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Civil Procedure

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VIII. CIVIL PROCEDURE

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Jurisdiction Ratione Personae

Two cases[1] decided during the past term presented an interesting question of the constitutionality of the venue provisions in a statute. In both, the plaintiff citizens and taxpayers sought to enjoin the continued operation of alleged gambling houses as an abatement of public nuisances, under the gambling abatement statute.[2] In each case, the defendants challenged the jurisdiction of the court, pleading that the amended statute under which the suit was brought violated the due process clauses of the Federal and State Constitutions and the constitutional provisions dividing the state into judicial districts. Specifically, the jurisdictional challenge stemmed from the failure of the legislature, in amending the statute, to include the phrase "having jurisdiction thereof" after the words "any district court"; and it was contended that this evidenced a legislative intent to vest jurisdiction in this type of case in any district court of the state, in violation of the constitutional provisions invoked. Pointing out that the last amendment had merely tracked the language of the original legislation, which had been broadened in an earlier amendment, the majority of the court held that the words "any district court" in the latest amendment meant any district court having personal jurisdiction over the defendants, and that since the latter were all sued at their domicile this requirement had been met. Three justices concurred in the result, but predicated their opinion on a recognition of a legislative intent to confer jurisdiction in such cases upon any district court, but a failure to find therein any violation of the constitutional provisions invoked.

Amendment of Petition

Despite the continuous progress made during the past fifteen years towards liberality of amendment of pleadings in Louisiana, thus far the cases prohibiting amendment in the field of conservatory writs[3] have escaped overruling. The technical position taken

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1. Tanner v. Beverly Country Club, Ellzey v. Original Club Forest, 214 La. 791, 38 So. (2d) 783 (1948).

2. La. Act 192 of 1920, as amended by La. Act 49 of 1938 and La. Act 120 of 1940.

3. Rhodes v. Union Bank of Louisiana, 7 Rob. 63 (La. 1844) (injunction); Kelly & Frazer v. Bentley, 9 La. Ann. 586 (1854) (attachment); and Terzia v. Grand Leader, 176 La. 151, 145 So. 363 (1933) (provisional seizure).

by the courts in these conservatory writ cases in the past has been based on the theory that an amendment can never be permitted to relate back to the time of filing the original petition, and hence never can be given any curative effect, when filed after the defendant has excepted to the original petition or moved to dissolve the writ. Since the rationale of these earlier cases has now been repudiated,[4] and as the supreme court in its latest decision on the subject has relaxed the strict rules of pleading heretofore applied in conservatory writ cases,[5] the overruling of these earlier decisions is to be anticipated.

An opportunity for such constructive work was presented in *Melerine v. Melerine.*[6] In the lower court, plaintiff sued her husband for a separation from bed and board and for injunctive relief to prevent the defendant from disposing of the community property. The petition's prayer, *inter alia,* asked for an injunction and for judgment perpetuating the same. Attached to the petition was an order drafted by plaintiff's counsel, and signed in due course by the trial judge, for the issuance of a temporary restraining order and a rule upon defendant to show cause why a *permanent* injunction should not issue. Defendant excepted to the petition on the ground that it disclosed no cause of action for injunctive relief, since a permanent injunction could not issue upon rule and plaintiff had not prayed for a preliminary injunction. On the trial of the exception, the temporary restraining order previously issued was recalled and the rule for a permanent injunction was dismissed. Plaintiff's request for permission to amend the petition so as to cure the defects complained of was refused.

Under its supervisory jurisdiction, the supreme court set aside all of the trial judge's rulings. In the opinion it was pointed out that here the plaintiff was entitled to an injunction as of right, and that the defendant's exception was not directed to the petition, but rather to the defective order signed by the trial judge, which was exclusively the latter's responsibility. It is unfortunate that the court did not see fit to decide the case on the broader ground that a petition in a conservatory writ case may be amended as in ordinary suits.

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4. In Reeves v. Globe Indemnity Co. of New York, 185 La. 42, 168 So. 488 (1936).

5. Cf. West v. Ray, 210 La. 25, 26 So. (2d) 221 (1946), noted in (1947) 7 LOUISIANA LAW REVIEW 433.

6. 214 La. 279, 37 So. (2d) 600 (1948).

