Louisiana Law Review

Volume 23 | Number 3
April 1963

Civil Procedure - Delay For Filing Applications For Rehearings In Courts of Appeal

H. F. Sockrider Jr.

CIVIL PROCEDURE — DELAY FOR FILING APPLICATIONS FOR REHEARINGS IN COURTS OF APPEAL

On March 15, 1962, the day after judgment was rendered, the clerk of court for the First Circuit Court of Appeal mailed copies of judgment to counsel of record who received them on March 16. Counsel's application for rehearing was mailed on March 29, and was received by the court on March 30. The application was denied under Rule XI, Section 1, of the Uniform Rules for the Courts of Appeal[1] because received by the court more than fourteen days after notice of judgment was mailed.[2] On certiorari, the Supreme Court of Louisiana reversed. *Held*, under the Louisiana Constitution the delay for filing an application for rehearing in the courts of appeal may not commence until the date counsel receives notice of judgment. Thus, Rule XI, Section 1, of the Uniform Rules for the Courts of Appeal is unconstitutional insofar as it provides the delay commences upon the date of mailing the notice of judgment. *Wanless v. Louisiana Real Estate Board*, 147 So. 2d 395 (La. 1962).

Determination of the date upon which the time for filing an application for rehearing in the courts of appeal commences to run necessitates examination of several sources. Prior to amendment in 1958,[3] Article VII, Section 24, of the State Constitution provided in part:

> "Notice of all judgments [of courts of appeal] shall be given to counsel of record; and the court shall provide by rule for the giving of such notices. No delay shall run until such notice shall have been given."

The 1958 amendment to Article VII deleted the last sentence of Section 25.[4] In 1960, however, Article 2166 of the Code of Civil Procedure was enacted to provide:

> "In the courts of appeal the delay for applying for a rehear-

1. "Applications for rehearing must be filed . . . on or before the fourteenth calendar day after (but not including) the date of such delivery in person or by deposit in the U.S. mail, and no extension of time shall be granted." *Uniform Rules of the Courts of Appeal* XI, § 1, in 8 LA. R.S. ANN. 70, 75 (West, Supp. 1961).

2. Wanless v. Louisiana Real Estate Board, 140 So. 2d 429 (La. App. 1st Cir. 1962).

3. La. Acts 1958, No. 561.

4. LA. CONST. art. VII, § 24, as amended, La. Acts 1958, No. 561: "Notice of all judgments shall be given to counsel of record; and the courts shall provide by rule for the giving of such notice."

> ing commences to run the day after notice of judgment has been given by the court to counsel of record in the case."[5]

Further, R.S. 13:4446 presently reads:

> "[A]pplications for rehearings in . . . courts of appeal must be filed on or before the fourteenth calendar day after notice of judgment has been given, as required by Article VII, Section 24, of the Constitution."[6]

Pursuant to the constitutional directive, Rule XI, Section 1, of the Uniform Rules for the Courts of Appeal now provides for the giving of notice as follows:

> "[Applications for rehearings] must be filed . . . on or before the fourteenth calendar day after (but not including) the date of . . . delivery in person or by deposit in the U.S. mails [of the notice of judgment]."[7]

Opposite results might be obtained in interpretation of these procedural provisions depending upon the analysis used. One analysis assumes that the 1958 constitutional amendment was intended to allow the legislature, if it saw fit, to provide for a different time for the commencement of the delay for rehearing applications. The legislature apparently did not intend to exercise its constitutionally granted prerogative for it used the identical word — "given" — in subsequently enacted statutes.[8] Since the term "given" as used in the constitutional provision prior to 1958 had been construed to require actual receipt of notice,[9] a

5. LA. CODE OF CIVIL PROCEDURE art. 2166 (1960). The official revision comments following this article list as its source: "Former R.S. 13:4446; La. Supreme Court Rule XII, sec. 1; Const. Art. VII, sec. 24."

6. LA. R.S. 13:4446 (1950), as amended, La. Acts 1960, No. 38, § 1.

7. *Uniform Rules of the Courts of Appeal* XI, § 1, in 8 LA. R.S. ANN. 70, 75 (West, Supp. 1961).

