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Exception of No Cause of Action - Affirmative Defenses

I. Henry Smith

whether the blinds were for the use of the building or its occupants as were discussed previously in connection with Paragraph 1 of Article 468 and the same conclusion would be reached.

In conclusion, it is believed that venetian blinds could not be held immovable under any of the articles discussed in the light of prior jurisprudence interpreting these articles. It appears that in determining what movables have become immobilized by destination in an apartment house or residence, the most practical test would be whether or not they are *permanently attached* by the owner.

EDGAR H. LANCASTER, JR.

EXCEPTION OF NO CAUSE OF ACTION—AFFIRMATIVE DEFENSES—Plaintiff and defendant executed a solidary note which was to be repaid by them jointly. After having called upon defendant unsuccessfully for payment of one-half of the debt, the plaintiff paid the note in full and brought this action for contribution. The petition, after stating facts sufficient to constitute a prima facie case, further alleged that the funds borrowed were used in a joint venture which plaintiff and defendant had undertaken. This surplusage was the basis of an exception of no cause of action, filed on the theory that the petition disclosed a partnership, the dissolution of which is prerequisite to suit by one partner against another on partnership debts. *Held,* there being exceptions to the general rule prohibiting actions by one partner against the other prior to partnership dissolution,[1] the plaintiff's petition did not show unequivocally that a cause of action could not be maintained under one of these exceptions. Hence the defendant's exception of no cause of action should be overruled. *West v. Ray,* 26 So. (2d) 221 (La. 1946).

Two different procedural rules compete for supremacy within the area occupied by this case. The first, that of construing all ambiguities against the pleader,[2] would seem to clamor for a strict construction of the petition. The second, throwing upon the defendant the burden of pleading and proving affirma-

1. Where the relief sought does not involve the taking of an accounting of complicated or numerous partnership transactions, a partner may sue another before dissolution. 21 A.L.R. 60. Also, an action may be maintained before dissolution on a note given in pursuance of the articles of partnership. Rondeaux v. Pedesclaux, 3 La. 510, 23 Am. Dec. 463 (1832).

2. Southport Mill v. Friedricks, 167 La. 101, 106, 118 So. 818, 820 (1928), and cases cited therein.

tive defenses,[3] argues for a liberal construction favorable to plaintiff. Generally, the trend of modern procedure in Louisiana has been to yield as little as possible to technicalities which seek to deny plaintiff the opportunity of a trial on the merits. This is evidenced by the general rule allowing plaintiff the privilege of amendment upon the sustaining of the exception of no cause of action.[4] In the field of conservatory writs, however, where admittedly harsh remedies are invoked by the plaintiff, stricter rules have been applied by the courts, as demonstrated by a refusal of the privilege of amendment where the petition fails to state a clear right to the conservatory writ.[5]

The appellate court inferentially recognized the use of the exception of no cause of action to present an affirmative defense, but, applying the test as originally set forth in *Burmaster v. Texas-Pacific Missouri-Pacific Railroad*,[6] limited its use to cases where the allegations of the petition exclude every reasonable hypothesis other than the premise upon which the defense is based. Considerable reliance was placed on a law review article[7] where the author, after pointing out that the exception of no cause of action has been used to assert the affirmative defenses of contributory negligence and compensation, observed:

> "By analogy it would seem that, in exceptional cases, any affirmative defense may be interposed successfully by the exception, but only where the facts alleged clearly and unequivocally afford a foundation for such a defense."

The exception of no cause of action has been utilized most

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3. Succession of Giordano, 194 La. 648, 194 So. 577 (1940); J. D. Adams Co. v. Dauterive, 193 So. 506 (La. App. 1940); Stafford's Estate v. Progressive Nat. Farm Loan Ass'n, 198 La. 122, 3 So.(2d) 532 (1941); Coca-Cola Bottling Co. v. Williams, 14 So.(2d) 319 (La. App. 1943).

4. Reeves v. Globe Indemnity Co. of New York, 185 La. 42, 168 So. 488 (1936); Fletcher v. Nineteenth Louisiana Levee Dist., 165 So. 495 (La. App. 1936); Messina v. Societe Francaise De Bienfaissance Et D'Assistance Mutuelle De La Nouvelle Orleans, 170 So. 801 (La. App. 1936); Purpera v. Fidelity & Deposit Co. of Maryland, 189 So. 639 (La. App. 1939); Levin v. Missouri Pac. R.R., 2 So.(2d) 99 (La. App. 1941); Simoneaux v. Gonzales, 4 So. (2d) 35 (La. App. 1941); Arceneaux v. Louisiana Highway Commission, 5 So.(2d) 20 (La. App. 1941).