Exceptions

The harvest reaped each term in jurisprudence on the procedural exceptions usually is a bountiful one. Last term's crop was relatively small, with even the few cases on the subject singularly free from difficulty.

In *Slattery Company v. F. W. Woolworth Company*,[7] plaintiff sought to cancel an extension of a commercial lease which was allegedly in consideration of valuable alterations and improvements to be made on the leased premises by lessee. Plaintiff's action was based on two different grounds: firstly, on the theory that the agreement was void as containing a potestative agreement, since the lessee was under no obligation to make the alterations and improvements; and secondly, on the ground that the lessee was obligated to make the alterations and improvements, and that the agreement had been breached because of his failure to do so. The trial court, finding that these two inconsistent causes of action had not been pleaded in the alternative, sustained an exception of no cause of action thereto and dismissed the suit. On appeal, the inconsistencies of the two actions was recognized, but the judgment of the trial court was reversed and the cause remanded with instructions to the trial court to require plaintiff to elect as to which of the two inconsistent actions it would continue to prosecute. The position of the appellate court is clearly supported by the pertinent code provision on the subject.[8]

The plaintiff owner of a commercial garage, in *Douglas v. Haro*,[9] sought to recover the damages sustained by a patron's car from a collision with an auto owned and operated by the defendant. The petition contained the usual allegations with respect to this damage having been caused by defendant's negligence. Both the trial and the intermediate appellate court had sustained defendant's exceptions of no right and no cause of action and had dismissed plaintiff's suit. The petition, attempting to show plaintiff's responsibility as depositary, alleged that at the time of the accident the patron's car was being operated by one of plaintiff's employees, who had taken the auto from the garage without permission. The theory on which both of these exceptions had been maintained was that the petition had failed to allege any loss by plaintiff or demand for restitution by the

7. 214 La. 876, 39 So. (2d) 161 (1949).
8. Art. 152, La. Code of Practice of 1870. See also Bickman v. Carbajal, 166 La. 618, 117 So. 738 (1928).
9. 214 La. 1099, 39 So. (2d) 744 (1949).

depositor. The supreme court refused to go into this question, holding such a decision unnecessary, since in all events the patron was an indispensable party to the litigation. The judgments of the two lower courts were set aside, and the case was remanded with instructions to require plaintiff to make the patron a party litigant.

Dodge v. Bituminous Casualty Corporation[10] again recognized the settled rule that plaintiff's contributory negligence, appearing from the allegations of the petition, might be raised through an exception of no cause of action. But once again this exception was overruled through the holding that for the exception to lie the allegations of the petition must leave no other rational hypothesis available except contributory negligence of the plaintiff. The court's actions in these respects appear unexceptionable. Its refusal to hold the plaintiff guilty of contributory negligence under the evidence presented is much more difficult to understand.[11]

In another case,[12] the court's decision was reached through a sustaining of exceptions of no right and no cause of action, involving only settled rules of pleadings and an elementary principle of insurance law. Plaintiffs, suing as subrogees of the insured owner of a building being constructed, brought suit to recover of the contractor the amounts of insurance paid, alleging that the defendant's negligence caused the destruction of the building by fire. Since the policies in question were of the type commonly known as "Builder's Risk Policies," made payable to the owner and contractor as their interest might appear, considerable ingenuity was shown by plaintiffs in alleging that on the date of the fire the building had been occupied by and belonged exclusively to the owner, and that the contractor had no interest therein. Other allegations of the petition, however, showed that at the time of the fire, the defendant contractor and his employees were still working on the building in accordance with the building contract. Under the latter allegations, the court experienced no difficulty in holding that the defendant contractor was still an insured under the policies, and hence could not be held for his negligence or that of his employees.

The exception of res judicata was urged and overruled in

10. 214 La. 1031, 39 So. (2d) 720 (1949).

