Louisiana Law Review

Volume 20 | Number 4
June 1960

Practice and Procedure - Right to Appeal from a Judgment in a Jactitory Action

William S. Moss Jr.

It should be noted that there was no mineral lease in existence at the commencement of the usufruct in the instant case and in this situation the naked owner could execute a lease. It would seem, however, that if there were a mineral lease on the property at the commencement of the usufruct then the naked owner would be bound by it and he could not execute another lease until the original lease had terminated.

The instant case will no doubt be the first in a series dealing with the rights of the naked owner and the usufructuary to oil and gas.[34] It is not decided, for example, what will constitute an "opened well" under Article 552. It may be that a well will be opened when a mineral lease has been granted on the property at the time the usufruct is established, or it may be necessary that there actually be a well already drilled and producing.[35] If a well has been opened at the time of the creation of the usufruct, then the usufructuary apparently will be entitled to all of the proceeds from the production with the naked owner obtaining nothing. By the use of modern drilling methods an oil deposit may be completely depleted in a short while, and it is apparent that the naked owner is in danger of being deprived of all of the mineral value of the property by an application of Article 552. In order to protect the naked owner's interest it would seem desirable to limit the usufructuary's rights as much as possible under Article 552. It is submitted that a well should not be considered as being opened or worked unless it has been drilled and is actually producing at the commencement of the usufruct.

Aubrey McCleary

PRACTICE AND PROCEDURE—RIGHT TO APPEAL FROM A JUDGMENT IN A JACTITORY ACTION

Two recent decisions have dealt with defendant's right to appeal devolutively from a judgment in a jactitory suit. In each

to receive bonuses, rentals, and royalties being determined by the terms of the agreement.

It would seem that if the lessee is going to be bound to compensate the usufructuary for any damages that he might cause in the exercise of his rights that he should still attempt to get the usufructuary's consent before he goes upon the land. By doing this he could avoid the expenses that would be involved if he were sued for damages.

34. There has already been one court of appeal decision in which the right to delay rentals and bonuses on a lease executed after the commencement of the usufruct were at issue. It was held that the naked owner and not the usufructuary is entitled to the bonus and delay rentals, as well as the royalties. King v. Buffington, 119 So.2d 519 (La. App. 1960).

35. See DAGGETT, LOUISIANA MINERAL RIGHTS 325 *et seq.* (rev. ed. 1949).

case judgment was rendered for plaintiff, ordering defendant either to disclaim all right, title, or interest in the property concerned or to institute a petitiory action within thirty days. In default of instituting such suit defendant would be forever barred from setting up any claim to the property. In the first case defendant was granted a devolutive appeal from the judgment and within the thirty days filed a petitory action, expressly reserving his rights under the devolutive appeal. The court of appeal, *held,* motion to dismiss the appeal sustained. Defendant, by filing the petitory action, voluntarily acquiesced in the judgment of the lower court. *Morgan City Co. v. Guarisco,* 116 So.2d 864 (La. App. 1959).

In the second case defendant failed to bring a petitory action and after the thirty-day period elapsed plaintiff caused execution to issue, and the clerk of court erased the slanderous instruments from the conveyance records. Defendant appealed devolutively and plaintiff moved to dismiss the appeal on the ground that the judgment of the district court had been fully executed so the issues presented on appeal were moot. *Held,* motion denied. A devolutive appeal has the effect of suspending the finality of the lower court's judgment; and if the judgment is reversed on appeal, any action taken to erase records is subject to correction. *Norman v. Guarisco,* 116 So.2d 872 (La. App. 1959).

The action of jactitation, also called the suit for slander of title, is a real action which has been created by the Louisiana courts.[1] Its object is to quiet possession of one who suffers a constructive disturbance.[2] The plaintiff must allege and prove

1. The action in jactitation was created by the Louisiana Supreme Court in the sense that it is not provided for in the Code of Practice but was borrowed from Spanish procedure. See Packwood v. Dorsey, 4 La. Ann. 90 (1849); Livingston v. Heerman, 9 Mart.(O.S.) 656 (La. 1821); Comments, 20 LOUISIANA LAW REVIEW 92, 100 (1959), 12 TUL. L. REV. 254 (1938).

2. The possessory action gives the possessor of immovable property a legal remedy when there has been either a disturbance in fact or a disturbance in law. LA. CODE OF PRACTICE art. 49(3) (1870) provides: "In order that the possessor of a real estate, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required: . . . (3) That he should have suffered a real disturbance either in fact or in law. . . ." Article 52 defines a disturbance in law, providing: "Disturbance in law takes place when one, pretending to be the possessor of a real estate, says that he is disturbed by the real possessor, and brings against the latter the possessory action; for in such a case the true possessor is disturbed by this action, and may also bring a possessory action, in order to be quieted in his possession.

