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Civil Procedure

*Henry G. McMahon**

DECLARATORY JUDGMENTS

Only one case of importance was decided by the Supreme Court in this area of our procedural law during the past term. In *Superior Oil Company v. Reilly*[1] the court refused to render a declaratory judgment construing the provisions of the act of donation by the Rockefeller Foundation to the state of a tract of marsh land. This tract had been donated for the primary purpose of providing a wild life refuge and preserve, but the act of donation permitted its leasing by the state for mineral purposes, with all revenues in excess of the costs of maintenance dedicated to the development and improvement of the state's public schools or its public health program. In the act of donation, the United States was given all reversionary rights in the land. The suit was brought against the Collector of Revenue of Louisiana, to whom all severance taxes are paid, and the Registrar of the State Land Office, to whom all royalty payments under the lease were payable. Neither the donor, the Rockefeller Foundation, nor the reversioner, the United States of America, was made a party to the litigation.

Plaintiff alleged that, since severance taxes paid the state are used for other state purposes, the payment of severance taxes on the royalty accruing to the state as mineral lessor might possibly violate the dedication in the act of donation of the surplus revenues derived from mineral leases to the state's public school system or its public health program. Plaintiff sought a declaratory judgment that, under the act of donation, no severance taxes were due on royalty to be paid the state.

In the trial court, the defendants excepted on the grounds that the trial court had no jurisdiction ratione materiae, and that the plaintiff's petition disclosed no right or cause of action. The two latter exceptions were sustained. While the opinion of the appellate court is not express on the point, it is reasonably clear that in sustaining the exceptions of no right and no cause of action the trial court relied on the broad holding in *Burton v.*

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1. 234 La. 621, 100 So.2d 888 (1958).

Lester[2] that an action for a declaratory judgment does not lie when the plaintiff has any other remedy available. The trial court expressed the view that, under R.S. 47:1576, the mineral lessee might pay the severance taxes to the collector under protest, and then file suit to recover them on the ground that these taxes were not due.

The one feature of the case which struck this writer immediately is the fact that indispensable parties to the controversy were not joined in the action, and that hence the court could not adjudicate in their absence. Here, without any joinder of the donor and the reversioner, the court was asked to construe the provisions of an instrument which directly and immediately affected their interests. Neither the trial nor the appellate court need have gone any further. This view of the matter was taken by Chief Justice Fournet and Justice McCaleb in their concurring opinions.

The majority opinion, however, did go further. The action was dismissed on the ground that no justiciable controversy was presented, and that therefore the trial court was without jurisdiction. While an excerpt from *Burton v. Lester* was quoted with approval, the majority opinion was not pitched on the proposition that a declaratory judgment could not be rendered because plaintiff had another adequate remedy available. The majority view was grounded on the premise that " 'the issue presented to the court is academic, theoretical, or based upon a contingency which may or may not arise.' "[3] Particularly significant in this connection is the statement in the majority opinion that:

2. 227 La. 347, 79 So.2d 333 (1955). This broad holding not only emasculates the Declaratory Judgments Act but it announces a completely unworkable rule. The courts have neither the time nor the facilities to investigate thoroughly the factual and legal backgrounds of each case to determine whether the plaintiff may not have some other remedy available. It makes it possible for the litigants to confer jurisdiction on the courts by not pleading or proving facts which would disclose the existence of another remedy. See *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Civil Procedure*, 17 LOUISIANA LAW REVIEW 379, 382 (1957).

If the proposed new procedural code is adopted the broad holding in *Burton v. Lester, supra*, will be overruled legislatively. "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; *and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.*" PROPOSED LA. CODE OF CIVIL PROCEDURE art. 1871 (Louisiana State Law Institute, 1959). The italicized language just quoted is taken from Rule 57, Federal Rules of Civil Procedure.

3. 234 La. 621, 629, 100 So.2d 888, 891 (1958). The court is quoting from its opinion in Tugwell v. Members of Board of Highways, 228 La. 662, 679, 83 So.2d 893, 899 (1955), on rehearing.

> "It must be presumed that the officers of the State will do their duty and it cannot be assumed that the revenues derived by the State from the production on this property when eventually deposited with the State Treasurer, will be used either in whole or in part, for purposes other than those stipulated in the deed of donation."[4]

Two of the Justices dissented from the refusal of the court to grant a rehearing.

RES JUDICATA

If there is anything in Louisiana law which is not res judicata, it is the subject of res judicata itself.