8. LA. CODE OF CIVIL PROCEDURE art. 2166 (1960); LA. R.S. 13:4446 (1950), as amended, La. Acts 1960, No. 38, § 1.

9. Reeves v. Department of Highways, 228 La. 653, 83 So.2d 889 (1955); Mid-State Tile Co. v. Chaudoir, 228 La. 634, 83 So.2d 654 (1955); O.K. Realty Co. v. John A. Juliani, Inc., 157 La. 277, 102 So. 399 (1924); Morning Star Baptist Church v. Martina, 150 La. 951, 91 So. 404 (1922); Soileau v. Manuel, 109 So.2d 502 (La. App. 1st Cir. 1959); Newsom v. Caldwell & McCann, 51 So.2d 393 (La. App. 1st Cir. 1951); Gomez v. Broussard, 35 So.2d 477 (La. App. 1st Cir. 1948); Martin v. Huff Truck Lines, 32 So.2d 621 (La. App. 1st Cir. 1947); Kond v. Royalty Indem. Co., 24 So.2d 489 (La. App. 1st Cir. 1946); Matthew v. Spears, 24 So.2d 485 (La. App. 1st Cir. 1946); Ridgdell v. Tangipahoa Parish School Board, 17 So.2d 386 (La. App. 1st Cir. 1944); Tyson v. Baker, 12 So.2d 468 (La. App. 1st Cir. 1943); Thompson v. Leach & McClain, 11 So.2d 925 (La. App. 1st Cir. 1943); Lacaze v. Hardee, 7 So.2d 719 (La. App. 2d Cir. 1941); Dambly v. Duconge, 5 So.2d 152 (La. App. 1st Cir. 1941); Murray v. Yazoo & M.V. R.R., 184 So. 413 (La. App. 1st Cir. 1938). *Contra*, Lovelace v. Gowan, 52 So.2d 97 (La. App. 2d Cir. 1951); Polizzi v. Thibodaux,

like construction should follow today. Under this view, it follows that the Uniform Rule's provision that the delay may commence upon mailing of notice is an exercise of authority granted by the Constitution to the legislature, and conflicts with the legislative provisions enacted pursuant to that power.

A contrary analysis assumes the 1958 constitutional amendment intended to delegate authority to the courts of appeal to "provide by rule" for the commencement of the delay. Admittedly, Article 2166 of the Code of Civil Procedure seemingly codified the "delay" provision deleted from the Constitution in 1958; however, R.S. 13:4446,[10] which by specific statutory provision[11] prevails over Article 2166,[12] provides that determination of when notice has been given is to be found in the Constitution. Since under this view the Constitution delegates power to the courts of appeal, rather than to the legislature, to provide for the commencement of the delay, ultimate determination of when the delay commences is found in the Rule provided by the courts of appeal.[13] This analysis was apparently relied upon by the drafters of the Uniform Rules for the Courts of Appeal; and since adoption of these Rules in 1960, the courts of appeal have uniformly held that the delay commences upon the court's mailing the notice of judgment,[14] not upon counsel's receipt.

37 So. 2d 62 (La. App. Orl. Cir. 1948); McCollister v. Police Jury of Sabine Parish, 197 So. 661 (La. App. 2d Cir. 1940).

10. LA. R.S. 13:4446 (1950), as amended, La. Acts 1960, No. 38, § 1.

11. La. Acts 1960, No. 15, § 5; Robertson v. Great American Indem. Co., 136 So. 2d 550, 556 (La. App. 3d Cir. 1962).

12. LA. CODE OF CIVIL PROCEDURE art. 2166 (1960).

13. Strength is given this view by a further assumption that the mentioned amendment intended to change the former law. See note 18 *infra*, and material cited therein.

