Louisiana Law Review

Volume 21 | Number 2
The Work of the Louisiana Supreme Court for the 1959-1960 Term
February 1961

Civil Procedure

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PARTIES

In *Teamsters Local Union No. 5 v. Tasty Baking Co.*,[1] the plaintiff labor union sought injunctive relief against the alleged breach by the defendant of the provisions of a labor contract. A temporary restraining order obtained on the ex parte application of the plaintiff was dissolved on motion of the defendant, on the ground that an unincorporated association has no procedural capacity to sue.[2] When plaintiff sought an appeal, the trial court refused to grant it on the ground that no final, appealable judgment could be rendered until after the trial of the case on its merits. Under supervisory writs, the Supreme Court ordered the trial court to grant an appeal to the proper appellate court. The technical validity of the trial court's position was recognized by the Supreme Court, but it held that, since a trial of the case on its merits could only result in a judgment of dismissal based on the same grounds as for the dissolution of the restraining order, the appeal should be granted immediately.

The rules on the subject of indispensable parties were applied in an expropriation proceeding where the sole defendant owned only a half interest in the property sought to be expropriated, and the usufruct of the other half owned by his children. The latter were held to be indispensable parties to the proceeding, and the appellate court remanded the case to permit the joinder of the children.[3]

The same results would obtain under the Louisiana Code of Civil Procedure.[4] In the new Code, however, the completely different subjects of necessary parties and indispensable parties are kept distinct, and the rules which apply to each are set forth clearly.[5] In the great majority of Louisiana cases, including the

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1. 239 La. 15, 117 So.2d 829 (1960).
2. Cf. LA. CODE OF CIVIL PROCEDURE art. 689 (1960).
3. Tennessee Gas Transmission Co. v. Derouen, 239 La. 467, 118 So.2d 889 (1960).
4. LA. CODE OF CIVIL PROCEDURE arts. 641, 646 (1960).
5. See *id.* arts. 641-647.

one now being reviewed, these two subjects are confused by treating the two terms as being synonymous.

PLEADINGS

Exceptions

The defendant, in *Hungerford v. Hungerford*,[6] pleaded exceptions to the jurisdiction of the court *ratione personae* and *ratione materiae* together, without pleading the former first and the other in the alternative, and with full reservation of all of his rights under the first. The trial court, following the *Garig* case,[7] held that defendant had thereby waived his exception to the jurisdiction *ratione personae* by pleading it with his exception to the jurisdiction *ratione materiae*. The Supreme Court granted supervisory writs to review this ruling of the trial judge; but, after a hearing, recalled its writs and followed the *Garig* case.

The *Hungerford* case was decided prior to the legislative adoption of the Louisiana Code of Civil Procedure. In a concurring opinion, Mr. Justice McCaleb expressed a reluctance to follow the hypertechnical subtlety of the *Garig* case, pointed out that it would be overruled by the proposed new Code,[8] and expressed the hope that the latter would be duly adopted. The learned Justice's hope was realized just three days before the Supreme Court refused a rehearing in the *Hungerford* case; although, of course, the effective date of the new Code was postponed until January 1, 1961.

The Reconventional Demand

Two cases during the past term, decided quite correctly by the Supreme Court under the rules of the Code of Practice, illustrate the need for the changes in the procedural law regu-

6. 240 La. 24, 121 So.2d 226 (1960).

7. George W. Garig Transfer, Inc. v. Harris, 226 La. 117, 75 So.2d 28 (1954), 15 LOUISIANA LAW REVIEW 849 (1955).

8. By LA. CODE OF CIVIL PROCEDURE art. 925 (1960), which provides that two or more objections, such as improper venue, lack of jurisdiction over the person of the defendant, lack of jurisdiction over subject matter, are pleaded in the declinatory exception, these objections "need not be pleaded in the alternative or in any particular order."

