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Procedure: Civil Procedure

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ruling, which will eliminate the possibility of its operating oppressively in deserving cases. First, while the defendant has no right of further appeal upon the legality of the penalty, the supreme court might in a sufficiently meritorious case, grant review under its plenary supervisory jurisdiction. Second, if the trial de novo in the appeal to the district court had been limited to the question of defendant's guilt or innocence, the issue of constitutionality of the penalty could have been presented in a direct appeal to the supreme court. That would be a case of concurrent appellate jurisdiction, upon separate and distinct questions.

CIVIL PROCEDURE

*Henry G. McMahon**

ORIGINAL JURISDICTION

Seven cases decided during the past term involved serious questions concerning the jurisdiction ratione materiae of the trial court. In two of these,[1] a closely-divided court held the gambling abatement statute[2] invalid because of an unconstitutional grant of territorial jurisdiction. Both cases presented appeals from judgments of the district court sustaining exceptions of no right and no cause of action to proceedings brought to enjoin defendants from continued operation of their gambling houses. These exceptions were leveled at the unconstitutionality of the basic statute in permitting institution of abatement suits in any district court of the state, regardless of the location of the nuisance sought to be enjoined, in violation of Sections 31 and 81 of Article VII of the Constitution, and of the due process clause of the Constitutions[3] of the state and of the United States. The chief justice, speaking for the majority of the court, accepted the argument of the defendants in pronouncing the invalidity of the basic statute. Two of the dissenting judges, Justices Hamiter and Hawthorne, adhered to their original positions[4] that the

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1. Tanner v. Beverly Country Club; Ellzey v. Original Club Forest, 217 La. 1043, 47 So. 2d 905 (1950), noted in 25 Tulane L. Rev. 399 (1951).

2. La. Act 192 of 1920, as amended by La. Acts 49 of 1938 and 120 of 1940, La. R.S. (1950) 13:4721 through 13:4727.

3. La. Const. of 1921, Art. I, § 2; U.S. Const. Amend. XIV.

4. These cases were considered by the supreme court about eighteen months before, when judgments of the trial court sustaining exceptions to the jurisdiction were reversed. See Tanner v. Beverly Country Club; Ellzey v. Original Club Forest, 214 La. 791, 38 So. 2d 783 (1948), discussed in The Work of the Louisiana Supreme Court for the 1948-1949 Term, 10 LOUISIANA LAW REVIEW 120, 237 (1950).

statute under attack permitted institution of the abatement proceeding only in the parish where the nuisance was being committed. As a further reason for his inability to subscribe to the majority opinion, Justice Hawthorne took the position that, since the abatement suits were brought in the parish where the defendants were domiciled and where the alleged gambling houses were located, there was no basis for the defendants' complaint that the legislation in question deprived them of due process of law. Justice McCaleb agreed with the position taken by the majority that the statute permits the abatement proceedings to be brought in any district court of the state; but found in such legislative provision nothing inimical to any express or implied constitutional restraint upon legislation. Such a provision, says Justice McCaleb, relates merely to venue, not territorial jurisdiction; and no more offends the constitutional provisions invoked than do any of the exceptions to the general rule of suit at defendant's domicile announced in the Code of Practice. The impact of these two cases upon the twin subjects of jurisdiction and venue are discussed elsewhere.[5]

The French Civil Code expressly provides where actions to partition property belonging to the community are to be brought.[6] Both of the Louisiana codes are silent on the subject. The question was presented for the first time in Louisiana in *Demourelle v. Allen*,[7] where an action was brought in Plaquemines Parish to partition immovables located in that parish and owned by the community formerly existing between the litigants, whose divorce had been decreed in Orleans Parish. The defendant husband, who previously had prayed for the partition of the community estate in the divorce proceedings in Orleans Parish, filed exceptions to the jurisdiction ratione personae of the Plaquemines court and of lis pendens, which were overruled by the trial court. In the absence of express provisions of positive law, both litigants were forced to rely upon analogical extensions of code provisions to sustain their respective positions as to venue: the plaintiff, upon those articles providing that suits for the partition of immovables owned by co-proprietors should be brought in the

5. See Comment 12 LOUISIANA LAW REVIEW 210 (1952).

6. Art. 1476, French Civil Code, providing that the partition of the community is subject to all of the rules specified for the partition of successions among co-heirs. Art. 2890, La. Civil Code of 1870, like its counterpart—Art. 1872, French Civil Code—provides that the rules concerning the partition of successions apply to partners.

