Procedure: Civil Procedure

Albert Tate Jr.
PROCEDURE

CIVIL PROCEDURE

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INTRODUCTION

It is an humbling experience to sit in the place of the late Dean Henry George McMahon. His vision and knowledge and perception in the field of civil procedure are irreplaceable. The great treatise he planned is forever lost. (Nevertheless, my teaching of Louisiana civil procedure over the past academic year has brought home to me that many of this wise scholar’s insights are perpetuated in the annotations in McMahon & Rubin, Pleadings and Judicial Forms, Volumes 10 and 11 of West’s Louisiana Statutes Annotated. The practitioner will be wise to check this source when confronted with a procedural problem.)

Over a third of the thousand-odd appellate decisions reported during the examined year concern one or more issues of civil procedure. The bulk of the procedural points raised were insubstantial and represented only unsuccessful tactical maneuver. In the residue, stemming from ambiguities in our procedural law or from misunderstanding with regard to the application of the procedural principles represented by our new Code of Civil Procedure, we will note only the more significant or more common of the procedural issues raised, with an occasional glance at the instructive example of pitfalls for the harried and time-pressed practitioner.

JURISDICTION AND VENUE

Article 10 of our Code of Civil Procedure provides that otherwise-competent Louisiana courts have jurisdiction to adjudicate status in certain specified situations. The article’s sub-

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1. Because such ephemeral publications are often not well preserved, at this point it may be fitting to reproduce the February 1967 dedication to the latest pocket parts of these works by Judge Alvin B. Rubin, co-author:

"There has been no greater figure in Louisiana procedure in this century than Henry George McMahon. With typical modesty he signed the volumes to which these pocket parts are enclosed merely as coauthor. But he led the way in their concept, plan and execution. They would not have existed without him."
division 5 provides for status jurisdiction of proceedings "to obtain the legal custody of a minor if he is domiciled in, or is in, the state." (Emphasis added.) The provision thus apparently recognizes that the simple physical presence of a child in the state, irrespective of the child's legal domicile (i.e., that of his parent or tutor), authorizes a Louisiana court to adjudicate the child's custody; and the Louisiana Third Circuit Court of Appeal so held, unanimously, in *Lucas v. Lucas*.

There, where the children had been abducted from Mexico and brought to Louisiana by the father, the mother unsuccessfully sought to dismiss the suit on the ground that the children were not legally "in" Louisiana because she, the mother, had been awarded the legal custody by a Louisiana court before she moved to Mexico and established her domicile there.

Additionally, *Lucas v. Lucas* involved a perplexing venue question, and on this the court divided 3-2. The mother had been awarded custody by a Caddo Parish court before she moved to Mexico. The father's attempt to regain custody (on allegations of neglect and improper care) in Caddo had been rebuffed, on the ground that a Louisiana court lacked jurisdiction, since the children were then neither domiciled in nor present in Louisiana. The father thereupon kidnapped the children and brought them to his present Louisiana domicile in Rapides Parish. The Code of Civil Procedure provides no specific venue for custody proceedings brought independently of marital or tutorship proceedings, although our jurisprudence does recognize such a custody demand as an independent action. The dissenting appellate judges believed that the Caddo Parish court retained exclusive "jurisdiction" of custody, since by its initial decree it had first obtained jurisdiction of the "res"—i.e., the custody status. The court's majority, however, found Louisiana jurisdiction over the absent defendant wife's person, since constructive service had been made upon her in the state in accordance with forum law. It further found that Rapides Parish was a proper venue. In the absence of specific regulation by other statutory regulation, the proper parish of a suit against a non-

5. See Thibodeaux v. Roscoe, 182 So.2d 77 (La. App. 3d Cir. 1966) and decisions discussed therein. Such jurisprudential applications are criticized by Professor Robert A. Pascal *supra* at 319.
resident is governed by Code of Civil Procedure article 42, the general venue provision. This provides for venue in any parish which a nonresident defendant may be served. Since the nonresident mother could be served in Rapides through an attorney appointed to represent an absent defendant (when a court has jurisdiction of the status), the majority found the suit to be properly brought in Rapides.

The Louisiana Supreme Court denied certiorari, but in so doing the majority did not express approval (or disapproval) of the intermediate court's majority rationale. The per curiam denial noted simply that the court of appeal "result" was correct because "Mrs. Lucas made a general appearance when she filed a peremptory exception of res judicata at the same time she filed the declinatory exception to the jurisdiction of the Court." One should at this time note that the jurisdiction of Louisiana courts was asserted by virtue of a status (custody), not by virtue of any presence or submission of the person of the defendant wife to the Louisiana court's power to adjudicate. It would seem therefore that, once jurisdiction over the status is recognized (i.e., despite the abduction of the minors), the discussion of jurisdiction over the person or of waiver to objections to it is irrelevant: If the court does have jurisdiction over the status, it necessarily has jurisdiction to render judgment affecting the absentee with regard to the status, by making him (her) a party through constructive service; if the court does not have jurisdiction of the status (custody, in this case), the decisions treat this lack as equivalent to a want of jurisdiction over the subject matter, which cannot ever be waived or conferred by consent.

The Supreme Court's memorandum opinion denying certiorari, as well as some of the discussion in the intermediate court's various opinions in the case, demonstrate a confusion between "jurisdiction over the person" and "venue," one which

7. 250 La. 539, 197 So.2d 81 (1967). Justice Sanders dissented on the ground that the Caddo Parish court retained continuing exclusive intra-Louisiana jurisdiction to modify its own custody decree.
8. LA. CODE CIV. P. art. 10 (1960).
9. Id. art. 6.
10. Id. art. 2: "Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted."
the 1960 Code of Civil Procedure was designed to clarify and avoid. Article 6 provides that "jurisdiction over the person is the legal power and authority of a court to render a personal judgment against a party to an action or proceeding," whereas under article 41 "venue means the parish where an action or proceeding may properly be brought and tried." In the present instance, therefore, the propriety of the Rapides Parish Court as a forum concerned really a question of venue, since it had jurisdiction of the subject matter and also of the defendant's person (by virtue of its jurisdiction over the status and constructive service on the defendant thereby authorized). However, although incorrectly referring to a waiver of objections to "jurisdiction," the Supreme Court's memorandum opinion correctly concluded that any objection to the venue of Rapides Parish was waived by the filing of the peremptory exception. A dilatory exception, by which objections may be urged both to venue and to want of personal jurisdiction, is waived if a general appearance is made before it is overruled, and the filing of a peremptory exception is, with limited exception not here pertinent, a general appearance which does indeed waive a simultaneously or previously filed declinatory objection. It is to be noted that, in any event, the Supreme Court's denial of certiorari does not necessarily mean approval of the ruling of the intermediate court's majority that Rapides Parish was an appropriate venue for the custody proceeding, since due to the defendant's waiver of objection by filing of the peremptory exception the Supreme Court majority never faced the dissenting judges' contention that Caddo alone remained the proper venue.

14. Under id. art. 7, filing the peremptory exception with objections to the jurisdiction is a general appearance unless "required by law." The only instances in which peremptory exceptions are required to be filed with all other exceptions is in courts of limited jurisdiction, where all exceptions must be filed with the answer. Id. arts. 4892, 4922, and 5002; cf. Mexie Bros. v. Sauviac, 191 So.2d 873 (La. App. 4th Cir. 1966), noted, 28 La. L. Rev. 291 (1968). The simultaneous filing of dilatory objections with the declinatory exception is always required by law, La. Code Civ. P. art. 928 (1960), so that the simultaneous filing of the dilatory exception with the declinatory does not waive the latter. Id. art. 7.
15. See La. Code Civ. P. art. 7 (1960), which defines a general appearance as being one made for other than certain specified limited purposes. See also "Caveat," Annotation 1, Form 1001, 11 West, LSA, McMahon & Rubin, Pleadings and Judicial Forms, form 1, Annot. 1, Caveat (1963).
due to the continuing jurisdiction of the Caddo Parish Court to modify its own custody decree.\textsuperscript{16}

The several opinions of the courts in \textit{Lucas v. Lucas} have been discussed at this length not only because of the intrinsic importance of the rulings as to jurisdiction and venue in child-custody cases. In these early years of the application of the concepts of the new Code of Civil Procedure, the conceptual distinction between jurisdiction (over the person or otherwise) and venue must not be confused. Similar imprecision of analysis and lack of clarity in applying the related concepts resulted in much confusion and in unsound jurisprudence which eventually destroyed the utility of the old Code of Practice concept of jurisdiction \textit{ratione personae}, forcing the present Code to adopt its present approach.\textsuperscript{17}

\textit{Morrison v. New Hampshire Ins. Co.}\textsuperscript{18} represents a ruling of some importance with regard to jurisdiction over nonresidents. A Louisiana policyholder had obtained a fire policy from a foreign insurer on a residence in Mississippi. When a fire loss occurred, his suit to obtain payment in Louisiana courts was dismissed in the lower courts on the ground that no procedural statute authorized suit in Louisiana on a cause of action arising outside Louisiana.\textsuperscript{19} In reversing, the Supreme Court majority opinion pointed out that, although it had been issued in Mississippi to insure a Mississippi residence, nevertheless the policy had been procured through a Louisiana agent (to whom the policy was transmitted for delivery in Louisiana to the mortgagee, and who collected in Louisiana the initial premium for the foreign insurer), and the policy provided for payment of any policy loss in Louisiana (under a loss payable to a mortgagee clause). The court weighed the interest of Louisiana in affording a forum remedy to its citizens for a cause of action growing out of a Louisiana-connected business activity, against the relatively little inconvenience to be caused the foreign insurer.