A similar scuttling of the "sacred order" rule of the *Garig* case is effected by *id.* art. 928, which requires the pleading of the declinatory and dilatory exceptions at the same time. This article provides that "these exceptions need not be pleaded in the alternative or in a particular order."

lating the reconventional demand which have been made by the new Code.

The Supreme Court's refusal to dismiss the appeal in *Jones v. Jones' Estate*[9] is not based on grounds sufficiently noteworthy to warrant discussion here. What is important for present purposes is the Code of Practice rule, presented obliquely in the *Jones* case, that a reconventional demand must either be connected with or related to the main demand, when both of the parties reside in the same parish. This limitation has been removed by the new Code, which has abolished the former requirements of either connexity or diversity of residence, and now permits the defendant to reconvene against the plaintiff on any cause of action.[10]

Johnson v. Wilson[11] primarily involves factual issues, but one point of law squarely decided by the Supreme Court merits attention here. This case involved an intersectional collision, which each party alleged was due to the negligence of the other. A trial court jury rendered verdicts which rejected the plaintiff's demand for damages, and awarded damages to the defendant under his reconventional demand. The case was affirmed by the intermediate appellate court;[12] but under certiorari the Supreme Court reversed, and held that the defendant's reconventional demand was barred by his contributory negligence.

The interesting point in this case hinges on the defendant's objections to proof of his contributory negligence on the ground that this defense to the reconventional demand had not been pleaded by the plaintiff. Under the jurisprudence interpreting pertinent Code of Practice articles,[13] exceptions are not permitted and an answer is not required in reconvention.[14] These rules, quite proper under the Code of Practice, are based on the theory that exceptions and an answer to a reconventional demand are replicatory pleadings. Actually they are not, since they are pleaded to the new demand which the defendant has injected into the case; and these pleadings would serve the same function in the reconventional demand as they serve in any other incidental action.

9. 238 La. 309, 115 So.2d 361 (1959).
10. LA. CODE OF CIVIL PROCEDURE art. 1061 (1960).
11. 239 La. 390, 118 So.2d 450 (1960).
12. Johnson v. Wilson, 97 So.2d 674 (La. App. 1957).
13. LA. CODE OF PRACTICE arts. 329, 375 (1870).
14. See Loew's, Inc. v. Don George, Inc., 237 La. 132, 110 So.2d 553 (1959), and cases cited therein.

The facts of the *Johnson* case illustrate these points. The decision of the Supreme Court is based on the procedural rules that responsive pleadings to a reconventional demand are unnecessary; and that every defense to a reconventional demand, factual or legal, is considered as pleaded by effect of law. Yet the same reasons which require a defendant to plead the affirmative defense of contributory negligence particularly should require the same plea of a defendant in reconvention.

The new Code permits exceptions, and requires an answer, to be filed to a reconventional demand.[15]

DISCOVERY

State v. Buckman[16] presented an interesting application of one section of the Depositions and Discovery Act.[17] On ex parte motion in an expropriation proceeding, the trial court had ordered the plaintiff to produce its written contracts with, and instructions to, the real estate experts plaintiff had employed to estimate just compensation for the property taken. Under supervisory writs, the Supreme Court ordered the trial court to vacate this order. This action appears justified by the plain language of the statutory provision. Since the defendant had not shown "that denial of production and inspection [of these documents] would unfairly prejudice [it] in preparing [its claim] or will cause [it] undue hardship or injustice," the trial court should not have ordered the production of these documents "prepared in anticipation of litigation or in preparation for trial."

The first paragraph of this statutory section is based on Rule 30(b) of the Federal Rules of Civil Procedure. The second paragraph thereof, which was invoked here, was added by the Louisiana State Law Institute to cover the situation of the *Hickman* case,[18] and to prevent the compulsory production of the "work product" of a party's attorney, agent, or expert. This provision has been retained in the new procedural Code.[19]

15. LA. CODE OF CIVIL PROCEDURE arts. 1034, 1035 (1960). While these rules make no change in the procedural law with respect to the other incidental demands, they definitely work a change in the rules regulating the reconventional demand.

