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## Private Law: Law In General

Robert A. Pascal

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# The Work of the Louisiana Appellate Courts for the 1972-1973 Term

## *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, 1972 to July 1, 1973.]

## PRIVATE LAW

### LAW IN GENERAL

*Robert A. Pascal\**

#### DISSENTS FROM GRANTING OF WRITS

Dissents to the granting of writs were entered in four instances. In one,<sup>1</sup> the dissent was to the granting of a writ of prohibition against a lower court order recusing a district attorney in a grand jury proceeding, and thus a dissent to the determination of the issue presented in the application for the writ without the benefit of a hearing. Such a dissent to a granting of a writ was unobjectionable, it being in favor of the petitioner. Also understandable was the dissent from the granting of a writ on the basis that the application therefor does not conform to the rules on the subject.<sup>2</sup>

The other instances of dissents to the granting of writs, however, were in effect formally rendered personal opinions on the merits of the petitioners' claims for review. Thus in *Board of Supervisors of L.S.U. v. Newark*,<sup>3</sup> two justices declared simply "there is no basis for granting this writ," and in *Society to Oppose Pornography, Inc. v. Thevis*,<sup>4</sup> three justices delivered separate opinions dissenting on the basis of their appreciation of the substantive merit of the application. This practice cannot but create in the mind of the person granted the writ the impression that the dissenting justice has already judged the case definitively and will not have an open mind when the court acts to reach its decision on the merits. It is true, of course, that the refusal of a writ also often represents a decision on the merits, but the refusal of a writ of review does not result in argument before the court and

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\* Professor of Law, Louisiana State University.

1. *State ex rel. Marvin v. McClendon*, 262 La. 447, 263 So. 2d 720 (1972).

2. *Society to Oppose Pornography, Inc. v. Thevis*, 262 La. 1076, 266 So. 2d 215 (1972).

3. 277 So. 2d 441 (La. 1973).

4. 262 La. 1077, 266 So. 2d 216 (1972).

further deliberation by the court itself. The granting of a writ of review entails that argument and further deliberation and the litigant should not be exposed to the fear that one or more of the justices may not be in a mood to hear him with an open mind.

#### PREVIOUS DECISIONS AND CUSTOM

In the 1970 case of *Johnson v. St. Paul Mercury Insurance Co.*,<sup>5</sup> the Louisiana supreme court affirmed vigorously the Louisiana judicial practice of applying the law of the place of a civil offense to determine the substantive rights and obligations between the offender and the offended. In the majority opinion Justice Summers had written 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.*<sup>6</sup>

Associate Professor Tête of the Louisiana State University School of Law and the present writer disputed the accuracy of the above statement in the *Louisiana Law Review's Symposium* on the 1969-1970 Louisiana appellate decisions,<sup>7</sup> arguing that previous judicial decisions *of themselves* neither constitute "law" or "custom," nor obligate lower courts until reversed.

In the past term the supreme court overruled *Johnson*.<sup>8</sup> Justice Summers dissented, arguing that the supreme court had applied the *lex loci delicti* in similar cases for at least seventy-three years, that this practice constituted a *jurisprudence constante*, and that the departure from a *jurisprudence constante* "lies more properly within the province of the legislature."<sup>9</sup> In support of his position Justice Summers proceeds to say that the doctrine of *jurisprudence constante* has been "explained with clarity" by the present writer and proceeds to quote the following passage from what Professor Tête and the writer had stated in the *Louisiana Law Review's Symposium* on the 1969-1970 Louisiana appellate decisions:

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5. 256 La. 289, 236 So. 2d 216 (1970).

6. *Id.* at 294, 236 So. 2d at 217-18 (Emphasis added.)

7. *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Law in General*, 31 LA. L. REV. 185-88 (1971).

8. *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973). The case is discussed in the *Conflict of Laws* portion of this *Symposium*, page 319 *infra*.

9. 276 So. 2d 309, 315.

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 as the express consent of the whole people through their representatives is generative of legislation . . . .<sup>10</sup>

Certainly there is a misunderstanding here. Professor Tête and the writer were stating that a custom could arise by reason of a *popular uninterrupted acquiescence* in a judicial practice, but had not stated that even a *jurisprudence constante* would of itself constitute either custom or accepted usage. Custom and accepted usage require *popular approbation*, not merely judicial acceptance. Thus, for example, the long line of Louisiana supreme court decisions misconstruing articles 184-197 of the Civil Code, on the disavowal of paternity and the proof of legitimate parentage, cannot be considered either custom or accepted usage because these decisions have been and are being attacked incessantly. The judiciary, indeed, may act authoritatively only for the particular persons and situation momentarily before it.<sup>11</sup>

Justice Summers' statement nevertheless deserves more attention if it is to be read as meaning that a (popular) *custom* is to be followed by the judiciary on the authority of article 3 of the Civil Code,<sup>12</sup> and that a (popularly) *received usage* is to be honored in the absence of legislation or custom on the authority of article 21 of the Civil Code.<sup>13</sup> Even then, however, the custom or the received usage would have to be *reasonable*, for reasonableness has always been understood to be an essential element of the initial and continued validity of custom. This is true even in Anglo-American law. Blackstone, for example, states:

When a custom is actually proved to exist . . . if it is not good custom it ought to be no longer used. To make a particular cus-

10. *Id.* The passage quoted is from *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Law in General*, 31 LA. L. REV. 185, 186-87 (1971).

11. For a fuller discussion see the comments of Professor Tête and the writer cited in note 7 *supra*.

12. LA. CIV. CODE art. 3: "Customs 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."

13. LA. CIV. CODE art. 21: "In all Civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

tom good, the following are necessary requisites. . . . 4. Customs must be reasonable; or rather, taken negatively, they must not be unreasonable . . . .<sup>14</sup>

Thus in any case of a (popular, not merely judicial) custom or received usage it is always permissible to inquire into its reasonableness and to reject it if it does not meet the proper standard. Indeed, substantive due process would require this, and the fact that men once failed to detect the unreasonableness of a custom or of a received usage would be no argument against its rejection.<sup>15</sup>

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14. 1 W. BLACKSTONE, COMMENTARIES \*76, 77.

15. The above has been written without comment on the position, shared by the majority in *Jagers* as well as by Justice Summers, that conflicts law is a part of state law. For the contention that conflicts law is federal law and not state law, however, see the discussion of *Jagers* in the *Conflict of Laws* portion of this *Symposium*.