The basic civilian rules on the subject are enunciated in Article 2286 of the Civil Code, which provides that:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

Under the common law concept of res judicata, if the cause of action in the two suits is the same, the judgment rendered in the first is conclusive of all issues pleaded, or which might have been pleaded, by the parties in the first suit. Under Anglo-American law, however, res judicata is supplemented by the estoppel by judgment, which comes into play when the causes of action in the two suits are not the same. Under the latter doctrine, the prior judgment operates as an estoppel only as to matters in issue or points controverted and determined in the first suit.[5]

As long as the legal profession in Louisiana remained bilingual, and the works of the French commentators remained available to Bench and Bar alike, the civilian rules of res judicata were applied without difficulty to the litigated cases. But when a reading knowledge of French was no longer considered a professional requisite in this state, the legal literature of England and America was drawn into the resulting vacuum, and in-

4. 234 La. at 627, 100 So.2d at 890-891.
5. See Comment, 2 LOUISIANA LAW REVIEW 347, 348-353 (1940).

creasingly provided the bases for the Louisiana decisions on res judicata.[6] In 1940, in *Hope v. Madison*,[7] the Supreme Court of Louisiana took cognizance of this anomaly for the first time, announced generally that common law rules of res judicata and estoppel by judgment would no longer be applied, and overruled the earlier cases based on Anglo-American precedents. *Hope v. Madison*, however, made no clean sweep in its overruling of prior cases based on common law precedents. The common law "might have been pleaded" rule was recognized as still applicable to: (1) petitory actions; (2) partition suits; and (3) injunctions to arrest the execution process. The clarification of this area of our law was continued in *Quarles v. Lewis*,[8] which enforced the code requirement that the demand in the two suits must be the same for res judicata to apply. The court disapproved of earlier Louisiana cases which had ignored this code requirement.[9]

Much of the good work of the *Hope* and *Quarles* cases was swept away by the five-to-two decision during the past term in *California Company v. Price*.[10] In a prior suit between the same parties,[11] the plaintiff mineral lessor had deposited the royalties which had accrued from eight producing oil wells in Plaquemines Parish into the registry of the court, and had impleaded the rival claimants of ownership to the "land," who had granted mineral leases to the plaintiff, to assert their conflicting claims to the funds deposited. One set of defendants asserted ownership of the "land" under a patent issued by the state many years ago. The state asserted ownership on the ground that this patent was null and void since the "land" was the bed of a navigable body of water, ownership of which was vested in the public in perpetuity and which could not have been alienated by patent. The opposing claimants pleaded in bar of the state's contention the six-year peremption of R.S. 9:5661, providing that a proceeding by the state to annul a patent must be brought within six years of its issuance, and that one to annul a patent issued prior to the effective date of the statute must be brought within six years of such date. On rehearing, the Supreme Court held by a four-to-three decision that the state was barred by the statu-

6. *Id.* at 491.
7. 194 La. 337, 193 So. 666 (1940).
8. 226 La. 76, 75 So.2d 14 (1954). The case is discussed in *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Civil Procedure*, 16 LOUISIANA LAW REVIEW 361, 366-367 (1956).
9. 226 La. at 86, n. 3, 75 So.2d at 17, n. 3.
10. 234 La. 338, 99 So.2d 743 (1957).
11. California Company v. Price, 225 La. 706, 74 So.2d 1 (1954), 15 LOUISIANA LAW REVIEW 463 (1955).

tory peremption from asserting the nullity of the patent relied on by its rival claimants.[12]

In the second concursus proceeding, the mineral lessor deposited the royalties accruing from the production on different wells on the same "land" into the registry of the court, and again impleaded the rival claimants of ownership to assert their conflicting claims to the funds deposited into the registry of the court. The successful claimants in the first proceeding pleaded res judicata and estoppel by judgment in bar of the state's renewed assertion of the nullity of the patent. The trial court sustained these pleas. On appeal, this judgment was affirmed by a majority of the Justices of the Supreme Court.

The basis of the majority opinion is the fact that the issue of ownership of the "land" had been adjudicated in the first concursus proceeding, and that hence the state was judicially estopped from renewing this issue in the second proceeding. The dissenting Justices, on the other hand, relied primarily upon the code requirement of identity of demands, pointing out that the demand in the first proceeding was for the royalties which had accrued from the production from the eight wells then drilled, while the demand in the second proceeding was for the royalties which had accrued from the production from other wells.

