Louisiana Law Review

Volume 9 | Number 2
The Work of the Louisiana Supreme Court for the 1947-1948 Term
January 1949

Civil Procedure

Henry G. McMahon

peal,[11] and the holding in this respect was affirmed by the supreme court.

However, the plaintiff offered to amend by showing additional facts. Presumably he proposed to allege that his duties sometimes required that he operate or ride in motor vehicles, and he sought to bring his situation within the doctrine of cases such as *Collins v. Spielman.*[12] The court of appeal's refusal to allow this amendment was regarded as error by the supreme court and the case was remanded.

V. BUSINESS AND COMMERCIAL LAW

NEGOTIABLE INSTRUMENTS

*Alvin B. Rubin**

In *Sherer v. State*[1] the court held that certificates of indebtedness of the Public Service Commission were not negotiable instruments. Plaintiff sought to recover on certain lost certificates. The state defended on the basis of potential claims by third persons who might show up with the certificates. Under Article 2644 of the Civil Code, payment to the original owner of a non-negotiable instrument would bar action by any transferee, and the court ordered payment by the state.

VI. CIVIL PROCEDURE

*Henry G. McMahon***

Jurisdiction Ratione Personae

An important question of venue was decided for the first time during the past year.[1] On the theory that all members of a partnership are liable either jointly or in solido for its debts, plaintiff sued defendant partnership, which was domiciled in Jefferson Parish, and all of its alleged partners in Orleans Parish, the domicile of one alleged partner.[2] Two of the individual defendants excepted to the jurisdiction ratione personae of the

11. Reagor v. First Nat. Life Ins. Co., 28 So.(2d) 527 (La. App. 1947).
12. 200 La. 586, 8 So.(2d) 608 (1942).

* Part-time Assistant Professor of Law, Louisiana State University; member, Baton Rouge bar.

1. 213 La. 728, 35 So. (2d) 591 (1948).

** Professor of Law, Louisiana State University.

1. Rheuark v. Terminal Mud & Chemical Co., 213 La. 732, 35 So. (2d) 592 (1948).
2. Under Art. 165 (6), La. Code of Practice of 1870, as last amended by La. Act 282 of 1940.

Orleans court. This exception was sustained by both the trial and the appellate courts, the latter holding that the partnership and its members could be sued only at the domicile of the former,[3] as long as the partnership continued. Plaintiff's procedural theory was rejected through the application of the principle that the liability of partners, as long as the partnership continues, is not a primary one. Such an obligation was held to be a vicarious one which cannot be enforced against the partners until established contradictorily against them, in a suit brought against both the partnership and its members.

The Petition

The settled rule that documents annexed to and made a part of a petition control its recitals was again applied.[4]

An omission in the language of the prayer of a petition was held supplemented by the precise words of a recital in the pleading in another case.[5] Plaintiff's prayer for interest, which did not specify the date from which this interest should run, was held sufficient, since one of the allegations of the petition supplied this date definitely.

The trend of liberality of pleading continued unabated during the last term. Strong and additional support for the rules that amendment of petitions should be allowed by trial judges even after evidence has been adduced on the trial and that these rulings will not be disturbed on appeal is offered by *Rials v. Davis*.[6] In another case,[7] the court felt compelled to maintain the judgment of the court below sustaining an exception of no cause of action, but remanded the case to permit the plaintiff to amend, if possible.

Exceptions, Rules and Motions

The failure to join indispensable parties again was recognized to be an objection of such serious nature that it may be raised on the court's own motion.[8] A defect of this character

3. Applying Art. 165 (2), La. Code of Practice of 1870, as last amended by La. Act 282 of 1940.

4. Stacy v. Midstates Oil Corp., 36 So. (2d) 714 (La. 1948); Ortego v. Morein, 212 La. 774, 33 So. (2d) 516 (1947).

5. Whitten v. Monkhouse, 213 La. 651, 35 So. (2d) 418 (1948).

6. 212 La. 161, 31 So. (2d) 726 (1947). The recent cases on the subject of the amendment of the petition are discussed in McMahon, Louisiana Practice (Supp. 1948) 29, 30.

7. Lemoine v. Lacour, 213 La. 109, 34 So. (2d) 392 (1948).

8. Whitney Nat. Bank of New Orleans v. Little Creek Oil Co., 212 La. 949, 33 So. (2d) 693 (1947).

is not one which could be waived through a failure to file timely the dilatory exception of non-joinder.

