Louisiana Law Review

Volume 3 | Number 3
March 1941

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been found to be a co-owner of the *servitude,* prescription could not have run against him under the doctrine that as between co-owners the mineral rights are indivisible and their mutual consent is necessary in order to exercise them.[26]

In conclusion, the foregoing may be restated as follows: As between co-owners of a mineral servitude, that servitude is indivisible. This is merely another way of saying that the rights of servitudes are indivisible under Article 656 of the Civil Code. However, the servitude itself may be divided by designating the superficial area to which the rights alienated are to apply. This act creates another servitude out of the original one granted. The sale by the landowner of a fractional part of the minerals creates an entire and distinct servitude carrying with it all the rights necessary for its exercise, and also the obligation of distributing to the other owners of mineral rights their just proportion of the minerals.

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JURISDICTION AND VENUE OF THE ACTION OF NULLITY IN LOUISIANA

Articles 604 to 608 inclusive of the Code of Practice of 1870 contain the provisions of our law relative to the annulment of judgments. The causes for which the nullity of a judgment may be demanded fall into two classes—vices in the form of proceeding and vices which go to the merits of the case.[1]

The vices of form which render a judgment null are listed in Article 606 of the Code of Practice:

> "1. If a judgment has been rendered, even contradictorily, against a person disqualified by law from appearing in a suit, as a minor without the assistance of his curator or tutor. . . .[2]
>
> "2. If the defendant, although qualified to appear in a cause, have been condemned by default, without having been cited;
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> "3. When the judgment, though clothed with all the necessary formalities, has, nevertheless, been given by a judge in-

26. Gulf Refining Co. v. Carroll, 145 La. 229, 82 So. 227 (1919); Gulf Refining Co. v. Hayne, 148 La. 340, 86 So. 891 (1921).

1. Art. 605, La. Code of Practice of 1870.

2. The last clause of this subdivision, which reads "or a married woman without the authorization of her husband or of the court" has been rendered obsolete by La. Act 283 of 1928.

competent to try the suit, either owing to the amount in dispute, or to the nature of the cause;

"4. If the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him."

The causes for nullity set forth in this article are exclusive and not merely illustrative, hence no other "vice of form" will serve as a basis for an action to annul.[3] Judgments vitiated by the defects of form enumerated in Article 606 are *absolute nullities* and are subject to collateral attack[4] in proper proceedings[5] at any time.[6] These vices may therefore be termed "absolute" vices.

Article 607 states the causes for nullity which pertain to the merits of the case:

"A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud, or other ill practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering of the judgment."

The examples of fraud or other ill practices set forth in this article are not exclusive but merely illustrative. As a matter of fact, our courts are vested with broad discretion in determining whether there has been such conduct on the part of the party in whose favor the judgment was rendered as to amount to a cause for nullity. They will generally set aside any judgment the enforcement of which would be "unconscientious and inequitable."[7] While an action to set aside a judgment affected with an *absolute nullity* may be brought at any time,[8] the action to vacate a judgment obtained through fraud or other ill practices must be

3. Blanck v. Speckman, 23 La. Ann. 146 (1871); Payne & Joubert v. Schaeffer-Gaiennie Co., 119 La. 382, 44 So. 134 (1907). See Tarver v. Quinn, 149 La. 368, 371, 89 So. 216, 217 (1921).

4. Edwards v. Whited, 29 La. Ann. 647 (1877); Conery v. Rotchford, Brown & Co., 30 La. Ann. 692 (1878); Bledsoe v. Erwin, 33 La. Ann. 615 (1881); Decuir v. Decuir, 105 La. 481, 29 So. 932 (1901).

5. McClelland v. District Household of Ruth, 151 So. 246 (La. App. 1933). In this case it was held to be error for a district judge to grant a new trial, after the delay in which application therefor had expired, on the ground that the first judgment was an absolute nullity.

