Procedure: Civil Procedure

Albert Tate Jr.
found reversible error, however, in requiring the state to pay an award to the lessee for lease advantage in addition to payment to the lessor of the value of the unencumbered property. The Holmes case is ably discussed in a student Note in this issue.

PROCEDURE

CIVIL PROCEDURE

Albert Tate, Jr.*

No procedural decision of any great consequence was rendered during the year, even though almost a third of the 1400 appellate opinions included procedural issues. This may demonstrate the clarity of the Louisiana Code of Civil Procedure of 1960 and the efficiency of its working. The discussion of the year's jurisprudence concentrates, therefore, on the few trouble areas and recommends statutory change where indicated by nearly ten years of experience with the Code.

ACTIONS AND PARTIES

Cumulation of Actions

The 1960 enactment liberalizes cumulation of actions and permissive joinder of parties, an important Code reform. A plaintiff may cumulate against a defendant all consistent actions, even though based on different grounds, providing certain simple procedural requirements are met, such as each being properly venued. If multi-plaintiffs or multi-defendants are joined, there must then also be "a community of interest" between the parties joined, that is, the cumulated actions must arise out of the same facts or present the same factual and legal issues.

The cumulation articles have worked well in practice. The
leading decision of *Dickson v. Sandefur*\(^3\) is an outstanding example. There, a plaintiff joined eighteen defendants in possessory actions against each of them, despite the circumstance that the defendants might each conceivably rely upon factually differing (although generically similar) defenses or claims of title. Insofar as differing defenses might unduly burden other defendants, the appellate court pointed out that the 1960 Code authorizes separate trial of properly cumulated actions.\(^4\)

The 1960 Code indicates that courts should order separate trial even of improperly cumulated actions, rather than dismissing them (as pre-1960) or requiring election between them.\(^5\) The Louisiana articles are based upon the theory now commonly accepted "that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common."\(^6\)

It is discouraging, therefore, to note that in two instances during the term the courts ignored the 1960 cumulation reforms. One, *People of the Living God v. Chantilly Corp.*,\(^7\) might serve as a casebook example of how not to decide a cumulation problem. A plaintiff sued an adjoining landowner and his general contractor both (a) to recover damages for pile driving subsidence during construction operations, and also (b) for injunctive relief to abate certain construction operations or practices which interfered with the plaintiff's enjoyment of its property. The trial court held the actions improperly cumulated and ordered the plaintiff to elect upon which action to proceed, under penalty of dismissal. The plaintiff failed to elect, and its suit was dismissed. The appellate court affirmed, holding damage and injunctive actions could not be cumulated because they did not meet the Code requirements of employing "the same form of procedure."\(^8\) (Emphasis added.)

In so holding, the court overlooked that the "form" referred

---


\(^4\) LA. CODE CIV. P. art. 465.

\(^5\) LA. CODE CIV. P. art. 464. *See id.* comment (c): "Separate trials of the actions improperly cumulated is the usual solution of the problem, and requiring the plaintiff to elect would be ordered only in those unusual cases where separate trials of the actions is not feasible."


\(^7\) 211 So.2d 445 (La. App. 4th Cir. 1968).

\(^8\) *See La. Code Civ. P. arts. 462(2), 463(3).*
to merely requires that each of the cumulative actions employ either ordinary, executory, or summary procedure. The two principal demands cumulated were for a money judgment and for injunctive relief. Both arose out of the same facts, the construction activities on the adjoining land. Both principal demands are triable by ordinary procedure, thus employing the same “form” of procedure. Therefore, the actions cumulated by the plaintiff met the Code requirements for cumulation, and the court erroneously denied cumulation.

In holding the cumulation improper, the court pointed out that a jury trial was available for the damage action, but not for the injunction action (no one had sought trial by jury), as well as certain differences in the treatment of appeals, such as that a permanent injunction may not be appealed suspensively as of right, while the damage action may. Citing a pre-1960 decision, the court concluded that the two actions could not be cumulated “because of the complications that would result.” The court’s refusal to permit cumulation because of these (exaggerated) procedural difficulties ignores the Code criteria authorizing cumulation of two or more actions against the same defendant. The court should not have refused cumulation when the Code requirements were met; its reliance upon pre-1960 case decisions overlooks the intent of the Code to overrule legislatively the pre-1960 jurisprudence to the contrary.

Finally, however, the appellate court committed serious error in affirming the trial court’s judgment ordering election between the actions held improperly cumulated, under penalty of dismissal. To do so ignored the thrust of the Code provisions that prejudice is to be avoided through separate trials—whether

9. LA. CODE Civ. P. art. 463, comment (a).
10. LA. CODE Civ. P. arts. 3601-13 regulate primarily the provisional remedy of preliminary injunction. This is ordinarily ancillary to a principal demand, in order to prevent irreparable injury during the pendency of an action. LA. CODE Civ. P. art. 3601. The preliminary injunction does utilize summary procedure. LA. CODE Civ. P. arts. 3602, 3609. However, the principal demand for the permanent injunction is tried after the same delays and with the same evidence as any other ordinary action. LA. CODE Civ. P. art. 851 provides that articles governing ordinary proceedings apply “in all cases, except as otherwise provided by law.” No statutory provisions provide that the action for a permanent injunction shall be tried other than by ordinary proceedings. See also Baton Rouge Cigarette Service, Inc. v. Bloomenstiel, 88 So.2d 742, 746-48 (La. App. 1st Cir. 1956).
12. The trial court’s election requirement is not discussed in the present opinion, but it was set forth in an earlier opinion in the same appeal. Id. at 197 So.2d 748, 749 (1967).
the cumulation is proper or improper—rather than to cause multiplicity of suit and further delay through election or dismissal. Unfortunately, no review by the supreme court was sought of this ruling.

