Adjective Law - Procedure: Civil Procedure

Henry G. McMahon

Repository Citation

Available at: https://digitalcommons.law.lsu.edu/lalrev/vol13/iss2/25

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.
During the past six months the Council of the Louisiana State Law Institute has been considering the case of notice pleading versus fact pleading—an issue which it has just resolved through the retention of the latter in principle. Thus far, however, agreement has not been reached upon all of the details. One of the principal arguments advanced by the writer, as Reporter on the title on Pleading, to support his recommendation to discard fact pleading, was the extreme difficulty which even the ablest appellate courts sometimes experience in distinguishing between allegations of ultimate fact and conclusions of law in borderline cases. Allegations that the plaintiff is a “holder in due course” or “purchaser in good faith,” or a “possessor in good faith,” or that the defendant “converted” certain property to his own use, or that either party has had the “real and actual possession” of property, not only have resulted in diametrically opposite holdings by the highest courts of the various American jurisdictions, but have as often caused a division of opinion among the justices of the same appellate court.¹ Florida Molasses Company v. Berger² is one of the cases falling within the troublesome penumbra zone, though surprisingly enough, there was no dissent from the opinion written by Mr. Justice McCaleb. Under an allegation “that the four named defendants, on or about May 13th or 14th, appropriated and converted [one hundred ninety odd thousand gallons of molasses] to their own use,”³ the plaintiff obtained an attachment of the property on the ground of the nonresidence of defendants. Motions to dissolve the attachment, and exceptions of no right or cause of action, all based upon the contention that these averments were conclusions of law and not allegations of fact, were overruled by the Supreme Court in reversing the judgment of the court below. In sweeping language, Mr. Justice McCaleb

¹ On these points see Cook, Statement of Fact in Pleading under the Codes, 21 Col. L. Rev. 416 (1921); Cook, “Facts” and “Statements of Facts,” 4 U. of Chi. L. Rev. 233 (1937); Clark on Code Pleading 225 et seq. (2 ed. 1947).
² 220 La. 31, 55 So. 2d 771 (1951).
³ 220 La. 31, 39, 55 So. 2d 771, 774.
said, "This is clearly a recital of facts which, if proved, would entitle plaintiff to judgment against the defendants in solido, as joint tort-feasors. We think that it would take a narrow and strained aspect of the pleadings to conclude that the well-understood words 'appropriate and convert' meant anything other than a wrongful or unlawful taking of another's property, i.e., a tort."  

While it is somewhat difficult to reconcile the result in this case with that reached by the majority of the court on rehearing in the leading case on fact pleading—State v. Hackley, Hume & Joyce— it is entirely consistent with the holding of a much later Louisiana case and is in complete harmony with the Supreme Court's present trend towards liberality of pleading.

**Exceptions**

Four cases decided during the past term involved the question as to the applicability of the well-settled rule that every person who may be affected by the judgment must be made a party to the proceeding. In *Horn v. Skelly Oil Company*, plaintiff brought suit under the Uniform Declaratory Judgments Act for a determination of the ownership of seven-eighths of the mineral rights of a tract of land of which the plaintiff owned a similar proportion of the surface rights. Plaintiff contended that a reservation, made by the Federal Land Bank in an act of sale to one of his ancestors in title created a mineral servitude which had been extinguished by the non-user of ten years, and which consequently reverted to the owners of the surface. Contrariwise, the defendants contended that such reservation merely created a mineral royalty which prescribed ten years thereafter because of non-use, and, since it was an appendage to the mineral interest, it reverted to the owners thereof. Since the Federal Land Bank had not been made a party to the litigation, the proceedings were remanded to permit it to be impleaded in the court below.

In *Doll v. City of New Orleans*, the owner of real estate

---

4. 220 La. 31, 39-40, 55 So. 2d 771, 774.
5. 124 La. 854, 50 So. 772 (1909).
6. Ciaccio v. Hartman, 170 La. 949, 129 So. 540 (1930), holding that the allegation that the plaintiff was in the "real and actual possession" of the property was an allegation of ultimate fact and not a conclusion of law. That the strict rules of fact pleading are not applied in Louisiana with respect to the four great real actions is attested by the forms set forth in Flemming's Formulary 482-483, 504-506 (McEnerny's 3 ed. 1933) which are completely supported by Ciaccio v. Hartman, supra.
7. 60 So. 2d 65 (La. 1952).
8. 221 La. 446, 59 So. 2d 449 (1952).
sought to recover certain rents collected from the then tenants by the city under a mistaken belief that it was the owner of the property under a tax adjudication. On appeal from a judgment of the First City Court of New Orleans in favor of plaintiff, the intermediate appellate court reversed the judgment and dismissed the suit, upholding the city's defense that since it was not acting in behalf of plaintiff at the time these rents were erroneously collected, an affirmance of the judgment might subject the city to a double recovery if sued subsequently by the tenants for recovery of the rents erroneously paid, and that consequently these tenants were indispensable parties to the litigation. By a divided vote under the writ of review, the Supreme Court affirmed the decision of the court of appeal. Justices Hawthorne and Moise dissented, being of the opinion that the judgment against the city in the instant case would afford it full protection against any subsequent suit by the tenants, and that hence the latter were not indispensable parties to the litigation.