11. This case will be the subject of a note appearing in an early issue of the LOUISIANA LAW REVIEW.

12. Glen Falls Ins. Co. v. Globe Indemnity Co., 214 La. 467, 38 So. (2d) 139 (1948).

two cases decided during the past term. In both, the court again had occasion to recognize the fact that our civilian rules applicable to the thing adjudged are much narrower than those obtaining at common law.[13] In *Durmeyer v. Streiffer*,[14] it was held that a judgment rendered against an improvement association which sought to enforce certain building restrictions against defendant was no bar to a subsequent suit by an individual owner of adjacent property to enjoin continued violation of the same restrictions. In *Jones v. Williams*,[15] the court again applied the civil law requirement that res judicata cannot be invoked unless the two suits were between the same parties. A judgment approving a compromise settlement of a workmen's compensation claim between an employee and his corporate employer was held not to constitute any bar to a suit by the employee against an individual alleged to have been an employer at the time of the accident.

Appellate Jurisdiction

Probably the most interesting case in the field of civil procedure decided during the past term was *Walker v. Fitzgerald*.[16] So close a question of appellate jurisdiction was presented therein that when the case was first appealed to a court of appeal the latter transferred it to the supreme court; and when the cause was considered in our highest court it was transferred back to the intermediate appellate court.

In the trial court plaintiffs had sued to annul an agreement granting defendant's assignor the right to extract sand and gravel from certain land, contending that this agreement was void as it contained a potestative condition. In the alternative, plaintiffs sought to recover of defendant $3,016 alleged to be due as royalty on the sand extracted under the contract. Defendant denied the nullity of the agreement, admitted that during the life of the contract he had extracted a certain number of tons of sand, but denied that any royalty for sand was due under the terms of the agreement. During the trial, the parties stipulated that the land subject to the contract had a value in excess of $100 but less than $2,000. The supreme court further found that

13. Some of these differences are brought into bold relief in Hope v. Madison, 194 La. 337, 193 So. 666 (1940). See also Comment: Res Judicata—Matters Which Might Have Been Pleaded (1940) 2 LOUISIANA LAW REVIEW 347, 491.

14. 215 La. 585, 41 So.(2d) 226 (1949).

15. 215 La. 1, 39 So. (2d) 746 (1949).

16. 214 La. 293, 37 So. (2d) 712 (1948).

"by plaintiffs' tacit concession" prior to submission of the cause to the trial court, the alternative demand for $3,016 had been reduced to $1,680. Judgment was rendered in the trial court rejecting plaintiffs' primary demand for the annulment of the contract, but awarding plaintiffs $1,680 as royalty for the sand extracted by defendant. The latter appealed to the court of appeal, and there plaintiffs answered the appeal, praying for the maintenance of their primary demand.

On its own motion, the intermediate appellate court questioned its jurisdiction over the case. Pointing out that since very considerable amounts of gravel and sand had been extracted under the agreement during the first four years of its existence, and that the loss which the defendant would sustain if the contract were avoided would be considerably more than $2,000, the cause was transferred to the supreme court.[17] The latter in turn considered the question of its appellate jurisdiction. Pointing out that the demand for royalty had been reduced to $1,680 prior to the submission of the case in the trial court, and by stipulation the land was worth less than $2,000, it was concluded that the amount involved in both of plaintiffs' demands was below the jurisdiction of the supreme court, and the cause was transferred back to the court of appeal. The highest court of the state refused to consider the value of the gravel and sand extracted from the land during prior operations under the contract.

Walker v. Fitzgerald brings into bold relief one of the most perplexing problems of appellate jurisdiction—the determination of the "amount involved." Usually, the possible gain to the plaintiff is exactly equal to the possible loss of the defendant. But this does not always follow, as there may be cases where the ultimate cost or loss to the defendant in the event of an adverse decision would far exceed the plaintiff's gain from a judgment in his favor. In such cases, the supreme court has applied the "defendant's viewpoint theory."[18] This was the rule which the court of appeal attempted to apply in its conjectures

17. 24 So. (2d) 263 (La. App. 1946).

18. In this connection, see the tests of appellate jurisdiction applied in the following cases: State ex rel. Chandler v. City of Shreveport, 151 La. 491, 91 So. 850 (1922)—cost to defendant of complying with a mandamus prayed for by plaintiff; Murff v. Louisiana Highway Commission, 180 La. 664, 157 So. 383 (1934)—cost to defendant of complying with a mandatory injunction sought by plaintiff; Frierson v. Cooper, 196 La. 450, 199 So. 388 (1940), noted in (1941) 1 Loyola L. Rev. 110—loss which defendant would sustain if injunction sought by plaintiff were granted: New Orleans & Northeastern R. Co. v. Redmann, 210 La. 525, 27 So. (2d) 321 (1946)—value of disputed strip plus cost to defendant of removing therefrom junk stored thereon.

as to the value of the contractual rights of which the defendant would be deprived by an adverse decision. Looking only to the maximum gain to the plaintiffs from each of their alternative demands, the supreme court concluded that it lacked appellate jurisdiction over the cause. In view of the basic rule that the appellate court's jurisdiction must appear affirmatively from the record, the supreme court's decision certainly is subject to no criticism. There appeared to be nothing in the transcript which established definitely and affirmatively the value to the defendant of the contract rights involved.

