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NOTES

LOUISIANA PRACTICE — THIRD-PARTY PRACTICE — NECESSITY FOR PLAINTIFF TO ASSERT DEMAND AGAINST THIRD-PARTY DEFENDANT TO OBTAIN JUDGMENT AGAINST HIM

Defendant contractor was sued for the replacement cost of a defective roof. Defendant called the material supplier as a third-party defendant, and the supplier in turn called the material manufacturer as a third-party defendant. Plaintiff did not amend his petition so as to seek a judgment against the third-party defendant manufacturer. The district court rendered judgment in favor of the plaintiff against the manufacturer. On appeal, the Orleans Court of Appeal *held*, reversed. In order to be entitled to judgment against a third-party defendant under the Third-Party Practice Act, plaintiff must file an amended petition asking that the third-party defendant be made a direct defendant as to plaintiff. *Ferrantelli v. Sanchez*, 90 So.2d 351 (La. App. 1956).

The Third-Party Practice Act,¹ adopted in 1954, is taken from the pertinent articles of the proposed revision of the Code of Practice now being drafted by the Louisiana State Law Institute.² These provisions of the proposed Code of Practice were in turn closely patterned after the federal third-party practice.³

1. LA. R.S. 13:3381-3386 (1950).

2. LOUISIANA STATE LAW INSTITUTE, EXPOSÉ DES MOTIFS No. 7, 59-68, 79-85 (Rules of Pleading and Practice in Ordinary Process, Title I, Pleading, Book II, Arts. 43-51, 62-67) (April 23, 1953), as amended by the Committee on Semantics, Style and Publications on August 1-2, 1953, and by the Council of the Institute on December 11-12, 1953.

3. FED. R. CIV. P. 14, as amended on December 27, 1946. "[T]he Louisiana State Law Institute recommended that the call in warranty be discarded, and that there be substituted the 'third-party action,' based substantially upon federal third-party practice." McMahon, *Courts and Judicial Procedure*, 15 LOUISIANA LAW REVIEW 38, 47 (1954).

"The most radical change proposed in the entire field of pleading is the discarding of our present call in warranty and the acceptance of the third-party practice of the Federal Rules in lieu thereof." LOUISIANA STATE LAW INSTITUTE, EXPOSÉ DES MOTIFS No. 7, p. 80 (Rules of Pleading and Practice in Ordinary Process, Title I, pleading, Book II, Art. 62, comments) (April 23, 1953), as amended by the Committee on Semantics, Style and Publications on August 1-2, 1953, and by the Council of the Institute on December 11-12, 1953.

However, as pointed out by Professor Henry G. McMahon, *supra* at 47, there are at least three major differences between the two acts. First, whereas under federal practice the plaintiff may only bring in "a person not a party to the action," the Louisiana statute provides that the third-party defendant may be "any person, including a co-defendant." (Compare FED. R. CIV. P. 14(a) with LA. R.S.

Prior to the adoption of the Third-Party Practice Act, the Louisiana counterpart to the third-party practice provisions of Anglo-American jurisdictions was the call in warranty.⁴ Serious inadequacies of the call in warranty evinced a need for remedial legislation.⁵ Under the call in warranty it was not possible for the plaintiff in the principal action to obtain a direct judgment against the warrantor of the defendant.⁶ The newly adopted Third-Party Practice Act allows the plaintiff in the principal action to "assert any demand against the third-party defendant arising out of the transaction or occurrence that is the subject of the principal demand."⁷

The instant case is the first Louisiana decision holding that plaintiff can obtain a judgment against the third-party defendant only by asserting his demand against the third-party defendant by amended petition. Noting the absence of a Louisiana decision on the question,⁸ and the similarity between the Louisiana and the federal legislation,⁹ the court supported its interpretation of the Third-Party Practice Act with a federal court decision.¹⁰

13:3381 (1950)). Second, federal practice requires the defendant to move for leave to bring in the third-party defendant, and permission is within the discretion of the trial judge. FED. R. CIV. P. 14(a). The Louisiana statute granted to the defendant a right to bring in a third party. LA. R.S. 13:3381 (1950). Third, in federal practice only the summons and a copy of the third-party complaint must be served upon the third-party defendant. FED. R. CIV. P. 14(a). The Louisiana statute requires the service of a citation and a certified copy of all the basic pleadings upon the third-party defendant. LA. R.S. 13:3384 (1950).

