Procedure: Civil Procedure

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The rapid expansion of our economy and the increasingly migratory tendencies of the American people in recent years have required the broadening of the personal jurisdiction of state courts over nonresidents far beyond the contemplation of a half century ago. This has been made evident by the more recent decisions of the United States Supreme Court,1 and in the various states by the more recent adoption of statutes to tap the full potential of these decisions.2 The decisions of the appellate courts of Louisiana during the past term further confirm this phenomenon.

Babineaux v. Southeastern Drilling Corp.3 well merits inclusion in all new casebooks on both Conflict of Laws and Civil Procedure, for both the majority and dissenting opinions of the Court of Appeal, Third Circuit, in this case are masterpieces of exposition and legal reasoning. Here, the conviction of the reader is tossed about like a leaf in an autumn breeze, as he completes the reading and the rereading of these opinions.

Babineaux sued to recover workmen's compensation from the named defendant, two of its corporate affiliates, and the compensation carriers of the three corporations, for a disabling injury received while he was working on an offshore drilling rig.
in the Persian Gulf off Kuwait. The defendants filed numerous exceptions to his petition, the most important of which challenged the personal jurisdiction of the Louisiana court on the ground that the named defendant and its corporate affiliates were foreign corporations not licensed to do business in Louisiana and had never done any business in this state. Considerable evidence pro and con was introduced on the trial of the exceptions. The trial court sustained the exception to its jurisdiction and several related exceptions and dismissed the suit.

On appeal, the majority of the Court of Appeal, Third Circuit, reversed. Presiding Judge Tate wrote the majority opinion, and Judge Hood vigorously dissented. The case turned on facts which were as close to the line of jurisdictional damarcation as any ever given on an examination by a law professor.

The majority, applying the rule of *International Shoe* and *McGee*, found sufficient minimal contacts which the defendants had with the state of the forum to justify the maintenance of the suit against them in Louisiana. These included their agent's advertisement in a Lafayette, Louisiana, paper for experienced oil field workers willing to work in the Persian Gulf to apply personally at a Lafayette motel; the subsequent interview of plaintiff and several other workers in that city; sending plaintiff to Dallas, Texas, for a further interview; allowing plaintiff to bring an unsigned contract of employment back with him to Lafayette to be considered by plaintiff and his wife there; the signing of the contract by plaintiff in Lafayette and mailing it back to Dallas, where it was signed by the employer; requiring plaintiff to go to New Orleans for a physical examination and the necessary inoculations against disease; sending to plaintiff in Lafayette a plane ticket to Kuwait, a travel expense check, and his passport with the necessary visas; and requiring him to emplane from New Orleans en route to Kuwait. The purchase and assembly in New Orleans of the drilling rig on which plaintiff subsequently worked in the Persian Gulf, and its shipment to Kuwait from that port, were given some weight by the majority in reaching its conclusion that the Louisiana court had jurisdiction. In balancing the conveniences and inconveniences to the parties of the suit in Louisiana, the majority was influenced to some extent by the fact that two of these corporations (includ-
ing plaintiff's employer at the time of the injury) were Panamanian corporations which had no offices or business establishments anywhere in the United States, and by the probability that if plaintiff had to sue in Texas, where the contract of employment was completed, he would be met by the same defenses interposed to the Louisiana suit.

The dissenting judge found the employing corporations’ contacts with Louisiana insufficient to justify its courts’ exercise of personal jurisdiction over them, and stressed the fact that the contract of employment was not completed in this state. He was of the opinion that since the contract of employment was signed by the employer in Texas, and it provided that it was to be governed by the law of that state, a Texas commission or court was the appropriate forum for the adjudication of the case.

The extent to which the personal jurisdiction of the courts of a state over nonresidents is being broadened is indicated by the fact that, even in as close a case as this, the Supreme Court of Louisiana refused to review the decision of the intermediate appellate court, and a subsequent appeal to the United States Supreme Court was dismissed on the ground that no substantial federal question was presented.