"But in no case shall the mere demand in revendication of a real estate, or of a real right, be considered as a disturbance in the enjoyment of a possessor, and entitle him to bring a possessory action." The narrowness of this definition left the possessor with no remedy for many types of disturbance, and the result was

his possession and the constructive disturbance.[3] Three defenses are available to the defendant:[4] (1) he may deny the possession of the plaintiff and, if he is successful, the plaintiff's only remedy is a petitory action;[5] (2) he may admit the slander and claim title in himself, thereby becoming the plaintiff in a petitory action;[6] or (3) he may traverse the slander, either by denying the occurrence of the alleged slanderous acts or by denying that the particular acts alleged are slanderous.[7] If possession and slander are proved by the plaintiff, and the defendant does not disclaim title or assert title in himself, the proper judgment is one ordering the slanderer to institute suit against the possessor within the time fixed by the court.[8] If he does not institute such suit, he is forever barred from claiming the property and all slanderous instruments are erased from the records.[9]

that the Louisiana courts borrowed the jactitory action from Spanish law. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153 (1906); Patterson v. Landru, 112 La. 1069, 36 So. 857 (1904); Livingston v. Heerman, 9 Mart.(O.S.) 656 (La. 1821).

3. Green v. George, 213 La. 739, 35 So.2d 595 (1948); Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153 (1906).

4. Craig v. Lambert, 44 La. Ann. 885, 11 So. 464 (1892); Lange v. Baranco, 32 La. Ann. 697 (1880).

5. The action of jactitation is governed by the rules of the possessory action, as far as they are applicable. Green v. George, 213 La. 739, 35 So.2d 595 (1948); Chatellier v. Bradley, 57 So.2d 805 (La. App. 1952); Brashears v. Chandler, 183 So. 546 (La. App. 1938).

LA. CODE OF PRACTICE art. 49(1) (1870) provides: "In order that the possessor of a real estate, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required: . . . That he should have had the real and actual possession of the property at the instant when the disturbance occurred; a mere civil or legal possession is not sufficient."

In the event of his failure to establish his possession of the property in question, the plaintiff's remedy is provided for in *id.* art. 5: "The petitory action is that by which he who has the property of a real estate, or a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled."

6. Riley v. Kaempfer, 175 So. 884, 886 (La. App. 1937): "Should the slanderer set up title in himself, he then converts the proceedings into a petitory action, and the burden of making proof of his claim is imposed on him." See also Rudd v. Land Co., 172 So. 804 (La. App. 1937); Dalton v. Wickliffe, 35 La. Ann. 355 (1883); Gay v. Ellis, 33 La. Ann. 249 (1881). *Cf.* Miller v. Albert Hanson Lumber Co., 134 La. 225, 63 So. 883 (1913).

7. Livingston v. Heerman, 9 Mart.(O.S.) 656 (La. 1821); Proctor v. Richardson, 11 La. 186 (1837) ("In the case of Livingston vs. Heerman (9 Mart. 656) this court had occasion to investigate the law which ought to govern the courts, in actions, of slander of title. It was the opinion of the court, that the defendant in such cases, should do one of two things: either deny the slander, which would amount to a waiver of title, or admit the allegation, and aver his readiness to bring suit."). This third defense exists only in theory in a case such as the instant one where the slander consists of instruments placed of public record, for in such a case there is little room for doubt as to either the existence or the slanderous nature of the instruments. Ware v. Baucum, 221 La. 259, 59 So.2d 182 (1952); Rudd v. Land Co., 188 La. 490, 177 So. 583 (1937).

8. Siegel v. Helis, 186 La. 506, 172 So. 768 (1937); Finch v. Schexnayder, 53 So.2d 484 (La. App. 1951); Riley v. Kaempfer, 175 So. 884 (La. App. 1937).