The failure of the record to establish affirmatively the appellate jurisdiction of the supreme court resulted in its transfer of another cause[19] to the intermediate appellate court. Defendant had appealed from a judgment of the trial court restraining him from the continued violation of certain building restrictions. In yet another case,[20] the record affirmatively established the supreme court's lack of appellate jurisdiction. These were succession proceedings, where the issue presented was whether certain real estate purchased in the name of the decedent, and inventoried in the proceedings at $3,500, was community or separate property. Since only a half interest in the property was in dispute, the court of appeal clearly had appellate jurisdiction.

State ex rel. Chehardy v. New Orleans Parkway Commission[21] illustrates the proper procedure to be followed by an appellate court when the appeal presents a plurality of points or demands, only some of which are within the particular court's jurisdiction. Here, relator instituted proceedings in the court below for mandamus to compel defendant commission to issue relator a permit to remove certain trees, or in the alternative for a judgment decreeing the ordinance creating the defendant commission unconstitutional. From a judgment granting the alternative relief and further ordering defendant commission to issue the permit, the defendant appealed. In the supreme court, the defendant abandoned any issue of the constitutionality of the ordinance, thus conceding tacitly the correctness of the judgment appealed from in this respect. Since this was the only point in the case over which the supreme court had appellate jurisdiction, the cause was transferred to the court of appeal. There is author-

19. Plauche v. Albert, 215 La. 776, 41 So. (2d) 677 (1949).
20. Succession of Valdez; Succession of Bianchi, 215 La. 791, 41 So. (2d) 682 (1949).
21. 215 La. 779, 41 So. (2d) 678 (1949).

ity for this procedure;[22] but in the past the failure of our appellate courts to transfer the cause after acting upon the only point or demand over which it had jurisdiction, has sometimes prevented any review of certain phases of the case.[23]

In the remaining case[24] within this subdivision, defendant had appealed from a judgment rendered in favor of a wife and her children, awarding them damages for illness alleged to have been contracted, during severely cold weather, from the disconnection of a gas line from which plaintiffs' home was heated, and damages for the embarrassment, inconvenience and hardship sustained thereby. Since these demands were for damages for physical injuries and "for other damages . . . arising from the same circumstances," over which the court of appeal had exclusive jurisdiction, the case was transferred to that court.

Appellate Procedure

Two appeals[25] were dismissed by the supreme court on the ground that only moot questions were presented for adjudication. In both, a devolutive appeal had been prosecuted from an order of court authorizing the judicial sale of property, and prior to a consideration of the appeal the property had been sold. Since the validity of the judicial sales could not be affected by any subsequent reversals of the judgments appealed from, both appeals were dismissed.

In *State ex rel. Lucas v. Hickey*,[26] the supreme court again held that the Recorder of Mortgages for the Parish of Orleans had a sufficient interest to appeal from a judgment of court ordering him to erase from the records of his office the inscription of a mortgage.

22. State v. J. Foto & Bro., 134 La. 154, 63 So. 859 (1913); Downs v. Dunn, 162 La. 747, 111 So. 82 (1927).

23. As where plaintiff has cumulated in his petition two separate demands, one reviewable on appeal only by the supreme court, the other appealable only to a court of appeal. In this connection, see Newsom v. Starns, 174 La. 955, 142 So. 138 (1932); Applewhite v. New Orleans Great Northern R. Co., 148 So. 261 (La. App. 1933); Searcy v. Interurban Transp. Co., 171 So. 468 (La. App. 1937); Id., 179 So. 93 (La. App. 1937); and Id., 189 La. 183, 179 So. 75 (1938).

