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Procedural Delays

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By far the more comprehensive of these efforts is the Louisiana Code of Civil Procedure. The major changes in the procedural law which it will make have already been explained at a number of Institutes conducted by the Louisiana State Bar Association throughout the state. As helpful as these Institutes have been to the Bench and Bar of Louisiana, limitations of time have restricted these expositions of the new procedural Code to a series of panoramic surveys, and have prevented any "exploration in depth" of particular procedural concepts.

In this symposium, some members of the editorial staff of the Louisiana Law Review present detailed studies of some of the procedural rules of the new Code. The areas selected for these critical studies represent those segments of the new Code in which the largest number of major changes are concentrated.

A procedural system, no matter how painstaking its redaction or admirable its design, cannot provide an effective base for the administration of justice for any extended period if it remains static. A procedural concept or device bottomed on social and economic conditions prevailing at the time of its adoption may lose much or all of its original efficacy when these conditions change. For this reason, the study of the procedural system must be both a critical and a continuous one, so that necessary modifications or replacements may be made as soon as the need thereof becomes evident. I sincerely hope that this symposium commences that critical and continuous study of the Louisiana Code of Civil Procedure which I feel is absolutely necessary if the Code is to continue to serve the purposes of its adoption.

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Procedural Delays

The purpose of this Comment is to set forth the provisions in the Louisiana Code of Civil Procedure relative to procedural delays and to point out the changes which are made in the former law. For convenience the Comment is divided into twelve sections which cover both the new and the former law.

ANSWER

Generally the delay for filing an answer was governed by articles of the Code of Practice, in effect requiring that a de-

fendant answer within ten days after service of citation, with one additional day granted for each ten miles from the defendant's home to the place of trial, up to an overall maximum of fifteen days.[1] These articles also allowed the defendant additional time to plead in the discretion of the trial judge. Finally the defendant could answer within ten days after the disposition of exceptions.[2]

Article 1001 of the Louisiana Code of Civil Procedure[3] requires the defendant to file an answer within fifteen days after service of citation, or within ten days after exceptions filed prior to answer are overruled or referred to the merits. However, the court may grant additional time to plead. This article does away with the allowance of additional time for answering based on the distance from the court and fixes a flat period of fifteen days.

Aside from the general rules for answering, several special rules deserve attention: (1) There was no precedural rule formerly as to when an answer to an incidental demand had to be filed, and, in some instances, no answer was required at all.[4] Article 1035 of the new Code requires that the answer in an incidental action shall be filed in the same delays as that allowed by Article 1001, or at any time prior to a default judgment in the incidental action.[5] This recognizes the existence of an answer to incidental actions and definite delays for this answer. (2) Notwithstanding the general provisions, the law formerly allowed the defendant to file his answer at any time prior to the confirmation of a default against him.[6] No change is made in this provision by the new Code.[7] (3) The Code of Practice provided that the garnishee must answer within the usual delay.[8] The delay for answering a garnishment interrogatory is fixed at fifteen days in the new Code.[9] This change adopts the flat

1. LA. CODE OF PRACTICE arts. 180, 316 (1870).
2. LA. R.S. 13:3344 (1950).
3. LA. CODE OF CIVIL PROCEDURE art. 1001 (1960).
4. LA. R.S. 13:3385 (1950) allowed the third party defendant to answer. Article 384 of the Code of Practice required an answer to an intervention. There was a conflict on answer in a reconventional demand. See Loew's Inc. v. Don George Inc., 227 La. 127, 78 So.2d 534 (1955). See Comment, 21 LOUISIANA LAW REVIEW 220 (1960).
5. LA. CODE OF CIVIL PROCEDURE art. 1035 (1960). The word default in this article refers to a *preliminary* default, and not confirmation of a final judgment by default.
6. LA. CODE OF PRACTICE arts. 314, 317 (1870).
7. LA. CODE OF CIVIL PROCEDURE art. 1002 (1960).
8. LA. CODE OF PRACTICE art. 262 (1870).
9. LA. CODE OF CIVIL PROCEDURE art. 2412 (1960).

period of fifteen days, which is the same as the general delay for answering.