7. 218 La. 603, 50 So. 2d 208 (1950).

parish where the property is situated; the defendant, on those articles providing for the venue of actions to partition property owned by co-heirs. The court, holding that suits for the partition of community property, like suits for the partition of succession and partnership property, were ancillary to the main proceeding, overruled defendant's exception to the jurisdiction ratione personae, but sustained his exception of lis pendens. The decision not only appears to be sound, but seems to provide a workable rule for the future.

In *Key v. Salley*[8] plaintiff sought to annul an administratrix' sale of property, on the ground that the court's jurisdiction over the succession proceedings had been terminated prior to rendition of the order decreeing the sale, by a judgment placing decedent's widow and son into possession of the effects of the succession. The judgment of possession, on which the entire result of the case hinged, was a most unusual one, which not only recognized the decedent's widow and son and sent them into possession, but expressly reserved the right of the widow to administer the succession or to claim the widow's homestead, if she so desired. These reservations were held by the supreme court to strike the judgment of possession with nullity, as constituting a prohibited conditional acceptance of a succession. As a consequence, the order of the district court decreeing the subsequent sale of the property in question was held valid.

In *Rathbone Lumber & Supply Company v. Falgout*[9] plaintiff had sold building materials to the named defendant, who had used them in constructing a building in Plaquemines Parish for Pelas, under an oral contract. Both contractor and owner having failed to pay the price of these materials, plaintiff instituted proceedings in Jefferson Parish: (1) to recover judgment in solido against Falgout and Pelas; and (2) to enforce plaintiff's materialman's privilege against the building in Plaquemines. Pelas, a resident of the latter parish, excepted to the proceedings on the ground of improper venue and lack of jurisdiction over the subject matter. The trial court sustained Pelas' exception to the venue, but overruled his objections to the jurisdiction. On appeal, the supreme court reversed both aspects of the trial court's judgment. Since both defendants were liable in solido, and Falgout admittedly was a resident of Jefferson Parish where the proceedings were filed, the district court there was held competent to

8. 218 La. 922, 51 So. 2d 390 (1951).
9. 218 La. 629, 50 So. 2d 295 (1951).

render a personal judgment against Pelas, even though he resided in Plaquemines Parish. But since the proceedings to enforce the privilege on the building were in rem, and the statute conferring the privilege provided for an enforcement of the privilege only in the parish where the building was located, the district court in Jefferson was held incompetent to enforce the privilege.

In *Inman v. Harris*[10] plaintiff sued a Louisiana citizen to recover damages for "waste" committed on a Mississippi plantation by an alleged life-tenant, whose succession had been accepted unconditionally by the defendant. An exception to the jurisdiction ratione materiae of the trial court was sustained in the court of first instance and was affirmed on appeal. Since litigation to determine the title to the plantation was then pending in the courts of Mississippi, an action for "waste" was deemed inseparable therefrom. An unfortunate paraphrasing in the original opinion of the language of a common-law compendium, based upon the concept of a "local action" which was repudiated quite early in our jurisprudence,[11] was pin-pointed in a per curiam[12] so as to restrict the ruling to the precise facts of the case.[13]

PARTIES

The plaintiff in *Cohen v. Grace*[14] sought to annul an adjudication of property to him by the state, on the ground that the latter's title thereto, acquired under a tax adjudication, was invalid. In the alternative, plaintiff sought to have the state ordered to pay all paving liens on the property out of the proceeds of the adjudication to plaintiff. As the tax debtor and the paving lien holders had not been made parties to the proceeding,

10. 219 La. 55, 52 So. 2d 246 (1951).

11. In Holmes v. Barclay, 4 La. Ann. 63 (1849).

12. "The observation contained in the opinion, that the courts of Louisiana are without jurisdiction of actions ex delicto arising out of waste committed on lands outside of the State, was intended to be limited to the facts herein and is not to be viewed as a holding that suits for damages, resulting from trespass or other acts committed on lands located elsewhere, are not cognizable in Louisiana if our courts have jurisdiction over the person of the defendant." 52 So. 2d 246, 247 (La. 1951).

13. Nothing of unusual importance was involved in the remaining case on the subject. Property of a nonresident defendant which was sought to be attached, since its entry into the country had been detained as unclaimed merchandise by the collector of customs, acting under authority of the revenue laws. The United States of America intervened to except to the jurisdiction ratione materiae of the state court. This exception was maintained by both the trial and the appellate courts, both holding that as long as the property was in the collector's custody it was not subject to seizure by the state courts, and that hence the writ of attachment was void. Universal Commercial Corp. v. Roani, 218 La. 997, 51 So. 2d 603 (1951).

