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Procedure

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of extensive biological experiments. Although the experts who testified were by no means in complete accord, there was ample evidence to justify the court's conclusion that the presence of oil in the quantities found above the oyster beds impaired the ability of the oysters to absorb nourishment from the water and resulted eventually in starvation.

The issue of the wrongfulness of the defendant's conduct was dealt with more sparingly than the other questions of the controversy. The court was satisfied that some of the oil escaped through carelessness on the part of the pumper or gauger, and that leaks developed in the pipes. One might conjecture whether such a case as this really rests upon negligence, or whether the trespassory nature of the invasion, or theories of nuisance, might not be employed if necessary so as to impose an insurer's responsibility.

III. PROCEDURE

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Appeals and Appellate Procedure

In *Mistich v. Holman*[1] plaintiff petitioned for a suspensive appeal and requested permission to file a statement of facts at any time before the return day of the appeal, reserving to the defendant the right to file a statement of facts. The plaintiff could not get the defendant to draft jointly a statement of facts.[2] The plaintiff thereupon asked the trial judge to make a statement according to his recollection of the facts pursuant to Article 603 of the Code of Practice. The trial judge refused, stating that he was without authority to do so after the signing of the order of appeal, and on the further ground that the chief deputy clerk of court was without authority to extend the period of time fixed by law for making a statement of facts. The supreme court, on appeal, held that once an order of appeal has been granted and the appeal bond signed, the appeal is perfected, and the trial court is divested of jurisdiction, except the right to test the sufficiency of the appeal bond as of the date when filed. Also, that

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1. 205 La. 171, 17 So. (2d) 23 (1944).

2. Art. 602, La. Code of Practice of 1870.

in order for the supreme court to consider a statement of facts, it would have to be made in compliance with Article 601 of the Code of Practice, or the two subsequent articles. This the plaintiff had failed to do in the instant case. Appellant's application for additional time to cure the omission in accordance with Act 234 of 1932 was also denied for the reason that said act had only to do with the correction of an incomplete or erroneous transcript and does not enable an appellant to add a statement of fact to the record after the jurisdiction of the trial court was divested by the taking of an appeal.

In *State ex rel. Parish of Plaquemines v. Baynard*,[3] the court reaffirmed recent jurisprudence to the effect that "to take away the right of appeal, there must be an unconditional voluntary and absolute acquiescence in the judgment on the part of the appellant who must have intended to abandon his right."[4] The court declared that a person cannot be said to acquiesce in a judgment so as to preclude an appeal when he merely abides by that part of the judgment which cannot prejudice his rights or which he concedes to be correct. It was further stated that a person may appeal from so much of a judgment as is prejudicial to him without complaining of the whole judgment; and even execution of so much of the judgment as he does not complain of does not constitute acquiescence in so much thereof as he does appeal from.[5]

Angelette v. Hardie[6] stated without discussion, that an appeal may be had without bond where the appellant is prosecuting his action *in forma pauperis*. Though not specified, it appears obvious that the appeal involved was devolutive rather than suspensive.

In the interest of economy, where a record in another suit which had been introduced on trial was present in the archives of the supreme court, a motion to compel plaintiff appellants to supplement their transcript by having the district court clerk send typewritten copies of such record up to supreme court was denied. The court felt that Section 12 of Rule I of the Rules of the Supreme Court, providing that where there is a first and

3. 204 La. 834, 16 So. (2d) 451 (1943).

4. Sanderson v. Frost, 198 La. 295, 305, 3 So. (2d) 626, 629 (1941).

5. Cf. Art. 567, La. Code of Practice of 1870. Augustin v. Farnsworth, 155 La. 1053, 99 So. 868 (1924); Kittredge v. Grau, 158 La. 154, 103 So. 723 (1925), and others. The earlier jurisprudence interpreting Code of Practice Article 567 had held that a person who voluntarily executes, *either partially or in toto*, a judgment rendered for or against him, thereby acquiesces in it and he cannot appeal. The rule to which the court is now committed requires a voluntary acquiescence in the whole of the judgment.

6. 204 La. 972, 16 So. (2d) 537 (1944).

second appeal in the same case, or growing out of the same case, the transcript used for the first appeal may, on leave of the court, be used for the subsequent appeal was broad enough to allow the court to consider those transcripts already on file with it in lieu of typewritten copies thereof.[7]

In *Thompson v. Jones*,[8] after judgment for the defendant, plaintiff moved for a new trial or rehearing on the grounds of newly discovered evidence. The supreme court refused the plaintiff a new trial or rehearing, having ascertained that the plaintiff, by exercise of due diligence, could have obtained alleged newly discovered evidence before first trial.