Under the new law, the delay for answering in city courts is five days, exclusive of legal holidays, from the date of service.[10] This represents a change in the law, since formerly there were different provisions depending upon the location of the court. Thus, in New Orleans the delay for answering was fixed at three days,[11] and in the rest of the state it was ten days after service.[12] The Revised Statutes provided for one other situation which merits mention. In all parts of the state except New Orleans, where concurrent jurisdiction existed betwen the district court and the justice of the peace court and where the amount involved was under $100, the procedure used was generally the same as was used in city courts. When the defendant did not answer timely, or had confessed judgment, a final judgment could be rendered and signed by either the judge or the clerk of the district court.[13] When the clerk rendered the judgment he had to note all the documents and oral evidence in a book, known as the clerk's book.[14] Articles 4971 and 4972 of the new Code make no change in the procedure in cases falling under the clerk's book statute.

APPLICATION FOR A NEW TRIAL

Under both the former law and the new law, the delay for applying for a new trial depends in part on the date of the rendition and signing of the judgment. Formerly,[15] all judgments, the civil district court of New Orleans excepted, had to be signed within three *calendar* days of rendition. According to Code of Practice Article 546 the judge in New Orleans could not sign a judgment until three *judicial* days after rendition of the judgment. An application for a new trial or rehearing had to be filed (1) in Orleans Parish before the judgment was signed, and (2) in the rest of the state either before the judgment was signed

10. *Id.* arts. 4895, 4921, 4922, 5002. Apparently, Article 5002 applies to all parts of the state. It should be noted there is no difference based on the amount of the dispute, whether over or under $100.

11. LA. R.S. 13:1951, 1877, 1971 (1950); LA. CODE OF PRACTICE art. 1082 (1870). It should be noted there is no difference based on the amount of the dispute whether over or under $100.

12. LA. CODE OF PRACTICE art. 1082 (1870).

13. LA. R.S. 13:3331-3347 (1950).

14. This statute was known as the clerk's book statute. The Reporter's Comments after Articles 4941 and 4942 of the new Code point out that justices of the peace in these cases would use this same city court procedure.

15. LA. R.S. 13:4212 (1950).

or within three days of rendition if the judgment had been signed before this three days expired.[16] There were certain exceptions to these rules. The Code of Practic provided two exceptions to the allowance of three days from rendition:[17] (1) Where the judge signed the judgment in a different parish from that where the case was tried, the procedural delays did not commence until the clerk of the parish where the case was tried issued notice of the judgment to the sheriff and he served the notice on the parties or their counsel. (2) If any party or attorney of record in any cause was a nonresident of the parish in which the cause was pending, he could deposit fifty cents and require notice of the judgment by the clerk before the delays commenced. There was another exception found in the Revised Statutes, which provided that in all matters taken under advisement by the judge, the clerk of court had to notify all litigants of the entry of any order or judgment.[18] The three-day delay for applying for a new trial did not commence until this notice of rendition by the clerk.

The time of the rendition and signing of the judgment has been changed in the new Code. Article 1911 provides: "Except as otherwise provided by law, all final judgments shall be read and signed in open court." It should be noted that no time limit is imposed on the judge, but it is contemplated by the redactors that the judge will sign within a reasonable time. Article 1913 requires that "notice of the signing of a default judgment against a defendant on whom citation was not served personally, and who filed no exceptions or answer, shall be served on the defendant by the sheriff. Notice of the signing of all other final judgments shall be mailed by the clerk of court of the parish where the case was tried to the counsel of record for each party, and to each party not represented by counsel." Article 1974 provides that the delay for applying for a new trial shall be three days, exclusive of holidays, the delay commencing to run on the day after the clerk has mailed notice of the judgment. Consequently the time for applying for a new trial is made uniform and the necessity of complying with the various exceptions in order to obtain notice of the judgment before the delays for

