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NOTES

CIVIL PROCEDURE — VENUE — ENFORCEMENT OF LABORER'S AND MATERIALMAN'S PRIVILEGE IN ACTIONS IN REM

In an action for recovery of the amount due on a pile-driving contract and for recognition of a recorded laborer's and materialman's privilege,¹ plaintiff-subcontractor, relying on the venue language of R.S. 9:4812² and Article 72 of the Code of Civil Procedure,³ brought suit against the defendant-property owner in the parish of the latter's domicile rather than at the situs of the encumbered property. Since defendant was not the owner of the building involved when plaintiff's services were performed, the trial court found that the action could only be one in rem filed in the parish of the property's situs, maintained defendant's exception of improper venue, and dismissed the suit. The Fourth Circuit Court of Appeal affirmed. *Held*, a suit to enforce a laborer's and materialman's privilege against a defendant not the owner of the property at the time the services were rendered is an action in rem and must be instituted in a competent court in the parish of the property's situs; further, the word "may" relating to venue in R.S. 9:4812 and Article 72 of the Code of Civil Procedure is mandatory, not permissive. *Gurtler, Hebert & Co. v. Marquette Casualty Co.*, 145 So.2d 145 (La. App. 4th Cir. 1962).

Prior to the adoption of the Louisiana Code of Civil Procedure, the general venue rule that a defendant be sued at his domicile was contained in Article 162 of the Code of Practice.⁴ This general rule was followed by articles containing various permissive and mandatory exceptions.⁵ Early decisions properly held a plaintiff had a choice of forum when his case fell within the application of two or more code provisions for jurisdiction

1. This procedure is authorized by LA. R.S. 9:4812 (1950). See note 15 *infra*. In the instant case the subcontractor had not recorded the contract.

2. LA. R.S. 9:4812 (1950).

3. LA. CODE OF CIVIL PROCEDURE art. 72 (1960). See note 14 *infra*.

4. La. Code of Practice art. 162 (1870).

5. These various exceptions to the general rule of venue provided that the action had to be brought at a certain place, or that the action might be brought at a certain place. The permissive exceptions were *id.* arts. 163, 165(5), (6), (9), (10), 166 (2d ¶), and 168. The mandatory exceptions were *id.* arts. 164, 165(1), (2), (3), (4), (7), (8) and 166 (1st ¶). Article 167 provided the mandatory venue in two situations when defendant had changed his domicile.

ratione personae,⁶ subsequent cases, however, held the jurisdiction *ratione personae* in a mandatory provision to be exclusive.⁷ Since rules regulating jurisdiction *ratione materiae* were properly mandatory, the latter line of cases thus resulted in judicial treatment of the mandatory principles regulating jurisdiction *ratione personae* as rules governing jurisdiction *ratione materiae*.⁸

The 1960 Code of Civil Procedure shows an attempt to avoid any perpetuation of this confusion⁹ by (1) adopting a rule of statutory construction that the word "may" is to be interpreted as permissive, and "shall" as mandatory;¹⁰ (2) deliberate use of "may" and "shall";¹¹ and (3) providing a formula to prevent any conflict when cases fell within the application of two or more Code provisions.¹²

Article 72 of the Code of Civil Procedure, a permissive exception to the general rules of venue,¹³ provides that when a privilege is sought to be enforced by an ordinary proceeding, the action "*may* be brought in the parish where the property . . . is

6. *Esmele v. Violet Trapping Co.*, 187 La. 728, 175 So. 471 (1937); *Joseph Rathborne Lumber Co. v. Cooper*, 164 La. 502, 114 So. 112 (1927); *Williams' Heirs v. Zengel*, 117 La. 599, 42 So. 153 (1906).

Prior to the adoption of the Code of Civil Procedure, Louisiana had no venue concept, the theory of jurisdiction *ratione personae* serving this function. See generally LA. CODE OF CIVIL PROCEDURE, *Introduction to Book I, Courts, Actions and Parties*, p. 2 (1960); Comment, 12 LA. L. REV. 210 (1951).