9. Siegel v. Helis, 186 La. 506, 172 So. 768 (1937).

The right to appeal is subject to a fundamental limitation, imposed by Code of Practice Article 567, which provides: "The party against whom judgment has been rendered cannot appeal; (1) If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily. . . ."[10] The case of *Buntin v. Johnson*,[11] in turn, restricted the applicability of this rule, with its oft-quoted holding that "the acquiescence which prohibits an appeal or which destroys an appeal when taken, is the acquiescence in a decree which commands something to be done or given. If the thing commanded to be done or given, is done or given, the judgment is acquiesced in." Further restrictions have been placed on the doctrine of acquiescence and it is now well-established that it must be unconditional, voluntary, and absolute, and the appellant must have intended to abandon his right to appeal.[12] Even where the defendant has done or given what he was ordered to do or give, the court looks to his reasons for so doing and if no intention to acquiesce is found the appeal is not dismissed.[13] An exception to this liberal

10. LA. CODE OF PRACTICE art. 567 (1870): "The party against whom judgment has been rendered can not appeal:

"1. If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily.

"2. If he has suffered the time prescribed by law for appealing to elapse."

11. 27 La. Ann. 625 (1875).

12. Kendrick v. Garrene, 231 La. 462, 91 So.2d 603 (1956); Scott v. Scott, 218 La. 211, 48 So.2d 899 (1950); Sanderson v. Frost, 198 La. 295, 3 So.2d 626 (1941); Saunders v. Busch-Everett Co., 138 La. 1049, 71 So. 153 (1916); Sims v. Jeter, 129 La. 262, 55 So. 877 (1911); Colvin v. Woodward, 40 La. Ann. 627, 4 So. 564 (1888); Breaux v. Savoie, 39 La. Ann. 343, 1 So. 614 (1887); Jackson v. Michie, 33 La. Ann. 723 (1881); State *ex rel.* Hoey v. Brown, 29 La. Ann. 861 (1877); Fontenot v. National Transfer Co., 93 So.2d 254 (La. App. 1957).

13. No intention to acquiesce was found where the defendant paid a money judgment rather than have his property seized and sold in Johnson v. Clark & Meader, 29 La. Ann. 762 (1877). And in the case of an alternative judgment, the fact that upon execution the appellant chose to comply with the less onerous of the demands does not bar his right to a devolutive appeal, if his intention to reserve that right is manifest. Colvin v. Woodward, 40 La. Ann. 627, 4 So. 564 (1888). *Cf.* Yale v. Howard, 24 La. Ann. 458, 459 (1872), holding: "It seems manifest that the plaintiffs were acting under compulsion of the law, for they were entreating the sheriff for a time to obey the writ which he was executing, and the fact that they chose to comply with one of the alternative demands of a writ which they could not resist does not, in our opinion, make the execution of the judgment voluntary. The sheriff was commanded to take the cotton or its value. He gave the debtors the right to deliver the cotton, which they delivered in obedience to the mandate of the law; but they continued to prosecute their appeal and were relieved from the judgment. A devolutive appeal implies the right to have the judgment executed and the obligation to refund."

In a judgment for alimony, the husband was not obliged to refuse to pay the alimony and subject himself to punishment for contempt in order to preserve his right to a devolutive appeal. Scott v. Scott, 218 La. 211, 48 So.2d 899 (1950).

A further indication of the attitude of the court is the statement of the court in Harnischfeger v. Greeson Co., 219 La. 546, 549, 53 So.2d 488 (1951), that "an appeal is a constitutional right and any doubt as to the right of an appeal must be resolved in favor of the appeal." *Cf.* Pool v. Gaudin, 207 La. 403, 21

attitude of the courts exists in the case of jactitation suits. The Supreme Court in *Navarre v. Lafayette Parish School Board*[14] held that a defendant who filed a petitory action acquiesced in the jactitory judgment and a special allegation purporting to reserve his rights under a pending devolutive appeal was not effective. The defendant in jactitation contended that he did not voluntarily acquiesce in the judgment by filing the petitory action, but did so merely to preserve his rights in the event the judgment of jactitation was affirmed on appeal. The court, however, held that it was immaterial for what purpose the defendant filed the petitory action, "because it is well-settled that when a thing commanded to be done or given, is done or given, the judgment is acquiesced in."[15]

The defendant's sole remedy in the instant case of *Norman v. Guarisco* lay in a devolutive appeal, for he failed to bring either a suspensive appeal or a petitory action within the time allowed. The motion to dismiss the appeal was predicated on the theory that, since execution had not been suspended, the issues presented were moot and a devolutive appeal could not "uncancel the cancellation."[16] The court held, however, that a right to a devolutive appeal existed in all cases, the effect of which is to suspend the finality of the executed judgment until the appellate court passes on it.[17] If the appellate court rules against a defendant on a devolutive appeal and the time fixed for filing a petitory action has expired, he is forever barred from claiming the property. As a practical matter, the chances of reversal in the instant case were small. This is because the only appealable issue was the question of the slander;[18] and as the instruments

So.2d 424 (1945); First Nat. Bank of Ruston v. Lagrone, 164 La. 907, 114 So. 832 (1927); Durand v. Judge, 30 La. Ann. 282 (1878).