16. *Id.* 13:4213. See also Comment, 21 LOUISIANA LAW REVIEW 228 (1960).
17. LA. CODE OF PRACTICE art. 543 (1870).
18. LA. R.S. 13:3344-3345 (1950). These statutes required notice where the case was taken under advisement. There would appear to be some question as to whether the court would have granted additional time where the clerk failed to give the required notice. However, it is submitted that additional time would have been granted.

applying for a new trial begin to run is eliminated. Under the new law the attorney is given a positive starting time for the running of the delay for applying for a new trial. It should be noted that there is no provision in the new Code for a rehearing in the trial court.

ACTION OF NULLITY

The Code of Practice divided the action for nullity into two classes, that for vices of form, and that for vices of substance.[19] Although there was no express statutory rule on the time for allowing a judgment to be attacked for a vice of form (absolute nullity), the jurisprudential rule was that such a judgment could be attacked at any time unless there had been an acquiescence in the judgment.[20] This rule was expressed in *Brana v. Brana*,[21] which held that the judgment of any tribunal in a matter in which it lacked jurisdiction ratione materiae was an absolute nullity, and could be treated as such whenever and wherever it was sought to be made a ground of action or defense. As for vices of substance, the Code of Practice allowed one year to attack the judgment from the time the fraud or ill practice was discovered.[22] Articles 2002, 2003, and 2004 of the new Code make no change in the former law with respect to the time for attacking the nullity of a judgment.

DELAY FOR CONFIRMING A DEFAULT

If the defendant neither appeared nor filed his answer within two days exclusive of Sundays and legal holidays after the pre-

19. LA. CODE OF PRACTICE art. 606 (1870) set out the Vices of Form:
"(1) If a judgment has been rendered . . . against a person disqualified by law from appearing in a suit, as a minor without the assistance of his curator . . .
"(2) If the defendant . . . have been condemned by default without having been cited;
"(3) When the judgment . . . has nevertheless been given by a judge incompetent to try the suit . . . .
"(4) If the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him."
Id. art. 607 sets out the Vices of Substance: "A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or other ill practices on the part of the party in whose favor it was rendered. . . ."

20. Brana v. Brana, 139 La. 305, 71 So. 519 (1916); Andrews v. Sheehy, 122 La. 464, 47 So. 771 (1908); Key v. Jones, 181 So. 631 (La. App. 1938). LA. CODE OF PRACTICE art. 612 (1870) provides that there should be no attack on an incompetent judge or attack for not being properly cited, if he was in the parish and let the judgment be executed. A jurisprudential rule provided for the acquiescence of judgment. Succession of Corrigan, 42 La. Ann. 65, 7 So. 74 (1890); Andrews v. Sheehy, 125 La. 217, 51 So. 122 (1910).

21. 139 La. 305, 71 So. 519 (1916).

22. LA. CODE OF PRACTICE art. 613 (1870).

liminary default was rendered, definitive judgment was given for the plaintiff provided he proved his demand.[23] Since the decision in *Frank v. Currie*,[24] Saturdays as well as Sundays were excluded. Article 1702 of the Louisiana Code of Civil Procedure makes no change as to the time allowed for confirming a default.[25]

DELAY FOR TAKING AN APPEAL

Under both the former and the new law, the delays for taking an appeal may be divided into two general classes — those for taking a devolutive appeal, and those for taking a suspensive appeal. The Code of Practice provided that no devolutive appeal, except as regards minors, could be taken after a year had expired, to be computed from the day on which the final judgment was rendered.[26] With reference to minors the delay was computed from the day on which they became of age. The same article provided that in cases questioning the validity of bonds or certificates of indebtedness of any public board or political subdivision, no appeal could be taken after thirty days from the day judgment was rendered. Under the Revised Statutes an application for a new trial or rehearing suspended the running of the time in which appeals could be taken.[27] Thus in *Caspari v. Osborne*,[28] the court held that the delay for appeals did not commence with rendition, but started as of the effective date of the judgment. This was the date on which the delays for applying for a new trial or rehearing expired, or if applied for timely, the date of refusal of the application.

