

# Louisiana Law Review

---

Volume 21 | Number 1

*Law-Medicine and Professional Responsibility: A*

*Symposium*

*Symposium on Civil Procedure*

*December 1960*

---

## The Louisiana Code of Civil Procedure

Henry G. McMahon

---

### Repository Citation

Henry G. McMahon, *The Louisiana Code of Civil Procedure*, 21 La. L. Rev. (1960)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol21/iss1/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# The Louisiana Code of Civil Procedure\*

Henry G. McMahon\*\*

## INTRODUCTION

For the past century and a half Louisiana has been a veritable laboratory of comparative law. Its juridical heritage from France and Spain, and its acquisition by the United States, precipitated an immediate struggle between the Romanistic and English systems of law. Louisiana's admission into the Union required adoption of the constitutional and public law of America. A flourishing trade and commercial intercourse with its sister states made the adoption of Anglo-American commercial law expedient. The failure of the Louisiana Legislature, in 1824, to adopt Edward Livingston's enlightened penal code resulted in a juridical vacuum which the Anglo-American common law of crimes and criminal procedure found relatively easy to fill. But in the extremely important area of private law the Romanistic system emerged triumphant: the civilian customs and institutions of the former colony were retained and perpetuated through the 1808 codification and the Louisiana Civil Code of 1825, the latter modeled upon the Code Napoléon. A lesser victory was scored by the Romanistic system in the field of civil procedure, where Livingston skillfully blended Continental procedural principles with judicial administrative provisions of Anglo-American origin.

Competition between these two great legal systems did not end, however, with this early demarcation of spheres of influ-

---

\*This article is largely a consolidation and revision of portions of prior writings of the author.

Parts I and II thereof are based, to a considerable extent, on *The Background, Structure, and Composition of the Louisiana Code of Civil Procedure*, 7 I.A. B.J. 246 (1960); *The Louisiana Code of Civil Procedure*, a paper prepared for the Mexican Congress of Procedural Law, which is being published by the Mexican Institute of Procedural Law; and *The Proposed Louisiana Code of Practice: A Synthesis of Anglo-American and Continental Civil Procedures*, an article prepared for the International Congress of Civil Procedure in Vienna. A condensation of this latter paper was published under the same title in 14 LOUISIANA LAW REVIEW 36 (1953).

Part III of this article is a revision and expansion of the *Analysis of the Proposed Louisiana Code of Civil Procedure and Companion Legislation*, a paper prepared for the Law Reform Committee of the Louisiana State Bar Association, and distributed by the Committee in multigraphed form to the members of the House of Delegates of the Association.

\*\*Professor and sometime dean, Louisiana State University Law School; Coordinator and Reporter, Louisiana Code of Civil Procedure.

ence. The training of Louisiana lawyers in the national law schools of America, the ultimate loss by the Louisiana practitioner and judge of the ability to read French and Spanish, and the greater availability of American legal literature, all permitted the influence of Anglo-American law to erode the civil law and procedure of the state. These inroads of the English common law, however, were the result of interstitial seepage between the provisions of the positive law of Louisiana, rather than an undermining of its foundations. In due time a reaction was to set in.

The great improvement in legal education in Louisiana, which commenced roughly thirty-five years ago, brought an almost immediate revival of interest in its civil law and procedure. The publication of law reviews by the three law schools of the state provided, for the first time, the scholarly research and doctrinal writings so necessary for the nourishment of any civilian system. A decade or so later, the Louisiana State Law Institute was established as the official research and law reform agency of the state, with generous support from public funds. The Institute, utilizing as it does the combined knowledge and energies of members of the legislature, the judiciary, the bar, and of the law faculties, has given a tremendous impetus to law reform and improvement in Louisiana. Its work in the drafting of the *projet* of the new procedural code was much more than a consolidation and editorial revision of the pre-existing rules of civil procedure. True, those principles, concepts, and devices which have proven effective and workable in actual practice are retained. But the improvements in procedure achieved under the Federal Rules of Civil Procedure, by the more recent procedural codes of the various American states, and by the more advanced codes of civil procedure of Continental countries were studied carefully, with the view of improving Louisiana's procedure through a borrowing of the more effective procedural principles and devices of other states and countries. More than any other American code, the Louisiana Code of Civil Procedure is a product of the comparative method.

Procedure is only the means of enforcing and implementing the substantive law. To perform its proper role, it must be correlated to the substantive law which it is designed to enforce. As the substantive law of Louisiana is partly of Romanistic and partly of English origin, it is not surprising to find that in the past its civil procedure has been a blend of Continental and Anglo-American procedures.

An appraisal of the procedural system which will be ushered in through the adoption of the Louisiana Code of Civil Procedure, and an evaluation of the contributions which are made thereto by both Continental and Anglo-American civil procedures, is one of the objects of the present article. Such an analysis, however, would be impossible without some mention of the various procedural systems in effect in Louisiana in the past.

## I. THE BACKGROUND

### *Procedural Systems Prior to 1825*

Though France claimed the vast Louisiana Territory as early as 1682, by virtue of the explorations of La Salle, no serious effort was made to colonize any part of the vast expanse until 1699, when d'Iberville set up the first settlement on the coast of the Gulf of Mexico. No civil government worthy of the name was established until 1712, when the colony was granted to Crozat. Under the latter's charter, it was provided that the Custom of Paris — that most interesting combination of Germanic custom and Roman law which had been codified in the sixteenth century — should be in effect throughout the territory. The expense of colonization proved too great a drain upon the resources of even the immensely wealthy Crozat, so that in 1717 he was compelled to surrender his charter. Thereupon, a grant of the colony was made to John Law's Company of the West, under a charter which confirmed the applicability of the Custom of Paris to the Louisiana territory. After the bankruptcy of the Company of the West in 1732, the French monarch was forced to take over the Louisiana territory as a crown colony; but until the Spanish took possession of Louisiana under the cession of 1762, the Custom of Paris continued to be the basic private law of the colony, modified slightly from time to time by royal ordinances.<sup>1</sup>

The judicial system of Louisiana may be said to have been founded during the Crozat administration, with the establishment of the Superior Council and the first court of the territory.<sup>2</sup> The procedure employed in civil cases in the Superior Council of the colony was based primarily upon the four titles of the Custom of Paris relating to real actions, actions generally, arrests and

---

1. For interesting accounts of this period of the legal history of Louisiana, see Henry P. Dart, *Courts and Law in Colonial Louisiana*, 22 LA. BAR ASS'N REP. 17 (1921), 4 LA. HIST. Q. 255 (1922); Wigmore, *Louisiana: The Story of Its Legal System*, 1 So. L.Q. 1 (1916).

