Civil Procedure

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PARTIES

Necessary and indispensable parties in Louisiana have been regulated heretofore only by jurisprudential rules, which have not always been as clear and as workable as might be desired.¹ Thomas v. Southdown Sugars, Inc.² illustrates the necessity for definite rules requiring the joinder of an indispensable party. The action was one brought by the administrator of a deceased party who alleged that he was the holder and owner of a stock certificate, and who prayed that the corporation be compelled to transfer the shares represented thereby to plaintiff. The corporate defendant alleged its willingness to transfer the stock to the owner thereof, but resisted the action on the ground that the stock certificate had neither been endorsed by its original owner, nor was it accompanied by her power of attorney authorizing such transfer. The evidence disclosed that the record owner of the certificate had had the stock sold at auction to one Gottlieb, to establish a loss thereon for income tax purposes; and the plaintiff's intestate had testified, prior to his death, that Gottlieb was acting at the time as his agent in the purchase of the stock. The trial court rendered judgment ordering the transfer, and the corporate defendant appealed. The intermediate appellate court affirmed.³ While the case was pending in the Supreme Court on the corporate defendant's application for a writ of review, the heirs of Gottlieb intervened,⁴ and alleged their ownership of the stock. Under the writ of review, the Supreme Court reversed, held that no judgment could be rendered because of

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4. "Intervention" in an appellate court is irregular. Following the general rule of civil jurisdictions, our present procedure permits a third person who is not a party to a suit to appeal from a judgment which affects him prejudicially. LA. Code of Practice art. 571 (1870). The proposed new code retains this rule, but to permit a more precise statement thereof permits the third person to appeal when "he could have intervened in the trial court." PROPOSED LA. CODE OF CIVIL PROCEDURE art. 2086 (Louisiana State Law Institute, 1960).

Since the court must notice a lack of indispensable parties on its own motion, the "intervention" in the Supreme Court here served the useful purpose of calling the defect to the attention of the court.
plaintiff’s failure to join indispensable parties, and dismissed the suit. In a per curiam opinion refusing to grant a rehearing, the Supreme Court recognized its power to remand the case to permit the joinder of the Gottlieb heirs and for further proceedings, but held that under the facts and circumstances of the case the dismissal was proper. These holdings of the Supreme Court accord with the rules which will be established when and if the new procedural code is adopted.5

EXCEPTIONS

Novel and interesting points of law were presented in Orr v. Walker.6 Plaintiff instituted suit to annul an act of sale of immovable property to the named defendant, on the ground of the fraud of the latter in acting as an interposed purchaser for the other defendant, well knowing that plaintiff considered this other defendant a most undesirable neighbor to whom he would not have sold the property at any price. The trial court rendered judgment annulling the sale, conditioned upon plaintiff’s repayment of the purchase price, and assessed all costs against the two defendants. Plaintiff’s demand for damages was rejected. The intermediate court, without reviewing the case on its merits, sustained the defendants’ exceptions of no right and no cause of action, and rejected the plaintiff’s demands.7 Its decision was pitched on two grounds: (1) plaintiff had no right of action since he had sustained no pecuniary loss and (2) an action does not lie for alleged fraud consisting only of statements promissory in nature. Under a writ of review, the Supreme Court reversed the decision of the intermediate appellate court and remanded the case to it for further proceedings. Under the basic code provision dealing with the nullity of contracts because of fraud,8 the alleged fraud of the defendants was actionable since it resulted in inconvenience to the plaintiff, even though the latter had sustained no pecuniary loss through the sale. The second contention of the intermediate appellate court was swept aside through a holding that the representations of the named defendant that he wished to purchase the property for his own use, when he was conspiring with the other defendant to purchase the property for the latter, was actionable.

In the only other case of importance involving the exceptions, the plaintiff sought to restrain the defendant levee board, and those acting under its authority, from interfering with plaintiff's enjoyment of its batture rights along the Mississippi River, and prayed for damages for the forced eviction of plaintiff from this batture. The land in question was situated in Jefferson Parish, where the suit was brought. Plaintiff alleged that defendant had authorized the use of this batture by the United States Army Corps of Engineers as sites for excavating earth to be used in repairing a portion of the levee along a non-navigable canal leading to a navigable lake. The trial court sustained the defendant's exception to the jurisdiction ratione personae, and of no right and no cause of action, and dismissed the suit. The first exception was grounded on the fact that defendant's domicile was in St. James Parish; while the other exceptions were based on the contention that the batture on plaintiff's land was subject to a perpetual servitude for levee purposes. On appeal, the Supreme Court reversed the trial court on all points. Since plaintiff's action was really one relating to trespass to real estate, and further related to a real servitude, the venue was held proper under one of the exceptions to the general rule of suit at the domicile of the defendant. Whether the batture on plaintiff's land was subject to a servitude for levee purposes on a non-navigable canal leading to a navigable lake was held to present mixed questions of law and fact which could not be disposed of on the trial of the exceptions. The case was remanded to the trial court for further proceedings.