\textsuperscript{16} If so, however, is this objection not more correctly termed an objection to the present suit because of the pendency of a prior action between the same parties, \textit{La. Code Civ. P.} art. 531 (1960), rather than an objection to the venue as improper? Both objections are equally raised through the declinatory exception, \textit{Id.} art. 925(3), (4) and are similarly waived by filing of the peremptory exception. See note 15 supra.


\textsuperscript{18} 249 La. 546, 187 So.2d 729 (1966).

\textsuperscript{19} See decision of intermediate court at 181 So.2d 418 (La. App. 4th Cir. 1965).
(against whom suit could under another statute have been maintained in Louisiana for Louisiana-issued policies). The court’s majority then concluded that Louisiana courts could exercise jurisdiction over the foreign insurer under what it characterized as the “‘Minimum Contacts’ doctrine.” The chief importance of the decision is its refusal to characterize a cause of action as Louisiana-based or not upon some technicality, such as the place where the contract was “made,” and in its broad approach towards determining Louisiana jurisdiction on the basis of the sufficiency of the Louisiana contacts weighed against the relative inconvenience and unfairness to the defendant.

One other issue in the case deserves some comment. Although the Supreme Court opinion reflects some confusion as to this, the defendant insurer, which was authorized to do business in Louisiana, accordingly had filed an instrument appointing the secretary of state as its agent for service of process “in any action or proceeding against such insurer,” with such appointment to “continue in force so long as any contract or other liability of such insurer in this state shall remain outstanding.” (Emphasis added.) The lower courts held that this consent to be sued through substituted service extended only to policies issued in Louisiana by virtue of the authorization to do business here, which is conditioned upon the consent so filed. After the trial court initially dismissed the suit on this ground, the plaintiffs had had the defendant insurer served again through the secretary of state under another statutory provision authorizing such service on a cause of action “resulting from” a foreign corporation’s business activity in this state. Not only did the Louisiana Supreme Court hold that the

20. See 249 La. 546, 556, 187 So.2d 729, 736 (1966): “Defendant is licensed to do business in Louisiana, but insofar as the record reflects it has no lawful agent for service of process.”

21. La. R.S. 22:985 (1950). See also id. 22:983(A)(2). The pleadings of the defendant insurer admitted that a consent to suit had been filed, but contended that the consent was limited to suits arising out of Louisiana-issued policies. See court of appeal record, Docket No. 1942, 4th Circuit, at Tr. 9-11.

22. Id. 13:3471(1) as amended by La. Acts 1960, No. 32; see also La. Code Civ. P. arts. 1261, 1262 (1960). Also relied upon in the appellate courts was La. R.S. 22:1253(A) (1950), under which a foreign insurer which delivers a policy to a Louisiana entity thereby appoints the secretary of state as its agent for service of process in suits arising out of such policy. No attempt was made to effect service through the Louisiana Personal Jurisdiction over Nonresidents Act, id. 13:3201-07, added by La. Acts 1964, No. 47, perhaps because the “nonresidents” within the reach of the enactment are statutorily defined so as to exclude foreign corporations licensed to do business in the state. The difficulty the courts had in the present case to ascertain which procedural statute applied so as to permit constructive service, of
"business activity" through the policyholder's local insurance agent permitted such substituted service upon the foreign insurer.\textsuperscript{23} Also, apparently—and a more far-reaching decision—the court held that substituted service could be made upon the foreign insurer by virtue of its statutory consent to be sued, despite the circumstance that the cause of action did not arise out of the particular activities in Louisiana in connection with which the insurer had filed its consent to be sued "in any action or proceeding" against it.\textsuperscript{24} Query: Since the statutory authorization of service upon an agent exacted as a condition for a foreign corporation to do business in the state is not limited to activities arising out of such business,\textsuperscript{25} to what extent does the corporation's presence in Louisiana, together with its consent through its unrestricted appointment of agent upon whom service may be made, authorize suit in Louisiana in any transitory action whatsoever against the defendant, whether based upon a Louisiana-connected cause of action or not?\textsuperscript{26}

\textbf{Jurisdictional Venue}

With regard to venue, our Code of Civil Procedure provides for three types: (a) "jurisdictional" venue, which may never be waived by the parties, (b) "preferred" venue (sometimes termed "mandatory"), which in the event of conflict between statutory provisions is a venue upon which an affected party may insist by timely exception (but which may be waived by failure to except timely); and (c) "permissive" venue, where the plaintiff at his option may choose one of two or more venues provided by the Code.\textsuperscript{27} Among the non-waivable jurisdictional venues provided by article 44 is that providing for the court the several arguably (but not concurrently) applicable, might indicate the wisdom of broadening the definition of the 1964 statute so as to permit at least one general catch-all nonresident statute under which service might be made against any type of nonresident (individual, corporation, insurer or not) in any type of suit.


\textsuperscript{24} 249 La. 546, 567, 187 So.2d 729, 736-37 (1966). The court specifically held that \textit{La. R.S. 22:985 (1950), cited in text at note 21 supra}, reflects the intention of the legislature to provide for substituted service in instances such as the present.

\textsuperscript{25} As is also the case of a non-insured foreign corporation, which to do business in Louisiana must appoint an agent for service of "any lawful process" upon the corporation. \textit{La. R.S. 12:202A (1950)}.

\textsuperscript{26} Note, 10 \textit{TUL. L. REV.} 659 (1936). See also Comment, 26 \textit{LA. L. REV.} 351, 354-60 (1966).

\textsuperscript{27} \textit{LA. CODE CIV. P. arts. 44, 45 (1960)}.
in which a succession may be opened. 28 Emphasizing the importance of the jurisdictional venues, in Succession of Guitar 29 the court annulled a succession judgment and dismissed the proceeding, where the court of its own motion noted that the succession was opened in an incorrect venue, stating that absence of jurisdictional venue in such instances is equivalent to lack of jurisdiction over the subject matter and imports absolute nullity to all proceedings. One of the other specified jurisdictional venues is that of article 2006, the intention of which is to require that an action to annul a judgment must be brought in the trial court in which the original proceeding was instituted. However, as a recent decision of the Second Circuit illustrates, 30 this venue provision relates only to actions to annul judgments which are merely voidable or relatively null—as to a judgment which is an absolute nullity, it is subject to collateral attack at any time in any proceeding, wherever venued, in which its validity is asserted in opposition to the party relying upon the judgment's absolute nullity.

**Actions**

Codifying a jurisprudentially created procedure and borrowing from the Federal Rules, articles 591-597 of our 1960 Code of Civil Procedure provide for a class action by which one or more members of a class may sue or be sued on behalf of all members, when the persons constituting the class are so numerous as to make it impracticable for all of them to join or be joined as parties. The Code action was first successfully utilized when two prospective candidates by virtue of it were able to secure a clarification of the election laws on behalf of all other potential candidates at an election to be called. 31 The period under review produced two decisions illustrating limitations and judicial safeguards pertaining to the remedy. In one, the plaintiff's right to a class action was denied where the plaintiff's individual claim for relief predominated over the alleged common interest. 32 In dismissing the single plaintiff's claim, the court noted that it was pertinent to consider, as well as the suit's representative character, whether the number of

28. Id. art. 2811.
29. 197 So.2d 921 (La. App. 4th Cir. 1967).
parties is sufficient as compared to the numerical size of the class and whether other members have notice of the pendency of the claim. The second decision, *Verdin v. Thomas*, concerned a petitory action filed by fifty-nine plaintiffs on behalf of all other heirs of certain decedents. The common interest of all the heirs in claiming ownership of the property was held to be sufficient basis for the institution of the class action, with the court also finding that under the circumstances the action fairly insured representation of all members of the class. *Verdin v. Thomas* is also interesting in that it recognized the right of these heirs to secure the appointment of a provisional administrator to grant a mineral lease of the property in order to safeguard the interest of all claimants to the property, as well as in that it involved court approval of a compromise of the claims of all members of the class negotiated on their behalf by the parties who brought the action.