To appreciate the difference between these two positions, subtle differences in approach and theory between the competing common and civil law rules must be recognized. Under civilian theory, the tests of identity to be applied are those of: (1) parties; (2) *demands*; and (3) causes of action. Under common law theory the tests of identity which must be applied are: (1) parties; and (2) *issues*. At common law, if the causes of action are the same, and these tests of identity are met, res judicata applies; and if the causes of action are not the same, but these tests of identity are met, estoppel by judgment applies.[13]

By much the same reasoning process, and certainly with greater validity in a civilian jurisdiction, the majority opinion might have been pitched on identity of *demands*, rather than of *issues*. The majority opinion might have held that the demand of the state in the first proceeding was for the nullity of the patent of the rival claimants, and that the state made the same judicial demand in the second proceeding.

12. *Ibid.*
13. See Comment, 2 LOUISIANA LAW REVIEW 347, 348-353 (1940).

Unfortunately for the future law of Louisiana, the majority of the court did not take this position, but instead relied upon the identity of issues, which could be sustained only through the application of common law rules. Capsuled into one short paragraph is a recognition of the continued application of the common law doctrine of estoppel by judgment. This re-opens the floodgates to the future reception of common law precedents on the subject. In this area of our law at least, *Corpus Juris Secundum* again becomes more authoritative than the "solemn expression of legislative will."

APPELLATE JURISDICTION

Supreme Court decisions on this subject, once so vitally important to the legal profession in Louisiana, now assume only transient importance. The recently adopted amendment to Article VII of the Constitution,[14] reorganizing the appellate courts of the state and transferring the great bulk of civil appeals to the intermediate appellate courts, will go into effect on July 1, 1960. The decisions of the Supreme Court on the subject of appellate jurisdiction possess a short-lived importance only.

During the past term the Supreme Court found that it had no jurisdiction over ten of the cases appealed to it, and transferred each to the proper court of appeal. None of these decisions further developed this segment of our procedural law. In each, the court applied jurisdictional tests which are now well settled. One, involving the right to qualify as a candidate in a party primary election, was not susceptible of pecuniary valuation.[15] In another, the property right asserted admittedly had a value less than the minimum jurisdictional amount.[16] In three, there was no affirmative showing in the record of the value of the right asserted.[17] The demands in two other cases, while on their face sufficient to be within the appellate jurisdiction of the Supreme Court, were found to be palpably inflated.[18] In two other appeals, the demands had been augmented by claims which were

14. Adopted on November 4, 1958, pursuant to Acts 1958, No. 561.

15. Janssen v. Second Congressional District Democratic Executive Committee, 235 La. 353, 103 So.2d 472 (1958).

16. Jefferson v. Tennant, 234 La. 994, 102 So.2d 243 (1958).

17. State *ex rel.* Village of Roseland v. Addison, 233 La. 708, 98 So.2d 160 (1957); Smith v. Holland, 234 La. 125, 99 So.2d 49 (1958); Holmes v. Wyatt Lumber Company, 234 La. 510, 100 So.2d 488 (1958).

18. Morgan v. Dixie Electric Membership Corporation, 235 La. 196, 103 So.2d 88 (1958); Theodos v. City of Bossier City, 104 So.2d 155 (La. 1958).

found to be legally untenable, and without foundation in fact.[19] In the remaining case, the appealable main demand was below the minimum jurisdiction of the Supreme Court, although the reconventional demand, if instituted as a separate suit, might have been appealed to our highest court. The court applied the settled rule that the main demand, if appealable, determines the appellate jurisdiction of the entire case.[20]

APPELLATE PROCEDURE

Although no particularly interesting cases were decided by the Supreme Court during the past term on the subject of appellate jurisdiction, nearly all of its decisions on appellate procedure during this period presented interesting points.

Two appeals were sought to be dismissed on the ground that the issues presented on appeal had become moot. In the first,[21] the purchasers of a liquefied petroleum gas business sought an injunction to prevent their vendor from violating a restrictive covenant in the purchase agreement not to compete with the vendors in the trade area during a five-year period. The trial court dismissed the petition. On appeal, the intermediate appellate court found that the defendant was competing with the plaintiff, through a son acting as his father's alter ego, and permanently enjoined both from further competition in violation of the restrictive covenant. The Supreme Court granted a writ of certiorari to review the judgment of the intermediate appellate court. Plaintiffs then moved to recall the writ of certiorari on the ground that the defendant had acquiesced in the judgment sought to be reviewed by selling his second business to a corporation in which neither he nor his son was interested, and attached to its motion to recall certified copies of the acts of sale. The defendant filed an opposition to the motion to recall the writ, contending that the sale of the business by the son did not constitute any acquiescence by the defendant in the judgment sought to be reviewed; and alternatively prayed that the plaintiffs' suit be dismissed as moot. The Supreme Court properly overruled the motion to recall the writ. However, the court further held that since the plaintiffs no longer needed injunctive relief, the suit would be dismissed as moot. The opinion does