The Incidental Demands

Reconventional Demand

Loew's, Inc. v. Don George, Inc. came back to the Supreme

10. La. Code of Practice art. 165 (8). The decision of the Supreme Court on the exception to the jurisdiction of the court ratione personae is clearly correct; but there is some language in its opinion on this point which conceivably could cause difficulty in the future. In referring to the term "trespass on real estate" in Article 165 (8), the court says: "Palpably, the instant suit constitutes an 'action in trespass,' a 'trespass' used in its generic and comprehensive sense of committing an act which is wrongful, and in itself productive of injury. It is not used in the technical sense of committing a trespass upon the property of another." 237 La. at 311, 111 So. 2d at 124. Article 165 (8) uses the term in its strict and technical sense; Article 165 (9) uses it in its broad and generic sense. Tripani v. Meraux, 184 La. 66, 76, 165 So. 453, 456 (1938) and cases cited therein.
11. 237 La. 132, 110 So. 2d 553 (1959). The first Supreme Court decision is
Court during the past term. The Supreme Court's decision on the only procedural point involved is noteworthy: a trial judge, on timely objection by the plaintiff, may exclude all evidence tendered by the defendant to support a cause of action pleaded in his reconventional demand and which is prescribed. This ruling will relieve somewhat the difficulties caused by the present rule precluding, as prohibited replicatory pleadings, an exception to a reconventional demand. The proposed new code solves this problem completely, by permitting exceptions and requiring answers to all incidental demands, and permitting the trial of such exceptions in limine.

**Intervention**

In *Emmco Insurance Co. v. Globe Indemnity Co.*, the facts were substantially as follows: As an aftermath of an intersectional collision, the owner of one car, and his collision insurer as partial subrogee, filed suit against the liability insurer of the owner of the other car involved, to recover property damage. The owner of the second car intervened, praying for damages for physical injuries and to property against the individual plaintiff. The latter excepted to the intervention on the ground that this claim was not the proper subject of an intervention. The trial court originally rendered judgment in favor of the plaintiffs and against the defendant, and dismissed the intervention. On rehearing, however, the trial court reversed itself, dismissed the plaintiffs' demand and rendered judgment for the intervener. On the appeal of the individual plaintiff, complaining only of the judgment in favor of intervener, the intermediate appellate court reversed. It held that the claim of the intervener was not a proper subject of intervention, as it could not meet the test of the rule that the dismissal of the main demand result in the dismissal of the intervention. Under a writ of review, the Supreme Court reversed. The intervention was held valid under the basic code articles on intervention. It was pointed out that but for the direct action statute, the intervener would have been an indispensable party to the plaintiffs' suit. The same result as that reported in 227 La. 127, 78 So.2d 534 (1955), and is discussed in *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Civil Procedure*, 16 Louisiana Law Review 361, 369 (1956).


14. LA. CODE OF PRACTICE arts. 389, 390 (1870).
reached by the Supreme Court would obtain under the broader and more liberal rule enunciated in the proposed new code.\textsuperscript{15}

Demand Against Third Party

Two cases of importance in this area were decided by the Supreme Court during the past term. In Succession of Franz\textsuperscript{16} the defendant, who as executor and universal legatee had successfully resisted an attack on the validity of the will of deceased, was sued by four examiners of questioned documents to recover the fees promised them for testifying as expert witnesses in the will contest. Defendant sought to bring in, as third party defendants, certain nonresidents who had unsuccessfully attacked the will. These defendants excepted to the jurisdiction of the trial court,\textsuperscript{17} and their exceptions were sustained. This ruling was upheld on appeal. The Supreme Court held that by attacking judicially the will of the deceased, these nonresidents had submitted themselves to the jurisdiction of the court in the will contest case, and were subject to any judgment taxing costs, but were not subject to the jurisdiction of the court in these separate suits.

