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Pleading and Practice - Third Party Practice - Jurisdiction Ratione Personae

John G. Torian II

right direction in its present plan to adopt the American Law Institute and Federal Rules' approach to time limitation.[32]

Walter I. Lanier, Jr.

PLEADING AND PRACTICE — THIRD PARTY PRACTICE — JURISDICTION RATIONE PERSONAE

Plaintiff filed suit in Lafayette Parish against his automobile insurer and the liability insurer of the party driving plaintiff's car at the time it was involved in an accident. Plaintiff's insurer then filed a third party petition against the driver of plaintiff's car, a resident of St. Mary Parish. The third party defendant filed an exception to the jurisdiction of the court ratione personae which was sustained by the trial court. On appeal, *held*, affirmed. "The third party practice act provides no exception to the general rule that a defendant is entitled to be sued in the Court of his domicile." *Cameron v. Reserve Insurance Company*, 237 La. 433, 111 So.2d 336 (1959).

Prior to the adoption of the Third Party Practice Act, the Louisiana equivalent of the Anglo-American third party action was the call in warranty.[1] Article 384 of the Code of Practice, in dealing with the call in warranty, provides an exception to the general rule that a defendant is entitled to be sued in the court of his domicile:[2] "The warrantor thus cited is bound to appear before the court in which the principal demand has been instituted, even when he resides out of its jurisdiction . . . ."[3] The purpose of this exception to the general rule is to avoid a multiplicity of actions. But for this rule the defendant in the initial suit could recover only by filing a second suit in the domicile of the warrantor and try essentially the same case he had just finished defending.

32. *Ibid.*; 18 U.S.C. §§ 3281, 3282, 3288-3290 (1918).

1. LA. CODE OF PRACTICE arts. 379-388 (1870).

2. *Id.* art. 162: "It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law."

3. *Id.* art. 384. See also *id.* art. 165(4), which provides: "In matters relative to warranty, they must be carried before the court having cognizance of the principal action in which demands in warranty arise."

Jones v. Louisiana Oil Refining Corp., 3 La. App. 85, 89 (1925): "Under this article [384] of the Code the fact that Miller [the warrantor] resides out of the jurisdiction of the court does not relieve him of the duty to appear. He is bound to appear, even though he resides out of the court's jurisdiction."

The Third Party Practice Act was adopted to provide a more effective mode of permitting a defendant to call a third party into pending litigation.[4] Its adoption was deemed necessary because of the jurisprudential limitation placed on the call in warranty in cases of personal warranty.[5] In *Anselm v. Wilson*[6] the Supreme Court held that the call in warranty could be employed in cases of personal warranty only where there was privity between the plaintiff in the principal demand and the third party called in warranty. While this rule was later rejected in *Muntz v. Algiers & G. Ry.*,[7] dictum in the latter case in turn provided the source of another limitation on the use of this procedural device in cases of personal warranty. The court said that "there must be a contract of warranty between such defendant and the person so called" in warranty.[8] Subsequent cases expanded this dictum into express holdings that for the defendant to call in a third party there must be either a contract of warranty between the two or a statute which expressly permitted the call.[9] This limitation deprived the call in warranty of much of its utility, as it prevented its use in the many instances where the third party's obligation arose by force of law rather than as a result of convention.[10] To overturn this limitation, the Louisiana Legislature in 1954 adopted the Third Party Practice Act.[11] The act is procedural in character and works no change in the substantive law.[12] Third party practice serves the same purpose as the

4. See McMahon, *Survey of 1954 Louisiana Legislation — Courts and Judicial Procedure*, 15 LOUISIANA LAW REVIEW 38, 47 (1954).

5. See Motors Securities Co. v. Hines, 85 So.2d 321, 323 (La. App. 1956): "Manifestly, the adoption of the Third-Party Practice Act in this state came as a result of dissatisfaction with procedural limitations encountered in actions relating to personal warranty arising under C.P. 378."

6. 8 La. 35, 37 (1835). The defendant being sued on a promissory note alleged she had paid the amount to a third party, Joseph Erwin. The defendant further alleged that Erwin "had promised to save her harmless against the note, and became her warrantor." Defendant called Erwin in warranty. The court stated as to the call in warranty: "This does not, in our opinion, present a case of simple or personal warranty, within the meaning of that part of the code which authorises delay for calling in warrantor. There does not appear to have existed any privity between the plaintiff and Joseph Erwin, who was a stranger to the contract sought to be enforced. Code of Practice, art. 379, et seq."

7. 114 La. 437, 38 So. 410 (1905).

8. *Id.* at 447, 38 So. at 414.