19. Salvaggio v. Palmisano, 235 La. 202, 103 So.2d 90 (1958); Breaux v. Simon, 104 So.2d 168 (La. 1958).

20. Ducore v. Gross, 234 La. 11, 99 So.2d 4 (1958).

21. S. & R. Gas Company v. Stephens, 234 La. 13, 99 So.2d 5 (1958).

not set forth sufficient facts to permit a reader to determine whether the dismissal of the case was justified or not. Obviously, if the plaintiffs acquiesced in the dismissal the decision was proper. But it appears to the writer that if the plaintiffs still desired the permanent injunction the suit should not have been dismissed. If the facts found by the intermediate appellate court were correct there had been a violation of the restrictive covenant by the defendant, and the sale of the second business did not remove the possibility of further competition in violation thereof.

In the second case,[22] the appellate court refused to dismiss the appeal on the ground that the issue had become moot. Therein, one of the beneficiaries of two trusts appealed from a judgment of the trial court ratifying the execution and authorizing the delivery of two reforestation contracts by the trustees. The appellant had been granted a suspensive appeal, but since she had been unable to post the $100,000 suspensive appeal bond required, she had perfected only a devolutive appeal. The appellee moved to dismiss the appeal on the ground that the issue had become moot, as the two contracts had been delivered to the other contracting party when the judgment appealed from had become executory. The court overruled the motion to dismiss, since the legality of these contracts was at issue and the delivery thereof to the other contracting party did not preclude any review of this issue.

In two cases the right of the appellant to appeal was questioned by a motion to dismiss filed by the appellee. The plaintiff in *South Lake Realty Corp. v. Board of Levee Com'rs*[23] had been unable to pay the full price of certain property purchased from the defendant, and agreed to retrocede it. The defendant insisted on retaining some of the funds previously paid it by plaintiff for taxes due and for interest due on the purchase money mortgage notes originally executed. As the plaintiff would not agree to this retention, it was agreed that the defendant would deposit these funds in escrow in a bank "until such time as a definitive judgment of a Court of original jurisdiction" ordered the reimbursement thereof to the plaintiff. In the suit which followed, the trial court ordered the reimbursement of the escrowed funds to the plaintiff, and the defendant

22. Guaranty Bank & Trust Company v. Musselman, 234 La. 560, 100 So.2d 507 (1958).

23. 234 La. 6, 99 So.2d 2 (1958).

suspensively appealed from that judgment. In the appellate court the appellee moved to dismiss the appeal on the ground that in the escrow agreement the defendant had agreed to abide by the judgment of the trial court. The court properly overruled the motion to dismiss. The reasons assigned therefor, while close to the principles of law applicable, do not quite hit the nail on the head. The majority opinion pitched the decision on the following language:

> "Under Article 539 of the Code of Practice, a definitive or final judgment is a judgment that decides all of the points in controversy between the parties. Whenever a suspensive appeal is taken from a judgment, it is not final until a final decision is handed down by an appellate court. Article 575 of the Code of Practice."[24]

One of the Justices concurred in the decree, but took the position that in the escrow agreement the defendant waived its right to a suspensive, but not to a devolutive appeal. The writer finds it difficult to follow this reasoning. However, it seems clear that two provisions of our positive law support the majority decision. A definitive judgment is one which has acquired the force of res judicata;[25] and a judgment of a trial court becomes res judicata only after it has been affirmed on appeal, or the delay for appealing therefrom has expired.[26] There was no definitive judgment of the trial court.