Article 2087 of the new Code provides that:

> "Except as otherwise provided by law, an appeal which does not suspend the execution of an appealable order or judgment may be taken, and the security furnished, only within 90 days of:
>
> "(1) The expiration of the delay for applying for a new trial as provided by Article 1974, if no application has been filed timely;

23. *Id.* art. 312.
24. 172 So. 843 (La. App. 1937).
25. LA. CODE OF CIVIL PROCEDURE art. 1702 (1960): "If no answer is filed timely, this confirmation may be made after two days, exclusive of holidays."
26. LA. CODE OF PRACTICE art. 593 (1870).
27. LA. R.S. 13:4214 (1950).
28. 169 La. 983, 126 So. 500 (1930). See also Lacaze v. Hardee, 7 So.2d 719 (La. App. 1941); Comment, 9 LOUISIANA LAW REVIEW 509 (1949).

"(2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or

"(3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914."

This article reduces the time for taking a devolutive appeal from one year to ninety days. It also makes the delay for the taking of a devolutive appeal dependent upon the rules for application for a new trial.

Formerly, a suspensive appeal could be taken at any time before the judgment became executory.[29] Judgments became executory ten days, exclusive of Sundays, after the expiration of the delay to apply for a new trial, or ten days from the rejection of the application for a new trial. The new Code allows a suspensive appeal to be taken only within fifteen days of (1) the expiration of the delay for applying for a new trial, (2) the court's refusal to grant a timely application for a new trial if the appellant is not entitled to notice of this refusal, and (3) the date of the mailing of notice of the refusal, if the appellant is entitled to notice under Article 1914.[30] This increases the time for applying for a suspensive appeal from ten to fifteen days and also provides for a uniform date for the commencing of the running of the delay.

There were other rules under the former law which governed appeals in specific types of cases. Revised Statutes 13:4452 allowed no appeal on a judgment of separation or divorce after thirty days from the judgment. Any appeal from a preliminary injunction had to be made within ten days from the entry of such order or decree.[31] Article 307 of the Civil Code required that an appeal from a judgment appointing or removing a tutor had to be made within thirty days of the nomination or confirmation. Formerly there was no definite time for appealing

29. LA. R.S. 13:4212 (1950).

30. LA. CODE OF CIVIL PROCEDURE art. 2123 (1960): ". . . an appeal . . . may be taken . . . only within 15 days of:

"(1) The expiration of the delay for applying for a new trial, as provided by Article 1974, if no application has been filed timely;

"(2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or

"(3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914."

31. LA. R.S. 13:4070 (1950).

from a judgment appointing or removing a curator.[32] Another rule was set forth in the case of *State* ex rel. *Mallu v. Judge*,[33] which held that an appeal from a judgment of eviction must be made within twenty-four hours of rendition.

There is no change in the new Code in the time to appeal from a judgment of separation, divorce, or annulment, nor is there any change in the time for appealing from a judgment of eviction.[34] Similarly, there is no change in the time to appeal from a judgment appointing or removing a tutor, but the starting date is changed to allow the delay to commence in accordance with the delay for taking a regular suspensive appeal.[35] A definite time of thirty days is set forth in Article 4548 for appealing from a judgment appointing or removing a curator, the period to begin in the same manner as provided for taking a suspensive appeal in Article 2123. This is a complete change, as there was no definite time for such an appeal under the former law.[36] The time for appealing from a preliminary injunction is changed from ten to fifteen days[37] to be consistent with the new delay for applying for a suspensive appeal.