14. Moreau v. State Farm Mut. Auto. Ins. Co., 146 So. 2d 692 (La. App. 3d Cir. 1962); Jefferson v. Jefferson, 145 So. 2d 356 (La. App. 3d Cir. 1962); United Gas Pipe Line Co. v. Town of Washington, 143 So. 2d 613 (La. App. 3d Cir. 1962); Thibodeaux v. Kern, 143 So. 2d 422 (La. App. 3d Cir. 1962); Hulin v. Hale, 137 So. 2d 709 (La. App. 3d Cir. 1962); Lewis v. Bell, 137 So. 2d 706 (La. App. 3d Cir. 1962); Interstate Oil Pipe Line Co. v. Friedman, 137 So. 2d 700 (La. App. 3d Cir. 1962); Robertson v. Great American Indem. Co., 136 So. 2d 550 (La. App. 3d Cir. 1962); Bailey v. Haymon, 129 So. 2d 203 (La. App. 3d Cir. 1961); Guarisco Const. Co. v. Talley, 126 So. 2d 793 (La. App. 3d Cir. 1961).

The drafters of the Uniform Rule had precedent on their side in choosing mailing as the beginning of their delay. The following Louisiana procedural statutes provide for the giving or service of notice by mail, effective as of the date of mailing: LA. CODE OF CIVIL PROCEDURE arts. 1914 (rendition of interlocutory judgments), 1975 (delay to apply for a new trial), 2087 (delay to take a devolutive appeal), and 2123 (delay to take a suspensive appeal). Moreover, the *Rules of the Supreme Court*, rule XII, § 1, as amended in 1954, in 8 LA. R.S. ANN. 60 (West, Supp. 1961) provides that the commencement of the delay for rehearing applications in the Supreme Court is upon *rendition* of judgment. See also Sanders v. Flowers, 218 La. 472, 496, 49 So. 2d 858, 866 (1950) (notice by newspaper pub-

It seems that both analyses have merit and that *Wanless* could have been resolved by application of either.[15] However, since the court based its decision upon an interpretation of the term "given" without mentioning the intention of the 1958 constitutional amendment,[16] it apparently assumed the amendment was not intended to change the law in any respect.[17] Since amendments are generally presumed to have intended some change in the former law,[18] it is submitted that the *Wanless* decision could have been based on more solid reasoning by using one of the suggested analyses.

---

lication valid; personal receipt of notice unnecessary under Louisiana Conservation Statute, LA. R.S. 30:6B (1950), as amended, La. Acts 1954, No. 489, § 1).

15. *E.g.*, a court rule contravening a procedural statute has been invalidated. State *ex rel.* Tebault v. Judges of Fifth Circuit, 37 La. Ann. 596 (1885). *Cf.* Louisiana *ex rel.* Tooreau v. Posey, 17 La. Ann. 252 (1865). When found to have been adopted under constitutional authority, however, the court rule has prevailed. Brott v. New Orleans Land Co., 156 La. 807, 101 So. 150 (1924). *Cf.* Douglas Pub. Serv. Corp. v. Gaspard, 225 La. 972, 74 So. 2d 182 (1954).

16. The court cited WEBSTER, NEW WORLD DICTIONARY (College ed.), which defines "deliver" as "to give up; give or hand over; to give out; distribute; as deliver the mail." 147 So. at 399. Noteworthy, however, is that WEBSTER, UNABRIDGED NEW INTERNATIONAL DICTIONARY 1060 (2d ed. 1959) defines "give" as meaning not only "to deliver" but also "to cause to have delivered." Further, both 38 C.J.S. *Give* 926 (1943) and FUNK & WAGNALLS, HANDBOOK OF SYNONYMS 220 (rev. ed. 1947) define "give" as a "term of such general import as to be a synonym for a wide variety of words." RODALE, THE SYNONYM FINDER 460 (1961) defines "give" as meaning not only "to deliver" but also "to issue; for example, the giving of notice may mean 'the issuing of notice,' as well as the 'delivering of notice.'"

In determining that "given" meant "actual delivery" the court cited Baldwin v. Fidelity Phoenix Fire Ins. Co., 260 F.2d 951 (6th Cir. 1958); Rapid Motor Lines, Inc. v. Cox, 134 Conn. 235, 56 A.2d 519 (1947); Selken v. Northland Ins. Co., 299 Iowa 1046, 90 N.W.2d 29 (1958). To the contrary, though not mentioned by the court, are Petition of Boyajian, 310 Mass. 822, 38 N.E.2d 336 (1941); Stanton v. Hawkins, 41 R.I. 501, 103 Atl. 229 (1918).