9. Bank of Baton Rouge v. Hendrix, 194 La. 478, 193 So. 713 (1940); Bennett v. Weinberger, 160 La. 1001, 107 So. 780 (1926); Girouard v. Agate, 44 So.2d 388 (La. App. 1950); Templeman Bros. Lumber Co. v. Sinnot, 9 Orl. App. 305 (1912).

10. McMahon, *Survey of 1954 Louisiana Legislation—Courts and Judicial Procedure*, 15 LOUISIANA LAW REVIEW 38, 47 (1954).

11. LA. R.S. 13:3381 *et seq.* (1950).

12. Kahn v. Urania Lumber Co., 103 So.2d 476, 482 (La. App. 1958): "The Third-Party Practice Act is procedural in character and does not effect any change in the substantive laws of this State, particularly as pertains to the

call in warranty, i.e., to avoid a needless multiplicity of actions[13] by providing a method for determining in a single suit the liability of the third person to the defendant for all or part of the judgment recovered against the defendant in the principal demand.[14] The provisions of the statute indicate quite clearly that there is no longer any requirement that the obligation of the third party arise from a contract of warranty with the defendant.[15] The statute permits the original plaintiff to obtain a judgment against the third party defendant, on a demand which arises out of the transaction or occurrence which is the subject of the main demand.[16]

The Third Party Practice Act was taken verbatim from the Louisiana State Law Institute's projet of the Proposed Louisiana Code of Civil Procedure.[17] The latter, however, contained

relationship of joint tort-feasors." See also MCMAHON, LOUISIANA PRACTICE 102, n. 45 (Supp. 1956): "Eventually, the principal use of third-party practice in Louisiana will be to enforce contribution among joint tort-feasors. While the way therefor has been paved procedurally by Louisiana Act 433 of 1954, (R.S. 13:3381 et seq.) there is considerable doubt as to whether our susbtantive law would permit the enforcement of contribution against a joint tort-feasor who was not sued initially by the plaintiff."

13. See Plummer v. Motor Insurance Corp., 233 La. 340, 351, 96 So.2d 605, 609 (1957): "It is an important procedural device, the purpose of which is to avoid needless multiplicity of actions."

14. See Bouree v. Roy, Inc., 232 La. 149, 155, 94 So.2d 13, 15 (1957): "The purpose of the third-party action statute was to provide a method for the settling in one suit of all liability in the numerous instances in which a third-party is indebted to the defendant for all or part of the obligation sued upon by the plaintiff although no express contract of warranty existed between the defendant and the party called."

15. LA. R.S. 13:3381 (1950): "In any civil action presently pending or hereafter filed the defendant in a principal action may by petition bring in any person (including a co-defendant) who is his warrantor, or who is or may be liable to him for all or part of the principal demand. . . ."

16. *Id.* 13:3381 provides in part: ". . . In such cases the plaintiff in the principal action may assert any demand against the third party defendant arising out of the transaction or occurrence that is the subject of the principal demand. . . ." See also Ferrantelli v. Sanchez, 90 So.2d 351, 354 (La. App. 1956): "There seems to be no doubt that the Third-Party Practice Act was enacted to afford an additional remedy to a plaintiff, and one of its purposes, among others, was to permit a judgment directly in favor of the plaintiff against a third-party defendant, which is not authorized by that section of our Code of Practice which authorizes demands in warranty for, under those articles, 384 and 385 of our Code of Practice, the original plaintiff obtains his judgment against the original defendant and the original defendant obtains his judgment in warranty against the defendant in warranty, but the plaintiff does not recover direct judgment against the warrantor of the defendant. Our Third-Party Practice Act makes such direct judgment possible, but only where the necessary pleadings are filed."

Sizeler v. Employer's Liability Assurance Corp., 102 So.2d 326, 329 (La. App. 1958): "When a defendant files a third party suit against one not a party to plaintiff's original suit, the plaintiff may assert only such demand against the third party defendant as arises out of the transaction or occurrence that is the subject of the principal demand."

17. Automotive Finance Co. v. Daigle, 80 So.2d 579, 580 (1955) (the court in discussing the third-party practice act stated "this act was adopted by the Legislature upon the recommendation of the Louisiana State Law Institute. It

two sets of rules regulating the third party demand: one specifically regulating the third party demand only, which was adopted verbatim in the Third Party Practice Act;[18] and a set of general rules regulating all of the incidental demands, which was not adopted by the legislature.[19] One of the general rules provides, in effect, that any incidental action may be brought in the court where the principal action is pending, if the latter is brought in the proper venue.[20] However, when the Third Party Practice Act was enacted the legislature did not adopt this rule, and as a result there is no provision on venue in the act itself.