24. Sibley v. Petty Realty Co., 215 La. 597, 41 So. (2d) 230 (1949).

25. Walters v. Childers, 214 La. 531, 38 So. (2d) 160 (1948); State v. Mutual Ins. Co., 214 La. 357, 37 So. (2d) 817 (1948).

26. 214 La. 711, 38 So. (2d) 395 (1949). The court distinguished the instant case from Carrere v. Reddix, 211 La. 566, 30 So. (2d) 432 (1947), on the ground that in the latter the appeal was not dismissed on motion but only after a consideration of the merits, and the judgment appealed from therein had not ordered the recorder to perform or to refrain from performing any official act. The *Reddix* case is discussed in The Work of the Louisiana Supreme Court for the 1946-1947 Term (1948) 8 LOUISIANA LAW REVIEW 269.

The old question of whose duty it is to file the transcript of appeal in the appellate court[27] came up again in the supreme court for its annual consideration. In *Manfre v. Corbello*,[28] defendants sought to appeal to the Orleans Court of Appeal from the judgment of a New Orleans city court ordering them to vacate certain premises rented from the plaintiff under an oral lease for a $15 monthly rental. The trial court had made the appeal returnable on December 20, 1947, but the transcript of appeal had been lodged in the appellate court on December 30th. The trial judge's certificate indicated that the record was transmitted to the court of appeal on December 18th. No where did the record indicate why the transcript was not filed in the appellate court until twelve days thereafter. Concluding that this delay must have been attributable to defendants, the court of appeal sustained plaintiff's motion to dismiss. Under a writ of review, the supreme court pointed out that the duty to file the transcript of appeal with the appellate court in cases involving less than $100 is upon the city court judge, rather than upon appellant, and held that in such cases the appeal could not be dismissed unless the delay was clearly due to negligence of the appellant. As the record was completely silent on this point, the cause was remanded to the court of appeal with instructions to determine the facts, and to dismiss the appeal only if the delay in filing the transcript was found to be due to the fault of appellant.

The two remedial statutes protecting an appellant from a dismissal of the appeal because of deficiencies in the transcript[29] were invoked by the supreme court in two appeals. In one,[30] the missing portions of the transcript of appeal were supplied by appellant immediately after appellee had moved to dismiss the appeal; and since the deficiencies of the record had been cured within the time allowed by the pertinent statute,[31] the motion was denied. In the other case,[32] the transcript had been prepared in accordance with the statute[33] allowing counsel the right to designate what portions of the record were to be sent up to the appellate court. The supreme court again denied the

27. For the applicable rules, see Note (1941) 15 Tulane L. Rev. 304 and authorities discussed therein.
28. 215 La. 81, 39 So. (2d) 830 (1949).
29. La. Act 234 of 1932 and La. Act 229 of 1910, as amended by La. Act 265 of 1918.
30. Smith v. Atkins, 215 La. 310, 40 So. (2d) 475 (1949).
31. La. Act 234 of 1932.
32. Birdwell v. Birdwell, 214 La. 401, 37 So. (2d) 850 (1948).
33. La. Act 229 of 1910, as amended by La. Act 265 of 1918.

motion to dismiss, holding that the remedy of the appellee who complained of a defective transcript in such cases was either to have the transcript supplemented or to point out the necessity therefor so that the appellate court might direct appellant to file a supplementary transcript.

The pertinent code provisions[34] offer a choice of two remedies to an appellee, when the appellant has failed to lodge the transcript timely and there has been no extension of the return day. The appellee may either lodge the transcript of appeal himself in the appellate court, so as to seek affirmance of the judgment appealed from; or, upon producing in the trial court a certificate of the abandonment of the appeal signed by the appellate court, the appellee may obtain execution of the judgment appealed from. The code articles do not state precisely the manner in which execution of the judgment may be so obtained. In *Barton v. Raziano*,[35] the appellee presented the certificate of abandonment to a deputy clerk of the trial court, and the latter thereupon issued a writ of fieri facias to the sheriff. To prevent the latter from proceeding with the sale of the property seized under authority of this writ, the judgment debtor unsuccessfully sought an injunction from the trial court. Under its supervisory jurisdiction, the supreme court held the writ of fieri facias a nullity and prohibited further proceedings under the seizure. Following an earlier case, the supreme court held that in such cases the order permitting the appellee to execute on the judgment appealed from must be obtained from the trial judge, rather than from a clerk; that the proceedings in this respect were judicial, rather than ministerial.