The third case in this series presented a less difficult question. An action brought against the operator of a mineral lease who owned only a half-interest in the lease, for the cancellation of the lease except with respect to a ten acre tract around a producing well, resulted in a judgment for plaintiff in the trial court. On appeal the judgment was reversed and the suit remanded to permit the impleading of the owner of the other half of the mineral lease, who was held to be an indispensable party to the suit.

The last of these cases, Marrero Land & Improvement Association v. Duplantis, presented issues both of misjoinder of parties defendant and lack of indispensable parties. Plaintiff alleged that a construction company, acting under a contract with the City of Westwego, had dug a number of large drainage canals on plaintiff's property; that after the failure of the construction company to refill the canals upon demand, plaintiff had employed a third person to do so; and that when the latter had attempted to do this work, he had been arrested by the city officials of Westwego, who had informed him upon his release that if he continued with such work he would be again arrested and incarcerated. Injunctive relief was prayed for by plaintiff to prevent such officials from disturbing its possession of property which it had possessed for more than a year. Reversing the judgment of the court below dismissing plaintiff's suit, the appellate court overruled defen-

10. 221 La. 540, 59 So. 2d 829 (1952).
dants' exceptions of misjoinder, lack of indispensable parties and no cause of action. It held that the facts alleged disclosed a right to injunctive relief, that the defendant city officials were properly joined as defendants, and that the City of Westwego was not an indispensable party to the litigation.

Two other cases presented an issue as to whether exceptions of no right or cause of action should be maintained. In one, the appellate court overruled the exceptions, which had been referred to the merits by the trial judge, on the ground that the allegations of plaintiff's petition were sufficient. In the second, Arata v. Orleans Capitol Stores, the trial court had sustained an exception of no cause of action to the plaintiff's petition, and this ruling had been sustained by the intermediate appellate court. Plaintiff sued primarily to recover damages for personal injuries sustained by his minor son, when he was thrown from a bicycle when it struck a depression in a concrete sidewalk adjoining the named defendant's property. Both the trial court and the intermediate appellate court sustained the exception on the ground that plaintiff's allegations showed clearly that his minor son had been negligent. Under a writ of review, the Supreme Court reversed the judgment and overruled the exception. Applying the now settled rule that exceptions of no right or no cause of action raising the issue of contributory negligence appearing from the allegations of the petition should not be maintained unless the alleged facts exclude every reasonable hypothesis other than that the proximate cause of the accident was the negligence of plaintiff, the organ of the court found that the factual allegations left considerable doubt as to the issue of contributory negligence. Accordingly, this doubt was resolved in favor of the plaintiff.

In overruling exceptions sustained by trial courts in two other cases, the Supreme Court again demonstrated its liberal

---

11. Juneau v. Laborde, 219 La. 921, 54 So. 2d 325 (1951), where plaintiffs sued to recover an interest in property formerly owned by the marital community of their parents, and which had been sold to defendant's ancestor in title by their father after the death of the mother. In overruling exceptions of no right and no cause of action, referred to the merits by the trial judge, the Supreme Court held that the petition adequately and accurately described their claim as heirs of their deceased mother and brothers. Defendant's exception of the acquisitive prescription of ten years was overruled, since the evidence disclosed that both defendant and his ancestor in title had full knowledge of all of the facts constituting plaintiff's claim prior to their purchase, and hence were possessors in bad faith. The case was remanded for further evidence on the issues of the enhanced value of the land due to defendant's improvements, and the extent of the warrantor's obligation to defendant.

12. 219 La. 1045, 55 So. 2d 239 (1951).
views of pleading. In *Houeye v. St. Helena Parish School Board*, an exception of the prescription of one year levelled at plaintiff's action to be restored to his former teaching position and for back salary was overruled by the appellate court, and the judgment rejecting plaintiff's demand was reversed. The prescription in question was held to have been interrupted by the filing well within the year of summary proceedings for reinstatement, and the institution of the present proceedings within ten days of the finality of the Supreme Court's dismissal of the summary proceedings. In *Weiser v. Di Cristina*, the trial court held that plaintiff's previously dismissed suit for specific performance of an agreement to sell real estate, brought against the prospective purchaser, was res judicata of the second suit brought against the prospective purchaser and the real estate broker for a decree of forfeiture of the prospective purchaser's deposit. Since the object of the first suit was to enforce specific performance and that of the second was to decree the forfeiture of the deposit, and since the defendant real estate broker had not been a party to the first suit, the Supreme Court properly held that the first action was not conclusive of the second.

**The Reconvetional Demand**

Article 375 of the Code of Practice, announcing the basic rule on the subject, permits the reconvetional demand to be filed only when it is "necessarily connected with and incidental to" the principal demand. This requirement of connexity is relaxed, however, when there is diversity of residence between the plaintiff and defendant. In divorce and separation cases, when the two litigants reside in the same parish, usually there can be little if any connection between the two demands, and hence a reconvetional demand ordinarily is not permitted. *Meyers v. Hackler* presented unusual circumstances. The two demands were so connected and interrelated that the Supreme Court upheld the filing of the wife's reconvetional demand for a separation on the ground of cruel treatment to the plaintiff's demand for a divorce on the ground of adultery. While this result was not novel, it did work a broadening of the rule of an earlier case.

