83. Id.
Although the legislature's action is obviously intended to benefit the health and safety of Louisiana citizens, there is some question whether the ban on radioactive waste disposal is within the legislature's competence. Under the provisions of the Atomic Energy Act of 1954, the Atomic Energy Commission may enter into agreements with the governors of the states by which the Commission can relinquish its regulatory authority over such matters as by-products, source materials, and special nuclear materials in quantities insufficient to form a critical mass. However, the Commission may not delegate its authority to the states over certain matters, including the disposal of waste by-products, unless it believes that their disposal will not be hazardous. Thus, it seems possible that Louisiana cannot control the disposal of radioactive wastes in its salt domes since an amount of waste large enough to warrant storage in a salt dome would probably be too hazardous to fall into the exception for state jurisdiction. It is possible, however, that political factors will cause federal officials to avoid pressing for resolution of the legal issues, and that some form of shared state-federal decision making will be used when storage sites for large amounts of nuclear wastes must be selected.

86. 42 U.S.C. § 2021(b) (1946).
87. Id. § 2021(c). See also 10 C.F.R. § 8.4(e): "However, section 274c (42 U.S.C. 2021(c)) provides that the Commission shall retain authority and responsibility with respect to the regulation of ... (3) the disposal into the ocean of waste by-product, source or special nuclear materials; and (4) the disposal of such other by-product, source or special nuclear material as the Commission determines should because of the hazards or potential hazards thereof, not be so disposed of without a Commission license."
88. See Morning Advocate, September 27, 1977, at 12-A, col. 3: "Bill Bishop, assistant director of waste management for the Nuclear Regulatory Commission, said federal officials will give up on a proposed storage site if local political pressure gets too hot ... Karl Kuhlman of the Energy Research and Development Administration also said that states will have some veto power over federal decisions in choosing storage sites."
PROCEDURE

CIVIL PROCEDURE

APPELLATE PROCEDURE

The 1977 legislature made several major changes in appellate procedure. Most of the changes were proposed by the Louisiana State Law Institute, and the result should make appeals both more accessible and less difficult.

Security to be Furnished for An Appeal

The requirement of a devolutive appeal bond has often proven to be a hindrance to efficient judicial procedure. Inasmuch as a devolutive appeal does not suspend the execution of a judgment, and payment of costs is now assured by the fact that the appellate court has no jurisdiction unless costs are paid, there is no compelling reason for a devolutive appeal bond. Therefore, Act 176 now provides that no security is required for a devolutive appeal. This will not only simplify the appellate process for litigants, but will also increase the efficiency of the judicial administration of appeals. Appeals are favored in the law, and Act 176 serves to dispose of an anachronism while streamlining appellate procedure. This Act also eliminates the last paragraph of article 2124, requiring appeal bonds to secure the costs due by the appellant including those due the clerk of the trial court for the preparation of the record on appeal. Such costs must now be paid upon receipt of their estimation of the costs by the clerk.

Return Day

In 1976, the legislature amended article 2125 of the Code of Civil Procedure to permit only one automatic extension of the return date in the

2. LA. CODE CIV. P. art. 2087.
trial court. However, due to an error in punctuation, the article provided that the return day was initially to be set on motion of the clerk. This was not the intent of the legislature, however, for the return date is fixed in the order of appeal, and not on the application of the clerk. Act 177 of 1977 corrects the punctuation to accord with legislative intent, and rewords the article so as to clarify the procedure for fixing the return day. Act 177 also changes the procedure for fixing the return day. Under prior law, the trial judge was required to fix the return day at sixty days or less from the date the appeal was granted. Under Act 177, the return day will be sixty days unless the trial judge fixes a shorter period.

Payment of Costs on Appeal

In 1976 the legislature amended article 2126 of the Code of Civil Procedure to require the appellant to pay the clerk of the trial court all estimated costs for the preparation of the record on appeal, including the filing fee of the court of appeal, not later than twenty days after the granting of the order of appeal. Any difference between the estimated costs and the actual costs is to be paid within three days of the return day. Act 198 continues some of these requirements and adds others in order to clarify the procedure for payment of costs. Specifically, article 2126 now requires the clerk to estimate immediately the costs of preparing the record on appeal, including the fee of the court reporter for preparing the transcript and the filing fee of the court of appeal, once the order of appeal has been granted and the security, if required, has been furnished. The clerk must send a notice by certified mail of the estimated costs to the appellant, who must pay the costs within twenty days of the mailing of the

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8. As it appeared in Act 426 of 1976, article 2125 of the Code of Civil Procedure provided that "[t]he return day of the appeal shall be fixed by the trial court at not more than sixty days from the date the appeal is granted on the application of the clerk . . . ." (emphasis added).
10. Id.; "The return day of the appeal shall be sixty days from the date the appeal is granted, unless the trial judge fixes a shorter period. The trial court may grant only one extension of the return day and such extension shall not be more than thirty days. A copy of the extension shall be filed with the appellate court. Subsequent extensions of the return day may be granted by the appellate court for sufficient cause."
notice unless an extension is granted.

One major new provision allows the appellant to question excessive estimated costs by rule in the trial court. Once the record on appeal has been prepared and completed, the clerk must refund any excess costs, or, if additional costs are due, he must send notice by certified mail to the appellant, who has twenty days from the mailing of the notice to pay the difference. The trial court is also given flexibility to impose sanctions for failure to pay timely the estimated costs or the difference between the estimated costs and the actual costs. Prior law only gave the trial court the power to dismiss the appeal, but the new provision gives the court the discretion either to grant a thirty day extension without penalty within which to pay the costs (presumably for cases where payment is delayed through no fault of the appellant or his attorney), or to fine the appellant and/or his attorney (where the attorney is at fault) a maximum of one hundred dollars. Thus, the dismissal of an appeal will now only be used in the most extraordinary of circumstances where costs are not timely paid. Finally, the amendment prohibits the dismissal of an appeal because of the passage of the return day without an extension having been obtained or because of an untimely lodging of the record on appeal if the appellant has paid the costs as required. Thus, even if costs should be paid untimely, the appeal may not be dismissed without the making of a motion under the provisions of the article.