14. 219 La. 91, 52 So. 2d 297 (1951).

and as none of the parties to the action questioned plaintiff's title to the property, but on the contrary asserted the validity thereof, the supreme court refused to decide the issues presented.

ABANDONMENT OF THE ACTION

Two cases of importance interpreted the code provision[15] relating to dismissal of the action because of non-prosecution for a period of five years or more. The first[16] presented a question of whether this code provision was applicable to executory process. Pointing out that it applied only to "suits that are capable of being prosecuted to final judgment," and that a decree ordering the issuance of the writ of seizure and sale is not a judgment, but merely an ex parte order in rem, the supreme court held the abandonment provision inapplicable to executory proceedings. *State v. United Dredging Company*[17] presented the much closer question of whether the abandonment provision applied to actions instituted by the state. The issue was presented by the motion of defendant in an action brought to recover taxes to dismiss the suit because of the failure of plaintiff to take any steps in the prosecution of the action for more than five years. The trial court's judgment granting such motion was sought to be reversed on appeal, under a contention by the state that this code provision actually was a type of prescription which, under the pertinent constitutional provision,[18] would not be applicable to the sovereign. Pointing out that the code article actually constituted one of the general regulations as to the interruption of prescription, an undivided court overruled the contentions of the state, and dismissed the action.

PLEADING

The trite rule that payment is an affirmative defense which must be specially pleaded afforded a simple solution to the procedural difficulties presented in *J. R. Watkins Company v. Calhoun.*[19] There, plaintiff and the named defendant executed a written contract in which defendant agreed to buy various articles of merchandise required by him for sale and to remit to plaintiff weekly certain proportions of the proceeds of the sale thereof. The contract further acknowledged a pre-existing indebtedness of

15. Art. 3519, La. Civil Code of 1870, as amended by La. Act 107 of 1898.
16. Greater New Orleans Homestead Ass'n v. Bell, 219 La. 41, 52 So. 2d 241 (1951).
17. 218 La. 744, 50 So. 2d 826 (1951).
18. La. Const. of 1921, Art. XIX, § 16.
19. 219 La. 151, 52 So. 2d 528 (1951).

$909.62 due plaintiff by defendant. In its petition the plaintiff company alleged the purchase by defendant of goods and merchandise to the value of $4,214.44; that defendant had paid on such account the sum of $4,296.18; that this overpayment of $81.74 had been credited on the pre-existing indebtedness, leaving a balance due thereon of $827.88, for which plaintiff sought judgment. The trial court sustained an exception of prescription of three years to this demand. The intermediate appellate court, while agreeing that the pre-existing indebtedness recognized in the contract was an acknowledged account governed by the prescription of ten years, took the position that the payments made by defendant had to be imputed firstly to the oldest obligation—the pre-existing indebtedness—leaving the balance due on the new purchases, which constituted an open account. From such an assumption, an easy leap led the intermediate appellate court to the conclusion that the three year prescription pleaded by defendant barred enforcement of this balance due on the open account. In its review of this decision under certiorari, the supreme court pointed out that this process of reasoning could not be applied, since the defendant had failed to plead payment of the pre-existing indebtedness. Judgments of both the lower courts were reversed and the case was remanded for further proceedings.

APPELLATE JURISDICTION

For more than a decade, the congestion of the docket of the supreme court has pressed strongly for a sharp reduction in its appellate jurisdiction. During the past five years, optimism mounted over the possibility of the new Louisiana constitution providing this urgently needed relief, by increasing the court's minimum jurisdictional amount from $2,000 to $10,000. With the indefinite tabling last year of all plans for calling a constitutional convention, hope for relieving a badly-overworked court through constitutional revision just about vanished. Perhaps this to some slight extent may explain the court's jealousy with respect to its appellate jurisdiction, or the unusually large number of cases transferred to intermediate appellate courts, during the past term.

In *Henwood v. Collector of Revenue*[20] an alleged income tax deficiency of less than $2,000 was involved. The basis on which the taxpayer sought recovery was that the tax in question had prescribed. Since no question as to the legality or constitutionality of the taxing statute was involved, the case was transferred.

20. 218 La. 291, 49 So. 2d 17 (1950).