*Shaw v. Texas & Pacific Ry.* is another case which appreciably broadened the court's jurisdiction *in personam* over a foreign corporation licensed to do business in Louisiana. Plaintiff sued to recover damages, under the Federal Employers' Liability Act, for the death of her intestate because of defendant's failure to provide him with a safe place to work, resulting in his accidental death. The deceased had been employed in Louisiana as a cook on one of defendant's work trains, worked for some period in this state, and later went to work in Texas, where he was killed. This broadening of personal jurisdiction is indicated by the following language of the court:

"[C]onsidering the fact that he was hired to perform and did perform a substantial part of his duties in this State,

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7. Seacat Marine Drilling Co. v. Babineaux, 86 Sup. Ct. 67 (U.S. 1965). Mr. Justice Harlan was of the opinion that the appeal should have been dismissed for want of jurisdiction.
8. 170 So. 2d 874 (La. App. 4th Cir. 1965).
9. Id. at 877.
we are of the opinion that although the accident happened in the State of Texas, the cause of action grows out of Mack Shaw's employment in this State and is connected with the business done by defendant in this State."

Certainly, this is a far more liberal interpretation of the statutory language "growing out of or connected with the business done by the corporation in this state" than has been accorded in earlier cases.

ABANDONMENT OF ACTIONS

The period of inaction required for the dismissal of a suit in the trial court in Louisiana is five years. Despite this lengthy time, three decisions of the appellate courts during the past term affirmed such dismissals by the trial courts.

In Henry v. Stephens, the case was tried in the court below on April 2, 1958, and plaintiff's brief was not filed in that court until July 15, 1963. Defendant successfully moved in the trial court to have the action dismissed on the ground of its abandonment. In the appellate court plaintiff relied strongly on the fact that the transcript of the testimony had been certified and filed in the trial court by the court reporter within the five-year period. The appellate court properly held that these actions by the court reporter were not sufficient to keep the case alive. Unfortunately, the appellate court reached a proper result through an application of the rule obtaining prior to 1960 that a "step in the prosecution of the case consists of some formal move before the court intended to hasten judgment."

This rule was applied by the same appellate court later, in DeClouet v. Kansas City Southern Ry., to reach an unfortunate result. There, prior to the expiration of the five-year period, the plaintiff took the depositions of the defendant's engineer, fireman, and possibly other employees, for purposes of discovery, under a stipulation between counsel as to the time.

14. 176 So. 2d 471 (La. App. 3d Cir. 1965).
place, and manner of taking these depositions.\textsuperscript{15} However, as there was no necessity for any court order, there was no "formal move before the court"; and in the trial court defendant successfully moved for dismissal of the suit on the ground of abandonment. By a divided vote, the Court of Appeal, Third Circuit, affirmed this decision, with Judge Frugé dissenting. Judge Tate, who had not participated in the original hearing, dissented from the court's refusal to grant a rehearing. The Supreme Court refused to review the decision of the intermediate appellate court.\textsuperscript{16}

This decision has dangerous possibilities, as conceivably both parties may be preparing their cases for trial by taking depositions, and using various of the discovery devices, without either the necessity for or the possibility of obtaining a single court order. As this decision is to be the subject of a note in the following issue of the Review,\textsuperscript{17} the reader is referred there for an analysis and discussion of the case. For present purposes, it suffices to point out that the Louisiana State Law Institute is now considering an amendment of the pertinent code article\textsuperscript{18} to straighten out the procedural law on this point.

The third case on this subject\textsuperscript{19} applies settled rules of law and reaches a proper result, but presents a curious and novel combination of procedural principles. There, the appellate court affirmed the judgment of the court below dismissing the action with respect to the individual defendants, but held that steps taken by the plaintiffs in the prosecution of the suit against the corporate defendant prevented its abandonment with respect to that party. However, since the individual defendants were indispensable parties to the litigation, and the action was held abandoned as to them, the suit was also dismissed by the appellate court as to the corporate defendant.

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  \item \textsuperscript{15} Under \textit{La. Code of Civil Procedure} art. 1421 (1960).
  \item \textsuperscript{16} DeClouet v. Kansas City So. Ry., 178 So. 2d 662 (La. 1965).
  \item \textsuperscript{17} 26 \textit{La. L. Rev.} 719 (April 1966).
  \item \textsuperscript{18} This proposed amendment would change the language of the first paragraph of \textit{La. Code of Civil Procedure} art. 561 (1960) to read as follows:
  "An action is abandoned when the parties fail to take any action, consisting of a formal move in the trial court to further its prosecution or defense, the taking of a deposition, or the use of any of the discovery devices, for a period of five years. This provision shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of its abandonment."
  \item \textsuperscript{19} Bolden v. Brazile, 172 So. 2d 304 (La. App. 4th Cir. 1965).
\end{itemize}
PLEADING

Exceptions

That rare phenomenon of the present decade, appellate affirmance of the trial court's dismissal because the petition stated no right or cause of action, occurred during the past term. In the case in question, plaintiff sued a tavern keeper to recover damages for injuries received when struck on a public highway in front of the tavern by a passing automobile. Plaintiff alleged that, at closing time, he was led out of the tavern by defendant's employee; and, as he was intoxicated at the time, he wandered to the adjacent highway where the accident occurred. The appellate court held that defendant's employee was under no continuing duty to the plaintiff to follow him and protect him against injury.