6. Art. 612, La. Code of Practice of 1870.

7. Succession of Gilmore, 157 La. 130, 102 So. 94 (1924); Hanson v. Haynes, 170 So. 257 (La. App. 1936).

8. Art. 612, La. Code of Practice of 1870.

brought within one year after the cause for nullity has been discovered.[9] In such a case the burden of proving that the vice was discovered within a year of the commencement of the action of nullity rests on the plaintiff.[10]

Judgments obtained by fraud or other ill practices must be attacked by a direct action.[11] These vices therefore will be referred to as "relative" vices.

The problem to be dealt with in the present comment concerns which court is the proper one in which to bring an action of nullity. Article 608 provides:

> "The nullity of judgment may be demanded from the same court which has rendered the same, or from the court of appeal before which the appeal from such judgment was taken, pursuant to the provisions hereafter expressed."

In an early case, *Melançon's Heirs v. Broussard,*[12] an action was instituted in the district court to annul a judgment which had been passed upon on appeal by the supreme court. The ground urged as giving rise to nullity was fraud in procuring the judgment. It was held that under Article 608[13] a district court was prohibited from entertaining an action to annul a judgment passed upon by an appellate court. The plaintiff argued that since the supreme court had no original jurisdiction to hear the matter[14] the power to annul should be vested in the district court which first had jurisdiction over the cause. This contention was held to be untenable.[15] Thus under this decision, if *A* procures a judgment against *B* by fraud and the judgment is affirmed on appeal before *B* discovers the fraud, *B* has no court in which to seek relief from the judgment. He cannot bring an action of nullity in the appellate court, for constitutional limitations on that court's origi-

9. Art. 613, La. Code of Practice of 1870.

10. Succession of Dauphin, 112 La. 103, 36 So. 287 (1904); Emuy v. Farr, 125 La. 825, 51 So. 1003 (1910); Smith v. Williams, 2 La. App. 24 (1925).

11. Hickey v. Duplantier, 4 La. 314 (1832); Bayhi v. Bayhi, 35 La. Ann. 527 (1883); Bruno v. Oviatt, 48 La. Ann. 471, 19 So. 464 (1896); Caldwell v. Caldwell, 164 La. 458, 114 So. 96 (1937). Cf. Paxton v. Cobb, 2 La. 137 (1831).

12. 2 La. 8 (1830).

13. La. Code of Practice of 1870.

14. La. Const. (1812) Art. IV, § 2, provided that the supreme court should have appellate jurisdiction only.

15. The court said: "But the Appellee's counsel urges that as this Court possesses no original jurisdiction, and is incapable of receiving any from the Legislature—its judgments may be attacked on the score of nullity, in the Court which rendered the judgment appealed from, whether affirmed or reversed by this Court. This appears to us a *non sequitur.*" (2 La. 8, 15-16 (1830)).

nal jurisdiction prohibit such procedure.[16] Neither can *B* sue to annul the judgment in the district court; that tribunal would have no authority to vacate a judgment passed upon by an appellate court. He would thus be compelled silently to suffer a fraud to be perpetrated upon him. It should be noted, however, that if the judgment is affected with an *absolute nullity*[17] it may be attacked collaterally in any court in which the principal demand is brought,[18] even though it has been passed upon by an appellate court.[19]

The issues raised by the *Melançon* case have not been passed upon again in Louisiana. The opinion however was cited with approval in a subsequent decision, *Succession of Martin v. Succession of Hoggatt.*[20] In that case there was an attempt in the district court to annul a judgment of the supreme court. It was held that the district court could not hear the cause. The decision, however, rests upon the fact that the identical issue of nullity had been passed upon by the supreme court on a previous hearing. Consequently, the case cannot be regarded as a reaffirmation of the doctrine of the *Melançon* case. Rather it is a simple application of the unquestionably sound rule that *error of decision on issues involved* in a judgment will not support an action of nullity.[21] If the identical issue of nullity has already been passed upon, that adjudication will obviously be res judicata[22] and will bar a subsequent action to annul for the same cause. This, however, is by no means the case when the cause for nullity has not been previously urged; in such a situation, the judgment attacked does not possess the authority of a thing adjudged.[23]

The *Melançon* case has been discredited by implication in two

16. Under the present constitution as under the Constitution of 1812, appellate courts have no original jurisdiction to hear an action of nullity. La. Const. of 1921, Art. 7, §§ 10, 29.

