Louisiana Law Review

Volume 4 | Number 3
March 1942

Venue of Direct Action Against Tortfeasor's Insurer - Louisiana Act 55 of 1930

H. A. M. Jr.

where there has been no previous adjudication of solidary liability.[22] Under the doctrine of comparative negligence, this reparation may extend to full indemnity.[23]

The conclusion reached by the instant case properly throws the burden of making reparation for misconduct on the party actually guilty, without danger of loss to the injured plaintiff. The case may be held out as an example of the equitable conclusions that can be reached by means of careful interpretation of the articles of the Civil Code without the necessity of special legislation.

G.R.J.

VENUE OF DIRECT ACTION AGAINST TORTFEASOR'S INSURER—LOUISIANA ACT 55 OF 1930—Under the provisions of Louisiana Act 55 of 1930,[1] which gives a right of direct action against a tortfeasor's insurer, three injured parties sued a truck-owner's insurer for damages growing out of the negligent operation of the truck. Suit was filed at the domicile of the insurer. Exceptions to the jurisdiction ratione personae and ratione materiae were sustained.[2] *Held,* this statute gives a "right"[3] of action which can be asserted only "in the parish where the accident or injury occur-

---

Obligations (1885) 416, Art. 1202, nº 22; 2 Planiol, Traité Élémentaire de Droit Civil (10 ed. 1926) 315-316, §§ 900-903; 2 Sourdat, La Responsabilité ou l'Action en Dommages-Intérêts (6 ed. 1911) 472, nºs 1393-1394.

22. 13 Baudry-Lacantinerie, op. cit. supra note 21, at 419, nº 1304; 2 Sourdat, op. cit. supra note 21, at 472, nº 1395.

23. 13 Baudry-Lacantinerie, loc. cit. supra note 21; 2 Sourdat, op. cit. supra note 21, at 472-475, nºs 1395-1396.

1. La. Act 55 of 1930 [Dart's Stats. (1939) § 4248] adds the following provision to La. Act 253 of 1918 [Dart's Stats. (1939) §§ 4248-4249] (which gives the injured person a direct action against the insurer when the assured is bankrupt or insolvent): "the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where assured has his domicil, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido."

2. In the lower court plaintiffs argued that filing the exceptions to the jurisdiction ratione personae and ratione materiae at the same time, defendants waived the former. The supreme court did not touch this point in its opinions, but, by maintaining defendant's exceptions, it indicated *sub silentio* that the exception to the personal jurisdiction was not waived. See Morales v. Falcon, 167 So. 109 (La. App. 1936); Brown v. Gajan, 173 So. 485 (La. App. 1937).

3. "Right of action pertains to the remedy and relief through judicial procedure. Cause of action is based on the substantive law of legal liability." Elliott v. Chicago, M. & St. P. Ry., 35 S.D. 57, 63, 150 N.W. 777, 779 (1915).

red, or in the parish where the assured has his domicile."[4] It cannot be asserted elsewhere, even at insurer's domicile. *In re Commercial Standard Insurance Company,* 6 So. (2d) 646 (La. 1942).

Act 55 of 1930 has been construed retrospectively so as to write its provisions into all policies in force at the time of its enactment.[5] Giving the statute retrospective operation does not impair the obligation of contracts under the federal and state constitutions.[6] The statute complies with the Louisiana constitutional requirements that a law embrace only one object,[7] and that the title sufficiently indicate that object.[8] The act has been held germane to the statute it amended,[9] and the text of the statute has been held no broader than its title.[10]

Louisiana is one of a small minority of states which permits a direct action by an injured person against the insurer of his tort-creditor. Wisconsin[11] and Rhode Island[12] have statutes similar to Act 55 of 1930. However, it is more common to permit suit directly against the insurer only when the assured is insolvent or bankrupt,[13] as was the situation in Louisiana under Act 253 of 1918.[14]

---

4. See note 1, supra.

5. Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., Inc., 18 La. App. 725, 138 So. 183 (1931).

6. U.S. Const. Art. I, § 10; La. Const. of 1921, Art. IV, § 15.

7. Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., Inc., 18 La. App. 725, 138 So. 183 (1931). See La. Const. of 1921, Art. III, § 16.

8. Ibid.

9. Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., Inc., 18 La. App. 725, 138 So. 183 (1931). See also Gager v. Teche Transfer Co., 143 So. 62 (La. App. 1932).

10. Ibid. See La. Const. of 1921, Art. III, § 16.

11. Wis. Stats. (1935) § 85.93. This statute is limited in its application to policies covering liability to others by reason of the operation of a motor vehicle. The Louisiana act covers "policies against liability," and has been used to sue an insurer who provided assured with workmen's compensation insurance [Levy v. Union Indemnity Co., 146 So. 182 (La. App. 1933)] or public liability insurance [Estes v. Aetna Casualty & Surety Co., 157 So. 395 (La. App. 1934)]. It does not apply to a bond given by a public official for the faithful performance of his duties [Martin v. Magee, 179 La. 913, 155 So. 433 (1934)], nor to a "bankers' blanket bond" [Tyler v. Walt, 184 La. 659, 167 So. 182 (1936)].