16. 239 La. 872, 120 So.2d 461 (1960).

17. LA. R.S. 13:3762 (1950).

18. Hickman v. Taylor, 329 U.S. 495 (1947).

19. LA. CODE OF CIVIL PROCEDURE art. 1452 (1960).

ACTION OF NULLITY OF JUDGMENT

Tracy v. Dufrene[20] presented a most interesting, but by no means novel, question. There, the Supreme Court held that an action to annul a judgment on the ground of its *absolute nullity* need not be instituted in the court which rendered the judgment. Under the settled jurisprudence, the Code of Practice rule[21] that the action of nullity must be instituted in the court which rendered the judgment was held applicable only to actions to annul *voidable* judgments, and not to those asserting their absolute nullity.

The same rule obtains under the new procedural Code.[22]

APPELLATE JURISDICTION

The Supreme Court again filled its quota of cases transferred to the intermediate appellate courts because of the failure of the record to establish affirmatively the appellate jurisdiction of the transferring court.[23] The cases transferred are of importance now only to the legal historian. The recent appellate reorganization has ended, once and for all, this enormous waste of professional and judicial energies.

APPELLATE PROCEDURE

The rules of appellate procedure applied in the cases decided by the Supreme Court during the past term make an interesting comparison with those contained in the new procedural Code.

In *Succession of Franz,*[24] an executor was permitted to appeal from a judgment insofar as it was unfavorable to him, despite the fact that he had accepted payment of the portion of the

20. 240 La. 232, 121 So.2d 843 (1960).

21. LA. CODE OF PRACTICE art. 608 (1870).

22. See Comments under LA. CODE OF CIVIL PROCEDURE arts. 2002, 2006 (1960).

23. See McBride v. McBride, 238 La. 270, 115 So.2d 346 (1959); Nolen v. Bennett, 238 La. 364, 115 So.2d 381 (1959); Katz v. Singerman, 238 La. 915, 117 So.2d 56 (1960); Talbert v. Tyler, 239 La. 1, 117 So.2d 824 (1960); Succession of Williams, 239 La. 21, 117 So.2d 832 (1960); Burr v. McCaleb, 239 La. 80, 117 So.2d 918 (1960); Leiter Minerals, Inc. v. California Co., 239 La. 116, 118 So.2d 124 (1960); State v. Orleans Parish School Board, 239 La. 224, 118 So.2d 127 (1960); Ralph's Fleet, Inc. v. American Marine Corp., 239 La. 435, 118 So.2d 877 (1960); Food Town, Inc. v. Town of Plaquemine, 239 La. 439, 118 So.2d 879 (1960); Caswell v. Hoft, 239 La. 503, 119 So.2d 94 (1960); Buras v. United Gas Pipe Line Co., 239 La. 721, 119 So.2d 839 (1960); Eskine v. Brown, 239 La. 729, 119 So.2d 842 (1960); and Williams v. Thompson, 240 La. 243, 121 So.2d 847 (1960).

24. 238 La. 608, 116 So.2d 267 (1959).

judgment in his favor. Under the new Code, "acquiescence in 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."[25]

Two cases presented a question concerning the appeal bond. In one,[26] the appellee moved to dismiss a suspensive appeal on the ground that the bond furnished therefor was insufficient in amount. The motion to dismiss was overruled under an application of the jurisprudential rule that a complaint as to the validity or sufficiency of an appeal bond must be urged in the trial court. The same rule is enunciated in the new Code.[27] In the second case,[28] the Supreme Court held that the Insurance Commissioner, who appealed from a judgment rendered against him in his capacity of ancillary receiver of a foreign insurance company in liquidation, as a state official was exempt by statute[29] from the necessity of furnishing bond. This statute has not been affected in any way by the adoption of the Code of Civil Procedure, and will continue to govern future cases.