That most highly unstable of all legal concepts in Louisiana—res judicata—presented itself for re-examination during the past term. In Rousseo v. Atlas Fin. Co., plaintiff sought the recovery of damages for the judicial sale under execution of two dump trucks which he claimed were exempt from seizure as implements of his trade or occupation. In the original suit, after the seizure of the trucks, the present plaintiff had ruled the judgment creditor into court to show cause why the trucks should not be released as exempt property, but his rule was dismissed after trial. A devolutive appeal from this judgment later was dismissed as moot, as the trucks had been sold pending the appeal. To his present suit defendant excepted in the trial court on the grounds of res judicata and that the petition disclosed no cause of action. Plaintiff appealed from the judgment dismissing his suit on the latter ground. The appellate court made short shrift of this procedural objection, but experienced considerable difficulty in deciding that the judgment dismissing the rule to release the trucks was not res judicata of the present suit. Though the facts here are somewhat different from those of prior decisions, the result reached by the appellate court appears to be sound.

21. 167 So. 2d 495 (La. App. 4th Cir. 1964).
22. In addition to the decisions relied on by the appellate court, compare Lee v. Cooper, 155 La. 143, 98 So. 869 (1924), and see Comment, Res Judicata—"Matters Which Might Have Been Plead"ed," 2 La. L. Rev. 491, 502, 503 (1940).
A novel and most interesting point was presented in *National Surety Corp. v. Standard Acc. Ins. Co.* through the defendant's plea of the liberative prescription of one year, which had been sustained in both the trial and the intermediate appellate courts. Within a year of the accident, the compensation carrier of the injured person had instituted suit against the alleged tortfeasor to recover the compensation payments which it was liable for as the result of an injury to its insured resulting from the defendant's alleged negligence. More than a year after the injury, the injured workman intervened in the suit, asserting his right to damages sustained in excess of the amount which would be recovered by the plaintiff.

The courts had previously recognized the insurer's right to intervene, more than a year after the accident, in the insured's suit against the tortfeasor. In these cases, the rationale of the decision was that the original plaintiff had timely instituted the action, and as the defendant could not be subjected to greater liability if the intervenor recovered, it had no interest in pleading that the demand asserted through the intervention was prescribed. Both the trial court and the court of appeal refused to apply this analogy to the facts of the principal case, and pointed out that here the intervention might subject the defendant to greater liability.

The Supreme Court, speaking through Justice Hamlin, took a completely different approach to the problem, which it solved through a broad and liberal interpretation of the statute relating to the interruption of prescription by suit. The statutory language which it found pertinent reads as follows:

"All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants,. . . by the commencement of a civil action in a court of competent jurisdiction and in the proper venue."

The Supreme Court pointed out that, while the intervener's demand was different from that of the original defendant, both demands were based on the same cause of action; and, conse-

23. 247 La. 905, 175 So. 2d 263 (1965).
sequently, the plaintiff's suit interrupted the running of prescription against the common cause of action.

Third-Party Demand

In Smith v. Southern Farm Bureau Cas. Ins. Co., where a wife sued the alleged tortfeasor and its insurer to recover damages for injuries sustained in a collision of automobiles, the defendants called her husband in as a third-party defendant. They alleged that he was driving the car in which his wife was riding at the time of the accident; that the accident resulted, at least in part, from the husband's negligence; and that, if defendants were cast, they were entitled to enforce contribution against the husband. Both the trial and the intermediate appellate courts held that, in view of the intraspousal immunity from suit between husband and wife, the defendants had no right to enforce contribution against the husband. Under a writ of review, the Supreme Court, by a divided vote, reversed. The majority held that the intraspousal immunity of the spouses was a procedural, rather than a substantive, bar; and that, as third persons, the defendants had a right to enforce contribution against the husband, if the latter's negligence contributed proximately to the accident.

