Procedure: Civil Procedure

Henry G. McMahon
PROCEDURE

CIVIL PROCEDURE

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The past year has provided the first real opportunity for observing the Code of Civil Procedure in operation. On the whole, the decisions of all of the appellate courts of Louisiana indicate that it is working well in actual practice. None of these decisions indicate any need of legislative change of its provisions. A single case confirms, rather than indicates for the first time, the need of supplementary legislation — and this, fortunately, in an area in which the Louisiana State Law Institute has been working for some months.

In certain technical areas to which in the past the trial and appellate courts have been compelled to devote considerable time and attention, such as the field of the exceptions, the Code of Civil Procedure appears to have effectively minimized this waste of judicial energy. On the other hand, the field of appellate procedure, which was liberalized to a considerable extent by the new procedural Code, has been the subject of many more appellate decisions than had been anticipated. The principal factor responsible for this unexpected development seems to have been professional unfamiliarity with some of the changes made in appellate procedure, particularly the reduction of procedural delays. It is to be hoped that, with increasing professional familiarity with these new rules, the appellate courts will be required to devote less time and attention to their enforcement.

JURISDICTION

Two of the most important decisions of the intermediate appellate courts during the past term were on the subject of jurisdiction in personam over nonresidents.

With respect to foreign corporations, our existing legislation taps the full potential of jurisdiction in personam permitted by the decisions of the United States Supreme Court.\(^1\) We are much

\(^{1}\)Professor and sometime dean, Louisiana State University Law School.

less fortunate with respect to statutory grants of jurisdiction in personam over nonresident individuals, partnerships, and unincorporated associations. In fact, beyond the Nonresident Motorist Act, the Foreign Watercraft Act, and the Direct Action Statute, no effort has been made in Louisiana to tap the full jurisdictional potential.

The resulting hiatus is spotlighted by De Marcy v. Keystone Exploration Co., where the action was dismissed because it was instituted in an improper venue. The suit was filed in Lafayette Parish against a Texas partnership to recover damages to the plaintiff’s home allegedly sustained as the result of defendant’s geophysical explorations in Vermilion Parish. At the time these explorations were being conducted, defendant maintained a branch office in Vermilion which had supervision over these operations, and also a branch office in Lafayette Parish. The branch office in Vermilion was closed immediately upon completion of the geophysical work in that parish; the Lafayette office was closed later, some little time before the institution of the suit. The venue point presented is clear and requires no extended consideration. The serious point thrust into prominence, however, is that even had the venue been proper, under existing law there is no statutory provision for a valid service of process, unless the serving officer is fortunate enough to locate an employee of the defendant transiently here on business of the partnership.

Present limitations on jurisdiction in personam over nonresident individuals, partnerships, and unincorporated associations are causing difficulty in all American jurisdictions. A few of the states have recently adopted statutes granting such jurisdiction to their courts. Some of these have gone too far, with the result that particular provisions have been held unconstitu-

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4. Id. 22:655.
5. 137 So. 2d 68 (La. App. 3d Cir. 1962).
6. The suit was filed several weeks before the effective date of the new procedural Code. The venue was improper under LA. CODE OF PRACTICE art. 165 (2, 9) and LA. R.S. 13:3236 (1950), since repealed; but would have been proper under LA. CODE OF CIVIL PROCEDURE arts. 42(5), 5251(11) (1960). However, the procedural rules in effect at the time of the institution of the suit governed. La. Acts 1960, No. 15, § 4(B)(2)(b).
tional. The difficulty which confronts the draftsman here is that the law in this area is in a state of flux, and no one can predict with accuracy just how far the United States Supreme Court will permit the states to move. The Louisiana State Law Institute has been working on such a statute for some months, and it is believed that work can be completed in time for its legislative adoption in 1964.

Forbess v. George Morgan Pontiac Co. also involved jurisdiction in personam, although fortunately it does not point to any existing hiatus in this area of our procedural law. There, plaintiff proceeded by attachment on the sole ground of the nonresidence of the defendant Arkansas corporation, and procured the seizure in Louisiana of a pickup truck belonging to the defendant. The latter moved to dissolve the attachment on the ground that the plaintiff had lured defendant into sending its pickup truck into Louisiana through fraud and deceit, and excepted to the jurisdiction of the court over the person of the defendant. Simultaneously, under a reservation of its exception and motion to dissolve the attachment, defendant moved contradictorily to recover attorney's fees and other damages resulting from the fraudulent attachment. The trial court dissolved the attachment, rendered judgment for the defendant for $330.00 attorney's fees and other damages, and otherwise dismissed the suit. On appeal, the majority of the Court of Appeal for the Second Circuit increased the attorney's fee to $250.00 (the maximum prayed for by defendant), but refused to award other damages on the ground that none had been proved. However, the appellate court reversed the dismissal of the suit, holding that by seeking to recover damages for the illegal attachment, the defendant had submitted to the court's jurisdiction over it in personam.

The only quarrel which the writer has with the majority opinion is with respect to the award of damages for the illegal attachment. Though no actual damages were proved, it is believed that the court could have awarded defendant $100.00 as nominal damages. Further, even though the doctrine of punitive damages was discarded by the Supreme Court of Louisiana nearly a half-century ago, its ghost still appears to be haunting two

of the fringe areas of our law. Pertinent here is the rule that when the plaintiff does not act maliciously, the only damages which the defendant may recover for the dissolution of a conservatory writ are his actual damages. Is there a negative pregnant lurking in this rule, which permits a court to award punitive damages when the plaintiff has acted maliciously? If so, the facts of this case, as found by both courts, would have justified the court in—to use the vernacular—throwing the book at the plaintiff.