A case which may have some unfortunate effects, not from the issue decided but rather from a dictum in the opinion, is *Reid v. Monticello*.[36] There the plaintiffs, husband and wife, sued a grocer and his casualty insurance carrier to recover damages for personal injuries sustained by the wife, and for the recovery of medical expenses paid by the husband, as a result of the wife's fall over a wire rack alleged to have been placed negligently in the store. These two defendants answered, denying any negligence on the part of the owner or his employees, and in the alternative pleading that the accident was caused solely through the negligence of the plaintiff wife. Thereafter, alleging that a second insurance company had issued a policy covering the negli-

34. Arts. 588-590, La. Code of Practice of 1870.
35. 215 La. 423, 40 So. (2d) 806 (1949).
36. 215 La. 444, 40 So. (2d) 814 (1949).

gence of the store-owner and his employees in the operation of the store, plaintiffs made this latter insurance company a party defendant. The second insurer's answer adopted both defenses relied upon by the two original defendants, but further pleaded a failure of the insured to give timely notice of the accident and claim. After trial, judgment was rendered in favor of plaintiffs and against the two original defendants only. By a so-called "supplemental judgment" the trial judge rejected plaintiffs' demands against the second insurer, holding the latter exonerated through the assured's failure to give timely notice of the accident. The two original defendants appealed from both the original and the supplemental judgment, and the plaintiffs answered this appeal, praying for an increase in the judgment against the two original defendants.

In the court of appeal, the second insurer moved to dismiss the appeal taken by the two original defendants, insofar as it affected plaintiffs' demands against the second insurer. This motion to dismiss was maintained through an opinion[37] somewhat difficult to follow. For the most part the intermediate appellate court cited and discussed cases supporting the settled rule that a judgment appealed from cannot be modified with respect to co-appellees. (Here, the two original defendants were not appellees, but appellants). Probably the crux of the court of appeal's position was the asserted inability to entertain appellants' complaint with respect to their co-defendant, since "no issue was contested or controverted nor was any issue between them adjudicated by the judgment appealed from."[38]

Under a writ of review limited to this single issue of the case, the supreme court reversed the decision of the intermediate appellate court dismissing the appeal insofar as it affected the second insurer. The organ of our highest court pointed out that the ultimate judgment against the second insurer might materially affect the extent to which the insured might pass the liability on to his insurers; and that even if the insured had not been made a party defendant, as a "third party aggrieved."[39] by any judgment rejecting the plaintiffs' demands against the second insurer, the insured might have appealed the judgment.

Had the opinion of the supreme court gone no further than this, it might have been approved unqualifiedly, but in answer-

37. Reid v. Monticello, 33 So. (2d) 760 (La. App. 1948).
38. 33 So. (2d) 760, 762.
39. Under Art. 571, La. Code of Practice of 1870.

ing the second insurer's argument, the organ of the court used the following language:[40]

> "While we accept the argument . . . that *the generally accepted rule is that where a solidary judgment is sought against two defendants as tort feasors, a judgment relieving one of liability cannot be questioned on appeal taken by the defendant cast in the judgment*, the reasons therefor being that each defendant is liable for the whole damage and the injured party my sue either or both and neither had any right as against the other, a study and analysis of the authorities that are the basis of this jurisprudence will show that they are neither apposite nor controlling here. . . ." (Italics supplied.)

This recognition by dictum of a rule announced heretofore only by the court of appeal[41] may serve to extend appreciably the hyper-technical decision of our supreme court in *Aetna Life Insurance Company v. De Jean.*[42]

Supervisory Procedure

No cases of unusual importance on this subject were decided by the supreme court during the past term. In two cases,[43] the rule was reiterated that the supreme court, under the writ of review, would not modify the judgment under review favorably to a litigant who had not applied for the reviewing writ. In a third case,[44] it was held that when the supervisory jurisdiction of the supreme court was invoked to compel the trial judge to issue an order of appeal, and the appeal was granted by the

40. 40 So. (2d) 814, 816.

