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Civil Procedure

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tainly will require clarification. The section now reads in part as given below, the added clause being designated by italics:

> "Nothing in this Part shall be construed to deprive any person or claimant within the terms of this Part of his right of action on the contractor's bond which shall accrue at any time after maturity of his claim, *which said action must be brought against the surety and/or the contractor within one year from the registry of acceptance of the work or of notice of default of the contractor. . . .*"

No opinion is expressed on the meaning or significance of this amendment.

Private Sale of Certain Expropriated Land.—R.S. 48:221 provides for the expropriation of the "balance" of a tract or lot of land as well as that part of it desired for highway purposes whenever that "balance" is less than a specified size. Formerly the state could dispose of that "balance" parcel only by public sale. Under the section as amended, however, the state may sell that parcel back to the original owner, his successor in title, or the adjoining landowner, *who owns land separated from the highway by that parcel.* The price must be the original cost to the state or the present market value, whichever is higher.

CIVIL PROCEDURE

*Henry G. McMahon**

Only six statutes adopted at the 1962 session affect the subject, but these make a number of rather important changes in our procedural law. For convenience of treatment, this section of the legislative symposium will be divided into two parts. The first of these will be devoted to consideration of the amendments of the Louisiana Code of Civil Procedure made by two of these statutes; the remaining statutes, affecting other provisions of our procedural positive law, will be considered in the second part.

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I. AMENDMENTS OF THE LOUISIANA CODE OF CIVIL PROCEDURE

Act 92, adopted on the recommendation of the Louisiana State Law Institute, amends eight articles of the Louisiana Code of Civil Procedure, adds six new articles, and makes minor structural changes in the titles of chapters and sections of the Code, and in the heading of one article.[1]

One new feature of the recommended amendments of the Law Institute is that the latter's Official Comments under all articles amended or added were included in the bill, and will be published in the official Acts of the Legislature.[2] This new feature, giving officially the Law Institute's reasons for recommending amendments of the new procedural Code, was adopted at the suggestion of Justice Hawthorne, the Supreme Court's representative on the Council, and will be retained as an integral part of all subsequent Institute recommendations for changes in the Louisiana Code of Civil Procedure.

Article 74 of the new procedural Code, providing the permissive venue for an action on an offense or quasi offense, was broadened in order to fill in a possible hiatus with respect to an action to enjoin a wrongful act. Further, this article was expressly made applicable to an action to enjoin, or to recover damages for, the commission of a nuisance, or to recover damages for a violation of Article 667 of the Civil Code.[3]

A possible conflict between Article 2315 of the Civil Code and Article 801 of the Code of Civil Procedure, regulating the voluntary substitution for a deceased party, was eliminated through an amendment of the latter code provision. As so amended, if the action survives in favor of a survivor designated by Article 2315 of the Civil Code, this survivor is to be substituted. Otherwise, the succession representative is to be substituted, if the succession of the deceased is being administered by a court of this state; and if there is no such administration, then the heirs and legatees of the deceased are to be substituted as parties.

1. (1) The title of Chapter 6 of Title III of Book VI is changed, and a new Section 4 included thereunder; (2) the title of Chapter 9 of Title VI of Book VII is changed, and a new Section 5 included thereunder; and (3) the heading of Article 4301 is changed. La. Acts 1962, No. 92, §§ 2, 4.

2. Under authority of House Concurrent Resolutions No. 23 of 1962. See J. OF LA. HOUSE OF REP. 205 (1962); J. OF LA. SENATE 103 (1962).

3. The last paragraph of this amended article reads: "As used herein, the words 'offense or quasi offense' include a nuisance and a violation of Article 667 of the Civil Code." LA. CODE OF CIVIL PROCEDURE art. 74 (1960), *as amended*, La. Acts 1962, No. 92, § 1.

Probably the most complicated code provisions amended by this 1962 statute were Articles 1092 and 2643. The first of these provided for the assertion generally of the rights of a third person claiming a mortgage or privilege on property seized; the second applied this rule specifically to executory proceedings. The amendment of both of these articles was deemed necessary to meet difficulties which might have followed in the wake of the decision in *Odom v. Cherokee Homes, Inc.*[4] The reasons assigned by the Law Institute for the recommended amendment include the following:

> "[I]n the Odom case, the courts appear to have accepted (at least for argument's sake) a construction of these two articles which would not permit separate sale or appraisement when the intervener's mortgage or privilege is inferior to that of the seizing creditor. Actually, separate sale or appraisement may be absolutely necessary under certain circumstances. Thus, in the enforcement of the intervener's privilege on some of the movables seized by another creditor, unless the intervener can obtain at least a separate appraisement, his substantive rights may be lost completely. . . . Even with respect to immovables, if the intervener's mortgage or privilege on a part of the property seized is inferior to that of the plaintiff, the only way the intervener can support a claim to any surplus in the sale of the property affected by his mortgage or privilege is through separate appraisement. This article, as amended, authorizes expressly the granting of this relief."[5]

Through these twin amendments, the rules governing judicial sales under writs of both fieri facias and seizure and sale were incorporated into Article 1092; the amendment of Article 2643 converts it into an adoption by reference of the rules prescribed by Article 1092.