The jurisdictional point involved in this case has aroused considerable professional interest, and some criticism. The writer completely agrees with the majority holding that, by seeking the recovery of damages for the illegal issuance of the attachment, the defendant submitted to the jurisdiction of the court. This result is called for by the specific language of the general appearance article of the new Code, which provides that “a party makes a general appearance which subjects him to the jurisdiction of the court and impliedly waives all objections thereto when, either personally or through counsel, he seeks therein any relief” other than the exceptions spelled out in the article. None of these exceptions include a defendant’s rule for damages for the illegal issuance of a writ of attachment. The dissenting judge of the appellate court was of the opinion that the defendant did not submit himself to the jurisdiction of the court because his rule for damages was not a “demand relating to the merits of the suit.” But the rules relating to the general appearance are not bottomed upon any defense of the suit on its merits. A defendant makes a general appearance whenever he affirmatively invokes the jurisdiction of the court. A nonresident defendant’s motion to release attached property under bond has nothing to do with the merits of the case; but it subjects him, and has always

10. Not pertinent here is the rule which permits the trier of fact, in determining the quantum of damages, to take into consideration the financial condition of the defendant. Lacaze v. Horton, 100 So.2d 252, 254, 255 (La. App. 2d Cir. 1958), and cases cited therein. This rule, rationalizing the idea that being forced to kneel on one knee is greater punishment for a one-legged man than for one with both limbs, is an atavistic throwback to the doctrine of punitive damages.


13. LA. CODE OF CIVIL PROCEDURE art. 7 (1960).

subjected him, to the jurisdiction of the court. Some restriction of the effect of a general appearance was made by the new procedural Code, but both sound public policy and the need for orderly rules of procedure preclude further restriction. *Inter alia*, the dissenting opinion states:

"The majority correctly holds that a defendant is entitled to damages and attorneys' fees for the wrongful issuance of a writ of attachment. In my humble opinion, it is a very hollow remedy indeed to grant a non-resident defendant the right to damages for wrongful attachment of his property and tell him in the same breath that in order to get those damages, he must submit to the jurisdiction of our courts on the suit brought against him by the seizing plaintiff...."

Louisiana law grants many rights to nonresidents; but are these hollow remedies because these nonresidents may have to enforce them in our courts, and thus submit to the adjudication of any rights which the Louisiana defendants may have against these nonresidents? Further, so far as this writer knows, the "hollow remedy" to which the dissenting judge alludes is the procedural law of every American jurisdiction. It has always been the law of Louisiana. Prior to 1886, a defendant had to file a separate suit to recover his damages after the dissolution of a conservatory writ; but in that year the rule was relaxed, to permit the defendant to reconvene for his damages in the same suit. The new procedural Code further relaxes the rule, and now permits a defendant to recover such damages by contradictory motion. Regardless of the mode of procedure employed, however, when the defendant affirmatively invokes the jurisdiction of the court, he submits himself thereto.

15. LA. CODE OF CIVIL PROCEDURE art. 7 (1960); First National Bank of Arcadia v. Johnson, 130 La. 248, 57 So. 930 (1912).
16. A motion for an extension of time to plead does not constitute a general appearance under LA. CODE OF CIVIL PROCEDURE art. 7(2) (1960). Prior to 1960 it constituted a general appearance which subjected defendant to the jurisdiction of the court. Modisette & Adams v. Lorenze, 163 La. 505, 112 So. 397 (1927); Stanley v. Jones, 197 La. 627, 2 So.2d 45 (1941).
17. 135 So.2d at 599.
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ACTIONS

Abatement

In *Dumas v. United States Fidelity & Guaranty Co.*, the husband sued under the Direct Action Statute to recover damages for physical injuries sustained as the result of the negligent driving of his wife. At the trial, the defendant insurer admitted the negligence of the wife. After the trial, but before judgment, the husband died from causes unrelated to the accident. His executor, surviving wife, and major daughter all moved to be substituted as plaintiff. The trial court held that the action had survived, and rendered judgment in favor of the executor. The intermediate appellate court held that, under Article 2315 of the Civil Code as it then read, the action survived only in favor of the wife, and rendered judgment for a reduced amount in her favor. Under certiorari, the Supreme Court reversed, and dismissed the suit. The grounds assigned were that the negligent wife could not profit from her own wrongdoing; and that, further, the cause of action was extinguished by confusion.

Certainly, this case presents very close questions on which reasonable men may differ. This writer, however, finds validity in the objections to the Supreme Court opinion voiced by both of the able authors of the student notes on the case, to which the reader is referred.