The trite principle that, when the plaintiff's claims for damages are palpably exaggerated, they will be disregarded by the appellate court in considering a question of jurisdiction was applied in two cases[21] decided during the past term. In both, the supreme court found that the largest amount which the plaintiffs could possibly recover did not exceed the minimum jurisdictional amount of the supreme court, and both cases were transferred to the courts of appeal.

Under the settled jurisprudence of the supreme court, in the absence of evidence showing the pecuniary amount involved in a suit, an affidavit of one of the parties as to the amount involved will be considered by the court.[22] It is also well settled that this affidavit must set forth concrete facts and figures concerning the amount involved; and that an affidavit presenting merely the opinion of affiant as to value does not suffice.[23] In one of the cases in which the failure of the record to establish affirmatively the jurisdiction of the supreme court was sought to be remedied through the use of an affidavit, the sworn statement of a real estate broker giving his opinion as to the value of the land involved in the suit, without furnishing any of the factual bases on which this opinion was formed, was held insufficient to prevent the transfer of the appeal for lack of jurisdiction.[24] In the other, the affidavit of one of the parties amply detailed the full facts, figures, and information establishing the value of the mineral interest involved as being within the appellate jurisdiction of the supreme court.[25]

In *Papalia v. Hartson*[26] the plaintiffs sued to recover a $600 deposit and $60 damages alleged to have resulted from the breach by the defendants of a contract to sell plaintiffs certain immovables at a price of $6,000. Since the amount involved was held to be $660, the appeal was transferred. In *Heirs of P. L. Jacobs, Incorporated v. Johnson*[27] defendant converted plaintiff's slander of title suit into a petitory action, asserting ownership of the forty acres of cut-over lands in himself. Since nothing in the record showed the value of the land in controversy, and the mineral

21. Nash v. Curette, 218 La. 789, 51 So. 2d 51 (1951); Givens v. Town of Ruston, 219 La. 672, 53 So. 2d 833 (1951).
22. New Orleans & Northeastern R. Co. v. Redmann, 210 La. 525, 27 So. 2d 321 (1946) and cases cited.
23. Ibid.
24. Prampin v. Southern Chemical Works, 218 La. 392, 49 So. 2d 737 (1950).
25. Meraux v. R. R. Barrow, Inc., 219 La. 309, 52 So. 2d 863 (1951).
26. 218 La. 200, 48 So. 2d 896 (1950).
27. 219 La. 125, 52 So. 2d 444 (1951).

deeds and leases affecting the land, as being in excess of $2,000, the appeal was transferred to the intermediate appellate court.

In one case,[28] in which the plaintiff brought a jactitory action for the purpose of having an alleged covenant running with the land declared to be a personal obligation of one of plaintiff's ancestors in title, a contract in the record disclosed that the value of the restrictive covenant did not exceed $2,000. In view of this, the supreme court held that it had no appellate jurisdiction and transferred the appeal.

In two cases the supreme court denied its appellate jurisdiction to review mandamus action. In the first[29] the State Board of Health appealed from a judgment in favor of relator, compelling the correction of a designation in its vital statistics records from "colored" to "white." In the second[30] relator appealed a judgment refusing to mandamus the defendant dentistry board to issue relator a license to practice dentistry, without requiring him to take an examination and without imposing any other conditions upon him. Both cases were held to have no "amount in dispute or fund to be distributed" and consequently were transferred to the courts of appeal. Under their precise facts, both decisions appear to be sound.

Two other appeals were similarly transferred, as not falling within the appellate jurisdiction of the supreme court. In one[31] plaintiff had appealed the judgment rendered in a suit which he had filed to annul a local-option liquor election. In the other[32] the plaintiffs had appealed from an adverse judgment rendered in their suit to enjoin the City of New Orleans from exchanging properties with the Orleans Parish School Board. In both cases the absence of an amount in dispute was held to deny appellate jurisdiction in the supreme court.

Perhaps the most important decisions rendered by the supreme court during the last term in the entire field of civil procedure were the three cases[33] holding that the supreme court has no appellate jurisdiction to review declaratory judgment actions.

28. Tucker v. Woodside, 218 La. 708, 50 So. 2d 814 (1951).

29. State ex rel. Treadway v. Louisiana State Board of Health, 218 La. 752, 51 So. 2d 41 (1951).

30. Montegut v. Louisiana State Board of Dentistry, 219 La. 307, 52 So. 2d 862 (1951).

31. Carter v. Richland Parish Police Jury, 218 La. 623, 50 So. 2d 293 (1951).

32. Blocker v. City of New Orleans, 218 La. 669, 50 So. 2d 643 (1951).

33. First Nat. Life Ins. Co. v. City of New Orleans, 218 La. 9, 48 So. 2d 145 (1950); Succession of Solari, 218 La. 671, 50 So. 2d 801 (1951); Board of Com'rs of Port of New Orleans v. Hibernia Nat. Bank, 219 La. 208, 52 So. 753 (1951).

