Louisiana Law Review

Volume 21 | Number 1
Law-Medicine and Professional Responsibility: A Symposium
Symposium on Civil Procedure
December 1960

Reconventional Demand

Hillary J. Crain

ing a motion for summary judgment.[56] However, there is a possibility of injustice in denial as noted by Judge Clark:

> "Refusal of summary disposal of a case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal, as it does from the grant, the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all."[57]

Ben R. Miller, Jr.

Reconventional Demand

The Louisiana Code of Civil Procedure makes several important changes in the procedure concerning incidental demands. One of the main incidental demands is reconvention,[1] which has been uniformly defined in the Louisiana Codes of Practice as "The demand which the defendant institutes in consequence of that which the plaintiff has brought against him."[2] It would appear that Louisiana adopted the reconventional demand from the Spanish,[3] although there are references to French legislation on the subject.[4]

PLEADING

Under the Code of Practice of 1870 the reconventional demand could be pleaded either in the answer to the principal action or as a separate demand.[5] If the reconventional demand was incorporated in the answer, it was not considered a part thereof, but as a petition setting forth a distinct cause of action.[6] Thus the rules of pleading relative to the petition applied except that it appears neither an answer nor exceptions to the reconventional demand were permitted.[7] Following the usual proce-

56. See 6 MOORE, FEDERAL PRACTICE ¶ 56.15(6) (2d ed. 1953).
57. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578 (1952).
1. LA. CODE OF PRACTICE art. 374 (1870).
2. *Ibid*; LA. CODE OF PRACTICE art. 374 (1825).
3. 2 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CODE OF PRACTICE OF 1825, p. 64 (1937).
4. E.g., Agaisse v. Guedron, 2 Mart.(N.S.) 73 (La. 1824).
5. LA. CODE OF PRACTICE art. 377 (1870).
6. *Cf.* Woodward-Wight Co. v. Haas, 149 So. 161 (La. App. 1933).
7. This has been a frequently litigated subject with cases holding that excep-

dure, the defendant in reconvention would wait until trial and then object to the introduction of evidence under the reconventional demand.[8] If the objection was well taken, the reconventional demand usually fell due to the court's reluctance to allow amendment.[9]

The Louisiana Code of Civil Procedure makes some change with reference to pleading the reconventional demand. It requires that an answer and exceptions be filed to the reconventional demand,[10] which remedies the situation where the reconventional demand fell because of a defect in pleading precluding the introduction of evidence. Inadequacies can thus be cured before trial on the merits.

The new requirement that the defendant in reconvention file an answer creates a special problem as to when the answer can be filed. An answer to a petition may be filed at any time prior to the confirmation of a default judgment against the defendant.[11] However, if this rule were applicable to the reconventional demand, the plaintiff in reconvention would be at a disadvantage. If he attempted to confirm his preliminary default judgment prior to trial, he would probably be forced to offer all the evidence that would be submitted on the trial proper by either party.[12] On the other hand, if plaintiff in reconvention waited to confirm the default judgment until the trial on the merits, he would be faced with the possibility of an answer filed immediately before commencement of the trial raising defenses he would be unprepared to meet. For this reason, the new Code provides

---

tions may be filed to the incidental demand, while others hold that exceptions are not permissible. *Cf.* Loew's Inc. v. Don George, Inc., 227 La. 127, 78 So.2d 534 (1955); General Accident Fire & Life Assur. Corp. v. Ross, 155 La. 545, 99 So. 443 (1924); Evans v. District Grand Lodge No. 21, GVOOF, 151 So. 664 (La. App. 1933); *cf.* Woodward-Wight Co. v. Haas, 149 So. 161 (La. App. 1933). It seems that the majority rule was that answer and exceptions were not allowed. See LA. CODE OF CIVIL PROCEDURE art. 852, Reporter's Comments (1960).

8. This is illustrated by cases involving the demand in compensation where the evidence in support of the plea was objected to. Bernos v. Michel, 168 La. 468, 122 So. 584 (1929); Ouachita Nat. Bank v. McIlhenny, 169 La. 258, 125 So. 69 (1929). See also Loew's Inc. v. Don George, Inc., 227 La. 127, 130, 78 So.2d 534, 535 (1955), where the court stated: "If plaintiff had adopted the more regular procedure of objecting to the introduction of any evidence in support of the reconventional demand, we would not be presented with an appeal at this time."