Abandonment

The trial court dismissed the action in *Plaisance v. Blanchard* because of the plaintiff's failure to take any active step in its prosecution for more than five years. The plaintiff instituted this action to be declared the owner of certain immovables, but died prior to the trial in the lower court. Subsequently, an attempt was made to substitute his heirs as plain-

24. 135 So.2d 612 (La. App. 1st Cir. 1961).
tiffs, and the trial court rendered judgment in their favor. On defendant's appeal to the Supreme Court, the latter held on November 7, 1955, that there had been an improper substitution of parties since one of the plaintiff's heirs was an unrepresented minor; and the case was remanded to the trial court for proper substitution of plaintiffs. No application for rehearing was filed in the Supreme Court. On November 10, 1960, the substituted plaintiffs ruled the defendant into the trial court to show cause why the case should not be regularly assigned for trial. The defendant then moved to dismiss for want of prosecution; and this motion was sustained by the trial court. On appeal to the Court of Appeal, First Circuit, the dismissal was reversed. The intermediate appellate court pointed out that the decision of the Supreme Court was not final until the expiration of the fourteen-day delay for applying for a rehearing; and since the substituted parties took an active step in the prosecution of the case within five years of the expiration of this delay, the action could not be considered abandoned.

PLEADING

The Petition

One of the simplifications of pleading made by the new procedural Code is effected through the general rule that "a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief." This article has already paid dividends. Twice during the past term, the intermediate appellate courts have invoked it to reverse dismissals in the courts below based on defective prayers, when the petitions as a whole showed that plaintiffs were entitled to relief, though not that prayed for.

Motion for Summary Judgment

This valuable procedural device, made available to Louisiana
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for the first time by the Code of Civil Procedure, was the sub-
ject of only one appellate decision.\textsuperscript{29} The facts disclosed by the
allegations of the petition and the proof supporting the motion
for summary judgment are not of sufficient professional inter-
est to repeat here. For present purposes, it suffices to point
out that the opinion supports the court's holding that several
issues of material fact were left open; and defendant was not
entitled to judgment as a matter of law. Of greater professional
interest is a question which the court did not consider it neces-
sary to answer.\textsuperscript{30}

\textit{Exceptions}

For years, the courts of Louisiana had consistently held that,
under the articles of the Code of Practice, the defendant waived
all objections to the trial court's lack of jurisdiction \textit{ratione
personae} when he permitted a default judgment to be rendered
against him.\textsuperscript{31} In 1951, with Taliaferro, J., dissenting, the Court
of Appeal for the Second Circuit had held the contrary in the
\textit{Thornton} case.\textsuperscript{32} The identical question was again presented to
the Court of Appeal, First Circuit, in \textit{Frederick v. Popich Ma-
rine Construction, Inc.;}\textsuperscript{33} and that appellate court refusing to
follow the \textit{Thornton} case, applied the rule of the prior juris-
prudence. The question has become academic with the adoption
of the new procedural Code, which expressly requires the objec-
tion of improper venue to be urged prior to answer or default.\textsuperscript{34}

The distinction between the cumulation of two or more
separate actions in the same suit and plural prayers for relief
based on the same cause of action is procedurally important.
An exception lies to dismiss one of two or more separate causes
where the petition discloses no right or cause of action with
respect thereto; but the exception does not lie if a single cause
of action is asserted and the petition discloses a right to any of

\textsuperscript{29} Snell v. Intercoastal Airways, Inc., 139 So.2d 70 (La. App. 4th Cir.
1962).

\textsuperscript{30} "[W]hether it is proper to use a discovery deposition, taken by the de-
defendants of the plaintiff as on cross examination only, to support this motion
for summary judgment"? 139 So.2d at 72. The writer believes that \textit{La. Code of
Civil Procedure} art. 966 (1960) requires an affirmative answer to the question.
The plaintiff may always present his version of the controversy in affidavit form.\textit{Ibid.}

\textsuperscript{31} See cases cited in Noté, 12 \textit{La. L. Rev.} 503 (1952).

\textsuperscript{32} \textit{Automobile Ins. Co. v. Thornton}, 56 So.2d 506 (La. App. 2d Cir. 1952),

\textsuperscript{33} 136 So.2d 425 (La. App. 1st Cir. 1961).

\textsuperscript{34} \textit{La. Code of Civil Procedure} arts. 7, 925(4), 928 (1960).
the plural relief demanded. In two cases decided during the past term, the intermediate appellate courts were compelled to make this distinction; and in both, these courts found that the plural demands of the plaintiffs were based on single causes of action. In one,\textsuperscript{85} plaintiff sought to be recognized as the owner of mineral royalties and also to recover a brokerage fee. In the second,\textsuperscript{86} plaintiff sought relief in the alternative on the same cause of action. In both, the exceptions which had been the proper pleading), the court treated it as such and cases remanded for further proceedings. No provision in the new procedural Code changes the prior jurisprudential rules on the subject, which were applied in both cases.