2. Henry P. Dart, *Courts and Law in Colonial Louisiana*, 22 LA. BAR ASS'N REP. 17, 25 (1921), 4 LA. HIST. Q. 255, 265 (1922).

executions, and the seizure and sale of movables.<sup>3</sup> Otherwise, the procedure applicable was that employed in cases before the Chatelet of Paris. From an examination of Pigeau's work on the subject,<sup>4</sup> it appears that the procedure of the Chatelet was based largely upon the Ordonnance Civile of 1667, Louis XIV's famed procedural code, generally regarded as the foundation of the present French Code of Civil Procedure.

Few lawyers were to be found in the colony at this time, and little litigation occurred during this period of French dominion. This procedural system thus failed to make any lasting impression upon the small population, with the result that French civil procedure played a relatively minor initial role in shaping the adjective law of Louisiana.

Under the secret Treaty of Fontainebleau in 1762, France ceded the entire Louisiana territory to Spain. The latter's initial attempt, under the timid de Ulloa, to take possession of the colony three years later resulted in resistance from the French colonists, which permitted Louisiana to remain under the *de facto* control of the French commander until 1769. In that year, Don Alejandro O'Reilly took possession of the territory with a strong Spanish force, ruthlessly punished the leaders of the resistance, and firmly established Spanish rule over the colony. His first official acts were proclamations issued in the name of His Most Catholic Majesty, abolishing the colonial government, establishing the new Spanish Province of Louisiana, abrogating French law in the colony, and establishing a short code of laws for the people. This code<sup>5</sup> was intended only for temporary use, and only until the colonists could become more familiar with the laws of Spain.

The judicial system created under O'Reilly's Proclamation consisted of regional trial courts throughout the territory under Alcaldes Ordinary, with an appeal in petty cases to the Cabildo, or municipal council of New Orleans, and in the more important cases to the Audiencia in Havana, with the Council of the Indies as the appellate court of last resort.

Annexed to the brief code embodied in O'Reilly's Proclamation was a set of "instructions as to the manner of instituting suits, civil and criminal, and of pronouncing judgments in gen-

---

3. See Titles 4, 5, 8, and 16, *Coutume de Paris*.

4. PIGEAU, *LA PROCÉDURE DU CHÂTELET DE PARIS* (1787).

5. See Ordinances and Instructions of Don Alexander O'Reilly, 1 *LA. L.J.*, No. 2, p. 1 (1841).

eral,"<sup>6</sup> compiled by two of the Spanish lawyers on O'Reilly's staff. The headnote thereon evidences the fact that both O'Reilly's "code" and the instructions annexed thereto were based upon the Recopilación de las Indias, the great digest of the laws and regulations enacted by Spain during the preceding centuries for the people of their colonial empire, and the Recopilación de Castilla. Both of these latter codes contained references to the monumental Código de las Siete Partidas and the Nueva Recopilación de las Leyes de España, as well as the earlier Spanish codifications, the Fuero Real, the Fuero Viejo de Castilla, and even to the ancient Forum Juzgo. From the numerous citations of these Spanish codes by the courts of Louisiana during the initial period of American dominion, it seems reasonable to conclude that the colonial lawyers were completely familiar therewith. The same evidence indicates that the works of Gregario López,<sup>7</sup> of Hevia Bolaños,<sup>8</sup> and of Febrero<sup>9</sup> likewise were available, and were accepted as authoritative in procedural matters during the Spanish regime. Although Spain held the colony for little more than a third of a century, its procedural law played an extremely important role in shaping the subsequent civil procedure of Louisiana.<sup>10</sup>

Under the secret treaty of San Ildefonso in 1800, Spain retroceded the Louisiana territory to France. The latter, however, made no effort to regain possession of the colony until late in 1803. Prior to taking possession, France sold the entire territory to the United States of America, which assumed control thereof on December 20, 1803.

As France exercised sovereignty over the colony in this period for less than a month, no effort was made to abrogate

---

6. 1 LA. L.J., No. 2, p. 27 (1841).

7. LAS SIETE PARTIDAS glosadas por el Lic. Gregario López.

8. Hevia Bolaños, CURIA FILÍPICA.

9. Febrero, LIBRERÍA DE ESCRIBANOS.

10. Henry P. Dart, *Civil Procedure in Louisiana under the Spanish Regime*, 12 LA. HIST. Q. 33 (1929); Henry P. Dart, *The Influence of the Ancient Law of Spain in the Jurisprudence of Louisiana*, 6 TUL. L. REV. 83 (1931), 18 A.B.A.J. 125 (1931); Henry P. Dart, *The Law Library of a Louisiana Lawyer in the 18th Century*, 25 LA. BAR ASS'N REP. 12 (1924); Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280 (1932), 7 TUL. L. REV. 82 (1932), 8 TUL. L. REV. 396 (1934), and 9 TUL. L. REV. 244 (1935).

For detailed accounts of the legal history of Louisiana during the period of Spanish dominion, the reader is referred to Wigmore, *Louisiana: The Story of Its Legal System*, 1 So. L.Q. 1 (1916); Henry P. Dart, *The Colonial Legal Systems of Arkansas, Louisiana and Texas*, 12 A.B.A.J. 481 (1926); Henry P. Dart, *Courts and Law in Colonial Louisiana*, 22 LA. BAR ASS'N REP. 17 (1921), 4 LA. HIST. Q. 255 (1922); Henry P. Dart, *The Place of Civil Law in Louisiana*, 4 TUL. L. REV. 163 (1930).

the Spanish laws then in force. The American government, after taking over the colony, moved slowly in effecting changes in the law of Louisiana. The former French colony was first divided. That portion north of the present northern boundary of the State of Louisiana was organized as the District, then the Territory, of Louisiana, and finally as the Territory of Missouri. The remainder of the former colony, comprising all of the present State of Louisiana except the West Florida Parishes, was organized as the Territory of Orleans. Three acts of Congress of the United States affecting the latter territory were passed during the first two years after the Louisiana Purchase. The first<sup>11</sup> left unchanged all of the laws then in force, simply vesting the administrative power in different officers. The second<sup>12</sup> and third<sup>13</sup> of these congressional acts reorganized the territorial government to conform to the American pattern, provided for the writ of habeas corpus and for trial by jury, but expressly declared that all laws in force in the territory should continue in effect until changed by subsequent legislation.