In the leading case of this trio, *First National Life Insurance Company v. City of New Orleans*,[34] the matter was presented to the trial court on the joint petition of plaintiff, defendant, and Samuel Zemurray to obtain a declaratory judgment respecting the validity of a proposed sale made by the municipality to plaintiff of certain property donated to the city by Zemurray to provide revenue for a charitable institution. The supreme court, on its own motion, raised the question of its lack of appellate jurisdiction. Dividing the constitutional grant of appellate jurisdiction to the state's highest court into seven different classifications, the organ of the court pointed out that the only classification within which the case could possibly be included was that providing for the court's appellate jurisdiction where the amount in dispute or the fund to be distributed, irrespective of the amount claimed, exceeds $2,000 exclusive of interest. Pointing out that "there is no issue in contest and the only matter that is presented to the Court, as is stated in the prayer of the joint petition of the parties is, 'A request for adjudication on the validity of the proposed sale of the property involved in this controversy . . .'," the court could find no "amount in dispute or fund to be distributed," and transferred the case to the court of appeal. No question was raised as to whether the case presented a justiciable controversy,[35] even under the Declaratory Judgments Act.

It is interesting to note that a slight shift in procedural approach in this case would have side-stepped completely the jurisdictional dangers presented. Had the city instituted a specific performance suit against the insurance company to compel the latter to take title to the property in question, joining Zemurray as a co-defendant, the "amount in dispute" would have been the value of the property, and the supreme court clearly would have had appellate jurisdiction.

In *Succession of Solari*[36] the purchaser of property from the universal legatee of the decedent brought a suit against all persons who would have inherited from the decedent had she died intestate, praying for a declaratory judgment decreeing the will of decedent valid and confirming title to the property purchased. The property in question was purchased by plaintiff from the

34. 218 La. 9, 48 So. 2d 145 (1950).

35. Cf. Coffman v. Breeze Corporations, 323 U.S. 316 (1945). The lack of "adversary process" in the *First National Life Insurance Company* case would appear to justify the fears which the late Sidney L. Herold expressed in 32 La. State Bar Ass'n Rep. 61, 62 (1932).

36. 218 La. 671, 50 So. 2d 801 (1951).

legatee for $350, while the entire estate of decedent amounted to $45,000. All but two of decedent's heirs at law intervened, praying that the will be decreed valid, while the two who did not intervene filed answers praying that the will be decreed invalid, as presenting a prohibited substitution. From a judgment upholding the validity of the will, the two opponents thereof appealed to the supreme court, and the appellees moved to dismiss the appeal on the ground that only $350 was involved. The contention of lack of appellate jurisdiction presented was found valid by the supreme court, and the case was transferred to the intermediate appellate court.

Board of Commissioners of Port of New Orleans v. Hibernia National Bank[37] presented an appeal by the defendant, named trustee under a mortgage issued by plaintiff to secure an issue of bonds, from a declaratory judgment rendered by the trial court and holding that any lease granted by plaintiff primed the rights of the trustee representing the bondholders. On a suggestion by the appellee of a lack of appellate jurisdiction, the supreme court transferred the appeal to the court of appeal. The result reached in this case, as in the other two declaratory judgment decisions, seems quite correct, since the records in all three of these cases failed to establish affirmatively the appellate jurisdiction of the court. But certain language of the opinion of the supreme court in this case appears to embody a rather broad generalization that may prove embarrassing in subsequent cases. Thus, in the *Hibernia National Bank* case, the organ of the court says:[38]

"It seems apparent that a suit, having as its sole object the judicial declaration of rights which do not presently, and may never, require enforcement is neither a monied demand nor one in which the matter in contest can be said to be capable of monetary appraisement. Manifestly, such an action involves merely the declaration of a right made justiciable by statute, . . . and is therefore appealable to the Court of Appeal under Section 29 of Article 7 of the Constitution. . . ."