Under article 531 of the Code of Civil Procedure a defendant may have all but the “first” suit dismissed when two or more suits are pending in Louisiana courts on the same cause of action between the same parties and having the same object. In *Landry v. Landry*, the husband filed suit on a legal holiday in the parish of matrimonial domicile, while the wife on the following day filed suit in a nearby parish in which she had established her separate domicile due to the husband’s alleged mistreatment of her. The court recognized that by statute ordinary suits may not be filed on a legal holiday; but, reversing the trial court, the appellate tribunal nevertheless sustained the husband’s exception of lis pendens and dismissed the subsequent suit by the wife. The intermediate court reasoned that nevertheless the husband’s suit was already in the clerk’s office the very first moment of the next day (when it became

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33. 191 So.2d 646 (La. App. 1st Cir. 1966).
34. LA. CODE Civ. P. art. 3011 (1960). The succession proceedings were instituted as separate actions, tried and decided at the same time as the subject suit. Succession of Billiot, 191 So.2d 652 (La. App. 1st Cir. 1966). Succession of Billiot, 191 So.2d 653 (La. App. 1st Cir. 1966).
35. Id. art. 594 provides that no class action may be compromised or dismissed without court approval nor until after notice be given to other members of the class in such manner as the court directs. In the present instance, the court ordered public notice by advertisement in a public newspaper in the parish, requiring interested parties to file a formal opposition before a court hearing set twenty days later. Docket No. 6718, First Circuit Court of Appeal, Tr. 81-83. The court patterned its order upon the provision requiring advertisement before compromise of succession claims by a succession representative. Id. arts. 3198, 3229.
36. 192 So.2d 237 (La. App. 4th Cir. 1966).
lawful to file suits), so that therefore it primed the wife's suit even if hers was filed at the opening hour (9:00 A.M.) of her clerk's office in the nearby parish.

At first blush, this approach may seem commonsensical and accurate in analysis. On further reflection, however, the circumstance that one party may obtain unfair advantage over the other by securing, through accommodation or friendship, a legally unauthorized "first" filing suggests a too-mechanical application of the Code provision, and one not required by it. Furthermore, by statute some clerk's offices in the state are authorized to open at 9:00 A.M., while all others are directed to open at 8:00 A.M.\(^{37}\) It would seem that one party's suit, filed with all the haste possible, should not be primed by another as "first" because filed in a parish with an earlier opening hour merely because of the fortuitous circumstance of the place of the suits; nor for instance because one clerk was early and another tardy in opening his office. One might hypothesize that all suits filed at opening hour might properly be considered concurrently filed, since the Code of Civil Procedure requires that the clerk of court note only the "date" of filing (not the hour and minute),\(^ {38}\) and since Civil Code articles regulating analogous legal events are to this effect.\(^ {39}\) At the very least, the illegally filed suit might not be considered validly "first" filed, just as where an illegally premature levy of execution, though valid for certain purposes, is not allowed to prime a levy by a law-observing judgment creditor who withholds execution during the legal delay.\(^ {40}\)

Possibly the problem is not of sufficient moment to require legislative clarification. Nevertheless, a more functional interpretation and application of article 531 by the courts might avoid regarding mechanically as "first" a suit which is placed


\(^{39}\) La. Civil Code arts. 3358 (mortgages concurrent if inscribed on same day), 3467 (time for prescription reckoned by days and not hours) (1870). The former Civil Code provision was modified by statute to provide that the date, hour, and minute should be inscribed on all acts importing "mortgage or privilege," with the act to be effective from time of filing. La. R.S. 9:5141 (1950). However, when through inadvertence three judgments were filed on the same day without noting the minute and hour of filing, the judgments were regarded as filed simultaneously and ranked concurrently. Godchaux Sugars Inc. v. Boudreaux, 153 La. 685, 96 So. 532 (1923).

in a courthouse earlier merely through the fortuities of accommodation, or of prematurity or tardiness or differentness of office hours.

Article 561 of the Code of Civil Procedure provides that an action is abandoned when the parties fail to take any step in its prosecution for a period of five years. Burglass v. Waguespack correctly notes that the consequent dismissal should be without prejudice. Aside from the inconvenience of instituting a second suit, the penalty for abandoning a suit by lack of prosecution is only that a second suit might be met by a plea of prescription, since the abandoned suit's interruption is regarded as erased by its abandonment. In Loftus v. Grain Dealers Mut. Ins. Co., the court held correctly that for purposes for computing the five years within which an active step must be taken, the determinative date is that of the minute entry fixing the case for trial, not the trial date itself, which might for instance be several months subsequent to the fixing, as in the cited case.

PARTIES

In its provisions relating to parties, the Louisiana Code of Civil Procedure provides detailed regulation of "proper" parties plaintiff and defendant. The thrust of these provisions is to assure (1) that the real parties in interest will be afforded a remedy and be bound by the litigation, (2) that a defendant may not be vexed by multiple or unauthorized suits, and (3) that judicial administration may have clear guidelines to determine at the threshold of litigation the procedural capacity of parties to prosecute or defend a suit and to stand in judgment which will be binding on the interests involved in the litigation. These Code articles perform a useful purpose when they are interpreted and applied in accordance with their function. However, as will be seen, on occasion harsh substantive results and traps for the unwary may obtain, not required by the function.

41. 187 So.2d 489 (La. App. 4th Cir. 1966). The court noted that its decision was in conflict with that of the First Circuit in LeBlanc v. Thibodeaux, 162 So.2d 753 (La. App. 1st Cir. 1964). The latter decision without comment dismissed the action without prejudice, which was erroneous (see text at note 42 infra) but not prejudicial in the decided case, since upon dismissal as abandoned for non-prosecution for five years the tort cause of action was prescribed by failure to file timely suit within the year. La. Civil Code art. 3536 (1870).


43. 185 So.2d 747 (La. App. 1st Cir. 1967).
of these articles, when they are applied mechanically and literally and without consideration of their limited technical purpose.

Typical of the sort of “which shell is the pea under” game that can be played with proper-party questions is where a husband and wife file suit, and then at the trial or on appeal it is determined that the particular claim asserted in the name of one spouse should technically have been asserted in the name of the other under substantive community property law. On technical analysis, the defendant obligor, although actually without interest in whether the husband or the wife collects the debt, is sometimes permitted to escape liability to either. A typical such fact situation is presented by Gebbia v. City of New Orleans,44 but there the Louisiana Supreme Court refused to play the shell game. A wife had sustained personal injuries by reason of a premise defect. She and her husband sued the premise occupier interests for damages. The court of appeal judgment had affirmed recovery, but it had deleted an award of $120 for the wife’s wages for which the wife had sued, noticing of its own motion that this is a community claim for which the husband is the proper party plaintiff. Granting certiorari, the Supreme Court reinstated the award of lost wages to the wife. In so doing, the court characterized the issue as being one of procedural capacity to sue for a community claim, a defense which must be urged by threshold exception or is otherwise waived, rather than being a want of interest which the courts may note and act upon at any time, even on appeal. Similarly, on authority of Gebbia, the court of appeal in Polk v. New York Fire & Marine Underwriters45 rejected an attempt on appeal to delete an award of $250 to the husband for automobile damage asserted as a community claim, where the evidence showed the vehicle had been acquired by the wife as a gift and was therefore technically her separate property. In both of these instances the courts refused to permit the often-shadowy distinction between a want of interest and a lack of procedural capacity to deter them from affirming an award of proven damages sustained by one of the spouses, although asserted by the other in a suit joined by both spouses. Since both spouses had joined both suits, there was no possibility of double recovery or multiple suit against either defendant, nor was there any serious question of the suing

45. 192 So.2d 667 (La. App. 3d Cir. 1966).
spouse being unauthorized to do so by the spouse with the real interest in the particular item of damages claimed. Undoubtedly this circumstance influenced the courts toward their resolution of the question in accordance with substantive justice.

The position taken by the courts might present some conceptual difficulty, however, if suit for the same item had been brought by separate suits by the different spouses, and it was discovered only at the trial (as in the Polk case above) of one suit or the other that in truth one spouse rather than the other had the sole actual interest under substantive law. Under the cited cases, technically, if the procedural incapacity of the wrong spouse is not timely raised, that spouse’s recovery cannot be denied because of his want of interest, and the defendant may theoretically be exposed to dual recovery. This sort of prospect is so unlikely, that the courts may nevertheless be applauded rather than condemned for refusing to apply a proper-party article so as to pervert substantive result, when the true function of the article is only to prevent multiple or unauthorized recovery and to expedite judicial administration of law suits. Under the circumstances of the decisions, where both spouses were joined as parties, perhaps less troublesome conceptually might have been a denial of the defendant’s right to question one spouse’s incorrect assertion of the other spouse’s right because the defendant could not possibly be prejudiced and therefore, on appeal, was without interest to urge application of a proper party article in order to change the substantive result, when no functional purpose of the proper party article is served; or perhaps, in legalese, to have rejected the improper party plaintiff contention on some theory of interspousal agency or authorization to assert, or estoppel to question assertion of, the claim through the “wrong” spouse. If this alternative rationale were followed, instances where in fact potential prejudice might exist because of non-joinder of other spouses with non-prescribed claims to the interest asserted by the wrong spouse, the appropriate resolution of a claim of improper party plaintiff might be by permission to amend for purposes of adding or substituting the proper party,46 or by remand for such purpose, instead of by an outright dismissal of a claim which might be well-founded

46. Such amendment should relate back to the date of filing the original pleading. LA. CODE Civ. P. art. 1153 (1960).
as a matter of substantive law and was timely instituted, though
by the wrong party.47