---

13. 220 La. 252, 56 So. 2d 413 (1951).
16. 219 La. 750, 54 So. 2d 7 (1951).
which was decided under facts which were the exact converse of those in the principal case.

The procedure employed and the facts of C. W. Greeson Company v. Harnischfeger Corporation\textsuperscript{18} are too involved and complicated to permit of complete statement and analysis within present limitations. A discussion of the law relating to attachment applied in this case will be discussed later;\textsuperscript{19} but the unusual procedure employed with respect to the reconventional demand merits attention at this point. The defendant originally sued the present plaintiff to recover the balance due on an open account covering the purchase of a dragline and accessory equipment. Defendant promptly reconvened for damages for alleged breach of contract. During the trial of the case, finding that the potential damages were in excess of those claimed in the reconventional demand, counsel for the reconvening defendant discontinued his reconventional demand. While the main demand was pending undecided, counsel filed a new reconventional demand for a larger sum. Alleging the nonresidence of the defendant in reconvention, the plaintiff therein attached the right, title and interest of the defendant in reconvention in the principal demand. The Supreme Court reversed the trial court which had dismissed the second reconventional demand as coming too late and had sustained the exception to the jurisdiction of the court ratione personae and the exceptions of no right or cause of action. The court held that since the second reconventional demand was filed while the main demand was pending in the trial court, it was timely. The exceptions of no right or cause of action were overruled. A claim for damages for the dissolution of the attachment was relied upon by the appellate court as constituting an appearance by the defendant in reconvention which cured his objections to the jurisdiction ratione personae of the trial court. The case is noteworthy with respect to two procedural tactics employed by the defendant in reconvention, though no issue as to the regularity or propriety thereof was ever presented to the Supreme Court. After moving to dissolve the attachment, the defendant in reconvention filed a reconventional demand to the reconventional demand, claiming damages for the illegal issuance of the writ of attachment at the instance of the plaintiff in reconvention. Defendant in reconvention also filed exceptions to the reconventional demand. The writer knows of no code, statutory or jurisprudential authority

\textsuperscript{18} 219 La. 1006, 54 So. 2d 528 (1951).
\textsuperscript{19} Infra, p. 320.
for the filing of a reconventional demand to a reconventional demand. Under the circumstances, however, there can be no question but that this procedure obviated an undesirable circuity of action. With respect to the filing of exceptions to the reconventional demand, the Louisiana cases are in conflict. The earlier ones\textsuperscript{20} treat the filing of an answer or exceptions to a reconventional demand as prohibited replications. A few recent cases\textsuperscript{21} appear to permit the filing of an answer and exceptions to the reconventional demand.

\textbf{The Trial}

No cases of any particular importance relating to trial procedure were decided by our Supreme Court during the past year. In \textit{Fellows v. Fellows},\textsuperscript{22} the appellate court sustained the action of a trial judge in refusing to grant a jury trial in an action brought to annul a will on the ground of forgery. This decision was in strict accord with the applicable code provision on the subject.\textsuperscript{23} In the second case,\textsuperscript{24} where the plaintiff sued the defendants to recover the sum of $4,650 entrusted to them for safekeeping, both the trial and appellate courts found that plaintiff's testimony and corroborative circumstances satisfied the requirements of Article 2277 of the Civil Code\textsuperscript{25} as to the proof of such an obligation. In a third case,\textsuperscript{26} where over the strenuous objections of the defendant the trial judge permitted the reopening of the case four months after its submission, in order to permit plaintiff to introduce evidence of a completely new issue not previously raised by the pleadings, the Supreme Court held the trial judge's action erroneous.


\textsuperscript{22} 220 La. 407, 56 So. 2d 733 (1951).

\textsuperscript{23} "All causes tried before a court of probate shall be decided without the intervention of a jury, even if the parties should wish for one." Art. 1036, La. Code of Practice of 1870.

\textsuperscript{24} Cormier v. Douct, 219 La. 915, 54 So. 2d 177 (1951).

\textsuperscript{25} "All agreements relative to movable property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved at least by one credible witness, and other corroborating circumstances."

\textsuperscript{26} Interstate Natural Gas Co. v. Mississippi River Fuel Corp., 220 La. 43, 55 So. 2d 775 (1951).
New Trial

In De Frances v. Gauthier, judgment by default had been rendered against defendant on eight checks issued to plaintiff, the payment of which had been refused by the drawee bank. Thereafter, defendant moved in the trial court for a new trial, alleging that the checks had been given in payment of gambling debts and hence had an illegal consideration. The trial judge refused a new trial, and defendant appealed, assigning the refusal to grant a new trial as error, and also filing an affidavit in the appellate court setting out for the first time alleged facts which he contended supported his application for a new trial. The appellate court refused either to grant a new trial or to remand the case to permit defendant to introduce evidence supporting his application for a new trial.

Appellate Jurisdiction

During the past two years, in an effort to relieve the congestion of a badly overcrowded docket, the Supreme Court has carefully scrutinized the jurisdiction of all cases lodged with it. This has resulted in numerous transfers of appeals to the intermediate appellate courts when the transcript failed to disclose affirmatively the appellate jurisdiction of our highest court. This strict examination of jurisdictional grounds, now implemented by a rule which requires the brief of the appellant to set forth “a statement of the appellate jurisdiction of [the Supreme Court] as applied to the case,” has produced during the past term a more bountiful harvest of transferred cases than in previous years. The sheer number of these transfers, as well as the questions decided in the more important cases, should serve as caveats to the practicing lawyers of the state, and eventually reduce to a minimum the number of cases improperly appealed to the Supreme Court.