If, in the future, the court restricts this language to the precise facts of the *Hibernia National Bank* case, no damage will be done. Should the supreme court, however, have intended by this language to have generalized a holding that it would never have appellate jurisdiction over declaratory judgment cases, then

37. 219 La. 208, 52 So. 2d 753 (1951).
38. 52 So. 2d 753, 754.

this decision is to be deplored. Admittedly, it will be much more difficult to establish affirmatively the appellate jurisdiction of the supreme court in declaratory judgment cases than in other types of actions; and admittedly, there will be some declaratory judgment cases which should go on appeal to the supreme court and in which the appellate jurisdiction of the supreme court will not be established affirmatively by the record. Yet there will be some cases where it will prove no more difficult to determine the "amount in dispute" than in petitory actions or suits to recover damages for breach of contract.[39]

APPELLATE PROCEDURE

Scott v. Scott[40] presented two very interesting questions. In this case, plaintiff had appealed from a judgment granting him a divorce under the two-year separation statute, and ordering him to pay alimony. Whether his appeal was taken from the entire judgment, or only from that portion ordering him to pay alimony, represented the first issue in the case, as the appellee contended that no appeal could be taken from a judgment of divorce more than thirty days after its effective date. Examining the language of the petition of appeal, which alleged that petitioner was aggrieved from that part of the judgment ordering to pay alimony and desired to appeal devolutively therefrom, the court experienced no difficulty in finding that the appeal was only from that portion of the judgment ordering plaintiff to pay alimony, and hence was sued out timely. The second ground of appellee's motion to dismiss the appeal was based upon the claim that "the appellant has made an unconditional, voluntary, and absolute acquiescence in the judgment." To support this contention, appellee was able to show only that the appellant had made alimony payments due under the judgment, and, in a rule taken against him by the wife to show cause why he should not be punished for contempt for failure to make certain alimony pay-

39. One illustration of this type of case is Succession of Solari, 218 La. 671, 677, 50 So. 2d 801, 802 (1951), where the court said "the dispute in this case resolves itself to the ownership of a piece of property valued at $350." Had the property been valued at $3,500, *semble* the court would have accepted appellate jurisdiction of the case.

A much more typical case would be a declaratory judgment action to interpret a contract for the sale of commodities, in instances where the language providing either the maximum or minimum quantities might be ambiguous. If the market had increased or dropped sharply since the execution of the contract, it would be just as easy to determine mathematically the "amount in dispute" as if the action had been one for damages for breach of contract.

40. 218 La. 211, 48 So. 2d 899 (1950).

ments, had reconvened asking that the alimony judgment be amended so that he would not be required to pay any alimony whatsoever. The fact that appellant had paid alimony, and, before the appeal, had sought to be relieved from payment of alimony, was held not to constitute any acquiescence in the judgment.

In *Coney v. Coney*[41] the wife originally, on January 27, 1950, obtained a suspensive appeal from a judgment signed on that date, in divorce and property settlement litigation, conditioned on her furnishing bond in the sum of $7,500. Complaining that this appeal bond was excessive, the wife invoked the supervisory jurisdiction of the supreme court to reduce the amount thereof. On her application, the court issued the usual alternative writs. After the hearing the supreme court refused to grant applicant relief in the matter of the reduction of the bond; but as the remainder of the thirty-day period allowed for taking an appeal from a judgment of divorce had elapsed while the wife's application for supervisory writs was pending, the court granted her six additional days from the finality of its judgment to appeal from the divorce judgment and allowed thirty days from the finality of the supreme court's judgment for the transcript of appeal from the divorce judgment to be lodged in the appellate court. Within fourteen days of the supreme court's opinion, the wife applied for a rehearing. Before her application for rehearing could be acted upon, the wife presented a motion to the supreme court, showing that she had previously filed the $7,500 appeal bond, but alleging that sixty days additional would be required by the clerk of the trial court to complete the transcript of appeal. The supreme court thereupon rendered an order, dismissing the application for rehearing as now being moot, and granting the wife an additional sixty days from the finality of the order to have the transcript of appeal in the divorce case lodged in the appellate court. The transcript of appeal was not delivered to the office of the clerk of the supreme court until the sixtieth day; and as this was a Saturday (a holiday in Orleans Parish), the transcript was not actually filed until Monday, the next judicial day.