5. Probably for this reason, the trial judge maintained the exception of no cause of action in the instant case and resolved the ambiguities in plaintiff's petition against him. Rhodes v. Union Bank of Louisiana, 7 Rob. 63 (La. 1844) (injunction); Kelly & Frazer v. Bentley, 9 La. Ann. 586 (1854) (attachment); Terzia v. Grand Leader, 176 La. 151, 145 So. 363 (1933) (provisonial seizure).

6. 174 So. 135 (La. App. 1937).

7. McMahon, Exception of no Cause of Action in Louisiana (1934) 9 Tulane L. Rev. 17, 24.

frequently to present the affirmative defense of contributory negligence. No hard and fast rule can be laid down for determining when the exception will be sustained, but it is generally held that the plaintiff's petition must show clearly and unmistakably that he was contributorily negligent. Otherwise the exception will be overruled, or at least referred to the merits.[8]

In cases involving automobile accidents, the court invariably cites the trite maxim of negligence that it is the duty of an automobile driver to maintain a speed sufficiently slow that he can stop within that distance to which his vision is limited.[9] And since he is also bound to keep a sharp lookout at all times, it would seem that generally any time a moving automobile strikes an immobile object, contributory negligence would be self-evident and the exception of no cause of action would lie.[10]

In the field of railroad accidents, the question of what constitutes a showing of contributory negligence on the face of plaintiff's petition has necessarily brought hairline distinctions. Thus, where the victim was walking on the railroad track and was struck down from the rear, the supreme court sustained the exception on the ground that the petition showed that the plaintiff chose the railway for pedestrian use when presumably there was a safer pathway available.[11] Eight years later, in a

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8. Illustrative of this rule is the language used in Gibbs v. Illinois Cent. R.R., 169 La. 450, 125 So. 445 (1929), where the court distinguished an earlier case [Chargois v. Morgan's La. & T.R. & S.S. Co., 149 La. 637, 87 So. 499 (1921)] sustaining the exception in these words:

"In that case the petition alleged the details of the accident about as *fully, completely, and minutely* as could have been done, and the court found that the facts alleged showed a clear case of contributory negligence on the part of the deceased." (Italics supplied) 169 La. 450, 456, 125 So. 445, 447.

9. Louisiana Power & Light Co. v. Saia, 188 La. 358, 177 So. 238 (1937); Arbo v. Schulze, 173 So. 560 (La. App. 1937); Hogue v. Akin Truck Line, 16 So.(2d) 366 (La. App. 1944).

10. Louisiana Power & Light Co. v. Saia, 188 La. 358, 177 So. 238 (1937); Arbo v. Schulze, 173 So. 560 (La. App. 1937). But the courts have made exceptions where the conditions which superinduced the accident were unusual or exceptional. In Gaienne v. Cooperative Produce Co., Inc., 196 La. 417, 199 So. 377 (1940), plaintiff was held not guilty of contributory negligence where he struck defendant's truck after being blinded by the lights of oncoming cars. In Warnick v. Louisiana Highway Commission, 4 So.(2d) 607 (La. App. 1941), a similar ruling was made where defendant's truck was parked on the highway just over the incline of a hill. See also Coats v. Buie's Estate, 157 So. 560 (La. App. 1934), where in overruling the exception of no cause of action, the court took cognizance of the fact that the plaintiff was sufficiently alert to swerve to the left in time to avoid defendant's truck, but in doing so struck a car coming in the opposite direction.

11. Chargois v. Morgan's La. & T.R. & S.S. Co., 148 La. 637, 87 So. 499 (1921).

case involving a somewhat similar situation the supreme court overruled the exception—the only factual distinction being that in the latter case the railroad was used by pedestrians at the particular point with knowledge and implied consent of the railroad company.[12] The court there observed that it did not understand that the prior adjudicated cases intended to lay down as an inflexible legal proposition that any person who goes upon a railroad track and is run down is debarred from recovering regardless of the circumstances under which the accident occurred. It would seem, therefore, by virtue of the more recent jurisprudence, that the contributory negligence of a victim of a railroad accident must be obvious and undeniable in order that the exception of no cause of action be sustained.[13] The same rule generally has been applied in sustaining the exception in other negligence cases.[14]

The use of the exception of no cause of action to assert affirmative defenses other than contributory negligence has not been resorted to frequently. Research reveals only one case where the exception was employed to assert compensation,[15] and two where compromise was thus asserted.[16]

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12. Gibbs v. Illinois Cent. R.R., 169 La. 450, 125 So. 445 (1929). Accord: Burmaster v. Texas-Pacific Missouri Pacific R. R., 174 So. 135 (La. App. 1937).