14. The new provision requires that this delay be calculated from the date of mailing rather than from the date of the granting of the order of appeal due to a possibility of a significant delay between the two dates. 1977 La. Acts, No. 198, § 2.

15. As under prior law, only one extension of a maximum of twenty days may be granted, upon written motion showing good cause.


16. This solves such problems as that encountered in Martin v. Garlotte, 245 So. 2d 517 (La. App. 1st Cir. 1970).

17. This amended provision now makes La. R.S. 13:4445 obsolete, and thus section 1 of Act 198 repeals this statute.
Prepayment of Fees

Act 178\(^{18}\) deletes the reference to timely payment of fees in article 2127 of the Code of Civil Procedure. This was done to avoid any implication that the reference related to the return day.\(^{19}\) The timeliness of payment of costs is now governed by article 2126.\(^{20}\)

Divesting of Jurisdiction of the Trial Court

Act 175\(^{21}\) amends article 2088 of the Code of Civil Procedure in several ways. The amendment distinguishes between the devolutive and suspensive appeal in defining the time at which the trial court is divested of jurisdiction.\(^{22}\) Furthermore, the list of matters over which the trial court retains jurisdiction has been made illustrative rather than exclusive. Thus the trial court now has jurisdiction over all matters not reviewable under the appeal, whereas under prior law this was not clear. This should solve many of the problems that have been apparent in the jurisprudence.\(^{23}\) Finally, the amendment specifically allows the trial court to retain jurisdiction to dismiss the appeal or to impose the sanctions provided in article 2126 when the appellant fails to pay timely the estimated costs and the actual costs of the appeal. The latter provision recognizes that in most cases, the issue of whether costs have been timely paid is a question of fact, and as such should be determined by the trial court. In addition, if costs have not been timely paid, then the appellate court has no jurisdiction over the matter, under the new provision; rather, the trial court retains jurisdiction to dismiss the appeal or to impose appropriate sanctions.\(^{24}\)

Delay for Taking Devolutive Appeal

A party who seeks to have a judgment modified, revised, or reversed may take a devolutive appeal therefrom. If an appeal has been taken

\(^{19}\) See, e.g., Connell v. Sowers, 270 So. 2d 171 (La. App. 1st Cir. 1972); Downey v. Bellue, 178 So. 2d 778 (La. App. 1st Cir. 1965).
\(^{22}\) Id. The Act provides in pertinent part: “The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal, or on the granting of the order of appeal, in the case of a devolutive appeal.” This was made necessary because of the elimination of the requirement of a bond for devolutive appeal. 1977 La. Acts, No 176. See text at note 4, supra.
\(^{23}\) See Acosta v. Masters, 336 So. 2d 948 (La. App. 4th Cir. 1976).
\(^{24}\) Any ruling by the trial court relative to sanctions for such failure is clearly reviewable by the appellate court.
timely, an appellee may then also take a devolutive appeal. Under prior law, the appellee was required to appeal within the remainder of the regular delays or within ten days of the granting of the first devolutive appeal in the case. Act 174 now allows the ten day period for such an appeal to start on the day of the mailing by the clerk of the notice of the first devolutive appeal in the case. This is equitable inasmuch as article 2121 requires the clerk to mail notice of an appeal to all other parties, and in that such mailing may be delayed by unforeseeable circumstances. This Act also alters the language of the last paragraph of article 2087 so that an appellee may now take a devolutive appeal against any other party, rather than just against "any other appellee." Originally, the legislature enacted this provision to allow an appellee against whom a devolutive appeal was taken on the final day of the time period for appealing to have an additional period in which to perfect a devolutive appeal, thus eliminating both possible injustice and unnecessary protective appeals. The amendment makes clear that this provision applies not only to appeals against other appellees, but also to appeals against any other party who may not have been named as an appellee. Finally, the legislature eliminated the reference in article 2087 to the security for devolutive appeal, inasmuch as the requirement for a devolutive appeal bond has been eliminated.

Application for Certiorari in the Supreme Court and Rehearing in the Appellate Courts

Under prior law, application for rehearing in the court of appeal was a jurisdictional prerequisite to application for a writ of certiorari to the Supreme Court. Inasmuch as the vast majority of such applications for rehearing are denied, clients are exposed to needless delay and costs, and the effectiveness of the judicial system is hindered. Therefore, by virtue of

26. LA. CODE CIV. P. art. 2087 (as it appeared prior to Act 174 of 1977).
29. State v. Moore, 175 La. 607, 143 So. 707 (1932); In re Huddleston, 106 La. 594, 31 So. 147 (1902); Colomb v. Rolling, 106 La. 37, 30 So. 293 (1901); State v. Charles E. Wermuth Co., 140 So. 699 (La. App. Orl. Cir. 1932).
new legislation, a litigant now has the option of applying for a rehearing in the court of appeal or applying directly to the supreme court for a writ of certiorari within thirty days of the mailing of the notice of the judgment of the court of appeal. Failure to do either in a timely fashion will cause the judgment of the court of appeal to become final and definitive. However, a timely application for rehearing in the court of appeal by any party stays the time limit within which any other party may apply to the supreme court for a writ of certiorari for a period of thirty days from the mailing of the notice of a denial of rehearing. If no application for a writ of certiorari is filed within thirty days of the mailing of such notice of denial, the judgment of the court of appeal becomes final and definitive.

The delay for application for rehearing in the court of appeal runs from the mailing of the notice of judgment. Act 180 now applies the same rule to an application for rehearing in the Supreme Court.