The Legislative Council of the Territory of Orleans, empowered by Congress to legislate for this new American possession, made more significant changes almost immediately. The Crimes Act of 1805<sup>14</sup> defined a large number of felonies and misdemeanors, repealed all prior criminal legislation, recognized the accused's right to a trial by jury, and provided that all of such trials should be conducted according to the common law of England. The most important of these early territorial statutes, subsequently known as the Practice Act of 1805,<sup>15</sup> recognized the Superior Court of the Territory, previously established in New Orleans by the territorial governor, and provided a simple procedure for the trial of cases therein. A third act<sup>16</sup> divided the territory into counties, created county and justice of the peace courts, and adopted a simplified version of the procedure embodied in the Practice Act of 1805 for the trial of cases in these courts.

The Practice Act of 1805 merits extended consideration here for at least two reasons. For one thing, it was the handiwork of the distinguished Edward Livingston, who, ruined financially by

---

11. Act of October 31, 1803.

12. Act of March 26, 1804.

13. Act of March 2, 1805.

14. Acts of the Legislative Council of the Territory of Orleans of 1805, c. L.

15. *Id.* c. XXVI.

16. *Id.* c. XXV.

the defalcations of a subordinate while holding the office of Mayor of New York, emigrated to Louisiana to regain his fortune, subsequently became an enthusiastic convert to the civil law, and led the fight for codification in Louisiana. For another, important segments of the Louisiana Code of Practice of 1825 were taken bodily from the 1805 legislation.

The most radical changes made in the civil procedure of Louisiana by the Practice Act of 1805 were the establishment of the trial by jury, and the requirement that the testimony of all available witnesses be taken in open court, with depositions permitted only for witnesses who were ill, aged, or beyond the control of the court. Other provisions established a simplified form of pleading, created the provisional remedies of attachment and arrest, provided for the enforcement of judgments under the writs of fieri facias and distringas, and authorized the court to issue writs of quo warranto, procedendo, mandamus, and prohibition. The statute went into great detail in prescribing the form of citations, writs and other mandates to be issued by the court. As Livingston was a staunch disciple of the great English reformer, Jeremy Bentham, the simplified procedure embodied in the Practice Act of 1805 reflected Bentham's influence.

Considerable difference of opinion exists today as to the sources of this legislation. Mr. Benjamin Wall Dart, the distinguished editor of the last edition of the Louisiana Code of Practice, and the son of Louisiana's leading legal historian, has voiced the opinion that the provisions of the Practice Act of 1805 "were in effect restatements of the Spanish procedure with additions made necessary by the new order resulting from France's transfer of Louisiana to the United States."<sup>17</sup> On the other hand, America's most distinguished student of comparative civil procedure, the late Professor Robert Wyness Millar, of the Northwestern University School of Law, was of the opinion that the Practice Act of 1805 was primarily a refinement and simplification of contemporary American chancery practice,<sup>18</sup> a view in which the present writer originally concurred.<sup>19</sup> Further research by the writer over a period of years, however, has convinced him that there is considerably more validity in Mr. Dart's position than the writer had originally thought.

---

17. Benjamin W. Dart, *Introduction*, CODE OF PRACTICE OF THE STATE OF LOUISIANA v (2d ed. 1942).

18. Millar, *The Fortunes of the Demurrer*, 21 ILL. L. REV. 596, 604 (1937).

19. *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 19 (1934).



A determination of the primary sources of the Practice Act is made extremely difficult by the very fact which, paradoxically enough, appears to lend support to the views of both Mr. Dart and Professor Millar: the striking similarity between many aspects of Anglo-American chancery practice and Spanish procedure. This is not surprising, in view of the fact that the equity system of England initially was administered by the ecclesiastics, who applied the procedural principles of canonical procedure in developing chancery practice. Since the adjective law of Spain was also a legitimate descendant of Romano-canonical law, many similarities of the two procedural systems are to be expected.

The present writer has been unable to find any recorded expression of the views of Edward Livingston on the subject. Fairly convincing evidence is available, however, to indicate that the courts and legal profession of Louisiana regarded the Practice Act of 1805 as being based primarily upon Spanish procedure.

The last section of this 1805 statute<sup>20</sup> authorized the Superior Court to issue writs of quo warranto, procedendo, mandamus, and prohibition. The first year after the admission of Louisiana to statehood, the newly created Supreme Court found it necessary to determine whether the common law rules relating to mandamus or the rules relating to its Spanish counterpart, *incitativo*, were applicable in Louisiana. In determining this issue the court observed:

"The common law names in judicial proceedings have naturally been adopted in a practice which is carried on in the English language, but they ought to be considered rather as a translation of the names formerly used, than as emanations from the English jurisprudence; the words *mandamus*, *procedendo*, *certiorari*, *prohibition*, &c., sometimes employed in our practice, may be good equivalents for *incitativo*, *evocación*, *inhibición*, &c.; but their adoption as words can, by no rule of law, or common sense, be considered as having introduced the English practice itself."<sup>21</sup>

This was the language of a court composed, not exclusively of native Louisianians who might be expected to be unsympathetic to any attempt to supersede the Spanish procedural rules with

---

20. Acts of the Legislative Council of the Territory of Orleans of 1805, c. XXV, § 22.

21. *Agnes v. Judice*, 3 Mart. (O.S.) 182, 185-86 (La. 1813).

which they were familiar, but of a court having a majority of its judges trained initially under the common law system.<sup>22</sup>

A later case,<sup>23</sup> although decided three years after the end of the period which we are now considering, in answering a somewhat similar question, confirmed the judicial view quoted above. In this later case, speaking through Justice Porter, the court said:

"The repeal of laws is never presumed; and if the new and old laws can stand together, they should be so construed. It would be going far, to hold that the special enactment of a remedy which previously existed, should introduce the consequences that attended that remedy in another system of jurisprudence. In this respect there is a material difference between this case and that construction which should be given to our laws introducing jury trial, and the writ of habeas corpus; for they being unknown to our jurisprudence, the understanding of them was ex necessitate, to be sought somewhere else. The use of common law terms is easily accounted for, in the desire of the legislature to use those words which would convey in the most clear and concise manner, to persons acquainted with the English language alone, the remedies defined."<sup>24</sup>

Louisiana was admitted as a member state of the North American union in 1812, under a constitution adopted earlier in that year. Neither this constitution nor the statutes implementing its provisions made any substantial changes in the procedural law of Louisiana, other than the creation of a system of courts based on the American pattern, and consisting of a supreme court, district courts, and justice of the peace courts. The Practice Act of 1805 remained in effect until its repeal when the Code of Practice went into effect in 1825.

The civil procedure of Louisiana at the end of this period, therefore, was based primarily upon the Spanish procedure in force during the period of Spanish dominion. Two significant changes had been made therein by the Practice Act: the adoption of the institution of jury trial; and the requirement that the

---

22. The Supreme Court of Louisiana on the date this case was decided was composed of three judges only: Chief Justice Dominick A. Hall, and Associate Justices George Mathews and Pierre Derbigny. Henry P. Dart, *The History of the Supreme Court of Louisiana*, 133 La. xxx, xxxix (1913).

23. *Abat v. Whitman*, 7 Mart.(N.S.) 162 (La. 1828).

24. *Id.* at 163-64.

testimony of all available witnesses be given in open court. The common law rules of evidence followed in the wake of the adoption of the jury trial almost as a necessary consequence.<sup>25</sup> The requirement of *viva voce* testimony in open court resulted in the direct and cross-examination of witnesses as under the English practice. As a result of these changes, the trial of litigation in Louisiana, at least during this period, took on the complexion of the common law trial. But otherwise, except to the extent that it ran counter to the provisions of the Practice Act and other legislation, Spanish influence upon the civil procedure of the state during this period remained paramount.

### *The Code of Practice of 1825*

Pursuant to a legislative resolution of March 14, 1822, L. Moreau Lislet, Edward Livingston, and Pierre Derbigny were appointed as a committee to revise and amend the so-called Civil Code of 1808, to prepare a commercial code,<sup>26</sup> and to submit "a treatise on the rules of civil actions and a system of the practice to be observed before our courts."<sup>27</sup> No more able a group of juriconsults could have been selected for these tasks. Livingston, who had come to Louisiana in 1804, probably was the most distinguished American legal scholar of his day, entirely familiar not only with the common law, but with Roman, French, and Spanish law as well. Derbigny had been an outstanding practitioner before the Spanish courts of the colony, one of the first Justices of the Supreme Court of Louisiana, and subsequently Secretary of State and Governor. Moreau Lislet, a distinguished veteran of the colonial period, had previously served as Attorney General of the state, and with Henry Carleton, had prepared the first English translation of the *Siete Partidas*.

Early in 1823, the three redactors submitted to the Legislature the *projet* of the new procedural code, which was subsequently approved and went into effect in 1825. This Code of Practice, in form and arrangement, was typically civilian, consisting of 1155 articles numbered consecutively, and divided into

---

25. See *Planters' Bank v. George*, 6 Mart. (O.S.) 670, 12 Am. Dec. 487 (La. 1819).

26. The *projet* of a commercial code, prepared by Livingston, was in due course submitted to the legislature but never adopted. The resulting vacuum led to the jurisprudential adoption of Anglo-American commercial law, subsequently adopted as positive law through the enactment of a number of comprehensive statutes on the various subjects thereof.

27. The legislative resolution is reprinted in Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 286-87 (1932).

titles, chapters, and sections. As Colonel Tucker, the distinguished President of the Louisiana State Law Institute, has pointed out, it was "the product of a mixture of French, Spanish, and Roman law elements, together with common law elements of English origin."<sup>28</sup>

The draftsmen of this procedural code, in the comments in their *projet*,<sup>29</sup> not only gave their reasons for the adoption of controversial principles and procedural devices, but listed the sources of the more important articles of the code. An examination of these source notes is extremely interesting. The direct Roman law influence was slight, only eight references having been made to the Digest and three to the Institutes, all in the title dealing with actions. Spanish procedural law, as might be expected, served as the basis of a number of extremely important segments of the new codification, with sixty-three references to the Spanish codes and procedure writers. There must be considered in this connection, however, the forty-five references to the Practice Act of 1805 (the majority of which in turn were botomed upon Spanish procedure), and the sixty-nine references to Louisiana statutes (a number of which were predicated on general concepts of Spanish law). French procedural theory, which had played a rather negligible role in the preceding era, increased its influence upon the adoption of the Code of Practice. Thirty references in the redactors' source notes were to works of French commentators, with the more indirect influence reflected through the twenty-six references to the Civil Code of 1808, which was based largely upon the Code Napoléon.

The Spanish procedural law constituting direct sources of the procedural code was drawn principally from the Siete Partidas, and the procedural works of Febrero and Hevia Bolaños. The writings of Domat and Pothier constituted the direct borrowings from French pre-code procedural theory. Important segments of Louisiana's procedural law, such as succession and injunction procedure, reflected the indirect influence of French procedure.

One of the deficiencies of the redactors' source notes is that very few references to Anglo-American law are listed, although even a cursory examination of this code indicates quite clearly that the Anglo-American contribution, though lesser than the

---

28. Tucker, *Source Books of Louisiana Law*, 7 TUL. L. REV. 82, 85 (1932).

29. The *projets* of the Code of Practice and Civil Code of 1825 have been officially reprinted by the State of Louisiana as Volumes 1 and 2 of the LOUISIANA LEGAL ARCHIVES (1937).

Romanistic one, was considerable. Some idea of the relative weight thereof can be gleaned from the brief analysis of Louisiana's first procedural code which follows.