Six appeals in mandamus cases, where no showing was

---

27. 220 La. 145, 55 So. 2d 896 (1951).
29. Rule X, § 2, Revised Rules of the Supreme Court of Louisiana, which went into effect on January 1, 1952.
made of a monetary or property interest involved, were transferred to the various courts of appeal. Similarly, appeals in cases where the plaintiff sought to annul a local option referendum and to reverse the decision of the Democratic State Central Committee dismissing plaintiff's objections to the qualifications of another gubernatorial candidate were held not to fall within the appellate jurisdiction of the Supreme Court and were transferred.

In Ledet v. Rodgers, plaintiff had sued for $2,391.50, and defendant's answer admitted that $409.50 was due, but incorporated a reconventional demand for $1,200. The court held that appellate jurisdiction must be determined by the amount in dispute on the main demand at the time of its submission to the trial court. Since less than $2,000 was at issue at that time, the case was transferred to the proper court of appeal. The privilege of the appellate court to disregard a grossly inflated claim of the plaintiff and to determine appellate jurisdiction upon the largest amount which plaintiff could reasonably recover was again exercised. There, plaintiff sued a laundry to recover $2,500 for damages for mental anguish, embarrassment and humiliation for its failure to deliver a suit in time for his wedding. Since the largest amount which plaintiff could recover was less than its jurisdictional minimum, the Supreme Court transferred the appeal.

Where no affirmative showing of the amount in dispute was made by the transcript, the Supreme Court refused to accept jurisdiction. Such cases included one where plaintiff sued to recover a half interest in land, and the record failed to show the value of the disputed interest; and another where the plaintiff sued for the removal of a fence from public property and for damages to plaintiffs' land and the transcript failed to provide any corroboration of plaintiffs' speculation as to the extent of the damage to their property. In Martin v. Carroll, the pleadings failed to recite the value of the land in dispute, and the highest appraisal thereof disclosed by the evidence introduced was $239.12. The appeal was transferred, despite a stipulation of the litigants that "the value of the property in contest, for jurisdictional purposes, be considered as in excess of $2,000."

33. 220 La. 650, 57 So. 2d 217 (1952).
37. 220 La. 481, 56 So. 2d 843 (1952).
The transcripts of appeal in two injunction cases failed to establish affirmatively any amount in dispute, and in both the appeals were transferred. In one, the appeal was from a preliminary injunction restraining the defendant lessor from constructing a fence across the backyard of the leased property. In the other, an undertaker sought to restrain the State Board of Embalmers from trying plaintiff on certain charges and taking disciplinary action against him.

In one instance, where two separate and distinct cases had been consolidated for trial, and a single transcript had been prepared for the appeals from the separate judgments, the Supreme Court reviewed the case falling within its jurisdiction, and since it had no appellate jurisdiction over the second case, the Supreme Court transferred it to the court of appeal. The fact that these cases were tried together in the lower court, and that a single transcript was prepared, could in no way confer jurisdiction upon the Supreme Court to review a case involving less than its minimum jurisdictional limit.

_Cavalier v. Original Club Forest_ presented a difficult and most interesting question which resulted from the freedom of cumulation of actions under Louisiana practice. Plaintiff brought suit to recover damages for personal injuries allegedly sustained from an assault and battery and from certain defamatory statements. The trial court rejected plaintiff's demand on the assault and battery charge, but awarded him damages for the defamatory statements. Both litigants appealed. The Supreme Court held that under the peculiar facts of the case, the defamation arose "out of the same circumstances" as the physical injuries, and that hence the intermediate appellate court had appellate jurisdiction over both claims. Under its precise facts, the result of the decision appears unexceptionable; but in its opinion the court took occasion to overrule expressly two former decisions which were thought to be in conflict. It appears to the writer that under the rationale of the overruled cases, the facts of the instant case might readily have been differentiated and the same result

---

41. 220 La. 183, 56 So. 2d 147 (1951), noted in 12 Louisiana Law Review 500 (1952).
The principal case has provided no substitute test for determining appellate jurisdiction in borderline cases where two demands having some connection with each other are cumulated in the same petition.

In Ryan v. Louisiana Society for Prevention of Cruelty to Animals, plaintiff was granted a permanent injunction abating an alleged nuisance. Defendant's appeal from the trial court's judgment was transferred to the court of appeal, for the Supreme Court found that there was no amount in dispute or fund to be distributed. Justice LeBlanc dissented on the ground that the appeal involved the plaintiff's civil right to the quiet enjoyment of her property free from the disturbances caused by the alleged nuisance, which right admittedly had a value in excess of $2,000. Although neither opinion states sufficient facts to enable the reader to reach any definite conclusion, the probabilities are that the result reached by the majority was sound, as there appeared to be no affirmative showing of the Supreme Court's jurisdiction, which cannot be conferred by the consent or admission of the parties.

