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Civil Procedure - Amended Petition - Rights of Action - Subrogation

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NOTES

CIVIL PROCEDURE—AMENDED PETITION—RIGHTS OF ACTION—SUBROGATION

A boiler exploded in Younger's motel causing $33,415 damage. Younger collected in full from his insurer, Springfield, conventionally subrogating the company to all his claims, rights, and interest. Four months later Younger filed suit against the boiler manufacturer, the installer, and the servicer. No mention was made of the subrogation. Four and one-half years later, while the suit was still pending, Springfield, the insurer-subrogee, sought to file a supplemental and amended petition to add itself as a party plaintiff.[1] *Held*, the filing of the supplemental and amended petition was disallowed as improper joinder; plaintiff's suit was dismissed for no right of action. *Younger v. American Radiator & Standard Sanitary Corp.*, 193 So.2d 798 (La. App. 3d Cir. 1967), *writs denied*, 195 So.2d 644 (1967).

Prescription appears to be the real, underlying issue. Because the Code provides a one-year prescriptive period for tort actions[2] and because four and one-half years had passed since the explosion, Springfield sought to avail itself of the timely filed suit by Younger. Had there been no prescriptive problem, Springfield could have instituted suit independently and would not have appealed the decision of the lower court. But prescription was not pleaded and could not be considered by the court.[3]

The court relied on Code of Civil Procedure article 697, which provides that the subrogee in a total subrogation shall be the proper party to judicially enforce the cause of action.[4]

1. The transcript indicates that it was the plaintiff himself who sought to amend and supplement his own petition to add Springfield as a party plaintiff. This is procedurally more correct, as the articles of the Code of Civil Procedure give no indication that third parties may amend petitions of the original party plaintiffs. Contrarily, the Code in article 1091 provides for intervention by third parties in a pending action to enforce a related right. The dissent is in error in designating Springfield as an intervenor. No such conclusion is evidenced by the briefs or the transcript.

2. LA. CIVIL CODE art. 3536 (1870).

3. *Id.* art. 3463; LA. CODE OF CIVIL PROCEDURE art. 927 (1960).

4. LA. CODE OF CIVIL PROCEDURE art. 697 (1960): "An incorporeal right to which a person has been subrogated, either conventionally or by effect of law, shall be enforced judicially by: (1) The subrogor and the subrogee, when the subrogation is partial; or (2) The subrogee, when the entire right is subrogated."

The Reporter's Comment on the article is ambiguous—"If there has been a total subrogation and the suit is brought in the name of the subrogor, the latter has no right of action, and the court cannot adjudicate in the absence of the indispensable party plaintiff—the subrogee." The majority read the sentence with emphasis on the first independent clause—the subrogor has no right of action. Thus, just as Younger could not have been joined in a suit filed by Springfield,[5] neither could Springfield be joined in a suit which Younger had instituted. In either instance there would be improper joinder of parties.

The dissent stressed the Reporter's suggestion that the subrogee is an indispensable party. As such no adjudication of the controversy would be possible without his joinder. Stressing that the rules of procedure are adjective to the enforcement of substantive law, the dissent reasoned that the subrogee, having a right to recover damages from the tortfeasor, should not be prevented from doing so by mere procedural law.

In deciding the case, both the majority and dissent focused on the problem of party interest. It is suggested that perhaps more direct consideration ought to have been given the basic issue of the real focal point raised by the pleadings—whether to permit amendment. Recognizing that procedure is a means of implementing substantive law,[6] the Code of Civil Procedure has adopted a liberal attitude toward amendments[7] which do not adversely prejudice the rights of parties involved. The contention may be made that if the amendment is permitted, the defendant will be prejudiced by the loss of his defense of prescription, which is just as much a part of the substantive law as the obligation of a tortfeasor to pay the injured party. However, it is apparent that the policy considerations underlying the rules of prescription are not defeated by allowing the amendment. These policy considerations are the prevention of prosecu-

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5. *Id.* art. 926(7).

6. *Id.* art. 5051: "The articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves."; *Id.* comment: "This article expresses the procedural philosophy of this Code and serves as a constant reminder to the bench and bar that procedural rules are only a means to an end, and not an end in themselves."