In the second of these cases, Cameron v. Reserve Insurance Co.,\textsuperscript{18} the Supreme Court rendered a decision which greatly re-

\begin{footnotesize}
\begin{enumerate}
\item Proposed LA. Code of Civil Procedure art. 1091 (Louisiana State Law Institute, 1960) reads as follows:
   \begin{quote}
   "A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by:
   "(1) Joining with plaintiff in demanding the same or similar relief against the defendant;
   "(2) Unitig with defendant in resisting the plaintiff's demand; or
   "(3) Opposing both plaintiff and defendant."
   \end{quote}

   The present harsh and hypertechnical rule that an intervention falls with the dismissal of the main demand would be abrogated by id. art. 1039.

   For a more complete discussion of the principal case, the reader is referred to the casenote cited supra note 12.

\item 236 La. 781, 109 So.2d 92 (1959).

\item The Supreme Court refers to this exception as a "plea to the jurisdiction ratione personae." Id. at 785, 109 So.2d at 93. Actually the objection was to the court's lack of jurisdiction over the person of these defendants—quite another thing. The confusion of the present terms respecting jurisdiction is one of the many reasons why the Louisiana State Law Institute is recommending suppression of the present terminology and acceptance of the Anglo-American terms jurisdiction, jurisdiction over subject matter, jurisdiction over the person, jurisdiction over property, jurisdiction over status, and venue. Whether we like it or not these Anglo-American concepts are a part of our procedural law as the result of the constitutional requirements of full faith and credit and due process of law. The change is recommended to avoid the confusion resulting from the necessity of having two separate and distinct terminologies. See Proposed LA. Code of Civil Procedure arts. 1-10 and Introduction, p. 2 (Louisiana State Law Institute, 1960).

\item 237 La. 433, 111 So.2d 336 (1958, on rehearing 1959), 20 Louisiana Law
\end{enumerate}
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duces the present efficacy of third party practice. There, on the original hearing, it was held that a third party defendant domiciled in a parish other than that where the main demand was pending was not subject to the jurisdiction of the court ratione personae, unless the case clearly fell within one of the exceptions to the general rule of suit at the domicile of the defendant; and that the Third Party Practice Act made no such exception. It is believed that this holding is erroneous, under a basic code article not called to the attention of or considered by the court. At all events, this unfortunate holding will be overruled legislatively when and if the new procedural code is adopted.

A rehearing was granted to reconsider this ruling, but the opinion rendered therein was devoted primarily to the question of whether the third party defendant had waived his exception to the jurisdiction ratione personae by filing his answer simultaneously therewith, but in the alternative and with full reservation of all of his rights under the exception. The court held that there was no waiver of the exception. This is one of those procedural decisions which appears to be commendably liberal, but which so clashes with analogous rules based on the same rationale that it leaves this area of our procedure confused and unsettled. It is hoped that this confusion will be short-lived.

19. This is one of several hiatuses resulting from the failure of the Legislature in 1954 to adopt the general provisions in the proposed new code applicable to all incidental demands, and its adoption of only those provisions relating to the demand against a third party. On this point, see Automotive Finance Co. v. Daigle, 80 So.2d 579 (La. App. 1955); and Survey of 1954 Legislation—Courts and Judicial Procedure, 15 Louisiana Law Review 38, 46-49 (1954).

20. La. Code of Practice art. 154 (1870) provides that all incidental demands are subject to the same jurisdiction as the suit itself. This point is discussed in greater detail in the note on the principal case, cited supra note 18.


22. An elementary principle of procedure should determine all of these problems. Has the defendant after filing, but before the trial court has acted on, his exception to the jurisdiction ratione personae submitted himself to the jurisdiction of the court by filing other pleadings which he need not file then and which affirmatively invoke that jurisdiction. The amendment of La. Code of Practice art. 333 by Acts 1936, No. 124 § 1, p. 386, requiring the filing at the same time of all declinatory and dilatory exceptions, posed somewhat of a problem. This was solved in State v. Younger, 206 La. 1057, 20 So.2d 306 (1944), 19 Tul. L. Rev. 480 (1945), with the holding that a defendant could comply with the amended code article by filing his declinatory and dilatory exceptions simultaneously, pleading the dilatory only in the alternative. Heretofore, this has marked the limits of permissible alternative pleading. Neither the Younger case, supra, nor Mann v. Mann, 170 La. 958, 129 So. 543 (1930) support the court's position here. In the Mann case, supra, the declinatory exception was to the jurisdiction ratione materiae, which could not be waived impliedly, or even expressly for that matter. Further, although the court is in no way responsible for this, the reporter has
The proposed procedural code provides workable rules for all facets of this problem.23