17. The court quoted from Mid-State Tile Co. v. Chaudoir, 228 La. 634, 83 So. 2d 654 (1955) which interpreted LA. CONST. art. VII, § 24, prior to its 1958 amendment and LA. R.S. 13:4446 (1950) prior to its 1960 amendment, and then reaffirmed that case, despite the mentioned amendments. Wanless v. Louisiana Real Estate Board, 147 So. 2d 395, 400, 401 (La. 1962). Further, since there is no provision in the present Article VII, § 24, of the Constitution prescribing when the delay commences to run, it seems the court construed the provision as it read prior to the amendment, *i.e.*, as if it included the clause "no delay shall run until such notice shall have been given."

18. Succession of Thomson, 221 La. 791, 798, 60 So. 2d 411, 414 (1952) held that "where the legislature deliberately amends an act . . . the courts are not authorized to ascribe a meaning at variance with the plain import of the language used, as that would be exercising legislative functions and would in effect operate as a judicial repeal." Further, Hibernia Nat'l Bank v. Louisiana Tax Comm'n, 195 La. 43, 53, 196 So. 15, 18 (1940) held that "the jurisprudence is well settled that, when a statute (particularly one which has been interpreted by the courts) is amended, and the wording of the act is altered, the Legislature intended to change the former law on the subject." Likewise, 82 C.J.S. *Statutes* § 384b(2) 904-06 (1953) states that "it will be presumed that the legislature, in adopting an amendment, intended to make some change in the existing law, and therefore the courts will endeavor to give some effect to the amendment. So a change . . . will raise the presumption that a change of meaning was also intended, *as where material words*

The *Wanless* decision, by the addition of mailing time of the notice of judgment, grants litigants a longer delay in which to apply for rehearings in courts of appeal.[19] Also, no delay will commence if the notice is lost through or delayed by miscarriage of the mail. On the other hand, under the Uniform Rule approach, the commencement date is within control of the courts for the important administrative purpose of allotting applications from each cycle of judgments to the judges who prepare the recommendations for rehearing conferences. As this control has allowed immediate distribution of all applications within each cycle at a predetermined date, final dispositions for each cycle have been more promptly administered.

The instant case nullifies a rule considered by the courts of appeal as "one of the more noteworthy changes in appellate practice"[20] effected by the 1960 constitutional reorganization of the Louisiana appellate courts. Perhaps the Supreme Court will reverse *Wanless* when shown the administrative necessity for the Uniform Rule's provision;[21] however, if the court feels bound by its prior jurisprudential interpretation of the term "given," the reversal may have to be accomplished by amendment to Article VII, Section 24, of the Constitution allowing the delay to commence prior to the "giving" of notice.[22] If the 1958 consti-

contained in the original act are omitted from the amendatory act." (Emphasis added.) See also United States v. Bashaw, 152 U.S. 436 (1894).

19. Hence, distance of parties from the court will not be a factor in the time counsel actually have for preparation of rehearing briefs and arguments.

20. Hulin v. Hale, 137 So. 2d 709, 715 (La. App. 3d Cir. 1962); Interstate Oil Pipe Line Co. v. Friedman, 137 So. 2d 700, 705 (La. App. 3d Cir. 1962); Robertson v. Great American Indem. Co., 136 So. 2d 550, 556 (La. App. 3d Cir. 1962); Bailey v. Harmon, 129 So. 2d 203, 206 (La. App. 3d Cir. 1961). See Tate, *Proceedings in Appellate Courts*, 35 TUL. L. REV. 585, 593-95 (1961).

21. The following cases have followed *Wanless*. Nipper v. Ferguson, 148 So. 2d 316 (La. App. 3d Cir. 1963); *In re* Berry, 148 So. 2d 313 (La. App. 3d Cir. 1963); Jones v. United States Fid. & Guar. Co., 148 So. 2d 309 (La. App. 3d Cir. 1963). However, in Jefferson v. Jefferson, 145 So. 2d 356 (La. App. 3d Cir. 1962) the Supreme Court has ordered the judges of the Third Circuit to show cause on or before March 25, 1963, why the rehearing was not granted when application therefor was received by the court within fourteen days from counsel's receipt but not within fourteen days of mailing the notice of judgment. If the court feels it was incorrect in *Wanless*, this case presents an excellent opportunity for reversal.