7. *Bercegeay v. Techeland Oil Corp.*, 209 La. 33, 24 So.2d 242 (1945), noted 7 LA. L. REV. 437 (1947). See also *Johnston v. Burton*, 202 La. 152, 11 So.2d 513 (1942); *Mitcham v. Mitcham*, 186 La. 641, 173 So. 132 (1937).

8. See Comment, 18 LA. L. REV. 182, n. 3, 183 (1957) ("The confusion centered over which were rules of jurisdiction *ratione personae*, and therefore waivable under the Code of Practice, and which were rules of jurisdiction *ratione materiae*, and not waivable. The exact cause of the confusion is not entirely clear. See Comment, 12 LA. L. REV. 210 (1952); *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Civil Procedure*, 18 LA. L. REV. 103, 105 (1957).")

9. See generally Comment, 21 LA. L. REV. 182 (1960).

10. LA. CODE OF CIVIL PROCEDURE art. 5053 (1960): "The word 'shall' is mandatory, and the word 'may' is permissive." See also LA. R.S. 1:3 (1950), which states the same rule.

11. *E.g.*, LA. CODE OF CIVIL PROCEDURE arts. 41-45, 71-83 (1960).

12. *Id.* art. 45 provides that (1) if there is a conflict between the mandatory exceptions and either the general rules or the permissive exceptions, the mandatory exceptions govern venue; (2) if there is a conflict between two or more mandatory exceptions, the plaintiff may choose either venue; and (3) if the mandatory exceptions are not applicable and there is a conflict between the general rules and the permissive exceptions, the plaintiff has a choice of venue provided by any applicable article.

13. The general venue rules are enumerated in Article 42. The various permissive exceptions are contained in Articles 71 through 77. (71 [action against individual who has changed domicile], 72 [certain actions involving property], 73 [actions against joint or solidary obligors], 74 [actions on offenses or quasi-offenses], 75 [actions on judicial bond], 76 [action on insurance policy], and 77 [action against person doing business in another parish]). The mandatory ex-

situated."¹⁴ (Emphasis added.) However, R.S. 9:4812,¹⁵ the statute authorizing the privilege sought to be enforced in the instant case, contains its own venue provision, which the court properly interpreted to be mandatory.¹⁶ The jurisprudence of Louisiana recognizes the rule that when a special statute creates a substantive right and also provides the venue for its enforcement, the venue so provided is exclusive and the general rules of venue have no application.¹⁷ Consequently, there seems to be no

ceptions are contained in Articles 78 through 83. (78 [actions against partners or existing partnerships], 79 [actions to dissolve partnerships], 80 [action involving immovable property], 81 [action involving successions], 82 [action in partition of community property], and 83 [action to partition partnership property]). Other mandatory exceptions are Articles 593 [secondary action of shareholders of a corporation], 1034 [exceptions to venue in incidental actions], 2006 [action to annul a judgment], 2811 [opening of successions], 2812 [succession of nonresident deceased opened in two or more district courts], 3652 [petitory action], 3941 [actions for divorce or separation], 3991 [emancipation of a minor], 4031 [appointment of a tutor for a minor], 4033 [appointment of a tutor filed in two or more courts], 4541 [interdiction proceedings], 4603 [judicial partition of property], and 4653 [concursum proceedings where immovable property is involved]).

14. *Id.* art. 72: "An action in which a sequestration is sought, or an action to enforce a mortgage or privilege by an ordinary proceeding, may be brought in the parish where the property, or any portion thereof, is situated.

"The court may render a personal judgment against the defendant if prayed for, unless he objects to the venue of the personal action by the timely filing of the declinatory exception, as provided in article 929. If this exception is maintained, the judgment shall be effective only against the property."

15. LA. R.S. 9:4812 (1950): "When the owner, or his authorized agent, undertakes the work of construction . . . for which no contract has been entered into, or when a contract has been entered into but has not been recorded, as and when required, then any person furnishing service or material or performing any labor on the said building or other work may record in the office of the clerk of court or recorder of mortgages in the parish in which the said work . . . has been done, a copy of his estimate or an affidavit of his claim . . . which recordation . . . shall create a privilege upon the building or other structure and upon the land upon which it is situated, in favor of any such person who shall have performed service or labor or delivered material in connection with the said work . . ."