In the only other third-party demand case, the Court of Appeal, Third Circuit, approved its prior decision in Harvey v. Travelers Ins. Co., holding that a defendant's right to enforce contribution against his co-tortfeasor was a subrogatory right which could no longer be asserted after plaintiff compromised his claim against the co-tortfeasor.

Depositions and Discovery

In Geolograph Serv. Corp. v. Southern Pac. Co., the Court of Appeal, First Circuit, by a divided vote, set aside the order of the trial court requiring defendant to produce all written

27. 164 So. 2d 647 (La. App. 3d Cir. 1964).
32. 172 So. 2d 128 (La. App. 1st Cir. 1965).
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statements made by all members of the train crew involved in the accident, so that plaintiff might inspect and copy them. Plaintiff had taken the depositions of the engineer and switchman, but had made no effort to take those of any other member of the train crew. On ex parte motion, plaintiff obtained an order requiring defendant to produce all statements made by members of the train crew, including the engineer and switchman, alleging merely that plaintiff had reason to believe and suspect that the production of these statements would disclose evidence of the negligence of defendant's employees. After moving unsuccessfufully in the trial court to set aside this order, defendant applied for supervisory writs to coerce the trial judge into vacating it. Based largely upon federal precedents interpreting the source of the pertinent code article requiring that good cause be shown for the production of these statements, and a holding that no sufficient cause had been shown here, the majority of the appellate court set aside the trial court's order. Actually, there is far greater support for this position than the opinion indicates.

Simon v. Castille recognized the validity of an order requiring plaintiff to submit to a physical examination by a physician of defendant's choice outside the presence of the plaintiff's attorney. This is a sound rule essential to even-handed justice. The presence of plaintiff's attorney during plaintiff's examination by defendant's physician serves only to impede and obstruct the examination. Further, most physicians see an ethical objection to such an examination, and will not conduct it under these conditions.

Kommer v. Assenheimer reached no novel result, but its

34. Louisiana has gone far beyond the Federal Rules of Civil Procedure in limiting the production of statements taken by a party, through its adoption of the "Hickman amendment." While this limitation is embodied in article 1452, relating to protective orders during the taking of depositions upon oral examination, article 1492 adopts this limitation with respect to the production of documents for inspection and copying. The "Hickman amendment" reads as follows:

"The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects the mental impressions, conclusions, opinions, or theories of an attorney or an expert."
35. 174 So. 2d 660 (La. App. 3d Cir. 1965).
36. 174 So. 2d 197 (La. App. 4th Cir. 1965).
holding is of sufficient importance to the profession to justify its noting here. Plaintiffs were held not entitled to tax the costs of discovery depositions, not introduced in evidence or otherwise used at the trial, as costs of court.

CROSS-EXAMINATION OF ADVERSARY

Under a writ of review the Supreme Court, in Soprano v. State Farm Mut. Auto. Ins. Co.,\(^{37}\) held that when a wife sued her husband's insurer under the Direct Action Statute to recover for injuries sustained through his negligence in operating his car in which the wife was riding, she had no right to call her husband as a witness under cross-examination.\(^{38}\) Prior contrary decisions of the intermediate appellate courts\(^{39}\) were expressly overruled. Curiously enough, the Supreme Court did not find it necessary to reverse the judgment in favor of the wife rendered in the courts below, and to remand the case for a new trial.\(^{40}\)

APPEALS AND APPELLATE PROCEDURE

Right to Appeal

When an insurer which is not authorized to do business in Louisiana is sued here, the Insurance Code permits it to object to the service of citation and to the jurisdiction of the court in personam.\(^{41}\) However, to file other pleadings, the unauthorized insurer first must either post a bond sufficient to satisfy any judgment which might be rendered against it, or obtain a license to do business in this state.\(^{42}\) In Vehrs v. Jefferson Ins. Co.\(^ {43}\) the unauthorized insurer filed the declinatory exception to plaintiff's suit objecting to the citation and the personal jurisdiction of the court. After this exception was overruled, the unauthorized insurer did not answer, and a default judgment against it was taken and confirmed. The insurer then took an appeal from the final judgment, for the sole purpose

\(^{37}\) 246 La. 524, 165 So. 2d 308 (1964).
\(^{38}\) Under LA. CODE OF CIVIL PROCEDURE art. 1634 (1960).
\(^{40}\) Although the trial court permitted plaintiff to call her husband as a witness under cross-examination, strangely enough he did not permit counsel for plaintiff to lead the husband during his examination.
\(^{41}\) LA. R.S. 22:1255(C) (1950).
\(^{42}\) LA. R.S. 22:1255(A) (1950).
\(^{43}\) 166 So. 2d 20 (La. App. 3d Cir. 1964).
of obtaining a review of the trial court's ruling on its exception. The appellee moved to dismiss the appeal on the grounds that: (1) the appellant had not posted the required bond or qualified to do business here; and (2) the overruling of the declinatory exception was an interlocutory judgment which was not appealable.