DISCONTINUANCE

The injustice to a defendant, put to all of the inconvenience and expense of preparing for trial and actually trying the case, resulting from the present code rule24 granting the plaintiff the right to discontinue his suit at any time prior to rendition of judgment,25 is high-lighted in Clark v. Cottage Builders, Inc.26 The proposed new code follows the federal rule of permitting the plaintiff to dismiss his suit at any time, but granting the trial court the discretion to determine whether this dismissal is to be with or without prejudice.27

ENFORCEMENT OF FOREIGN JUDGMENT

Under the original Code of Practice, a judgment of another court, whether of Louisiana, another state, or a foreign country, could be enforced ex parte through executory process.28 This added to the confusion in its editorial headnotes. Syllabus No. 9 is flatly contradicted by La. Code of Practice art. 333, as amended.

The prior decisions of the Supreme Court on the subject have been extremely technical. The various declinatory exceptions themselves had to be filed in the alternative, and in a sacred order; and one of a higher order was waived by coupling it with one of a lower order. George W. Garig Transfer v. Harris, 226 La. 117, 75 So.2d 28 (1954); 15 LOUISIANA LAW REVIEW 849 (1955); Mitchell v. Gulf States Finance Corp., 226 La. 1003, 78 So.2d 3 (1955). These hypertechnical results were thought to be required by inexorable logic. Procedural rules which waste so much of the time and energies of the courts and attorneys on such trivia are unworkable. The proposed new code adopts a much more sensible approach.29

23. The solution of all of these problems under the Proposed La. Code of Civil Procedure (Louisiana State Law Institute, 1960) is much simpler and more workable. The numerous nominate exceptions of our present law would be abolished, and only three exceptions permitted: the declinatory exception, the dilatory exception, and the peremptory exception. Art. 922. The various types of procedural objection which may be pleaded through each of these three exceptions are spelled out. Arts. 925-927. “When two or more of these objections [the present nominate declinatory exceptions] are pleaded in the declinatory exception, they need not be pleaded in the alternative or in any particular order.” Art. 925. The declinatory and dilatory exceptions must be filed at the same time; but “When filed at the same time or in the same pleading, these exceptions need not be pleaded in the alternative or in a particular order.” Art. 928. “When a defendant makes an appearance, all objections which may be raised through the declinatory exception, except the court’s lack of jurisdiction over the subject matter of the action, are waived unless pleaded therein.” Art. 925.


25. The more recent cases have qualified the code rule by denying plaintiff the right to discontinue when the defense “is in the nature of a reconventional demand”, whatever that may mean. These cases are discussed in the principal case, and in McMahon, Louisiana Practice (1959), Supplement 156 (1956).


procedure was found unworkable for the enforcement of the judgments of other states and foreign countries, so in 1846 the code articles were amended, so as to limit executory procedure to the enforcement of judgments of other Louisiana courts. This left this portion of our procedure without a positive law basis, but the courts filled in this hiatus by developing jurisprudential rules requiring suit on the foreign judgment in an ordinary proceeding, with personal service of process upon the defendant in Louisiana, and an opportunity for the defendant to plead and prove the lack of jurisdiction of the foreign court. These jurisprudential rules were applied in *Henson v. Henson* were an ex parte judgment of a Louisiana court recognizing the judgment of a Kansas court, without service of process on the defendant, was held void. An interesting off-shoot of the case is the court's holding that the defendant did not submit to the jurisdiction of the Louisiana court by appearing for an examination under the Judgment Debtor Examination Act, without objection or protest. The proposed new code will make no change in either of the rulings of the court in this case.

**APPELLATE JURISDICTION**

There was the usual quota of cases transferred by the Supreme Court to the intermediate appellate courts during the past term. None of these involve any particularly important principle, and since this subject will become almost moot after the appellate reorganization goes into effect next July 1st, there is no need to consider any of these specially.

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30. See the cases cited in the principal case.