12. General Laws of Rhode Island (1923) c. 258, § 3815. This statute applies to policies covering liability for property damage or personal injuries, provided the tortfeasor is not found in Rhode Island when process is issued for him. The statute was altered so as to eliminate the direct action by Pub. Laws of 1936, c. 2422 [General Laws of Rhode Island (1938) c. 155, § 1].

13. E.g., Cal. Gen. Laws (Deering, 1931) Act 3738; Conn. Gen. Stat. (1930) § 4231; Indiana Stats. Ann. (Burns, 1933) § 39-3005; Mo. Stat. Ann. (1932) c. 37, § 5898; N.J. Stat. Ann. (1939) 17:28-2; Vt. Act 155 of 1919; Va. Code Ann. (1936) § 4326a. See also, e.g., the following statutes permitting the action when the judgment against assured is unsatisfied: Ala. Code (1928) §§ 8376, 8377; Conn. Gen. Stat. (1930) § 4231; Iowa Code (1931) §§ 8940(5)(b), 8940(5)(e), 8940(9); N.Y. Consol. Laws (1940) 27:7:§167(b).

14. See note 1, supra.

The right which an injured party may assert against the insurer under Act 55 of 1930 gives rise to an action *ex delicto,* and not *ex contractu.*[15] The fact that the injured party is indirectly asserting the right as a statutory subrogee does not characterize this action as one arising *ex contractu.*[16] This position is in harmony with the Louisiana court's consistent holding that the act is one of procedure.[17] Thus an injured party may use this procedure to sue an insurer on a cause of action arising in this state, even though the liability contract was made in Texas[18] or in Missouri[19] and was governed by the laws of those states, neither of which has direct action statutes.

The act has been construed in other states as a part of Louisiana procedure; hence even though the contract was made in Louisiana,[20] it may not be used in Mississippi to sue the insurer directly. But both the Wisconsin and Rhode Island statutes have been interpreted in other states as creating substantive rights.[21] In these cases it is held that the direct action statutes, by reason of their being written into the liability contract, confer a substantive contractual right on the injured party, which he may enforce wherever he finds the insurer.[22] The effect of this interpretation is literally to embody the terms of the act in the liability con-

15. Reeves v. Globe Indemnity Co., 182 La. 905, 162 So. 724 (1935), involving jurisdiction of the supreme court.

16. If the action were considered *ex contractu* in Louisiana, we would have the somewhat anomalous situation of one year prescription running on the injured's right against the assured, and ten year prescription running on his right against insurer. See Stephenson v. New Orleans Ry. & Light Co., 165 La. 132, 115 So. 412 (1927), involving action on a carrier's bond. Cf. Distefano v. Michiels, 158 La. 885, 104 So. 914 (1925).

17. On this basis, constitutionality was upheld. See cases cited in notes 5 and 9, supra.

18. Stephenson v. List Laundry & Dry Cleaners, Inc., 182 La. 383, 162 So. 19 (1935), criticizing Lowery v. Zorn, 157 So. 826 (La. App. 1934), which reached a contrary conclusion.

19. Robbins v. Short, 165 So. 512 (La. App. 1936).

20. McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305, 120 A.L.R. 846 (1939), overruling Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938). Two judges dissented.

21. Interpreting the Wisconsin statute: Kertson v. Johnson, 185 Minn. 591, 242 N.W. 329 (1932). Interpreting the Rhode Island statute: Lundblad v. New Amsterdam Casualty Co., 265 Mass. 158, 163 N.E. 874 (1928). And this substantive construction has been accorded in spite of the fact that these statutes had previously been construed as procedural in their own states. See Morrell v. Lalonde, 44 R.I. 20, 114 Atl. 178 (1921); Stone v. Inter-State Exchange, 200 Wis. 585, 229 N.W. 26 (1930). But see Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L.J. 333, where that author demonstrates that a right may be substantive for one purpose and procedural for another.

22. See Note (1940) 1940 Wis. L. Rev. 315, where it is suggested that the Wisconsin act makes the injured party privy to the liability contract as a third party beneficiary.

tract, and to make the rights and obligations under it the same regardless of where or in what jurisdiction their enforcement is sought.