Procedural concepts and devices which reflect the primary influence of Continental law include the code provisions relating to actions generally; real actions; jurisdiction (*ratione materiae et personae*); demands and incidental demands; cumulation of actions; consolidation of actions; pleading (including the exceptions); the provisional remedies of arrest, sequestration, provisional seizure, and injunction; interrogatories on facts and articles; *contestatio litis*; real tenders; judgments; nullity and rescission of judgments; ordinary, summary, and executory procedures; and succession procedure. The primary influence of Anglo-American law was reflected in the code provisions relating to judicial administration (composition of courts, functions of judicial officers, assignment and continuance of cases, et cetera); the provisional remedy of attachment;<sup>30</sup> production of evidence; trial of cases (including trial by jury); new trial; execution of judgments (particularly the enforcement of money judgments); and the extraordinary remedies. Both systems of procedural law appear to have contributed to the code provisions relating to citation and service of process, depositions, appellate procedure, and proceedings before justice of the peace courts.

We have seen heretofore that, under the Practice Act of 1805, the institution of jury trial had been adopted, and that this led to the jurisprudential adoption of the common law rules of evidence. Under the Anglo-American system, the appellate court reviewed only questions of law, and ordinarily would not reverse the jury verdict on factual issues. Under the Continental system, the appellate court reviewed both legal and factual issues, as presented by the record. A compromise had been effected for the Superior Court of the Territory of Orleans: the court reviewed issues of law on appeal, and if any appellate review of factual questions was desired, the case was completely retried by a new jury selected in the appellate court. Very shortly after Louisiana's admission to the Union, its Supreme Court held that, under the Constitution of 1812, no retrial of a factual issue could be had

---

30. Attachment on mesne process, though not of common law, is of English origin. For an interesting account of its development, its obsolescence in England, and its general use throughout the American states, see MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 481-97 (1952).

before a new jury.<sup>31</sup> This was followed shortly by a decision<sup>32</sup> holding that the appellate court could review the transcript of the evidence presented in the trial court, to determine the correctness of the jury's findings of fact. The principle of appellate review of the facts thus adopted was repeatedly affirmed by the court,<sup>33</sup> and was confirmed in subsequent constitutions of the state, at first impliedly,<sup>34</sup> and then expressly.<sup>35</sup>

The effects of these decisions, which did not make themselves evident for some years, were to prove far-reaching. As the appellate courts were free to substitute their findings on factual issues of the trial jury's verdict, and not infrequently did so, jury trials in civil cases ultimately were had with relative infrequency. As a result, the technique of applying the common law rules of evidence completely changed in the vast majority of civil cases. Instead of being used to determine the *admissibility* of evidence sought to be presented to the lay jury, they were now used by the trial judge, skilled through experience in the marshaling and evaluation of testimony, to *weigh* evidence, usually admitted subject to the objections urged. In the area of the trial, Continental procedure had regained much of the ground previously lost to Anglo-American procedure, and had neutralized much of the latter's earlier victory.

The influence of Anglo-American procedure, however, continued to increase during this period, as a reading knowledge of Spanish and French grew rarer in the profession, and Anglo-American legal literature became increasingly available. Members of the Louisiana Bench and Bar began to turn to English and American precedents in the solution of procedural problems really calling for the application of the principles of Continental civil procedure. Not a great deal of damage was done thereby,

---

31. *Syndics of Brooks v. Weyman*, 3 Mart.(O.S.) 9 (La. 1813).

32. *Abat v. Doliolle*, 4 Mart.(O.S.) 316 (La. 1816).

33. In *Martineau v. Hooper*, 8 Mart.(O.S.) 699 (La. 1820); *Mitchel v. Jewel*, 10 Mart.(O.S.) 645 (La. 1822); *Morris v. Hatch*, 2 Mart.(N.S.) 491 (La. 1824). See also *Scott v. Turnbull*, 10 Mart.(O.S.) 335 (La. 1821); *Dunn & Wife v. Duncan's Heirs*, 10 Mart.(O.S.) 671 (La. 1822); *La Pointe v. Guidry*, 7 La. 246 (1834); *Montgomery v. Russell*, 10 La. 330 (1836); *Williams v. Lanier*, 14 La. 210 (1839); *Hood v. McCorkle*, 16 La. 240 (1840); *Nott & Co. v. Kirkman*, 19 La. 14 (1841).

The subject is discussed in an interesting manner in Brumfield, *Louisiana Practice — Trial De Novo on Appeal*, PROCEED. OF N.A.C.C.A. 560 (1951).

34. LA. CONST. art. 63 (1845); LA. CONST. art. 62 (1852); LA. CONST. art. 70 (1864); LA. CONST. art. 74 (1868).

35. LA. CONST. art. 81 (1879); LA. CONST. art. 85 (1898); LA. CONST. arts. 85, 95 (1913); LA. CONST. art. VII, §§ 10, 29 (1921).

but this interstitial seepage subsequently was to pave the way for an increased reception of Anglo-American procedural law.

### *The Code of Practice of 1870*

The purpose of the revision of Louisiana's two codes following the Civil War were the elimination of all references therein to the institution of slavery, and the incorporation therein of all related special procedural legislation adopted since 1825. The Code of Practice of 1870 went no further than this, and did little to change the civil procedure of Louisiana.

### *The Period 1870-1960*

Important changes of procedure were brought about during the early years of this period. The former judicial view that common law terms in the procedural code and statutes were to be regarded merely as translations of the names of their Continental counterparts<sup>36</sup> now yielded to an excessively generous appraisal of the common law contribution to the procedure of the state,<sup>37</sup> and increased resort to the legal compendia then being published in America.

Somewhat later, the American code procedure movement, which was ushered in by New York's adoption of the David Dudley Field Code of Procedure in 1848, and which spread like wildfire throughout America during this period, had much to do in extending the influence of Anglo-American procedure over Louisiana practice. Paradoxically enough, the initial flow of influence was thus reversed, for it was the Louisiana Code of Practice of 1825 which provided the inspiration for the Field Code, and "from it very many of the best portions of the Field Code were adopted."<sup>38</sup> During this period, the current reversed its direction.