\textit{Incidental Demands}

For some years, Louisiana jurisprudence attributed a considerable degree of sanctity to the label designating a particular pleading, especially in the field of the exceptions. Under the liberalization of our procedure by the appellate courts during the past quarter-century, this emphasis on labels has gradually diminished. During the past term, it was virtually discarded in \textit{Treigle v. Patrick}.\textsuperscript{37} There, a defendant sought to reconvene against a co-defendant. Since the pleading complied with all requirements of the third party demand (which would have been the proper pleading), the court treated it as such and disregarded the label affixed by the pleader.\textsuperscript{38}

\textbf{JURY TRIAL}

Three cases presented questions of procedure in jury trials. In \textit{Arrington v. McCarty},\textsuperscript{39} and its companion case,\textsuperscript{40} the plaintiffs had prayed initially for jury trials. Two sets of defendants, each seeking to throw liability upon the other, filed “cross actions”;\textsuperscript{41} and one set moved for a separate trial of the issues

\textsuperscript{35} Bailey v. Texas Pacific Coal and Oil Co., 134 So.2d 339 (La. App. 3d Cir. 1961).
\textsuperscript{36} Lindsay v. Treadaway, 138 So. 2d 241 (La. App. 4th Cir. 1962).
\textsuperscript{37} 138 So.2d 652 (La. App. 4th Cir. 1962).
\textsuperscript{38} LA. CODE OF CIVIL PROCEDURE art. 5051 (1960). Further, the new Code offers a direct analogy. “If a party has mistakenly designated an affirmative defense as an incidental demand, or an incidental demand as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation.” Id. art. 1005.
\textsuperscript{39} 136 So.2d 119 (La. App. 3d Cir. 1961).
\textsuperscript{40} Woods v. McCarty, 136 So.2d 122 (La. App. 3d Cir. 1961).
\textsuperscript{41} Technically, there are no cross actions recognized by LA. CODE OF CIVIL PROCEDURE (1960) comparable to the cross claim of Rule 13(g), FED. R. CIV. PROC.
raised by the defendants’ incidental demands. The other set of defendants, while not opposing the request for separate trial, moved to rescind the order granting a jury trial of these issues on the ground that the request for trial by jury came too late. This motion was sustained by the trial court. On appeal, the intermediate appellate court held that since plaintiff had timely requested jury trial, all other parties were entitled thereto; but further held that, since the new Code prohibits piecemeal jury trials of the same case, the defendants were not entitled to a separate trial by jury of the issues raised by their incidental demand. The case was remanded to the trial court for further proceedings. The appellate court’s decision appears to indicate that the trial court could still grant a separate trial of the incidental demands, but not a separate trial by jury.

One question which calls loudly for an answer that this writer cannot supply is how appeals were ever taken in these two cases from the orders of the trial court denying separate jury trial of the issues raised by the incidental demands. Obviously, the orders were interlocutory; and it would strain the imagination to the breaking point to say that they caused irreparable injury. For these reasons, it would seem that the defendants had no right of an appeal at this stage of the proceedings, and that their sole remedy would have been to invoke the supervisory jurisdiction of the intermediate appellate court. Piecemeal appeals are not only burdensome to the appellate courts, but when they also stay further proceedings in the trial courts they delay and obstruct the administration of justice.

The third case involving jury trial, tried prior to the effective date of the new procedural Code, highlights one change made by the latter. After the entire jury had been accepted by both sides, sworn, and seated in the jury box, the trial judge excused two of them when challenged peremptorily by one of the litigants. The appellate court held this action to have been proper prior to January 1, 1961; but was careful to point out that the trial judge no longer had this discretion.
APPellate Jurisdiction AND Procedure

The flow of cases transferred to the intermediate appellate courts by the Supreme Court during the past ten years or so, on the ground of lack of appellate jurisdiction, has been so heavy and continuous that any reversal of this current seems as newsworthy to lawyers as the mythical man-bites-dog incident appears to journalists. Yet, precisely this occurred during the past term. An appeal from a judgment sustaining the legality of a paving assessment levied by a parish was transferred to the Supreme Court by a court of appeal on the ground that the latter had no appellate jurisdiction over the case.

Procedure

In one case, an appeal from a moneyed judgment was dismissed on the ground that the judgment had not become effective, since it had been signed in chambers and not in open court. While the legality of the judgment had to be tested by the applicable rule of the Code of Practice, which was in effect at the time, the same result would have obtained under the new procedural Code.

The new Code retained the traditional Louisiana rule that an appeal cannot be taken by a party who acquiesced in the judgment voluntarily and unconditionally. The basic reasoning of the prior jurisprudence on the subject was followed in Thompson v. Bland Produce Co., which held that the defendant had not acquiesced in the judgment voluntarily when he paid the amount thereof to release a judicial seizure of his property in execution of the judgment. Defendant's devolutive appeal was held valid.

right to challenge peremptorily.” LA. CODE OF CIVIL PROCEDURE art. 1766 (1960).
48. Under the appellate reorganization which went into effect in 1960, the Supreme Court retained appellate jurisdiction over cases “in which the constitutionality or legality of any . . . local improvement assessment . . . levied by . . . any parish . . . is contested.” LA. CONST. art. VII, § 10(1), as amended pursuant to La. Acts 1958, No. 561.
49. Panzica v. Interdiction, 132 So.2d 906 (La. App. 3d Cir. 1961). The title of the case is confusing. Actually, the judgment was rendered in favor of Charles J. Panzica and against Mary E. Panzica, an interdict.
50. As required by LA. CODE OF PRACTICE art. 543 (1870).
51. Under LA. CODE OF CIVIL PROCEDURE art. 1911 (1960), which retains the general rule that all final judgments must be read and signed in open court.
52. Id. art. 2085 (1960).
53. 134 So.2d 336 (La. App. 4th Cir. 1961).
Since the Louisiana State Law Institute realized the initial danger of the new Code's shortening of the period for taking a devolutive appeal from one year to ninety days, every effort was made to publicize this change and to warn lawyers of its danger. Apparently, these efforts paid off, as the anticipated toll of dismissed devolutive appeals did not materialize. In the first of three cases on the subject the delay allowed by the Code of Practice had commenced to run but had not elapsed on the effective date of the new Code. The appeal, taken within the delay allowed by the former code, was held timely under the transition provisions of the statute adopting the new Code. In the second case, the trial judge had orally denied an application for a new trial in open court, and several days later signed a written order to this effect. The appeal was taken within ninety days of the written order, but more than ninety days after the oral denial of the application. The appeal was dismissed as untimely. The third case on the subject indicates the price which must often be paid for the professional penchant for discarding the musical score and playing by ear. An appeal from a city court judgment not taken within ten days of the denial of an application for a new trial was dismissed as untimely.

