Legislation Affecting Practice and Procedure

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The Legislature of 1956 made no changes which can be classified as revolutionary or even major, in the field of Pleading and Practice. The new statutes on the subject fall within four categories, namely (a) Judicial Sales, (b) Compulsory Attendance of Witnesses, (c) Civil Appeals from City Courts, and (d) Jurisdiction, Service of Process and Direct Actions against Insurers.

PUBLIC SALES

Heretofore all public sales by auction, except in the Parish of Orleans, took place on Wednesdays and Saturdays, beginning at 11:00 a.m. Act 2692 made the single amendment that such sales shall begin at 10:00 a.m. instead of 11:00 a.m.

The reason no doubt is to allow more time for such sales prior to the noon hour, as well as to begin such sales earlier in the business day, especially on Saturdays when the people prefer to conclude their business as early as practicable so as to permit them to start the week-end diversion before noon where possible.

The 11 o'clock provision has been the law since 1908. At that time it was conceivable that prospective purchasers coming from sections remote to the place where the sale was held would require the travel time allowed. With modern transportation facilities, the Legislature of 1956 deemed it expedient to advance the starting time forward one hour. The change should be welcomed.

COMPULSORY ATTENDANCE OF WITNESSES

The 1942 Legislature passed a statute permitting the compulsory attendance of witnesses residing within one hundred

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miles of the court to be subpoenaed and to appear and testify. The original statute\(^5\) required the deposit of adequate funds with the court for expenses, including $1.50 per day in addition to mileage at the rate of 5¢ per mile. Act 300\(^6\) increased the per diem expenses to $5.00 per day, which is far more realistic under present economic conditions, and which can hardly be deemed excessive, as is apparent if one seeks to purchase three meals for $5.00. The amendment could well have increased the per diem for hotel expenses now fixed at $3.50 per day, which is at present quite unrealistic. The Legislature apparently felt that this amount was adequate, but experience proves the contrary.

Another change operated by this act is to permit the order for summoning the witness to be signed by the clerk of court as well as by the judge, whereas formerly the statute merely indicated that only the judge could sign the order.\(^7\) This change is salutary for the reason that in many judicial districts the judge is not always available to sign such an order. In keeping with the now common practice in other cases the clerk of court, as well as the judge, has been authorized to issue orders.\(^8\)

**CIVIL APPEALS FROM CITY COURTS**

The three new separate statutes\(^9\) applicable to city courts in general will be discussed elsewhere in this symposium under the title of “Courts.” As they apply to Practice and Procedure, it is appropriate to mention that although these three statutes appear in conflict one with another in many respects, there has been no change in procedure in appeals from the city courts.

Since 1938\(^11\) appeals from city courts, Parish of Orleans excepted,\(^12\) where the amount in contest exceeded $100.00, exclu-

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7. Ibid.
8. To mention several of the major instances, clerks of court may grant orders for the following: Conservatory writs, LA. R.S. 13:901 (1950); Calls in warrant and commissions to take testimony out of the state, LA. R.S. 13:902 (1950); Advertisements of tableaux and accounts, LA. R.S. 13:903 (1950); Garnishments, LA. R.S. 13:904 (1950); Probate and execution of wills, LA. R.S. 13:905 (1950); Executory process, LA. R.S. 13:907 (1950).
10. See page 38 infra.
12. The jurisdiction of the city courts in New Orleans is fixed by the Constitution. See LA. CONST. art. VII, §§ 91, 92, which are the only city courts created by the Constitution, and now have jurisdiction in money demands of $1,000.00, exclusive of interest.
sive of interest and attorney fees, are returnable to the court of appeal of the circuit in which the city court is situated, and where the amount is $100.00 or less, exclusive of interest, the appeal is returnable to the district court of the parish in which the city court is situated. All three of the new statutes carry provisions on the question of such appeals but operate no change. Act 257\textsuperscript{13} and Act 422\textsuperscript{14} both carry provisions that appeals shall be returnable “as provided in R.S. 13:1876.” Act 326 provides a new section on civil appeals from the city courts but effects no change. Therefore any comparison of language used will not result in any change in the appellate procedure in the city courts.