Two appeals from declaratory judgments were transferred to the intermediate appellate courts, on the ground that there was no showing of any amount in dispute or fund to be distributed. These two cases continued the doubt in the minds of the legal profession as to whether our highest court considered that it would have appellate jurisdiction over any declaratory judgment case. This uncertainty was dispelled shortly thereafter, however, when the Supreme Court accepted appellate jurisdiction in three declaratory judgment cases, where apparently the records

43. On this point see Note, 12 LOUISIANA LAW REVIEW 500 (1952).
44. 221 La. 559, 59 So. 2d 883 (1952).
45. Mr. Justice LeBlanc's dissenting opinion was based on Frierson v. Cooper, 196 La. 450, 199 So. 388 (1940), noted in 1 Loyola L. Rev. 110 (1941). This case adopted the "defendant's viewpoint theory" in holding that the test of appellate jurisdiction was the loss which would be sustained by the defendant if a final judgment was rendered granting plaintiff injunctive relief.
47. See the discussion of the question in The Work of the Louisiana Supreme Court for the 1950-1951 Term, 12 LOUISIANA LAW REVIEW 121, 181-194 (1952).
48. Arkansas Louisiana Gas Co. v. Southwest Natural Production Co., 60 So. 2d 9 (La. 1952); Southwest Natural Production Co. v. Arkansas Louisiana Gas Co., 60 So. 2d 12 (La. 1952); and Horn v. Skelly Oil Co., 60 So. 2d 65 (La. 1952).
affirmatively showed that the mineral interests involved were considerably in excess of the minimum jurisdictional limit.

**Appellate Procedure**

Three cases decided during the past term presented the perennial question of whether the judgment of the court below was appealable. In *Succession of Mallary* at the instance of plaintiffs, the trial court rendered a judgment declaring decedent's will null and void, insofar as it affected property in Louisiana. More than six months thereafter, the successful plaintiffs took a rule upon the executrix to show cause why she should not file her final account, terminate the administration and deliver the assets to the heirs seeking to be placed in possession. This rule was made absolute and the trial court rendered judgment accordingly. Within a year of the rendition of this last judgment, but more than seventeen months after rendition of the judgment declaring decedent's will null, the executrix appealed from both judgments, characterizing the first as an interlocutory decree and the second as a final judgment. The Supreme Court sustained appellees' motion to dismiss the appeal, holding that the judgment avoiding the will was a final judgment, while the second was only an interlocutory decree implementing the final judgment. It was held that no appeal from the final judgment could be taken except within the year of its rendition and that the interlocutory decree could be reviewed only under a valid appeal from the final judgment which it implemented.

In *Oliphint v. Oliphint*, the court overruled a motion to dismiss the appeal based on the contention that the judgment was neither a final one nor an interlocutory decree causing irreparable injury. The judgment in question had been rendered in a separation case after rendition of the final judgment of divorce, and had dismissed a rule brought by the wife against the husband for the ascertainment of the community property and for an accounting. Since the decree in question disposed of the main controversy between the parties, the Supreme Court held it a final judgment.

The appellee's motion to dismiss plaintiff's appeal in a contested election case was sustained by the court. An appeal had been taken from a ruling of the trial judge, made during the trial

---

49. 220 La. 825, 57 So. 2d 737 (1952).
50. 219 La. 781, 54 So. 2d 18 (1951).
of the case, excluding certain ballot boxes from evidence on the ground that no proof had been submitted to show that they had not been tampered with. The court properly held that this ruling was neither a final judgment nor an interlocutory decree causing irreparable injury.

In two cases orders of appeal had been taken, the transcript prepared and lodged in the appellate court. In neither of these cases, however, had the appellant ever filed an appeal bond. On motion of the appellee, the appeals were dismissed. A similarly trite rule was employed to dismiss the appeal in another case, where plaintiff's demands against one defendant had been dismissed under exceptions, and no appeal from the judgment of dismissal was taken by plaintiff. The Supreme Court held that the other defendant's appeal from a final judgment against him did not bring up for review the judgment rejecting plaintiff's demand against the co-defendant.

R.S. 18:364 requires that any appeal in a contested election case be lodged in the appellate court within five days from the rendition of judgment in the trial court. In Gouaux v. Guidry plaintiff appealed to the intermediate appellate court from a judgment of the trial court dismissing his suit under exceptions. The appeal was lodged in the court of appeal within five days of the rendition of judgment by the court of first instance, but the intermediate appellate court held that it had no jurisdiction over the appeal and transferred it to the Supreme Court, where the record was lodged within the thirty days allowed for the transfer. Appellant's motion to dismiss the appeal on the ground that it had not been filed in the Supreme Court within the statutory five day period was overruled.

In Hagstette v. Wadsworth the appeal was dismissed on the ground that it presented only a moot issue. From a judgment ordering the judicial sale of property to effect a partition, the plaintiffs took a devolutive appeal, complaining of the failure of the trial judge to order a survey of the property to be sold. While the appeal was pending, the property was sold under the court order. Since the validity of the sale could not be questioned on

52. Rosier v. Good Pine Lumber Co. of Louisiana, 221 La. 531, 59 So. 2d 826 (1952); Whatley v. Good Pine Lumber Co. of Louisiana, 221 La. 534, 59 So. 2d 827 (1952).
54. 220 La. 916, 57 So. 2d 894 (1952).
55. 220 La. 666, 57 So. 2d 222 (1952).
appeal, the failure of the trial judge to order a survey of the property was held to have become a moot question.