Several cases involved the validity of the bonds furnished by appellants for a suspensive appeal. In one, the intermediate appellate court applied the prior jurisprudential rule that a single bond sufficed for multiple appellants from a single judgment; and in another, a single bond was held sufficient in appeals from separate judgments, where the cases had been consolidated for trial, and a single opinion for both had been written by the trial judge. In a third case, the appeal, insofar

56. La. Acts 1960, No. 15, § 4(B) (a) provides that the adoption of the new Code should not "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."
60. Succession of Abraham, 136 So.2d 471 (La. App. 3d Cir. 1962).
as it operated suspensively, was dismissed because the amount of the appeal bond had not been fixed by the trial judge, in a case where the new Code\textsuperscript{63} required this. The appeal, however, was sustained as a devolutive one.

The most important decision in this area of the law is Davis v. LeBlanc.\textsuperscript{64} In an action to rescind the sale of immovables, plaintiff had obtained a judgment in the trial court ordering defendant to return the $20,200 purchase price, and to pay plaintiff $1,727.90 damages sustained. Defendant timely petitioned for a suspensive appeal, which was granted on condition that he furnish a $3,500 appeal bond. Plaintiff immediately ruled defendant into court to show cause why the suspensive appeal should not be dismissed because of the insufficiency of the appeal bond. The trial judge dismissed this rule, and plaintiff invoked the supervisory jurisdiction of the intermediate appellate court to force defendant to increase the amount of the bond. The appellate court very properly held that the appeal was actually one from a moneyed judgment, and ordered plaintiff to furnish a bond of one and a half times the amount of the judgment and accrued interest. The important feature of this decision, however, is contained in a footnote of the appellate court's decision.\textsuperscript{65} Therein, the defendant's attention was directed to the fact that the decision of the appellate court, rendered in the exercise of its supervisory jurisdiction, became final the day it was rendered,\textsuperscript{66} and that defendant had only four days from this date to furnish the proper suspensive appeal bond.\textsuperscript{67}

The new rules requiring timely payment of all fees to the clerk of the trial court and imposing on him the duty of filing the record of appeal in the appellate court appear to be working well. However, two appeals were dismissed because of the appellants' failure to pay these fees timely to the trial court

\textsuperscript{63} LA. Code of Civil Procedure art. 2124 (1960).
\textsuperscript{64} 139 So.2d 224 (La. App. 3d Cir. 1962).
\textsuperscript{65} Id. at 226, n. 1.
\textsuperscript{66} Under LA. Code of Civil Procedure art. 5124 (1960), the appellant had four days, exclusive of legal holidays, to supplement his original bond, or to furnish a new bond, after rendition of judgment holding the original bond insufficient.
\textsuperscript{67} Unless this delay was interrupted by a stay order issued by the Supreme Court in the exercise of its supervisory jurisdiction. Differently, a decision of an appellate court in the exercise of its appellate jurisdiction becomes final when a rehearing is refused, or the delay for applying therefor has expired. LA. Code of Civil Procedure art. 2107 (1960).
clerk. In both, the delay in filing the transcript of appeal was held imputable to the appellants.

*Wischer v. Madison Realty Co.* might well be the subject of a law review article, for which an apt title would be "An Extended Journey Through the Judicial Stratosphere." The case was originally appealed to the Supreme Court, but as a result of the appellate reorganization of 1960, the appeal was transferred to an intermediate appellate court. The latter dismissed the appeal because of the tardy lodging of the transcript, and the appellants applied to the Supreme Court for a writ of certiorari to review this dismissal. Our highest court granted the writ, and reversed the decision of the intermediate appellate court under a holding that the late filing of the transcript must be held imputable to the clerk of the trial court, and not to appellants.

The plaintiffs' appeals from the judgment of the trial court signed on May 29, 1959, was originally made returnable to the Supreme Court on August 5, 1959. Successive orders rendered by the Supreme Court extended the return day through July 7, 1960. On that day, the appellants obtained from the Supreme Court another extension of the return day until August 8, 1960, and the record of appeal was lodged in that court prior to that date. After the transfer of the case to the intermediate appellate court, the appellees moved to dismiss the appeal on the ground that the record had not been filed in the Supreme Court on or before the return day. This motion was based on the contention that the power of all appellate courts to extend return days had been withdrawn and transferred to the trial courts on June 20, 1960; and since no extension had been

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68. Murry v. Southern Pulpwood Insurance Company, 133 So.2d 827 (La. App. 3d Cir. 1961); Jackson v. Dupont, Incorporated, 140 So.2d 463 (La. App. 1st Cir. 1962). In the first of these cases both parties appealed from the judgment of the trial court. Defendant timely and properly perfected its appeal, but plaintiff failed to file the appeal bond and to pay the necessary fees to the clerk of the trial court.