The appeals in two cases[30] were dismissed because the record of appeal was not filed timely, under the Code of Practice rule[31] that the appellant has the duty of filing this record in the Supreme Court. This harsh result is eliminated as far as it can be under the new Code. If the appellant pays the necessary fees timely to the clerk of the trial court, it is the latter's duty in all cases to transmit the record to the appellate court; and no appeal will be dismissed because of the clerk's failure to file it timely.[32]

Under the Code of Practice rule,[33] an answer to an appeal must be filed within three days before the date assigned for argument in the appellate court, if the appellee seeks any modification of the judgment appealed from. In one case,[34] the Supreme Court refused to consider an answer to an appeal which

25. LA. CODE OF CIVIL PROCEDURE art. 2085 (1960).
26. Schwarz v. Friedenberg, 239 La. 427, 118 So.2d 875 (1960).
27. LA. CODE OF CIVIL PROCEDURE arts. 2088, 5123 (1960).
28. State v. Preferred Accident Ins. Co. of New York, 238 La. 372, 115 So.2d 384 (1959).
29. See LA. R.S. 13:4521 (1950) and Natalbany Lumber Co. v. Louisiana Tax Commission, 175 La. 110, 143 So. 20 (1932).
30. Coney v. Coney, 238 La. 410, 115 So.2d 801 (1959); *Id.*, 238 La. 418, 115 So.2d 803 (1959).
31. LA. CODE OF PRACTICE art. 587 (1870).
32. LA. CODE OF CIVIL PROCEDURE art. 2127 (1960). See also, to the same effect: LA. R.S. 13:4445 (1950), as amended by La. Acts 1960, No. 38, § 1.
33. LA. CODE OF PRACTICE art. 890 (1870).
34. Evans v. Evans, 238 La. 963, 117 So.2d 73 (1960).

was not filed on or before this date. The result would be the same under the new Code. In fact, the latter has a much stricter rule: an answer to an appeal must be filed "not later than fifteen days after the return day or the lodging of the record, whichever is later."[35]

EXECUTORY PROCESS

In *Spiro v. Richardson*,[36] the Supreme Court applied the settled rule that injunction will lie to restrict the enforcement of a mortgage in an executory proceeding to the amount of the mortgage indebtedness. None of the articles of the new Code expressly enunciate this rule, but the redactors' official comments indicate no intent to recommend any legislative change on this point, and a liberal construction of either of two of the articles on executory process would certainly support this rule.[37]

SUCCESSION PROCEDURE

A novel, and quite interesting, question of succession procedure was decided in *Sun Oil Co. v. Roger*.[38] This was a concursus proceeding involving the ownership of oil royalties deposited into the registry of the trial court, and where the validity of a succession sale of immovable property was challenged by some of the heirs of the deceased. The property had been sold at public auction to pay the debts and charges of the succession. The co-administrators of the succession, on whose petition the property had been sold, were a daughter of the deceased and her husband. The property was purchased by this daughter. One group of heirs claimed title to the property through this succession sale; the other group asserted the absolute nullity of this sale, and contended that the ownership of the property remained vested in all of the heirs of the deceased.

The principal contention of this latter group of heirs, and the only point which warrants consideration here, was that title to the property so purchased would have vested in the community existing between the co-administrators, and since the

35. LA. CODE OF CIVIL PROCEDURE art. 2133 (1960). This change was made to insure adequate briefing of all issues to be presented to the appellate court, including those raised by an answer to the appeal.
36. 240 La. 192, 121 So.2d 741 (1960).
37. LA. CODE OF CIVIL PROCEDURE arts. 2752, 2753(1) (1960).
38. 239 La. 379, 118 So.2d 446 (1960).

