Louisiana Law Review

Volume 17 | Number 4
June 1957

Louisiana Practice - Exceptions of Want of Capacity and No Right of Action Distinguished

Richard F. Knight

of the clause. Recall that under a strict interpretation of 8(d)(4), the term "expiration date" means only the date when all rights and duties under the contract cease. If subjected to such an interpretation a union with a three-year contract containing a provision for annual reopenings would be unable to strike to enforce demands made during the reopenings. With the union's hands tied by statute the company could reject any demands made without fear of union reprisal. In this situation equality of bargaining power, a prime requisite for effective collective bargaining,[8] is destroyed, although one of the purposes of the Taft-Hartley Act is to provide for such equality.[9] Moreover, if unions shunned long-term agreements, little progress could be made toward the stabilization of industry sought by the Congress that enacted the Taft-Hartley Act.[10]

F. R. Godwin

LOUISIANA PRACTICE — EXCEPTIONS OF WANT OF CAPACITY AND NO RIGHT OF ACTION DISTINGUISHED

Plaintiff, a married woman suing in her own name, appealed from an adverse decision in a petitory action. The court of appeal reversed the decision of the trial court and decreed plaintiff to be owner of the property in question. On application for rehearing, in the court of appeal,[1] defendant filed an exception of "no right and no cause of action" on the ground that the property was presumably community property and the plaintiff had no standing to sue. The exception was overruled by the court, since it felt the exception was more appropriately an exception of want of capacity, which being dilatory, had to be filed in limine litis.[2] In response to the contention that the exception questioned plaintiff's right of action, the court was of the opinion that the record clearly established the property in question as part of the wife's separate and paraphernal estate. The Supreme Court granted writs of review, and affirmed the judgment of the court of appeal. On rehearing, the Supreme Court *held* that an exception which questions the right or interest of a married woman to file

8. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 449 (1949): "Another requirement for successful bargaining is that both sides should be of relatively equal strength. There can be no actual bargaining when the employers' group dominates the union, and vice versa."

9. 61 STAT. 136 (1947), 29 U.S.C. § 151 (1947).

10. *Ibid.*

1. Stevens v. Johnson, 81 So.2d 464 (La. App. 1955).

2. *Id.* at 469.

a petitory action and stand in judgment in cases involving property acquired during marriage is the peremptory exception of no right of action and not the dilatory exception of want of capacity. The case was remanded to the district court solely for the purpose of trial and decision on the exception of no right of action, with an order to the judge to dismiss the suit if the exception was well founded. *Stevens v. Johnson,* 230 La. 101, 87 So.2d 743 (1956).

Louisiana courts have been troubled for years in distinguishing the exceptions of want of interest, no right of action, and want of capacity. Although the exceptions of want of interest and no right of action developed separately[3] and evolved as a part of Louisiana procedure at different periods,[4] they have come to be regarded as no more than dual names for the same exception.[5] This peremptory exception, now generally referred to as an exception of no right of action, presently serves to raise

3. Commercial National Bank v. Sanders, 132 La. 174, 177, 61 So. 155, 156 (1913); Ramos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898 (1906); Derouen v. Hebert, 46 La. Ann. 1388, 1391 (1894); Prevost v. Martel, 10 Rob. 512, 515 (La. 1845); State v. Desforges, 5 Rob. 253, 258 (La. 1843). For a detailed discussion of the history of these two exceptions, see McMahon, *Parties Litigant in Louisiana,* 11 TUL. L. REV. 527-33 (1937).

4. The exception of want of interest had its inception in our system of procedure quite early and is of continental civilian origin. It was a peremptory exception relating to law challenging the plaintiff's interest in litigation. Brown & Sons v. Saul, 4 Mart.(N.S.) 434, 16 Am. Dec. 175 (1826). *Cf.* LA. CODE OF PRACTICE arts. 345, 346 (1870); MCMAHON, LOUISIANA PRACTICE 453-60 (1939). In the *Brown* case, the court, during trial, noticed on its own motion the want of interest of certain intervenors, although no exception had been filed. The exception of no right of action made its appearance later, evolving as a concomitant of the exception of no cause of action. McMahon, *Parties Litigant in Louisiana,* 11 TUL. L. REV. 527-33 (1937).

5. Wischer v. Madison Realty Co., 92 So.2d 589, 591 (La. 1956); Roy O. Martin Lumber Co. v. St. Denis Securities Co., 225 La. 51, 72 So.2d 257 (1954); Ritsch Alluvial Land Co. v. Adema, 211 La. 675, 30 So.2d 753 (1947); Outdoor Electric Advertising v. Saurage, 207 La. 344, 21 So.2d 375 (1945); Leteff v. Maryland Casualty Co., 82 So.2d 80, 82 (La. App. 1955). While there is some tendency on the part of the bench and bar to treat the exceptions of no right of action and no cause of action as if they were synonymous, such is not the case. If it appears that a plaintiff has an actual interest in the outcome of the case, then he has a right of action. No cause of action, on the other hand, presents the issue of whether or not sufficient grounds for obtaining the desired relief are alleged in the petition. Terminal v. McCormick, 208 La. 221, 23 So.2d 52, 55 (1945); Brooks v. Smith, 35 So.2d 613 (La. App. 1948). Some of the language in the *Roy O. Martin Lumber Co.* case was questioned by Professor McMahon in *The Work of the Louisiana Supreme Court for the 1953-1954 Term—Civil Procedure,* 15 LOUISIANA LAW REVIEW 376, 381 (1955). Professor McMahon pointed out that the court, in describing the function of the exception of no right of action, spoke in terms of *capacity to sue,* which usage might serve to confuse the function of the exception of no right of action with that of the exception to procedural capacity. Since that writing, the language of the *Martin* case has been repeated in some subsequent cases. Liquefied Petroleum Gas Comm. v. E. R. Kiper Gas Corp., 229 La. 640, 646, 86 So.2d 518, 520, n. 2 (1956); Wischer v. Madison Realty Co., 92 So.2d 589, 590 (La. 1956).