DIRECTED VERDICT

While summary judgment and judgment on the pleadings are integral parts of Louisiana procedural law, there has never been a provision for directed verdicts. A motion for a directed verdict is made in a jury trial at the close of the evidence offered by the adverse party, and in effect usurps the power of the jury to decide the case. It is argued that such a device serves judicial efficiency by allowing the judge to conclude the litigation if the facts and inferences are so overwhelmingly in favor of the moving party that the court believes that reasonable men could not arrive at a contrary verdict. The legislature adopted verbatim the provisions of Federal Rule of Civil Procedure 50(a), thus allowing directed verdicts in Louisiana civil jury trials. However, in a system that allows appellate review of facts, directed verdicts may prove inefficient. For instance, if a

30. 1977 La. Acts, No. 179, amending LA. CODE CIV. P. art. 2166. In the event that one party applies for a rehearing in the court of appeal and one party applies for a writ of certiorari to the supreme court, the proceeding in the supreme court would most likely be stayed pending the disposition of the rehearing.
31. Id. By virtue of this amendment, as well as Rule X, section 4 of the Supreme Court Rules, LA. R.S. 13:4450 is unnecessary and is thus repealed by Act 181.
34. Under prior law, the fourteen day period for applying for a rehearing in the supreme court ran from rendition of the judgment.
35. LA. CODE CIV. P. arts. 965, 966.
directed verdict is issued at mid-trial, the record will be incomplete and the appellate court will not have all of the facts before it on review. Furthermore, if the evidence is so overwhelmingly in favor of the mover as to support a directed verdict, usually a motion for summary judgment will have been made earlier, or the defendant may simply rest after the presentation of the plaintiff’s case. A provision for judgment notwithstanding the verdict would thus be more practical in Louisiana.

LONG-ARM JURISDICTION

The Louisiana long-arm statute allows a court to exercise personal jurisdiction over a nonresident concerning a cause of action arising from five different circumstances, including "causing injury or damage by an offense or quasi offense committed through an act or omission in this State." A common jurisdictional problem arises where a spouse or former spouse seeks alimony or child support from a nonresident. Louisiana courts have refused to consider a failure to pay such an obligation of support as capable of causing sufficient injury or damage within the state to permit use of the long-arm statute. Act 734 allows a Louisiana court to exercise personal jurisdiction over a nonresident who fails to pay child support or alimony to a spouse or former spouse with whom the nonresident formerly resided in the state.

JURIES AND JURORS

Act 182 was enacted at the request of the Louisiana Judicial Council. It permits district judges to direct a person who has been summoned but has not yet served as a civil juror to serve as a juror in a criminal action, and vice-versa. It is anticipated that in those parishes where this is feasible, the district judges will implement this procedure by a local rule.

District judges have the power to order the jury commission to draw the names of persons to serve for a petit jury venire. Prior law did not explicitly allow the sheriff to summon the jurors by mail, thus increasing judicial costs due to the requirement of personal service. Act 57 amends the statute in accordance with a request by the Louisiana Judicial Council to allow the sheriff, at the election of the district judge, to serve such

summons by personal or domiciliary service, or by certified mail. When the service is made by mail, the sheriff must attach to his return the return receipt of delivery from the postal service showing the disposition of the envelope bearing the summons to the juror. The law provides that the return, with the attached receipt of delivery, shall form part of the record and be considered prima facie correct. While this new provision should greatly facilitate the summoning process for the sheriffs, it is possible that a juror might not receive the summons if the mail is delivered to another. If such situations occur often, the court is still free to require personal service, or may continue to serve notice by certified mail with the provision that the notice be delivered to the addressee only.

When jury service would result in undue hardship or extreme inconvenience to the juror, the trial judge has the authority to excuse the prospective juror from service. However, under prior law there was no provision allowing the excused jurors to be placed back into the jury pool after discharge. Act 377 now allows the court to order that the discharged juror’s name be placed again in the general venire or in a central jury pool.

**NOTARIES PUBLIC**

The powers of notaries public have historically been limited to parishes where they are commissioned. Even the power of a notary to administer oaths and take acknowledgements was considered to be limited to the parish where the notary was commissioned. Act 354 overrules this limitation of powers, and allows each notary public to administer oaths to parties appearing before such notary in any parish of the state. The oaths which can be administered include those for the taking or execution of depositions, interrogatories, and statements to be used in Louisiana courts. The oaths as well as the certificates issued by the notary “shall

44. In 1972, the legislature amended LA. CODE CRIM. P. art 417(C) to allow service in a similar manner on jurors in criminal cases.
45. LA. CODE CIV. P. art. 1767. See also LA. CODE CRIM P. art. 783.
47. An identical provision is incorporated in LA. CODE CRIM. P. art. 783 by virtue of Act No. 378.
49. LA. OP. ATT. GEN. 818 (1934-36); LA. OP. ATTY. GEN. 899 (1920-22). See also State ex rel Wootan, 313 So. 2d 621 (La. App. 4th Cir. 1975), writs denied, 318 So. 2d 47 (La. 1975), cert. denied, 424 U.S. 912 (1976).
51. See LA. CODE CIV. P. art. 1434.
52. See id. art. 1458.
have legal efficacy, including legal efficacy for purposes of the laws on perjury.\textsuperscript{53} The new provision, which somewhat expands notarial powers, should eliminate many of the problems which formerly affected parties and witnesses, as well as notaries. The legislature also enacted legislation to make it more convenient for notaries to live in one parish and have their principal office in another.\textsuperscript{54}

Act 451 provides for uniform qualifications and appointment of notaries public.\textsuperscript{55} The act provides for the situation in which a notary resides in one parish but maintains his office in another by allowing a notary who has been validly appointed for five years and who changes his residence to be issued a notarial commission for the parish of his new residence. The act also changes the composition of the committee for the examination of applicants for notaries by providing that the committee is to be composed of the clerk of court or his designee, an attorney, and a non-attorney notary.