41. Rumpf v. Callo, 16 La. App. 12, 132 So. 763 (1931); Thalheim v. Suhren, 18 La. App. 46, 137 So. 874 (1931); Spanja v. Thibodaux Boiler Works, 37 So. (2d) 615 (La. App. 1948). The first two of these cases were decided prior to the supreme court's decision in Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933), holding that one of two joint tortfeasors cast by a solidary judgment might enforce contribution against the other. The third case relied strongly on the court of appeal decision in the instant case, which was reversed by the supreme court.

Jones v. Illinois Cent. R. Co., 35 So. (2d) 33 (La. App. 1948), which also supports this view, was overruled expressly by the supreme court in the instant case.

42. 185 La. 1074, 171 So. 450 (1936) noted in (1939) 1 LOUISIANA LAW REVIEW 235, holding that contribution may not be enforced between joint tortfeasors unless both are cast solidarily by the judgment. The dictum of the instant case would appear to go further, and to hold that one joint tortfeasor cast in judgment has no interest sufficient to permit him to appeal from a judgment absolving another alleged joint tortfeasor.

43. Cassar v. Mansfield Lumber Co., 215 La. 533, 41 So. (2d) 209 (1949); Osborne v. Mossler Acceptance Co., 214 La. 503, 38 So. (2d) 151 (1948).

44. State ex rel. Dowling v. Canal Bank & Trust Co., 214 La. 283, 37 So. (2d) 709 (1948).

trial judge in compliance with an alternative writ of mandamus, the issue originally presented thereupon became moot. No principle of Louisiana law permitted the supreme court to condemn the trial judge personally for the costs of the proceedings.

The only new principle of law announced in this field resulted from the decision in *Jones v. Williams*.[45] In the trial court plaintiff asserted alternatively claims for workmen's compensation and for damages, there obtaining a judgment on his primary demand. On appeal, the court of appeal reversed the judgment, rejecting both of plaintiff's demands. A rehearing was then applied for by plaintiff, which the intermediate appellate court granted in part, limiting the reconsideration solely to the plaintiffs alternative demand for damages. On rehearing, this demand of plaintiff's likewise was rejected, and plaintiff was applied to the supreme court for a writ of review. Under the pertinent constitutional provision,[46] an application to the supreme court for a writ of review must be filed within thirty days of the court of appeal's refusal to grant applicant a rehearing. Though the application for the writ here was filed within thirty days of the intermediate appellate court's refusal to grant a second rehearing on plaintiff's claim for damages, it was filed more than thirty days after the court of appeal refused to grant plaintiff a rehearing with respect to his demand for workmen's compensation. Based on this latter fact, defendant contended in the supreme court that the writ was not filed timely to permit consideration of plaintiff's claim for workmen's compensation. This contention was brushed aside by the supreme court, which stated that the words "any case," as distinguished from any demand, indicated a constitutional intent to have the delay commence only through final action by the court of appeal.

Homestead Exemptions

Acosta v. Whitney National Bank of New Orleans[47] reiterated the rule that the constitutional provisions[48] granting the head of a family the right to have the family homestead exempt from seizure were not self-operative. The heirs of the former owner brought a petitory action to have their ownership of the property in dispute recognized, alleging that the property was sold at judicial sale for less than $4,000, in an action brought

45. 215 La. 1, 39 So. (2d) 746 (1949).
46. La. Const. of 1921, Art. VII, § 11.
47. 214 La. 700, 38 So. (2d) 391 (1948).
48. La. Const. of 1921, Art. XI, §§ 1-4.

after their father's death to enforce a mortgage on the property. The constitutional language "no court or ministerial officer of this State shall ever have jurisdiction, or authority, to enforce any judgment, execution, or decree, against the property exempted, as a homestead"[49] was asserted as a basis of the alleged nullity of the judicial sale. Relying on an unbroken line of jurisprudence, the court held that this language merely prohibited the courts and ministerial officers from seizing a homestead which had been judicially declared exempt from seizure from the debt sought to be enforced. It was further pointed out that, even with respect to the dependent wife and children of the debtor, the homestead exemption is lost forever unless it is claimed by the one entitled thereto at the time the property is seized.