17. See Art. 606, La. Code of Practice of 1870, and authorities cited in note 4, supra.

18. Edwards v. Whited, 29 La. Ann. 647 (1877); Decuir v. Decuir, 105 La. 481, 29 So. 932 (1901). See Bledsoe v. Erwin, 33 La. Ann. 615, 617-618 (1881).

19. Edwards v. Whited, 29 La. Ann. 647 (1877).

20. 37 La. Ann. 340 (1885). The court said: "The identical ground of nullity on which our judgment was held to be of no force by the lower court, had been suggested in bar of plaintiff's right of recovery, had been considered by us, and disposed of as insufficient for the end proposed by the defendant. "That element of nullity was therefore no longer an open question. . . ." (37 La. Ann. at 344.)

21. Heroman v. Louisiana Institute of Deaf and Dumb, 34 La. Ann. 805 (1882); Gumbel v. New Orleans Terminal Co., 190 La. 904, 183 So. 212 (1938).

22. State ex rel. Marrero v. Judge of the Twenty-Sixth District Court, 35 La. Ann. 214 (1883).

23. Edwards v. Edwards, 29 La. Ann. 597 (1877); Holbrook v. Holbrook, 32 La. Ann. 13 (1880); Lirette v. Lirette, 176 La. 368, 145 So. 773 (1933).

later decisions.[24] The rule is obviously a harsh and unconscionable one. However, its effect is only to limit the action to annul on the ground of *relative* vices. If the vice complained of is an *absolute* one, the judgment may be attacked *collaterally in any court,*[25] and the fact that the venue of the *direct* action to annul might be restricted to the court which rendered the judgment[26] is unimportant. Since, however, a *relative* nullity is subject only to a direct attack,[27] articles of the Code of Practice bearing upon actions to annul because of *relative* nullities should be examined to determine whether the *Melançon* case represents a proper application of those provisions. Article 607 provides:

> "A definite judgment may be annulled *in all cases* where it appears that it has been obtained through fraud, or other ill practices. . . ." (Italics supplied.)

From this language it appears that the legislative intent was that the remedy be complete—that no person aggrieved by such a judgment should be left without recourse. If the legislature intended that the supreme court should have original jurisdiction to hear actions to annul its own judgments, the doctrine of the *Melançon* case is sound. The articles of the Code would then have been designed to afford a *complete remedy,* and the maxim *inclusio unius est exclusio alterius* would clearly preclude any other mode of attack. Under this view, the limitation placed by the *Melançon* case on the action to annul would then be regarded as of a purely constitutional nature. Did the legislature intend that the articles setting forth the courts in which the action to annul

24. Grivot v. Louisiana State Bank, 31 La. Ann. 467 (1879); Walker v. Barelli, 32 La. Ann. 1159 (1880). In the *Grivot* case an action of nullity was brought in the district court to annul a judgment of the supreme court—the latter tribunal disposed of the case on other grounds without inquiry as to the propriety of the proceedings in the lower court. In the *Barelli* case the court said: "Whatever may be said of the soundness of this decision [the *Melançon* case] so far as it denies jurisdiction [to annul a judgment of the supreme court] to the District Court, it certainly cannot be claimed that it asserts or admits such jurisdiction in this Court."

"As to the jurisdiction of the District Court, we find no subsequent case reiterating the doctrine, and in the case of Grivot v. Bank, 31 A. 467, its authority was impliedly disregarded." (32 La. Ann. at 1161.)

25. Edwards v. Whited, 29 La. Ann. 647 (1877); Decuir v. Decuir, 105 La. 481, 29 So. 932 (1901). See Bledsoe v. Erwin, 33 La. Ann. 615, 617-618 (1881).