In the second case where the right of the appellant to appeal was raised through a motion to dismiss the appeal, the court properly denied the motion.[27] There, a dative testamentary executrix appealed from a judgment of a district court rejecting her demands for a judgment against the defendant for a large sum of money. The motion to dismiss was grounded on the contention that the powers of an executrix without seizin are limited to the delivery of legacies, the taking of an inventory, and the performance of similar conservatory acts; and that hence she was without procedural right to institute and prosecute the suit, or to prosecute any appeal from an adverse judgment. Since the basic issue raised by the motion to dismiss was inextricably connected with the plaintiff's right and interest to sue, the question presented was held to be one to be determined on the con-

24. 234 La. at 9, 99 So.2d at 4.
25. LA. CODE OF PRACTICE art. 539 (1870).
26. LA. CIVIL CODE art. 3546(31) (1870).
27. Jones v. Jones, 234 La. 549, 100 So.2d 502 (1958).

sideration of the appeal on its merits. The case is readily distinguishable from those involving the acquiescence in the judgment appealed from by the appellant, failure to take the appeal timely, and other instances of the loss of the right of appeal.

During the past term three cases, quite properly decided by the appellate court under existing rules of procedure, illustrate vividly the simplification and elimination of technical rules which will be effected when the proposed new procedural code is adopted.

In *Love v. Department of Highways*[28] the appeal was dismissed because of the failure of the appellant to lodge the transcript in the appellate court on or before the return day originally assigned by the trial court, or within the three days of grace thereof. The duty of filing the transcript in the appellate court was held to be that of the appellant, and not of the clerk of the trial court. An attempted extension of the return day by the trial court was held ineffective on the ground that its jurisdiction had been divested when the appeal was perfected. Under the proposed Louisiana Code of Civil Procedure there would have been no dismissal of the appeal. The proposed new code imposes the duty of lodging the transcript of appeal on the clerk of the trial court;[29] and the trial court retains jurisdiction to extend the return day, on application of its clerk or the appellant.[30]

In *Marek v. McHardy*,[31] the appellant had prayed for the issuance of a citation of appeal on the appellee, and the trial court had ordered it. The clerk failed to issue the citation until after the transcript had been lodged in the Supreme Court. Faced with the settled rule that the appeal will not be dismissed when the citation of appeal had been prayed for but the clerk failed to issue it, the appellant presented a novel argument to support his motion to dismiss. It was contended that, although the clerk of the trial court issued the citation, he did so after the jurisdiction of the trial court had been divested, and that therefore the citation of appeal was without effect. This novel argument was promptly swept aside by the court, which pointed out that it was the mandatory duty of the trial court clerk to issue

28. 234 La. 825, 101 So.2d 683 (1958).
29. PROPOSED LA. CODE OF CIVIL PROCEDURE art. 2127 (Louisiana State Law Institute, 1959).
30. *Id.* arts. 2088, 2125.
31. 233 La. 835, 98 So.2d 207 (1957).

the citation when prayed for, and the appeal would not be dismissed because of any irregularity imputable to the clerk.

In a second case on the same subject,[32] before the return day the appellant moved in the Supreme Court to dismiss the appeal because of a failure to issue and serve a required citation of appeal. Prior to a hearing on the motion to dismiss, the clerk of the trial court issued and the sheriff served the citation of appeal. The motion to dismiss was denied on the ground that the failure of the appellant to pray for the issuance of citation, the failure of the trial court to order it, and the failure of the trial court clerk to issue the citation before were all irregularities which were cured by the issuance and service of the citation before the transcript was lodged in the appellate court.

Under the proposed Louisiana Code of Civil Procedure the appellate courts will not have to waste time considering and disposing of technical points of this character. Citations of appeal are abolished; the clerk of the trial court is required in all cases to mail notices of the appeal to all appellees; and the clerk's failure to mail the required notice does not prejudice the appeal.[33]

A novel and interesting point was decided in *Thibodeaux v. Pacific Mutual Life Insurance Co.*[34] The case originally had been appealed to a court of appeal, and the latter finding itself without jurisdiction, on May 2, 1957, transferred the appeal to the Supreme Court. The judgment ordering the transfer conditioned it on the lodging of the transcript of appeal in the Supreme Court within "30 days from the date of finality of this judgment." Both parties applied to the intermediate appellate court for a rehearing, and both applications were denied on June 4, 1957. The transcript of appeal was lodged in the Supreme Court on July 24, 1957. The appellee moved to dismiss the appeal on the ground that the transcript was not filed timely. The motion to dismiss was denied on the ground that, under the constitutional provision regulating applications for writs of certiorari to the Supreme Court,[35] the judgment of the intermediate appellate court did not become final until the expiration of thirty days from the date it denied a rehearing. The transcript was

32. Cameron v. Reserve Insurance Company, 233 La. 704, 98 So.2d 159 (1957).
33. PROPOSED LA. CODE OF CIVIL PROCEDURE art. 2121 (Louisiana State Law Institute, 1959).
34. 233 La. 804, 98 So.2d 195 (1957).
35. LA. CONST. art. VII, § 11.

lodged in the Supreme Court within thirty days of the date the court of appeal judgment became final.

