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# Civil Procedure

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Two cases[1] decided by the Supreme Court during the past term deferred the answer to an important and interesting question of mineral law to a later date; but the action of the court in remanding the cases for the impleading of parties not joined initially answered an important procedural question on which attorneys heretofore have held divergent views.

In both cases, the mineral lessee sought a declaratory judgment[2] against its mineral lessor to determine the proportionate royalty due each from the production on a 177.60 acre unit established by the conservation department. Prior to the establishment of the conservation unit, the lands owned by each defendant had been included in a contractually-pooled unit of 160 acres established by the mineral lessee, but only 101.13 acres originally included in the contractual unit had been included in the conservation unit. In each case, the plaintiff sought a declaratory judgment holding that the royalty due for these 101.13 acres must be paid to the owners of all of the acreage in the 160 acre contractual unit. Both the trial court and the intermediate appellate court[3] sustained the contention of the defendants that the establishment of the conservation unit had the effect of supplanting and superseding the contractual unit, and that all royalty due from the latter should be distributed to the owners of all lands therein in proportion to their respective holdings. Judge Tate dissented from the majority holding of the Court of Appeal for the Third Circuit, on the ground that since the interests of the owners of land in the contractual unit not included in the conservation unit were directly affected, they were indispensable parties to the action and should be joined.[4]

Under writs of review, the Supreme Court accepted Judge Tate's reasoning. The judgments in both cases were set aside,

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1. Humble Oil & Refining Co. v. Jones, 241 La. 661, 130 So.2d 408 (1961); Same v. Edwards, 241 La. 676, 130 So.2d 413 (1961).

2. Under the provisions of the former LA. R.S. 13:4231 *et seq.* (1950), now incorporated into LA. CODE OF CIVIL PROCEDURE art. 1871 *et seq.* (1960).

3. See Humble Oil & Refining Co. v. Jones, 125 So.2d 640 (La. App. 1960); Same v. Edwards, 125 So.2d 654 (La. App. 1960).

4. See 125 So.2d at 648.

and the cases were remanded to the trial court for the joinder of these indispensable parties.

The Uniform Declaratory Judgment Act, now incorporated into the Code of Civil Procedure, has only one general provision regulating the parties to an action brought thereunder. This provides that "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."[5] This requirement of joinder of interested parties was held to make applicable all of the rules of joinder of necessary and indispensable parties, now clarified and embodied in the new procedural code.[6] Since the rights of the owners of land in the contractual unit not included in the conservation unit would be directly affected by any judgment rendered, they were held to be indispensable parties to the action.

Procedurally these decisions are both important and far-reaching.

## INTERVENTION

One of the most difficult tasks of any system of civil procedure is to provide a workable rule governing the juridical interest required of a third person to permit him to intervene in a pending action. Here, the difficulty is that of reaching the happy medium between apparently conflicting requirements — a rule flexible enough to serve the interests of justice yet definite enough to permit its effective application in the trial of cases. Obviously in Louisiana, such a rule must be broader than either the "community of interest" required for the cumulation of actions by or against plural parties,[7] or the "interests affected by the judgment" which determines necessary or indispensable parties.[8] Yet, to prevent interference with the administration of justice by intermeddlers and rank interlopers, the privilege of intervening must be restricted to those who have some juridical interest connected with or related to the pending action.

The former Code of Practice never enunciated the requirement of connexity which is the basis of the right to intervene

5. Former LA. R.S. 13:4241, now LA. CODE OF CIVIL PROCEDURE art. 1880 (1960).
6. See LA. CODE OF CIVIL PROCEDURE arts. 641-647 (1960).
7. Under *id.* arts. 463, 647.
8. Under *id.* arts. 641-646.

in other civilian jurisdictions, but contented itself with a provision that "[i]n order to be entitled to intervene, it is enough to have an interest in the success of either party, or an interest opposed to both."[9] Thus, the real test was left to the Louisiana courts to supply; and the latter, influenced largely by Anglo-American procedural principles, had held that "the interest required to authorize intervention must be a direct one by which the [intervener] is to obtain immediate gain or suffer immediate loss by the judgment which may be rendered between the original parties."[10]