The cases discussed reached sound results. However, in two
other instances during the examined period, mechanical applica-
tion of proper-party provisions accomplished ends hard to
Auto. Ins. Co.48 concerned a tort suit by a father as administrator
of his then-minor daughter's estate. Although no motion to sub-
stitute was ever made, the evidence at the trial revealed that
at the time of the trial the daughter had reached majority. As
a matter of substantive law, the father's administration of the
child's estate automatically ceases at a child's majority,49 so
that the child as a competent major becomes the proper party
to sue.50 Following prior jurisprudence, the appellate court sua
sponte noticed that the appeal by the father had not been taken
by the proper party, and it therefore dismissed the child's appeal
for an increase in damages. To avoid this result, a Louisiana
State Law Institute committee has recommended statutory re-
vision so as to provide, once a suit is instituted by and between
proper parties, that all subsequent steps taken by them shall
be deemed valid until formal request for substitution of proper
successors is made. Perhaps even without statutory change, the
same result might be reached by a liberal interpretation of Code
of Civil Procedure article 807, permitting continuance of an
action by or against a party who "transfers" an interest until
such time as substitution of proper party is made;51 this appli-
cation of article 807 will likewise have the effect of interpreting
the proper-party provisions so as to limit them to their intended
function of clarifying proper representation of incompetent or
non-individual parties at the time suits are initially instituted.
mechanical application of the proper-party articles may have
produced harsh substantive results not required by the func-
tional purpose of the statutory provisions. Since the writer

47. See, e.g., Douglas v. Haro, 214 La. 1099, 39 So.2d 744 (1949); Lafeur v.
National Life & Health Ins. Co., 185 So.2d 838 (La. App. 3d Cir. 1966);
Nettles v. Great American Ins. Co., 155 So.2d 87 (La. App. 1st Cir. 1963),
cert. denied, 244 La. 1024, 156 So.2d 227 (1963).
48. 195 So.2d 314 (La. App. 4th Cir. 1967).
50. LA. CODE CIV. P. art. 682 (1960).
51. This was the approach taken in Nettles v. Great American Insurance
Co., 155 So.2d 87 (La. App. 1st Cir. 1963), cert. denied, 224 La. 1024, 156 So.2d
52. 193 So.2d 798 (La. App. 3d Cir. 1967), cert. denied, 250 La. 368, 195
So.2d 644 (1967).
agrees with the excellent casenote in this issue of the Law Review discussing the decision, no further analysis will be made here.

In Hy-Grade Investment Corp. v. Robillard, the court did not even discuss the possible pertinence of a proper-party article, perhaps to avoid the conceptual problem or harsh substantive result which sometimes follows from such an article’s application of situations not within its functional scope. Code of Civil Procedure article 687 provides that a “person” doing business under a trade name is the proper party to enforce a right growing out of such business, and “persons” include corporations as well as individuals and all other entities. The plaintiff in the suit was incorporated as “Hy-Grade Investment Inc.,” although it did business under the name of “Hy-Grade Investment Corp.,” under which latter name it filed suit. On the defendant’s exception, the trial court dismissed the suit, finding there was no such legal entity. The intermediate court reversed, basing its rationale on a Civil Code article permitting the courts to disregard a “slight alteration” in a corporate name. In the absence of this statutory authorization, another acceptable rationale might have been not to dismiss the suit, but instead to permit amendment for substitution of the proper party plaintiff, since this is permissible under the Code of Civil Procedure’s amendment articles; while, at the same time, this result would accomplish the restricted purpose of the proper-party articles, which is not to defeat a cause of action but only to insure that it is enforced by the proper parties in conclusive litigation.

EXCEPTIONS

The 1960 Code announced: “Three exceptions and no others shall be allowed: the declinatory exception, the dilatory excep-

53. See infra Note, 28 La. L. Rev. 479 (1968). The writer may state, as a dissenting member of the court which decided the case, that neither the majority nor the dissenters had analyzed the issue as actually concerning substitution and amendment rather than proper-party, as did the note-writer. Had we done so, perhaps the entire court could unanimously have reached a result opposite to that which we did on our (incorrect, I now believe) analysis of what was the issue in the case.

54. Hy-Grade Inv. Corp. v. Robillard, 196 So.2d 558 (La. App. 4th Cir. 1967). See also Capital Loans, Inc. v. Stassi, 193 So.2d 670 (La. App. 1st Cir. 1967), cert. denied, 250 La. 889, 199 So.2d 912 (1967), and discussion at note 63 infra.

56. La. Civil Code art. 432 (1870).
tion, and the peremptory exception.\textsuperscript{58} (Emphasis added.) By this provision it was intended to abolish the thirty-odd separate exceptions previously recognized and to reduce their number to three. The grounds of the previous exceptions were now recognized as "objections" which might be urged by one or the other of the three recognized exceptions. The classification of the objections as declinatory, dilatory, or peremptory is actually based in borderline instances on historical rather than analytical grounds, and as Professor Donald Tate noted in last year's faculty symposium there are conceptual and practical difficulties in administering the Code's exception scheme.\textsuperscript{59} The present writer's further observation is that the bench and bar and reported appellate opinions continue to speak of peremptory exceptions of no cause of action, res judicata, etc., of a declinatory exception of improper venue, etc., and of a dilatory exception of vagueness, etc., rather than talking of a peremptory exception urging objections of no cause of action and res judicata, a declinatory exception urging improper venue, or a dilatory exception based on the objection of vagueness. No great harm is done by continuation of the old custom, but it is perhaps further evidence that tradition and history rather than thoughtful procedural device predominate in this field of our law, even as clarified by the great McMahon analyses over the past several decades.

A sound procedural reform of the 1960 Code abolishes the blanket-objection and requires an exceptor to allege with particularity the objections urged by his exception.\textsuperscript{60} There are obvious benefits in such notice expediting prior preparation for hearing and immediate disposition thereafter, but the requirement is not so rigid as to prevent subsequent amendment to amplify previously pleaded declinatory or dilatory objections or to add new peremptory objections.\textsuperscript{61} However, while all objections to be raised by the declinatory or the dilatory exception must be filed simultaneously and prior to answer or the entering of a preliminary default,\textsuperscript{62} the grounds, original or supplemental, to be urged by the peremptory exception may be raised at later

\textsuperscript{58} Id. art. 922.
\textsuperscript{60} LA. CODE CIV. P. art. 924 (1960).
\textsuperscript{61} Id. art. 1152. The restriction prevents adding new objections to the dilatory or the declinatory exception, so as to string out the filing of such objections in derogation of the Code scheme of preclusion of further such objection after the initial pleading stage.
\textsuperscript{62} Id. art. 928.
stages of the proceedings. The tardy or careless pleader of a peremptory objection should nevertheless give some consideration to the limits which might prevent his obtaining consideration of late-pleaded objections or delayed clarification of those previously filed but not well articulated.

Thus, in Abramson v. Piazza the appellate court, referring obliquely to the rule that in pleading objections of prescription by the peremptory exception the pleader may not plead prescription generally but must specifically plead the particular prescription relied upon, held that pleas relying upon certain prescriptions specified by cited Civil Code articles had not been timely filed since peremptory objections must be pleaded in the trial court “prior to a submission of the case for decision.” (However the delay in specification was not prejudicial in the cited case, because the court affirmed judgment in the pleader’s favor by sustaining a plea of acquisitive prescription timely filed as founded on another Civil Code article.) Even though not filed, timely or not, a trial or appellate court does have discretionary power to notice of its own motion certain peremptory objections (not prescription or res judicata, which must be specially pleaded), while under another Code provision an appellate court always “may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of exception appears of record.” (Emphasis added.) However, as noted in Capitol Loans, Inc. v. Stassi, when the peremptory exception

63. 198 So.2d 565 (La. App. 3d Cir. 1967).
64. La. Civ. Code arts. 3463, 3464 (1870). See also Succession of Drysdale, 130 La. 167, 57 So. 789 (1912); James F. O’Neil Co. v. Calhoun, 144 So.2d 151 (La. App. 4th Cir. 1962), and Neilson v. Haas, 199 So. 202 (La. App. 1st Cir. 1940). During the period reviewed, in one decision a court refused to consider a two-year prescription not pleaded, although the one-year prescription actually pleaded sought to prevent recovery on allegations of fact sufficient to justify application of the former but not the latter prescription. Consolidated Loans, Inc. v. Smith, 190 So.2d 522 (La. App. 1st Cir. 1966).
65. La. Code Civ. P. art. 928 (1960). However, as noted in Capital Loans Inc. v. Stassi, 195 So.2d 670 (La. App. 1st Cir. 1967), the appellate court may under article 2163 exercise discretion to consider a peremptory exception filed in the trial court too late for the latter’s consideration.
66. Id. art. 927.
67. Id. art. 2163.
68. 195 So.2d 670 (La. App. 1st Cir. 1967), cert. denied, 250 La. 889, 190 So.2d 912 (1967). The exception was based upon a proper-party issue such as is discussed in the text accompanying notes 46 through 57 supra. The owner of the note sued upon was the “Capital American Acceptance, Corp.” although suit was brought and new trial applied for in the name of “Capital Loans, Inc.” a subsidiary corporation. The trial court permitted amendment and substitution of the correct party, and the appellate court rejected the contention that the motion for the new trial was void (and hence the
is first pleaded in the appellate court, that court may exercise its Code-grounded discretion not to consider the exception.