32. Proposed La. Code of Civil Procedure art. 2541 (Louisiana State Law Institute, 1960) is declaratory of the jurisprudential rules for the enforcement of a judgment of a court of another state or foreign country. Under the proposed new code, a defendant would make a general appearance which would subject him to the jurisdiction of the court only when he seeks any relief therein, except that mentioned in the code provision. Id. art. 7.

33. Four cases were transferred because the record did not show affirmatively the jurisdiction of the Supreme Court. Scott v. Blanton, 237 La. 926, 112 So.2d 693 (1959); Roseland Wirebound Box Co. v. Walker, 237 La. 292, 111 So.2d 118 (1959); Jackson v. Golson, 236 La. 735, 109 So.2d 75 (1959); and Succession of Hopkins, 236 La. 469, 108 So.2d 92 (1959).

Four additional cases were transferred because the record showed affirmatively that the Supreme Court did not have appellate jurisdiction. State ex rel. Stephens v. Kea, 235 La. 396, 106 So.2d 447 (1958)—mandamus proceeding with no
A novel and interesting question of appellate procedure was presented in two of the cases decided during the past term. In both, a retail merchant had challenged the constitutionality and validity of a sales tax imposed by the City of New Orleans on merchandise sold within but delivered outside of the city, and had appealed from an adverse judgment. The city and its director of finance moved to dismiss the appeal on the ground that the appellant had no right to appeal, since the sales taxes were paid by customers and not by the retailer, and hence the appellant had no pecuniary interest in the controversy. The court held that a party had a right to appeal from an adverse judgment, and the issue of whether he had a pecuniary interest in the controversy was immaterial insofar as his right to appeal was concerned. It was pointed out that it was a person who was not a party to the action who had to establish an interest in order to appeal. The proposed new code will make no changes with respect to either of these points.

None of the other cases in this field decided during the past term present any novel problem, and all were disposed of readily through the application of settled rules of procedure. Yet four of these cases focus attention on the technical nature of some of our present rules, which in many instances serve more to defeat than to further the ends of justice. In two of these cases, the appeals (by the State of Louisiana incidentally) were dismissed because the transcripts of appeal were filed after the extended return day. In both, the appellant had obtained an amount in dispute; Dwyer Lumber Co. v. Murphy Lumber and Supply Co., 237 La. 756, 112 So.2d 435 (1959)—less than $2,000 in dispute at the time the case was submitted to the trial court for a decision; Succession of Crotty, 235 La. 1032, 106 So.2d 459 (1958)—less than $2,000 in the fund to be distributed; and Thomas v. Fidelity and Casualty Company of New York, 237 La. 257, 111 So.2d 105 (1959)—claim, inter alia, for damages for shock to the nervous system again held to be a claim for damages for physical injury. James v. Rapides Police Jury, 236 La. 493, 108 So.2d 100 (1959) was transferred on the ground that there was no amount in dispute therein. The appeal was from a judgment which restrained the defendant from paying dues to a private nonprofit corporation under a resolution previously adopted. The appellant sought to sustain the jurisdiction of the Supreme Court under the contention that this was an appeal from a judgment holding an ordinance of a parish unconstitutional. The Supreme Court distinguished a legislative ordinance from an administrative resolution, and swept the argument aside.

extension of time to file the transcript which had not been completed by the original return day, but neglected to obtain a further extension. Under the proposed new code: (1) it will be the duty of the clerk of the trial court in all cases when the record of appeal is not ready by the return day, to obtain the necessary extension thereof from the trial court;\(^{37}\) (2) in all cases when the filing fee is due the appellate court has been paid to the clerk of the trial court, it will be his duty to file the record of appeal in the appellate court;\(^{38}\) and (3) no appeal will be dismissed because of any delay, neglect, or failure not imputable to the appellant.\(^{39}\)

In two cases, the motion to dismiss was based upon the failure of the appellant to pray for citation of appeal upon an appellee. In one,\(^{40}\) the appeal was dismissed for this reason. In the other,\(^{41}\) the appellant was more fortunate. The appellee moved to dismiss the appeal on another ground, and mentioned the failure of the appellant to pray for citation of appeal only in his brief. It was held that he had waived his objections to this defect. Under the proposed new code, regardless of the type of appeal and to what court, there will be no necessity for any citation of appeal. It will be the duty of the clerk of the trial court to mail notice of the appeal to counsel of record for all other parties, and his failure to do so will not be ground for the dismissal of the appeal.\(^{42}\)