**Small Claims Courts**

The legislature authorized each district court to establish one or more small claims divisions.\textsuperscript{56} It is anticipated that local rules will provide for such divisions. Among other provisions, the new legislation allows for evening and Saturday hours of operation and provides that subject matter jurisdiction shall be the same as that provided for justices of the peace courts.\textsuperscript{57} The procedural rules of the small claims court are very informal. The technical rules of evidence are relaxed, reconventional demands are permitted, and no depositions, interrogatories or other discovery proceedings are allowed. The judge may refer the matter to an arbitrator if the parties agree to such reference. The small claims courts are not bound by statutory rules of procedure, evidence, or pleading, except provisions relating to privileged communications, and hearings shall be conducted so "as to do substantial justice between the parties." A plaintiff waives his right to appeal by proceeding in small claims court, as does a defendant, except that a defendant may file a written notice of removal of the action to the ordinary civil docket of the district court within a specified delay. This

\textsuperscript{57} See LA. CODE CIV. P. art. 4832.
Act will provide for efficient judicial administration in those areas where there currently are no small claims courts.58

HOMESTEAD EXEMPTION

The transitional provisions in the 1974 Louisiana Constitution59 provide that the provisions of the 1921 Constitution60 concerning homestead exemptions shall be continued as a statute until the legislature enacts the homestead exemption required by the new constitution.61 Act 44662 fulfills this mandate. Basically, the Act follows the provisions of the 1921 Constitution, providing that fifteen thousand dollars in value of a homestead is exempt from seizure and sale under any writ, mandate, or process. The Act also continues the provisions for certain exceptions to the exemption. However, the Act goes beyond prior law by providing that whoever claims the benefit of the exemption must execute a written declaration of homestead containing specified statements which must be sworn to and recorded in mortgage records of the parish where the homestead claimed is situated. Under prior law, this was only required in cities with a population exceeding 250,000 persons (i.e., New Orleans).63 The Act, however, makes no such restriction. This requirement for recordation could pose serious problems if a debtor were to seek to record the declaration after the seizure of his property. The Act does not anticipate such a situation and makes no provision for it. If the purpose of the homestead exemption is to protect the debtor and preserve for him a certain amount of assets, a declaration and recordation subsequent to seizure should be held valid.64

58. The Declaration of Purpose of the Act is as follows: "The purpose of this Part is to improve the administration of justice in small noncriminal cases, and make the judicial system more available to and comprehensible by the public; to simplify practice and procedure in the commencement, handling, and trial of such cases in order that plaintiffs may bring actions in their own behalf, and defendants may participate actively in the proceedings rather than default; to provide an efficient and inexpensive forum with the objective of dispensing justice in a speedy manner; and generally to promote the confidence of the public in the overall judicial system by providing a forum for small claims."
59. LA. CONST. art. XIV, § 34.
60. LA. CONST. of 1921, art. XI.
61. LA. CONST. art. XII, § 9.
63. See Barlow v. Estate of Carr, 292 So. 2d 721 (La. App. 2d Cir. 1974).
64. See Lee v. Cooper, 155 La. 143, 98 So. 869 (1924); Becker v. Hampton, 137 La. 323, 68 So. 626 (1915); Barlow v. Estate of Carr, 292 So. 2d 721 (La. App. 2d Cir. 1974).
CAUSE OF ACTION FOR FAILURE TO SUPPLY NATURAL GAS

Act 674 provides that in the event of a failure to supply natural gas in Louisiana which is the direct result of compulsory reallocation or curtailment procedures (other than such procedures implemented pursuant to an emergency), the former recipient of the gas shall have a right and cause of action against the ultimate industrial user or local distribution company to whom the gas was reallocated and who knowingly received such gas. No ultimate user is liable if such user itself is a victim of compulsory curtailment. The Act also provides for jurisdiction over, and service of process on, non-resident defendants against whom the cause of action is created. There may, however, be a problem in obtaining jurisdiction over a non-resident industry whose only contact with Louisiana is that it received gas originally destined for a Louisiana resident.

SMALL CLAIMS SETTLEMENT LAW*

There is no statutory authority allowing state officials to compromise tort claims against the state. The result is that small claims will often result in litigation where the costs of such litigation far exceed the value of the claim. Furthermore, court dockets are frequently crowded with such small claim cases because the state does not allow its officials to use the judicially-favored compromise. Thus Act 596 provides a substantive and procedural basis for the swift non-judicial settlement of tort claims against the state or any of its agencies in amounts of two thousand dollars or less. Claims susceptible of settlement are those for damages to or loss of property, as well as personal injury claims caused by the negligent act or omission of any state employee while acting within the scope of his employment, under circumstances where the state, if it were a private person, would be liable to the claimant under state law. A small claims fund is to be established by legislative appropriations. All claims must be in writing, and each department of the state government must investigate each accident within the department which results in a claim. The report of the investigation must be forwarded to the attorney general with specific findings and recommendations concerning liability and amount of damage. The liability of the state is not extended to interest on the principal amount, punitive damages, attorney fees, court costs nor other costs incurred by the claimant in presenting his claim. The attorney general has

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* See the discussion of this legislation in the Administrative Law and Procedure section of this symposium, 38 LA. L. REV. 96, 99-101 (1977).
the authority to settle the claims; the settlement is final and conclusive on
the claimant, and shall constitute a complete release of the claim against
the state. Certain claims are not susceptible of settlement.67

OTHER LEGISLATION

Generally, attorney fees are not permitted in any action unless ex-
pressly granted by statute.68 In alimony and child support cases, however,
the jurisprudence has allowed attorney fees in some cases while denying
them in others.69 Act 462 resolves the conflict among the circuits by
allowing the court to award reasonable attorney fees in favor of the
prevailing party when the court renders an executory judgment incorporat-
ing the payment of child support or alimony in arrears.70 Act 686 provides
for attorney fees in suits for the prosecution and collection of a claim
arising out of a check dishonored for insufficient funds.71

Act 192 amends the provisions regarding the nature of the security to
be deposited by a tutor for the faithful discharge of his duties.72 Previ-
ously, the court could approve only a bond secured either by a domestic surety
company, by bonds of the state or a political subdivision or shares of
domestic building and loan or homestead associations. Under the new
provision, certificates of deposit in any domestically or nationally char-
tered bank insured by the Federal Deposit Insurance Corporation may be
used as security.