One of the most vexing problems in the field of the exceptions is determining when an exception of no cause of action can be utilized to invoke the parol evidence rule, where the plaintiff either declares on an oral agreement, or his petition fails to disclose the existence of written evidence required by law.[9] In *Lemoine v. Lacour*,[10] an exception of no cause of action was sustained to a petition seeking specific performance of an oral agreement to sell immovable property, since the allegations did not bring the case within any of the exceptions[11] to the rule that every transfer of immovable property must be in writing. The case was remanded to the trial court for amendment, if possible. The solution of the problem here appears to be most satisfactory and quite workable, and it is hoped that it will be applied in all similar cases in the future.

Perhaps the most trite of all our procedural rules is that prohibiting the introduction of evidence on the trial of the exception of no cause of action. However, in one case,[12] where such evidence had been introduced in the court below without objection by the plaintiff, the court held that it had the effect of enlarging the pleadings and consequently would be considered on appeal.

The exception of no cause of action was permitted to dispose of one of two of the plaintiff's demands in one decision.[13] There, the curator of an interdicted wife sought to annul a donation previously made by the interdict on two grounds: first, as an interspousal donation; and second, as a donation *omnium bonorum*. Since the first objection was held to be one which was strictly personal to the donor and could not be asserted by her curator, the exception was sustained as to this demand. The second objection, however, was held to be one which could be asserted by the curator, so the exception was overruled as to this demand.

Again all doubts were resolved in favor of the plaintiff in overruling an exception of no cause of action maintained by the

9. This problem is discussed in the cases cited in 1 McMahon, Louisiana Practice (Supp. 1948) 69.

10. 213 La. 109, 34 So. (2d) 392 (1948).

11. Under Art. 2275, La. Civil Code of 1870.

12. Rheuark v. Terminal Mud & Chemical Co., 213 La. 732, 35 So. (2d) 592 (1948).

13. McIntyre v. Winnsboro State Bank & Trust Co., 213 La. 914, 35 So. (2d) 853 (1948).

trial court. A petition for double the amount of earnest money deposited by plaintiff under a contract to purchase realty was held not subject to this exception on the ground that the stipulated time for performance had passed, as the pleadings and evidence did not show that time was of the essence under the contract.[14]

In *Janney v. Calmes*,[15] the same procedural rules were applied to a plea of estoppel as govern exceptions raising factual issues. Since no evidence was introduced at the trial of the plea of estoppel in the court below, the plea was disposed of on the face of the plaintiff's petition, and overruled.

The thing adjudged was pleaded in three of the cases decided during the last term. In one,[16] a foundation of the plaintiff's petitory action was a judgment rendered in a prior boundary action. Since the latter did not constitute any adjudication of title, the then owner of the property was not a party thereto, and the boundary judgment recognized the plaintiff as owner only of a portion of the disputed tract not involved in the petitory action, the supreme court refused to hold the boundary judgment conclusive of the issues presented in the petitory action. An exception of res judicata was sustained in another case,[17] where the plaintiff sought to recover loss of property rentals against a railroad company, the City of New Orleans and the Orleans Levee Board, and to compel defendants to restore a street to its former condition. A prior suit against the railroad company alone to recover damages because of the closing of the street had been decided adversely to plaintiff, and the judgment therein was pleaded in bar in the second suit by the railroad company. Since the two demands were the same, the same parties involved insofar as defendant railroad was concerned, and the causes of action were identical, this exception was sustained by both courts.

The closest case decided by the supreme court during the last term was *Picard v. Mutual Life Insurance Company of New York*.[18] The defendant insurer had filed a declaratory judgment action in the United States district court, seeking to obtain a judg-

14. Johnson v. Shreveport Properties, 213 La. 485, 35 So. (2d) 25 (1948); Newton & Stoer v. Shreveport Properties, 213 La. 503, 35 So. (2d) 31 (1948).
15. 212 La. 750, 33 So. (2d) 510 (1947).
16. Forrest v. Hunter, 213 La. 693, 35 So. (2d) 460 (1948).
17. Cogswell v. Board of Levee Com'rs of Orleans L. D., 213 La. 817, 35 So. (2d) 743 (1948).
18. Picard v. Mutual Life Ins. Co. of New York, 212 La. 234, 31 So. (2d) 783 (1946).