16. "The said privilege . . . may be enforced by a civil action in any court of competent jurisdiction in the parish in which the land is situated." *Ibid.* (Emphasis added.) Although the statute uses the permissive word "may," it is submitted this is permissive only with reference to plaintiff's choice of enforcing or not enforcing the privilege; the legislature did not use the word "shall" because this would require judicial enforcement to perfect the privilege. The word "may," therefore, modifies the substantive right and not the venue. Consequently, if a plaintiff chooses to enforce the privilege, he *must* bring the action in the parish wherein the land is located.

On the other hand, Article 72 of the Code of Civil Procedure is specifically a venue provision and creates no substantive right. Hence the word "may" modifies only the venue and the venue is therefore optional unless otherwise provided by law.

17. *Miller v. Commercial Standard Ins. Co.*, 199 La. 515, 6 So.2d 646 (1942) (venues provided in Louisiana Direct Action Statute, LA. R.S. 22:655 (1950), are exclusive). See also *Rathborne Lumber & Supply Co. v. Falgout*, 218 La. 629, 50 So.2d 295 (1950) (venue provided by Building Contract Statute, LA. R.S. 9:4812 (1950), exclusive; dictum); LA. R.S. 23:1313 (1950), as amended, La. Acts 1958, No. 414, § 1, provides venues for a workmen's compensation and prohibits suit at any "other place"; cf. *Bergstedt v. Neff*, 17 F. Supp. 753

objection to the holding in the instant case that an action to enforce a laborer's and materialman's privilege under R.S. 9:4812 must be brought in the parish where the property is situated, since that is the sole venue provided by the statute itself.

However, there was no necessity for the court to convert the permissive "may" in Article 72 into the mandatory "must," in the teeth of two separate code provisions adopted for the purpose of preventing such a conversion.¹⁸ This mandatory interpretation of Article 72 may present some serious problems in future litigation of other cases covered by the article.¹⁹ The greatest danger, however, seems to lie in the possibility that the courts will extend a like mandatory interpretation to other permissive articles of the Code,²⁰ notwithstanding the obvious intent of the legislature.

It is submitted that the result reached in the instant case is clearly correct; but the reasoning employed to reach that result is unfortunate. The well-settled rule that a special statute which creates a substantive right and provides its own exclusive venue rendering the general rules of venue inapplicable is sufficient to reach an identical result. If the integrity of the provisions of the Code of Civil Procedure is to be maintained, the ruling of the instant case that the venue provided in Article 72 is mandatory cannot be followed.

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(W.D. La. 1936), in which a federal district court held that since the Louisiana Nonresident Motorists Act, LA. R.S. 13:3474 (1950), provided no venue for the action created, the general rules of venue applied.

18. LA. CODE OF CIVIL PROCEDURE arts. 45(3), 5053 (1960). See notes 12 and 10 *supra*.

19. *E.g.*, in enforcement of mortgage *via ordinaria*. Suppose *D* is domiciled in Parish *X* and owns property in Parish *Y*. If *P* sought to enforce his mortgage on the property by ordinary proceeding, there would be a conflict between the general rule of venue requiring that a person be sued at his domicile, LA. CODE OF CIVIL PROCEDURE art. 42(1) (1960), and the exception which provides that an action to enforce a mortgage by ordinary proceeding may be brought in the parish wherein the property is located (*id.* art. 72). Under the instant case's interpretation of Article 72, and considering the mandatory language of the general rules provided in Article 42, the suit *must* be filed in each of Parishes *X* and *Y*—not only an obvious impossibility, but contrary to the express provisions of Articles 43 and 45. Further, if the suit were filed in Parish *Y* and *D* timely excepted to the court's jurisdiction *in personam*, it would be impossible for *P* ever to obtain any judgment against *D* except one *in rem* against the property.

20. *Id.* arts. 71, 73, 74, 75, 76, and 77. See note 13 *supra*.