In the other unhappy cumulation opinion during the year, the supreme court by way of dicta wrongly indicated that a defendant might have successfully objected to the cumulation by two plaintiffs of claims for injunctive relief because these two demands were based upon "separate and distinct causes of action." Since each plaintiff's demand arose out of the same seizure by a judgment creditor, there was undoubtedly the requisite community of interest between their claims. The court seems to have overlooked completely that lack of identity in the causes of action is immaterial, if the other Code requirements facilitating cumulation are met.

Compulsory Joinder

The 1960 Code sought to govern by statute compulsory joinder of necessary or indispensable parties questions previously successfully regulated by the jurisprudence only. The effort of the redactors has on the whole probably produced more litigation and more confusion on the issue than existed prior to the 1960 attempt to clarify the question. Essentially, "indispensable" parties are those whose interests are so interrelated and directly affected that a complete adjudication of the controversy cannot be made unless they are joined. Their absence may be pleaded or noticed by the trial or appellate courts at any time, with the action dismissed if the indispensable party cannot be joined. On the other hand, a "necessary" party is one whose joinder would permit a complete adjudication of controversy, but whose interest is separable and would not be directly affected by the judgment if not before the court. A party desiring the joinder of another as a

17. LA. CODE Civ. P. art. 641.
20. LA. CODE Civ. P. art. 642.
"necessary" party waives his right to require compulsory joinder, if the objection is not pleaded at the threshold by a timely dilatory exception.21

The classifications are conceptual in nature and subject to varying interpretations. The attempt to require joinder, or to make issue of the failure of the trial court to do so, offers tactical opportunity to delay or to complicate the disposition of the litigation; although, of course, the general aim to facilitate disposition of related claims in a single suit is commendable. The characterization of a party as indispensable can be particularly onerous to those desiring swift termination of the litigation, since no stage-preclusion bars the contention of non-joinder from being raised or noticed even on appeal and, if upheld, from thus requiring remand for joinder and then retrial.22

In Consolidated Credit Corp. of Baton Rouge v. Forkner,23 a judgment creditor asked the court to declare how the proceeds of a judicial sale of the debtor's property under fieri facias should be distributed between (a) the debtor's homestead claim of $4,000, (b) a first mortgage on the property, in which the debtor had waived her homestead rights, and (c) the judgment held by the creditor. The debtor appealed from a determination that the first mortgage be paid first out of any proceeds, the debtor next receiving any excess between the mortgage debt and $4,000, and the creditor's claim following. Noticing the absence of the first mortgagee, the appellate court without discussion assumed that this absentee was an indispensable party and remanded the proceedings to start over again.

It is to be noted that any execution sale was subject to the first mortgage, which primed the judicial mortgage of the creditor.24 The first mortgagee could not be prejudiced by the sale, since no sale could take place unless a bid was received sufficient to discharge this superior mortgage.25 The only issue on appeal was whether the property could be sold for a minimum price sufficient to cover only the $4,000 homestead exemption, from

22. The conflicting policy objectives of compulsory joinder, as well as cogent suggestions for criteria based upon consideration of the actual interrelated (but sometimes competing) interests, are summarized in the classic article Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 483 (1957). See also F. James, Civil Procedure, §§ 9.14-9.20 (1965).
23. 219 So.2d 213 (La. App. 1st Cir. 1969).
25. LA. CODE Civ. P. art. 2337.
which the first mortgagee would be paid, or whether instead the price bid must be sufficient to pay both the first mortgage and the homestead claim. This issue concerned only the judgment creditor and the judgment debtor, and neither complained of non-joinder.

Within the functional reasons why parties are so classified, the first mortgagee was simply not an indispensable party. The underlying policies behind so classifying parties include a weighing of three factors: "(1) the unfairness to those present of proceeding without an absent party; (2) the effect on the absentees of a determination of the controversy before the court; and (3) the court's ability to determine finally the rights of the parties before it in a manner which cannot be aborted by action of an absent party." Consideration of the present facts will show that factors (2) and (3) were absent, while the risk of factor (1) was minimal. This suggests that the absent mortgagee was at most a "necessary" party, whose non-joinder was waived by the defendant's threshold failure to raise the issue.

Yet the long-delayed execution of a judgment was to be delayed by a remand for yet another trial, as well as possibly another appeal, and the additional expense (to the parties and to the absentee) of joining as "indispensable" an absent party who essentially had no interest in how the judgment creditor and the judgment debtor resolved their particular dispute!

Just as the Louisiana compulsory joinder articles do now, Federal Rule of Civil Procedure 19, when originally promulgated in 1937, attempted to regulate joinder on the basis of abstract concepts, not of functional considerations such as those noted above. Because of the confusing and impractical judicial applications, the rule was revised in 1966 to require joinder or not on the basis of the true policy considerations, sometimes conflicting, such as the practical impairment of the protection of an absentee's interest, substantial risk to any of the parties of incurring multiple or otherwise inconsistent obligations, or the adequacy of the relief possible without the joinder. Similar revision of the Louisiana articles on the subject seems indicated by the growing confusion in their judicial applications.

27. FED. R. CIV. P. 19, as amended, 1966. See Advisory Committee's Note recommending the 1966 revision.
Proper Parties

In *Phillips v. Garden* 28 a car owner had sued for damages resulting from personal injuries. The owner had alleged that he suffered property damage of $1,100 through the total destruction of his car, but he did not seek recovery for it (because a collision insurer had paid most of it). When the collision insurer's intervention was dismissed for procedural reasons, 29 the car owner sought to amend his petition, after the prescriptive year, to recover the property damages of $1,100 sustained. The appellate court commendably allowed the amendment to relate back to the time suit was filed, insofar as the owner's individual loss of $50 was concerned; 30 but it refused to allow him to make claim for the $1,050 paid by the collision insurer, on the ground that it, as the subrogee, was the sole proper party to sue for it. 31

In the writer's view, expressed elsewhere, 32 this is an improper application of the proper-party articles beyond their limited procedural objectives. Substantive justice is denied because technically a "wrong" but closely related plaintiff asserts the action, although the defendant has full notice of the claim within the prescriptive period. This result is reached by the mechanical application of the principle expressed by article 681 that "an action can be brought only by a person having a real and actual interest" in the claim asserted. To avoid similar misapplications, the counterpart federal rule was amended in 1966 to provide expressly that an action shall not be dismissed as brought by a party without legal interest, unless opportunity for joinder or substitution relating back to the initial filing is first given. 33 Similar amendment of Louisiana article 681 seems in order.