The intermediate appellate court held that since, under the Insurance Code, the insurer was permitted to object to the citation and personal jurisdiction of the court, it could have the trial court's rulings on these objections reviewed on appeal. The second ground of the motion to dismiss was brushed aside by an application of the settled rule that an appeal from the final judgment brings up for appellate review all of the interlocutory judgments rendered in the case by the trial court.

The jurisprudence has established the general rule that a party may not appeal from a judgment which grants him all of the relief for which he has prayed. However, this rule is relaxed when adverse (and usually collateral) adjudications in the judgment may prejudice the appealing party.\textsuperscript{44} Such an exception was recognized in Simpson v. Kimbell Milling Co.,\textsuperscript{45} where the judgment from which the two defendants appealed rejected the plaintiff's demand on the ground of his contributory negligence, but, \textit{en passant}, held that the defendant driver was also negligent. A suit by the corporate defendant here against the plaintiff here to recover damages sustained in the same accident was then pending in a federal district court, and appellants feared that the trial court's finding on the question of the driver's negligence might be made the basis of the defense in the federal case of either res judicata or estoppel by judgment. This was held sufficient to give the successful parties below the right to appeal.\textsuperscript{46}

\textsuperscript{44} See the cases cited in Comment (i) under \textit{La. Code of Civil Procedure} art. 2085 (1960).
\textsuperscript{45} 164 So.2d 637 (La. App. 3d Cir. 1964).
\textsuperscript{46} The appeal probably would have been dismissed had the second case been pending in a Louisiana rather than a federal court, as the successful parties below could not then have been prejudiced by the judgment. Under Louisiana law, res judicata would not apply, as the two demands were not the same. \textit{La. Civil Code} art. 2286 (1870) and Quares v. Lewis, 226 La. 76, 75 So.2d 14 (1954); and estoppel by judgment is an Anglo-American concept which is not now recognized in Louisiana. Hope v. Madison, 194 La. 337, 139 So. 666 (1940). See also \textit{The Work of the Louisiana Supreme Court for the 1957-1958 Term—Civil Procedure}, 19 \textit{La. L. Rev.} 388, 390-93 (1959) and Comment, \textit{Res Judicata—Matters Which Might Have Been Plead}, 2 \textit{La. L. Rev.} 491 (1940).
During the past term,\textsuperscript{47} the Court of Appeal, Third Circuit, approved its prior decision in \textit{Vidrine v. Simoneaux}.\textsuperscript{48} In the latter case it was pointed out that, as a result of the recent grant of the substantive right to enforce contribution against a co-tortfeasor,\textsuperscript{49} an appeal by one of two defendants from a judgment against him brought up for appellate review that portion of the judgment rejecting plaintiff’s demand against the other defendant.

\textit{Procedure for Appealing}

The new procedural code imposes upon the clerk of the trial court the duty to file the record of appeal in the appellate court,\textsuperscript{50} but requires the appellant to pay to this clerk, at least three days before the final return date, the fees for preparing the record and filing it in the appellate court.\textsuperscript{51} No provision of positive law requires the trial court clerk to notify appellant of the fees to be paid and the date when due; and, consequently, counsel for appellant must inquire as to any extension of the return date and the fees to be paid. Different customs in different sections of the state are producing different results when appellant fails to pay these fees timely, and as a result the record is not filed in the appellate court timely. The clerk of the Civil District Court for the Parish of Orleans has established a practice of issuing timely notices of the fees to be due and the date when these must be paid, and having these notices served by the sheriff on counsel for appellants. As a consequence, in a case where this notice was not so served, the Court of Appeal, Fourth Circuit, refused to dismiss the appeal, holding that the late filing of the record was not attributable to counsel for appellant.\textsuperscript{52} In Vernon Parish, where no such practice had ever been inaugurated by the clerk of the district court, an appeal was dismissed when the late filing of the record in the appellate court was due to the failure of