There was also a separate set of rules for appealing from city courts in certain areas. A suspensive appeal from a city court in New Orleans where the amount was less than $100 had to be taken within ten days of the rendition of the judgment.[38] If the amount was over $100, the period within which to appeal was ten days, exclusive of Sundays, from the judgment.[39] Only New Orleans had these special statutes; the time for appealing in the rest of the state was the same as that for appealing from the district courts. One year was allowed for a devolutive appeal in all city courts except that of New Orleans, where the applicable delay was the same for a devolutive as for a suspensive appeal.[40] Under the new Code the delay for appealing from city

32. LA. CIVIL CODE art. 395 (1870).
33. 128 La. 914, 55 So. 574 (1911).
34. LA. CODE OF CIVIL PROCEDURE art. 3942 (judgment of separation, divorce, or annulment), art. 4735 (judgment of eviction) (1960).
35. *Id.* art. 4068. Under Civil Code Article 307 the thirty-day period commenced on the day of the judgment decreeing the nomination or confirmation. This new Code article makes the starting date depend on the correct time set out in the three classes in Article 2123. (These three are set out in note 30 *supra.*)
36. LA. CODE OF PRACTICE art. 395 (1870). This article sets out the appointment, but no time is given. See LA. CODE OF CIVIL PROCEDURE art. 4548, Reporter's Comments (1960).
37. LA. CODE OF CIVIL PROCEDURE art. 3612 (1960).
38. LA. R.S. 13:1951 (1950); LA. CODE OF PRACTICE art. 1131 (1870).
39. LA. R.S. 13:1971 (1950).
40. It is submitted that since the special statute was only applicable to New

courts is fixed at ten days in all cases.[41] This changes the number of days for appealing only in New Orleans city courts. However, the starting date for the delay for appealing is changed in cases involving more than $100. The new Code provides that the delay starts after the expiration of the delay for a new trial, or the denial of a new trial if one is applied for.[42] Under the former law the delay started as of the signing of the judgment.[43]

APPELLATE DELAYS

Under the former law the judges were required to fix the return day for appeals in the order granting the appeal. In all cases appealable to the Supreme Court and to the First and Second Circuits of the Courts of Appeal, the return day had to be fixed at not less than fifteen nor more than sixty days.[44] However, the return day for appeals from the district court to the Court of Appeal for the Parish of Orleans was required to be not less than fifteen nor more than thirty days from the date of the order granting the appeal. The new Code requires the trial court to fix the return day of the appeal in the order granting the appeal at not more than sixty days from the date the appeal is granted.[45] This article establishes a uniform period in all appellate courts with discretion still left in the judge to extend the return day for sufficient cause. The fifteen-day minimum is done away with and the maximum is raised in the Orleans Court of Appeal from thirty to sixty days.

In *New Iberia National Bank v. Lyons*,[46] the Supreme Court announced a rule of practice by which the appellant was allowed

Orleans, the general rule was applicable to appeals from city courts elsewhere in the state.

41. LA. CODE OF CIVIL PROCEDURE art. 4899 (less than $100 everywhere except New Orleans), art. 4922 (less than $100 for New Orleans), art. 5002 (more than $100 for entire state) (1960). Although the statute in question is not express, it is submitted that Article 5002 does apply to New Orleans as well as the rest of the state.

There is one exception provided for in Article 4972. This is the provision covering the old clerk's book statute for cases outside of New Orleans where the district court and the justice of the peace court had concurrent jurisdiction. There the delay was the same as in city courts.

42. *Id.* art. 5002.

43. LA. R.S. 13:1971 (1950).

44. *Id.* 13:4437 (sets the return day for the Orleans Court of Appeal), 13:4438 (sets the return day for the Supreme Court and courts of appeal, New Orleans excepted).

45. LA. CODE OF CIVIL PROCEDURE art. 2125 (1960). This article appears in LA. R.S. 13:4446 (1950) and applies to both civil and criminal cases. It was not repealed in connection with the adoption of the new Code so that it would still apply to criminal cases.