*Succession of Guidry v. Bank of Terrebonne & Trust Co.*\(^6\) reversed a trial court's dismissal of a suit and its refusal to permit amendment to cure the ground of the peremptory exception sustained which resulted in the dismissal. In so ruling, by forceful statement the appellate court expressed the effect of the procedural reform represented by article 934 of the Code of Civil Procedure. "[W]here the ground of a peremptory exception may be removed by amendment, no discretion is vested in the trial court to grant or deny time for amendment. In such instances the trial court must afford time for amendment."\(^7\)

### The Peremptory Exception Raising the Objection of No Cause of Action (alias the Exception of No Cause of Action)

The exception urging the objection of no cause of action is equivalent to the common law demurrer to the pleadings.\(^7\) It performs the useful function of permitting determination on the pleadings alone, without evidence, whether the law affords a remedy (cause of action) to anyone for the grievance alleged by the plaintiff. The exception was properly overruled in an excellent opinion in *Roloff v. Liberty Mut. Ins. Co.*,\(^7\) where in a suit against an insurer the court refused to permit a policy defense by means of the exception. The court also affirmed the dismissal of the action on motion for summary judgment, a procedural device which (unlike the exception) does permit consideration of factual defenses outside the pleadings. The technicality of the different procedural methods by which defenses may be raised is properly a matter to be questioned intellectually,\(^7\) but the procedural scheme of Louisiana practice now envisions one trial on the merits and one appeal rather than

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\(^6\) *Id.* at 672.

\(^7\) See note 59 *supra.*
piecemeal trials and appeals. This fundamental conception will be thwarted unless the various procedural devices are restricted to their intended function, as so clearly instanced by the Roloff decision.

Thus, although evidence received without objection may be considered in disposing of the peremptory exception at a hearing prior to trial, yet the exception based on no cause of action may not be urged after evidence is introduced at the trial on the merits: Its function is limited to testing the sufficiency of the pleadings prior to the trial and does not encompass testing the sufficiency of the evidence educed at the trial to prove the properly pleaded cause of action, as held in Joseph v. Tri-Parish Flying Service. The court there cited well-established jurisprudence to the effect that motions for judgment notwithstanding verdict, directed verdicts, and demurrers to the evidence are procedural devices which Louisiana law has until now deliberately rejected, so that the no cause of action exception cannot be used to introduce these concepts disguised under its nomenclature. Nor, because of this general approach of Louisiana procedural law, may a party expand the scope of the no cause of action exception so as to secure its application on the basis of evidence permissibly introduced in support of another peremptory objection or exception, since evidence admitted pre-trial in support of other motions or objections may not be considered in the determination of the exception of no cause of action, at least if objected to. Thus, in view of the limited function of the exception, the court erred in dicta in Stamper v. Arkansas Louisiana Gas Co, inferring that the exception raising the objection of no cause of action could be sustained after trial; the proper disposition then is by judgment dismissing the demand on the merits.

The general rule is that, for purposes of determining the exception raising the objection of no cause of action, all well-pleaded facts of the petition and any annexed document must be accepted as true, with all doubts being resolved in favor of

75. 201 So.2d 321 (La. App. 3d Cir. 1967).
78. 187 So.2d 134 (La. App. 2d Cir. 1966).
the sufficiency of petition alleging a cause of action.\textsuperscript{80} Loeb v. Badalament;\textsuperscript{81} is a reminder that, while usually the facts are considered sufficiently well-pleaded if evidence broadly admissible under the general allegations can prove a cause of action,\textsuperscript{82} nevertheless, where fraud is an element, the cause of action is not well-pleaded by general allegations, for the Code provides that the factual circumstances constituting fraud must be alleged with particularity.\textsuperscript{83} In sustaining the objection of no cause of action to a petition containing only general allegation of fraud, the court also noted that certain recorded deeds found in the record could not be considered, since not annexed to (and therefore part of) the petition\textsuperscript{84} and since no evidence may be introduced over objection at the trial of the exception urging no cause of action.\textsuperscript{85}

Dean McMahon once wrote that “the distinction between the functions of the objections of no right, and of no cause, of action [is] never material except when evidence is sought to be adduced on the trial of the exception.”\textsuperscript{86} In his classic clarification of the functions of the two exceptions, he had earlier written that the exception urging no right of action “is employed (in cases where the law affords a remedy) to raise the question as to whether plaintiff belongs to the particular class in whose exclusive favor the law extends the remedy, or to raise the issue as to whether plaintiff has the right to invoke a remedy which the law extends only conditionally.”\textsuperscript{87} Borderline cases are presented where a defendant alleges that because of some defense, available to the defendant uniquely against the plaintiff, the plaintiff no longer belongs to the particular class in whose favor the case of action exists. However, the prevalent view of the Louisiana cases is that the objection of no right of action is not available to urge such a defense to the effect that the plaintiff

\begin{itemize}
  \item 81. 192 So.2d 246 (La. App. 4th Cir. 1966), \textit{cert. denied}, 250 La. 24, 193 So.2d 530 (1967).
  \item 82. West v. Ray, 210 La. 25, 26 So.2d 221 (1946); Babineaux v. Southeastern Drilling Corp., 170 So.2d 518 (La. App. 3d Cir. 1965).
  \item 84. \textit{Id.} art. 853.
  \item 87. McMahon, \textit{The Exception of No Cause of Action}, 9 \textit{Tul. L. Rev.} 17, 29-30 (1934).
\end{itemize}
is without interest simply because the defendant has a defense to the plaintiff's action, so in these cases the objection is overruled and the defense so urged is not tried piecemeal by the exception but is instead relegated to the general trial on the merits along with all other factual defenses to the cause of action alleged by the petition.88

Under this analysis, Pappas v. Aetna Cas. & Surety Co.89 during the reviewed period incorrectly sustained an objection of no right of action. The petition alleged a cause of action against the defendant's insurer. The insurer excepted, urging no right of action in the plaintiff because of his refusal to furnish medical reports as required by the policy. The evidence to such effect is, under the prevalent jurisprudence, in reality a defense to the cause of action. The blurring of the distinction between the objections of no right and of no cause of action is a cause of concern in administering Louisiana's procedural policy against fragmentary trials of merit-issues of litigation, however sensible the result may be in a particular instance. In extenuation of the decision, it appears that the real issue was chiefly a matter of law, that neither of the parties questioned the propriety of the trial of the issue by the objection of no right of action, that the same result could have been reached by admission without objection of the same evidence on trial of an objection of no cause of action, and that also the issue, essentially uncontested factually, could have been raised and tried in advance of the merits by a motion for summary judgment.

Review of Decision Overruling Exception

The general rule is that a judgment overruling an exception is not appealable,90 nor is a judgment which merely sustains an exception without at the same time determining the

88. Cattle Farms, Inc. v. Abercrombie, 244 La. 969, 155 So.2d 426 (1963) (title defects in the plaintiff's claim); Wischer v. Madison Realty Co., 231 La. 704, 92 So.2d 589 (1956) (quitclaim by plaintiffs to defendants inadmissible on trial of exception of no right of action, because this was a factual defense to a cause of action and was not evidence to plaintiff's right or not to sue as being or not being in the general class of persons in whom the cause of action is vested); Roloff v. Liberty Mut. Ins. Co., 191 So.2d 901 (La. App. 4th Cir. 1966) (policy defense not raisable by defendant insurer under no right of action); Leteff v. Maryland Cas. Co., 82 So.2d 80 (La. App. 1st Cir. 1955) (policy defense not triable by no right, faction, objection; full discussion).

89. 191 So.2d 658 (La. App. 2d Cir. 1966).

90. Lounsberry v. Hoffpauir, 199 So.2d 553 (La. App. 3d Cir. 1967).
merits and disposing of the suit.\textsuperscript{91} The reason, of course, is that in general only final judgments are appealable,\textsuperscript{92} and judgments rulings on exceptions are usually interlocutory\textsuperscript{93} unless at the same time they accomplish a dismissal of the suit. Two decisions with regard to application of this principle present interesting demonstrations of the judicial process in action; but so to show requires first a statement of preliminary context.

In 1962 the Louisiana Third Circuit, relying upon an earlier jurisprudential misapplication, refused in \textit{Lafleur v. Dupuis}\textsuperscript{94} to review the correctness or not of a trial court's sustaining of an exception of vagueness, even though actually the appeal was from a final judgment of dismissal when the plaintiff declined to amend to cure the vagueness (i.e., not from the interlocutory judgment sustaining the exception of vagueness and ordering amendment). In reviewing the appellate decisions for the year Dean McMahon noted that the erroneous result overlooked the rationale for the procedural rule invoked, commenting: "The reason for the prohibition against an appeal from an interlocutory judgment which does not cause irreparable injury is not to preclude any appellate review thereof, but rather to prohibit fragmentary appeals. An interlocutory order which causes no irreparable injury is reviewable under the appeal taken from the final judgment in the case. The interlocutory order in \textit{Dupuis} requiring amendment of the petition should have been reviewed under the appeal from the final judgment dismissing the suit."\textsuperscript{95} Whereupon, when faced recently with decision of the identical question in \textit{Washington v. Flenniken Const. Co.},\textsuperscript{96} the Third Circuit overruled its earlier decision in \textit{Lafleur v. Dupuis} in a re-analysis of the issue based upon Dean McMahon's critique of the case, thus affording to a true believer in the Louisiana civil law some support to the contention that doctrinal writings are more relied upon than mere case precedent in Louisiana as in other civilian jurisdictions.