7. *Id.* art. 854, comment b: " . . . liberality of amendment [is] provided by Art. 1154, *infra* . . . "; *Id.* arts. 1153, 1154, 1155; Douglas v. Haro, 214 La. 1099, 39 So.2d 744 (1949); Reeves v. Globe Indem. Co. of New York, 185 La. 42, 168 So. 488 (1936).

tion of stale claims[8] and the psychological and economic security for the wrongdoer.[9] Here Younger filed suit within the prescriptive period, and this served to notify the defendant of the claim against him. Therefore, the defendant was on notice to preserve evidence for the pending litigation. Since he already had notice of suit, it should have made no difference to him whether he paid Younger or Springfield. Injustice had not been done to the rules of prescription, for the spirit had been complied with. For these reasons—a liberal attitude toward amendments, effectuation of the substantive law, and an absence of real prejudice to the defendant—the amendment should have been permitted. By express provision of the Code of Civil Procedure,[10] the amendment would relate back to the date of filing of the original pleading, since it arose out of the occurrence set forth in the original pleading.

The trend today in other jurisdictions is to permit party amendments after the statute of limitations has run against the party with the right of action.[11] These courts conclude that permitting such amendments does not conflict with the previously mentioned policies underlying statutes of limitations. "[T]he new plaintiff today is usually allowed to take advantage of the former action if the original plaintiff had in any capacity, either before or after the commencement of suit, an interest in the subject matter of the controversy."[12]

In applying this philosophy to the problem in *Younger*, a technical problem is created. By allowing a party amendment to a suit instituted by one without any actual interest, the doors may be opened to suits by intermeddlers. The courts, however, should simply distinguish such suits on their facts. Here Younger had, before subrogation, an *actual interest* in the controversy that would have supported this suit. There still exists at least a real connection between Younger and the defendant.[13]

8. United States v. Nebo Oil Co., 90 F. Supp. 73 (W.D. La. 1950), *affirmed*, 190 F.2d 1003 (5th Cir. 1951); F. JAMES, CIVIL PROCEDURE 174 (1965).

9. Davies v. Consolidated Underwriters, 14 So.2d 494 (La. App. 2d Cir. 1943); F. JAMES, CIVIL PROCEDURE 174 (1965).

10. LA. CODE OF CIVIL PROCEDURE art. 1153 (1960): "When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading."

11. Comment, 63 HARV. L. REV. 1177, 1239 (1950).

12. *Id.*

13. Support for such a distinction exists in Douglas v. Haro, 214 La. 1099, 39 So.2d 744 (1949), where the court fictitiously created an interest in a bailee of an automobile.

Intermeddlers would have no such connection or arguable interest.

Interestingly, had Springfield remained silent, the subrogation would not have been before the court, and the plaintiff might have been successful in his action to recover damages. Springfield then could have recovered the money from the plaintiff, who would hold it only as constructive trustee.[14]

If this decision is followed, total subrogees, as the proper parties to sue, will not be able to take advantage of suits filed by the subrogor by adding themselves as party plaintiffs through amendment. The court has given the words of the Code a literal interpretation and has thereby prevented the subrogor's suit from having any effect.

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CONFLICT OF LAWS—RECOGNITION OF FOREIGN DIVORCE DECREES

Wife sued to have a certain immovable declared her separate property. Prior to its purchase both wife and defendant-husband had gone to Mexico and within three days secured divorces from their respective spouses and married each other. The parties returned to Louisiana to live, later secured Louisiana divorces from their "former" spouses and were married in a Louisiana ceremony. The property in question, however, was purchased prior to the Louisiana ceremony. *Held*, the immovable was the wife's separate property. The Mexican divorces and marriage were invalid, therefore no community of acquets and gains existed between the parties at the time of the purchase. Although the court was unable to locate a single pertinent Louisiana case, it reasoned that since Louisiana courts are not required by the full faith and credit clause to recognize divorces granted in foreign countries it follows, a fortiori, that such divorces, which do not meet the standards required for recognition of divorces granted by sister states, need not be recognized. Under the full faith and credit clause a divorce granted in a sister state is entitled to recognition only when one of the parties is domiciled there. Neither the parties nor their spouses

14. Moncrieff v. Lacobie, 89 So.2d 471, 474-75 (La. App. 1st Cir. 1956).