The amendments do straighten out one thing in appeals. As mentioned above, appeals from the city courts to the districts prior to the 1956 act were allowed “where the amount in contest is one hundred dollars or less, exclusive of interest.”\textsuperscript{15} The new amendments all read “where the amount in contest is one hundred dollars or less, exclusive of interest and attorney fees.”\textsuperscript{16}

**JURISDICTION AND SERVICE OF PROCESS**

The most significant 1956 statute in the field of Practice and Procedure is Act 138\textsuperscript{17} which purports to reach nonresident in-

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\textsuperscript{13} See note 9 supra.
\textsuperscript{14} See note 9 supra.
\textsuperscript{17} Incorporated as La. R.S. 13:3474 (Supp. 1956), in West’s Louisiana Legislative Service No. 2 (1956). It reads as follows:

“Sec. 3474. Operation of motor vehicle by non-resident as appointment of Secretary of State as agent for service of process.

“The acceptance by non-residents of the rights and privileges conferred by existing laws to operate motor vehicles on the public highways of the State of Louisiana, or the operation by a non-resident or his authorized agent or employee of a motor vehicle within the State of Louisiana, shall be deemed equivalent to an appointment by such non-resident of the Secretary of the State of Louisiana or his successor in office, to be his true and lawful attorney for service of process, as well as the attorney for service of process of the public liability and property damage insurer of the vehicle, if such insurer be a non-resident not authorized to do business in the state, upon whom or such insurer, may be served all lawful process in any action or proceeding against the non-resident, or such insurer, growing out of any accident or collision in which the non-resident may be involved while operating a motor vehicle in this state, or while same is operated by his authorized agent or employee. In the event of the death of such non-resident before service of process upon him, any action or proceeding growing out of such accident or collision may be instituted against the executors or administrators of such deceased non-resident, if there be such, and if not, then against his heirs or legatees, and service may be made upon them as provided in R.S. 13:3475. Process against the defendant or defendants, the non-resident, his executors or administrators, if there be such, and if not, then against his heirs or legatees, or
surers of nonresident motorists who use the highways of this state.

In 1877 the pioneer decision of *Pennoyer v. Neff*\(^{18}\) by the Supreme Court of the United States established the norm whereby a state court might acquire jurisdiction against nonresidents, so that its judgments would be entitled to full faith and credit under the due process clause of the fourteenth amendment. The Court declared that the nonresident defendant must be served personally in the state, or must put in a voluntary appearance, or his property found within the forum must be seized, in which event the judgment could not exceed the amount realized from its sale under execution.

Since then the doctrine in the *Pennoyer* case has been expanded and stretched. In 1927 the Supreme Court of the United States in *Hess v. Palowski*\(^{19}\) validated the Massachusetts statute, which was one of the first acts seeking to reach nonresident motorists who had injured persons on the highways of that state by serving the Secretary of State of Massachusetts. The basis for the decision was that the voluntary use of the state's highway system by the nonresident motorist made him answerable for damages inflicted on such highways through the Secretary of State as his agent. Louisiana promptly adopted a similar statute in 1928.\(^{20}\)

Then in 1948 the Legislature stretched the doctrine still further when it passed a statute affecting owners of watercraft by simply tracking the provisions of the highway statute, but substituting watercraft for motor vehicles, and waterways for highways.\(^{21}\) This writer questioned the validity of that statute on the grounds that it improperly invaded the exclusive jurisdiction of the Federal Government over admiralty and maritime jurisdiction.\(^{22}\) However it has been declared constitutional by both United States District Courts in Louisiana.\(^{23}\)

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18. 95 U.S. 714 (1877).
Now in 1956 the Legislature has attempted a further stretching of the original nonresident motorist doctrine by permitting service on the Secretary of State as the tacitly appointed agent in actions against nonresident insurers of nonresident motorists who cause damage while using the state's highways. The measure goes beyond the realm of reason.