Although the point has not as yet been squarely passed upon, the Louisiana act has been treated as substantive in the federal courts[23] in spite of the general rule that federal courts apply the substantive law of the state and the procedural law of the federal courts.[24] The federal courts will therefore entertain a suit by an insurer against a claimant, under the direct action statute, for a declaration of rights[25] under the Federal Declaratory Judgment Act.[26] But when the cause of action is governed by the provisions of the Federal Motor Carriers' Act, as in the case of interstate carriers,[27] the latter will supersede the Louisiana statute.

The civilian rule of *expressio unius est exclusio alterius* is applicable to the question of venue. Since of three possible venues in which the action could have been brought,[28] only two were set out in the statute, the other venue—the domicile of defendant—is held to be purposely omitted. The common law would arrive at the same result through slightly different rules: (1) where one seeks to avail himself of a statutory right of action, he must show

23. See Standard Acc. Ins. Co. v. Rivet, 89 F.(2d) 74 (C.C.A. 5th, 1937); Williams v. James, 34 F.Supp. 61 (W.D. La. 1940); Wheat v. White, 38 F.Supp. 796 (E.D. La. 1941).

24. Under the rule of Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1937), the federal courts are bound to follow the state courts' decisions concerning matters of substance and procedure. See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Cook, The Federal Courts and the Conflict of Laws (1942).

25. C. E. Carnes & Co., Inc. v. Employers' Liability Assur. Corp., Ltd., 101 F.(2d) 739 (C.C.A. 5th, 1939).

26. Judicial Code § 274(d), 48 Stat. 955 (1934), as amended by 49 Stat. 1027 (1935), 28 U.S.C.A. § 400 (Supp. 1941).

27. Grier v. Tri-State Transit Co., 36 F. Supp. 26 (W.D. La. 1940). See 49 Stat. 543 (1935), as amended by 54 Stat. 919 (1940), 49 U.S.C.A. §§ 301-327 (Supp. 1941).

28. The majority of the court held that automobile liability policies are accident policies within the meaning of Article 165(10), La. Code of Practice of 1870 [citing Lawrason v. Owners' Automobile Ins. Co., 172 La. 1075, 136 So. 57, A.L.R. 1412 (1931)], and that, if Act 55 of 1930 did not specify two venues, the right could be exercised in the three venues set forth in Article 165(10). But rather than construe the venue clauses of the act as permissive and hence surplusage, the court gave them full force and construed them as restrictive. In construing a statute the courts are bound, if possible, to give effect to all its parts, and no sentence, clause, or word shall be construed as surplusage if a construction can be legitimately found which will give force to *all the words of the statute.* State v. Fontenot, 112 La. 628, 36 So. 630 (1904). Moreover, where the words of a law admit of two interpretations, one of which would convict the legislator of carelessness, while the other would be consistent with the wisdom that should characterize his acts, the latter should be adopted. Succession of Baker, 129 La. 74, 55 So. 714, Ann. Cas. 1912D 1181 (1911).

compliance with the conditions of the grant;[29] and (2) where a particular procedure is prescribed, it is exclusive and mandatory.[30] Applying either the civilian or common law principles of interpretation the same result might be reached.[31]

Although a defendant generally must be sued at his own domicile,[32] there is no constitutional right to be sued there. And the same article[33] which states that one must be sued at his domicile qualifies the rule in that it is "subject to those exceptions expressly provided by law."[34] *In re Commercial Standard Insurance Company* construes Act 55 of 1930 as one of those exceptions.[35]

Chief Justice O'Niell and Justice McCaleb agreed with the result reached by the majority of the court, but based their conclusion on their opinion that the venues set forth in the statute are restrictive, and that the privilege of proceeding directly against the insurer can only be exercised in the two venues mentioned.[36]

The portion of Act 55 of 1930 dealing with venue had not been dealt with by the court up to its present decision. Plaintiff's contentions might have been upheld without conflict with any previous Louisiana jurisprudence. But though the present decision may work some hardship on plaintiffs, the conclusion reached by all members of the court in these three well-reasoned opinions appears to be more in harmony with the canons of statutory interpretation. *H.A.M., JR.*

29. See Sanderson v. Postal Life Ins. Co., 72 F.(2d) 894 (C.C.A. 10th, 1934).

30. See in re Ward's Estate, 127 Cal. App. 347, 15 P.(2d) 901 (1932).

31. The Rhode Island and Wisconsin statutes are not helpful in the matter of venue, because they give the right of action without prescribing where it may be exercised. Hence it is governed by the general rules of venue of those states.

32. Art. 162, La. Code of Practice of 1870.

33. Ibid.

34. Ibid.

35. Other exceptions in the same class as Act 55 of 1930 are suits on matters relative to successions [Art. 164, La. Code of Practice of 1870], Partition [Art. 165(1)] and partnership [Art. 165 (2)].

36. These two justices, however, differ with the majority of the court in their holding that automobile liability policies are accident policies under the meaning of Art. 165(10), La. Code of Practice. See note 30, supra.