ment declaring that the insured's previous total and permanent disability had ceased. The insured counterclaimed, praying for judgment for all disability benefits due to date of trial, together with the statutory penalties and attorney's fees allowed when a health and accident insurer withholds payments of benefits due without just and reasonable cause. The United States district court rendered judgment against the insurer, but rejected the insured's claim for penalties and attorney's fees. Both parties appealed from this judgment to the United States circuit court of appeals. During the pendency of the latter appeal, the insured instituted the present action in the state district court to recover benefits due since the date of trial, together with statutory penalties and attorney's fees. From a judgment as prayed for by plaintiff, the insurer prosecuted this appeal to the supreme court. While the latter appeal was pending, the federal appellate court rendered its decision, and by stipulation this opinion was incorporated into the transcript, and the insurer pleaded the federal court judgment as res judicata of the cause pending on appeal in the state court, rendering unsuccessful all benefits due since the rendition of judgment in the United States district court. On the first hearing, the supreme court affirmed the judgment appealed from, by a divided court. On rehearing the majority of the court reversed the judgment of the lower court, holding (1) that the decision of the federal court was res judicata of any question as to whether the insurer acted without just and reasonable grounds in refusing to pay the monthly benefits and (2) that the insurer had reasonable grounds for refusing to pay these benefits. Chief Justice O'Niell and Associate Justices Fournet and Bond concurred in the decree, the first two accepting the majority's second reason but disagreeing with the majority's first position. Justice Fournet handed down a concurring opinion, relying upon *State v. American Sugar Refinery*,[19] and taking the position that since the two demands were for benefits, penalties and attorney's fees for different periods of time, res judicata was maintained improperly by the majority. Justice Fournet's concurring opinion accords with the established rules of our jurisprudence and with civilian concepts of res judicata.[20]

The settled principle that no answer need be filed by a de-

19. 108 La. 603, 32 So. 965 (1902).

20. Art. 2286, La. Civil Code of 1870. The subject is discussed in Comment (1940) 2 LOUISIANA LAW REVIEW 397, 491, 495.

fendant in rule to support the introduction of evidence rebutting the position of a plaintiff in rule again was applied.[21]

The Answer and Incidental Demands

The principle that replicatory pleadings are not required in Louisiana was again applied. An estoppel relied upon by plaintiff as a counter-defense to a point raised in defendant's answer was held validly presented. Every objection of law and fact to a defendant's answer could be relied on by plaintiff without special plea.[22]

In *Williams v. Williams*,[23] the court announced very broadly that when the plaintiff sued for a separation on the ground of cruel treatment, the defendant would not be permitted to reconvene for a judgment of separation on the ground of abandonment. Though the decision in this case is entirely sound, the general language used by the court is unfortunate. A reconventional demand usually is precluded in these cases, where husband and wife live in the same parish, because of a lack of connexity between the main and reconventional demands.[24] Under unusual circumstances, where there exists either diversity of residence between plaintiff and defendant or connexity between these two demands,[25] such a reconventional demand might lie.

In another case,[26] a firm of attorneys sued by a client for the payment of money collected under a judgment were precluded from reconvening for a larger amount alleged to be due defendants for professional services in other cases or from compensating the debt sued on. Both holdings appear correct: the first because there was no diversity of residence between the parties and no connexity between the main and reconventional demands; and the second because the two debts were not equally liquidated.

The Trial

Generally, a plaintiff has the right to discontinue his suit at any time prior to rendition of judgment, except to the prejudice of a reconventional demand or any defense urged "in the nature

21. Melton v. Melton, 36 So. (2d) 395 (La. 1948).
22. Galiano v. Galiano, 213 La. 332, 34 So. (2d) 881 (1948).
23. 212 La. 334, 31 So. (2d) 818 (1947).
24. Art. 375, La. Code of Practice of 1870, as amended; Dowie v. Becker, 149 La. 160, 88 So. 777 (1921).
25. As in Landry v. Regira, 188 La. 950, 178 So. 502 (1921).
26. Noel Estate v. Dickson & Denny, 212 La. 313, 31 So. (2d) 810 (1947).

of a reconventional demand."[27] In *Barbara, Incorporated v. Billelo*,[28] prior to rendition of judgment the defendant moved to discontinue his reconventional demand. This motion was refused by the trial court, which rendered judgment in favor of defendant on both demands. On defendant's appeal from this judgment, the general rule stated above was applied by the supreme court to the reconventional demand. Defendant's right to discontinue the latter was upheld.