**Provisional Remedies**

**Attachment**

A novel question was decided in *South Street Lumber Co. v. Dickerson*.\(^{43}\) There, the plaintiff sued the nonresident defendants to recover a money judgment, and to confer jurisdiction upon the trial court had obtained a writ of attachment, under which certain immovable property alleged to belong to the defendants was seized. Under a supplemental petition and writ,
additional immovable property alleged to belong to the defendants was seized later. The defendants not having answered, an attorney at law was appointed by the court to represent them, and a default judgment was taken and confirmed contradictorily against this attorney. In the meantime, Lake Charles Lumber Co. filed a third opposition, and alleged that the writ was null and void because the third opponent was the owner of the immovable property seized initially. After trial, judgment was rendered for the third opponent, dissolving the attachment insofar as the immovable property claimed by the third opponent was concerned. Plaintiff appealed devolutively from this judgment, and the third opponent moved to dismiss the appeal. The Supreme Court sustained this motion on the ground that, as a result of the failure of the plaintiff to appeal suspensively from the judgment partially dissolving the attachment, the trial court had lost its jurisdiction over the property claimed by the third opponent. Since this case is the subject of a note in the Review, the reader is referred thereto for a discussion of the applicable principles of law involved.

**Injunction**

Three of the four cases decided in this area during the past term presented novel and interesting questions. *United Mine Workers v. Arkansas Oak Flooring Co.* raised the question of the extent of the liability of a plaintiff in a labor injunction suit for the damages sustained by the defendant, when the injunctive order had issued illegally. Plaintiff union sued to recover court costs, premium on an appeal bond, reasonable attorney's fees, travel and subsistence expenses of its attorneys, and a large amount which it claimed resulted from its inability to collect the dues of its members while the injunctive order was in effect. The trial court maintained the defendant's exceptions of no right and no cause of action, and rejected plaintiff's demands completely. On appeal, the Supreme Court partially reversed. The amounts claimed by the plaintiff (except the last item mentioned above) appeared to be recoverable under the express language

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45. 238 La. 106, 113 So.2d 899 (1959).
46. In *Arkansas Oak Flooring Co. v. United Mine Workers*, 227 La. 1109, 81 So.2d 413 (1955), the Supreme Court sustained the jurisdiction of the trial court and the validity of the injunctive order which it had issued. This decision was reversed by the Supreme Court of the United States, under a writ of certiorari, and it was there held that a state court had no jurisdiction to issue an injunctive order under the facts of the case. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1966).
of Section 6 of the Little Norris-LaGuardia Act, but the total amount claimed greatly exceeded the penal sum of the bond. The statutory provision was interpreted by the Supreme Court as providing the measure of damages when suit was filed on the bond itself, but that when the defendant in injunction elected to pursue his alternative remedy of a suit at law authorized by the statute for an amount in excess of the bond, liability of the plaintiff in injunction was to be determined by the general law. Plaintiff's cause of action was held limited to a recovery not in excess of the penal sum of the bond.

The principles of law applied in two of these cases are so clear and well settled that these cases would hardly be worthy of note, except for one little point made therein by the Supreme Court. The plaintiffs' petition in these cases had prayed for a temporary restraining order, a rule for a preliminary injunction, and a final injunction. The defendants in each had filed a single answer which the Supreme Court held sufficient as both an answer to the rule for the preliminary injunction and to the plaintiffs' petition. Under the facts and circumstances of these cases, and very probably under the language of these answers, the Supreme Court's position was well taken. But this language should not be misconstrued into a holding that every answer to a rule for a preliminary injunction is likewise an answer to the plaintiff's petition. These two pleadings have separate and distinct functions; and while there is certainly no objection to both being incorporated in the same document, it should be clear that both are being pleaded therein.

In the opinion of the writer, the primary importance of *New Orleans v. Belas* is due to its re-affirmation, by a unanimous court, of the rule announced previously in *New Orleans v. Liberty Shop*, by a divided court. The latter case recognized the general rule that injunction does not lie to restrain the commission of a crime; but held that where the crime was also a nuisance, injunction would lie to abate the nuisance.