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\item \textsuperscript{47} In Fontenot \textit{v. Grain Dealers Mut. Ins. Co.}, 168 So. 2d 478 (La. App. 3d Cir. 1964).
\item \textsuperscript{48} 145 So. 2d 400 (La. App. 3d Cir. 1962). This decision was later approved by the Supreme Court in Emmons \textit{v. Agricultural Ins. Co.}, 245 La. 411, 158 So. 2d 594 (1963).
\item \textsuperscript{49} By \textit{La. Civil Code} art. 2103 (1870), as amended by \textit{La. Acts} 1960, No. 30, § 1.
\item \textsuperscript{50} \textit{La. Code of Civil Procedure} art. 2127 (1960).
\item \textsuperscript{51} \textit{Id.} art. 2126.
\item \textsuperscript{52} Atlantic Gulf Supply Corp. \textit{v. McDonald}, 171 So. 2d 481 (La. App. 4th Cir. 1965). See also Mathies \textit{v. Freuhauf Trailer Co.}, 170 So. 2d 785 (La. App. 1st Cir. 1965).
\end{itemize}
counsel for appellant to pay these fees timely to the clerk of the trial court.53

Procedure in Appellate Court

Under the new procedural code, a motion to dismiss the appeal must be filed within three days (exclusive of holidays) of the return day or lodging of the record in the appellate court, whichever is later, if the motion is based on some irregularity, error, or defect imputable to the appellant.54 However, if the motion to dismiss is based on lack of jurisdiction, or appellant’s lack of a right to appeal, or on the abandonment of the appeal, the motion to dismiss may be filed “at any time.”55 There is a conflict in the jurisprudence as to whether appellant’s failure to file the appeal bond timely is jurisdictional, or is merely an error or irregularity.56 In two cases decided during the past term, the motion to dismiss was filed after the appellate court had rendered its judgment; and both held that the late filing of the appeal bond was jurisdictional, and hence the motion to dismiss need not be filed within the three-day period. However, the two cases are in conflict. In Orrell v. Southern Farm Bur. Cas. Ins. Co.,57 decided by the Court of Appeal, Third Circuit, it was held that the motion to dismiss was filed too late. In Britt v. Brocato,58 decided by the Court of Appeal, Third Circuit, the motion was held timely, the appellate court’s judgment was recalled and vacated, and the appeal was dismissed.

The only other noteworthy case in this area was General Motors Accept. Corp. v. Deep South Pest Control,59 where the Supreme Court, under a writ of review, affirmed the intermediate appellate court’s decision60 that the order of a trial court denying an application for a new trial was not appealable, and a motion to dismiss the appeal on this ground need not be filed within the three-day period.

54. LA. CODE OF CIVIL PROCEDURE art. 2161 (1960).
55. Id. art. 2162.
57. 174 So. 2d 841 (La. App. 3d Cir. 1965).
58. 170 So. 2d 516 (La. App. 4th Cir. 1965).
59. 247 La. 625, 173 So. 2d 190 (1965).
60. General Motors Acceptance Corp. v. Deep South Pest Control, 166 So. 2d 46 (La. App. 4th Cir. 1964).
Rule XI, section 2, of the Uniform Rules of the Louisiana Courts of Appeal provides that "In the case of an application for rehearing sent through the mail for filing, it shall be deemed timely filed when the official U.S. postmark upon the envelope transmitting such application shows that it was mailed on or before the fourteenth day." In *Roberts v. Houston Fire & Cas. Co.*, the appellate court held that an application for rehearing received at its clerk's office after the fourteen-day period was not filed timely, even though it was postage metered within that period, where the postage meter's postmark was not an "official U.S. postmark."

**SUPERVISORY JURISDICTION AND PROCEDURE**

Prior to 1960, the courts of appeal had no supervisory jurisdiction, except in aid of their appellate jurisdiction. In the appellate reorganization which went into effect that year, each of the intermediate appellate courts was granted "supervisory jurisdiction, subject to the general supervisory jurisdiction of the Supreme Court, over all inferior courts in cases in which an appeal would lie to the court of appeal." It was generally understood in the profession that the Supreme Court would not exercise its general supervisory jurisdiction in any case in which an appeal would lie to a court of appeal, unless the latter had exercised, or refused to exercise, its supervisory jurisdiction.

