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Louisiana Practice -Splitting Causes of Action

Charles W. Darnall Jr.

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The analogical application of this provision would have been nothing unusual in a civilian jurisdiction, where, traditionally, code provisions are held in high regard and applied generously to factual contexts not within the strict purview of their terms.¹⁰ Such an application of Article 3061 in the instant case and *Muntz v. Algiers* would have led to the result which the court thought desirable without exposing the court to suspicion that it disregarded the plain letter of the law.

It is therefore submitted that the instant case and the enigmatic decision in *Muntz v. Algiers* do not reach wrong results. Both can be justified, not as making an exception to Article 2286, which admits of no exception and is of doubtful application, but as reaching the result which the legislature dictated in the analogous situation contemplated by Article 3061. Although the rule they established is, as suggested above, unfair to plaintiffs, this unfairness can be offset by according a judgment obtained against the servant considerable weight as evidence of the servant's fault in the subsequent suit against the master.¹¹ If this were done, the added risk to which the master would be exposed, that the plaintiff would seek to obtain a judgment against the servant collusively, should serve to deprive plaintiffs of cause to complain of the rule.

Donald J. Tate

LOUISIANA PRACTICE—SPLITTING CAUSES OF ACTION

Plaintiff filed suit to recover for property damage sustained in an automobile collision and, prior to trial, filed a second suit against the same defendants for personal injuries arising from the same accident. Trial of the property damage suit resulted in a judgment for plaintiff, which was paid by defendants within a few days. At that time a release was executed, signed only by plaintiff, which recited:

“[T]his release shall in no way affect [plaintiff's] claim for injuries . . . asserted against [defendants] in a second suit now pending in the [same court]. The release herein granted

10. See Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TULANE L. REV. 485, 501 (1935); Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TULANE L. REV. 351, 390 (1943).

11. RESTATEMENT, JUDGMENTS 481 (1942).

being specifically confined to the claims for property damage to . . . truck. . . ."

After securing this release defendants effected the dismissal of plaintiff's second suit through an exception of no right of action,¹ which was grounded on the theory that only one cause of action arises out of a single tort. Plaintiff unsuccessfully contended that the portion of the release quoted above constituted a waiver of defendant's legal right to have the second suit dismissed.

The court of appeal affirmed the judgment, finding (1) that the release could not constitute a waiver of defendants' rights because it was executed only by plaintiff; (2) only one cause of action is created by a single tort. *Fortenberry v. Clay*, 68 So.2d 133 (La. App. 1953).

The *Fortenberry* case is an addition to a very old and harmonious pattern of Louisiana decisions which forbid the splitting of a cause of action.² Though the holding is weakened by the

1. It would appear that the proper exception in this case would have been that of "res judicata" rather than "no right of action." Cf. cases cited note 2 *infra*.

2. *Faurie v. Pitot*, 2 Mart.(o.s.) 83 (1811); *Succession of Mann*, 4 La. Ann. 28 (1849) (where principal amount had been recovered in one judgment, a subsequent suit for interest was dismissed); *Delahaye v. Pellerin*, 2 Mart.(o.s.) 142 (1812) (where possession of a slave was recovered in one suit, a subsequent suit for damages for wrongful detention of the slave was dismissed); *Vascocu's Widow and Heirs v. Pavie*, 14 La. 135 (1839) (where a party evicted from land recovered the price paid and the value of improvements from her vendor on a call in warranty, a subsequent suit for damages for the increased value of the land was dismissed on a plea of res judicata); *McCaleb v. Estate of Fluker*, 14 La. Ann. 316 (1859) (where the value of notes was recovered in one suit, a subsequent suit for attorney fees was dismissed); *Brooks v. Wortman*, 22 La. Ann. 491 (1870) (where plaintiff in reconvention in a petitory action secured judgment for the total amount of the reconventional demand, then on appeal asked that the amount be increased, the request was denied on the ground that plaintiff in reconvention, having failed to amend his petition, must lose the overplus under Article 156); *Stafford v. Stafford*, 25 La. Ann. 223 (1873) (where a wife recovered part of the paraphernal funds in one suit, a subsequent suit for additional paraphernal funds was dismissed); *State ex rel. Dobson v. Newman*, 49 La. Ann. 52, 21 So. 189 (1897) (where seventeen ten dollar damage suits were brought for one tort in justice of the peace court, it was held that the complaints stated one indivisible cause of action which could not be divided into a multiplicity of suits); *Bargain Lumber Yard, Inc. v. Carbo*, 142 So. 346 (La. App. 1932); *Pic v. Mente & Co., Inc.*, 201 La. 237, 9 So.2d 532 (1942) (where two suits were brought in city court for amounts purchased on one open account, the claims were held to constitute one indivisible cause of action); *Hemperly v. George Sliman & Co.*, 174 So. 673 (La. App. 1937) (where intervenor in one suit prayed for recognition as owner of funds in a bank account, and damages, and secured judgment for the former without mention being made of the damages, a second suit to recover the damages was dismissed on a plea of res judicata); *Olivier & Sons, Inc. v. Board of Com'rs of Lake Charles Harbor and Terminal Dist.*, 181 La. 802, 160 So. 419 (1935) (where one suit had been brought for damages for breach of contract,

seeming importance which the court attributed to the fact that defendants had not signed the release, it is submitted that the plaintiff would not have been allowed to accomplish by convention what is forbidden by law. The theory behind the instant case was recognized as early as Justinian's Code, which provided that a suit to recover interest must be brought with the action on the principal or be barred by the exception of *res judicata*.³ The precept is a necessary one if litigation is to be minimized and defendants spared the harassment and expense of a multiplicity of suits.