Jurisdiction

In re Sherill[9] restated the ironclad rule that the supervisory jurisdiction of the supreme court cannot be invoked unless relator has first exhausted his remedies in the lower court. Application for a writ of prohibition directing the judge of the juvenile court not to proceed in trial because of alleged lack of jurisdiction was refused. The supreme court declared that the petitioner should not apply to the supreme court for such writ until his plea to the jurisdiction had been presented to and overruled by the *lower* court.

An appeal to the supreme court will not lie to correct the overruling of a plea to the jurisdiction filed on the trial of a misdemeanor. Article 7, Section 10, of the Louisiana Constitution of 1921 restricts the appellate criminal jurisdiction of the supreme court to those cases involving a possible penalty of death or imprisonment at hard labor.[10]

In *Porter v. O'Neal*,[11] it was held that where the Louisiana Public Service Commission issued a certificate to the plaintiff pursuant to Act 301 of 1938, the plaintiff should seek the protection of his right thus acquired before the commission. The plaintiff should invoke the jurisdiction of the courts only where the commission ignored some fundamental right or invaded some

7. Cockerell v. Moran Corporation of the South, 204 La. 405, 15 So. (2d) 805 (1943). See also Rule I, Section 12 of the Supreme Court Rules.

8. 205 La. 118, 17 So. (2d) 5 (1944).

9. 204 La. 1096, 16 So. (2d) 885 (1944).

10. State v. Lejeune, 205 La. 708, 18 So. (2d) 33 (1944). This was a criminal prosecution for "neglect of family" which doesn't provide punishment by death or imprisonment at hard labor. Defendant's remedy was to invoke the supervisory jurisdiction of the court by application for writs of certiorari, mandamus and prohibition. Cf. State v. Borum, 188 La. 846, 178 So. 371 (1937).

11. 205 La. 445, 17 So. (2d) 622 (1944).

constitutional guarantee of the plaintiff. The plaintiff should first exhaust his remedies before the commission.

Supervisory Writs

By four to three decision, the court, in *Wilson Sporting Goods Company v. Alwes*,[12] dismissed the relator's application for writs of certiorari, mandamus and prohibition, recalling a writ of certiorari and dismissing a rule nisi previously issued. The relator had not delivered or mailed to the trial judge and adverse party's attorney a copy of his petition for said writs[13] as required by Rule XIII, Section 7, of Rules of Supreme Court.

Writs of certiorari and prohibition were denied in *Blaize v. Hayes*[14] also. The supreme court grounded its denial on the correctness of the judgment of the district court. The latter tribunal, in a suit brought by plaintiff, appointee of the governor to fill unexpired term, held that the appointment was valid since less than a year remained of the unexpired term.[15]

In *Edwards v. Hester*,[16] the supreme court declared that, in applying for writs of certiorari, prohibition and mandamus, sufficient notice is given the adverse party, if such notice was actually delivered "in time for him to present his side of the case . . . ." The fact that a certified copy of petition was not served upon adverse party until next morning after petition for writs was filed in supreme court did not violate Section 7 of Rule XIII of the Rules of the Supreme Court.

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12. 204 La. 637, 16 So. (2d) 217 (1943).

13. The relator had, however, complied with Rule XIII, Section 2 of the Rules of the Supreme Court.

Chief Justice O'Niell and Justice Higgins based their dissents primarily upon the ground that though an application for remedial writs may be denied for noncompliance with Rule XIII, Section 7, nevertheless the requirement of the rule should be considered as waived if the court, either inadvertently or designedly, issues a writ of certiorari and rule nisi, as was done here. They point out that it is a very different thing to deny *ab initio* an application for writs, which would allow counsel to reapply and to recall and rescind a writ of certiorari and rule nisi which might have the effect of *res judicata* in that the party would be shut off from further relief. Section 2 of Rule XIII, while making it mandatory for the applicant to give the required notice of intention to apply for writs, expressly provides that failure to do so is not a ground for dismissing the application or rescinding the writs issued. Failure of the court to include this proviso in Section 7 of Rule XIII caused the majority of the court to consider the requirements of that rule as sacramental.

14. 204 La. 263, 15 So. (2d) 217 (1943).

15. See La. Const. of 1921, Art VII, § 69.

16. 205 La. 549, 17 So. (2d) 820 (1944). Cf. Wilson Sporting Goods Co. v. Alwes, 204 La. 445, 16 So. (2d) 217 (1943).