JUDICIAL SALES

Two interesting points were presented in *Lambert v. Bond*,[36] where the adjudicatee at a judicial sale under a writ of fieri facias sought to confirm the sale in a monition proceeding. The trial court rendered a judgment of confirmation, from which only the judgment debtor appealed. The first ground of nullity of the judicial sale asserted is interesting but without merit. It was contended that the sale was null for the reason that the sheriff, in reading the required mortgage certificate, had read the inscription of a $9,000 first mortgage on the property, while actually the balance due thereon was only $6,500. Since the price of adjudication was adequate to clear all mortgages and privileges on the property priming the right of the seizing creditor, the court overruled this contention.

The appellant's second contention on appeal was both more serious and more successful. In the judicial advertisement of the sale the sheriff had not set out a full description of the property, but had used only the description "Especially Lot No. 5 and a portion of Lot No. 6 of the Lanier Addition to the Town of Jonesville, Catahoula Parish." No reference was made in this advertisement to any plat or recorded conveyance which might supplement this description. The appellee objected to the court's consideration of this ground of nullity as it had not been asserted and relied on by the appellant in the court below. The court overruled this objection for two reasons. Firstly, the point had been urged by another defendant who had failed to appeal, and had been considered by the trial court. Secondly, it was pointed out that in a monition proceeding the court was required to satisfy itself of the sufficiency of the description of the property judicially sold. For argument's sake, the Supreme Court conceded that in a petitory action brought by an adjudicatee who had been in possession of the property for more than two years it might hold the insufficiency of the description a relative nullity cured by prescription. But it was held that in a monition proceeding the only issue is the validity *vel non* of the judicial sale. As the description of the property in the judicial advertisement had not furnished adequate information to enable a pros-

36. 234 La. 1092, 102 So.2d 467 (1958).

pective purchaser to bid thereon intelligently, the judicial sale was annulled.

MISCELLANEOUS

One of the basic articles[37] of the Code of Practice provides that "In all actions which are to be brought at the end of a stated period, the right of action subsists until the last day has expired." In *Mansur v. Abraham*[38] the Supreme Court held that when the last day of a term allowed by law for the institution of an action falls on a holiday, the action is instituted timely if filed on the next legal day. Under R.S. 1:55, in many parishes of the state, Saturday is a half-holiday, on the morning of which the courts are open and suits may be filed. This presents a problem in the computation of the time within which an action may be instituted, or a procedural step taken, when the last day of the term falls on a Saturday. In *Frank v. Currie*,[39] the Court of Appeal for the Parish of Orleans held that Saturday must be considered as an excluded holiday in computing the delay allowed a defendant to answer. Dicta to the effect that Saturday must be treated as a holiday in the computation of procedural delays were to be found in at least two Supreme Court cases;[40] but the question of whether Saturday should be excluded if it was the last day of the term allowed by law for the institution of an action was not squarely decided until the past term.

In *Hebert v. Spano*[41] the plaintiffs in four suits consolidated for trial on Monday, April 4, 1955, judicially demanded damages for wrongful death resulting from an accident which occurred on April 2, 1954. Sunday, being a holiday, obviously had to be excluded in determining whether the defendant's exception of prescription of one year was well taken. The trial court further held that since Saturday, April 2, 1955 was a half-holiday, it likewise should be excluded. The intermediate appellate court

37. Art. 16.

38. 183 La. 634, 164 So. 421 (1935). See also State *ex rel.* Marcade v. City of New Orleans, 216 La. 587, 44 So.2d 305 (1949); Bergeron v. Rappelet, 212 La. 717, 33 So.2d 207 (1947); Folse v. Dale, 194 La. 180, 193 So. 581 (1940); State *ex rel.* Graham v. Republican State Central Committee, 193 La. 863, 192 So. 374 (1939).

39. 172 So. 843 (La. App. 1937).

40. See Vicknair v. Vicknair, 211 La. 159, 29 So.2d 706 (1947) and Evans v. Hamner, 209 La. 442, 24 So.2d 814 (1946). For discussions of the subject, see *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Procedure*, 7 LOUISIANA LAW REVIEW 262, 270 n.31 (1947); *The Work of the Louisiana Supreme Court for the 1946-1947 Term — Civil Procedure*, 8 LOUISIANA LAW REVIEW 261, 273 (1948).