To require a foreign insurance company to answer a suit in Louisiana, merely because an insured has seen fit to use the state's highways, appears to constitute a clear deprivation of due process in the light of the decisions already mentioned.24 The all important factor that is lacking completely is that the foreign insurance company is not required to consent to its assured coming to Louisiana and therefore lacks the essential element of the Hess case, namely, voluntary physical appearance in this state by such a prospective defendant.

In the Hess case the Supreme Court of the United States declared:25

"The measure in question operates to require a non-resident to answer for his conduct in the State . . . .

"Under the statute the implied consent is limited to proceeding growing out of accidents or collisions on a highway in which the non-resident may be involved." (Emphasis added.)

A foreign liability insurance carrier not having any agents in Louisiana and not being "on a highway" in Louisiana, appears beyond the reach of the rule in the Hess case. Stated otherwise, the 1956 statute seeks to imply agency through an implied agency. The relationship is too remote to merit further analysis and discussion.

Furthermore the Supreme Court of Louisiana has already held that a nonresident cannot be mousetrapped for service of process. In Fidelity & Deposit Co. v. Bussa,26 the court held that an invitation to lunch and conference in Shreveport to a resident

24. See Hess v. Palowski, 274 U.S. 352 (1927); Pennoyer v. Neff, 95 U.S. 714 (1877). See also Brassett v. United States Fidelity and Guaranty Co., 153 So. 471 (La. App. 1934), in which the Court of Appeal for the Parish of Orleans held the nonresident motorist statute was inapplicable as against a nonresident automobile owner whose car was being driven by a person who was neither his authorized agent nor employee.
26. 207 La. 1042, 22 So.2d 562 (1945).
of Texas was a fraudulent subterfuge to effect service of process and set the service aside. The fact that the process server permitted the victim to partake of his meal to the fullest extent before plunging his harpooning summons did not alleviate the situation one bit. The statute stretches the rule in the *Hess* case beyond the breaking point, and the courts should declare the scheme unconstitutional at the earliest opportunity.

But even if declared constitutional, the statute should be no insurmountable obstacle to liability in Louisiana. The nonresident insurers could easily restrict the applicability of their policies so as to exclude operation in Louisiana. In this manner the further ground of invalidity would be established, namely, that the statute would in such event be in contravention of the prohibition in the Federal Constitution against the impairment of contracts by the states.27

A related topic to liability insurance companies is the further modification of the direct action statute. Act 47528 seeks to extend the relief to the designated beneficiaries under Civil Code article 2315 of a deceased injured person, and provides further that the action may be brought in the parish where the insured is domiciled. The validity of this measure seems reasonable.

### Appeals on Facts in Jury Trials

**Involving Actions Ex Delicto**

Although the 1956 Legislature will go down in history as one of the most turbulent since the Reconstruction Era following the Civil War, it will also be recorded as very mild on the overall in its effect on the field of Practice and Procedure.

One group of measures, which were defeated, were potentially disastrous to our efficient system of keeping trial dockets up to date, and merit some reference.

For the third consecutive regular session, several joint resolutions were introduced29 which aimed to eliminate appeals on the facts in personal injury matters tried by jury. Requiring a two-thirds vote of each house, the proposed amendments to the

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29. Senate Bills Nos. 155, 168; House Bills Nos. 733, 734, 746, 747, 774.
Constitution were abandoned when the test vote in the House failed to pass.\textsuperscript{30}

It is indeed ironic that contemporaneously the New York and New Jersey systems are seeking some solution to their huge trial docket backlog resulting from jury trials in personal injury cases, as is common knowledge among lawyers. If Louisiana changed its system it would only be a brief time before a similar bottleneck would be established throughout the state. It is axiomatic in Louisiana procedure at present that almost all civil dockets in our district courts enable litigants to have their cases heard in a matter of weeks. It is to be hoped that Louisiana's judicial system will never be guilty of denying justice by inordinate delays. Such would be the inevitable result if trial by jury in personal injury cases should be placed beyond the reviewing powers of appellate courts.

\textsuperscript{30} The original vote on House Bill No. 733 was 47 in favor and 34 against. On reconsideration the vote was 46 in favor and 35 against, as the \textit{Legislative Journals} bear out.