70. Particularly under La. Const. art. VII, § 30, as amended pursuant to La. Acts 1960, No. 593, authorizing the transfer by the Supreme Court of all cases then pending before it of which the intermediate appellate courts were given jurisdiction under the appellate reorganization.

71. Since the new procedural Code did not become effective until January 1, 1961, and the appellate reorganization went into effect on July 1, 1960, the reforms of appellate procedure to be effected by the former were put into effect immediately by transitional legislation providing rules identical with those of the new Code. La. R.S. 13:4438 and 13:4445 (1950), as amended by La. Acts 1960, No. 38, § 1, granted power to the trial courts to extend the return days of all appeals granted by them, and imposed the duty of filing the record of appeal in
granted by the trial court thereafter, the lodging of the transcript after July 7, 1960, was untimely.\textsuperscript{72} The majority of the Supreme Court\textsuperscript{73} reluctantly agreed that its July 7, 1960, extension of the return day was ineffective, but neatly sidestepped the impact of this contention by holding that, under the transitional statutory provisions\textsuperscript{74}, the failure to file the record of appeal timely must be imputed to the clerk of the trial court, and not to the appellants. This conclusion was bottomed on the absence of any indication in the transcript, and the lack of any assertion by appellees, that appellants failed to pay the proper fees timely.

The facts of this case occurred during a transitional period, and the case itself will have no particular value as a precedent. It does, however, provide a happy ending of an otherwise technical and drab chapter of our civil procedure.

Article 2128 of the Code of Civil Procedure, \textit{inter alia}, incorporates the provisions of the old praecipe of transcript statute,\textsuperscript{75} permitting the appellant to designate those portions of the record to be included in the transcript of appeal, and permitting the appellee to cross-designate those portions that he wants included. The succeeding code article, however, provides that when an appellant designates portions of the record to be included in the transcript, “he must serve with his designation a concise statement of the points on which he intends to rely, and the appeal shall be limited to those points.”\textsuperscript{76} Although this provision was not complied with by the appellant in \textit{Weber v. Press of H. N. Cornay, Inc.},\textsuperscript{77} the appellate court refused to dismiss the appeal, holding that the appellees had not been prejudiced or surprised because of the omission. The failure of an appellant to comply with this requirement could easily prejudice an appellee, who cannot otherwise designate with any degree of safety those portions of the record which he may need.
on appeal. However, the appellate court's solution of the problem appears sound. Any actual prejudice to an appellee in such cases can be corrected by an appellate court through an order of supplementation or correction of the record on appeal.\(^{78}\)

*Tri-State Finance Corp. v. Surry*\(^{79}\) recognized a limitation on the function of the answer to the appeal which should prove useful in the future. There, in a proceeding *via ordinaria* plaintiff sought to enforce a chattel mortgage on a pickup truck and a sedan owned by defendant; and in connection therewith had both vehicles sequestered. The case went to trial on the merits of the defenses urged in the answer, none of which are pertinent here. After trial, but prior to judgment, defendant moved successfully to dissolve the sequestration of the pickup truck on the ground that it was exempt from seizure, and for damages for the illegal seizure. This motion was disposed of by separate judgment, dissolving the sequestration and awarding defendant $250 attorney's fees. By another judgment (on the merits), the trial court awarded plaintiff the relief prayed for. Plaintiff suspensively appealed from the judgment dissolving the sequestration and mulcting it in damages; and defendant answered this appeal, praying for the reversal of the judgment on the merits. On the original hearing, the Court of Appeal for the First Circuit reviewed both judgments, with one judge dissenting. On rehearing, however, the appellate court held that the judgment on the merits could not be reviewed under defendant's answer to plaintiff's appeal from the judgment dissolving the sequestration.

In *Franks v. Harper*,\(^{80}\) the appellant had failed to comply with certain requirements of the new Code relating to the appeal.\(^{81}\) The appellee, apparently not noticing these irregularities, first answered the appeal and prayed for damages for a frivolous appeal. Thereafter, the appellee moved to dismiss the appeal on the ground of these irregularities. The intermediate appellate court properly held that the appellee had waived his objections to the irregularities complained of by answering the appeal.

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78. LA. CODE OF CIVIL PROCEDURE art. 2132 (1960).
79. 139 So. 2d 100 (La. App. 2d Cir. 1962).
80. 134 So. 2d 916 (La. App. 3d Cir. 1961).
81. LA. CODE OF CIVIL PROCEDURE art. 2125 (1960), requiring the motion for an extension of the return day to be filed by the clerk of the trial court; and id. art. 2126 requiring the payment to the clerk of the trial court of his fees for preparing the transcript and the filing fee in the appellate court.
SUPERVISORY JURISDICTION AND PROCEDURE

Prior to July 1, 1960, the intermediate appellate courts had no supervisory jurisdiction except in aid of their appellate jurisdiction. Under the appellate reorganization which went into effect on that date, each court of appeal "has supervisory jurisdiction, subject to the general supervisory jurisdiction of the Supreme Court, over all inferior courts in all cases in which an appeal would lie to the court of appeal."  