The Field Code, figuratively speaking, was a protest against the complexities and technicalities of contemporary Anglo-American procedure. It unified common law procedure and chancery practice as far as was then practicable, and it sought

36. *Agnes v. Judice*, 3 Mart.(O.S.) 182 (La. 1813); *Abat v. Whitman*, 7 Mart.(N.S.) 162 (La. 1828).

37. See, for instance, *Gill v. City of Lake Charles*, 119 La. 17, 43 So. 897 (1907), and the writer's criticisms thereof in *The Joinder of Parties in Louisiana*, 19 LOUISIANA LAW REVIEW 1, 5-9 (1959).

38. *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 427 (1896), 54 ALBANY L.J. 198, 204 (1896); CLARK, CODE PLEADING 28, n. 70 (2d ed. 1947).

to eliminate unnecessary technicalities and to simplify procedure. But it was a procedural system designed to implement Anglo-American law, and consequently was an Anglo-American code; and it, and its offspring in the various American states, had to be interpreted and applied largely by lawyers and judges whose mental processes were molded by the "inexorable logic" of common law procedure, and who were still dominated by the procedural philosophy of the old system. Considering the background of these American procedure codes, cases interpreting their provisions should never have been accepted by the Louisiana courts in the solution of the procedural problems of Louisiana; but unfortunately they were.

The system of pleading developed by these American codes was intended to require brief, simple statements of the controlling facts on which each litigant's position was based. As ultimately developed by judicial interpretation, there evolved a system of pleading rules almost as technical as the common law rules which they displaced. No lessening of the importance of the role played by pleading in Anglo-American procedure resulted from the adoption of American code pleading. In the present writer's opinion, the Louisiana courts adopted the system of "fact pleading" of the American codes shortly after the turn of the present century, through acceptance of the judicial decisions of the various American states on the subject, and froze it into our system somewhat later through the adoption of the Pleading and Practice Act. The original simplicity of the system of pleading in the Louisiana Code of Practice gradually ossified into a harsher and more technical system, with penalties for a breach of what actually were rules of judicial etiquette ranging from time-consuming amendments of the pleadings to the more drastic dismissal of the suit. This system of pleading obtains today in Louisiana, although its rigors have been tempered appreciably in recent years through the commendably liberal attitude of the Louisiana courts,<sup>39</sup> and the Louisiana Code of Civil Procedure has further liberalized the system by both authorizing and encouraging amendment at every stage of the proceeding.

At just about the same time that the rules of fact pleading were received in Louisiana, the common law rules of joinder of

---

39. On this subject, the reader is referred to the article on *The Case Against Fact Pleading in Louisiana*, 13 LOUISIANA LAW REVIEW 369 (1953). The opposing view is presented in Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading: Exposé des Motifs*, 13 LOUISIANA LAW REVIEW 395 (1953).



parties effected a partial entry into the jurisprudence of the state. The provisions of the Codes of Practice relating to cumulation of actions, taken directly from Spanish procedure, as the redactors' source notes indicate, contained no requirement of connexity with respect to subjective cumulation (*litisconsortium*). The early Louisiana jurisprudence had solved the problem through the jurisprudential adoption of the requirement of a common interest, or community of interest, between the plaintiffs joining, or the defendant joined, in the suit — substantially the same concept as the "community of jural interest" of the German Code of Civil Procedure.<sup>40</sup> In 1909, objection was raised by the defendant in a case to the union of actions by a plurality of plaintiffs.<sup>41</sup> The result reached by the court was completely sound, and thoroughly harmonious both with the earlier jurisprudence of the state and with generally accepted Continental principles of subjective cumulation. However, three gratuitous and erroneous observations were voiced in the opinion, to the effect that: (1) Spanish and French procedure had no rules which would afford any solution of the problem present; (2) the early Louisiana jurisprudential rules on the subject were derived from Anglo-American procedure; and (3) a resort should be made "to the books of the common law" for aid in the solution of related problems.<sup>42</sup> Since the only non-Louisiana authorities cited in this opinion were equity precedents applying the negative test of multifariousness, derived from the same Romano-canonical principles which constitute the source of Continental rules of cumulation of actions, it seems clear that the court did not intend to invite a resort to the applicable common law rules, but rather to the pertinent rules of chancery practice. Subsequent cases,<sup>43</sup> however, misconstrued the quoted language as vouching for the acceptability in Louisiana of the common law rules of joinder of parties, which were designed to implement the substantive rules of the common law joint, several, and joint and several, obligations — concepts completely alien to the civil law of Louisiana. Not too much damage was done through the application of these common law procedural rules in isolated cases. The alarming potential of these unfortunate

---

40. Art. 59.

41. *Gill v. City of Lake Charles*, 119 La. 17, 43 So. 897 (1907).

42. *Ibid.*

43. *Dubuisson v. Long*, 175 La. 564, 143 So. 494 (1932); *Gates v. Bisso Ferry Co.*, 172 So. 829 (La. App. 1937); *Delesdernier's Estate v. Zettwoch*, 175 So. 137 (La. App. 1937).

decisions has now been removed through the Louisiana Code of Civil Procedure.<sup>44</sup>

The adoption, since 1870, of a small number of procedural statutes has further increased the content of Anglo-American procedure in Louisiana practice. Limitations of space permit the writer to refer only to the most important of these legislative acts.

The code provisions relating to injunctions originally were taken indirectly from French procedure, through the medium of provisions of the so-called Civil Code of 1808. With the rapid social and economic development in Louisiana, this injunction procedure had proven inadequate, and even anachronistic. Considerable improvement in the injunction practice had been made in prior years in several American jurisdictions. The injunction practice in the federal courts particularly had been improved through the adoption of a statute drafted by an extremely able congressional committee after an extended study of the subject. In 1924, Louisiana adopted a statute<sup>45</sup> regulating the issuance of interlocutory injunctions, which was taken almost verbatim from this federal statute. The adoption of this legislation, and the gradual reception of equity principles relating to the issuance of injunctions which occurred both before and after this enactment, have resulted in an injunction procedure virtually of Anglo-American origin.