None of the Supreme Court's decisions on the subject of injunction procedure would be changed or affected in any way through the adoption of the proposed new procedural code, which

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HABEAS CORPUS

A single case produced both of the decisions of the Supreme Court on this subject during the past term. In the first,\(^5\) it was held that the action of the paternal grandparents, after service of the writ upon them, in turning the child over to its father, who subsequently took it with him into Mexico, was a prima facie constructive contempt of court, punishable only after service of a rule upon the contemnors. The advice of an attorney to the father, after the institution of the habeas corpus proceeding, that the father had at least equal rights to the custody of his child and hence could take him to Mexico, was held not to constitute a direct contempt, and as such punishable under the present law.\(^5\)

In the second case,\(^5\) the respondents did not produce the child in the trial court in obedience to the writ, and merely filed a return generally denying all of the allegations of the petition. The trial judge proceeded with the trial and rendered judgment in favor of the plaintiff mother, ordering the respondents to deliver possession of the child to the plaintiff forthwith. This was held error by the Supreme Court, which ruled that the trial judge should not have proceeded with the trial until the child was produced in open court in obedience to the writ, or a full and complete explanation given for the inability of the respondents to so produce him.

The proposed new code would make no changes in habeas corpus procedure in civil cases,\(^5\) and would make only a few changes with respect to contempts of court. The latter are recognized as being of two kinds: direct and constructive, and the acts constituting each are specifically enumerated.\(^6\) The alleged actions of the grandparents and their attorney in these two cases, if found to be true, would also be classified as constructive con-

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53. Under La. R. S. 13:4612 (1950) an attorney may be punished only for a direct contempt of court as defined therein.
56. Id. arts. 221, 222, and 224.
tempts under the new code. The court could punish a direct contempt committed in its presence "forthwith, without any trial other than affording [the contemnor] an opportunity to be heard orally by way of defense or mitigation." A constructive contempt could be punished only after the trial of a rule served on the contemnor at least forty-eight hours before, which rule must state the facts alleged to constitute the contempt. An attorney would be subject to punishment for either a direct or constructive contempt.  

EXECUTORY PROCEEDINGS

In Mack Motor Truck Corp. v. Coco the plaintiff sought to enforce two chattel mortgages on five motor trucks sold to the defendant. After proceedings not pertinent here, the trucks were offered at judicial sale by the sheriff separately, and in each instance the plaintiff was the highest bidder. The defendant then demanded a further offering of all five trucks en globo, and an adjudication to the highest bidder, if this bid exceeded the total of plaintiff's five separate bids. This request was complied with, and at the offering in bulk the defendant was the highest bidder. The plaintiff then ruled the sheriff into the trial court to show cause why he should not be ordered to execute acts of sale to the plaintiff for the five trucks. After a trial thereof, the rule was recalled on the ground that the procedure followed by the sheriff in selling the trucks accorded with the local custom. The defendant and the sheriff then filed exceptions of no right or cause of action to the petition for executory process, based on the contention that plaintiff was without right to employ a single proceeding and a single writ to enforce its two chattel mortgages against the five trucks. These exceptions were maintained by the trial court, and the executory proceeding was dismissed. On appeal, the Supreme Court reversed on both points. In the absence of an order for the sale of the trucks en globo, rendered on the application of a party and proof that such

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57. Id. art. 224 (1, 2, 10).  
58. Id. art. 223.  
59. Id. art. 225.  
60. Id. arts. 222, 224, 371.  
62. The defendant first sought to enjoin the sale on the ground of certain vices and defects in the trucks. The trial court found that such defects were proved, but refused to enjoin the sale on this ground, allowing only a reduction in the amount claimed by the plaintiff. This judgment was reversed on appeal on the ground that the defendant had failed to prove the amount of the damages allegedly sustained by him, and the injunction proceeding was dismissed as of nonsuit. Coco v. Mack Motor Truck Corp., 235 La. 1095, 106 So.2d 691 (1958).
a sale would be in the best interests of the applicant, the Supreme Court held that there was no authority for the procedure followed by the sheriff in selling the trucks. On the second point, the court pointed out that defenses and objections to an executory proceeding may be raised only in an injunction proceeding to arrest the seizure and sale, or by a suspensive appeal.\footnote{Theoretically, the defendant in an executory proceeding may raise objections patent on the face of the record through a devolutive appeal. But this is a hollow remedy, since the seized property is usually sold pending the appeal, and the latter is then dismissed on the ground that it presents only a moot question. Bank of La Fourche v. Barrios, 167 La. 215, 118 So. 893 (1928). For this reason, the Law Institute is recommending elimination of the devolutive appeal in executory proceedings.} The proposed new code is declaratory of the rule of executory procedure applied by the Supreme Court here,\footnote{Proposed LA. CODE OF CIVIL PROCEDURE art. 2642 (Louisiana State Law Institute, 1960).} but will make a change in the law with respect to a judicial sale under execution.\footnote{Id. art. 2295: “When property is offered by items or portions and the total price bid is insufficient to satisfy the judgment, with interest and costs, or if the judgment debtor so requests, the property shall be offered in globo and thus sold if a higher bid is obtained.”}