9. Under prior law, it seems that amendment of an answer was not permitted after the case was called for trial and the issues joined, and therefore it appears that the courts were reluctant to allow amendment to an incidental demand when the demand was subjected to exceptions at the trial. See Vicknair v. Terracina, 164 La. 114, 113 So. 787 (1927).

10. LA. CODE OF CIVIL PROCEDURE art. 1034 (1960).

11. *Id.* art. 1002.

12. *Id.* art. 1035, Reporter's Comments.

a special rule for the answer to the reconventional demand, requiring that it be filed before the taking of a preliminary default by the plaintiff in reconvention.[13]

JURISDICTION AND VENUE

Reconventional demand, under the prior law and the new Code, is triable only by a court having jurisdiction over the subject matter of the reconventional demand. An illustration is *Feahney v. New Orleans Railway & Light Co.*,[14] where the plaintiff brought suit in the Civil District Court for the Parish of Orleans for the sum of $128.00 and defendant reconvened for the sum of $46.00. The court disallowed the reconventional demand on the ground that district courts had jurisdiction only when the amount in dispute exceeded $100.00. Thus even though a court has jurisdiction over the subject matter of the principal action, the amount sought by reconvention must meet the jurisdictional amount of the court or the demand will fall.

The same rule does not pertain with regard to venue,[15] since the court having venue over the parties to the principal action also has venue over the parties in the reconventional demand.[16]

REMOVAL OF LIMITATIONS ON THE USE OF THE RECONVENTIONAL DEMAND

Diversity and Connexity

Historically, one of the problems relating to the reconventional demand involved the question of types of demands which could be pleaded in reconvention. Under the original Code of Practice of 1825, a defendant was allowed to institute a reconventional demand only if it was necessarily connected with and incidental to the principal action.[17] Yet the meaning of the requirement of connexity was never entirely clear from the jurisprudence, since determination was made on a case by case basis. Generally, however, it may be noted that connexity seemed to

13. *Id.* art. 1035. It should be noted that Article 1035 uses the language "judgment by default." However, this refers to the preliminary default, as indicated by the Reporter's Comments to this article.

14. 4 Orl. App. 277 (La. App. 1907).

15. The new Code replaces the term jurisdiction ratione personnae with the term venue. *Id.* art. 41. See also Comment, 21 LOUISIANA LAW REVIEW 182 (1960).

16. LA. CODE OF PRACTICE art. 377 (1870). The new Code contains no articles which indicate a change with regard to the rule pertaining to venue.

17. LA. CODE OF PRACTICE art. 375 (1825).

depend on the similarity of the evidence used in the reconventional demand with that used in the principal action.[18] Thus, it has been held that there is no connexity between an action for divorce on the grounds of separation for seven years and an action for divorce on the grounds of adultery.[19] Yet, in a case where the wife filed suit for separation on the ground of cruel treatment and the husband reconvened for a divorce on the ground of adultery, the reconventional demand was allowed.[20] The court said that evidence of cruel treatment and evidence of adultery are sufficiently connected to allow the latter to be raised by way of reconventional demand.

In 1866, the Code of Practice of 1825 was amended to provide that in cases where the connexity requirement was not met, the defendant would still be allowed to bring a reconventional demand where the parties reside in different jurisdictions.[21]

The Louisiana Code of Civil Procedure eliminates both the connexity and the diversity requirements to the reconventional demand and allows any action to be brought by reconvention.[22] Under the Code of Civil Procedure the reconventional demand is apparently to a large extent a counterpart of the permissive counterclaim under the Federal Rules,[23] which provide for the inclusion of as many causes of action as can properly be disposed of in one suit, regardless of the fact that the actions do not arise from the same transaction.[24] The Federal Rules recognize, however, that it would be impractical to require the courts to decide all causes in one suit. Thus it is provided that if it appears to the trial justice that the trial of the issues of the complaint will likely be confused, complicated, or lengthened because of the counterclaim, he is authorized to order a separate trial of the