the question of whether the plaintiff has any interest in judicially enforcing the right asserted.[6] The exception of want of procedural capacity, however, questions the authority of a plaintiff who appears in a representative capacity, or in the case where the plaintiff appears individually, raises the issue of whether he has the legal capacity to institute and prosecute his suit, and to stand in judgment therein.[7] The exception is a dilatory one and must be filed in limine.[8] The real difference between the exception of no right of action and that of want of capacity is that the former challenges the plaintiff's ownership of or interest in the claim sued on, while the exception of want of capacity challenges the authority of the plaintiff to institute and prosecute the suit regardless of whether the plaintiff owns or has an interest in the claim sued on.[9] An exception of want of capacity is raised when the plaintiff is alleged to be under some disability, such as minority or interdiction, which prevents him from suing unassisted; or, where suit is brought through a representative who is alleged to have no authority to represent the plaintiff, as in the case of a tutor who has not been properly appointed or confirmed.[10] While there has been some confusion in distinguishing between the exception of no right of action and the exception of want of capacity, the line of distinction now seems reasonably clear.

In the instant case, the ruling of the court on the exception is in consonance with the prior jurisprudence on the subject. Under this well-established line of authority, it has been held that the exception of no right of action, and not the exception of want of capacity, is the proper vehicle for challenging an action brought by a married woman, in her own name, involving property which could be found to be community property.[11] How-

6. Termini v. McCormick, 208 La. 221, 23 So.2d 52 (1945); Tichenor v. Dr. G. H. Tichenor Antiseptic Co., 180 La. 119, 156 So. 194 (1934); Succession of Breaux, 168 La. 712, 123 So. 300 (1929).

7. Riche v. Ascension Parish School Board, 200 So. 681 (La. App. 1941); McMahon, *Parties Litigant in Louisiana*, 11 TUL. L. REV. 527, 548 (1937).

8. LA. CODE OF PRACTICE art. 333 (1870), as amended, La. Acts 1936, No. 124, p. 386; Cartwright v. Puissigur, 125 La. 700, 51 So. 692 (1910); Wiseman v. Begnaud, 35 So.2d 836 (La. App. 1948); Central Surety & Ins. Corp. v. Canullette Shipbuilding Co., 195 So. 114 (La. App. 1940).

9. Riche v. Ascension Parish School Board, 200 So. 681 (La. App. 1941).

10. McVay v. New Orleans Public Service, 148 So. 67 (La. App. 1933); Campbell v. New Orleans City R.R., 104 La. 183, 186, 28 So. 985, 986 (1900); Reynolds v. Reynolds, 12 La. 617, 618 (1838); Harper v. Destrehan, 2 Mart. (N.S.) 389 (La. 1824); Riche v. Ascension Parish School Board, 200 So. 681 (La. App. 1941).

11. Succession of Howell, 177 La. 276, 148 So. 48 (1933); Casente v. Lloyd, 68 So.2d 329 (La. App. 1953); Hand v. Coker, 11 So.2d 272, 274 (La. App. 1942).

ever, the court of appeal, on rehearing, was of the opinion that the exception of no right of action and no cause of action filed by the defendant was "more properly an exception of want of capacity to sue."[12] The Supreme Court, in overturning the court of appeal's ruling on the exception, properly regarded the exception as one of no right of action.[13] The real question was not the plaintiff's capacity to sue but was, in fact, whether she had a justiciable interest in the property in question. Plaintiff was suing to have property acquired during marriage declared her separate property. There was no allegation that she was suing for the community, or as agent for her husband as head and master of the community, nor was there any issue as to her individual capacity to sue. Therefore, the exception was directed toward the question of whether she had an interest in having this property adjudicated to herself. This situation is not to be confused with the case where a wife purports, as agent for the community, to sue on a community cause of action. In such a case, the proper exception might well be one of want of capacity.[14] Pretermitting that question, however, the proper exception for challenging plaintiff's interest in the property and determining whether it was in fact separate or community property appears to be that of no right of action. If plaintiff, on trial of the exception, can adduce sufficient evidence to establish the property as part of her paraphernal effects, then the exception should be overruled; if not, it should be sustained.

Richard F. Knight

LOUISIANA PRACTICE — RES JUDICATA — MATTERS WHICH MIGHT HAVE BEEN PLEADED

Plaintiffs sued to have a probated olographic will declared a nullity. The controversy had been before the court on two prior occasions. In the first suit the will was attacked on the ground that the imposition of one numeral over another made the date uncertain, but it was held that the date was adequate. A second

12. Stevens v. Johnson, 81 So.2d 469 (La. App. 1955). While the opinion of the court of appeal is not entirely clear, the court seemed to indicate that, even accepting defendant's contention that the exception was one of no right of action, it was not well founded because the record furnished evidence to rebut the presumption that the property involved was community property.

13. See note 11 *supra*.

14. For a discussion of this point, see MCMAHON, LOUISIANA PRACTICE 30-31 (Supp. 1956).