14. 226 La. 876, 77 So.2d 520 (1955).

15. 226 La. 876, 880 (1955). The court cited Buntin v. Johnson, 27 La. Ann. 625 (1875) for this proposition. The case of Riley v. Kaempfer, 175 So. 884 (La. App. 1937) was also referred to by the court in the *Navarre* case, and is cited by the court in the *Morgan City Co.* case. It is the only other case found presenting a fact situation like the *Navarre* and *Morgan City Co.* cases, and its decision is in accord with them.

16. 116 So.2d 872, 875 (La. App. 1959).

17. It is apparent that a suspensive appeal suspends the running of the period fixed by the court for the filing of a petitory action. See Collier v. Marks, 200 La. 521, 57 So.2d 43 (1952). Consequently, if the court rules against a defendant, he may still institute a petitory action within the delays originally fixed by the court.

18. The defendant filed an exception of improper cumulation of actions before he excepted to the plaintiff's possession. The effect of this was to join issue, after which, under the provisions of LA. R.S. 13:5063 and 5064 (1950), the defendant was deemed to have waived his right to raise the defense of lack of sufficient possession by the plaintiff.

complained of were of public record, this could not be open to much dispute. Nevertheless, a devolutive appeal was not vain, for a reversal would have the effect of releasing the defendant from the judgment, forever barring him from asserting title to the property. It is submitted that the court's decision is consistent with the theory of devolutive appeals, for to hold that the execution of judgment is a bar to such an appeal would be to deny it in virtually every case.

In the other instant case, *Morgan City Co. v. Guarisco*, the court of appeal stated it was bound by the decision of the Supreme Court in the *Navarre* case. In that decision the doctrine of *Buntin v. Johnson* was applied strictly and without regard to the later jurisprudence giving paramount consideration to the true intention of the appellant. This seems to be inconsistent with the practice of the court in other types of cases[19] and as far as can be determined is confined to actions of jactitation. Perhaps the true rationale of the *Navarre* decision lies in the court's statement that any decision rendered on appeal would be vain and useless since the defendant's petitory action below would probably have been tried before the devolutive appeal could be passed on.[20] The court added that in cases where no practical results could be obtained an appeal would not be entertained.[21] It is true that under the particular facts of the instant

19. See cases cited note 13 *supra*.

20. 226 La. 876, 879, 77 So.2d 520, 521 (1955): "The act which the defendants seek to overturn by appeal has been fully performed and is now an accomplished fact. Any decision that this Court could render on the appeal would be useless. If we decided in favor of the plaintiff, we could only order the defendants to assert title or disclaim it. If we were to decide in favor of the defendants, it would be a vain and useless thing because the defendants have already filed a suit asserting title to the property in compliance with the judgment and any action on our part could not affect the trial of that suit. The suit now pending in the lower court will probably be heard and tried before this Court could pass on the appeal. In cases where no practical results can be obtained, this Court will not entertain the appeal."

21. 226 La. 876, 880, 77 So.2d 520, 521 (1955). The cases cited by the court for this proposition are, with one exception, cases in which a devolutive appeal from a judgment denying an injunction was dismissed after the thing sought to be enjoined had become an accomplished fact. State *ex rel.* Clement Betpouey, Jr. & Co. v. Jefferson Parish Waterworks District, 223 La. 566, 66 So.2d 338 (1953); Freret Civic Ass'n v. Orleans Parish School Board, 223 La. 407, 65 So.2d 893 (1953); Gulf Coast Construction Co. v. Adams, 165 La. 873, 116 So. 217 (1928); Turner v. New Orleans, 164 La. 1013, 115 So. 128 (1927); Carey v. Louisiana Highway Commission, 161 La. 435, 108 So. 874 (1926); Dunham v. Town of Slidell, 133 La. 212, 62 So. 635 (1913). The sole exception, Pettingill v. Hills, Inc., 199 La. 557, 565, 6 So.2d 660, 662 (1942), was a suit for a partition by licitation of certain common property. The party complaining of the homologation was granted a devolutive appeal. Execution was had on the judgment and the funds were distributed. The appellee's motion to dismiss the appeal was sustained, the court holding an appeal would be a useless thing because a reversal of the judgment ordering the partition and distribution of the funds would be

case the appellant's chances of a reversal were small, for the same reasons as in the *Norman* case. It is submitted, however, that it is not for the court to prejudge the issue, and the smallness of the possibility of reversal is not grounds for the denial or dismissal of an appeal. Where the plaintiff's possession is an appealable issue, the possibility of reversal is greatly increased. If the defendant does succeed in reversing the decision of the lower court on the issue of possession, the plaintiff in jactitation would be the proper party to bring the petitory action, with the consequent burden of proving title.[22]