A new final paragraph was added to Article 2087, which regulates the time within which a devolutive appeal must be taken, by its 1962 amendment. This new paragraph reads as follows:

> "When a devolutive appeal has been taken timely, an

4. 241 La. 824, 132 So.2d 55 (1961).

5. Comment (d) under LA. CODE OF CIVIL PROCEDURE art. 1092 (1960), *as amended*, La. Acts 1962, No. 92, § 1 [2 WEST'S LOUISIANA LEGISLATIVE SERVICE 513, 514 (1962)].

appellee who seeks to have the judgment appealed from modified, revised, or reversed as to any other appellee,[6] may take a devolutive appeal therefrom, and furnish the security therefor, within the delays allowed in the first paragraph of this article, or within ten days of the granting of the first devolutive appeal in the case, whichever is later."

The Law Institute assigns the following reason[7] for recommending this amendment:

"The difficulty presents itself in cases involving three or more parties, when one obtains an order for a devolutive appeal on the last day, and another, who should take an appeal to protect his position against any change through the first appeal, has no opportunity to do so. The problem is not a new one, see Coleman v. Cousin, 128 La. 1094, 55 So. 686 (1911); but it has been intensified and aggravated by third party practice. Under the last paragraph of this article, such an appellee is granted additional time to obtain his own appeal."

Two of the code articles amended by Act 92 of 1962 merely corrected erroneous references in the text of the original articles. Thus, the amendment of Article 3306 merely substitutes the proper reference "Article 3305" for the erroneous reference "Article 3303" in the article as originally adopted. Similarly, the amendment of Article 4554 corrects an erroneous reference therein[8] by providing, in its second paragraph, that:

"The rules provided in Articles 4032 and 4033, the second paragraph of Article 4067, and in Articles 4101 through 4172, 4231 through 4342, and 4391 through 4464 apply likewise to the curatorship of an interdict."

6. There is no need for an appellee to appeal, if he wishes the judgment appealed from modified, revised, or reversed as to the appellant. In such a case, he may answer the appeal. LA. CODE OF CIVIL PROCEDURE art. 2133 (1960).

7. Comment (c) under LA. CODE OF CIVIL PROCEDURE art. 2087 (1960); *as amended*, La. Acts 1962, No. 92, § 1 [2 WEST'S LOUISIANA LEGISLATIVE SERVICE 514, 515 (1962)]. As adopted, this amendment had a typographical error in it; the word "application" in Subdivision (2) of the article should have read "applicant." This error was corrected by the Council of the Louisiana State Law Institute, at its meeting of June 29, 1962, under authority of La Acts 1960, No. 15, § 2(C).

8. The second paragraph amended in 1962 originally read: "The rules provided in Articles 4032, 4033, 4067, 4101 through 4172, 4231 through 4342, and 4391 through 4464 apply likewise to the curatorship of an interdict." LA. CODE OF CIVIL PROCEDURE art. 4554 (1960). The 1962 amendment struck out the erroneous reference to the first paragraph of Article 4067, which had no applicability to curatorship procedure.

The following reasons were assigned by the Law Institute[9] for the recommendation to amend Article 4342, authorizing the private sale by a tutor of bonds and stocks owned by the minor:

> "In the original source of this article, La. Act 21 of 1890 as amended by La. Act 246 of 1918, the family meeting was required to recommend the private sale of bonds and stocks belonging to a minor or interdict before the court could authorize such a sale. This express requirement was not carried over into the R. S. 9:1455 in the statutory revision of 1950, as the family meeting had been abolished, and the substitute procedure therefor incorporated into R. S. 9:651 through 9:653 and R. S. 9:671 through 9:673. However, the intent to require such substitute procedure to be followed in obtaining a court order authorizing such a sale seemed clear. See Reporter's notes, 3 LSA-Revised Statutes 323 (1951). The original Art. 4342 was not definite on this point; and the 1962 amendment was adopted to indicate clearly that a compliance with Art. 4271 was required."

Six completely new articles were added to the Code of Civil Procedure by Act 92. The first four of these, the new Articles 3291 through 3294, authorize the exchange of succession property "for a consideration to be paid in corporate stock or other property, or partly therein and partly in cash, if advantageous to the heirs and legatees and not prejudicial of the rights of the succession creditors."[10] Proper safeguards and protection are afforded for the heirs, legatees, and creditors. As pointed out in the Official Comments of the Law Institute,[11]

> "While not restricted thereto, the authority granted under these new articles probably will be exercised only in unusually large successions, where the management and administration of valuable properties will be facilitated, and considerable tax savings effected thereby."