22. In *Wanless* the clerk of court mailed the judgment to counsel of record one day earlier than anticipated; hence the date of March 16, 1962, appeared on the notice attached to the judgment, even though notice was mailed on March 15. As a consequence, relators also contended the delay commenced on March 16 because the notice itself was so dated. 147 So. 2d at 398. It is submitted that the court could have accepted this contention and found the application timely without passing upon the validity of the Uniform Rule. Since the court apparently chose to cast the contention aside without ruling thereon and to base its decision upon an interpretation of the term "given," it is submitted the court went out of

tutional amendment was actually intended to give the courts of appeal authority to adopt a rule for the commencement of the delay prior to the actual receipt of notice, it was unfortunate that the Constitution retained, and subsequent legislation employed, the term "given."

So long as *Wanless* retains its vitality, the criteria formerly utilized to determine receipt of notice will apparently again be applicable. Generally, notice of judgment will be sent by registered or certified mail; thus, the delay for filing an application for rehearing will begin on the date the return card was signed.[23] In order to be effective, a return receipt must be signed either by the addressee or his authorized agent.[24] The return receipt will be received as evidence of actual receipt by counsel of record unless it is proved the person signing was without authority to receive and receipt for the notice.[25] Further, notice addressed to a counsel participating in the case, though not counsel of record, will suffice.[26] Finally, as the judgment of a court of appeal becomes final and executory upon expiration of the delay for rehearing without application therefor being filed,[27] the exact date of the delay's expiration[28] is of primary

its way to pass upon the validity of the rule; hence the decision may stand until legislatively overruled.

23. Matthews v. Spears, 24 So. 2d 485 (La. App. 1st Cir. 1946); McCaskey Register Co. v. Lumpkin, 197 So. 640 (La. App. 1st Cir. 1940).

24. See note 23 *supra*.

25. Matthews v. Spears, 24 So. 2d 485 (La. App. 1st Cir. 1946); Ridgdell v. Tangipahoa Parish School Board, 17 So. 2d 386 (La. App. 1st Cir. 1944; McCaskey Register Co. v. Lumpkin, 197 So. 640 (La. App. 1st Cir. 1940).

26. Ridgdell v. Tangipahoa Parish School Board, 17 So. 2d 386 (La. App. 1st Cir. 1944) (notice given assistant district attorney sufficient where district attorney's name appeared as counsel of record).

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

28. The date of filing is the day the application is delivered to actual custody of the court. Nipper v. Ferguson, 148 So. 2d 316 (La. App. 3d Cir. 1963); *In re* Berry, 148 So. 2d 313 (La. App. 3d Cir. 1963); Jones v. United States Fid. & Guar. Co., 148 So. 2d 309 (La. App. 3d Cir. 1963); State v. Lumpkin, 147 So. 2d 80 (La. App. 2d Cir. 1962); King v. McCoy Bros. Lumber Co., 147 So. 2d 77 (La. App. 2d Cir. 1962); Funderburk v. Metropolitan Life Ins. Co., 146 So. 2d 710 (La. App. 3d Cir. 1962); Moreau v. State Farm Mut. Auto. Ins. Co., 146 So. 2d 692 (La. App. 3d Cir. 1962); Jefferson v. Jefferson, 145 So. 2d 356 (La. App. 3d Cir. 1962); United Gas Pipe Line Co. v. Town of Washington, 143 So. 2d 613 (La. App. 3d Cir. 1962); Thibodeaux v. Kern, 143 So. 2d 422 (La. App. 3d Cir. 1962); Hulin v. Hale, 137 So. 2d 709 (La. App. 3d Cir. 1962); Lewis v. Bell, 137 So. 2d 706 (La. App. 3d Cir. 1962); Interstate Oil Pipe Line Co. v. Friedman, 137 So. 2d 700 (La. App. 3d Cir. 1962); Robertson v. Great American Indem. Co., 136 So. 2d 550 (La. App. 3d Cir. 1962); Genovese v. Abernathy, 135 So. 2d 802 (La. App. 3d Cir. 1962); Harper v. Borden Co., 129 So. 2d 330 (La. App. 3d Cir. 1961); Bailey v. Haymond, 129 So. 2d 203 (La. App. 3d Cir. 1961); Guarisco Constr. Co. v. Talley, 126 So. 2d 793 (La. App. 3d Cir. 1961); McGee v. Southern Farm Bureau Cas. Ins. Co., 125 So. 2d 787 (La. App. 3d Cir. 1960).