In the redaction of the Code of Civil Procedure, the Louisiana State Law Institute made an extensive study of the problem, and of the solutions provided both in Anglo-American and civilian jurisdictions. In an effort to broaden, and thus increase the usefulness of, the remedy of intervention, Article 1091 of the Code of Civil Procedure provides that:

> "A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by:
>
> "(1) Joining with plaintiff in demanding the same or similar relief against the defendant;
>
> "(2) Uniting with defendant in resisting the plaintiff's demand; or
>
> "(3) Opposing both plaintiff and defendant."

*United Gas Pipe Line Co. v. Louisiana Public Serv. Com'n*[11] illustrates the extent to which the right to intervene has been broadened by the new procedural code. In the trial court, the plaintiff sought to revise upward certain increases in the rates at which it sold natural gas to two local utilities in the New Orleans area, and which had been granted by the Louisiana Public Service Commission. Certain industrial consumers, who had been permitted to intervene in the proceeding before the commission, sought to intervene in the judicial review of the commission's orders. To show a juridical interest in the pending suit, these interveners alleged that they purchased large quanti-

9. LA. CODE OF PRACTICE art. 390 (1870).
10. United Gas Pipe Line Co. v. Louisiana Public Serv. Com'n, 241 La. 687, 130 So.2d 652, 656 (1961).
11. 241 La. 687, 130 So.2d 652 (1961).

ties of natural gas from one of the two local utilities supplied by the plaintiff; that if the rates fixed by the commission were increased, this increase would be passed on to the interveners and others by the local utility; and that hence the interveners had an interest in opposing the plaintiff's demand. The trial court maintained exceptions to these interventions and dismissed them, holding that the interveners had no interest in the pending action. The New Orleans Sewerage & Water Board, one of these interveners, appealed to the Supreme Court, which affirmed the dismissal of its intervention.

After reviewing the prior jurisprudence, the court summarized its position on the procedural point presented as follows:

> "As we appreciate the record herein, the rate increase allowed can be passed on to the Board by New Orleans Public Service, Inc. It may eventually be done. But the evidence does not establish that the transference is mandatory. It seems clear that the Board will be affected only if further rate action is taken by New Orleans Public Service, Inc., after the termination of this proceeding. Hence, the interest shown by the Board is remote, indirect, and contingent.
>
> "We conclude that the intervention of the Sewerage and Water Board of New Orleans was properly dismissed."[12]

As the case was tried in the court below prior to the effective date of the new procedural code, the prior jurisprudential rule referred to above was applicable.[13] And, since the intervener would not have suffered immediate loss through the judgment which might have been rendered between the parties, the court had no alternative except to dismiss the intervention. Yet this was a case where, if the Sewerage & Water Board had no remedy by intervention, it would have had no remedy at all. The New Orleans Public Service, like the plaintiff, is a public utility legally entitled to a fair and reasonable return on its investment. If the rates charged Public Service had been increased, realism compels the conclusion that this increase ultimately would have been passed on to its customers. But at this juncture, these customers would not have been able to question the increase granted to the plaintiff previously by the courts.

12. 130 So.2d at 657.
13. Under LA. ACTS 1960, No. 15, § 4(B)(2)(b).

Under the broader rule of the Code of Civil Procedure, the intervener's juridical interest to intervene to enforce a right related to or connected with the object of the plaintiff's action would appear to be clear.

## EXCEPTIONS

*Williams v. Marionneaux*,[14] involving very interesting points of tort and procedural law, was one of the most important cases decided during the past term. There, the plaintiff sued to recover damages caused by the negligence of one Blanchard, alleged to have been an employee of the defendant. The latter, in his answer, denied that Blanchard was his employee, alleged that Blanchard was the owner of the truck involved in the accident, and at the time was acting as an independent contractor. Defendant called Blanchard and his casualty insurer in as third party defendants, praying for judgment over against them for any amount for which judgment might be rendered against the defendant. These third party defendants in turn called in the plaintiff as a third party defendant, alleging that plaintiff had compromised his claim against Blanchard and, while reserving his rights against the defendant, had agreed to hold Blanchard harmless against further liability because of the accident.