26. "If it was a suit *merely* for nullity of the judgment, it was one which could be brought *only* before the court which rendered that judgment, and which that court *alone* was competent to decide."

"If the charge of nullity had been coupled with a main and controlling demand, the question of validity of judgment could be inquired into and determined by any court having jurisdiction of that demand. . . ." Bledsoe v. Erwin, 33 La. Ann. 615, 617-618 (1881).

27. See authorities cited in note 11, supra.

may be brought should apply to judgments of appellate courts? If it did not, the provision of Article 607, that the annulment may be obtained *in all cases* specified, would eliminate any idea that the limitations of Article 608 relative to the proper venue of proceedings to annul were exclusive. There would then be no positive law on the subject of procedure to annul a judgment of an appellate court. Consequently, since the district court has unlimited original jurisdiction,[28] it would appear that Article 607, providing that the nullity may be demanded *in all cases,* would be adequate to vest authority in that tribunal to hear the action of nullity.[29]

Some weight is added to this view by the articles dealing with the procedure for annulling a judgment pending appeal.

As we have already observed, Article 608 provides that the nullity may be demanded from the court rendering the judgment or from the court to which an appeal is taken. Article 609 provides:

> "The nullity can be demanded on the appeal, *only* while the appeal is still pending, and when the nullity is apparent on the face of the records." (Italics supplied.)

In view of the language of these articles it may be said that the legislative intent was to limit the jurisdiction of appellate courts regarding the action of nullity to cases before them on appeal. Further, the language of Article 611 that "Though there has been no appeal . . . the nullity . . . may yet be demanded . . . before the court which has rendered the same," perhaps warrants the conclusion that by "court which has rendered the same" is meant simply the trial court and does not embrace appellate courts.

Conceding that the provisions of the Code of Practice setting forth the procedure to be followed in the action of nullity are exclusive, further doubt may be cast upon the decision in the *Melançon* case. The rule enunciated there seems to rest upon the theory that a judgment passed upon by an appellate court becomes the judgment of that court. Therefore, since under Article 608 the proper court in which to proceed would be the one which rendered the vicious judgment, a district court has no authority

28. La. Const. of 1921, Art. VII, §§ 35, 81.

29. The situation would be the same as that presented when any other cause of action is created by statute without any special provision as to venue being made. Under this theory the proper venue would be governed by the rules applicable to any other ordinary suit. See Arts. 162-168, La. Code of Practice of 1870.

to annul a judgment of an appellate court. Under the circumstances, it would appear that a more reasonable and workable interpretation was available. The court might well have interpreted the phrase "court which rendered the same" as meaning the court rendering the judgment which first had jurisdiction of the cause. Such a construction would do no violence to the letter of the law and furthermore comports well with the other provisions of the Code of Practice relating to the nullity of judgments.

Either of these arguments might have been seized upon by the court in the *Melançon* case in order to avoid creating this unfortunate hiatus in our law. If the ruling in that decision is to be followed, the only way remaining to obviate the difficulty is an amendment to Article 608 expressly empowering the district courts to annul judgments of appellate courts.

KENNETH J. BAILEY

THE EFFECT OF ARTICLE 2462 OF THE LOUISIANA CIVIL CODE

The meaning of Article 2462 of the Louisiana Civil Code and its equivalent[1] in the French Civil Code has been the subject of much controversy. It is the purpose of this study to consider the rules of agreements relating to sales in order to ascertain the meaning of the article and to see how it has been applied. It will first be necessary to examine briefly the theories of the French writers on the article from which Article 2462 was taken.

FRENCH LAW

ARTICLE 1589, FRENCH CIVIL CODE:

> *La promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur a la chose et sur le prix.*
> (Translation) The promise of sale amounts to a sale, when there exists reciprocal consent of the two parties on the thing and on the price.[2]

In order to understand the interpretations that have been given to the above article, it is necessary to look briefly at the rules existing in French customary law. A sale or a contract of

1. Art. 1589, French Civil Code.
2. Cf. Art. 2437, La. Civil Code of 1825.