46. 164 La. 1017, 115 So. 130 (1927).

a three-day period of grace following the original return day within which to file the transcript. In addition, he might apply for an extension of the period in which he could file the transcript. If the transcript was not filed within the three days or within the granted extension, there were no further days of grace allowed.[47] It should be noted that under the former law the jurisprudence appeared to hold that it was the duty of the appellant to file the record when an appeal was taken to the Supreme Court and the Orleans Court of Appeal,[48] but that it was the duty of the clerk of court when an appeal was taken to the other courts of appeal. Article 2127 of the new Code places the duty of filing the transcript on the clerk of the trial court. He must lodge it by the return day or any extension thereof, but a failure of the clerk to comply will not prejudice the appeal. This article eliminates the former rule which permitted filing of the transcript within three days of the return day. It also places a uniform duty on the clerk to file the transcript.

Although there was some conflict on the point in the Code of Practice, it was settled that no answer was required by the *appellee*.[49] However, if the appellee did answer, he had to do so at least three days before the date for argument, provided that in the courts of appeal such answers would be allowed before argument within the first three days of the term.[50] No answer was necessary if the appellee sought only a confirmation of the judgment.[51] Article 2133 of the new Code makes clear that an appellee shall not be required to file an answer, but if he does, it must be not later than fifteen days after the return day or the lodging of the record, whichever is later. This changed the rule permitting filing of an answer three days before argument or within the first three days of the term.

A jurisprudential rule required the appellee to file his mo-

47. New Iberia Nat. Bank v. Lyons, 164 La. 1017, 115 So. 130 (1927).

48. LA. CODE OF PRACTICE art. 585 (1870). This article placed the duty of preparing the record on appeal upon the clerk of the trial court. This was the position taken by the first and second circuit courts of appeal. Succession of Bickham, 197 So. 924 (La. App. 1940); Wilson v. Lee, 196 So. 373 (La. App. 1940).

LA. CODE OF PRACTICE arts. 587, 883, 884 (1870) indicated that it was the duty of the appellant to have the record lodged on time. This was the position taken by the Supreme Court and the Orleans Court of Appeal. Cann v. Ruston State Bank, 155 La. 283, 99 So. 221 (1924).

49. LA. CODE OF CIVIL PROCEDURE art. 2133, Reporter's Comment (a) (1960).

50. LA. CODE OF PRACTICE art. 890 (1870).

51. *Cf. id.* art. 890. This article provided that the appellee could answer up until the day of argument if he sought only a confirmation of the judgment with costs. However, in practice no answer was required.

tion to dismiss levelled at an error or irregularity in the order of the appeal or appeal bond within three days after the return day or extended return day.[52] Of course, the appellant had to be allowed a chance to correct the error. Article 2161 of the new Code codifies these rules.

An aggrieved party could apply for a rehearing in all the appellate courts within fourteen days of the rendition of the judgment.[53] A 1958 amendment to Louisiana Constitution Article VII, Section 24, requires notice of the rendition of judgment in the courts of appeal before the commencement of the delay. This constitutional amendment changed the law only for the Orleans Court of Appeal, as notice was already required by the other courts of appeal. Article 2166 of the new Code allows a party to apply to an appellate court for a rehearing for fourteen days after notice of the rendition of the judgment. This article also reiterates the requirement of notice of the judgment before the delay for applying for a rehearing begins.

DELAY FOR PLEADING EXCEPTIONS

Code of Practice Article 333 required that all dilatory and declinatory exceptions be pleaded *in limine litis,* before issue joined. The meaning of these terms was unclear and unworkable in practice,[54] and in the case of *Phipps v. Snodgrass,*[55] it was held that these exceptions could be filed before answer or judgment by default. Article 333 also required that all *dilatory* exceptions be filed at the same time. In *State v. Younger,*[56] it was held that under Article 333, declinatory exceptions as well as dilatory exceptions properly speaking had to be filed at the same time. Article 928 of the new Code codifies the test of *Phipps v. Snodgrass,* and requires that declinatory and dilatory exceptions be filed before answer or confirmation of judgment by default;[57] thus there is no change from the former law. There

52. Esparros v. Vicknair, 191 La. 193, 184 So. 745 (1938); D'Angelo v. Nicolosi, 188 La. 326, 177 So. 64 (1937).

53. LA. CONST. art. VII, § 24; LA. R.S. 13:4446 (1950). One exception was provided in R.S. 13:4446. This was the case of a de novo appeal from the city court in New Orleans directly to the court of appeal in cases involving $100 or less. In such cases the party had five days to apply for a rehearing.