41. 233 La. 813, 98 So.2d 199 (1957).

certified the question to the Supreme Court for an answer. The latter held that a Saturday half-holiday must be excluded in the computation of the year allowed the plaintiffs to institute suit, when it fell on the last day of that year.

The proposed new procedural code has anticipated the question, and expressly reaches the same conclusion.[42]

The *Forma Pauperis Act* provides that if the party litigating under the benefit of the statute is cast in judgment "he shall be condemned to pay the costs incurred by him and the costs recoverable by the other parties to the action."[43] This provision was recognized and enforced in two of the earlier cases decided by the Supreme Court.[44] Despite this, in a subsequent case the statutory provision was overlooked, and the Supreme Court held that a plaintiff who instituted suit in *forma pauperis* could not be condemned to pay the costs when his demand was rejected.[45] This decision was followed subsequently by the Supreme Court,[46] and in fourteen subsequent decisions by the intermediate appellate courts.[47] In *Coulon v. Anthony Hamlin, Inc.*,[48] the Court of Appeal for the Parish of Orleans refused to follow these later cases, expressing "tremendous timidity" in suggesting that the statutory provision had been overlooked therein. Under a writ of certiorari, the Supreme Court expressly recognized the applicability of the statutory provision, affirmed the judgment of the court of appeal, and at least inferentially overruled the later cases in which the statutory provision had been overlooked.[49]

When a district court has no official court reporter, and the plaintiff sues in *forma pauperis*, it is the duty of the clerk to take down the testimony offered by the parties at the trial in long hand, or to assign a deputy to do so.[50] The ineffectiveness

42. PROPOSED LA. CODE OF CIVIL PROCEDURE art. 5059 (Louisiana State Law Institute, 1959). The contrary result obtains under federal practice. Rule 6(a) Federal Rules of Civ. Procedure.

43. LA. R.S. 13:4528 (1950).

44. Jackson v. Hart, 192 La. 1068, 190 So. 220 (1939); White v. Walker, 136 La. 464, 67 So. 332 (1915). The same result was reached in Fulton Bag & Cotton Mills v. Fernandez, 165 So. 476 (La. App. 1936) and Singleton v. First Nat. Life Ins. Co., 157 So. 620 (La. App. 1934).

45. Causey v. Opelousas-St. Landry Securities Co., 192 La. 677, 188 So. 739 (1939).

46. Hicks v. Royal Indemnity Co., 229 La. 536, 86 So.2d 183 (1956).

47. These fourteen cases are cited in Coulon v. Anthony Hamlin, Inc., 93 So.2d 557 (La. App. 1957).

48. 93 So.2d 557 (La. App. 1957).

49. Coulon v. Anthony Hamlin, Inc., 233 La. 798, 98 So.2d 193 (1957).

50. Williamson v. Enterprise Brick Co., 190 La. 415, 182 So. 556 (1938).

of this solution of the problem is obvious to any one who has ever tried a lawsuit. In *Hartford v. Mobley*[51] the twenty-six plaintiffs sued in *forma pauperis* for damages for the desecration of graves of relatives, and prayed for jury trials. After joinder of issue, the plaintiffs moved to have the consolidated cases assigned for trial at the earliest convenient date. Since counsel for the plaintiffs insisted that the clerk of court have the testimony offered at the trial taken and transcribed by a court stenographer, and the court had no official reporter, the trial judge denied the motion. He further indicated that he would assign the case for trial, and order the clerk to provide a court stenographer, only when compelled to do so by the Supreme Court, and after the latter had answered the questions posed as to who would pay the cost thereof, the fees of witnesses called, and the *per diem* of the jurors. The plaintiffs applied to the Supreme Court for a mandamus to coerce the trial judge into granting their motion.

After due consideration, the Supreme Court made the alternative mandamus previously issued peremptory insofar as it required the trial judge to assign the case for trial at the earliest convenient date, but otherwise recalled the alternative writ. The Supreme Court recognized the duty of the clerk of the trial court to take down the testimony offered at the trial in long hand, but held that he was under no duty to employ a court stenographer for such purpose. In answer to the questions posed by the trial judge, the Supreme Court held that it was the duty of the parish to advance the fees of witnesses and the *per diem* of jurors when the plaintiff sued in *forma pauperis* and demanded a trial by jury. Under the provisions of the *Forma Pauperis Act* the Supreme Court had no alternative to its decision. Yet this provides only a theoretical solution of the problem. No actual solution will be available until the legislature requires the police juries of all parishes to provide in their annual budgets an amount sufficient to advance the fees and other expenses of court stenographers, witnesses, and jurors in *forma pauperis* cases.