The Code of Civil Procedure, as adopted originally, empowered the court to authorize the exchange of "any interest of a minor in property, owned either in its entirety or in indivi-

9. See Comment (c) under LA. CODE OF CIVIL PROCEDURE art. 4342 (1960), *as amended*, La. Acts 1962, No. 92, § 1 [2 WEST'S LOUISIANA LEGISLATIVE SERVICE 518 (1962)].

10. LA. CODE OF CIVIL PROCEDURE art. 3291 (1960), added by La. Acts 1962, No. 92, § 3.

11. Comment (b) under LA. CODE OF CIVIL PROCEDURE art. 3291 (1960), added by La. Acts 1962, No. 92, § 3.

sion, for any purpose,"[12] but failed to provide specifically the procedure to be followed in obtaining judicial authority for such an exchange. The new Article 4371, added by Act 92, supplies the specific procedural rules to be followed.

Both clarification and change in the procedural law are effected by the new Article 4643 of the procedural Code added by Act 92, providing for the appointment by the court of an attorney at law to represent minors or mental incompetents in a partition proceeding, where there is a conflict of interest between such a minor or incompetent and his tutor, undertutor, curator, undercurator, or another such minor or incompetent. The Official Comments[13] of the Law Institute set forth its reasons for recommending the clarification and change made by this new article:

> "(b) Prior to 1961, it was settled that in any judicial partition of property where one or more of the co-owners were incompetent, and the interest of such a co-owner conflicted either with those of another co-owner having the same legal representative, or with the interest of the legal representative, the latter could not act for such incompetent co-owner in the partition proceeding. The court had to appoint an attorney at law either to act for the other incompetent co-owner, or to replace the legal representative if the latter had a conflicting interest. . . . A fortiori, the same rules obtained with respect to a non-judicial partition under the former R.S. 13:4984, the source of the present Art. 4642.
>
> "The failure of the Code of Civil Procedure to include provisions expressly declaratory of these rules, and the broad language of its Art. 4204, led to some doubt as to what procedure should be followed in such cases. The above article removes this doubt.
>
> "(c) This article goes beyond the prior law, and requires the appointment of an attorney at law to replace an undertutor or undercurator of two or more incompetent co-owners having conflicting interests, or when the interests of the undertutor or undercurator conflict with those of his ward. In modern tutorship or curatorship procedure, the role

12. LA. CODE OF CIVIL PROCEDURE art. 4301 (1960).
13. Comments (b) and (c) under LA. CODE OF CIVIL PROCEDURE art. 4643 (1960), added by La. Acts 1962, No. 92, § 6.

played by the undertutor or undercurator in a partition is virtually as important as that played by the tutor or curator."

Article 1369 of the Civil Code, which was replaced by this new article of the procedural Code, was expressly repealed[14] on the recommendation of the Law Institute.

Act 409, which amends Article 156 of the Code of Civil Procedure, was adopted on the recommendation of several district judges. At the time the original code article was adopted, it was felt that there were a sufficient number of district judges and retired judges to take care of the trial of cases where a district judge recused himself or a motion for his recusation was filed, without the need of appointing an attorney as judge *ad hoc* to try any such case;[15] and the former provision authorizing such an appointment[16] was not retained in the new procedural Code. The very appreciable, and unanticipated, increase in judicial business throughout the entire state during the past three years, however, more than used up our reserves of judicial manpower—with the result that it had become increasingly difficult to obtain a judge to serve in lieu of a recused judge, or one whose recusation was sought. The amendment of Article 156 reverts to the former procedural law, and on this point provides:

> "When a ground assigned for the recusation of the judge of a district court having a single judge is his interest in the cause, the judge shall appoint a district judge of an adjoining district to try the motion to recuse. When any other ground is assigned for the recusation of such a district judge, he may appoint either a district judge of an adjoining district, or a lawyer domiciled in the judicial district who has the qualifications of a district judge, to try the motion to recuse."

While the amended article refers specifically to an appointment to try a motion to recuse, it likewise governs the trial of the case when the district judge recuses himself, or is recused after the trial of the motion to recuse.[17]

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14. By La. Acts 1962, No. 70.

15. LA. CODE OF CIVIL PROCEDURE art. 156 (1960) required the district judge to appoint the judge of an adjoining district in all cases.