SUPervisory Jurisdiction and Procedure

Heirs of P. L. Jacobs, Incorporated v. Johnson \(^{56}\) presented for the first time the question of whether the mere mailing by registered mail or special delivery of the application for a writ of review within thirty days of the court of appeal's denial of an application for rehearing satisfied the constitutional requirement that such an application be *filed* in the Supreme Court within a thirty day period. It was held that the constitutional provision was mandatory, and that in view of the failure of the applicant to comply therewith, the Supreme Court could not consider the application.

In *Box v. May*, \(^{57}\) believing that an important question of law was presented, the Supreme Court granted a writ of review to a decision of one of the courts of appeal. After consideration, it was found that only issues of fact were involved, and as there appeared to be no manifest error in the findings of the intermediate appellate court, the writ was recalled and the case affirmed.

In a contested election case \(^{58}\) the trial judge failed to render his judgment within the twenty-four hours allowed by the pertinent statute. At the instance of one of the litigants, alternative supervisory writs were issued ordering the trial judge either to render and sign his judgment on or before March 12, 1952, or to show cause to the contrary on a later date fixed by the Supreme Court. In his return to the writs, the trial judge contended that the writs should be recalled since (1) the twenty-four hours allowed by statute had now elapsed; and (2) the question was now moot since under the pertinent act the ballots were required to be in the hands of the state printer by a date which had then passed. Both points were swept aside by the Supreme Court in unmistakable language. The trial judge's failure to comply with his mandatory duty was held not to excuse his continued failure to render and sign the judgment. The second objection was held "not an issue before [the trial judge] nor a matter that concerns him." The respondent judge was directed forthwith and without delay to render and sign his final judgment in the case.

---

56. 221 La. 473, 59 So. 2d 691 (1952).
57. 220 La. 846, 57 So. 2d 744 (1952).
CONSERVATORY WRITS

In two cases the actions of the defendants in seeking affirmative relief were held to constitute a waiver of their objections to defective citations and to the court's lack of jurisdiction ratione personae. In both, writs of attachment issued on the ground of the nonresidence of the defendants were maintained. In C. W. Greeson Company v. Harnischfeger Corporation, after moving for a dissolution of the writ, the defendant reconvened, praying for damages for the illegal issuance of the writ. Florida Molasses Company v. Berger applied the settled Louisiana rule that the bonding of an attachment constitutes a general appearance which subjects defendant personally to the jurisdiction of the court. The fact that the attachment was bonded after the filing of defendant's motion to dissolve the writ, and after his exceptions to the citation and jurisdiction ratione personae, was held not to take the case out of the application of the general rule.

The damages which may be recovered by defendant for the illegal issuance of a conservatory writ was the subject of two cases. In one, a sequestration had been dissolved under application of the rule that conditional sales agreements are not enforceable under Louisiana law. Attorneys testifying in the trial court to the value of the services rendered by defendant's attorney in securing the dissolution of the writ were held to be officers of the court, and as such not entitled to fees as expert witnesses. In the other, a preliminary writ of injunction had been dissolved by the appellate court on the ground that the affidavits introduced by plaintiff on the trial of the rule nisi were defective in form and should have been excluded on objection. In a new suit, the former defendant sought damages for the illegal issuance of the writ, which were denied by the Supreme Court because there had been no final judgment holding that the preliminary injunction had been wrongfully issued. Such a judgment was held to be a condition precedent to the maintenance of the action to recover damages.

59. 219 La. 1006, 54 So. 2d 528 (1951).
60. 220 La. 31, 55 So. 2d 771 (1951). The pleading aspects of the case are discussed supra, p. 305.
61. For other facets of the problem, see Comment: Attorney's Fees As an Element of Damage for the Dissolution of Illegally Issued Conservatory Writs, 12 LOUISIANA LAW REVIEW 433 (1952).
THE EXTRAORDINARY WRIT OF MANDAMUS

In State ex rel. Loraine v. Adjustment Board of City of Baton Rouge, the relator sought to set aside the revocation by the named defendant of a building permit previously issued, and to mandamus the named defendant, the City of Baton Rouge and various of its officials, to reissue the permit which had been revoked. No exceptions to the summary form of the proceeding were filed by the defendants and various property owners who intervened to resist the proceedings. All of them excepted to relator's petition merely on the ground that it disclosed no right or cause of action. The objection that the action should have been brought in a proceeding via ordinaria was overruled, for the reasons that defendants had failed to except to the form of the action, that they had had twelve days to answer and prepare their defenses to the suit, and that they had waived citation of a supplemental petition filed by the relator. The court recognized that a mandamus might be sought as an incident of an ordinary action, but held that since a judgment setting aside the revocation of the building permit previously issued would leave the permit in effect, there was no need for mandamus in the instant case. On the merits, the Supreme Court set aside the revocation, holding the defendant city's comprehensive zoning ordinance unconstitutional insofar as it classified relator's property as residential. The court was of the opinion that as written the ordinance unreasonably deprived relator of the use of its property without just compensation, and had no substantial relationship to the health, safety, convenience or general welfare of the inhabitants of that part of the city.