A constitutional provision[29] requires the district courts in Orleans Parish to hold continuous sessions during nine and a half months of the year. This provision was invoked in one case[30] in an effort to invalidate a divorce decree, rendered by the civil district court during vacation with consent of both parties. It was properly held that nothing in the constitutional provision prevented the court below from rendering a valid judgment by consent during vacation.

Appeals, Appellate Jurisdiction and Procedure

Motions to dismiss three appeals were based on the ground that only moot questions were presented. In one,[31] where a wife had appealed from a judgment rejecting her demand for a separation from bed and board, the appeal was held moot, since the husband already had obtained a final judgment of divorce. In the second case,[32] an appeal had been taken from a judgment revoking permits to sell intoxicating liquors. After the dates on which these permits would have expired, one of the appellees moved to dismiss the appeal. Since, under the applicable statute, the appellant could not have obtained any renewals because of the revocation of the permits, the motion to dismiss was overruled. In the third case,[33] plaintiff had appealed from a judgment rejecting his demand to be reinstated as a teacher and for compensation during the period following his dismissal. In an application for the return of contributions and accrued interest due him from the the Teacher's Retirement System, plaintiff had stated that he did not intend to teach again in Louisiana. Based upon this, defendant school board moved to dismiss the appeal

27. Rives v. Starcke, 195 La. 378, 196 So. 657 (1940), noted in (1940) 3 LOUISIANA LAW REVIEW 457.
28. 212 La. 937, 33 So. (2d) 689 (1947).
29. La. Const. of 1921, Art. VII, § 43.
30. Freeman v. Mayer, 212 La. 681, 33 So. (2d) 194 (1947).
31. Sampognaro v. Sampognaro, 213 La. 814, 35 So. (2d) 742 (1948).
32. Breaux v. Trahan, 213 La. 512, 35 So. (2d) 130 (1948).
33. State ex rel. Piper v. East Baton Rouge Parish School Board, 212 La. 714, 33 So. (2d) 206 (1947).

as presenting only a moot question. As the suit contained a demand for compensation for the period following his dismissal, the motion to dismiss was overruled.

Three interesting questions concerning the right of appeal, or to a suspensive appeal, were settled during the past term. In *Three Way Finance Company v. McDonald*,[34] the garnishees' right to appeal from an order of court requiring them to retain amounts held by them and due to the defendant were recognized. Since these amounts were due under negotiable instruments held by third parties in no way bound by the court order, the garnishees were held to have a right of appeal from the interlocutory order. In another case,[35] a claimant of certain stock certificates was held entitled to an appeal from a judgment recognizing another as the owner of the stock, even though the appellant was not a party to the suit below. In *Cox v. Cox*,[36] the supreme court held that the trial court could not render a valid order of suspensive appeal from a judgment awarding custody of the two children to the wife, even though previously the parties had agreed that each spouse would be given custody of one of the children.

Cotton v. Wright[37] applied the well settled rule that a motion to dismiss an appeal based on the want of any legal right to appeal need not be filed within three days of the return day. The rule itself is quite simple of statement, but its application to concrete circumstances has always been difficult and troublesome.[38]

A number of decisions determined some issue as to the appellate jurisdiction of the supreme court. In one,[39] the rule was applied that palpably inflated claims will not be accepted at face value for jurisdictional purposes. In *Sheffield v. Jefferson Parish Developers*,[40] it was held that the amounts in dispute in consolidated suits could not be aggregated for jurisdictional purposes.[41]

---

34. 213 La. 504, 35 So. (2d) 31 (1948).
35. State ex rel. Zeldon v. Home Realty Inv. Co., 36 So. (2d) 633 (La. 1948).
36. 212 La. 726, 33 So. (2d) 500 (1947).
37. 36 So. (2d) 713 (La. 1948).
38. The more recent cases on the subject are collected and discussed in 1 McMahon, Louisiana Practice (Supp. 1948) 102, 103.
39. Trahan v. Breaux, 212 La. 457, 32 So. (2d) 845 (1947).
40. 213 La. 799, 35 So. (2d) 737 (1948).
41. The conflicting cases on this subject, and the analogous question of whether plural claims cumulated in a petition can be aggregated for jurisdictional purposes, are collected and discussed in 1 McMahon, Louisiana Practice (Supp. 1948) 10, 11.

