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The Work of the Louisiana Appellate Courts for the 1969-1970 Term: A Symposium
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Law in General

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A Symposium

[*Editor's Note.* The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1969 to July 1, 1970.]

LAW IN GENERAL

*Robert A. Pascal and W. Thomas Tête**

The Obligatory Force of Decisions

The majority opinion in *Johnson v. St. Paul Mercury Insurance Co.*[1] reversed and in dictum rebuked the Court of Appeal for the Second Circuit for applying a conflict of laws rule different from that applied by the supreme court in previous similar cases.[2] The dictum of rebuke was as follows:

> "What is unique here is that this departure from the settled jurisprudence should be undertaken by an intermediate court. The action involves, at least, a failure by the Second Circuit to recognize its obligation to follow the settled law of this State. For, since the question is not regulated by statute, the law is what this Court has announced it to be."[3]

Two issues are raised here: (1) Do Louisiana judicial decisions, even if amounting to a "settled jurisprudence," ever obligate as law? If so, then certainly they must be followed in lower courts, and perhaps even in the courts in which they were rendered. If they do not obligate as law, however, then (2) are Louisiana lower courts nevertheless obligated to follow them in later cases until they are overruled by higher courts? These issues will be discussed in turn.

Do Prior Judicial Decisions Constitute "Law"?

By the dictum quoted above the justices of the supreme court admit the supremacy of the legislature in matters of law; but in asserting that in matters "not regulated by statute, the

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1. 236 So.2d 216 (La. 1970). Dissent by Sanders, J.
2. The conflict of laws issue in this case is discussed at page 321 *infra*.
3. 236 So.2d 216, 217-18 (La. 1970).

law is what this court has announced it to be" they have used language inconsistent with the legislation of this state. The preliminary title of the Louisiana Civil Code, especially if construed against the background of the state's legal history, leaves no doubt that there are only two sources of positive law in Louisiana, the solemn expression of legislative will and custom.

Unlike the French *Code Civil*, which has never recognized formally anything but legislation as a source of law,[4] the Digest of 1808, consistently with its nature as a digest of the uncodified [Spanish] civil laws then in force, and the Civil Codes of 1825 and 1870, recognized the two sources of positive law acknowledged in Spain, legislation and custom.[5] In the "silence" of legislation and custom—the positive law—the Digest of 1808 and the Civil Codes of 1825 and 1870 have directed the judge to proceed according to sources of criteria of order not considered positive law, "natural law and reason, and received usages."[6] Nothing was or is said even now of judicial decisions as such constituting a source of positive law, and hence judicial decisions cannot in and of themselves have that effect.

It is, nevertheless, entirely consistent with the Digest of 1808, and with the general Spanish law of which it was a digest, to affirm that "a long series" of judicial decisions, "constantly repeated" *and enjoying "uninterrupted acquiescence" by the people*, may evidence that "tacit and common consent" of the people which is as generative of custom[7] as the express consent of the whole people through their representatives is generative of legislation. Similarly, it is consistent with the Digest of 1808 and its background that a series of judicial decisions, though neither sufficiently long or repeated, nor enjoying such uninterrupted acquiescence as to constitute custom, may constitute evidence of a "received usage" of permissible application in the absence of valid legislation or custom. When it is that it can be said a line of decisions enjoys that "uninterrupted acquiescence" sufficient

4. CODE CIVIL DES FRANÇAIS prelim. tit., arts. 1-6 (1804).

5. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (referred to in the text as the Digest of 1808), prelim. tit., arts. 1 and 3 (1808); LA. CIV. CODES of 1825 and 1870, arts. 1 and 3.

6. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS prelim. tit., art. 21 (1808); LA. CIV. CODES of 1825 and 1870, art. 21.

7. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS prelim. tit., art. 3 (1808) and LA. CIV. CODES of 1825 and 1870, art. 3, define custom to "result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent."

to constitute custom, or when it is that a line of decisions can be said to evidence "received usage," are questions of considerable complexity which are beyond the scope of a symposium comment and must form the subject of a future essay. It is sufficient now to affirm vigorously that Louisiana's legislation and legal history do not permit the conclusion that decisions can of themselves constitute law.[8]

Do Previous Louisiana Decisions, Though Not "Law," Nevertheless Obligate Lower Louisiana Courts?

The *Johnson* dictum that the supreme court's "settled jurisprudence" obligates lower courts in subject matters "not regulated by statute" may imply the supreme court has abandoned its 1969 position in *Pringle-Associated Mortgage Corp. v. Eanes*[9] that even a single previous decision construing legislation is obligatory on lower courts. Even so, however, the basic question raised in this section remains one of considerable importance, for an affirmative answer would violate at least the spirit of the principle of "basic fairness" to litigants.