67. Two areas where the attorney general has no settlement authority are (1)
any claim based on assault or battery, false imprisonment, false arrest, malicious
prosecution, abuse of process, libel, slander, misrepresentation, or deceit; and (2)
any claim invoking a cause of action based on absolute liability or liability without
fault.


69. The early case of Newson v. Newson, 176 La. 699, 146 So. 473 (1933),
allowed attorney fees. However, in Wainwright v. Wainwright, 217 La. 563, 46 So.
2d 902 (1950), the supreme court denied attorney fees without discussing Newson.
Wainwright was followed in Stoltz v. Stoltz, 162 So. 2d 103 (La. App. 4th Cir.),
2d 402 (La. App. 4th Cir. 1975), cited all the above cases, yet followed Newson.
Janise v. Janise, 328 So. 2d 711 (La. App. 3d Cir.), writs denied, 333 So. 2d 233 (La.
1976) discussed the cases, yet followed Wainwright and disallowed attorney fees,
and suggested legislative action on the subject. When the Third Circuit was again
presented with the problem, it refused to follow its own precedent in Janise and
thus allowed attorney fees. Baldwin v. Baldwin, 337 So. 2d 245 (La. App. 3d Cir.
1976).

Act 96\textsuperscript{73} increases the maximum fees that sheriffs\textsuperscript{74} can charge in all civil matters. Attorneys should note these increases which will affect most areas of law practice.\textsuperscript{75}

Act 107\textsuperscript{76} increases the jurisdiction of justices of the peace in civil matters. Under prior law, they had jurisdiction concurrent with the district courts where the amount in dispute did not exceed three hundred dollars.\textsuperscript{77} This ceiling is now increased to five hundred dollars.\textsuperscript{78} In all other respects, the statute remains the same.\textsuperscript{79}

Act 360 adds several new exemptions from seizure and otherwise broadens and clarifies the language of the statute.\textsuperscript{80} The additions are clothes dryers, living room suites, heating and cooling equipment, and one cow.

Several new acts concerning prescription were passed by the Legislature. Act 444 provides that actions for the recovery of damages sustained in motor vehicle accidents brought pursuant to uninsured motorist provisions in automobile insurance policies prescribe two years from the date of the accident.\textsuperscript{81} The Act takes effect on July 1, 1978.\textsuperscript{82} Act 311 provides that judgments in favor of the state in the principal amount of three thousand dollars or less prescribe ten years from the date that the trial court signs the judgment, or the date of rendition by the appellate court.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{74} Orleans Parish is explicitly exempt from the provisions of the Act. 1977 La. Acts, No. 96, § 1.
\item \textsuperscript{75} The following paragraphs of LA. R.S. 13:1428 were amended (all fees were increased by one dollar): paragraphs (1) through (14), (16), (22), and (25).
\item \textsuperscript{77} The amount in dispute is exclusive of interest and attorney fees. LA. R.S. 13:2584 (Supp. 1975).
\item \textsuperscript{78} 1977 La. Acts, No. 107, § 1.
\item \textsuperscript{80} LA. R.S. 13:3881(4) (Supp. 1961), as amended by 1977 La. Acts, No. 360, now provides for the following general exemptions from seizure: “The clothing, bedding, linen, chinaware, non-sterling silverware, glassware, living room, bedroom, and dining room suites, cooking stove, heating and cooling equipment, kitchen utensils, pressing irons, washers, dryers, refrigerators (electric or otherwise) used by him or a member of his family; the family portraits; his arms and military accoutrements; the musical instruments played or practiced on by him or a member of his family; and the poultry, fowl, and one cow kept by him for the use of his family.” See the discussion of Act 360 in the Consumer Protection section of this symposium, 38 LA. L. REV. 135, 136 (1977).
\item \textsuperscript{81} 1977 La. Acts, No. 444, adding LA. R.S. 9:5604.
\item \textsuperscript{82} Id. § 4.
\end{itemize}
Act also provides for prescription of liens and privileges in favor of the state. Act 254 provides that a prescribed action arising under the Federal Consumer Credit Protection Act is not available as a defense, despite the fact that it may be incidental to or connected with the obligation sought to be enforced by the plaintiff.

Act 353 expands the method for service of process in cases under the non-resident motor vehicle statute. Under prior law, the plaintiff was required to send to the defendant a copy of the petition and citation, along with the notice of service, by registered mail. The Act now allows attorneys to use less expensive certified mail instead.

Act 606 increases the fee of witnesses residing outside the parish or more than twenty-five miles from the courthouse where the proceeding is to be held from five dollars to eight dollars per day. The mileage rate was increased from five cents to sixteen cents per mile. Act 315 raised the fees of witnesses residing within the parish or within twenty-five miles of the courthouse to the same levels.

PRE-TRIAL CRIMINAL PROCEDURE

Criminal Discovery Act

The most significant legislation passed this year relating to criminal law and procedure was Act 515, which provides for discovery by both the defendant and the prosecution in criminal cases brought in the district court. Much of the act is based on the Federal Rules, but there are some significant additions and deletions. The act provides for a relatively broad scope of discovery, a reciprocal duty to disclose in some situations, a continuing duty to disclose, a pre-trial conference, and regulation of discovery.


In some instances, discovery by the defendant may be conditioned on his own disclosure of similar materials. Such is the case when the defendant seeks to discover (1) books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, and (2) any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with or material to the particular case.