Based upon these facts, the appellee moved to dismiss on the grounds (1) that the appeal bond was not furnished within the required legal delay, as the supreme court was without power to extend the statutory limitation of thirty days for taking an appeal

41. 218 La. 218, 48 So. 2d 902 (1950).

from a divorce judgment; and (2) the transcript of appeal was not filed in the appellate court timely. The first contention was swept aside with the statement that regardless of the merits of the contention advanced, the court's ruling in the first opinion was now the law of the case and could not be altered. The second ground for the motion to dismiss was overruled under a holding that, since the last day of the sixty day extension was a holiday, a filing of the transcript of appeal on the next judicial day was timely.[42]

The remaining case involving appellate procedure applied well settled principles.[43]

REAL ACTIONS

Sims v. State Mineral Board[44] established no far-reaching procedural precedents, but nonetheless was a very interesting case. The plaintiff, alleging himself to be the owner of certain property in Calcasieu Parish and in corporeal possession thereof for more than a year, and claiming that defendants were slandering his title to the oil, gas, and other minerals under the land by having caused a mineral lease granted by the mineral board to the other defendant to be placed of record, prayed that defendants be ordered to disclaim or assert any right, title, or ownership in the property and in the oil, gas, and minerals thereunder, and for the cancellation of the mineral lease issued by the mineral board to the other defendant. The defendant mineral board filed its answer, converting the suit into a petitory action and setting up its ownership of the property. The other defendant failed to answer, and the suit was dismissed as to it.

The issue as to the ownership of the property resolved itself into a determination of whether one Poe, to whom the state had issued a patent and one of plaintiff's ancestors in title, was the

42. On this last point, compare Vicknair v. Vicknair, 211 La. 159, 29 So. 2d 706 (1947), discussed in The Work of the Louisiana Supreme Court for the 1947-1948 Term, 8 LOUISIANA LAW REVIEW 261, 273 (1948). The two cases are distinguishable, since in the *Vicknair* case the extension granted by the court was not for a certain number of days but rather through "the 19th day of October, 1946."

43. Fisher v. International Brotherhood of Electrical Workers, 218 La. 243, 48 So. 2d 911 (1950) reiterated the rule that the one year period allowed by Art. 593, La. Code of Practice of 1870, for taking a devolutive appeal is the limit of time within which the appeal must be completed by the filing of the bond.

Succession of Tullier, 218 La. 1005, 51 So. 2d 606 (1951) literally applied the language of Art. 890, La. Code of Practice of 1870, as amended by La. Act 103 of 1908, requiring an answer to the appeal to be filed generally more than three days prior to the date assigned for argument, to be considered.

44. 219 La. 342, 53 So. 2d 124 (1951).

tax debtor or had the legal right to redeem the property from the state, to which it had been adjudicated for unpaid taxes. Under the pertinent constitutional provision,[45] if Poe had no interest in the land at the time he acquired it from the state, the mineral rights in the land were reserved to the sovereign; if Poe was the tax debtor, or otherwise had the legal right to redeem the property, the transfer to him conveyed full mineral rights in the land. The sheriff's adjudication to Poe stated that he was "the owner thereof and entitled to full interest in the said property." Furthermore, under the law, the sale of the property to Poe for less than its assessed value could have been made only if Poe had the legal right to redeem the property.

After the mineral board had filed its answer, plaintiff took a rule against it for judgment on the pleadings and filed exceptions of estoppel and prescription. On the trial of the rule for judgment on the pleadings, the mineral board introduced the tax adjudication to the state for unpaid taxes, the proces verbal of the adjudication from the state to Poe, and the patent from the state to Poe, confirming this adjudication.[46] On the face of this evidence the trial court rendered judgment rejecting the mineral board's demands and recognizing plaintiff as owner of the minerals under the land in question. From this judgment the mineral board appealed.

In the face of the evidence introduced by the mineral board itself, showing no reservation of the minerals in the state at the time the property was adjudicated to Poe, and at least indicating that Poe had a legal right to redeem the property and reacquire the minerals, the court was compelled to affirm that portion of the judgment appealed from dismissing the mineral board's petitory action. However, since plaintiff had not prayed to be decreed the owner of the minerals under the law, that portion of the judgment appealed from recognizing ownership therein in plaintiff was set aside.

PARTITION

In *Norah v. Crawford*[47] plaintiff sought to effect a partition of certain immovable property, on the ground that he and defendant were the owners thereof in indivision, plaintiff having

45. La. Const. of 1921, Art. IV, § 2.

46. Technically, under La. R.S. (1950) 13:3601 (4) the rule for judgment is triable on the face of the papers and no evidence is admissible. Here, plaintiff apparently acquiesced in defendant's introduction of the documentary evidence.