The proper-party problem of the subrogor-subrogee was raised in two other interesting aspects during the year. In *Carl*

---

28. 211 So.2d 735 (La. App. 2d Cir. 1968).
29. See text accompanying note 67 infra.
30. See LA. CODE CIV. P. art. 1153.
31. See LA. CODE CIV. P. art. 697.
33. FED. R. CIV. P. 17, as amended, 1968. The amendment provides: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."
Heck Engineers, Inc. v. Daigle\(^8\) an automobile owner sued a garageman for the value of his vehicle, destroyed by fire while in the garage for repairs. The suit was brought within the prescriptive year. After the year, the owner filed a supplemental petition to show that, prior to suit, the car owner's fire insurer had paid him $2,150 as the value of the vehicle and had further agreed that the owner could sue for these damages on behalf of the insurer. The trial court, however, rejected the claim of $2,150 vehicle damage. It held the insurer alone could assert the claim, that it did not do within a year of the fire, and that the claim had therefore prescribed. The court of appeal properly reversed, pointing out that an agent has the procedural capacity to sue for a principal when specially authorized.\(^8\)

Of special cogency was the court's application of the subrogor-subrogee proper-party article in accordance with its functions only—to protect the debtor from multiple harassment by suit, to prevent the subrogor from collecting twice, and to assure the subrogee authority over its claim.\(^8\) When these interests are not invaded, as in the instant case, the procedural article should not be applied so as to cause unnecessary multiple litigation or as to deny substantive rights.

The other subrogor-subrogee decision involves the situation where each files a separate suit. In this instance, a prior timely suit by the subrogor will not save from prescription the subrogee's suit filed after the prescriptive year.\(^8\) Yet if the subrogee's claim were asserted by amendment of petition in the timely filed suit of the subrogor, then prescription might be avoided through the Code provision which expressly permits amendment within a suit to relate back to the initial filing.\(^8\)

**Substitution of Parties**

The Code provides that, once filed, "An action does not abate on the death of a party."\(^8\) It contains provisions to effectuate the voluntary or compulsory substitution of parties who die after the action is filed.\(^40\) Lawyers therefore frequently assume that,

---

34. 219 So.2d 294 (La. App. 1st Cir. 1969).
35. See LA. CODE Civ. P. art. 694.
38. LA. CODE Civ. P. art. 1153.
40. LA. CODE Civ. P. arts. 801-04.
if a party dies after the action is brought, there is no danger of loss in substantive rights by delaying substitution of the successor until trial. At least one exception exists, however, which occasionally traps the unwary. Civil Code article 2315 provides for the survival of actions for damages caused by offense or quasi-offense. In 1960, it was amended so as to avoid most of the over-technical abatement problems of the prior jurisprudence. However, the article still provides that the tort action “shall survive for a period of one year from the death of the deceased” in favor of the survivors. The pre-1960 jurisprudence interprets this, technically, to mean that the survivors must substitute themselves within a year of a tort plaintiff's death, even though he himself had timely filed suit. Thus, the Fourth Circuit was presumably correct in Marvin v. Toye Brothers Yellow Cab Co., in holding that the surviving children’s claim was extinguished by peremption, when they waited more than a year after their parents’ death before substituting themselves as plaintiffs. But the supreme court has not so held yet.

ORDINARY PROCEEDINGS

The Action for a Declaratory Judgment

In Vignes v. Jarreau the first circuit held that an action for a declaratory judgment could not be used to establish a boundary between two properties; that other statutory provisions provide the sole procedural remedy by which this may be done. The supreme court denied writs of review, noting that “The result is correct” (emphasis added), two justices dissenting. In the writer’s belief, the appellate courts were patently in error, in thus reversing the trial court, which had established the boundary on the merits, and in dismissing the petition on an excep-

43. 214 So.2d 196 (La. App. 4th Cir. 1968).
44. Of course, once the survivors of the tort-injured person have filed suit or substituted themselves as plaintiff, then, if they die, by the express terms of revised article 2315 their claim is inherited by their heirs as property (see Blanke v. Chisesi, 142 So.2d 45 (La. App. 4th Cir. 1962), and sources cited in note 41 supra), without time limit on substitution save that an action is deemed abandoned if no step is taken for five years in its prosecution or defense, LA. CODE CIV. P. art. 561.
45. 222 So.2d 566 (La. App. 1st Cir. 1969).
46. LA. CIV. CODE arts. 823-55; LA. CODE CIV. P. arts. 3891-93.
tion that the pleading stated no cause of action for declaratory relief.

First, the intermediate appellate court mistakenly characterized the declaratory action as summary in nature, thus (the court noted) making such action inapplicable in view of another Code provision that boundaries are established by ordinary proceedings. This overlooks article 851's classification of modes of procedure as ordinary, summary, and executory, and its provision that the articles governing ordinary proceedings apply to all actions "except as otherwise provided by law." No provision exempts the action for declaratory relief from ordinary proceedings. This type of action simply does not fall into the Code definition of summary proceedings: "those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observation of all the formalities required in ordinary proceedings."