Quite early the Supreme Court made it known that it would not entertain any application for supervisory writs in a case over which an intermediate appellate court had appellate jurisdiction unless the relator had unsuccessfully sought supervisory relief from the proper court of appeal. While statistics are not available as to the number of applications for supervisory relief presented to the Supreme Court in such cases, there appears to have been only one instance where our highest court actually granted supervisory relief refused by an intermediate appellate court.

With but the single exception noted hereafter, this constitutional provision appears to be working well in actual operation. The reported cases do not indicate that any great burden has been placed on the courts of appeal through this grant of supervisory jurisdiction; and applications to the intermediate appellate courts for supervisory writs appear to be relatively few and to have been handled expeditiously and without difficulty.

However, Moity v. Mahfouz indicates the need of an authoritative interpretation of some of the language of this con-

82. Putnam & Norman v. Levec, 179 La. 180, 153 So. 685 (1934) and cases cited therein.
84. Odom v. Cherokee Homes, Inc., 241 La. 824, 132 So. 2d 55 (1961). However, Li Rocchi v. Keen, 127 So. 2d 44 (La. App. 1st Cir. 1961) and Id., 127 So. 2d 47 (La. App. 1st Cir. 1961), which granted relators the supervisory relief sought, were reversed by the Supreme Court. Id., 242 La. 111, 134 So. 2d 893 (1961), noted 22 LA. L. REV. 671 (1962).
85. During the past term these cases included Vincent v. Grain Dealers Mutual Insurance Co., 134 So. 2d 415 (La. App. 3d Cir. 1961); Finn v. Uddo, 135 So. 2d 364 (La. App. 4th Cir. 1961); Gaspard v. Lemaire, 136 So. 2d 97 (La. App. 3d Cir. 1962); DuVigneaud v. Marcello, 136 So. 2d 176 (La. App. 4th Cir. 1962); Rhea v. Welch, 136 So. 2d 322 (La. App. 2d Cir. 1961); General Motors Acceptance Corp. v. Kroger, 136 So. 2d 402 (La. App. 1st Cir. 1961); Estate of Helis v. Hoth, 137 So. 2d 472 (La. App. 4th Cir. 1962); Moity v. Mahfouz, 137 So. 2d 513 (La. App. 3d Cir. 1961); and Alphonse Mortgage Co. v. Saucier, 138 So. 2d 849 (La. App. 4th Cir. 1962).
86. 137 So. 2d 513 (La. App. 3d Cir. 1961).
stitutional provision by the Supreme Court. There, the relator had been sentenced to jail for contempt of the trial court for inserting insulting and scandalous allegations in his petition to recover on a promissory note; and having no remedy by appeal, he applied to the court of appeal for supervisory relief. The intermediate appellate court held that the proceeding for contempt was independent of the case in which it had been brought, and since there was no appeal from the contempt sentence, it had no supervisory jurisdiction in the matter. Relator then applied to the Supreme Court for supervisory writs, but that court refused to issue them on the ground that the errors complained of did not justify its exercise of supervisory jurisdiction. However, the Supreme Court's *per curiam* contained the following caveat: "By denying this application for writs we are in no way approving of the holding of the Court of Appeal that it is without supervisory jurisdiction."

It is believed that the Supreme Court's reasons for questioning this decision of the court of appeal are completely valid. The grant of supervisory jurisdiction to the intermediate appellate courts was intended to be as broad as their appellate jurisdiction; and if any court of appeal would have appellate jurisdiction over the final judgment in any case, it has supervisory jurisdiction to review any order or action of the trial court in that case, regardless of connexity with the merits of that case. Any other construction of the constitutional provision would not only render the supervisory jurisdiction of the intermediate appellate courts shadowy and uncertain, but would serve to defeat the very purpose of that grant of supervisory jurisdiction.

**EXECUTION OF JUDGMENTS**

**Garnishment**

An important clarification of garnishment procedure under the new Code was made by *Succession of Hoffman.* One of the new Code's provisions reiterates the general rule contained in the Code of Practice that the sheriff must serve a notice of seizure upon the judgment debtor, after a seizure has been made in the execution of the judgment. The basic article of the new

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88. 141 So. 2d 505 (La. App. 4th Cir. 1962).
Code relating to garnishment procedure requires that the notice of seizure be served on the garnishee, but does not require a similar service to be made on the judgment debtor.\textsuperscript{90} Prior to 1961, it was settled that no such service need be made.\textsuperscript{91} In \textit{Hoffman}, the judgment debtor contended that the garnishment process was invalid because he had never been served with a notice of the seizure under garnishment. This contention was rejected by the appellate court through reliance on the rationale of earlier cases. When the sheriff seizes property to be sold under execution, the judgment debtor must be notified of the seizure so that he may appoint one of the appraisers to value the property; otherwise, the subsequent sale is a nullity. But when the seizure is of the indebtedness of a third person to the judgment debtor, which can be paid to the sheriff without any sale, there is no real necessity for the judgment debtor to be notified of the seizure under garnishment.