In the other case on the subject, the Supreme Court held that the relatrix seeking to mandamus the defendant parish school board for reinstatement had failed to prove the issuance of a written contract by defendant. The court further recognized that, under the Teacher's Tenure Act, neither mandamus nor summary proceedings were authorized as a means of effecting the reinstatement of a teacher wrongfully discharged.

THE REAL ACTIONS

Figuratively speaking, Hill v. Richey could well serve as a

64. 220 La. 708, 57 So. 2d 409 (1952).
67. 221 La. 402, 59 So. 2d 434 (1952).
refresher course in the procedural rules relating to the possessory action. Defendant prosecuted an appeal from the judgment of the trial court restoring and quieting plaintiff in the possession of certain timber lands, and reserving to plaintiff the right to ascertain what timber had been cut and removed therefrom by defendant and the right to bring further proceedings to recover the value thereof. Plaintiff answered the appeal, seeking to amend the judgment appealed from so as to obtain judgment for the value of the timber removed. In overruling the various defenses asserted, the Supreme Court practically reviewed all the rules of the possessory action. The principle that a purely civil possession of the property, preceded by actual, physical possession, is sufficient to enable the possessor to prosecute the action was again applied. The court again held that one who relies on the prescription of thirty years must have the actual, physical and corporeal possession of the property he seeks to acquire. But once such prescription has been commenced and established without interruption, possession may be preserved by external and public signs announcing the possessor's intention to preserve his possession. Such civil possession is sufficient to prescribe as long as any vestiges of his possession remain on the property. The court conceded that one who possesses without title can establish a prescriptive title only to property included within the limits or marks of enclosure, but held that since the extent of plaintiff's possession was fixed with sufficient certainty by fences, remains of old fences, marks on trees and "no trespassing" signs, such possession was sufficient to entitle plaintiff to maintain the possessory action. The judgment appealed from was modified only to the extent of remanding the case to the trial court for further proceedings to receive additional evidence as to the value of the timber removed by defendant.

*Ware v. Baucum* illustrates the difficulty which the courts of Louisiana experience in employing the jactitory action to force the alleged owners of mineral rights to institute a petitory action to establish the validity of their claims. The facts of this case and the procedure employed by the parties forced the Supreme Court to go somewhat beyond the limits of previous decisions. Unlike the situation in *International Paper Company v. Louisiana Central Lumber Company*, where the owner of the mineral servitude was actually and adversely possessing and exercising the

---

68. 221 La. 259, 59 So. 2d 182 (1952).
69. 202 La. 621, 12 So. 2d 659 (1943).
mineral rights through the successful development of its lessees, here it was admitted that there had never been any exploration or exercise of defendants' alleged mineral interest. Differently from *Frost-Johnson Lumber Company v. Salling's Heirs*, the defendant did not convert the slander of title suit into a petitory action. In the instant case, in the effort to show that they were in possession of the mineral interest, defendants attempted to prove that subsequent to the original grant of the servitude (and well within ten years of the institution of the suit) by notarial act the then sole owner of the land had acknowledged defendants' ownership of one-half of the minerals under the land. In view of the admission that there had been no exercise of the mineral servitude, and the fact that the latter had been granted more than ten years prior to the institution of suit, the Supreme Court refused to consider the validity of the acknowledgment, holding that plaintiffs had made a presumptive and prima facie showing of their possession. The judgment appealed from was affirmed.

A much simpler question was presented in *Collier v. Marks*, where the plaintiff appealed from a judgment dismissing his petitory action. Previously, the present plaintiff, as defendant in a jactitory action, had been ordered by the trial court to institute a petitory action within sixty days or be barred thereafter from asserting any claim to the property. This judgment had been affirmed on appeal by the Supreme Court. As the succeeding petitory action was not filed within sixty days of the denial by the Supreme Court of an application for rehearing, the trial court held the action barred. The Supreme Court affirmed, holding that the mere failure to record its decision in the records of the trial court did not take the case out of the application of the judicial peremption.

In the remaining case involving a real action, the Supreme Court held that, under the evidence introduced, a defendant in a jactitory action who had converted the suit into a petitory action had failed to prove his ownership of the land in question.

**MISCELLANEOUS**

In *Gabriel v. United Theatres*, the plaintiff wife had sued to recover damages for personal injuries allegedly sustained as a

---

70. 150 La. 756, 91 So. 207 (1921).
71. 220 La. 521, 57 So. 2d 43 (1952).
73. 221 La. 219, 59 So. 2d 127 (1952).
result of a fall in one of defendant's theaters. From an adverse judgment, the plaintiff appealed to the court of appeal. After the appeal had been lodged in the appellate court, the plaintiff died and nearly five years thereafter her husband filed a motion to be substituted as plaintiff, alleging the marriage and the absence of issue thereof or of any adopted children. Defendant moved to dismiss the appeal on the ground that no beneficiaries specified under Article 2315 had been made parties to the action within one year of plaintiff's death. This motion was overruled by the intermediate appellate court, which annulled the judgment appealed from and remanded the case to the trial court for further proceedings. Under a writ of review, the Supreme Court set aside this latter judgment, holding that the action had abated upon the death of the original plaintiff. Although neither party had urged the provisions of La. Act 239 of 1946, providing that no action shall abate after issue joined, the Supreme Court took notice of its existence, but held that it had been repealed impliedly by the provisions of Act 333 of 1948, amending and re-enacting Article 2315 of the Civil Code. Two arguments appear to militate strongly against the validity of this decision. Firstly, the sole purpose of the 1948 statute amending Article 2315 was to include "children given in adoption" among the statutory beneficiaries, and nothing in such amendment indicates the slightest intention to repeal, or to make any exception to the rule expressed in the 1946 act. Secondly, even assuming that the 1948 amendment to Article 2315 did repeal Act 239 of 1946, this latter statutory provision was re-adopted as R.S. 13:3349 in 1950, and hence constitutes the latest expression of legislative will.