The jurisprudence is neither clear nor consistent on the question of whether attorney's fees are allowed as an element of damages for an illegal seizure. In Hernandez v. Harson,\footnote{237 La. 389, 111 So.2d 320 (1958).} where the court found that the seizing creditor acted in good faith and without malice, it refused to allow attorney's fees to the third opponent who had successfully arrested the seizure and sale of an automobile on the ground that it was the property of the third opponent and not of the defendant in the executory proceeding. The cases on all facets of this subject are analyzed and discussed in a recent comment in the Review,\footnote{20 LOUISIANA LAW REVIEW 389 (1960).} to which the reader is referred.

**PARTITION BETWEEN CO-OWNERS**

*Roy O. Martin Lumber Co. v. Strange*\footnote{236 La. 77, 106 So.2d 723 (1958).} focuses attention on both the inadequacy and the unfairness of our present statutes relating to the partition of property in which a nonresident has an interest. Proceeding under R.S. 9:171 et seq. the plaintiff sought in the trial court to provoke a partition by private sale of a large tract of timber land in which the nonresident defendant owned an undivided 1/32 interest. The defendant appeared through counsel and opposed the proceeding on the ground that...
she was not an absentee within the intendment of the statute. The trial court ordered the private sale of the property at the fair value established by the evidence. The intermediate appellate court affirmed. Under a writ of review, the Supreme Court originally affirmed the judgment. On rehearing, however, the court reversed the judgment of both courts below, and dismissed the proceeding. It was held that since the defendant had appeared, she was no longer an absentee within the intendment of the statute invoked.

Largely because of this case, the Law Institute is recommending changes in the statutory law on the partition of property in which an absentee has an interest. The proposed new code will in effect amalgamate the two present statutes on the subject; but since the private sale of such property was deemed unfair and prejudicial of the interest of the absent owner in most instances, only a public sale will be authorized. If the property is divisible in kind, and the absentee timely answers through counsel of his own selection and prays therefor, the court would order the partition to be made in kind.

A settled rule of law was applied to new circumstances in *Nides v. Hoyle*. There, a divorced wife sought an accounting of the community property by her husband and the partition by licitation of the single piece of immovable property owned in common. The trial court rendered judgment decreeing the partition and ordering the accounting, but directed that the sale of the property be stayed pending the accounting. On appeal, the Supreme Court reversed. It was held that when judgment is rendered decreeing a partition by licitation, the property must be sold immediately, and the proceeds held subject to the further orders of the court. The proposed new code would make no change in this rule.

**Nullity of Compromise**

Only one question of law was decided in *Blades v. Southern*
Farm Bureau Casualty Ins. Co., but that was both novel and important. The Supreme Court there held that a father, acting as the administrator of the estate of his minor child, could execute a valid compromise of the minor's claim for physical injury without first obtaining authority from a court of competent jurisdiction. Admittedly, a tutor would have to obtain judicial authority for such a compromise. The soundness of the Supreme Court's decision hinges upon the construction to be placed on the italicized language of the following excerpt from the pertinent code article:

"Property belonging to minors, both of whose parents are living, may be sold or mortgaged, and any other step may be taken affecting their interests, in the same manner and by pursuing the same forms as in the case of minors represented by tutors, the father occupying the place and being clothed with the powers of the tutor."

In reliance upon the established jurisprudence, the court held that judicial authority for the act of the administrator of the estate of a minor is necessary only when property of the minor is to be alienated or encumbered, or some action is to be taken with respect to his property beyond the mere administration thereof. The court further held that the prosecution and settlement of a claim for personal injuries does not fall within this category. The writer doubts the soundness of the court's decision. He admits that the prosecution of a claim for physical injuries, as well as the receipt of the full amount of a judgment in favor of the minor, is a matter of administration. But the writer believes that the compromise of such a claim is a species of alienation of a right of the minor which should require judicial authorization.

76. 237 La. 1, 110 So.2d 116 (1959).