Extraordinary Writs

A writ of mandamus seeking reinstatement as state troopers was denied where the supreme court decided that application made eighteen months after dismissal constituted laches on part of relators. Relators' plea that they were awaiting determination of constitutionality of relevant acts of legislature in another suit was held not excusable delay.[17]

On certiorari and review the supreme court upheld the reinstatement of a teacher in the same school from which she had been discharged. The ruling was based upon the acquiescence by the school board in such decision. The supreme court expressly declared that it was not setting a precedent "that a teacher *must* be reinstated in the same school from which he or she was dismissed."[18]

The supreme court, in *State ex rel. Jagneaux v. Jagneaux*,[19] reiterated the doctrine that a writ of habeas corpus is proper remedy for obtaining the custody of a minor child by the person legally entitled thereto.

Capacity

A foreign corporation's compliance or non-compliance with Act 8 of the 3rd Extra Session of 1935 relates to its right and capacity to prosecute and stand in judgment in a suit. That question has nothing whatever to do with the corporation's cause of action as such. It involves an affirmative defense which must be raised by special plea and disposed of by the introduction of evidence.[20]

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17. State ex rel. Boudreaux v. Alford, 205 La. 46, 55, 16 So. (2d) 901, 903 (1944). The court declared ". . . awaiting a final decision in a similar case does not constitute a sound excuse for the delay of the relators in asserting their rights."

18. State ex rel. Hamberlain v. Tangipahoa Parish School Board, 205 La. 34, 16 So. (2d) 897 (1944). See also State ex rel. Bass v. Vernon Parish School Board, 194 So. 74 (La. App. 1940), and State ex rel. Broyles v. Tangipahoa Parish School Board, 6 So. (2d) 696 (La. App. 1942). See also State ex rel. Nobles v. Bienville Parish School Board, 198 La. 688, 4 So. (2d) 649 (1941).

19. 206 La. 107, 18 So.(2d) 913 (1944). See also State v. Aucoin, 174 La. 7, 139 So. 645 (1932), regarding use of habeas corpus as ancillary to suits for separation from bed and board to secure the custody of a child.

20. Hess Warming and Ventilating Co., Inc. v. Home Comforts Corporation, 205 La. 1045, 18 So. (2d) 611 (1944). It is submitted that the proper plea to invoke is an exception to procedural capacity (or exception of want of capacity, as it is generally termed). See R. J. Brown Co. v. Grosjean, 189 La. 778, 180 So. 634 (1938). If this be true, the issue must be presented *in limine litis* inasmuch as that exception is a dilatory one. However, the court of appeal in Norm Advertising, Inc. v. Parker, 172 So. 586 (La. App. 1937) allowed the question to be raised by an exception to the jurisdiction.

The issue whether a foreign corporation has sufficiently complied with Act 8 of the 3rd Extra Session of 1935, which denies such corporation recourse to the courts of this state unless and until it has qualified by law to do business herein and unless and until it has paid all taxes and licenses due the state, cannot be raised by an exception of no cause of action. The function of this exception is not to traverse the allegations of the petition, but is to test their legal sufficiency. This issue involves an affirmative defense which must be raised by a special plea and disposed of by the introduction of evidence.

Contempt

It was held[21] that the use of insulting language in a petition for certiorari served on judges of the court of appeal and filed in the supreme court, in session, constituted contempt of court. The supreme court, conceding that judges of the court of appeal and counsel for petitioners were not *physically* present, still maintained there was a sufficient contempt of court.[22]

Costs

In *Senseley v. First National Life Insurance Company*,[23] the defendant had asked for dismissal of the plaintiff's suit under Article 3519 of the Revised Civil Code of 1870. The clerk of the district court refused to accept and file the motion. He took the position that the defendant would first have to pay $21.08, costs due by plaintiff, in pursuance of Act 186 of 1940. The supreme court decided that the defendant was entitled to a dismissal of the suit, declaring that Act 186 of 1940 was not applicable. The latter act contemplates a voluntary withdrawal of a suit, whereas Article 3519 of the Revised Civil Code contemplates a forced withdrawal by operation of law.

Section 3 of Act 95 of the Extra Session of 1921, making the Louisiana Highway Commission[24] a body corporate and "as such liable to sue and be sued," did not make that body liable to pay interest and costs other than those incurred for the taking of testimony. Nor did Act 4 of 1942.[25]

21. Lanoix v. Home Indemnity Co. of New York, 204 La. 1044, 16 So. (2d) 834 (1943).

22. See La. Rev. Stats. of 1870, § 125; La. Const. of 1921, Art. XIX § 17; Rules of Supreme Court, Rule X, § 4.

23. 205 La. 61, 16 So. (2d) 906 (1944).