## II. THE LOUISIANA CODE OF CIVIL PROCEDURE

The new procedural code which has just been adopted,<sup>46</sup> and which becomes effective on January 1, 1961, is the product of ten years of painstaking work by the Louisiana State Law Institute, the members of its council, the three reporters and their research assistants, and the members of the Institute's advisory and special committees. The Institute's organization for this project, and the manner in which this work was done, has been described in some detail in the Institute's Report to the Louisiana Legislature which submitted the completed *projet*, and need not be repeated here.

---

44. Arts. 461-465, 647.

45. La. Acts 1924, No. 29, now LA. CODE OF CIVIL PROCEDURE arts. 3601-3613 (1960). For the reasons for the adoption of this legislation initially, see Spencer, *Discussion of Act 29 of 1924, Relating to Writs of Injunction*, 26 LA. BAR ASS'N REP. 15 (1925).

46. By La. Acts 1960, No. 15, § 1.

*Structure and Organization*

Except in the two respects mentioned later, the Louisiana Code of Civil Procedure follows the conventional pattern of structure and organization of codes of civilian jurisdictions. It is divided into 9 books, 36 titles, 117 chapters, and 1029 articles.<sup>47</sup> It departs from this conventional pattern, however, in two respects — the numbering of the code articles, and the inclusion of the redactors' comments in the code itself.

In lieu of the consecutive numbering of code articles from the first to the last, the new code employs the split number system, with all articles in a particular chapter or section numbered consecutively, but with wide gaps between the number of the last article in a particular chapter or section and the number of the initial article in the next book, title, chapter, or section. This system was adopted to permit the continuous revision of the new code after adoption, by the inclusion in appropriate places thereof of special procedural statutes adopted by the legislature in the future.

The inclusion of the redactors' comments in the code itself is a departure from traditional civilian redaction techniques, and was adopted over the objections of a few of the old-school civilians in Louisiana. This system was first employed by the Louisiana State Law Institute, as an experiment, in the *projet* of the Louisiana Criminal Code of 1942.<sup>48</sup> The official comments in the latter have proved so helpful to the courts and practicing

---

47. Book I is divided into three titles: Courts; Actions; and Parties. Book II, containing the rules governing ordinary procedure, has six titles: Pleading; Citation and Service of Process; Production of Evidence; Pre-Trial Procedure; Trial; and Judgments. Book III is divided into two titles: Appellate Procedure; and Supervisory Procedure. Book IV, Execution of Judgments, has four titles: General Dispositions; Money Judgments; Judgments Other than Money Judgments; and Foreign Judgments. Book V has two titles, on Summary Proceedings and Executory Proceedings, respectively. Book VI, Probate Procedure, is divided into six titles: General Dispositions; Acceptance of Successions Without Administration; Administration of Successions; Ancillary Probate Procedure; Small Successions; and Partition of Successions. Book VII, Special Proceedings, is divided into eleven titles: Provisional Remedies (conservatory writs); Real Actions; Extraordinary Remedies (habeas corpus, mandamus, and quo warranto); Annulment of Marriage, Separation from Bed and Board, and Divorce; Judicial Emancipation; Tutorship; Administration of Minor's Property During Marriage of Parents; Interdiction and Curatorship of Interdicts; Partition Between Co-Owners; Concursus Proceedings; and Eviction of Tenants and Occupants. Book VIII, Trial Courts of Limited Jurisdiction, makes uniform the procedure in justice of the peace and city courts, and in the "clerk's book" cases in the district courts, so far as constitutionally possible. It has three titles: General Dispositions; Cases Involving One Hundred Dollars or Less; and Cases Involving More than One Hundred Dollars. Book IX has only two titles: Miscellaneous Provisions; and Definitions.

48. Adopted by La. Acts 1942, No. 43, § 1.

lawyers of the state that there was a strong professional demand for the employment of this technique in the *projet* of the new procedural code. Judicial precedent plays a more important role in Louisiana than in any other civilian jurisdiction, and the consideration of the prior jurisprudence was deemed helpful in all cases. The citation of prior cases was absolutely necessary in those instances where the jurisprudential rule was being reversed legislatively.

### *Objectives*

Through the redaction of the Louisiana Code of Civil Procedure, the Louisiana State Law Institute sought to accomplish the following objectives:

(1) The consolidation of all procedural rules relating generally to civil actions and proceedings. Prior to the adoption of the new code, these rules were to be found in the Code of Practice, a large number of special statutes adopted since 1870, a much larger number of judicial decisions, and in the Civil Code. The latter contained large segments of our adjective law, including the procedural rules relating to successions, tutorship, judicial emancipation, interdiction, curatorship, annulment of marriage, separation from bed and board, and divorce.

(2) The elimination of many unnecessarily technical rules and results which served more to defeat than to further the ends of justice. A few of these were to be found in the positive law, but many more lurked in the prior decisions of the courts.

(3) The revision and reformation of those procedural devices and concepts of some efficacy and workability, which could be improved either through simplification or expansion, so as to operate more efficiently under modern economic or social conditions.

(4) The borrowing of some of the newer and more effective procedural devices in Anglo-American and Continental procedure which could be assimilated by and integrated into our adjective law.

(5) The granting of more power, authority, and discretion to the trial judge. The shackling of the trial judge in the United States during the past century and a quarter was largely a result of the influence of Jacksonian democracy, which was distrustful of the judiciary and sought to control procedural decisions

through the adoption of minute and rigid statutory rules. The Code of Practice, largely the handiwork of Edward Livingston, one of the leaders of this school of political thought, hamstrung the trial judge unnecessarily in many respects. Here, the new code has adopted the approach of the Federal Rules of Civil Procedure in granting necessary power, authority, and discretion to the trial judge.

(6) The statement of procedural rules in clear, simple English. The Code of Practice of 1825 was drafted in French, with the English version an imperfect translation. The revision of 1870 left the latter as the only official version, but did nothing to remove its many awkward and cumbersome phrases. The procedural statutes adopted since 1870, most of which were replete with hackneyed legal terms and expressions which obscured their meaning, had further aggravated this unfortunate situation.

#### *Redaction Policies*

For nearly a century and a half the civil procedure of Louisiana has been a blend, or synthesis, of Continental and Anglo-American civil procedures. One of the initial decisions of the Louisiana State Law Institute, when it commenced work on the new procedural codification, was that there would be no discarding of the basic Louisiana procedure to accept a new system based upon either the Federal Rules of Civil Procedure or the procedural code of another American state.