\textit{Examination of Judgment Debtor}

Rarely does a case in this area ever reach an appellate court. One did during the past term,\textsuperscript{92} and it served a useful purpose in construing the articles of the new Code on the subject. The basic article on the subject provides that “the judgment creditor may examine the judgment debtor, his books, papers, or documents,” either in open court or through deposition.\textsuperscript{93} Examination of the judgment debtor through deposition was borrowed from the Federal Rules; but the source provision is much broader than our code article in permitting examination by deposition of “any person, including the judgment debtor.”\textsuperscript{94} In the single case on the subject, the intermediate appellate court held that our code rule permitted only the examination of the judgment debtor, and his books and papers; and did not allow the examination of a third person, or his books and papers. The decision seems completely sound, from the standpoint of both statutory construction and public policy. If the judgment creditor has reason to believe that a third person is indebted to the judgment debtor, he may always garnish the third person;

\textsuperscript{89.} \textit{La. Code of Civil Procedure} \textit{art. 2293} (1960).
\textsuperscript{90.} \textit{Id.} \textit{art. 2412}.
\textsuperscript{91.} Chalmette Petroleum Corp. \textit{v. Myrtle Grove Syrup Co.}, 175 \textit{La.} 969, 144 So. 730 (1932) and cases cited therein.
\textsuperscript{94.} Rule 69(a), \textit{Fed. R. Civ. Proc.}
and if the latter's answers to the garnishment interrogatories are negative, in the process of traversing them he may then examine the garnishee and compel him to produce his books and papers.

**EXECUTORY PROCESS**

In the opinion of this writer, the closest case decided by any of the appellate courts during the past term is *Li Rocchi v. Keen*, where the issue was whether sufficient authentic evidence had been presented to the trial judge to justify his order for seizure and sale of mortgaged property. The mortgage notes sought to be enforced were made payable to “Ourselves”; and these notes were actually endorsed in blank by the mortgagors. However, the act of mortgage did not recite this endorsement in blank, nor did it recite the delivery of the notes to the plaintiffs. Because of these omissions in the act of mortgage, the defendants sought to enjoin the seizure and sale in the trial court on the ground of the lack of sufficient authentic evidence. The trial court refused to enjoin the seizure and sale, but under its supervisory jurisdiction the Court of Appeal for the First Circuit reversed, holding the authentic evidence insufficient.

Under its supervisory jurisdiction in turn the Supreme Court reversed, holding (with Justices McCaleb and Summers dissenting) that since the defendants had admitted that plaintiffs were the original and only holders of the mortgage notes sought to be enforced, the authentic evidence presented to the trial judge was sufficient for him to order the seizure and sale of the properties. An unusually acute analysis of this case is made in a Note in the *Review*, to which the reader is referred. For present purposes, it suffices for this writer to record his complete agreement with the analysis and conclusions of the able student author.

**CURATORSHIP OF INTERDICTS**

In *Panzica v. Panzica* the curator of an interdict sued his ward to recover substantial sums of money allegedly advanced

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95. 242 La. 111, 134 So. 2d 893 (1961), noted 22 La. L. Rev. 671 (1962). This case was governed by the applicable rules of LA. CODE OF PRACTICE (1870) and of the jurisprudence thereunder; but the new Code has made no change of the applicable rules. See LA. CODE OF CIVIL PROCEDURE arts. 2635, 2636 (1960).

96. *Li Rocchi v. Keen*, 127 So. 2d 44 (La. App. 1st Cir. 1961); *Id.*, 127 So. 2d 47 (La. App. 1st Cir. 1961).


98. 132 So. 2d 908 (La. App. 3d Cir. 1961).
for her account. Although an undercurator had been appointed for the interdict and was still acting as such, at the instance of the plaintiff, the trial court appointed an attorney at law to represent the interdict. The attorneys so appointed filed exceptions of no right and no cause of action, of prescription, and also filed an answer denying the plaintiff's allegations and calling for strict proof thereof. After a trial, the trial court dismissed the action, holding that the undercurator was the proper representative of the interdict, and not an attorney appointed by the court. The intermediate appellate court affirmed. The case was governed by the rules of the Code of Practice; but the same result would have obtained under the new procedural Code.\footnote{99}{See \textit{La. Code of Civil Procedure} arts. 4202, 4553 (1960).}

There is some language in the appellate court's opinion, however, that requires qualification. The trial judge's Reasons for Judgment, quoted in part with approval in the appellate opinion, states that "'the articles of the Civil Code and Code of Practice . . . make it plain that the undercurator is the person who is to represent the interdict in suits wherein the interdict and curator have conflicting interests.'"

This is too broad a statement of the rule. Both before\footnote{100}{\textit{La. Code of Civil Procedure} art. 1368 (1870), repealed by \textit{La. Acts} 1962, No. 70.} and under the new procedural Code\footnote{101}{\textit{La. Code of Civil Procedure} art. 4643 (1960), added by \textit{La. Acts} 1962, No. 92, § 6.} an attorney at law must be appointed to represent an interdict in a partition proceeding, when he and his curator have conflicting interests.

\section*{CRIMINAL PROCEDURE}

\textit{Dale E. Bennett*}

\textbf{Racial Discrimination in Jury Selection}

In \textit{State v. Clark}\footnote{*}{Professor of Law, Louisiana State University.} a colored defendant, who had been convicted of aggravated rape by an all white jury, urged racial discrimination as a principal basis for his appeal. Systematic exclusion was not established by the facts that there were only three Negro names on the petit jury list of 30, and that only 15

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\footnote{1}{242 \textit{La.} 914, 140 So. 2d 1 (1962).}
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