husband was prohibited by law[39] from purchasing any of the property of the succession, the sale was an absolute nullity. In a carefully considered opinion by the Chief Justice, the court pointed out that since the wife was an heir of the deceased, she could have validly purchased the property, and the technicality that her purchase might be considered for the benefit of the community would not affect the validity of the purchase. Both the holding and the reasoning of the appellate court appear completely sound. As an heir of the deceased, the wife had a right to protect her interest by purchasing the property to prevent its sacrifice. Whether the funds used for this purpose were her paraphernal funds under her own administration, or whether the money or credit used to purchase the property were supplied by the community or a third person, was of no concern to either the other heirs or the creditors of the succession. The substantive law governing the community of acquets and gains are rules of accounting between husband and wife. Third persons have no juridical interest to invoke these rules except to prevent double recovery, or to prevent fraud if they are either forced heirs or creditors of husband or wife.[40]

Unfortunately, the same result may not obtain under the new procedural Code. In the articles thereof[41] which replace the basic Civil Code articles invoked here,[42] the right of an heir to purchase succession property has not been preserved. The writer can think of no reason for such a change, and from the redactors' official comments it would appear that it is the result of an inadvertence.[43] The matter will be called to the attention of the Louisiana State Law Institute for appropriate recommendation.

ACTIONS FOR DIVORCE OR SEPARATION

Some idea of the general improvement of the adjective law through the adoption of the new Code can be gleaned from a comparison of the rules applied in recent cases on this subject with those provided by the Code of Civil Procedure.

Davis v. Davis[44] held that a jury trial may be had in an

39. Under LA. CIVIL CODE art. 1146 (1870), repealed by La. Acts 1960, No. 30, § 2.

40. On this point, see Comment (b) under LA. CODE OF CIVIL PROCEDURE art. 686 (1960).

41. *Id.* arts. 3194, 3195 (1960).

42. LA. CIVIL CODE art. 1146 (1870), repealed by La. Acts 1960, No. 30, § 2.

43. See Comments under LA. CODE OF CIVIL PROCEDURE arts. 3194, 3195 (1960).

44. 238 La. 293, 115 So.2d 355 (1959).

action for a divorce; but the court was careful to hold that the issues of the custody of minor children and alimony for their support were not triable before a jury. The decision, though unfortunate, appears to be correct, since the Code of Practice expressly allows jury trial in all civil cases except those excluded, and no provision of positive law excludes a trial by jury in divorce or separation cases.[45]

This rule is both a historical accident and a judicial anomaly. Under Anglo-American law, divorce and separation cases fell within the jurisdiction of the courts of chancery, where trial by jury was not available. The possibility of jury trial in divorce and separation cases is probably the result of the failure of the Livingston Committee in 1824 even to contemplate such a possibility. The fact that this privilege was not claimed for more than a century and a quarter thereafter would appear to indicate that the members of the legal profession did not regard this as a possibility for a very long period. The new procedural Code expressly prohibits trial by jury in such cases.[46]

Twice during the past term, the Supreme Court very properly held that there could be no suspensive appeal from a judgment insofar as it awarded custody of minor children to one of the spouses.[47] There is no change in the rule under the new Code.[48]

Three times during the past term, the Supreme Court recognized and applied the rule that a suspensive appeal may be taken from a judgment of the trial court awarding alimony.[49] In *Lodatto v. Lodatto*,[50] a very able but quite unsuccessful effort was made to overturn this rule, insofar as it permitted a suspensive appeal from an order awarding alimony *pendente lite*. This rule is another historical accident; but, unfortunately, it is more far-reaching, and much more serious, than the one permitting jury trial in divorce or separation cases. This rule may force a dependent wife to borrow money to support herself and her children, or throw them upon public or private charity if borrowing is not possible. It has been in effect for a long period

45. See LA. CODE OF PRACTICE arts. 494, 756, 757, 1036 (1870).
46. LA. CODE OF CIVIL PROCEDURE art. 1733(3) (1960).
47. Kaufman v. Kaufman, 239 La. 500, 118 So.2d 901 (1960); Labat v. Gautreaux, 239 La. 760, 119 So.2d 853 (1960).
48. LA. CODE OF CIVIL PROCEDURE art. 3943 (1960).
49. Lodatto v. Lodatto, 238 La. 305, 115 So.2d 359 (1959); Randle v. Randle, 239 La. 646, 119 So.2d 495 (1960); Lavigne v. Schneider, 240 La. 93, 121 So.2d 498 (1960).
50. 238 La. 305, 115 So.2d 359 (1959).