54. LA. CODE OF CIVIL PROCEDURE art. 928, Reporter's Comment (1960).

55. 31 La. Ann. 88, 90 (1879). "We held in this case that it was too late after judgment by default or answer, to plead to the jurisdiction of the court ratione personae."

56. 206 La. 1037, 20 So.2d 305 (1944). See also Note, 19 TUL. L. REV. 460 (1945).

57. LA. CODE OF CIVIL PROCEDURE art. 928 (1960): "The declinatory exception

is also no change in the new Code from the rule requiring that declinatory and dilatory exceptions be filed at the same time.[58]

Succession of Douglass[59] recognized the rule of Code of Practice Article 346[60] that a peremptory exception could be filed at any stage of the proceeding previous to definitive judgment. They could even be filed in appellate courts. No change is contemplated in the new Code in the the time for filing the peremptory exception.[61]

DELAYS FOR INCIDENTAL DEMANDS

Under the former law the time for filing an incidental demand varied with the nature of the particular demand. Compensation could be demanded at any stage of the proceeding though in practice this was not allowed to retard the progress of the suit.[62] The Code of Practice was silent as to when a reconventional demand could be filed, but in practice it had to be filed before answer so as not to change the issues.[63] The third party practice act did not contain rules as to when a petition for a third party demand could be made. Intervention had to be filed in such time as not to retard the progress of the suit.[64] The Code of Practice was silent on third opposition, though it had to be filed before judicial sale.[65] Article 1033 of the new Code allows incidental demands to be filed up to and including the time of the answer to the principal demand and later with leave of court, if it will not retard the progress of the principal action. This article provides a definite time limit for the incidental actions, which was lacking in the former law. The article continues to recognize the notion that the filing of the incidental demand cannot retard the progress of the suit.

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and the dilatory exception shall be pleaded prior to answer or judgment by default. When both exceptions are pleaded, they shall be filed at the same time. . . . The peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision."

58. *Ibid.*

59. 225 La. 65, 72 So.2d 262 (1954) (the appellate court has discretion to consider a peremption exception so filed, or not.) See also *Work of the Louisiana Supreme Court — Civil Procedure*, 15 LOUISIANA LAW REVIEW 376, 393 (1955).

60. LA. CODE OF PRACTICE art. 346 (1870): "Peremptory exceptions, founded on law, may be pleaded in every stage of the action, previous to the definitive judgment; . . ." There were exceptions to this article in LA. R.S. 13:5063-5064 (1950) which will not be considered here.

61. See LA. CODE OF CIVIL PROCEDURE art. 928, Reporter's Comment (1960).

62. LA. CODE OF PRACTICE art. 367 (1870). See LA. CODE OF CIVIL PROCEDURE art. 1033, Reporter's Comment (1960).

63. LA. CODE OF CIVIL PROCEDURE art. 1033, Reporter's Comment (1960).

64. LA. CODE OF PRACTICE art. 391 (1870).

65. LA. CODE OF CIVIL PROCEDURE art. 1033, Reporter's Comment (1960).

DELAY BEFORE EXECUTION OF JUDGMENT

The Code of Practice provided that the party in whose favor a judgment was rendered could only proceed to the execution after the delay for a suspensive appeal had elapsed.[66] There were decisions to the effect that an execution before the expiration of the delay was not ipso facto null, but the defendant would be counted as having ratified the execution by failing to apply timely for a suspensive appeal.[67] No change is made in the new Code concerning the delay by the party in whose favor a judgment was rendered before having the judgment executed.[68]