In another decision,[42] the court held that legislative permission to sue the state was a "law" within the intent of the constitutional provision granting the supreme court exclusive appellate jurisdiction where a state law had been declared unconstitutional. A fourth case[43] applied the rule that the appellate court would take cognizance of its own lack of jurisdiction when facts affirmatively establishing such jurisdiction did not appear of record. In a fifth decision,[44] the issue of jurisdiction was raised by the court in oral argument, and an affidavit intended to evidence this jurisdiction was filed subsequently by the appellant. Holding that even the facts alleged in the affidavit did not establish affirmatively the jurisdiction of the court, the latter refused to consider the appeal. All five of these cases were transferred to the courts of appeal.

The usual number of questions concerning appellate procedure are to be found in the decisions rendered at the last term. In *Cressione v. Millet*,[45] an appeal only from that portion of the judgment of divorce awarding custody of a child, was held valid as a devolutive appeal, even though it was applied for more than thirty days after rendition of judgment, and no appeal could then have been taken from the divorce decree. In another case,[46] no appeal bond had been filed. As the appellee did not complain thereof either in brief or oral agrument, the defect was treated as waived.

In *In re Hibernia Bank & Trust Company*,[47] the appellant had secured several extensions of the time for filing the transcript of appeal, alleging the inability of the clerk of the court below to complete the transcript timely. Subsequently, the appellee moved to dismiss the appeal, assigning as a reason therefor that the delay in the preparation of the transcript was not attributable to the clerk, but only to appellant's failure to inform the clerk of the particular documents to be included in the transcript. Finding the latter facts established, the appeal was dismissed.

The settled rule that the judgment appealed from cannot be

42. Fouchaux v. Board of Com'rs of Port of New Orleans, 213 La. 738, 35 So. (2d) 738 (1948).

43. Green v. George, 213 La. 739, 35 So. (2d) 595 (1948).

44. Louisiana Wholesale Distributors Ass'n v. Rosenzweig, 212 La. 1015, 34 So. (2d) 58 (1947).

45. 212 La. 691, 33 So. (2d) 198 (1947).

46. Roach v. Roach, 213 La. 746, 35 So. (2d) 597 (1948).

47. 213 La. 790, 35 So. (2d) 733 (1948). See, to the same effect, In re Liquidation of Hibernia Bank & Trust Co., 213 La. 797, 35 So. (2d) 736 (1948) (three cases).

amended in favor of an appellee who had neither appealed nor answered the appeal, was again applied.[48] A remand was ordered in another case,[49] in a commendable effort to give the parties an additional opportunity to offer all evidence available, and to amend their pleadings to obtain relief which could not be granted under the pleadings submitted.

The applicable constitutional provision[50] provides that "the rules of practice regulating appeals to, and proceedings in, the supreme court, shall apply to appeals and proceedings in the courts of appeal, so far as they be applicable, until otherwise provided." Article 912 of the Code of Practice provides that applications for rehearing in the supreme court must be submitted in an elaborated petition. *Cox v. Shreveport Packing Company*[51] settled the authority of the intermediate appellate courts to adopt by rule procedural requirements different from those applying to the supreme court. Pointing out that while the proviso in the language quoted above contained the words "unless otherwise provided by law" in the Constitution of 1879, the last two words thereof were omitted from the corresponding provisos of later constitutions, it was held that rules adopted by the courts of appeal might validly prescribe the mode and manner of applying for rehearings therein.

Supervisory Jurisdiction and Procedure

A procedural question of some importance was decided in *Trimble v. Employers Mutual Casualty Company*.[52] A constitutional provision[53] governs the running of delays for applying for rehearings in the Courts of Appeal, First and Second Circuits; and provides that such delays do not begin to run until service on counsel of the judgment of the intermediate appellate court. This provision was held inapplicable to the thirty days' delay for applying to the supreme court for a writ of review to a judgment of a court of appeal. Even though counsel was not given notice of the intermediate appellate court's refusal to grant a rehearing for several days, the delay for applying for a writ of review was held to run from the date the rehearing was refused.