of time, and has been condemned repeatedly and continuously by professional opinion. Yet this has been a situation, as Mark Twain once observed about the weather, where everybody talked about it but nobody seemed to do anything about it. The new procedural Code *has* done something about it: a suspensive appeal from a judgment awarding alimony is expressly prohibited.[51]

MISCELLANEOUS

Martin v. Mud Supply Co.[52] probably was the closest case decided by the Supreme Court during the past term, and must have been one of the most difficult to decide. This writer has read all of the various reported opinions a number of times, and concludes each reading of an opinion in complete agreement with its author, only to reverse the process when the next opinion is read.

In the instant case, the mother of a young man killed in an automobile accident sued to recover damages for wrongful death against the defendant, the employer of the negligent operator of the car in which the deceased was riding at the time of the accident. The defense was a denial of the allegation that the negligent operator was an employee of the defendant; and an alternative plea that if he was, he was acting without the course and scope of his employment in inviting the deceased to ride with him without the knowledge and consent of the defendant. Thereafter, but more than a year after the fatal accident, the plaintiff amended her petition and sought to make the defendant's liability insurer a defendant, relying upon the omnibus clause of the policy.

After a trial on the merits, the plaintiff's demand against the owner of the vehicle was rejected, and this judgment was affirmed on appeal.[53] This holding precluded any argument that prescription against the insurer was interrupted by the suit against the original defendant, his solidary co-debtor. Under these circumstances, the plaintiff argued that the owner of the insured vehicle had been sued timely; that the insurer had knowledge of this fact, having defended the suit through its own attorneys; and that, therefore, this notice of the plaintiff's demand interrupted prescription against the insurer.

51. LA. CODE OF CIVIL PROCEDURE art. 3943 (1960).
52. 239 La. 616, 119 So.2d 484 (1960).
53. Martin v. Mud Supply Co., 111 So.2d 375 (La. App. 1959).

The trial court, the intermediate appellate court,[54] and the majority of the Supreme Court on rehearing, rejected this contention. Each of these courts recognized the rule that prescription is interrupted by notice of the plaintiff's demand brought to the debtor in any legal capacity, but held that a broadening of this rule so as to apply to the facts of the case would be unwarranted.

With some doubts, and without any strong feeling in the matter, this writer reluctantly expresses his agreement with the majority holding.

Tucker v. New Orleans Laundries, Inc.,[55] was a shareholder's derivative action[56] to recover judgment in favor of a corporation against a number of its officers, because of the latter's alleged fraud and manipulation. The trial court dismissed the suit by sustaining exceptions of *res judicata* and no cause of action. On appeal, the Supreme Court reversed the judgment appealed from, and remanded the case for further proceedings.

The judgments successfully pleaded in the trial court as *res judicata* were two rendered in the federal courts in shareholders' derivative actions involving the same subject matter, and several judgments in suits brought by the plaintiffs individually against the officers of the corporation. The federal shareholder's derivative actions had been dismissed because of the courts' lack of jurisdiction, and the nonjoinder of an indispensable party. In view of these facts, the Supreme Court held that neither of these judgments were definitive, and hence neither precluded further action to compel the corporation to enforce its rights. The shareholders' individual suits had been dismissed because they sought to enforce rights which belonged to the corporation, and not to the latter's shareholders; and hence none precluded the instant suit.

Under the numerous and complicated allegations of the petitions, the Supreme Court held that a cause of action had been stated.

54. *Ibid.*
55. 238 La. 207, 114 So.2d 866 (1959).
56. The rules regulating the procedure in a shareholder's derivative action are set forth in LA. CODE OF CIVIL PROCEDURE arts. 591-597, 611 (1960).