13. Sizemore v. Yazoo & M.V.R.R., 164 So. 648 (La. App. 1935), where the exception was sustained against a petition alleging that plaintiff, a trespasser, fell asleep with his head on a railroad tie. See also Pittman v. Gifford-Hill & Co., 188 So. 470 (La. App. 1939), where the court overruled the exception because of the unusual and exceptional circumstances, plaintiff's automobile having been struck at a railroad crossing where there was no warning light and where tall weeds obstructed the view.

14. Odum v. Newstadt's Shoe Stores, 194 So. 81 (La. App. 1940) (exception successfully utilized where the plaintiff continued to wear a misfit shoe negligently sold to her until injury occurred); Oubre v. Carondelet Bldg., Inc., 14 So.(2d) 293 (La. App. 1943) (exception sustained where deceased fell out of an office window which he was sitting in and which was allegedly constructed dangerously low); Flotte v. Thomas Egan's-Sons, Inc., 134 So. 428 (La. App. 1931) (exception sustained where the plaintiff sustained an injury in jumping from a wagon by grasping an upright stock rather than the handle). But see Waggoner v. City of Minden, 9 So.(2d) 244 (La. App. 1942) (exception overruled where plaintiff stepped on a water meter top which turned under her weight, causing a leg injury); Wilcox v. Lehman, 12 So.(2d) 641 (La. App. 1943) (exception overruled where the injury was caused by slipping on slime which had gathered on concrete due to a leaky faucet); Gerald v. Standard Oil Co. of Louisiana, 204 La. 690, 16 So.(2d) 233 (1943) (exception overruled where the injury occurred when the plaintiff struck a match in his room, gas having collected because of defendant's negligence).

15. Levy v. Roos, 32 La. Ann. 1029 (1880). The plaintiff had previously been sued by a third party and his property attached, with defendant Roos as surety on the attachment bond. There was judgment for the third party for $1981, but the attachment was subsequently dissolved and damages al-

There is, however, at least one deviation from the general rule that any affirmative defense might be urged through the exception of no cause of action. In the field of prescription, where the courts are prohibited from supplying the plea,[17] the defense cannot be presented through the exception of no cause of action but must be tendered by the exception of prescription.[18]

The principal case presents the first expression by the court of a rule applicable to the assertion of affirmative defenses generally by means of the exception of no cause of action. Since this rule requires an exclusion of every reasonable hypothesis other than the premise upon which the defense is based, it appears that the decision affords proper protection of the plaintiff from dismissal because of technical insufficiencies or surplusage. At the same time it preserves the use of the exception of no cause of action in those unusual cases where the petition definitely and unequivocally establishes a factual basis for the defense.

I. HENRY SMITH

JURISDICTION RATIONE MATERIAE ET PERSONAE—SUITS AGAINST INSOLVENT CORPORATIONS IN RECEIVERSHIP—Under a code provision permitting real actions to be brought either at defendant's

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lowed Levy on his reconventional demand, of $1675. Levy then brought suit against Roos, the surety, for $1675 and was met by an exception of no cause of action. The court, in sustaining the exception, pointed out that the record of the previous suit was part of the plaintiff's petition and that, since compensation takes place by mere operation of law, extinction of the debt by compensation could be asserted by an exception of no cause of action.

16. Ackerman v. McShane, 43 La. Ann. 507, 9 So. 483 (1891), where the defendant was the surviving partner of the firm of the deceased and under a compromise agreement paid the plaintiff, the universal legatee, $20,000 in full settlement of deceased's half of the partnership business. Later the plaintiff brought suit, alleging the compromise and that the defendant fraudulently represented that her interest was worth $20,000 when actually it was worth $29,000; and asked judgment for $9000. In sustaining the exception of no cause of action, the court observed that the petition on its face showed the compromise; and that the plaintiff could not ask that it be set aside for fraud and at the same time retain the $20,000 paid.

In Brandon v. Gottlieb, 132 So. 283 (La. App. 1931), the plaintiff's petition alleged that his 14 year old son was killed through the gross negligence of defendant's employee, an elevator operator; and that shortly thereafter the defendant and his insurance agent induced the plaintiff to sign a document called a "release" for which he was to receive a "gift" of $350. The court overruled the defendant's exception of no cause of action, concluding that the plaintiff was not asking for annulment of a compromise, but was assuming rather that there was no such agreement.

17. Art. 3463, La. Civil Code of 1870.

18. Succession of Thompson, 191 La. 480, 186 So. 1 (1938); White v. Davis, 169 La. 101, 124 So. 186 (1929).