Even more important an error, however, was the court's refusal to permit the action for declaratory relief despite the clear intent of the 1960 codification to overrule prior jurisprudence which had barred the declaratory action where another remedy was available. The decision overlooks a prime purpose of the 1960 Code: to avoid dismissal on technical objections to the wording of pleadings seeking justiciable relief. It overlooks that an action for declaratory relief is identical with any other action seeking the same substantive ruling, except that the decree technically only declares the rights of the parties rather than awarding specific relief. The ruling is especially unfortunate in the area of real actions, where in advance of evidentiary findings relating to possession and prescription it may be difficult to ascertain whether the petitory, possessory, or boundary action is most appropriate to determine ownership of lands along the boundary of two contiguous properties.

52. La. Code Civ. P. arts. 862, 865, 2164, attempting to abolish the "theory of a case" doctrine and the slot-method of adjudication, i.e., no justice rendered, unless the pleading fits snugly into an appropriate slot.
Incidental Actions

In 1960, the incidental actions were simplified and broadened. The reconventional demand now permits the defendant in the principal action to assert any claim whatsoever he has against the main plaintiff, regardless of connexity or venue considerations, and even though its assertion requires the joinder of third parties to the action. The right of a third person to intervene is enlarged to permit assertion of all justiciable rights related to or connected with the main demand. The federal third-party practice is assimilated into the new Code, greatly increasing the right to implead third persons beyond the old call in warranty. The trial court is authorized discretion to allow separate trial of principal and incidental actions, where appropriate to avoid undue prejudice to other parties through burdensome joinder of issues unrelated to their interests. Dismissal of the principal action can no longer cause the automatic dismissal of an incidental demand filed in the suit.

Nevertheless, the Louisiana incidental actions are largely based upon historical antecedents. They do not necessarily permit joinder of related claims and parties upon the basis of coherent regulation of the question. For instance, as historically derived, no incidental action permits one defendant to assert a claim against a codefendant arising out of the same transaction or occurrence that is the subject matter of the principal action—the cross-claim of federal practice.

A typical situation of this nature is Bellow v. New York Fire & Marine Underwriters, Inc. A passenger in a bus involved in a bus-truck collision sued the operators of the bus and of the truck for his personal injuries caused through their concurring negligence. The defendant bus operator filed what he termed a “third-party petition” against the truck operator, claiming property damage caused allegedly through the sole negligence of the truck operator. At the trial on the merits, the negligence of the truck operator was held to be the sole cause of the accident. On appeal, the contention was made that the bus operator could

55. LA. CODE CIV. P. art. 1061.
56. LA. CODE CIV. P. art. 1064.
57. LA. CODE CIV. P. art. 1091.
58. LA. CODE CIV. P. art. 1111.
59. LA. CODE CIV. P. art. 1038.
60. LA. CODE CIV. P. art. 1039.
61. See FED. R. CIV. P. 13(g).
not recover against the truck operator, because no procedural vehicle permitted a cross-claim by one defendant against another. The court nevertheless held that, with respect to the plaintiff's claim against the truck operator, the bus operator was a "third person"; he was thus permitted to intervene under the greatly broadened right of intervention, because his claim arose out of the same facts and negligence as were asserted by the plaintiff in his principal demand against the truck operator. This liberal interpretation of the Code articles seems consistent with the intent of the intervention provisions to avoid multiplicity of action, with possible inconsistency of judicial result. Thus, a jurisprudential solution has remedied the legislative hiatus of cross-claim.

Article 1094 provides that an intervener "cannot object to the form of the action, to the venue, or to any defects and informalities personal to the original parties." This requires the intervener to take the proceedings as he finds them, without delaying their disposition by raising technicalities not urged by the parties. In City of Natchitoches v. State, the plaintiff asserted that the intervener could not therefore question the cause of action asserted by the petition. The court of appeal rejected these contentions. The provision was held not to prevent an intervener from raising objections which go to the existence of the plaintiff's right to a remedy or to his cause of action, when these objections are essential to the intervener's claim; since then they go to the substance, not the form, of the plaintiff's demand. In light of the functional aim of the Code provision, this sort of objection by an intervener is not barred.

Article 1033 provides that, after answer, leave of court must be obtained to file an incidental action, in order to prevent late filing from retarding the progress of the suit. In Phillips v.

63. The third party demand was unavailable to the first defendant against the second defendant, because this device is available only to a defendant against another person "who is or may be liable to him for all or part of the principal demand [i.e., that asserted by the plaintiff against the defendant]." LA. CODE Civ. P. art. 1111. A reconventional demand was not available, because this device is available only to assert actions "against the plaintiff in the principal action." LA. CODE Civ. P. art. 1061 (emphasis added). It was argued that the intervention was also not available, because technically this device is for a "third person having interest," not a co-defendant. LA. CODE Civ. P. art. 1091 (emphasis added).

64. See LA. CODE Civ. P. art. 1094, comment; Cahn v. Ford, 42 LA. Ann. 965, 8 So. 477 (1890); Parish v. Holland, 166 LA. 24, 116 So. 580 (1928).

65. 221 So.2d 534 (LA. App. 3d Cir. 1969).

66. See LA. CODE Civ. P. art. 1033, comment.
Garden, an otherwise allowable intervention was filed on the last day of the prescriptive year for a tort action. Since no leave of court was obtained, the court held the filing ineffective; it therefore held the claim asserted prescribed. While this is in accord with comparable rulings relating to the leave of court required for amended or supplemental pleadings, it is doubtful that this harsh substantive result should obtain simply because the intervener neglected the procedural formality of having the trial court sign pro forma a two-line order permitting intervention. In comparable federal leave-to-amend situations, the pleading filed without leave is permitted to stand if leave to amend would have been granted had it been sought at the time. Probably legislative revision of this nature might best avoid the use of procedural objection based upon this technicality to defeat substantive rights otherwise asserted timely.