16. LA. CODE OF PRACTICE art. 340 (1870), *as amended*, La. Acts 1948, No. 336, § 1.

17. Under LA. CODE OF CIVIL PROCEDURE art. 157 (1960).

II. AMENDMENTS AFFECTING OTHER PROCEDURAL LEGISLATION

Act 471, recommended by the Law Reform Committee of the Louisiana State Bar Association, amended the Direct Action Statute. The 1962 amendment removes some loose language brought into the statute by a prior amendment,[18] and removes the doubt concerning all venues available to the plaintiff, by providing that:[19]

> "[S]uch action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. . . ."

R. S. 13:3671 was amended by Act 69, on the recommendation of the Louisiana State Law Institute. This was done to fill in a hiatus with respect to the fees and mileage of witnesses living outside of the parish but within twenty-five miles of the courthouse.[20] The 1962 amendment grants to these witnesses the same fees and mileage to which witnesses living in the parish where the court is held are entitled.

Act 114 of 1962 amends the Inheritance Tax Act, primarily[21] to provide express authority for the trial court to award the state reasonable expert fees in a contest between the inheritance

18. Under LA. R.S. 22:655 (1950), *as amended*, La. Acts 1958, No. 125, it was doubtful whether the action could be brought against both insured and insurer in the parish where the accident or injury occurred.

19. LA. R.S. 22:655 (1950), *as amended*, La. Acts 1962, No. 471, § 1.

20. A rather radical change was made by LA. CODE OF CIVIL PROCEDURE art. 1352 (1960) and the legislation implementing the new procedural Code. Article 1352, *supra*, removed the distance limitation of one hundred miles for the compulsory attendance of witnesses in open court imposed by the former LA. R.S. 13:3661 (1950), and provided that "a witness, whether a party or not, who resides or *does business* in this state may be subpoenaed to attend a trial or hearing wherever held in this state." On the recommendation of the Law Institute, this article was amended in 1961 to make two changes. First, the words "does business" were changed to "is employed"; secondly, the following proviso was added: "No subpoena shall issue to compel the attendance of such a witness who resides and is employed outside the parish and more than twenty-five miles from the courthouse where the trial or hearing is to be held, unless the provisions of R.S. 13:3661 are complied with." LA. CODE OF CIVIL PROCEDURE art. 1352 (1960), *as amended*, La. Acts 1961, No. 23, § 1. The statutory provision referred to was also amended that same year to recognize the changes made by the amended code article. LA. R.S. 13:3661 (1950), *as amended*, La. Acts 1961, No. 25, § 1. Unfortunately, one of these changes left a hiatus in our procedure law. The 1962 amendment fills this in.

21. To provide the proper section sequence, La. Acts 1962, No. 114, § 1 renumbers the former LA. R.S. 47:2423 (1950) as R.S. 47:2424.

tax collector and the heirs or legatees of the deceased, when the court determines that a larger tax is due than that admitted to be due. In all probability, the trial court had this authority already,[22] but the amended section provides needed authority to permit the inheritance tax collector to pay his experts the fees awarded by the court as soon as they are paid to him by the heirs of legatees.[23]

On the recommendation of the Law Institute, two articles of the Civil Code were expressly repealed in 1962.[24] The repeal of Article 398 of the Civil Code, which should have been effected at the time the new procedural Code was adopted,[25] was somewhat tardily accomplished. The reasons for the repeal of Article 1369 of the Civil Code have been given above.[26]

CRIMINAL LAW AND PROCEDURE

*Dale E. Bennett**

CRIMINAL LAW

Services Included in "Anything of Value"

Act 68 broadens the definition of "anything of value" in Article 2 of the Criminal Code[1] specifically to include services, by adding the phrase "and including transportation, telephone or telegraph service, or any other service available for hire," to the first sentence of that definition. The added language removes any doubt as to the propriety of prosecuting variously executed telephone service frauds as theft. It would also embrace the obtaining of filling station services by means of fraudulently used credit cards. The "credit card" fraud situation and other fraudulent devices used to obtain services clearly come within the gen-

22. Under LA. R.S. 13:3666 (1950), *as amended*, La. Acts 1960, No. 114, § 1.

23. LA. R.S. 47:2423 (Supp. 1962), added by La. Acts 1962, No. 114, § 2.

24. LA. CIVIL CODE arts. 398, 1369 (1870) were expressly repealed by La. Acts 1962, No. 70.

25. *Id.* art. 398, required the curator of an interdict to advertise the judgment of interdiction three times within a month of its rendition. This requirement did not mesh with the new schedule of judicial advertisements adopted by LA. R.S. 43:203 (1950), *as amended*, La. Acts 1960, No. 34, § 2, and La. Acts 1961, No. 26, § 1, and it was both unnecessary to, and in conflict with, the new rules adopted by LA. CODE OF CIVIL PROCEDURE art. 4552 (1960).

26. See text accompanying notes 13, 14, *supra*.

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1. LA. R.S. 14:2(2) (Supp. 1962).