48. Succession of Babin, 213 La. 950, 35 So. (2d) 864 (1948).
49. Succession of Addison, 212 La. 846, 33 So. (2d) 658 (1947).
50. La. Const. of 1921, Art. VII, § 27.
51. 212 La. 325, 31 So. (2d) 815 (1947).
52. 213 La. 644, 35 So. (2d) 416 (1948). See, also to the same effect, Thomas v. Maryland Casualty Co., 213 La. 650, 35 So. (2d) 418 (1948). These cases overruled Morning Star Baptist Church v. Martina, 150 La. 951, 91 So. 404 (1922), and approved the cases to the contrary.
53. La. Const. of 1921, Art. VII, § 24.

The general rule that a litigant must exhaust all of his remedies in the court below before invoking the supervisory jurisdiction of the supreme court was applied once during the past term.[54]

Supervisory writs were recalled in two cases because changed circumstances presented only moot questions. In one,[55] alternative writs issued to review the trial court's order to plaintiff to submit to a physical examination and to produce certain evidence was recalled after the trial court had vacated the order complained of on motion of defendant. In the other,[56] alternative writs issued to inquire into the validity of the trial judge's refusal to sign a judgment were recalled when the judgment in question was signed. But in a third case,[57] even though the court found that the case now presented only a moot question, the recall of the writ was refused. A decision of a court of appeal affirming the judgment appealed from and ordering the abatement of a nuisance sought to be reviewed under a writ of review was acknowledged to be moot when the nuisance burned pending review and defendant had no intention of rebuilding it. However, the writ was not recalled but the case was remanded to the trial court with instructions to dismiss it as a moot case.

Supervisory writs were employed successfully in one case[58] to coerce the trial judge into granting a husband a suspensive appeal from a judgment ordering him to pay alimony to his wife *pendente lite.*

Exemptions from Seizure

J. B. Beaird Company v. Aubrey[59] presented a simple but interesting question of whether defendant's home was exempt from seizure, or whether its seizure would be allowed as an exception to the constitutional prohibition[60] on the ground that the debt sought to be enforced was a liability "incurred by any fiduciary for money collected or received on deposits." The defendant was an assistant purchasing agent of plaintiff, and through fictitious orders for materials placed with a third party was able to defraud the plaintiff of a considerable amount of money, for which judgment was rendered in the court below.

54. McGehee v. Town of Kentwood, 213 La. 721, 35 So. (2d) 589 (1948).
55. Brown v. Mathieson Alkali Works, 212 La. 700, 33 So. (2d) 200 (1947).
56. Tucker v. Edwards, 212 La. 457, 32 So. (2d) 845 (1947).
57. Caddo Parish School Board v. Pyle, 212 La. 481, 32 So. (2d) 897 (1947).
58. Foret v. Gautreaux, 36 So. (2d) 393 (La. 1948).
59. J. B. Beaird Co. v. Aubrey, 213 La. 509, 35 So. (2d) 129 (1948).
60. La. Const. of 1921, Art. XI, §§ 1 and 2.

As the defendant did not sign the plaintiff's checks, did not handle, or have authority to handle, any of the plaintiff's money and property, the court held the funds were not obtained while defendant was acting in a fiduciary capacity. The judgment of the trial court, holding defendant's home exempt from seizure, was affirmed.

Injunction

In the cases[61] dealing with injunction procedure, the points presented were clear-cut and settled through application of rudimentary principles. In these cases, consolidated for trial and appeal, plaintiff and defendant had filed separate suits against each other and other parties, each asserting the ownership of certain timber, and each seeking injunctive relief to prevent the other from cutting and removing the timber. On proper showings, temporary restraining orders and rules to show cause why preliminary injunctions should not issue were granted in both cases. After the trial of the rules nisi, the trial court rendered judgments on the merits, though the record showed that the cases were submitted only on the issue of whether preliminary injunctions should be granted or not. Under the circumstances, the supreme court properly remanded the cases to the court below for further proceedings not inconsistent with the appellate court's vacation of the judgments on the merits.

Extraordinary Writs

The writ of habeas corpus again was employed successfully by a mother to regain the custody of her minor child.[62] Under the facts found established by the record, the relatrix had left the matrimonial domicile because of the alleged cruelty of her husband, and no basis for any attack upon the moral character of the mother or her fitness to rear the child was found. Under these circumstances, the custody of the child was given to the mother pending the outcome of a separation suit between the parents.