4. LA. CODE OF PRACTICE arts. 380-388 (1870).

5. For a general discussion of the inadequacies of the former call in warranty, see McMahon, *Courts and Judicial Procedure*, 15 LOUISIANA LAW REVIEW 38, 46 (1954).

6. LA. CODE OF PRACTICE arts. 380-388 (1870).

7. LA. R.S. 13:3381 (1950).

8. This is the first case presenting this question of interpretation of the Third-Party Practice Act. Since the adoption of the statute in 1954, the appellate courts have had only two other occasions to construe its provisions. See *Automotive Finance Co. v. Daigle*, 80 So.2d 579 (La. App. 1955); *Motors Securities Co. v. Hines*, 85 So.2d 321 (La. App. 1956).

9. The provisions of the two statutes relevant to the question raised in the instant case are almost identical.

FED. R. CIV. P. 14(a): "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

LA. R.S. 13:3381 (1950): "In such cases the plaintiff in the principal action may assert any demand against the third-party defendant arising out of the transaction or occurrence that is the subject of the principal demand."

10. *United States v. Lushbough*, 200 F.2d 717 (8th Cir. 1952). In that case the court held that the plaintiff must assert his demand against the third-party defendant in order to obtain a judgment against him.

There seems to be no doubt that federal practice requires such an assertion in order to be entitled to a judgment against the third-party defendant. See 3 MOORE, FEDERAL PRACTICE, c. 14, § 14.01, p. 405 (History of Rule; Committee Notes, (3) Committee Notes of 1946 to Rule 14 (2d ed. 1948).

The holding in the instant case seems to be sound. The statutory language that plaintiff "may assert" his demand against the third-party defendant neither indicates that it is mandatory that the assertion be made, nor that a judgment is to be rendered between the third-party defendant and the plaintiff in the absence of such an assertion. The rule requiring the plaintiff in the principal action to assert a demand against the third-party defendant in order to recover a judgment directly against him was probably intended by the Louisiana State Law Institute in the interest of orderly procedure. Orderly procedure requires that a judgment adjudicate only the legal issues raised by the pleadings. A contrary practice might preclude a third-party defendant from asserting a valid defense such as set-off or compensation which would be available against the plaintiff in the principal action, but which would not be available against the third-party plaintiff.

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MINERAL RIGHTS — HORIZONTAL DIVISION OF A SERVITUDE

Plaintiff landowner sued to cancel a one-fourth mineral servitude, specially pleading prescription of ten years for non-usage. The servitude had been created on an eighty-acre tract of land by a sale of minerals to defendant in 1939. No exploration occurred on the premises during the ten-year prescriptive period following the sale, but in 1947 the tract was included in a drilling unit established by the Commissioner of Conservation which was restricted to the Kilpatrick Zone. A producing well was located in the unit but not on the tract. The landowner contended that since there had been no drilling on the tract during the prescriptive period the entire servitude was lost because of non-user, or, alternatively, that the conservation order created a horizontal division or restriction of the servitude and therefore any interruption of prescription should be limited to the Kilpatrick Zone. The district court rejected these contentions, ruling that the prescription of the servitude on the entire tract had been interrupted. On appeal to the Supreme Court, *held*, affirmed. Production from a well in a compulsory drilling unit is a user of the mineral servitudes on all tracts of which the unit is comprised, and therefore interrupts the prescription of every mineral servitude within the unit. As to the alternative claim, since the user of