FINALITY OF JUDGMENT IN THE APPEAL COURT

Under the former law a judgment became final if the Supreme Court when the delay for a rehearing expired, or when the Supreme Court denied the application where such an application was timely filed.[69] In the courts of appeal the judgment became final when the delay for a rehearing expired, or thirty days after the denial of a rehearing where one was timely applied for, if no application for a writ to the Supreme Court was made, and when the Supreme Court denied the writ where application for one was made.[70] The new Code codifies this procedure.[71]

DISMISSAL FOR WANT OF PROSECUTION

The Civil Code provided that if five years elapsed and there was no prosecution of a suit, it was considered abandoned.[72] The new Code of Civil Procedure carries forward this rule and repeals the Civil Code article.[73]

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66. LA. CODE OF PRACTICE art. 624 (1870).

67. Wheeling Pottery Co. v. Levi, 48 La. Ann. 777, 19 So. 752 (1896); Sowle & Ward v. Pollard, 14 La. Ann. 287 (1859).

68. LA. CODE OF CIVIL PROCEDURE art. 2252 (1960): "A judgment creditor may proceed with the execution of a judgment only after the delay for a suspensive appeal therefrom has elapsed."

69. LA. CONST. art. VII, § 11: ". . . provided, however, that the Supreme Court shall in no case exercise the power conferred by this Article unless the application shall have been made to the court or to one of the justices thereof within thirty days after a rehearing shall have been refused by the Court of Appeal; and provided further, that the judgment of the Court of Appeal shall not become executory until the expiration of thirty days; or, in cases in which application is made for the writ of review, or other writs, until the decision of the Supreme Court upon the application shall have become final." LA. R.S. 13:4446 (1950).

70. See note 69 *supra*.

71. LA. CODE OF CIVIL PROCEDURE art. 2167 (1960).

72. LA. CIVIL CODE art. 3519 (1870): "Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same."

73. LA. CODE OF CIVIL PROCEDURE art. 2165 (1960).

SUPERVISORY JURISDICTION

Article VII, Section 10, of the Louisiana Constitution gives the Supreme Court control and general supervision over inferior courts, including the authority to determine the delays for applying for supervisory writs. The new Code makes no change in this area.[74]

EFFECTIVE DATE OF THE CODE

Act 15 of 1960 provides in Section 4(B)(2)(a) that none of the provisions of the new Code shall decrease or shorten any procedural delay granted or allowed by any law in existence immediately prior to, and which had commenced to run but had not yet completely elapsed on, the effective date of this act. An example of the importance of this provision is found in the devolutive appeal. If judgment is rendered on December 1, 1960, the appellant will still have one year to appeal even though the new Code goes into effect January 1, 1961, and would allow only ninety days for a devolutive appeal.

Sam J. Friedman

Venue

The section of the Code of Civil Procedure entitled "Venue" contains the provisions relating to the parish in which an action must or may be brought. Some special venue provisions are found in other sections of the Code, as well as the Revised Statutes, but the over-all result has been a comprehensive consolidation of the rules of venue and the elimination of much duplication.[1]

The concept of jurisdiction in Louisiana was formerly subdivided into jurisdiction ratione materiae and jurisdiction ra-

74. *Id.* art. 2201.

1. The 1960 acts, in conjunction with the Code of Civil Procedure, amended or repealed 11 articles of the Revised Civil Code and 20 provisions of the Revised Statutes of 1950 on the subject of venue. With regard to the Code of Practice of 1870, approximately 34 articles dealt with venue, either directly or indirectly.

The venue provisions now found in the Revised Statutes are of a particularized nature, not warranting inclusion in the Code itself. The venue provisions formerly found in the Civil Code were removed, and only matters relating to the cause of action remain. Examination of the acts of 1960 reveals that the following articles of the Louisiana Civil Code relating to venue were either repealed or amended so as to remove the venue provision: Articles 142, 307, 935, 1101, 1113, 1114, 1162, 1193, 1210, 1327.