In holding that the Third Party Practice Act provided no exception to the general rule of jurisdiction ratione personae, the court in the instant case although it did not say so expressly, necessarily based its position on two tacit assumptions: (1) that third party practice and the call in warranty are completely different and distinct procedural devices; and (2) that the legislature intended to repeal all of the articles in the Code of Practice regulating the call in warranty, whether in conflict with the Third Party Practice Act or not. Available arguments, not presented to or considered by the court in the instant case, cast doubt upon the validity of both of these assumptions. First, the fact that the third party practice and the call in warranty perform the same function, serve the same purpose, and operate in much the same manner lends some merit to the argument that the two are the same procedural device under different labels, and that in 1954 the legislature intended to broaden, rather than to suppress, the call in warranty. In other words the difference in terminology is more a matter of form than of substance. Secondly, some significance must be attached to the fact that the Third Party Practice Act did not expressly repeal the code articles regulating the call in warranty. The repealing clause of this statute repeals only those "laws or parts of law in conflict herewith."[21] Nothing in this act conflicts with Article 384 of the Code of Practice, providing that a defendant in warranty may be sued in the court where the main demand is pending.

is based upon federal third-party practice . . . and tracks with identical verbiage except for section numbers, the recommended Institute text.").

18. *Ibid.*

19. Proposed Louisiana Code of Civil Procedure art. 1031-1040.

20. Proposed Louisiana Code of Civil Procedure art. 1034: "A defendant in an incidental action may plead any of the exceptions available to a defendant in a principal action, and may raise any of the objections enumerated in Articles 925 through 927 except that an objection of improper venue may not be urged if the principal action has been instituted in the proper venue."

21. La. Acts 1954, No. 433, § 7.

Thus it would seem the article was not even tacitly repealed. But even assuming the validity of these two tacit assumptions, it is believed that the court fell into error in the instant case in treating the Third Party Practice Act as an isolated statute, rather than as an integral part of the procedural law of Louisiana. From its nature, the third party demand is of necessity an incidental demand, defined in the present procedural Code as one "which is made . . . in order to obtain something relating to the principal object of the suit."[22] In procedural theory the incidental demand is a superstructure erected on the foundation of the principal demand; and if the court has jurisdiction ratione personae over the latter, it necessarily has it over the former. This is made clear by one of the general rules on the incidental demands, apparently not called to the attention of or considered by the court in the instant case, which provides in effect that the court having jurisdiction over the incidental demand also has jurisdiction over the main demand.[23]

The instant case is unfortunate as it restricts materially the usefulness of third party practice. However, the probabilities are that the rule announced therein will be short-lived. If the Proposed Louisiana Code of Civil Procedure is adopted, the instant case can be considered overruled by the legislature.

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22. LA. CODE OF PRACTICE art. 153 (1870).

23. *Id.* art. 154: "The principal demand must be brought before the court which has the jurisdiction of the case.

"The incidental demand must be decided at the same time with the principal; it is subject to the same jurisdiction as the suit itself."

The term "jurisdiction" in this article can only mean jurisdiction ratione personae, as Louisiana follows the traditional rule of civilian jurisdications that the incidental demand must always be within the jurisdiction ratione materiae of the court. Speyrer v. Miller, 108 La. 204, 32 So. 524, 61 L.R.A. 781 (1902); Cross v. Parent, 26 La. Ann. 591 (1874); Heirs of Kempe v. Hunt, 4 La. 477 (1832); Koerner & Co. v. Francingues, 3 La. App. 220 (1925); Artic Pure Ice Co. v. Rathe, 3 La. App. 14 (1925); Kaufman v. Mahen, 2 La. App. 354 (1925); Feahney v. New Orleans Rys. & Light Co., 4 Orl. App. 277 (1907); Labarthe v. Mazzei, 2 Orl. App. 367 (1905). See LA. CODE OF PRACTICE arts. 372, 377 (1870). *Cf.* San-I-Baker Corp. v. Magendie, 157 La. 643, 102 So. 821 (1925) and cases there cited; Hagan v. Hart, 6 Rob. 427 (La. 1844) and cases there cited.

The only exceptions to the general rule are provided in LA. CONST. art. VII, §§ 91, 92, granting jurisdiction to the city courts of New Orleans over "reconventional demands, interventions and third oppositions filed in said courts and necessarily connected with or growing out of the main demand, irrespective of the amount in dispute or the value of the property."

Both the general rule and the exceptions thereto are retained in Proposed Louisiana Code of Civil Procedure art. 1036.