After the last third party petitions had been filed, the defendant filed exceptions of res judicata and no cause of action to plaintiff's petition, and on the trial thereof the compromise agreement between plaintiff and Blanchard was introduced in evidence without objection. The trial court sustained both exceptions; and this judgment was affirmed on appeal by the intermediate appellate court.

Under a writ of review, the Supreme Court overruled the exception of res judicata on the ground that it did not meet the code requirement that the two suits be between the same parties,[15] but affirmed the judgments of both courts maintaining

14. 240 La. 713, 124 So.2d 919 (1960).

15. See LA. CIVIL CODE art. 2286 (1870). The compromise agreement was pleaded as res judicata under the provisions of *id.* art. 3078 providing, in part, that "Transactions [or compromises] have, between the interested parties, a force equal to the authority of things adjudged."

In the course of its opinion on this point, the Supreme Court rendered a service to Louisiana law in expressly overruling Muntz v. Algiers & G. St. Ry., 116 La. 236, 40 So. 688 (1906) and McKnight v. State, 68 So.2d 652 (La. App. 1953), both of which had failed to apply LA. CIVIL CODE art. 2286 (1870). The note on the

the exception of no cause of action. Since the alleged liability of the defendant would have been purely a secondary one based on the doctrine of *respondeat superior*, the plaintiff's release of Blanchard was held to have effected the release of the defendant. On both of the points decided, the opinion of the Supreme Court is well reasoned and convincing. Unfortunately, there is some language in the opinion which, if taken out of context, may cause difficulty in the future.[16]

While the facts of this case do not present, they at least suggest, a related question of considerable importance to the profession in this state. In this case, the employee and employer were not joint tortfeasors, the employer being liable only secondarily for any negligence of the employee. But suppose this had been a case where the plaintiff, with full reservation of his rights against the other, had compromised his claim against the first of two joint tortfeasors, and later sued the second. What would be the effect of this compromise upon any judgment which might be rendered against the second?[17]

latter case in 14 LOUISIANA LAW REVIEW 901 (1954), by Donald J. Tate, former Editor-in-Chief of the *Review*, is cited with approval. 130 So.2d at 922, n. 4.

16. The first of these is the reference to the propriety of pleading a judicial estoppel, rather than res judicata, under factual situations similar to those in the Muntz and McKnight cases. 130 So.2d at 922, 924, n. 7. In a civilian jurisdiction there is neither a need of, nor room for, the common law doctrine of estoppel by judgment. See *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Civil Procedure*, 19 LOUISIANA LAW REVIEW 388, 390-393 (1959). A more legitimate rationale for the holdings in these two cases is that the plaintiffs had no cause of action in the second cases because the judgments in the first cases deprived the defendants of any possible subrogatory rights to enforce indemnity against the parties primarily bound.

The second of these is the statement by the court that, in the principal case, the plaintiff had but a single cause of action against both employee and employer. 130 So.2d at 923. This statement gives recognition to the extremely broad concept of the "cause of action" at common law, which treats as a single cause of action in tort cases "one actionable wrong permitting of but one recovery." See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 13 (1951); Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). The civilian concept of the "cause of action" is much narrower, and would regard a suit against employee and employer as cumulating two distinct actions — one against each. On this point, see Preliminary Statement to Chapter 2, "Cumulation of Actions," Title II of Book I, LA. CODE OF CIVIL PROCEDURE (1960). A retention of the common law concept of the "cause of action" will produce future difficulties in the areas of cumulation of actions, joinder of parties, and the splitting of the cause of action. Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 150 So. 855 (1933) and P. Olivier & Sons v. Board of Com'rs, 181 La. 802, 160 So. 419 (1935), relied on by the court to sustain its position that plaintiff here had but a single cause of action against both employee and employer, may be differentiated readily. In the first case, the first and any second suit would have been between the same parties. In the second case, both suits were between the same parties. Both cases involved different items of damage in the same cause of action. Compare LA. CODE OF CIVIL PROCEDURE art. 425 (1960).