Probably the toughest nut which the Supreme Court has had to crack in years was the problem presented to it in *Cipriano v. Sherman*.[52] The writer emerges from days of mulling over the case as *dubitante* as Frankfurter, J.

51. 233 La. 956, 98 So.2d 250 (1957).
52. 234 La. 60, 99 So.2d 23 (1958).

In the original case arising out of this controversy the plaintiff sued his vendor, the contractor who built the house, the latter's subcontractor, and the sureties of the two latter for damages caused by a fire in his home which resulted from a heating plant which had either been defective when installed, or had been installed in a defective manner.[53] This suit was a cumulation in the alternative of two actions: a primary demand against plaintiff's vendor based on the implied warranty of the property sold; and, alternatively, a demand against the contractor, subcontractor, and their sureties based on their delictual responsibility for the installation of the defective heating plant. On appeal, the Supreme Court rendered judgment for the plaintiff on his primary demand and, of course, rejected his alternative demand. The successful plaintiff applied for a rehearing in which he asserted that his judgment against his vendor was worthless, as it had been out of business for years, and pressed his alternative demand upon the Supreme Court again.[54] This application for a rehearing was denied.

Plaintiff then instituted another suit against the contractor, subcontractor, and their sureties, presenting again his demand for damages based on their delictual responsibility for the installation of the defective heating plant. The defendants excepted on the grounds that the plaintiff's action was barred by prescription and by the judgment rendered in the first case, and that his petition disclosed no right or cause of action. The trial court maintained the exceptions of res judicata and prescription and dismissed the suit.

On appeal, the defendants filed further exceptions of no right and no cause of action in the appellate court, based on the contention that the plaintiff originally had two inconsistent remedies available, and that since he had elected to recover judgment against his vendor, he had waived his action *ex delicto*. These exceptions were maintained by the Supreme Court.

The initial point which troubles the writer is his inability to understand why the plaintiff sued the two sets of defendants originally in the alternative, instead of joining all in a single demand for a solidary judgment. Assuming that the plaintiff had a cause of action against the contractor, subcontractor, and

53. Cipriano v. Superior Realty & Construction Corp., 228 La. 1065, 84 So.2d 922 (1956).

54. See 234 La. 60, 64, 99 So.2d 23, 24 (1958).

their sureties (and on this the writer expresses no opinion), it was not inconsistent with his cause of action against his vendor. Alternative pleading is an extremely useful procedural device, but here it appears to have backfired.

The writer's second difficulty is due to his innate prejudice against the solution of Louisiana procedural problems through the importation of common law rules. Initially, perhaps, when a common law concept is employed by our courts for the decision of a case, a just result may be reached. But the long odds are that the same just result might have been reached through the application of our own basic principles of procedure, without having to pay the future price of accepting concepts which are alien to our system and which eventually will be found to be unworkable. We have such an instance here. The common law doctrine of election of remedies is a product of the era when a law suit was regarded as a duel between skilled protagonists, and is an unnecessary concession to the inexorable logic of common law procedure. We never needed to borrow this doctrine, as the purpose for which it has been employed is better served by the simpler civilian doctrine of *concurrence of actions*, based upon an analogical extension of the rules governing cumulation of actions.[55]

The result reached in this case appears to the writer, after considerable vacillation, to be the proper one. In the abstract it might appear that if the plaintiff had a cause of action against these defendants he should be able to recover judgment against them. However, the situation which confronted the plaintiff in the second suit is the product of his own procedural strategy. Further, he has put these defendants to the trouble and expense of a complete trial of the case in the lower court, and a full argument of the case on appeal. Under these circumstances, the result reached in the case does not appear to be unjust.

While the writer has never been able to dispel all of his doubts on the subject, it appears to him that the defendants' exception of res judicata should have been maintained.[56]

55. See *The Work of the Louisiana Supreme Court for the 1950-1951 Term — Civil Procedure*, 12 LOUISIANA LAW REVIEW 184, 198-199 (1952).

56. All of the requirements of res judicata appear to be satisfied completely, except possibly the initial rule of LA. CIVIL CODE art. 2286 (1870) that "The authority of the thing adjudged takes place only with respect to what was the object of the judgment." The writer believes that one of the objects of the judgment rendered by the Supreme Court in the first suit was the rejection of the plaintiff's alternative demand.