24. Predecessor of the Department of Highways.

25. Makofsky v. Department of Highways, 205 La. 1029, 18 So. (2d) 605 (1944). See also Boxwell v. Department of Highways, 203 La. 760, 14 So. (2d) 627 (1943).

Motion for New Trial

Where a judgment was rendered on December 2, 1930, and the defendant filed a motion for a new trial on December 5, 1930, it was held that the court's action, ex proprio motu, granting a new trial, on May 13, 1938, came too late.[26]

Third Party Opposition

In *Atkins v. Smith*,[27] the supreme court held that a third opposition in no way depends upon the outcome of the original suit between the original plaintiff and defendant. The court pointed out that the settled jurisprudence of this state and the Code of Practice[28] clearly establish that the third opponent does not have to inquire into or depend upon the validity of the proceedings between the plaintiff and the defendant in the original suit. It was consequently held that the disposal of the main demand did not justify the court of appeal in dismissing the third opposition as a nonsuit, but, on the contrary, the appellate court should have passed upon the issues so raised.

Exceptions

In *Gerald v. Standard Oil Company of Louisiana*,[29] the supreme court followed the general rule that contributory negligence must be specially pleaded. The court recognized the exception to this general rule, to wit, "where the plaintiff alleges facts affirmatively showing that he was guilty of contributory negligence, the defendant may raise the issue by exceptions of no right or cause of action." However, the allegations of fact of the plaintiff's petition did not affirmatively show that the plaintiffs were contributorily negligent. The court therefore decided that the defendant's exceptions of no right or cause of action should be overruled.

Enforcement of Judgments

In *Isaac v. Comision Reguladora Del Mercado de Henequen*,[30] the court reaffirmed the Louisiana jurisprudence to the effect that a garnishee should be protected against double payment of a

26. Mitchell v. Louisiana Industrial Life Ins. Co., 204 La. 855, 16 So.(2d) 458 (1943). On May 9, 1938, the court had overruled the motion for a new trial, but subsequently the judge ex officio set aside this previous ruling and granted the new trial.

27. 204 La. 458, 15 So. (2d) 855 (1943).

28. Art. 398, La. Code of Practice of 1870.

29. 204 La. 690, 16 So. (2d) 233 (1943).

30. 204 La. 1, 14 So. (2d) 865 (1943).

single debt, and granted full faith and credit to the garnishment judgment of another state. *Cusachs v. Cusachs*[31] reiterated the doctrine that property of any kind held in pledge by a creditor may be seized at the instance of another creditor of the pledgor; and sold subject to the claim of the pledge.

Rules of the Supreme Court

Section 5 of Rule XII of the Rules of the Supreme Court was flatly applied in *Blaize v. Hayes*,[32] where the court declared that an application for rehearing will not be considered where the court has refused to grant a writ of certiorari or a supervisory writ or a rule nisi.

The supreme court refused to "render a decision on a moot question" in *State ex rel. Jones v. Slater*.[33] The suit was brought for the purpose of excluding the defendant as sheriff for an unexpired term. By the time the action came before the supreme court on certiorari, the defendant had been nominated to fill the office, and decree by the court could not affect. The court, finding that a consent judgment was also a compromise judgment, refused to annul said judgment for alleged error of law, in *Couret v. Couret*.[34]

In reassigning a case for further argument, the court held that it might do so within its discretion. However, it was stated that Section 1912 of the Revised Statutes (granting a plaintiff the privilege of reargument *as of right*) had become inoperative and ineffective.[35]

Five hundred dollars was held not an excessive fee for a curator ad hoc, in *Cockrell v. Moran Corporation of the South*.[36] The court stated that the responsibility incurred, the amount involved, the extent and character of the labor performed, the legal experience and knowledge of the attorney involved, and the ability of the debtor to pay, must all be considered in the final determination.

In *Watson v. Harvey*,[37] the plaintiff obtained an order from the court, pursuant to Act 326 of 1942, that the defendants appear before court for cross-examination under Act 115 of 1934. The

31. 204 La. 316, 15 So. (2d) 316 (1943).
32. 204 La. 298, 15 So. (2d) 228 (1943).
33. 205 La. 1077, 18 So. (2d) 627 (1944).
34. 206 La. 85, 18 So. (2d) 661 (1944).
35. State v. Aucoin, 204 La. 301, 15 So. (2d) 313 (1943). C. J. O'Niell was of the opinion that Section 1912 of the Revised Statutes was still operative.
36. 205 La. 761, 18 So. (2d) 174 (1944).
37. 205 La. 813, 18 So. (2d) 305 (1944).

defendants opposed the order on the ground that Act 326 of 1942 had application to witnesses but *not* to parties litigant. Defendants further contended that the plaintiff's remedy was relegated to taking defendants' testimony by deposition. The supreme court *held* that the decisions on which the defendants based their contentions[38] were modified by Act 326 of 1942 wherein Section 3941 of Revised Statutes of 1870 was specifically repealed. The court declared that the plaintiff had, therefore, proceeded properly in the instant case.