But, lest the reader relax and prepare to attend to his pop-

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\textsuperscript{91} Succession of Dancie, 187 La. 628, 175 So. 418 (1937); Mann v. Edenborn, 185 La. 154, 168 So. 759 (1936); Sonnier v. Allstate Ins. Co., 198 So.2d 694 (La. App. 3d Cir. 1967).
\textsuperscript{92} LA. CODE CIV. P. art. 2083 (1960).
\textsuperscript{93} Id. art. 1841, sets forth the theoretical distinction between final and interlocutory judgments.
\textsuperscript{94} 147 So.2d 724 (La. App. 3d Cir. 1962).
\textsuperscript{96} 188 So.2d 486 (La. App. 3d Cir. 1966).
corn in the expectation that Pauline (the true doctrine) has finally escaped the clutches of Dangerous Dan (the Lafleur v. Dupuis misapplication), there is yet another episode to this dramatic serial of the judicial process. Another Louisiana circuit was faced with a similar issue in People of the Living God v. Chantilly Corp., where the plaintiff appealed from the dismissal of its suit when it failed to amend its petition in compliance with an order sustaining an exception of improper cumulation of actions. The appellate court refused to review the question of whether the trial court was correct in maintaining the exception, holding that the only question on appeal was the right and power of the trial court to dismiss the suit when the appellant did not comply with its order to amend; the court held that the correctness of the order itself was not before the court for review. The opinion cited Lafleur v. Dupuis, that decision's lone precedent, and a Third Circuit decision decided shortly after Lafleur which followed its application. To the non-believer, this might afford some support to the contention that in Louisiana, as in many American common law jurisdictions, case law predominates over doctrine as the guideline to decision. To the unkind, perhaps, the decision might simply illustrate deficiency in analysis and research under any system of law, since even rudimentary shepardizing leads to the doctrinal criticism of Lafleur v. Dupuis (Dangerous Dan) and further indicates that the court which rendered it overruled it by the cited Washington decision (Pauline). Fortunately, the Louisiana Supreme Court was given the opportunity to grant certiorari, and on review reversed the intermediate court's decision in People of Living God v. Chantilly Corp. and ruled in accord with Dean McMahon's views and the Washington decision, which the Supreme Court cited. Dangerous Dan is laid to rest and Pauline is safe at last (we hope).

MOTIONS

Article 963 of the Louisiana Code of Civil Procedure provides that a court may grant an order ex parte if it is one the mover is "clearly entitled [to] without supporting proof." On its face, this guideline is not very definite; it affords flexibility in working out applications according to the varying circumstances and the jurisprudential development over the years. In State
ex rel. Stevens v. Babineaux the defendant obtained ex parte the annulment of an interlocutory judgment, on allegations and a showing that such interlocutory order had itself been obtained improperly and essentially without notice. Granting supervisory writs, the court of appeal annulled the order, pointing out that, whenever there are serious questions of law or fact, a motion should be first served on the opposing party and then tried contradictorily with him. It is to be noted that the thrust of the decision is to require a contradictory hearing even though there is a substantial showing of the invalidity or unfairness or ex parte nature of the initial order attacked by the subsequent motion: The first flouting of article 963 by an ex parte order does not ordinarily permit a second flouting by ex parte annulment, the remedy rather being more careful initial observance of the Code requirement by bench and bar.

Since the 1960 Code introduced the motion for summary judgment into our procedure, the annual faculty symposium has on several occasions noticed its heavy-handed use beyond its scope to short cut litigation without the normal trial. The function of the device is chiefly to decide issues of law upon a determination that there are no substantial issues of material fact, with all doubts to be resolved in against the mover and in favor of a trial on the merits. Nevertheless, a trial court pressed by an overburdened docket is often unconsciously tempted to grant the motion when the showing greatly preponderates against eventual recovery, even though this is an inappropriate ruling when there remain disputed issues of fact. For this reason, the number of appellate reversals usually exceed the number of appellate affirmances of summary judgments; but this year produced an even number of affirmances and reversals. In at least fourteen instances during the reviewed period the availability of the summary judgment as a remedy was questioned, and in seven of these appeals summary judg-

100. 196 So.2d 668 (La. App. 3d Cir. 1967).
102. Kay v. Carter, 243 La. 1095, 150 So.2d 27 (1963). See Smith v. Preferred Risk Mut. Ins. Co., 185 So.2d 857, 860 (La. App. 3d Cir. 1966): "The federal decisions show that summary judgment is only rarely feasible in negligence actions, where the standard of a reasonable man and issues of negligence and contributory negligence present issues which usually cannot be determined as a matter of law but only in the context of the total facts."
ments were reversed because the appellate court found there were disputed issues of material fact.\textsuperscript{103}

Of these decisions, some note might be given to \textit{Roy & Roy v. Riddle},\textsuperscript{104} where the court pointed out that "the summary judgment device is often not appropriate when based only upon the defendant's uncontradicted affidavits negating subjective facts material to decision of the case"\textsuperscript{105} because then, by ex parte affidavit, the movant is permitted to withdraw a witness from cross-examination and from the fact-trier's demeanor-evaluation, which may determine that the witness's verbal denial is nevertheless untrue. Viewed from this aspect, it is doubtful that summary judgment should have been affirmed in \textit{Henderson v. Falgout},\textsuperscript{106} since it was based upon incidental subjective evaluations in a deposition of a plaintiff concerning two nigh-simultaneous impacts. Summary judgment should not be allowed in borderline cases or where the courts must strain to construe whether the testimony shows factual controversy or not; as held by \textit{Guichard v. Greenup},\textsuperscript{107} even ambiguity in the showing defeats the extra-ordinary judgment and relegates resolution of the dispute to the normal trial on the merits. In \textit{Frank v. Great American Ins. Co.},\textsuperscript{108} the use of a summary judgment at the close of the evidence at the trial was disapproved, as being beyond the function of the device, which is to dispose of litigation with undisputed facts prior to trial, not to serve as a motion for directed verdict following it.


\textsuperscript{104} 187 So.2d 492 (La. App. 3d Cir. 1966).

\textsuperscript{105} Id. at 494.

\textsuperscript{106} 188 So.2d 208 (La. App. 1st Cir. 1966). See also, \textit{Henderson v. Falgout}, 183 So.2d 675 (La. App. 1st Cir. 1966), where the opponent to the motion had attempted to secure a remand to take depositions of witnesses to show that material factual dispute existed.

\textsuperscript{107} 187 So.2d 516 (La. App. 4th Cir. 1966).

\textsuperscript{108} 196 So.2d 50 (La. App. 3d Cir. 1967), \textit{cert. denied}, 250 La. 739, 199 So.2d 180 (1967).
Similar to the summary judgment remedy, the motion for judgment on the pleadings provides a method to dispose of litigation without a full-scale trial; in this instance when there is no dispute as to the material allegations of fact. However, of the three cases in which judgments on the pleadings were allowed by the trial court during the period, on appeal two were reversed because the remedy is unavailable when allegations are denied by the opponent (for lack of sufficient information or otherwise), whereas in the third case the issue of law was determined differently by the appellate court on the basis of the undisputed facts reflected by the well-pleaded and undisputed allegations of the petition and answer.

**The Answer: Affirmative Defenses**

One article of the Code of Civil Procedure requires that any affirmative defense must be specifically pleaded by the answer, with the article listing certain affirmative defenses and also applying to "any other matter constituting an affirmative defense." Jurisprudential applications make plain that affirmative defenses must be disregarded unless well pleaded in the trial court. On the other hand, peremptory objections may be pleaded any time, even on appeal, and the Code article which specifies recognized objections also states that the objections are not limited to those listed.

Query: May the same defense be raised either by the peremptory objection or by the answer pleading it affirmatively? The Third Circuit answered yes in the 1963 decision of Bowden v. State Farm Mut. Auto. Ins. Co., in a ruling approved by Dean McMahon, when the court held that compromise as a defense may be raised in advance of the merits by the peremptory objection of res judicata, as well as by affirmative defense pleaded by the answer to be tried on the merits. During the

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111. Succession of Killingsworth, 194 So.2d 331 (La. App. 1st Cir. 1966).
112. LA. CODE CIV. P. art. 1005 (1960).
114. LA. CODE CIV. P. arts. 928, 2163 (1960).
115. Id. art. 927.
116. 150 So.2d 655 (La. App. 3d Cir. 1966).
recent year the First Circuit held to the same effect in *E. M. Glynn, Inc. v. Duplantis*,\(^{118}\) where the defense of illegality of a contract was raised by the peremptory exception. Query: Then, may what is usually pleaded as an affirmative defense in the answer be raised in the appellate court by the peremptory objection, when the pleader has overlooked pleading the contention in the trial court? The appellate court in *Penny v. Bowden*\(^{119}\) was faced with this question when the appellants on appeal filed the peremptory exception urging an objection of "laches"—however, since both parties agreed for the court to consider the exception (which was sustained as to part of the demand), the court was not required to make a definite ruling on the issue.