17. The reason why the Louisiana State Law Institute recommended creation

SUPERVISORY JURISDICTION

The Supreme Court of Louisiana for years has held that when a decision of an intermediate appellate court is reviewed under a writ of certiorari, the judgment under review may be modified only to grant relief to the applicant for the writ. The judgment of the court of appeal cannot be revised so as to grant relief to any other party.[18]

Two cases decided during the past term demonstrate some of the unfortunate aspects of this jurisprudential rule.[19] *Jones v. Hogue*[20] presented a difficult problem of dividing among the adjacent riparian owners the alluvion formed over the years by the Mississippi River. The trial judge adopted one method of apportionment, the court of appeal another, and the Supreme Court held a third formula to be proper. The impact of the jurisprudential rule upon any modification of the judgment of the court of appeal is made clear from the following language of the Supreme Court's opinion:

> "As we have pointed out, no actual survey has been made or dividing line established in this case, and we are not able to say what frontage or what area the riparian owners in this case will receive when the alluvion is divided as ordered above. However, when the apportionment is made in accordance with our orders, relators are not to receive any less area than that given to them by the judgment of the Court of Appeal, for respondents did not apply to this court for a writ, and relators should not be penalized because of their application."[21]

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of the full substantive right to enforce contribution between joint tortfeasors through an amendment of LA. CIVIL CODE art. 2103 (1870) was to have the rights and obligations of joint tortfeasors *inter sese* regulated by the same substantive rules which govern the similar rights and duties of conventional solidary debtors. Compare LA. CIVIL CODE arts. 2100-2107, 2203 (1870).

Thus, when an injured party compromises his claim against one joint tortfeasor, even though he may reserve his rights against the second, the release given the first has the effect of reducing the claim against the second by one half. LA. CIVIL CODE art. 2203 (1870). By releasing the first, the injured party has deprived the second of his subrogatory right to enforce contribution against the first, and to this extent has released the second.

18. May Finance Co. v. Nagy, 223 La. 816, 66 So.2d 860 (1953); Speed v. Page, 222 La. 529, 62 So.2d 824 (1952).; Washington v. Holmes & Barnes, 200 La. 787, 9 So.2d 35 (1942) and the list of cases cited therein.

19. Jones v. Hogue, 241 La. 407, 129 So.2d 194 (1960); Rogillio v. Cazedessus, 241 La. 186, 127 So.2d 734 (1961).

20. 241 La. 407, 129 So.2d 194 (1960).

21. 129 So.2d at 203.

In *Rogillio v. Cazedessus*[22] the court of appeal affirmed judgments against, *inter alia,* two casualty insurers, for damages sustained in an automobile accident by the plaintiffs. Under a writ of review granted at the instance of one of these insurers, the Supreme Court reversed the judgment as to it. One of the most hotly contested issues in the intermediate appellate court had been as to the quantum to which the plaintiffs were entitled, and in the Supreme Court the plaintiffs argued strenuously that the judgments should be increased. As the plaintiffs had not applied for a writ of review, the Supreme Court refused to consider this issue.

This type of procedural problem is by no means new, since both of these cases might have arisen at any time during the past three or four decades. Perhaps a more typical problem would be presented where the intermediate appellate court reversed judgments against the defendant and the third party defendant, and the plaintiff applied for a writ of review on the very last day. The defendant (and third party plaintiff) would have been completely satisfied with the decision of the court of appeal, and really had no right to apply for a writ. Yet, if the Supreme Court reverses this judgment of the intermediate appellate court, the defendant (and third party plaintiff) will be unable to pass this judgment, or any part thereof, on to the third party defendant.