Separate Adjudication of Separate Issues

Sometimes a distinct issue exists in a litigated case which may dispose of the suit: for example, the issue of coverage in a direct action against a liability insurer; the issue of liability as distinguished from quantum in a tort action; the issue of ownership in an injury suit for premise defects; the issue of a quitclaim by plaintiff's ancestor to the defendant's ancestor, in a suit for ownership of the land. Yet, as the decisions cited show, in Louisiana no procedural device exists, by exception or otherwise, permitting separate adjudication of the separate issues. Louisiana's traditional policy disfavoring piecemeal trial is an essential theme throughout our procedure. As we have noted, separate trial and separate adjudication of incidental actions is authorized, although separate judgments are appropriate only

67. 211 So.2d 735 (La. App. 2d Cir. 1968).
68. See Robinson v. Williams, 2 Mart. (N.S.) 665 (La. 1825); Wallace v. Hanover Ins. Co., 164 So.2d 111 (La. App. 1st Cir. 1964); Martino v. Fairburn, 71 So.2d 358 (La. App. 1st Cir. 1954); Anding v. Texas & Pac. Ry., 1 La. App. 180 (1st Cir. 1924), rev'd on other grounds, 158 La. 412, 104 So. 190 (1925).
70. Leteff v. Maryland Cas. Co., 82 So.2d 80 (La. App. 1st Cir. 1953).
74. See LA. CODES Civ. P. art. 1915, comment (b); LA. CODES Civ. P. art. 2063; see also, Loew's, Inc. v. Don George, Inc., 227 La. 127, 78 So.2d 534 (1955); Bielkiewicz v. Rudisill, 201 So.2d 138 (La. App. 3d Cir. 1967).
75. LA. CODES Civ. P. art. 1038.
in exceptional instances. In the absence of statutory authorization, separate adjudication is not permitted, however useful it might be. For instance, in a personal injury suit, the issues of negligence and contributory negligence might require only a few witnesses in a half-day trial; once this is decided finally, the much more expensive and cumbersome trial of the medical disability and damages might be unnecessary, or avoided through compromise.

The counterpart to this trial court policy on the appellate level is the appellate court's refusal to review adjudications of partial trials, remanding for full trial of all issues, even though an affirmance of the partial judgment might dispose finally of the entire suit upon the issue adjudicated separately. Under the classic policy, an appellate court will remand an appeal upon an adjudication on negligence tried separately from damages below, refusing to review the issue even though all parties are willing for the court to decide this issue separately. The twin policies avoid prolonged litigation, multiple trial appearances of witnesses and fragmentation of their testimony overlapping several issues, and multiple adjudications and appeals, with the possibility of multiple reversals and remands.

Despite lip-service to this doctrine, and with solemn adjurations of "never again," in three decisions during the year the appellate courts reviewed the separately tried issue of negligence-contributory negligence (without damage evidence), and affirmed the district court's dismissal of the entire action on the ground of no liability. But what if these instances concerned reversals rather than affirmances? Then, the intermediate courts would be forced to remand for trial of damages; and the supreme court, applying its traditional policy, would deny review of this

---

76. La. CODE CIV. P. art. 1038, comment (b); La. CODE CIV. P. art. 1915(1), (4), comment (b).
77. A district court may consolidate separate suits involving a common issue of law or fact for trial, or it may order a joint trial of any of their common issues. La. CODE CIV. P. art. 1561. Inherent in the court's power to control the proceedings before it, La. CODE CIV. P. art. 1631, 1632, is the reasonable authority to order separate trial of different issues. But neither of these statutory powers permits a separate adjudication by appealable final judgment of any separate issue.
80. See McLain v. Zurich Ins. Co., 224 La. 13, 222 So.2d 67 (1969): "Writ refused. The judgment is not final. Relator may reurge the assignment of error in the event of adverse judgment [on the merits]."
non-final intermediate determination. Thus the adjudication
would not be final until after a trial on remand, a second appeal
to the intermediate court, and, at last, the supreme court's denial
or grant of certiorari on the merits.

Yet counter-considerations of judicial efficiency in this day
of more complicated litigation, with the greater trial expense of
expert witnesses and modern discovery and joinder policies,
might require modification of this traditional policy. If so, guid-
ance might be found in the provisions of federal practice permit-
ting separate trial of issues and, in exceptional cases, appellate
review of dispositive interlocutory rulings.81

A closely related separate-adjudication question was dis-
cussed by Professor Donald Tate in a recent faculty symposium.82
He points out that the Louisiana practice of permitting through
exception separate trial of merit-defense issues is largely based
upon their conceptual function, each narrowly limited by his-
torical development rather than by some general scheme. For
instance, a defense based upon the plaintiff's compromise with a
defendant may be tried by a peremptory exception pleading res
judicata, upon which evidence is admissible.83 Yet closely re-
lated defenses—such as estoppel through the plaintiff's compro-
mise with a third party84 or as extinguishment of an obligation
through the plaintiff's voluntary release of the defendant85—are
defenses to the cause of action and must be tried on the merits
unless apparent from the face of the plaintiff's petition, since no
evidence is admissible to determine an exception pleading no
cause of action.86 Again, a threshold evidentiary hearing is avail-
able to decide that the plaintiff has no interest in land he claims,
because of a quitclaim executed by his ancestor in title in favor

---

81. Fed. R. Civ. P. 42(b) permits separate trial of issues "when separate
trials will be conducive to expedition and economy." Fed. R. App. P. 5 regu-
lates the discretionary appeals from interlocutory judgments authorized by
28 U.S.C. § 1292(b) (1958). The latter provision permits leave of court to
grant appellate review of an interlocutory order concerning a controlling
question of law as to which there is substantial ground for differing view,
where an immediate appeal may materially advance the ultimate termina-
tion of the litigation.

82. The Work of the Louisiana Appellate Courts for the 1965-66 Term—
84. Williams v. Marionneaux, 240 La. 713, 124 So.2d 919 (1960), discussed
at The Work of the Louisiana Appellate Courts for the 1960-61 Term—Civil
86. La. Code Civ. P. arts. 927(4), 931. Of course, evidence can be con-
sidered when introduced without objection at the trial of the exception.
of third persons; but not if the quitclaim was executed in favor of the ancestor in title of the defendant. Further, if there is the slightest conflict in evidence, the motion for summary judgment is not an appropriate procedural device for threshold disposition of the issues.