Plaintiff brought an action against his alleged partners, in Voinche v. LeCompte Trade School, for the dissolution of the partnership, and for an accounting of its affairs. In the petition, plaintiff prayed for the issuance of a rule on defendants to show cause why the books of the alleged partnership should not be examined by plaintiff's accountant and defendants' accountant. This rule was made absolute, and the defendants invoked the

74. Incorporated into the Louisiana Revised Statutes of 1950 as Section 3349 of Title 13.
75. La. R.S. 1950, 13:3349 provides that "No act of the legislature . . . hereafter passed shall be construed as making an exception to this rule, unless such act specifically and specially makes an exception thereto."
77. 220 La. 126, 55 So. 2d 889 (1951).
supervisory jurisdiction of the Supreme Court to set aside the order. The majority of the court, speaking through Justice Moise, held that since the trial court could appoint auditors at any time to examine the accounts of litigants, the rule and order complained of were entirely regular. The alternative writs previously issued were recalled. Justices LeBlanc and Hawthorne dissented, the latter assigning written reasons. He took the position that since the defendants' books were not to be examined during the course of the trial, the order was not incidental to the pending proceedings, and therefore could not be obtained through summary process.

The validity of the punishment of an attorney for contempt of the trial court was presented in Gautreaux v. Gautreaux. A petition for a divorce had originally been stricken because of the scurrilous and indecent matter contained therein. Counsel for plaintiff then filed a new petition, in substance tracking the former allegations, but omitting therefrom a few of the indecent phrases. The trial judge ordered the second petition stricken, and while he was reading this order to the offending counsel in open court, the latter interrupted him and used language which the trial judge deemed contemptuous. The court thereupon adjudged the attorney guilty of contempt, and sentenced him therefor. When the trial judge resumed the reading of his order, the attorney again interrupted him, using abusive and insulting language. The court again adjudged him guilty of contempt and sentenced him therefor. Under supervisory writs, the Supreme Court held the trial judge's action in striking the entire second petition was erroneous, as the indecent allegations therein could have been expunged without affecting the remainder of the petition. A majority of the court set aside the second sentence for contempt, holding that the two incidents were so interwoven and inseparable as to constitute but a single offense. Justices Hamiter and Hawthorne dissented from the latter holding of the majority. They were of the opinion that since the second incident arose after the attorney had been adjudged guilty of and sentenced for contempt of court, the two incidents constituted separate offenses.

The interpleader proceedings brought by the plaintiff in Placid Oil Company v. George against the claimants of mineral interests under land on which plaintiff had obtained production, were dismissed by the Supreme Court under a writ of review.

78. 220 La. 564, 57 So. 2d 188 (1952).
79. 221 La. 200, 59 So. 2d 120 (1952).
The judgments of both the trial and intermediate appellate courts were set aside. After an examination of the case, the Supreme Court held that plaintiff was not purely a stakeholder, as there was a strong possibility that plaintiff was obligated to all of the defendants impleaded.

*State v. Bayles,* an expropriation case, presented only factual issues. Since no manifest error was found in the value of the land placed by the jury of freeholders before whom the case was tried, the judgment appealed from was affirmed.

CRIMINAL PROCEDURE

*Dale E. Bennett*

**VENUE—CRIMINAL NEGLECT OF FAMILY**

The venue rule that prosecutions for criminal neglect of family could be brought only in the parish where the father resided stemmed from the provision in Article 39 of the Civil Code that the domicile of the mother and children is that of the father. This limitation operated unfortunately in cases where the husband had deserted the family, or the wife and children had been forced to live with the wife's family as a result of the husband's nonsupport. The parish where the neglected wife and children resided was interested, but without jurisdiction to prosecute the husband. The law enforcement officials of the husband's domicile had jurisdiction over the offense, but there was frequently a lack of interest on their part. In 1950, a special venue provision was enacted which provided, in essence, that the prosecution for nonsupport might be brought (1) in the parish in which the person owing the support resided, (2) in the parish in which the last matrimonial domicile was established, or (3) in the parish in which the dependent established a justifiable and bona fide separate residence.

In *State v. Maxie* this broader venue provision was invoked to support a prosecution for criminal neglect of family in a parish where the widowed defendant's children had been living and cared for by their maternal grandmother. Defense counsel argued that the offense was committed and the proper place for prosecu-

---

80. 220 La. 506, 56 So. 2d 852 (1952).
* Professor of Law, Louisiana State University.
2. 221 La. 518, 59 So. 2d 706 (1952).