The discovery by the defendant of documents and tangible objects is limited to those items which are within the state's possession, custody or control, and (1) are favorable to the defendant and material and relevant to the issue of guilt or punishment, or (2) are intended for use by the state as evidence at the trial, or (3) were obtained from or belong to the defendant. Most documents or tangible objects of any significance should meet one of these criteria—most inculpatory items will be used by the state at trial, and most exculpatory items should be covered under the first criterion.

Discovery of inculpatory reports or results of examinations or tests is conditioned upon possession, custody, control, or knowledge of the district attorney and the state's intent to use the same at trial. However, exculpatory reports or results are not subject to the “use at trial” limitation. Allowing discovery of inculpatory reports and results will prevent surprise at trial and will give the defense sufficient time to retain its own

3. LA. CODE CRIM. P. art. 718; cf. id. art. 724.
4. Id. art. 719; cf. id. art. 725.

The court is authorized to make an in camera inspection to determine if evidence falls into this category. LA. CODE CRIM. P. art. 718.

6. Id. art. 719.
7. Id. art. 719. Since most reports would be inadmissible hearsay, the “use at trial” limitation may have rendered article 719 useless, at least for inculpatory reports. On the other hand, although the document itself is inadmissible and therefore not discoverable under this article, it may be argued that the “results” are discoverable if the state intends to have someone testify as to those results at trial. But cf. id. art. 725. If the results are not discoverable, then article 719 may be a trap. It also may be unconstitutional. See note 34, infra.
8. Id. Cf. FED. R. CRIM. P. 16(a)(1)(D) which does not distinguish between inculpatory and exculpatory reports or results; the Louisiana rule is thus broader than the federal rule in this instance, since the Louisiana rule allows discovery of exculpatory material.
experts to evaluate the reports of the state, to make independent tests, and to prepare for cross-examination of state witnesses.9

**Discovery by the Defendant—Non-reciprocal**

Article 716 of the Code of Criminal Procedure provides for discovery by the defense of statements made by the defendant. Subsection (A) allows discovery of "any relevant written or recorded confessions or statements of any nature, including recorded testimony before a grand jury."10 This should include both inculpatory and exculpatory statements made to anyone, whether pre-arrest or post-arrest.11 The statements must be "in the possession, custody, control, or knowledge of the district attorney,"12 but there is no requirement that the state intend to use the statements or confessions at trial in order for them to be discoverable.13

The defendant may also discover the substance of any oral statement which is made in response to interrogation by a known law enforcement official whether before or after arrest, if the state intends to offer the statement in evidence.14 For other oral statements made by the defendant, which the state intends to introduce, the defendant may discover only the existence thereof, with information as to when, where, and to whom such statements were made.15 The provisions of article 716 should not affect the state's duty to give notice required by Louisiana Code of Criminal Procedure article 768.16

Article 717 allows the defendant to discover a copy of any record of his criminal arrests and convictions.17 Articles 720 and 721 provide for

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9. Moore, *supra* note 5, ¶ 16[3], at 16-75. Cf. Miller v. Pate, 386 U.S. 1 (1967) (stain on clothing looked like blood but was actually paint; failure to allow discovery resulted in conviction based on state's expert testimony that the stain was blood). But see note 7, *supra*.


12. La. Code Crim. P. art. 716 (A). It is noteworthy that the "due diligence" language of Fed. R. Crim. P. 16(a)(1)(A) was not included in the Louisiana provision.


15. La. Code Crim. P. art. 716(B). Fed. R. Crim. P. 16(a)(1)(A) does not contain a comparable provision, so the Louisiana rule is broader in this instance.


17. Fed. R. Crim. P. 16(a)(1)(B) is the source for this article. Not only the district attorney but also the appropriate law enforcement agency may be ordered to produce the record of the defendant's arrests and convictions.
notice of evidence of other crimes and hearsay statements of co-conspirators.\(^{18}\) Article 720 only applies to other crimes which will be used to show knowledge, intent, or system,\(^{19}\) which are not part of the res gestae,\(^{20}\) and which will not be used solely to impeach the defendant's testimony. Article 721 allows only discovery of the state's intent to use hearsay statements of co-conspirators, not the statements themselves.\(^{21}\)

Article 722 appears to be quite significant; it provides for discovery of "any relevant written or recorded confessions or inculpatory statements made by a co-defendant and intended for use at trial."\(^{22}\) It also provides for the discovery of exculpatory statements even if the prosecution does not intend to use them at trial.\(^ {23}\) Discovery under this article will allow a defendant to be in a better position to decide whether to request a severance,\(^ {24}\) and will provide him with material for the impeachment or corroboration of witnesses.\(^ {25}\)

**Discovery by the State**

As noted above, when a defendant moves for discovery of documents and tangible objects,\(^ {26}\) or reports or results of examinations and tests,\(^ {27}\) he incurs a reciprocal duty to disclose similar material to the state.\(^ {28}\) The prosecution cannot initiate discovery under these articles, and the state may only discover the above items when the defendant intends to use them at trial.\(^ {29}\)

\(^{18}\) The defendant must make a motion for such notice. La. Code Crim. P. arts. 720-21. The discovery allowed by article 720 should not affect the state's duty to give Prieur notice of other crimes, since Prieur notice should also include the exception to the general exclusionary rule upon which it relies. State v. Prieur, 277 So. 2d 126 (La. 1973).


\(^{21}\) See id. 15:455 (Supp. 1966).


\(^{23}\) "Inculpatory statements" would appear to refer to statements made by a co-defendant which are inculpatory as to the defendant who is seeking discovery.

\(^{24}\) Article 722 differs from proposed Fed. R. Crim. P. 16(a)(1)(ii) in several respects. Article 722 adds the relevancy requirement and adds the provision for discovery of exculpatory evidence. "Exculpatory statements" apparently refers to statements made by a co-defendant which are exculpatory as to the defendant who is seeking discovery.

\(^{25}\) See La. Code Crim. P. arts. 704-06.