Two cases decided by the Supreme Court during the past term go far, as a practical matter, in delaying the exercise of the general supervisory jurisdiction of our highest court. In these cases, the Supreme Court construed the constitutional provisions as preventing any exercise of its supervisory jurisdiction to review a court of appeal's refusal to grant remedial writs unless an application for rehearing had been filed in and refused by the intermediate appellate court. In effect, the Supreme Court held that it could review such a case only under

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61. 170 So. 2d 188 (La. App. 3d Cir. 1964).
63. LA. CONST. art. VII, § 29, as amended on November 4, 1958.
the writ of review,65 rather than under its general supervisory jurisdiction.66 Prior cases had indicated a contrary result.67

The writer regards as unfortunate this enlargement of the time lapse in cases where a litigant's only relief may be afforded through the supervisory jurisdiction of the Supreme Court. In a commendable effort to alleviate the situation, the Uniform Rules of the Louisiana Courts of Appeal have been amended to make provision for an application for rehearing from their refusals to grant remedial writs.68 The increased time lapse may be minimized somewhat by the immediate filing of such an application, and immediate action thereon by the intermediate appellate court. More alarming, however, is the potential for employing dilatory tactics, when the proceedings in the trial court are stayed through the filing of frivolous applications for remedial writs.

SUMMARY PROCEDURE

The right to use summary process was involved in Succession of Smith,69 where the surviving husband attempted to assert his claim to a half interest in certain property treated as belonging to his deceased wife's separate estate through an opposition to the final account of the executor. The intermediate appellate court held that this claim could be asserted only through an ordinary action, and sustained the executor's exception to the improper use of summary procedure. Under a writ of review, the Supreme Court held that, regardless of what designation was affixed to the pleading, it was actually a motion to traverse the inventory of the succession where summary process could be used. However, after reviewing the evidence, the Supreme Court held that the property in question belonged to the wife, and that the community had no interest therein.70

68. Through the addition of a new section 7 to rule XII. Prior to this year, no provision was made in these rules for any application for a rehearing from a court's refusal to grant remedial writs, as it had been felt that the applicant could apply immediately to the Supreme Court for an exercise of its general supervisory jurisdiction.
69. 169 So. 2d 414 (La. App. 4th Cir. 1964).
70. Succession of Smith, 247 La. 921, 175 So. 2d 269 (1965).
The facts and proceedings in *Hibernia Nat’l Bank v. Mary*\(^7^1\) are somewhat involved and complicated. Reduced to its simplest elements, the plaintiff sought to enforce a mortgage for more than $90,000 *via executiva*, and the mortgagor unsuccessfully sought in the trial court to arrest the seizure and sale through injunction. After a trial of the rule for a preliminary injunction, the trial court refused to issue the injunctive order. However, it granted the mortgagor a suspensive appeal from this order, conditioned on his furnishing a $9,000 suspensive appeal bond, and further stayed “all proceedings” during the pendency of the appeal. Under supervisory writs, the Court of Appeal, Fourth Circuit, properly held that, under the pertinent code provision,\(^7^2\) only the injunction proceedings could be stayed during the pendency of the suspensive appeal, and modified the trial court’s order to revoke the stay of the executory proceedings.

**Probate Procedure**

*Jurisdiction*

*Succession of Simms*\(^7^3\) probably has presented as many interesting questions as any case decided during the past term. The important point of procedural law which it recognized is that a nonresident executor who had had the testament probated in Louisiana, and had qualified as ancillary executor here, was subject to the personal jurisdiction of the Louisiana court in an action, brought after the judgment of possession had been rendered, to annul the testament insofar as it affected immovable property in this state.

*Administration of Successions*

One of the basic articles in our present probate procedure, adopted as a more workable substitute for prior articles based on the ancient French doctrine of seizin, provides that the “succession representative shall be deemed to have possession of all

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\(^{71}\) 167 So. 2d 200 (La. App. 4th Cir. 1964).

\(^{72}\) LA. CODE OF CIVIL PROCEDURE art. 3612 (1960).