Discharge in bankruptcy is one affirmative defense which is waived unless specially pleaded.\(^{120}\) During the period under review, in all five instances where the issue was raised, a debtor had—following adjudication and discharge in bankruptcy—erroneously assumed that he could ignore pending or subsequently filed suits involving debts listed in his bankruptcy schedule. In each such instance, a small loan company was held to have secured a valid judgment on the note because the debtor had not pleaded his discharge prior to the judgment.\(^{121}\) In one instance, the attorney for the bankrupt had secured a stay order as to a pending suit, but the creditor nevertheless confirmed his default judgment, without further notice to the defendant debtor, when the bankruptcy stay order expired by its own terms upon the debtor's discharge.\(^{122}\) These decisions are in accord with existing law, although we may note that, if a discharge is obtained after the judgment, it may then be pleaded in bar to the judgment's enforcement.\(^{123}\) Attorneys who secure discharges in bankruptcy for clients may well wish to counsel them that the discharge is not effective unless pleaded in any pending or subsequent litigation seeking payment of the discharged debts.

\(^{118}\) 189 So.2d 84 (La. App. 1st Cir. 1966), reversed on other grounds (without discussion of the point), 250 La. 381, 196 So.2d 47 (1967).

\(^{119}\) Penny v. Bowden, 199 So.2d 345 (La. App. 3d Cir. 1967).

\(^{120}\) LA. CODE Civ. P. art. 1005 (1960).


\(^{122}\) X-L Finance Co. v. Fenske, 197 So.2d 182 (La. App. 1st Cir. 1967).

\(^{123}\) Louisiana Machinery Co. v. Passman, 158 So.2d 419 (La. App. 3d Cir. 1963).
Other Pleadings

Incidental Actions

The 1960 Code broadened the right of third persons to intervene in pending litigation. This is instanced by *Boyd v. Donelon*. Neighboring homeowners were held entitled to intervene in a suit to enjoin enforcement of zoning ordinances, whether or not the judgment would result in provable direct pecuniary gain or loss to them. However, *Elrod v. Le Ny* illustrates that the right is not so broadened as to permit intervention by intermeddlers without real juridical interest in the outcome of the suit. There, the court refused to allow a mortgage creditor to intervene in a suit between mother and daughter to annul an intra-familial sale, since the mortgage was in no way imperiled by the outcome of the suit.

The reconventional demand was likewise broadened as a remedy by the 1960 Code, but *Gruber v. Perkins* and *Davis v. Bankston* demonstrate that a litigant may not always assert his claim by reconventional demand with the same confidence of success as if claimed by principal demand. In *Gruber*, the principal demand in tort had been filed within the prescriptive year of the accident. Nevertheless, although based upon the same accident, a reconventional demand was held to be prescribed since filed after the expiration of the year. In *Davis*, suit was filed by the mother of a minor. After her procedural capacity to sue could no longer be questioned since not challenged by timely filed dilatory exception, the defendant reconvened, asserting against the plaintiff a claim against the minor arising out of the same accident. However, the court was unable to afford relief against the plaintiff. Since exceptions to an incidental action need not be pleaded (though they may), and since all new matter urged by answer is deemed denied or avoided without the necessity of replicatory pleading, the court affirmed the dismissal of the reconventional demand by sustaining an (unfiled) objection to the minor's procedural

124. LA. CODE CIV. P. art. 1091 (1960).
125. 193 So.2d 291 (La. App. 4th Cir. 1966).
126. 193 So.2d 299 (La. App. 4th Cir. 1966).
128. 192 So.2d 222 (La. App. 4th Cir. 1966).
129. 192 So.2d 614 (La. App. 3d Cir. 1966).
130. LA. CODE CIV. P. art. 855 (1960).
131. *Id.* art. 1034.
132. *Id.* art. 852.
capacity to be used through his plaintiff mother, who was not qualified as his tutrix.  

**AMENDMENTS**

During the year the amendment provisions of the New Code were generally administered by the courts in accordance with their spirit of affording liberal relief so as to effectuate substantive rights. Thus, in *Sharp v. St. Tammany Parish Hospital* the court approved an oral amendment of the petition at the trial to cure a technical objection to admissibility of certain evidence, thus ignoring the overtechnical view that written amendment is required. Again, in *Breaux v. Co-Operative Cold Storage Builders, Inc.* the defendant was permitted during the trial to amend its answer of general denial so as to allege specially certain defenses, the court finding the amendment caused no prejudice to the plaintiffs and further indicating that, had there been any, such prejudice could have been cured by granting a continuance along with allowance of the amendment. Another decision permitted a plaintiff to file a supplemental petition by amendment of his pleadings the day before the trial to increase the amount demanded by an item of damages, there being no real prejudice resulting to the opponent. Even where a defendant had failed to amend his answer so as to obtain a base for admission of essential evidence (to which the plaintiffs timely objected), although the appellate court sustained the objection and reversed judgment in the defendant's favor, it nevertheless remanded the proceedings for amendment of the pleadings rather than render final judgment on the merits against the defendant.  

There are some limits to these liberal amendment policies. For instance, if an amendment introducing new issues is sought

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133. Id. art. 732. However, the appellate court remanded so as to permit amendment to secure appointment of an attorney through whom the reconventional demand could be asserted against the minor, since a proper judgment sustaining an exception should afford the opponent an opportunity to cure a defect rather than dismiss the suit outright.

134. Id. arts. 1151-56.

135. 190 So.2d 500 (La. App. 1st Cir. 1966).

136. This view was expressed by dicta in *Bertucci Bros. Constr. Co. v. Succession of Mitchell*, 149 So.2d 675, (La. App. 4th Cir. 1963), a decision criticized therefor by Dean McMahon at 24 LA. L. REV. 300-01 (1964).

137. 187 So.2d 1 (La. App. 1st Cir. 1966).


after the case is tried and submitted for decision, the prejudice to the opposing party (by causing an additional trial and perhaps indefinite prolongation of the litigation) may outweigh the procedural policies designed to be effectuated by liberal allowance of amendment. Again, in Brooks v. Fondren the appellate court upheld the discretion of the trial court in disallowing a supplemental petition. The pleading, for the first time in the litigation, claimed damages for trauma-caused psychiatric disorders, these being additional to those previously demanded for merely physical injuries. Insofar as the appellate court's opinion suggests that the amendment sought to inject a new "cause of action" into the proceedings, it is simply erroneous, for an amendment which seeks greater damages arising out of the same factual breach does not change the substance of the original demand. Insofar as the opinion implies that the prayer to amend in order to demand these greater damages was unduly prejudicial just before trial, the decision's correctness is doubtful under the modern view as to liberality in allowing pre-trial amendment, in view of the usually sufficient protection afforded an opponent by a continuance. The probable explanation for the court's seeming illiberality in allowing amendment is that the plaintiff, who desired to amend, did not at the same time desire any continuance; thus, in view of this unwillingness for a continuance so as to mitigate any prejudice caused the defendant by this late amendment, the trial court's exercise of its discretion to deny amendment could not be considered unreasonable.

OTHER PROCEEDINGS IN THE TRIAL COURT

Discovery

As instanced during the year, a discovery order is usually considered interlocutory and non-appealable, especially since to

140. Crisp v. Instantwhip-New Orleans, Inc., 196 So.2d 612 (La. App. 1st Cir. 1967). (The writer doubts that, in the cited case, the additional matter was so different or new from that previously alleged as to justify the holding that permission of amendment would unduly prejudice the opponent. However, the decision of the court is supported by respectable authority, and the writer's comment may illustrate that the degree of prejudice is to some extent a matter which may vary with individual context circumstances within the discretion of the court charged with determining same.)

141. 199 So.2d 588 (La. App. 3d Cir. 1967).
143. F. James, Civil Procedure § 5.3 (1965).
countenance piecemeal appeals would contravene a basic purpose of discovery to expedite the disposition of litigation. On the other hand, the appellate courts will exercise their supervisory jurisdiction to inquire into abuse of discovery practices. They did so during the past year, on one occasion quashing burdensome document-production requirements as unreasonable, on another to affirm a trial court's quashing as unreasonable some burdensome written interrogatories, on a third to grant a trial continuance where the plaintiff had unreasonably obstructed court-ordered discovery obtained by the defendants.

In Voisin v. Luke, our Supreme Court limited the use of a request for an admission, a discovery device which provides that such a request shall be deemed admitted unless denied within fifteen days. The court held that the device should not be an irretrievable automatic admission forever preventing admission of evidence as to a controverted legal issue lying at the heart of the case. The court pointed out that the essential and limited function of the device is to eliminate the necessity of producing evidence to prove uncontroverted facts, indicating that it was not intended to be used as a trap by which the real facts might be suppressed through carelessness or inattention on the part of an opponent.

**Jury Trial**

With trial by jury becoming more prevalent in the state, Huntsberry v. Millers Mut. Fire Ins. Co. provides a useful clarification of the provisions regulating waiver of the right. Under article 1732 of the Code of Civil Procedure a party waives his right to trial by jury unless he makes demand therefor within a specified delay. What happens when one party has demanded jury trial and then seeks to withdraw such demand, over the objection of the other party who in reliance upon the earlier demand did not himself request jury trial within the statutory delay? Huntsberry held that the initial demander cannot subsequently withdraw his request to the prejudice of other parties in the suit.