\(^{27}\) La. Code Crim. P. art. 718.

\(^{28}\) Id. art. 719. See note 7, supra.

\(^{29}\) The question may be raised whether discovery by the state violates a
Article 726 requires the defendant to notify the state of his intent to introduce testimony relating to a mental disease or defect which bears upon the issue of whether he had the mental state required for the offense charged. This article may prove to be a trap for the unwary. The state is not required to request 726 notice, and failure to give the notice may result in the exclusion of such testimony at trial—perhaps even the defendant’s testimony.

Article 727 provides for notice of alibi defense. Its enactment is in accord with the general purpose of the act, which is to prevent unnecessary surprise and delays at trial. Article 727 is the only provision of the act which allows discovery of the names of witnesses.

Disclosure of intent to use an alibi defense is state-initiated, and the prosecution must disclose the time, date, and place the alleged offense was committed. The defendant must then disclose whether he intends to offer an alibi defense. If he does, the defendant must also disclose the specific place he claims to have been and the names and addresses of witnesses he

defendant’s fifth amendment privilege against self-incrimination. However, the "use at trial" limitation may solve this problem. See Moore, supra note 5, ¶ 16.08(2), at 16-122; Wright, Federal Practice and Procedure § 256 (hereinafter cited as Wright).

30. Cf. Fed. R. Crim. P. 12.2(b); Moore, supra note 5, ¶ 12.2; Wright & Elliot, Federal Practice and Procedure § 20 (Supp. 1976). Louisiana did not adopt Rule 12.2(a) (defense of insanity) or Rule 12.2(c), which allows the court to order a psychiatric examination of a defendant upon motion of the attorney for the government. See La. Code Crim. P. arts. 650-58.

Article 726 does not deal with competency to stand trial. See id. arts. 641-49.

31. Id. at 726(B) provides: "If there is a failure to give notice as required by Subsection A of this Article, the court may exclude the testimony of any witness offered by the defendant on the issue of mental condition." Note that no explicit exception is made for testimony of the defendant, and that the Federal Rule says "any expert witness." But cf. Davis v. Mississippi, 394 U.S. 721 (1969).


33. "Given the ease with which an alibi can be fabricated, the State’s interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." Id. at 81. See also Wardius v. Oregon, 412 U.S. 470, 473-74 (1973): "Notice-of-alibi rules, now in use in a large and growing number of States, are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . . The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system."
intends to use to prove his alibi. Upon such disclosure by the defendant, the prosecution must divulge the names and addresses of witnesses it will use to establish the defendant’s presence at the scene of the crime or to rebut the testimony of the defendant’s alibi witnesses. Subsection (C) of article 727 provides for a continuing duty to disclose should new witnesses be discovered after the above information has been exchanged, and subsection (D) allows the court to exclude the testimony of any undisclosed witness, except that of the defendant.

As protection for the defendant, and in the interest of fairness, subsection (F) allows the defendant to withdraw a notice of alibi defense without fearing that such withdrawal will be used against him. Moreover, the court is authorized, for good cause shown, to grant exceptions to any of the requirements of subsections (A) through (D).

Article 727 should be beneficial to all parties. Since the alibi issue is raised prior to trial instead of at the eleventh hour, guilty pleas or dismissals are encouraged and the temptation to fabricate is discouraged.

Matters Not Subject to Discovery

Articles 723 and 728 provide explicit limitations on the scope of discovery authorized by the Act. Both incorporate the work product rule, and both preclude discovery of statements made by witnesses or prospective witnesses. In addition, article 728 precludes discovery by the state of the names of defense witnesses or prospective witnesses.

Manner of Discovery

Most of the discovery articles begin: "Upon motion of X, the court shall order . . . ." The Federal Rules use "request" instead of "motion," perhaps to ensure or at least suggest informality, but Louisiana retained the practice of trading motions. Notable exceptions are con-

34. This reciprocity is constitutionally required. Cf. Wardius v. Oregon, 412 U.S. 470, which held that an Oregon notice of alibi statute was a denial of due process because it was non-reciprocal.
36. LA. CODE CRIM. P. art. 727(E).
37. Cf. FED. R. CRIM. P. 16(a)(2) & 16(b)(2).
39. Although article 723 does not contain a similar prohibition against defense discovery of state witnesses, article 727 (notice of alibi) is the only article which authorizes such discovery.
40. "The court shall order" is the language of FED. R. CRIM. P. 16 prior to its amendment in 1975. The 1975 amendments changed the language to "the government shall permit" or to "the defendant shall permit." This was to make clear that a
tained in article 726, requiring notice of defense based on mental condition to be given without prior demand by the state, and article 727, where notice of alibi defense is initiated via written demand by the district attorney rather than by motion and court order. In addition a defendant must request in one motion all relief sought under the discovery rules.  

Defense motions for discovery must be filed after indictment or information, but not later than "ten days before trial or within such reasonable time as the court may permit." Notice of defense based on mental condition must be filed at least ten days prior to trial, but here also the court has discretion to allow late filing. The defendant has ten days to respond to a notice of alibi demand, and the state in most cases will have ten days after the defendant's response to file its counter-response.  

Article 729.4 provides for a pre-trial conference in criminal cases to dispose of discovery motions and to consider "such other matters as may aid in the prompt and fair disposition of the charge." Pre-trial conferences may be initiated by special order of the court or authorized by local rules. As in civil cases, the use of pre-trial conferences in criminal cases court order was generally unnecessary—that the parties should voluntarily comply. MOORE, supra note 5, ¶ 16.03[1], at 16-48; WRIGHT, supra note 29, § 258. While the Louisiana statute seems more formal, the discovery act does not preclude the type of voluntary discovery often used in civil cases, and such informal discovery may be desirable.

The discovery articles also provide for a pre-trial conference and a formal hearing. LA. CODE CRIM. P. arts. 729.4,729.1(A). A two-tier structure appears to be contemplated: (1) informal discovery, whether voluntary or at a pre-trial conference, and (2) discovery at a formal hearing.