Professor Tate suggested evaluation of the merits of substituting the federal-rules approach of a coherent general regulation permitting separate threshold trial of defenses based upon practical considerations, for the present conceptual and imprecise criteria largely derived from historical rather than logical reasons. Of course, one consideration against change is that the present system of exceptions—though not based upon a rational general scheme and though often producing unnecessary full-scale trial on the merits—has become well-formulated through a century's experience and, within its limits, permits efficient disposition of issues properly so raised.

Jury Trials

The Louisiana Constitution permits full appellate review of facts. One result is a relative scarcity of jury trials, since a theoretical advantage of sympathetic lay judgment is not immune from revision by the possibly differing judgment of the appellate judges. From a purely administrative point of view, meritorious effects include expeditious trial dockets (unhampered by the greater lengths of numerous jury trials causing backlog and delay), and also the final determination of the case upon only one appeal on the merits (since the appellate court can re-determine the facts without remand for retrial, as in common law jurisdictions). A by-product of viewing a jury-determination as not sacrosanct is that trial technicalities, such as jury instructions and evidentiary rulings, have until now been regarded as not all-important, since not determinative of the results of an appeal.

87. State ex rel. Adoma v. Meraux, 191 La. 202, 184 So. 825 (1938). This defense is properly raised by the exception pleading no right of action or want of interest, for a trial of which evidence is admissible. LA. CODES CIV. P. arts. 927-5, 931.
88. Wischer v. Madison Realty Co., 231 La. 704, 92 So.2d 589 (1956). This defense was held to relate to no cause of action, so that no evidence was admissible.
90. LA. CONST. art. VII, §§ 10, 29.
Two recent decisions by the state supreme court may be regarded as unfortunately importing procedural gamesmanship into the Louisiana use of jury trial. In Bienvenu v. Angelle,\textsuperscript{92} the intermediate court refused to reverse and remand for erroneous jury instructions (or even consider whether they were erroneous), affirming on the record as a whole without invoking the manifest error presumption.\textsuperscript{93} The supreme court reversed.\textsuperscript{94} Finding an instruction erroneous, it reversed for retrial, holding that "[t]he instructions given to the jury . . . were so erroneous that there is no assurance that the jury could make a legal determination of the issues before it."\textsuperscript{95} There is much merit in the high court's analysis of the function of the trial court as the essential trier of fact, with the appellate court's function being limited to review for error rather than to retry. The net effect of the holding, however, is that Louisiana jury trials are now burdened both with the theoretical disadvantages of Louisiana appellate review and also with the administrative disadvantages of retrials and multiple appeal because of procedural technicalities inherent in common-law jury-trial review.

In the other jury trial decision of note, the supreme court resolved a dispute between the first circuit on the one hand and the second and third on the other. The issue concerned the proper procedure when the plaintiff demands jury trial in a suit against multiple defendants, but is not entitled to jury trial against one or more of them.\textsuperscript{96} Article 1735 prohibits piecemeal jury trials of the same case, requiring there be but one trial of any issue triable by jury.\textsuperscript{97} Therefore, two resolutions of the issue are permissible: (a) that the case be tried without jury, the plaintiff in result waiving his right to jury trial by joining a non-jury defendant, as held by the first circuit;\textsuperscript{98} (b) that there be concurrent trials of the same issue, with the trial judge separately deciding the non-jury demand, as held by the second and third circuits.\textsuperscript{99}

\textsuperscript{92} 211 So.2d 395 (La. App. 1st Cir. 1968).
\textsuperscript{94} Bienvenu v. Angelle, 223 So.2d 140 (La. 1969). Two Justices dissented, and two Justices concurred in the result only.
\textsuperscript{95} Id. at 146.
\textsuperscript{98} Abercrombie v. Gilfoil, 205 So.2d 461 (La. App. 1st Cir. 1967).
latter circuits in part relied upon the successful federal practice to this effect, in application of the federal source rule for article 1735. They also felt that by so doing they gave effect both to the Code provisions granting the plaintiff the right to jury trial of certain demands, as well as to the statute prohibiting trial by jury against a public body.

In *Jobe v. Hodge*, the supreme court overruled these latter circuits and adopted the view of the first circuit. It held that maintenance of the prohibition against jury trial against public bodies barred jury trial even against the other defendants, in view of article 1735's prohibition of multiple trials. The crux of its reasoning is that the concurrent or fragmented trial "can only operate to destroy the independent determination of either the judge or the jury in their conscious or unconscious efforts to avoid the ludicrous consequences of opposite results reached in the same trial on the same evidence."

The closeness of the issue is instanced by the dissent of three justices and the division among the circuits. The present federal and the former Louisiana practice of concurrent trials has worked well, without requiring the plaintiff to sacrifice his right of jury trial against certain of multiple defendants. It is difficult to accept the majority's theoretical considerations as outweighing the successful former practice which gave effect to both the jury trial and non-jury trial provisions. Also, a defendant desiring to avoid jury trial might under the majority rationale deprive a plaintiff of his right to jury trial by impleading a non-jury third-party defendant, however weak the claim against the latter.

In another jury-trial review of note, the supreme court instructed the intermediate appellate courts to make findings of fact on appeals from jury verdicts. The indicated reason was that otherwise there was no basis for reviewing whether the correct principles of law were applied to the facts so found.