Two other cases on the subject form a striking contrast aptly illustrating the social objective to be served by the homestead exemption. In one,[50] a dependent widow, who continued to live on the property, was permitted to assert the homestead exemption, even against the children of her husband by a first marriage. These children owned a half interest in the property and sought to enforce against the other half interest a mortgage given them by their father to secure amounts due them from their mother's succession. In the other,[51] a husband who sought to use the homestead exemption as a screen to prevent the execution of a judgment in favor of his divorced wife for past-due alimony for the support of herself and her child was held not entitled to the exemption. From the evidence presented, the court found that the husband had no one (other than his child and divorced wife) dependent upon him for support. The court rested its denial of the exemption on the ground that the latter was granted primarily for the benefit of the dependent members of the family. Any other decision would have permitted the homestead exemption to have been used as a sword against the very persons whom it was intended to serve as a shield.

Miscellaneous

Rhodes v. Collier,[52] a possessory action, presented an interesting application of established procedural principles. Plaintiffs' petition alleged, *inter alia*, that they had been in the real,

49. Id. at § 2.
50. Harrell v. Crow, 214 La. 548, 38 So. (2d) 226 (1948).
51. State ex rel. Code v. Code, 215 La. 485, 41 So. (2d) 62 (1949).
52. 215 La. 754, 41 So. (2d) 669 (1949).

actual and corporeal possession of all of the land in dispute prior to the disturbance through defendant's entry thereon. On the trial, however, plaintiffs could show the corporeal possession of only a portion of the land, relying upon the doctrine of civil possession of the whole through physical possession of a part to supplement their proof. Based on this, defendant argued strongly that there was a discrepancy between pleading and proof. The court swept this argument aside, holding that it was only incumbent upon plaintiffs to exhibit proof of possession, actual or constructive. The court again applied the settled rule that a defendant in a possessory action, without color of title, could not defeat the possession of record owners who had corporeal possession of a part of the tract, except through an adverse possession by inclosures.

In *Lawrence v. Claiborne*,[53] plaintiff sued to be recognized as the owner of certain property, alleging that defendant took title to the property merely as agent for plaintiff's husband, since deceased. An exception of no cause of action, levelled at plaintiff's attempt to prove title to property by parol, was maintained; but plaintiff was granted leave to amend so as to declare upon a counter-letter or other written evidence. By a supplemental petition, plaintiff next alleged that defendant had acknowledged in writing that he was her husband's agent, and annexed to her pleading a memorandum book allegedly showing that defendant had accounted to plaintiff's husband for collection of rents, taxes paid and commissions charged by defendant. The defendant again excepted, and simultaneously therewith filed an answer, averring defendant's purchase of the property for his own account, but admitting an oral agreement to sell the property to plaintiff's husband and the subsequent default of the latter therein and cancellation of the agreement accordingly. On the day of trial, defendant objected to the introduction of evidence on the ground that plaintiff's petition disclosed no cause of action. The exception and objection were maintained, plaintiff's demands rejected, and she appealed. In the supreme court, plaintiff relied strongly on the admission in the defendant's answer of the oral agreement to sell the property, contending that this constituted sufficient written evidence. The court, however, held that these allegations in defendant's answer could not be considered except as answers to interrogatories to facts and articles; and as so considered, the allegations as to default by plaintiff's husband and cancellation of the agreement could not be refuted by plaintiff.

53. 215 La. 785, 41 So. (2d) 680 (1949).

Appeals from judgments rendered by courts of limited jurisdiction in Louisiana, in matters involving $100 or less, generally are tried *de novo* in the appellate court. *Scott v. Moore*[54] considered the procedure in such cases. In a New Orleans city court plaintiff owner of certain property used summary proceedings to evict the occupant from the premises, so that the owner and his family might occupy the house. This action was dismissed by the trial judge through the maintenance of defendant's exception of no cause of action. On appeal, the Orleans Court of Appeal overruled the exception, and after a trial of the case on its merits rendered judgment for plaintiff. As the case had not been tried on the merits in the trial court, defendant under a writ of review sought to have the supreme court set aside the judgment on appeal and to have the case remanded to the court of first instance for trial. Pointing out that a trial *de novo* was a trial anew, the supreme court held that on such an appeal the appellate court might pass on all questions presented, including those relating to the merits, even though the case had been disposed of by the trial court only on the exception.

54. 214 La. 1090, 39 So. (2d) 741 (1949).