If the last day of the delay falls on a legal holiday, the application may be filed the following day. LA. R.S. 13:4446(C) (1950), as amended, La. Acts 1960, No. 38,

importance to litigants. Henceforth, action to be taken upon final and executory judgments of the courts of appeal must be preceded by careful examination of the time the notices of judgment were received by counsel of record, with the above rules in mind.

H. F. Sockrider, Jr.

CIVIL PROCEDURE — DISCOVERY — ORAL EXAMINATION OF OPPONENT'S EXPERT WITNESS

The state expropriated defendant's property for an amount certified by two licensed realtors to be just compensation.[1] Before trial contesting the appraised fair market value of the property, defendant sought by oral deposition to determine the manner in which one realtor arrived at his valuation. The realtor testified he could not remember without referring to his notes, which counsel for the state had instructed him not to do. Subsequently, on the trial of a rule to show cause why he should not answer all questions, the court ordered the realtor to consult whatever material he planned to use upon trial of the case and to answer questions in regard to *facts* upon which he based his appraisal. The state contended this order violated Louisiana

§ 1; *id.* 1:55, as amended, La. Acts 1956, No. 549, provides that the following days are legal holidays all over the state: Sundays; January 1; January 8; January 19; February 22; May 30; June 3; July 4; August 30; Labor Day (1st Monday in September); November 1; November 11; Thanksgiving Day (4th Thursday in November); Christmas Day; Inauguration Day in Baton Rouge. For cases involving the question of legal holidays, see Interstate Oil Pipe Line Co. v. Friedman, 137 So. 2d 700 (La. App. 3d Cir. 1962) (February 12, Lincoln's Birthday, held not a legal holiday); Hulin v. Hale, 137 So. 2d 709 (La. App. 3d Cir. 1962) (same); Genovese v. Abernathy, 135 So. 2d 802 (La. App. 3d Cir. 1962) (Christmas is a legal holiday); Guarisco Constr. Co. v. Talley, 126 So. 2d 793 (La. App. 3d Cir. 1961) (same); McGee v. Southern Farm Bureau Cas. Ins. Co., 125 So. 2d 787 (La. App. 3d Cir. 1960) (Sunday is a legal holiday).

Further, courts of appeal are without authority to grant additional time for the application (*Uniform Rules of the Courts of Appeal XI*, § 1, in LA. R.S. ANN. 70, 75 (West, Supp. 1961); Gautreaux v. Harang, 190 La. 1060, 183 So. 349 (1938); Kelley v. Ozone Tung Coop., 38 So. 2d 232 (La. App. 1st Cir. 1948)), even though the untimeliness is due solely to a miscarriage of the mails (McGee v. Southern Farm Cas. Ins. Co., 125 So. 2d 787 (La. App. 3d Cir. 1900)), a party's change in attorneys (Clark v. Delta Tank Mfg. Co., 22 So. 2d 135 (La. App. 1st Cir. 1945)), or a secretary's misinterpretation of the attorney's instructions (Clostio's Heirs v. Sinclair Ref. Co., 37 So.2d 44 (La. App. 1st Cir. 1948)).

1. LA. R.S. 48:441-460 (Supp. 1962). The procedure is basically the following: amount of money estimated to be just and adequate is paid into registry of court; ex parte order issued declaring property has been taken for highway purposes; title vests in state when money deposited; defendant must contest within ten days, or every claim waived except claims for compensation; defendant has the burden of proof in establishing any market value other than the one alleged by the state.