18. See Landry v. Regira, 188 La. 950, 178 So. 502 (1937).
19. Dowie v. Becker, 149 La. 160, 88 So. 777 (1921).
20. Landry v. Regira, 188 La. 950, 178 So. 502 (1937).
21. LA. CODE OF PRACTICE art. 375 (1870), as amended, La. Acts 1886, No. 50.
22. LA. CODE OF CIVIL PROCEDURE art. 1061 (1960).
23. FED. R. CIV. PRO. 13(b). There are two types of counterclaims in federal jurisdictions: the compulsory and the permissive. If a defendant brings an action that "arises out of the same transaction or occurrence that is the subject matter of the opposing parties' claim, and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction" then such action must be raised by way of counterclaim. *Id.* 13(a). Failure to do so results in the action being considered res judicata. 3 MOORE, FEDERAL PRACTICE 28, 29 (2d ed. 1953). Since Louisiana has never required that a defendant plead a cause of action through the reconventional demand even if it does arise from the same transaction, it must be concluded that the reconventional demand in Louisiana is a counterpart of the permissive counterclaim of federal jurisdiction. See Delahoussaye v. Judice, 6 Mart.(N.S.) 251 (La. 1827).
24. FED. R. CIV. PRO. 13(b).

counterclaim.[25] The Louisiana Code of Civil Procedure recognizes the same need for some restriction and provides: "The Court may order the separate trial of the principal and incidental actions."[26]

When the principal and incidental actions are tried separately, the Code of Civil Procedure allows separate judgments to be rendered.[27] This could give rise to a problem of having separate appeals from the two judgments, which appears undesirable from the standpoint of efficient handling of litigation by the appellate court. However, the Code of Civil Procedure meets this problem by providing that the court may withhold the signing of the judgment on the action first tried until the second is completed.[28]

Reconvention and Compensation

One of the most important changes that the Louisiana Code of Civil Procedure will make in the law of incidental demands is to broaden the reconventional demand to incorporate the demand in compensation.[29] Compensation, a separate incidental action under the Code of Practice,[30] is a mode of extinguishing a debt which takes place when both plaintiff and defendant are indebted to each other in such a manner that one debt offsets the other in whole or in part.[31] However, the reconventional demand and the demand in compensation are so similar that the redactors of the new Code thought it unnecessary to have two separate actions, especially in view of the removal of the connexity and diversity requirements from the use of the reconventional demand.[32] In fact, in at least one situation there appears to have been a definite overlap between the two. Thus, in the case where the debt which the defendant pleads in compensation exceeds the amount which plaintiff claims, and the defendant desires the bal-

25. *Id.* 13(i), 42(b).
26. LA. CODE OF CIVIL PROCEDURE art. 1038 (1960).
27. *Ibid.*
28. *Id.* art. 2083.
29. *Id.* art. 1062.
30. LA. CODE OF PRACTICE art. 363 (1870).
31. *Id.* art. 366.
32. LA. CODE OF CIVIL PROCEDURE art. 1062, Reporter's Comments (1960). If the demand in compensation were incorporated into the reconventional demand before the requirements of diversity and connexity were removed from the reconventional demand, instances might have arisen when compensation could not be pleaded because of the requirement not being met. Removal of these requirements will remove the danger of limiting the demand in compensation.

ance, either the demand in compensation or the reconventional demand would have been proper.[33]

The Civil Code provides that compensation takes place between two debts "which are equally liquidated and demandable."[34] When originally faced with the problem of "equally liquidated" it was recognized that there were two policy factors to consider.[35] On one hand, if parties are mutual creditors, it seems that neither should be permitted to demand or enforce payment from the other. Yet, if one debt was established beyond controversy so that it could be judicially enforced immediately, and the other was not judicially ascertained, it would seem unfair to suspend the execution of one until an examination was completed of the other. Weighing these two factors the court reached the conclusion that a debt should be considered "equally liquidated" if it is susceptible of being speedily and satisfactorily proved.[36] Later cases, however, referred to a common law definition of "equally liquidated" and indicated that a claim is liquidated where the amount is fixed by law or has been ascertained by the parties.[37] This required a greater degree of certainty as to the debt than did the former interpretation and therefore was more restrictive on the use of the demand in compensation.

By procedural changes in the new Code it is possible that this restrictive substantive requirement may be avoided. Since the broadened reconventional demand allows the defendant to assert any action he may have against plaintiff regardless of diversity or connexity,[38] apparently a debt owed defendant by plaintiff could be asserted by way of reconvention, whether or not that debt be equally liquidated. It should be noted, however, that since a defendant in reconvention will be allowed to except to the demand,[39] a debt which is not *demandable* can probably be stricken by an objection of prematurity.