41. Id. art. 729.
42. Id. art. 729.6.
43. Id. art. 729.
44. Id. art. 726.
45. Id. art. 727.
46. Cf. FED. R. CRIM. P. 17.1, which is substantially different from article 729.4. The federal conference may be invoked by motion of either party as well as by the court; the rule contemplates, but does not require, the presence of the defendant; and the rule requires the court to promulgate a memorandum. See WRIGHT, supra note 29, § 291. Moreover, MOORE, supra note 5, ¶ 17.1.02[2][a], 17.11-3, states that the federal conference is intended for complex cases only. Our rule, on the other hand, contains no such limitation and provides explicitly that the conference is a proper time for disposing of discovery motions.

47. L. CODE CRIM. P. art. 729.4.
should contribute greatly to efficient use of court time. The broad authority granted to the district courts to promulgate local rules could result in a procedure very similar to that used in civil cases.

Continuing Duty to Disclose

Article 729.3 provides for a continuing duty to disclose matters which arise after the issuance of an order and which come within the scope of the order.\(^4\) This is in keeping with the goal of preventing surprise and unnecessary delay at trial. An additional effect may be to encourage a defendant to make his initial motion for discovery very broad in order to gain the benefit of continuing discovery.

Regulation of Discovery

Discovery is not to be denied to a party without a contradictory hearing unless it appears on the face of the motion that as a matter of law the party is not entitled to the relief.\(^4\) The court has discretion, however, to vacate, restrict, or defer an order, upon a "sufficient showing by either party."\(^5\) The discretion allowed here appears to be analagous to the court's ability to render protective orders in civil cases.

Article 729.5 provides penalties for failure to comply with orders for discovery.\(^6\) The court is authorized to "order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant,\(^7\) prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate." Moreover, subsection (B) provides that a willful non-compliance with discovery rules or orders will be deemed a constructive contempt of court.\(^8\)

In Williams v. Florida,\(^9\) Mr. Justice White stated, "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."\(^10\) The Criminal Discovery Act is in keeping with this sentiment. The statute allows review of some potentially surprising items in advance of

\(^8\) This possibility is not explicitly provided for in the federal rule. Fed. R. Crim. P. 16(d)(2).
\(^9\) Subsection (B) is not a part of the federal rule. Fed. R. Crim. P. 16(d)(2).
\(^11\) Id. at 82.
trial, and the continuing duty to disclose prevents parties from withholding evidence obtained after initial discovery. The pre-trial conference authorized by the Act, if developed and used as in civil cases, can become an important device for framing the issues for trial. Finally, the regulatory devices provided by the Act should prevent abuse of the procedures. The end effect is a more efficient criminal procedure which should result in greater fairness for all parties.

APPOINTMENT OF COUNSEL

Prior to amendment, article 230.1 of the Code of Criminal Procedure provided that a defendant must be brought before a judge within 144 hours after arrest for the appointment of counsel. It also provided that if good cause was shown a defendant could be kept in custody after 144 hours without a hearing. Act 395 reduces the period to 72 hours and deletes the good cause language. Thus a defendant must be released if he is not timely brought before a judge for appointment of counsel.

Nolo Contendere Pleas

Act 534 expands the scope of cases in which a plea of nolo contendere can be entered. Formerly available only in traffic offenses, Act 534 makes the plea of nolo contendere available in all criminal cases except for capital offenses. In addition, the Act provides that a plea of nolo contendere is inadmissible in any civil proceeding for any purpose.

Central Jury Pools

The desire for a more efficient jury selection system prompted the passage of Act 372. The Act allows state district courts to pass local rules to create a central jury pool for civil and criminal cases, and provides that jurors may serve on civil or criminal juries or both.
Penalties were increased for prostitution,\(^1\) simple and aggravated arson,\(^2\) forcible rape,\(^3\) simple burglary,\(^4\) simple robbery,\(^5\) and obscenity.\(^6\) On the other hand, the death penalty for aggravated rape was repealed.\(^7\) In addition, two "omnibus" penalty bills were passed this year, providing enhanced penalties for crimes against the elderly\(^8\) and for crimes committed with firearms or explosives.\(^9\)

Act 105 enables the trial judge to empanel a new sentencing jury where there is an error in the sentencing hearing which would necessitate the granting of a mistrial or new trial.\(^{10}\) This prevents having to retry an entire case if an error occurs in the sentencing hearing.

Act 635 may prove to be quite significant, especially for criminal appeals and judicial efficiency.\(^{11}\) The act provides factors for the trial judge to consider when deciding on the penalty for felonies and misdemeanors,\(^{12}\) and it requires the judge to state for the record the factors taken into account and the factual basis therefor.\(^{13}\)

Restitution as a criminal penalty has caused some debate recently, and Louisiana has decided to join those states which allow restitution as a sentencing alternative. Act 720\(^{14}\) enables the court to order, as a condition

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4. 1977 La. Acts, No. 133, amending LA. R.S. 14:62 (1950). Although the maximum penalty was increased, simple burglary was changed to a relative felony (punishable with or without hard labor). Since theft is also a relative felony, this raises the interesting double jeopardy question whether a defendant may be tried for both theft and burglary under the new joinder rules. LA. CODE CRIM. P. art. 493.
12. Cf. ABA STANDARDS—SENTENCING ALTERNATIVES AND PROCEDURES § 2.5(c) (1968).
13. Cf. id. § 5.6.
of suspension of sentence and probation, restitution to the victim, payment to the indigent defender fund, or restitution of court costs.\textsuperscript{15}

\textsuperscript{15} The question may be raised whether requiring a defendant to pay court costs is an appropriate sanction, since in effect he will be paying the court to try him. Certainly the policy considerations for restitution to the victim and payment to the indigent defender fund do not apply here.