**Miscellaneous**

*Finuf v. Johnson* provides an important clarification of the procedure for moving for a new trial after judgment in the

---

100. FED. R. CIV. P. 39(a).
103. Id. at 491, 218 So.2d at 570.
105. 218 So.2d 151 (La. App. 2d Cir. 1968).
district court. Article 1971 provides that a new trial may be granted "upon contradictory motion of any party." Article 1976 provides that notice of the motion for new trial and of the time and place of hearing "must be served upon the opposing party as required by Article 1314." (Emphasis added.) Article 1314 provides for service by the sheriff of all pleadings which require an appearance or answer. The revision comment indicates that a change was intended from the practice of service by mail (instead of by sheriff) of such motions, yet examination of over a thousand appellate records indicates that almost universally motions for new trial are served by mail as formerly. The justification for the practice is that a simple motion for a new trial is filed, which does not assign a date for a hearing and thus (any more than an exception) does not require responsive pleadings nor appearance and, therefore, need not be sheriff-served.

In Finuf v. Johnson, the subject case, trial court had sustained a motion to strike the motion for a new trial. The grounds were that the motion did not fix a time and place for hearing and that it was not served by the sheriff, as allegedly required by articles 1971, 1976. The second circuit reversed. The court pointed out that the validation of a filing for new trial is not dependent on any formality of service or of assignment for trial, since these are separate and distinct acts. Objection to informalities of service or assignment may require service or assignment anew, but will not justify striking from the record as invalid this important procedural step which, if timely, interrupts the running of delays for appeal. The court also approved the use of a simple motion and, thus, of the inexpensive and sensible procedure generally followed by the bar. Not the least of the

106. LA. CODE Civ. P. art. 1314 literally provides for service by the sheriff of all pleadings "which may not be mailed or delivered under Article 1313." LA. CODE Civ. P. art. 1313 permits service by mailing to opposing counsel of any pleading "which requires no appearance or answer."

107. The mechanics of fixing the hearings on the application for new trial by simple written motion are: A motion to fix it for hearing is made in open court rather than by written motion. The motion to fix, when made in open court, may be oral, LA. CODE Civ. P. art. 901, and an oral motion is not a "pleading" (see LA. CODE Civ. P. art. 852, defining the pleadings as including "written motions"). Therefore, LA. CODE Civ. P. arts. 1312-1314, regulating service of "pleadings," are inapplicable. The opposing counsel receives notice of the fixing by virtue of the requirement that all district court rules must provide for adequate notice of trials to all parties. LA. CODE Civ. P. art. 1571(1). Such notices generally are given by written letter of the district clerk, although no express Code formality governs the form of the notice (except, where a prior written request for said notice is filed, in which case the clerk must give written notice to the party at least ten days before the date fixed, LA. CODE Civ. P. art. 1572).

108. 216 So.2d 151 (La. App. 2d Cir. 1968).
values of this important opinion is its disapproval or at least severe limitation of the illiberal and overtechnical rationale of McDonald v. O'Meara,109 which (under aggravated circumstances, it is true) had sustained for procedural defects a motion to strike an application for new trial.110

On another subject, the thoughtful opinion in Gates v. Hanover Ins. Co.111 is considered erroneous in its holding that the trial court has discretion whether or not to allow an amendment of the petition to remove the grounds for an exception. Article 934 provides that a judgment sustaining the exception “shall order such amendment within the delay ordered by the court.” (Emphasis added.) The article also provides that the action shall be dismissed “[i]f the grounds of the objection cannot be so removed” (emphasis added), but the trial court has no special insight to determine that the grounds of the exception cannot be removed; by the mandatory terms of the Code article, it has no discretion not to allow amendment. Either the plaintiff is entitled to amend as a matter of law, or he is not. The usual practice is to allow him an opportunity to attempt amendment if he so desires. The holding is in conflict with at least two other decisions on the question during the year.112

**Appeals and Appellate Procedure**

Ordinarily, an appeal by a defendant brings up for review only the correctness of the judgment rendered against him, not the correctness of the trial court's action in dismissing or granting demands against any codefendants.118 To this rule, the jurisprudence has created one exception: Where the defendant-appellant may otherwise be denied contribution from codefendants possibly liable in solido, the defendant's appeal also brings before the court the issue of contribution, despite the plaintiff's failure to appeal from the dismissal of the suit against such co-defendants.”114

---

109. 149 So.2d 611 (La. App. 1st Cir. 1962).
110. Since the motion for a new trial was struck from the record as invalid, the mover was deprived of his right to appeal; for, by the date the motion to strike was sustained, the delays for appealing had expired.
111. 218 So.2d 648 (La. App. 4th Cir. 1969).
In Williams v. City of Baton Rouge, the supreme court refused to follow this rationale. There, two defendants, an employer and the father of the negligent employee, had been held solidarily liable for $2,500. Both appealed. The plaintiff answered the appeal only as against the employer, and he obtained an increase in the award of $10,000 as against the employer. The court refused, however, to amend the judgment so as further to hold the codefendant father solidarily liable for this increase in the award—thus the employer was held liable for $10,000 damages, while the supposedly solidarily liable father was held for only $2,500. It denied the increase against the father because it was not sought by the appellate pleadings, since, the court stated, he was not made an appellee as to the employer's appeal.

This rationale overlooks the contribution exception and applies the general rule that, in the absence of a third-party or other demand by one defendant against the other, an appellant's appeal only brings before the reviewing court the correctness of the trial court's judgment as to the only demand appealed, that is, that by the plaintiff against the defendant. Under this general rule, an appeal does not bring up for review the correctness of the trial court's decision of other demands between the plaintiff and other defendants-appellees.

This had been pointed out by the intermediate court in Emmons v. Agricultural Ins. Co., a decision reversed by the supreme court in the lead case establishing the contribution exception. As the intermediate court had pointed out in Emmons, the issue is not whether one defendant is to be denied contribution, for that can be obtained by subsequent suit where one defendant does not seek contribution by third-party demand against the other in the instant suit. The real issue is only whether it is preferable to determine contribution in the single suit rather than through a subsequent action. In reversing, the supreme court in Emmons determined that contribution should be decided in the one suit, despite the absence of third-party demand or other pleadings asserting the right to contribution.