The court again had occasion to apply the rule that the extraordinary writ of mandamus lies only to compel the performance of a ministerial duty.[63] The judgment of the court below order-

61. Kirby Lumber Corporation v. Cain; Anderson-Post Hardwood Lbr. Co. v. Kirby Lumber Corporation, 212 La. 1055, 34 So. (2d) 259 (1948).

62. State ex rel. Morrison v. Morrison, 212 La. 463, 32 So. (2d) 259 (1948).

63. Houeye v. St. Helena Parish School Board, 213 La. 807, 35 So. (2d) 739 (1948).

ing the reinstatement of a teacher dismissed by a school board after hearing was set aside. As the statute under which the defendant board proceeded provided for a judicial review and as there was no ministerial duty on the part of the board to re-employ the teacher, it was held that mandamus would not lie.

Real Actions

One of the essentials of the jactitory action is the possession of the plaintiff, and the type of possession required varies with the character of the land in dispute. In one case,[64] both the trial and appellate court found that the alleged possession of plaintiff was not sufficient to maintain the petitory action. A judgment dismissing the suit was affirmed.

Miscellaneous

In *Washington v. Palmer*,[65] plaintiff obtained a judgment against defendant husband at a time while the latter was living with his wife. Subsequently defendant and his wife were divorced. A suit to revive the judgment thereafter was brought against the husband alone. The latter's objections that the action to revive should be brought against the wife as well was swept aside by the court. The well-recognized rules that the husband is always bound unconditionally on all community obligations and that he may be sued alone therefor after the dissolution of the community were applied.

An interesting point of interdiction procedure was reviewed and applied in *Interdiction of Maestri*.[66] Contending that the annual account filed by the interdict's curator contained overcharges in an item for the board and lodging of the interdict, and attorney's fees charged the curator, two nieces and a nephew of the interdict opposed the account. In the court below all of these oppositions were dismissed. On appeal, the decision of the trial court was affirmed, the court holding that the opponents had no interest in opposing the account, as they did not claim to be creditors or otherwise interested in the estate. As in the case of tutorship, the court pointed out that the annual account rendered by the curator is not binding upon the incapacitated party, and any injury sustained by the latter might be asserted

64. Jeanerette Lumber & Shingle Co. v. Kemper, 213 La. 785, 35 So. (2d) 732 (1948).
65. 213 La. 79, 34 So. (2d) 382 (1948).
66. 213 La. 213, 34 So. (2d) 790 (1948).

against the representative by an opposition against the latter's account.

VII. CRIMINAL LAW AND PROCEDURE

*Dale E. Bennett**

A. CRIMINAL LAW

Definition of Crimes—Degree of Certainty Required

A number of recent decisions have served to crystallize and clarify the supreme court's position as to the certainty with which a criminal statute must define the proscribed criminal conduct. In *State v. Truby*[1] the supreme court previously held that the definition of keeping a disorderly house, as the keeping of a house to be used habitually for any "immoral purpose," was unconstitutional on the grounds of uncertainty. The court had stressed the idea that the phrase "immoral purpose" was a concept of such diverse connotations that its judicial interpretation would vary with the standards of morality of each community and of each individual judge. Such a nebulous standard failed to apprise sufficiently the individual of the line between proper and criminal conduct. Following this same line of reasoning the supreme court held in *State v. Vallery*[2] that Clause 7 of Article 92 of the Criminal Code, which defined contributing to the delinquency of a juvenile as enticing, aiding or permitting a juvenile to "perform any immoral act," was unconstitutional by reason of its vagueness, indefiniteness and uncertainty. Again the supreme court announced the general principle that a criminal statute must define the act denounced "with such precision [that] the person sought to be held accountable will know his conduct is such that it falls within the purview of the act intended to be prohibited."[3]

Compare, however, the supreme court's holding in *State v. Saibold*[4] that Article 81 of the Criminal Code, which defined the crime of indecent behavior with juveniles as the commission of "any lewd or lascivious act upon the person or in the presence

*Professor of Law, Louisiana State University.

1. 211 La. 178, 29 So. (2d) 758 (1947), discussed by author (1948) 8 LOUISIANA LAW REVIEW 283.

2. 212 La. 1095, 34 So. (2d) 329 (1948).

3. 34 So. (2d) 329, 331.

4. 213 La. 415, 34 So. (2d) 909 (1948).