Joinder of Third Parties

Aside from the diversity or connexity requirement, another restriction on the use of the reconventional demand under the

33. LA. CODE OF PRACTICE art. 371 (1870). See Moore v. Hamilton, 16 La. App. 630, 133 So. 790 (1931).
34. LA. CIVIL CODE art. 2209 (1870).
35. Caldwell v. Davis, 2 Mart.(N.S.) 135 (La. 1824).
36. *Ibid.*
37. E.g., Moore v. Hamilton, 16 La. App. 630, 133 So. 790 (1931).
38. LA. CODE OF CIVIL PROCEDURE art. 1061 (1960).
39. *Id.* art. 1034.

law prior to the adoption of the Code of Civil Procedure was the inability of the plaintiff in reconvention to bring necessary third parties into the action.[40] This limitation resulted from a literal interpretation by the courts of the article in the Code of Practice defining reconvention as a demand which "defendant institutes in consequence of that which the plaintiff has brought against him."[41] Under this limitation, when the third person was an indispensable party, the reconventional demand would fall. The Louisiana Code of Civil Procedure expressly eliminates this limitation, so that third parties may be joined in a cause asserted by way of reconvention when their presence is necessary for complete relief.[42] The source of this provision is similarly found in the Federal Rules, where it is provided that persons not parties to the principal action can be made defendants when relief cannot be granted without their presence.[43] This rule seems to prevent an undesirable multiplicity of actions due to a technicality, and should greatly enhance the use of the reconventional demand.

The Action Matured or Acquired After Pleading

While there appears to be no case in point, it seems that under the prior law, a defendant could not assert by way of reconvention any action which was acquired or matured after defendant had filed his answer.[44] The new Code, however, allows an action which is acquired or matures after the defendant files his answer to be asserted by supplemental pleading with permission of the court.[45]

It should be noted that the new Code provides that an incidental demand, filed after the answer to the principal demand, can only be done with leave of court and such leave can be granted only if the incidental action will not retard the progress of the principal action.[46] It seems, however, that this requirement of non-retardation will not have to be met where the incidental

40. Lyons v. Fry, 112 La. 759, 36 So. 674 (1904).
41. *Ibid.*; LA. CODE OF PRACTICE art. 374 (1870).
42. LA. CODE OF CIVIL PROCEDURE art. 1064 (1960).
43. FED. R. CIV. PRO. 13(h) provides: "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counter-claim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action."
44. LA. CODE OF CIVIL PROCEDURE art. 1066, Reporter's Comments (1960).
45. *Ibid.*
46. *Id.* art. 1033.

action filed after the answer to the principal demand is one which was acquired or matured after answer.[47]

Effect of Dismissal of the Principal Action

Under the Code of Practice of 1870 a plaintiff could discontinue his suit at any stage prior to the rendition of judgment.[48] This provision caused considerable difficulty in situations where a plaintiff decided to discontinue the litigation after the defendant filed a reconventional demand. The basis for this difficulty was the fact that since reconvention is an incidental demand, it is, by definition, incidental to a principal action, and would ordinarily be thought to depend on the principal action for its existence.[49] However, since such a ruling would detract from the policy behind the reconventional demand, which is the expedient handling of as many causes of action as possible in one suit, the jurisprudence has developed the rule that a voluntary discontinuance of the principal action does not defeat the reconventional demand.[50] Under the Code of Civil Procedure this jurisprudential rule has been codified, with a view to ending any possible confusion on the point. Thus it is provided that: "If an incidental demand has been pleaded prior to motion by plaintiff in the principal action to dismiss the principal action a subsequent dismissal thereof shall not in any way affect the incidental action."[51]

The purpose of the new Louisiana Code of Civil Procedure is to clarify and simplify the rules of procedure in Louisiana practice. In the area of the reconventional demand this purpose seems to have been accomplished through the important changes that have been made.

Hillary J. Crain

47. *Ibid.* This article seems to except from its application the situation arising under Article 1066, since it provides: "An incidental demand may be filed thereafter, with leave of Court, if it will not retard the progress of the principal action, *or* if permitted by Articles 1066 or 1092" (Emphasis added.)

48. LA. CODE OF PRACTICE art. 491 (1870).

49. *Id.* art. 362.

50. Person v. Person, 172 La. 740, 135 So. 225 (1931); State *ex rel.* John T. Moore Planting Co. v. Howell, 139 La. 336, 71 So. 529 (1916); Alfonso v. Ruiz, 2 So.2d 480 (La. App. 1941).

51. LA. CODE OF CIVIL PROCEDURE art. 1039 (1960).