A requirement that lower courts follow previous decisions of higher courts is not found expressly in any of the provisions of the Louisiana Constitution or legislation. It may be that the supreme court envisions the very existence of lower, appellate, and supreme courts as implying such a requirement. It may be that the supreme court believes that the restriction is implicit in the constitutional limitation of the right to review by the supreme court as a matter of law, as distinguished from the right to petition therefor, to instances (1) in which the decisions of two or more courts of appeal differ on the same point or (2) in which the decision of a court of appeal is inconsistent with previous decisions of the supreme court.[10] But it is precisely in the latter constitutional limitation that the basic difficulty is presented. In all instances in which there is no right to review by the supreme court, contentions concerning the state of the law reach that court only on the basis of written applications *not supportable by oral argument.*[11] A litigant urging the recon-

8. It must be noted that the justices of the supreme court may not have realized the implications of the statement; for, instead of relying simply on the court's previous decisions to dispose of the case at hand, the majority opinion goes to great length to attempt to justify the "rule" being applied.

9. 254 La. 705, 714, 226 So.2d 502, 505 (1969).

10. LA. CONST. art. VII, § 11.

11. LA. SUP. CT. R. 10, § 4(3).

sideration of the correctness of prior decisions can have no hope of a judgment consistent with his contention in either the lower court or the intermediate appellate court—for as to each of these courts the previous decisions might as well be law—and then he is denied the opportunity to confront visibly and to dispute orally with the one set of judges who in practice have the power to pass judgment on the validity of his contention. It is for this reason that the supreme court's rebukes of the appellate courts in *Pringle* and *Johnson* violate the spirit of basic procedural fairness to litigants. Thus it is questionable whether any lower or intermediate court should be required to follow the decisions of the court above it in any instance in which the litigant is not entitled to review with oral argument as a matter of law. Even if the litigant is so entitled, however, it seems more in keeping with the spirit of an administration of justice according to law that the judge at any level should be allowed to deviate from previous decisions of courts above him by assigning in writing the reasons for which he does not consider those decisions expressive of the correct appreciation of the law. The litigant whose position corresponds to the correct appreciation of the law should be entitled to have a decision in his favor without being forced to take an appeal. The party cast in judgment might himself appeal, it is true, but in some instances at least he would not, and the litigant in the right would have justice in the lower court without further expense. Judicial convenience would suffer, but judicial convenience must be subordinated to concern for the litigant with the law on his side.

Finally, if the comments of Livingston, Moreau Lislet, and Derbigny, the drafters of the Civil Code of 1825, can be taken as reliable guides to the effect to be attributed to decisions under article 21—decisions based on "natural law and reason, or received usages" in the absence of legislation or custom—then it may be affirmed that such decisions are not to be given the force of precedent. The report of the redactors contains the following language in speaking of decisions under article 21:

> "[S]uch decisions shall have no force as precedents unless sanctioned by the Legislative will."[12]

12. *Preliminary Report of the Code Commissioners* (1823), reprinted in 1 LOUISIANA LEGAL ARCHIVES LXXXV, XCII (1937).

And further,

> "Those decisions will be the means of improving legislation, but will not be laws themselves; the departments of government will be kept within their proper spheres of action. The Legislature will not judge, nor the Judiciary make laws."[13]

PRIVATE LAW

PERSONS

*W. Thomas Tête**

In *Tannehill v. Tannehill*[1] plaintiff sued to have his marriage declared null and to disavow the child born to his purported wife. The trial court sustained exceptions of no cause of action as to both claims. The Third Circuit Court of Appeal reversed the exception as to the claim of nullity, but sustained it as to the action of disavowal. However, two judges dissented on the question of the action of disavowal.

The action of nullity rested in part upon article 3941 of the Code of Civil Procedure. Plaintiff alleged that defendant had obtained a divorce in LaSalle Parish purporting to dissolve a previous marriage while she and her husband were both domiciled in Winn Parish. Article 3941 provides that an action for divorce must be brought in the parish of domicile or of last matrimonial domicile under penalty of absolute nullity. The defendant's exception to the action of nullity was based upon "the strong jurisprudential rule preventing collateral attack upon divorce decree," a rule stated in *Wilson v. Calvin.*[2]

The court of appeal correctly distinguished the *Wilson* case from that before it on the ground that the *Wilson* ruling expressly barred collateral attacks on decisions only on "errors or irregularities *not jurisdictional,*"[3] whereas the error in venue in the divorce purporting to dissolve Mrs. Tannehill's previous marriage was one that was jurisdictional under article 44 of the Code of Civil Procedure. The court, however, indicated uncer-

13. *Id.*, 1 LOUISIANA LEGAL ARCHIVES LXXXV, XCIII (1937).

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1. 226 So.2d 185 (La. App. 3d Cir. 1969).
2. 221 La. 451, 59 So.2d 451 (1952).
3. *Id.* at 453, 59 So.2d at 453. (Emphasis added.)