In our written law, the prohibition against splitting a cause of action is approached obliquely in the following provisions of the Code of Practice:

Art. 91 (2): "But if one, in order to give jurisdiction to a judge, demand a sum below that which is really due him, he shall be presumed to have remitted the overplus, and after having obtained judgment for the sum he had claimed, he shall lose all right of action for that overplus."

Art. 156: "If one demands less than is due him, and do not amend his petition, in order to augment his demand, he shall lose the overplus."

Article 2065, Louisiana Civil Code of 1870, presents an exception to the general rule in providing that conjunctive obligations may be severally enforced.⁴ The writer's attempt to trace the origin of these provisions through the Projet of the Code of Practice of

a second suit for damages for breach of the same contract was dismissed on an exception of *res judicata*); *Kearney v. Fenerty*, 185 La. 862, 171 So. 57 (1936) (where two suits were brought in city court on fifteen twenty-five dollar rent notes containing an acceleration clause, it was held that non-payment of the first note caused all fifteen to become a single matured obligation for which only one suit could be brought); *Thompson v. Kivett & Reel, Inc.*, 25 So.2d 124 (La. App. 1946) (where a party involved in a truck accident cashed a settlement draft covering his property damage, his subsequent suit for personal injuries was dismissed on exceptions of *res judicata* and *estoppel*). See also *Reed v. Warren*, 172 La. 1082, 136 So. 59 (1931); *Norton v. Crescent City Ice Mfg. Co.*, 178 La. 135, 150 So. 855 (1933) (where survivors sued for wrongful death of a relative, it was held that the deceased's right of action inherited by the heirs, and the heirs' own right of action arising from the deceased's death, were but one indivisible cause of action).

3. CODE 4.34.4.

4. "Where a sum is promised to be paid at different instalments, a conjunctive obligation is created, and the payment may be severally paid or enforced. Rents, payable at fixed periods, come also under this rule."

See *Brandagee v. Chamberlin*, 2 Rob. 207 (1842); *Levy v. Telcide*, 8 La. App. 550 (1928).

1825 and the *Projet* of the Civil Code of 1825 revealed that no source notes or comments are given for any of the articles.

French law achieves a result similar to that found in Louisiana, but approaches the problem through a limitation on testimonial proof of claims. The French rule has its origin in Article 6, Title 20, French Civil Ordinance of 1667, and is restated in Article 1346 of the French Civil Code.⁵ Article 1346 states that all claims not substantiated by a writing must be sued for in one action; but Articles 1347⁶ and 1348⁷ provide two very broad exceptions. The rule does not apply when the claimant has "a commencement of proof in writing, i.e., a written document emanating from the person against whom the claim is made . . . which makes the fact alleged probable."⁸ Neither does the rule apply to cases wherein it is impossible for the claimant to obtain written proof of the debtor's obligation, such as claims which arise out of quasi-contracts and torts.⁹ It should also be noted that these Civil Code provisions are not controlling over purely commercial matters, that is, transactions between merchants.¹⁰

The Code of Civil Procedure of Quebec forbids the splitting of a cause of action in clear and concise terms in the second paragraph of Article 87: "A creditor cannot divide his debt for the purpose of suing for the several portions of it by different actions." This provision is also traceable to Article 6, Title 20, French Civil Ordinance of 1667, and to Article 1346 of the French Civil Code.¹¹

5. "Every claim, no matter how founded, which is not entirely substantiated by a writing, must be made by the same writ, after which any other claims which are not evidenced by a writing shall be barred."

6. "The rules above given are not applicable when there is a commencement of proof in writing, i.e., a written document emanating from the person whom he represents, which makes the fact alleged probable."

7. "There is a further exception to be made to the above rules, i.e., whenever it was impossible for the creditor to obtain a written proof of the obligation under which the debtor was to him. This second exception is applicable (1) to obligations which arise out of quasi-contracts, criminal offences and torts; (2) deposits which had to be made owing to a fire, a house falling down, a tumult, or a shipwreck, and to deposits made by travellers when living in an inn, regard being had to the positions in which the parties stood to one another, and the circumstances of each case; (3) to obligations entered into owing to unforeseen accidents when it was impossible to draw up a writing; (4) to a case where a creditor has lost his document of title, which was his written proof, in consequence of an event which was unforeseen, or the result of *force majeure*."

8. Art. 1347, FRENCH CIVIL CODE.

9. Art. 1348, FRENCH CIVIL CODE.

10. 7 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 1525 (2d ed. 1954); Cass. 29 juillet 1918, D. 1918, 1, 59.

11. COMMISSIONERS' REPORTS, CODE OF CIVIL PROCEDURE OF LOWER CANADA Art. 15 (1866).

The Louisiana State Law Institute's proposed Code of Practice Revision will not recommend changes in this area of our procedural law. Article 6 of the proposed title on Civil Actions, based upon a combination of the Quebec law, Louisiana jurisprudence, Articles 91 (2) and 156 of the present Code of Practice, and Article 2065, Louisiana Civil Code of 1870, reads as follows:

"An obligee cannot divide an obligation for the purpose of bringing separate actions on different portions thereof. If he brings an action to enforce only a portion of the obligation, and does not amend his pleading to demand the enforcement of the full obligation, he shall lose his right to enforce the remaining portion.

"These rules do not apply to conjunctive obligations."¹²

Charles W. Darnall, Jr.

12. LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, EXPOSÉ DES MOTIFS No. 5, p. 13 (1954), gives the following sources for Article 6: First sentence, Art. 87(2), CODE OF CIVIL PROCEDURE OF QUEBEC, and Louisiana jurisprudence. Second sentence, Arts. 91(2), 156, LA. CODE OF PRACTICE of 1870. Third sentence, Art. 2065, LA. CIVIL CODE of 1870.