In *Slater v. Blaize*,[39] court followed established jurisprudence to the effect that person in possession and claiming title to public office may resort to injunctive proceedings pending an orderly determination of title to office. It was further declared that the proper procedure in cases where the person claiming title to a public office is not in actual possession thereof, is by quo warranto proceedings.[40]

In *State ex rel. Riddle v. Jeansonne*,[41] a proceeding for removal of a sheriff was brought under Section 6 of Article IX of the Louisiana Constitution of 1921. The suit was dismissed, the court holding that the sheriff's failure to obey the requirement of Act 286 of 1940 was not sufficient to justify his removal. On application for rehearing the court asserted that since the sheriff had been nominated for another term, the controversy had become moot; consequently, the petition for rehearing was denied.[42]

Disbarment Procedure

In *In re Roy*[43] it was alleged generally that the defendant colluded in forty-five divorce suits; only thirty-six of the suits were described and their records included in the plaintiff's petition. The supreme court decided that a cause of action was stated, but that, as to the nine undescribed suits, the petition was too vague and indefinite to require the defendant to answer. "In disciplinary proceedings against an attorney formal and technical

38. Smalley v. Brown, 156 La. 669, 101 So. 16 (1924); and Interstate Rice Milling Co., Inc. v. Hibernia Bank and Trust Co., 176 La. 308, 145 So. 548 (1933).

39. 204 La. 21, 14 So. (2d) 872 (1943).

40. Art. 867 et seq., La. Code of Practice of 1870; La. Rev. Stat. of 1870, § 2593 et seq., as amended by Act 102 of 1928.

41. 205 La. 818, 18 So. (2d) 306 (1944).

42. "The petition for rehearing is denied on the ground solely that the suit to remove the sheriff has become abated by the expiration of the term of office for which he was serving at the time of the filing of this suit to remove him." 205 La. 818, 828, 18 So. (2d) 306, 309.

43. 204 La. 256, 15 So. (2d) 79 (1943).

pleadings are not essential, it being sufficient if the charges are specific enough to inform him of the misconduct alleged. No greater formality is required in the preliminary proceeding before the investigating committee."[44]

The section of the State Bar Association's articles of incorporation, *authorizing* the supreme court to strike an attorney's name from the rolls and cancel his license to practice law on proof of his conviction of a felony, does not *require* the court to inflict such penalty. So noted the supreme court in *Louisiana State Bar Association v. Steiner*,[45] stating that it might, within its discretion, either suspend or disbar the attorney.[46] The fact that the attorney repaid clients' money and the latter were willing to withdraw charges did not relieve the attorney from liability already incurred. The attorney had taken fees without rendering any professional services therefor.[47]

Where the Secretary of the Bar Association notified defendant attorney thus: "I have been directed by the undersigned Committee to notify you that an investigation will be had by it of the alleged improper obtaining of divorces by you in various cases in the Parish of St. Bernard," the supreme court held this was not sufficient and specific notice. Section 3 of Article XIII, of Articles of Incorporation of Louisiana State Bar Association, requires reasonable notice and sufficient time and opportunity to prepare.[48]

IV. CIVIL CODE AND RELATED SUBJECTS

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MINERAL RIGHTS

Servitude

Baker v. Wilder[1] evidenced yet another unsuccessful struggle to prove interruption of a mineral servitude by acknowledgment in a lease, allegedly joint, under the *Mulhern* case.[2] Again the

44. In re Fallon, 204 La. 955, 16 So. (2d) 532 (1943).
45. 204 La. 1073, 16 So. (2d) 843 (1944).
46. See La. Const. of 1921, Art. VII, § 10.
47. In re Craven, 204 La. 426, 15 So. (2d) 861 (1943).
48. In re Armstrong, 205 La. 67, 16 So. (2d) 908 (1943). See Sections 3, 4, and 5 of Article XIII of Articles of Incorporation of the Louisiana State Bar Association.

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1. 204 La. 759, 16 So. (2d) 346 (1943).
2. Mulhern v. Hayne, 171 La. 1003, 132 So. 659 (1931).