The proposed Code of Civil Procedure has no provision for the jactitory action, but the possessory action has been broadened so that it includes all cases in which the action of jactitation is presently used.[23] Equally important, the relief granted in this broadened possessory action will be the same presently accorded a successful plaintiff in a jactitation suit.[24] As to the problem

without effect because "the court could not undo what has already been done by virtue of the judgment while it was executory, nor grant any order that could be enforced."

It is submitted that these decisions, with the possible exception of the *Pettingill* case, are sound authority for the dismissal of an appeal if it appears that a reversal would avail the appellant nothing. They are not, however, authority for the dismissal of an appeal on the basis that there is only a slight possibility of reversal.

22. LA. CODE OF PRACTICE art. 5 (1870) (quoted in note 5 *supra*); *id.* art. 44; "The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand." See Verdun v. Gilmore, 128 La. 1063, 55 So. 675 (1911); Rowson v. Barbe, 51 La. Ann. 347 (1899).

23. Proposed Code of Civil Procedure art. 3655: "The possessory action is one brought by the possessor of immovable property or of a real right to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted."

Article 3659 defines a disturbance in law: "A disturbance in law is the execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right *of* ownership or *to* the possession of immovable property or of a real right, or any claim or pretension of ownership or right to the possession thereof except in an action or proceeding, adversely to the possessor of such property or right."

24. *Id.* art. 3662: "A judgment rendered for the plaintiff in a possessory action shall:

"(1) Recognize his right to the possession of the immovable property or real right, and restore him to possession thereof if he has been evicted, or maintain him in possession thereof if the disturbance has not been an eviction;

"(2) Order the defendant to assert his adverse claim of ownership of the immovable property or real right in a petitory action to be filed within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief; and

"(3) Award him the damages to which he is entitled and which he has prayed for.

"A suspensive appeal from the judgment rendered in a possessory action may be taken within the delay provided in Article 2123, and a devolutive appeal may

of acquiescence, the proposed code does not purport to change the present law.[25] It is submitted, therefore, that the conclusion reached in the *Morgan City Co.* case would remain unchanged.

The need to provide a possessor with an expeditious means of clearing his title would seem to justify a limitation on the slanderer's right to appeal devolutively from a judgment in jactitation. This is recognized in the proposed new code.[26] However, the possibility of a prohibitively high suspensive appeal bond is reason enough for not denying the devolutive appeal altogether. The *Morgan City Co.* decision appears to impose an onerous condition on the right to a devolutive appeal. It is submitted that the alternative of the defendant in jactitation, to bring either a devolutive appeal without a petitory action, or a petitory action without a devolutive appeal, is not called for by the jurisprudence or by the Code of Practice.

William S. Moss, Jr.

SALES — LITIGIOUS REDEMPTION — PARTIAL TRANSFER

Plaintiff brought suit for breach of a contract to drill an oil well on his property. After trial on the merits in the district court, plaintiff died. Judgment was rendered in behalf of the administrator and defendant appealed to the Supreme Court. Subsequent to judgment in the district court, the four heirs of decedent were put into possession of the estate and were substituted for the administrator as parties plaintiff. Pending the appeal two of the plaintiffs sold their interests in the litigation to a third party who was substituted for them as party plaintiff. Shortly after learning of the transfer defendant filed a motion to remand to the district court in order to institute proceedings for

be taken from such judgment only within thirty days of the applicable date provided in Article 2087(1)-(3)."

Note that the final paragraph of Article 3662 will effect an important change, in that the period allowed for bringing the devolutive appeal will be limited to thirty days. This is only fifteen days longer than allowed for the bringing of a suspensive appeal and serves to minimize the opportunity of the defendant to employ dilatory tactics.

25. *Id.* art. 2085: "An appeal cannot be taken by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him. Confession of or acquiescence in a part of a divisible judgment or in a favorable part of an indivisible judgment does not preclude an appeal as to other parts of such judgment."

26. The last paragraph of Article 3662 of the Proposed Code of Civil Procedure provides for a devolutive appeal, but only if taken within thirty days of the applicable date. See note 24 *supra*.