While not new, these problems have been rendered more acute, and their potential frequency has been increased, by recent procedural developments. Three factors are chiefly responsible: (1) the adoption of third party practice; the increase, both in number and in complexity, of the cases now being handled by the courts of appeal; and (3) the jurisprudential development, retained by the Code of Civil Procedure, of more liberal rules of joinder, both unqualified and in the alternative.

The Appellate Reorganization Committee of the Judicial Council is now studying a proposed solution of these problems, to be effected through the adoption of a new Section 8 of Rule XIII of the Rules of the Supreme Court.[23] This proposes to create

22. 241 La. 186, 127 So.2d 734 (1961).

23. Reading as follows:

"Section 8. When a writ of review has been granted by the court, any respondent who desires to have the decree of the Court of Appeal modified, revised, or reversed in any respect other than that sought by the petitioner, may file an answer to the petition for the writ. This answer shall state the relief desired, and

a new procedural device, the "answer to the petition for a writ of review," somewhat analogous to, but considerably broader than, the answer to the appeal.[24] While not completely free of any possible doubt, the writer believes that the proposed amendment to the Supreme Court Rules would be constitutional.[25]

## REAL ACTIONS

*Erath Sugar Co. v. Broussard*[26] reflects the commendably liberal attitude of the Supreme Court in procedural matters. Both the trial court and the intermediate appellate court had maintained an exception of no cause of action to the plaintiff's petition, on the ground that it had no right to invoke the Declaratory Judgment Act;[27] since the facts alleged showed that the petitory action was available. Both of these decisions were

shall be filed on or before the return day on the writ fixed by this court. Before this answer is filed, a copy thereof must be delivered or mailed to the petitioner for the writ and all other respondents; and verification of such delivery or mailing must appear from the affidavit of the respondent filing the answer, or of his attorney.

"An answer to a petition for a writ which complies with the requirements of this section shall be deemed the equivalent of a timely cross-application for a writ of review which has been granted by the court. Under authority thereof, the court may grant any relief prayed for therein, whether against the petitioner for the writ or against any other respondent.

"As used in this Section 8, the word 'respondent' includes any party (other than the petitioner for a writ of review) who appeared in the case in the Court of Appeal, either through brief or oral argument, or both."

24. It would have to be broader than the answer to the appeal in order to permit modification or revision of the judgment of the court of appeal as between respondents.

25. LA. CONST. art. VII, § 10, provides that "The Supreme Court has control of and general supervisory jurisdiction over all inferior courts." In a long line of decisions, the Supreme Court has properly held that the only limitations on its exercise of supervisory power are those expressly imposed by the Constitution, and those which are self-imposed by the court in the interests of orderly procedure and the efficient administration of justice. The Constitution further provides that, when a decision of an intermediate appellate court is reviewed by the Supreme Court, the latter has "the same power and authority as if [the case] had been carried directly by appeal" to the Supreme Court. The only language of the Constitution which, by any stretch of the imagination, might be construed as a limitation with respect to the proposed amendment of the Rules is the proviso in Article VII, § 11, "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." However, in every case in which the Supreme Court would permit an answer to the petition for a writ of review to be filed, of necessity there would have been a prior compliance with this constitutional requirement. Since, after granting the writ, the Supreme Court has the same jurisdiction over the case as if it had been appealed directly to it, certainly it has jurisdiction to grant full and complete relief to all parties before it, and should not be limited to the granting of relief only to the applicant for the writ.

26. 240 La. 949, 125 So.2d 776 (1961).

27. The former LA. R.S. 13:4231 *et seq.* (1950), the provisions of which have now been incorporated into LA. CODE OF CIVIL PROCEDURE arts. 1871-1883 (1960).

based on the rule of *Burton v. Lester*,[28] that the remedy provided by this statute could not be invoked by any litigant to whom another adequate remedy was available.

Under a writ of review, the Supreme Court reversed. Even though the plaintiff's petition had recited that the action was based on the Declaratory Judgment Act, his prayers for both declaratory and specific relief characterized the action as a petitory one. On this ground, the exception was overruled and the case was remanded to the trial court for further proceedings.