47. 218 La. 433, 49 So. 2d 751 (1950).

inherited his deceased mother's one-half ownership thereof. Defendant answered, denying plaintiff's ownership of the property. Defendant then instituted a direct action in the mortuary proceedings, alleging that the judgment recognizing the partition plaintiff as the sole heir of decedent was an absolute nullity, having been obtained through the fraud and ill practices of the alleged heir. The latter excepted to the petition in the nullity action, on the ground that it did not disclose a right or cause of action, and these exceptions were sustained and the nullity action dismissed.

Subsequently, defendant in the partition action filed a supplemental answer in such suit, alleging that the judgment of possession relied on by the plaintiff therein was a nullity, having been obtained through the fraud and ill practices of plaintiff. To this defense the plaintiff pleaded res adjudicata, and this plea was sustained by the trial court, which ordered the partition. On the appeal the majority of the court held that the defense urged in the partition action was not concluded by the prior unsuccessful nullity action for three reasons: (1) the issue in the nullity action was the right or lack of interest in the plaintiff to attack the judgment of possession, quite different from the issue in the partition action; (2) the thing adjudged in the nullity action was the lack of any interest in the plaintiff therein to bring such an action, which is not involved in the partition case; and (3) the parties were not appearing in the same quality in the two actions: plaintiff in the nullity action being a rank interloper, while in the partition suit he was made a defendant because of his quality as owner of an undivided one-half interest in the property. One of the justices dissented from the reversal of the judgment appealed from.

The only other case handed down during the past term involving partition procedure was decided on a factual issue.[48]

MISCELLANEOUS

In the procedure of most civilian jurisdictions, the counterpart of the common law doctrine of "election of remedies" is

48. Walker v. Chapital, 218 La. 663, 50 So. 2d 641 (1951), where both the trial and appellate courts decided that the evidence did not establish the defense of agreement to hold the property in indivision for a term. Two important questions of law were presented, but were not decided by the courts: (1) whether an agreement to hold immovables in indivision for a definite period must be in writing; and (2) whether in the absence of a stipulation to the contrary the term of such an agreement, even when in writing, is limited to five years, under Art. 1300, La. Civil Code of 1870.

"concurrence of actions,"[49] a subject derived from and closely akin to "cumulation of actions." In its early history, Louisiana made quite considerable headway towards a development of its own rules of concurrence of actions through application of the principles governing a cumulation of actions.[50] Full development of the subject, however, was prevented when the supreme court took the path of least resistance through an adoption of the doctrine of election of remedies.[51] In *Brown v. Lancaster*[52] the supreme court reached its decision through the application of the analogy of the principles of cumulation of action, as well as the rules of election of remedies. Since the plaintiff had first sued the real estate broker and its surety for the recovery of the deposit, and had been partially successful by obtaining a compromise from the surety, plaintiff was not permitted to institute subsequently an inconsistent action for specific performance of the agreement to buy and sell the property.

In *Anderson v. Merriman*[53] plaintiff instituted suit for a judicial dissolution of a partnership and for an accounting from the defendant. Alleging that, the day prior to the filing of his suit, plaintiff had withdrawn $10,000 from the partnership accounts, and that the withholding of these funds would deprive the court of the opportunity of granting the major portion of the relief requested, defendant ruled plaintiff into court to show cause why this amount should not be restored to the partnership accounts or at least deposited into the registry of the court, under penalty of dismissal of the account. To reverse a judgment of the trial court making this rule absolute, plaintiff unsuccessfully attempted to invoke the supervisory jurisdiction of the supreme court. Thereafter, plaintiff having failed to restore the funds in question, the suit was dismissed. On appeal from the judgment of dismissal the supreme court found no authority or precedent for the trial court's action and reversed the judgment of the court below. The appellate court was of the opinion plaintiff could not be compelled to restore these partnership funds as a prerequisite to the maintenance of his suit for a dissolution of the partnership and for an accounting.

49. Millar, The Joinder of Actions in Continental Civil Procedure, 28 Ill. L. Rev. 26, 28 (1933).

50. Adams v. Lewis, 7 Mart. (N.S.) 400 (La. 1829), applying the code provisions relating to cumulation of actions to two inconsistent, but separate, actions.

51. Lowenstein v. Glass, 48 La. Ann. 1422, 20 So. 890 (1896). See also R. B. George Machinery Co. v. New Orleans, T. & M.R. Co., 167 La. 474, 119 So. 432 (1929).

52. 218 La. 1036, 51 So. 2d 617 (1951).

53. 218 La. 157, 48 So. 2d 641 (1950).