117. 150 So.2d 94 (La. App. 4th Cir. 1963).
118. 245 La. 411, 153 So.2d 594 (1963).
119. LA. CODE Civ. P. art. 1113.
tungished the *Emmons* progeny as involving a different procedural stance than that before it, namely, only an unrestricted appeal by one defendant from the plaintiff’s judgment against it. The dissent of Justice Sanders correctly analyzed the majority’s mistake in rationale. The confusing inconsistency of *Williams* with *Emmons* will need clarification by subsequent jurisprudence or by legislation.

**EXECUTORY PROCEEDINGS**

The landmark decision of *League Central Credit Union v. Montgomery* was discussed in the last symposium. Resolving a conflict in the prior jurisprudence, the supreme court in that case held a mortgage debtor could defend against a deficiency judgment by, for the first time, contending that the seizure and sale by executory process was invalid for technical procedural reasons. Previously, substantial authority had indicated that the debtor waived procedural defects by failing to enjoin or suspensively appeal the executory proceedings. The *League Central* holding will have great impact on office practice and the use of executory process, requiring much greater care and attention to minute detail to avoid impairing a client’s right to a deficiency judgment; for there the mortgage creditor was deprived of a deficiency judgment by an insignificant procedural defect.

The supreme court expressly limited its holding to avoid annulment of a sale after the mortgaged property passed into the possession of a third person purchaser. Left unanswered, however, was whether, by reason of such procedural defect, the mortgage debtor might annul a sale under executory process to the mortgage creditor himself, and thus recover the property, even though the debtor failed to enjoin or suspend the sale at the time it was made. This was the situation before the court in *Jambois O. & M. Machine Shop, Inc. v. Dixie Mill Supply Co.*, at least insofar as the fifteen thousand dollars worth of mortgaged property not resold after the judicial sale and still in the

---

120. 251 La. 971, 207 So.2d 762 (1968), noted in 29 La. L. Rev. 405 (1969).
122. The acknowledgment of a chattel mortgage executed under private signature before two witnesses was held to be deficient, because the mortgagee signed it rather than the mortgagor or a witness as statutorily required. La. R.S. 13:3720 as amended, La. Acts 1952, No. 470.
123. 218 So.2d 672 (La. App. 4th Cir. 1969).
possession of the purchasing mortgage creditor at the time of suit. In refusing to annul the sale, the court relied upon its earlier decision in White Motor Co. v. Piggy Bak Cartage Corp.,\textsuperscript{124} which the supreme court had expressly overruled in League Central at least insofar as applying to third persons. Reliance upon this scholarly decision was misplaced, for it concerned a situation where (unlike the present) all of the mortgaged property sold at the judicial sale was in the possession of innocent third person purchasers at the time the suit to annul the sale was filed.

Nevertheless, the Jambois decision is right in result. There are valid reasons why a mortgage debtor should not be able to annul a sale when he did not enjoin or suspend it; and yet should be allowed to rely upon these same procedural defects to prevent a deficiency judgment against him in excess of the value at judicial sale. On the one hand, the mortgage creditor’s security up to the value of the property securing the debt should be protected, so that the debtor delinquent in raising procedural defenses to the sale should be held to have waived them. On the other, in view of the latter day consumer-protection policies disfavoring deficiency judgments,\textsuperscript{125} a personal judgment in monied amount beyond the value of the property ought not be allowable unless the creditor follows the letter of the law when he uses the short-cut procedures permitting his immediate seizure and sale of the property through executory process. It is unfortunate that the deciding court in Jambois did not come to grips with League Central’s application, as raised by the briefs, and did not decide the case on the basis of the true considerations rather than of the inapplicable White Motor Co. decision.

**Conclusion**

The Louisiana Code of Civil Procedure of 1960 has been in effect for almost ten years. On the whole, it has effectively accomplished its purpose of simplifying civil practice in Louisiana and of subordinating procedural devices to the proper role of serving as hand-maiden to substantive justice. The writer shares the general view that our Code is a major procedural reform and an enduring monument to the vision of the late Dean Henry George McMahon and his colleagues who drafted it.

\textsuperscript{124} 202 So.2d 294 (La. App. 4th Cir. 1967).

Nevertheless, the first years of operations have indicated areas which should be restudied and most probably revised. It has been the writer's duty to review intensively the Louisiana procedural decisions of the last three years for evaluation in this faculty symposium. In this, the third and final performance of this pleasant task, an effort has been made to suggest these few major problem areas and possible cures, as follows:

1. The need for revision of criteria for compulsory joinder of necessary and dispensable parties;  

2. The need for Code amendment to prevent the proper-party articles from being misused to deny substantive justice;  

3. The possible need for rationalization of the incidental actions and for revision of the requirement for leave of court to prevent substantive injustice based upon this procedural technicality;  

4. Consideration of allowing separate trials and adjudications of severable issues, and of interlocutory appeals with leave, under limited conditions;  

5. In line with 4, consideration of instituting a rationalized general policy of allowing separate threshold trial of defenses which might conclude the litigation, in place of the present scheme of specialized exceptions with function delineated by chiefly historical considerations.

CRIMINAL PROCEDURE

Dale E. Bennett*

SEARCH WARRANTS—REQUISITE RECITALS OF SUPPORTING AFFIDAVIT

Mapp v. Ohio, holding that illegally seized evidence is inadmissible in state as well as federal courts, necessitated a careful review of state search warrant procedures. It is important that search warrants be validly issued, to the end that the property seized will be admissible in evidence in subsequent criminal proceedings. Thus, article 162 of the Code of Criminal Procedure

126. See text accompanying notes 15-27 supra.
127. See text accompanying notes 32-33 supra.
129. See text accompanying notes 70-81 supra.
130. See text accompanying notes 82-89 supra.
* Professor of Law, Louisiana State University.