\(^{73}\) 175 So. 2d 113 (La. App. 4th Cir. 1965). The Supreme Court subsequently issued a writ of review in this case, 247 La. 882, 175 So. 2d 112 (1965); but the probabilities are that the writ issued only to review the substantive questions of trusts and succession law.
property of the succession."\(^{74}\) In one case, an executor interpreted this language literally and was successful in evicting the deceased widow from the premises she had occupied since the death of her husband. The Court of Appeal, Second Circuit, properly reversed the judgment of eviction from which the widow had suspensively appealed. The intermediate appellate court held that the property belonged to the community which had existed between the deceased and his widow; and that, as the owner of an undivided half interest therein, the widow had a legal right to occupy the premises.\(^{75}\)

The question of whether a succession representative may be removed for anticipated mismanagement was settled by the Supreme Court in the negative in *Succession of Houssiere*.\(^{76}\) There, the administratrix had indicated her intention\(^{77}\) to pay her two sons, who were serving as her attorneys, a large fee which the other heirs regarded as exorbitant; and based on this, she had been removed from office on the ground of mismanagement by the trial court. The intermediate appellate court affirmed the judgment of removal.\(^{78}\) Under a writ of review, the Supreme Court reversed, holding that no act of mismanagement had been committed, as no attorneys' fees had been paid, and the other heirs had a right to oppose any application by the administratrix for judicial authority to pay a fee which the other heirs deemed exorbitant.

**THE REAL ACTIONS**

The action to remove a cloud on title or, as it is sometimes called, the action to quiet title, was borrowed by Louisiana jurisprudence from Anglo-American equity. Prior to 1908, there was some need for this procedural borrowing, as the petitory, possessory, and jactitory actions afforded no remedy in a case where neither party was in possession of the property. However, in 1908, the legislature created a new procedural remedy to fill in this hiatus—the action to establish title.\(^{79}\) Thereafter,

\(^{75}\) Coon v. Miller, 175 So. 2d 385 (La. App. 2d Cir. 1965).
\(^{76}\) 247 La. 794, 174 So. 2d 521 (1965).
\(^{77}\) By estimating the attorneys' fees for handling the succession as $25,000 in both her federal estate tax return and in her state inheritance tax return.
\(^{78}\) Succession of Houssiere, 166 So. 2d 98 (La. App. 3d Cir. 1964).
there was no need for the action to remove a cloud on title, and it should have withered on the vine; but unfortunately it was utilized from time to time thereafter, and this occasional use preserved its life.

One of the most serious mistakes made by the Louisiana State Law Institute in the redaction of the new Procedural Code — and for this the writer must assume most of the responsibility — was that this remedy was not suppressed at the time.\(^{80}\) This mistake bore fruit almost immediately, for in *Walmsley v. Pan American Petroleum Corp.*,\(^ {81}\) its continued existence was not only recognized, but the remedy was extended to cover a case where the defendant mineral lessee was actually in possession. The rule of the *Walmsley* case probably will not be applied again except to a case presenting the identical, and peculiarly harsh, facts of that case.\(^ {82}\) As the action to quiet title does not recognize possession as creating a presumption of ownership, and further does not permit possession to play its historic role as arbiter of the burden of proof, it has been subjected to severe criticism.\(^ {83}\)

In *Shell v. Greer*,\(^ {84}\) the action was again successfully employed. From the facts stated in the opinion of the intermediate appellate court, it appears that plaintiff was in possession of the property and could have obtained the identical relief through the broadened possessory action based on a disturbance in law.\(^ {85}\) One possibility for consigning the action to remove a cloud on title to virtual obsolescence would be for the courts to treat it as either a petitory or possessory action, dependent upon which party is alleged to be in possession. There is respectable precedent for such a judicial technique.\(^ {86}\)

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\(^{80}\) The action to remove a cloud on title was not considered during the redaction of the Louisiana Code of Civil Procedure. See Introduction to Title 11 of Book VII.

\(^{81}\) 244 La. 513, 153 So. 2d 375 (1963).

\(^{82}\) "Plaintiffs, finding themselves embroiled in a title dispute with the state, were either unable to secure permission to bring suit or found the procedures for doing so too awesome a prospect." *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Mineral Law*, 24 La. L. Rev. 215, 231 (1964).

\(^{83}\) Id. at 229-36. See also Zengel, *The Real Actions — A Study in Code Revision*, 29 Tul. L. Rev. 617, 634 n.59 (1955).

\(^{84}\) 171 So. 2d 672 (La. App. 2d Cir. 1965).

\(^{85}\) Under LA. CODE OF CIVIL PROCEDURE arts. 3655 and 3659 (1960).

\(^{86}\) "The characterization of a pleading by the litigant is not controlling. Pleadings are taken for what they really are, and not for what their authors designate them. A court should not eject a justiciable cause merely because it is dressed in the wrong coat." *Succession of Smith*, 247 La. 921, 928, 175 So. 2d 269, 271 (1965).