149. LA. CODF Civ. P. art. 1496 (1960).
150. 199 So.2d 196 (La. App. 3d Cir. 1967).
Under the Louisiana Constitution our appellate courts review facts as well as law, although at least lip-service is paid to the doctrine that on review a finding of fact will not be disturbed in the absence of manifest error. If no error is made in the jury instructions or in the admission or rejection of evidence, the manifest error rule obtains in favor of jury verdicts, although the appellate court will not hesitate to set the jury verdict aside or modify it in the event it finds manifest error. However, when trial error is made in the instructions or in evidentiary ruling, one cannot say that the usual assumption of the jury verdict's correctness should obtain. The question then becomes: (a) Should the case be remanded for new trial in order that the movant for jury trial secure one despite the first trial's error; or (b) Should instead the appellate court render judgment and avoid a remand, by ruling on the evidence in the record, without affording the jury verdict any benefit of the manifest error rule? As to this question, the appellate courts divided during the reviewed year. The Fourth Circuit remanded for a new trial. The Third Circuit specifically adopted the contrary course (i.e., b) and rendered judgment on the basis of its own factual evaluation of the record. The Supreme Court denied review in both cases, for different reasons.

Miscellaneous

Mayon v. New Amsterdam Cas. Co. set aside a judgment adverse to a party who had incorrectly been denied instanter a subpoena duces tecum during trial to secure probative evidence. Several decisions of the year deal with the situation where a case is fully tried but without transcription of the oral testimony and the consequent limiting effect upon appellate review, with one of the opinions extensively discussing to

151. LA. CONST., art. VII, §§ 10, 29.
what extent the trial court's written reasons for judgment may be considered to supplement or limit the record under such circumstances.\textsuperscript{159} Loyola University, Radio WWL-TV Station \textit{v. Lakeside Rambler Sales, Inc.}\textsuperscript{160} set aside a default judgment on the ground that the account proved by affidavit was not technically an "open account" (which by specific Code provision\textsuperscript{161} for default-confirmation purposes may be so proved), because the claim was based upon a particular contract to supply television commercials on a monthly basis rather than upon simple sales in the usual course of business. \textit{Nelkin v. Lomm}\textsuperscript{162} held that procedural deficiencies as to the technical form of a motion for a new trial did not destroy its efficacy as a procedural step which, after timely filing and until overruled, tolls the delay within which an appeal might be taken. \textit{Brewer v. Shiflett}\textsuperscript{163} underlines one of the rare technicalities of the new Code, that which conditions a suspensive appeal upon a requirement that an answer in an eviction proceeding be verified personally by the party if he pleads an affirmative defense.\textsuperscript{164} The appeal was dismissed because the answer had been verified by the party's attorney, not by the party himself.

\textbf{Court Costs}

Overruling prior jurisprudence on the basis of a construction of a new constitutional provision, the Louisiana Supreme Court held in \textit{Southern Constr. Co. v. Housing Authority,}\textsuperscript{165} that the authorization to sue a state agency includes with it a waiver of the state's immunity from liability for court costs (as well as for interest). In so doing, the high court apparently reversed the intermediate court's holding\textsuperscript{166} that the agency was liable only for stenographer's costs by virtue of a statute\textsuperscript{167} exculpating the state or its agencies from liability to pay court costs except for a court reporter's fees. Several months earlier, however, the high court had applied the statute so as to exculpate the state

\textsuperscript{159} Clement v. Perry, 194 So.2d 111 (La. App. 3d Cir. 1967).
\textsuperscript{160} 199 So.2d 49 (La. App. 4th Cir. 1967).
\textsuperscript{161} \textit{La. Code Civ. P.} art. 1702 (1960).
\textsuperscript{162} \textit{Nelkin v. Lomm}, 197 So.2d 709 (La. App. 4th Cir. 1967).
\textsuperscript{163} \textit{Brewer v. Shiflett}, 198 So.2d 704 (La. App. 1st Cir. 1966).
\textsuperscript{165} \textit{Southern Constr. Co. v. Housing Authority of the City of Opelousas}, 250 La. 569, 197 So.2d 628 (1967).
\textsuperscript{166} \textit{Southern Constr. Co. v. Housing Authority, 189 So.2d 454 (La. App. 3d Cir. 1966), reversed by Southern Constr. Co. v. Housing Authority of the City of Opelousas, 250 La. 569, 197 So.2d 628 (1967).
highway department from liability for court costs assessed against it by virtue of a judgment confirming a compromise award in an expropriation suit. On the same decision day, the court held in another decision that the fees of the landowner's experts, not called to testify due to compromise of an expropriation suit, were not taxable as "costs" per the judgment approving the compromise, which assessed them against the state agency. The court held that the fees of experts for preparatory work in connection with testimony are not taxable unless the experts are actually called to testify, even though they are prevented from doing so by compromise or dismissal of the suit. In so holding, the court apparently overlooked its own prior decision interpreting a similar statute to contrary effect. It is suggested that the two decisions during the year which exculpated the highway department from liability for costs assessed against it were oversolicitous of the state's liability for the ordinary expenses of litigation and are thus inconsistent with the broad ruling in Southern Constr. Co. v. Housing Authority, initially referred to above.

To exculpate himself from any court costs whatsoever, a defendant liable for all or part of the amount sought must, by (waivable) dilatory exception of want of amicable demand, unconditionally tender to the plaintiff the amount for which he is liable. The defendant may also exonerate himself from subsequent court costs by an unconditional tender at a later stage of the proceedings. But in either event the offer of the amount owed must be a real tender, so that a tender conditioned upon the creditor's release of a claim for a greater amount is in reality only an offer of compromise and not such a tender as will exonerate the debtor from liability for interest and court costs upon the undisputed portion claimed. In exculpating the defendant from liability for court costs in Liwerant v.

172. LA. CIVIL CODE arts. 2167-2169 (1870).
Boston Ins. Co., the court overlooked these principles. There, the defendant's check tendered in payment contained the notation that it was offered in full settlement of a claim against the defendant for a greater amount, so therefore it was not a real tender. The two decisions cited by the court to justify its action were not really in point. One involved an unconditional tender, the other involved only the liability for legal interest after a defendant had unconditionally admitted liability for part of the amount demanded by the plaintiff.

Appeals and Appellate Procedure

Due to limitations of space, we will not discuss most of the opinions deciding points of appellate procedure during the year. One comment will be made, however. The number of appeals dismissed for timely failure to file a bond reflects a not infrequent misunderstanding of the bar in this connection.

So great is the ceremonial significance in Louisiana procedural law of a timely filing of the appeal bond required to perfect an appeal that an appeal is a complete nullity unless such is done, even though the appellant has paid the costs of the appeal, payment of which the appeal bond is designed to secure. Additionally, by anachronistic survival a rule remains, not yet overruled by the state Supreme Court, to the effect that the amount of a devolutive appeal must be fixed by the trial court, so that in the absence of this formal fixing a devolutive appeal must be dismissed no matter how great the bond furnished, as an appellate court felt forced to hold this year over a powerful dissent.

In the context of this strict construction of provisions requiring timely filing of bonds required to perfect appeals, it is surprising to note the number of appeals which are dismissed because of what seems to be a not infrequent misconstruction of the delay period within which the bond must be

174. 198 So.2d 925 (La. App. 4th Cir. 1967).
175. Gas Appliance Co. v. Hamlin Homes, Inc., 147 So.2d 228 (La. App. 4th Cir. 1962).
178. Dupre v. Hartford Acc. & Indem. Co., 197 So.2d 119 (La. App. 3d Cir. 1967). As a member of the court's majority, the writer reluctantly concurred with what he felt to be a correct appreciation of a harsh jurisprudential rule.
filed. Article 2087 of the Code of Civil Procedure provides that an appeal must be perfected, by obtaining the order and furnishing the security, within ninety days of the *date the judgment becomes final* in the trial court by denial of a new trial or by expiration of the delay to apply for one. Another article of the Code provides that, when the appeal is taken, the trial court shall fix the return day "at not more than sixty days *from the date the appeal is granted.*" (Emphasis added.) In a number of instances during the year, the appeal bond was not filed until a few days of the return day; but this filing is too late if more than ninety days after finality of the trial court judgment, and the appeal must be dismissed. The ninety-day delay within which the devolutive appeal bond must be filed is determined in relation to the date of finality of the trial court judgment, not the return day.

CRIMINAL PROCEDURE

*Dale E. Bennett*

**Change of Venue**

Change of venue provisions are based on the idea that a defendant should not be tried in a parish where there is such prejudice that a fair trial cannot be had. Prejudice will affect witnesses, as well as jurors. The Louisiana Constitution recognizes the power of the legislature to provide for change of venue, and statutory provisions for change of venue are set out in Title XX of the 1966 Code of Criminal Procedure. *State v. Mejia* answers a number of important change of venue questions, some of which are similarly settled in the new code provisions. Of primary importance was the effect of the then operative limitations that the transfer must be to "an adjoining parish of the same judicial district, or to a parish of an adjoining district," and that a second change of venue could not be had "under any pretense whatsoever." In *Mejia* the original change of venue

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179. LA. CIV. P. art. 2125 (1960).
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2. 250 La. 318, 197 So.2d 73 (1967).
4. Id. 15:294.