The pragmatic justification of comparative law is the opportunity afforded for the improvement and enrichment of one legal system through the intelligent borrowing of more effective concepts and principles from other systems. The comparative method was utilized throughout the redaction of the new code. The latter contains some procedural devices and concepts borrowed from the latest and most advanced Anglo-American "codification"—the Federal Rules of Civil Procedure. These, however, have largely been in replacement of Louisiana counterparts of Anglo-American origin. Less extensive borrowings have been made from modern Continental procedural systems, and these largely in replacement of Louisiana analogues of Continental origin. As each procedural device and concept was considered by the Law Institute, it was compared carefully with its Continental and Anglo-American counterparts. If any of the latter clearly proved more useful and more workable, it was borrowed and

incorporated into the new code. In some instances where no actual borrowing resulted, the comparison indicated the desirability of a more precise or clearer statement of the Louisiana rule which was to be retained.

Throughout the work of the redaction of the new code the Louisiana State Law Institute followed one cardinal policy: there should be no change for the mere sake of change. No matter how appealingly novel or intriguing the suggestion, no matter what its theoretical appeal, no change was made except upon convincing evidence that it would prove more useful and workable than its Louisiana counterpart. The result is that no radical or revolutionary changes were made in the civil procedure of the state through the adoption of the new code.

### *Procedural Philosophy*

Every codification reflects, in large measure, the legal philosophy of its redactors. The procedural philosophy of the Louisiana Code of Civil Procedure is essentially pragmatic. While recognizing the need for symmetry and the correlation of the articles of this code, in its redaction the Louisiana State Law Institute was more concerned with the utility and workability of the procedural rules embodied therein than with any "science of civil procedure." The Code of Practice of 1825 provided an excellent base for an affective administration of civil justice in Louisiana, but for roughly half of the one hundred and thirty-five years which have elapsed since its adoption, its spirit was overlooked by both the legislatures and the courts of the state. During this period, both of the latter were largely under the influence of the procedural philosophy of Anglo-American law, which then regarded a lawsuit as a duel between skilled protagonists. Both shook off this influence more than a quarter of a century ago, but many legislative and jurisprudential rule overturned by the new code reflected this misconception of the function of procedure. The new code embodies procedural rules designed to permit the trial of a case to serve as a search for the truth, and to have its decision based on the substantive law applicable, rather than upon technical rules of procedure.

The procedural philosophy of the Louisiana Code of Civil Procedure is summed up by the language of its Article 5051: "The articles of this Code are to be construed liberally, and with

due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves.”

### III. MORE IMPORTANT CHANGES MADE BY PROCEDURAL REVISION

As indicated in the title of the act adopting the new code,<sup>49</sup> the latter consolidates all of the procedural rules generally applicable to civil actions and proceedings. Hence, it includes those procedural statutes now incorporated in Titles 9 and 13 of the Revised Statutes, and the procedural rules in the Civil Code relating to successions, tutorship, interdiction, curatorship of interdicts, judicial emancipation, annulment of marriage, separation from bed and board, and divorce. The companion legislation to implement the adoption of the new code<sup>50</sup> repeals or amends a number of code or statutory provisions which have either been transferred in whole or in part to the new procedural code, or which are inconsistent therewith and must be amended to correlate with the new procedural rules.

The most radical changes proposed by the Louisiana State Law Institute in the redaction of this code were with respect to Depositions and Discovery, Pre-Trial Procedure, and Third Party Practice, all borrowed from the Federal Rules of Civil Procedure. These changes were adopted by the Louisiana Legislature in 1952<sup>51</sup> and 1954,<sup>52</sup> and appear to have worked well since their adoption. By comparison, none of the other changes embodied in the Louisiana Code of Civil Procedure appear anywhere near as far-reaching. The new code incorporates a large number of rules not heretofore recognized by code or statutory provisions, but the great majority of these are merely declaratory of existing jurisprudence and make no change in the law. Some existing

---

49. La. Acts 1960, No. 15.

50. La. Acts 1960, No. 30, amending the Revised Civil Code of Louisiana; La. Acts 1960, No. 31, amending Title 9 of the Louisiana Revised Statutes of 1950; La. Acts No. 32, amending Title 13 of the Louisiana Revised Statutes of 1950; La. Acts 1960, No. 33, amending LA. R.S. 32:710(K) (1950); La. Acts 1960, No. 34, adopting a new LA. R.S. 43:203 (1950); and La. Acts 1960, No. 35, amending LA. R.S. 47:2413(B) (1950).

51. La. Acts 1952, No. 202, § 1, incorporated Depositions and Discovery into Title 13 of the Louisiana Revised Statutes of 1950 as Sections 3741 through 3794 thereof. These provisions have been transferred into the new Code as Articles 1421 through 1515 thereof. La. Acts 1952, No. 84, § 1, incorporated Pre-Trial Procedure into Title 13 of the Louisiana Revised Statutes of 1950 as Section 5151 thereof. This statutory provision is incorporated in the Code of Civil Procedure as Article 1551 thereof.

52. La. Acts 1954, No. 433, § 1, incorporated Third Party Practice into Title 13 of the Louisiana Revised Statutes of 1950 as Sections 3381 through 3386 thereof. These statutory provisions have been transferred into the new Code as Articles 1111 through 1116 thereof.

jurisprudential rules are overruled legislatively, but it is believed that nearly all lawyers will agree that these were unduly technical or unworkable, and should have been discarded.

The more important changes in the procedural law made by the adoption of the new code, and which are of general and immediate interest to all members of the profession, are summarized below. This summary will include consideration of the few new statutory provisions which likewise make changes of some importance in the procedural law.

### Courts

An important theoretical change is made in the title on Courts,<sup>53</sup> in discarding the concepts of jurisdiction *ratione materiae et personae* — based upon the *competence ratione materiae et personae* of French procedure — to accept completely and exclusively the Anglo-American concepts of jurisdiction and venue. Actually, this theoretical change is not as radical as may appear at first blush. The Anglo-American concepts of jurisdiction over the person, over property, and over status were brought into our law years ago by the constitutional requirements of full faith and credit, and due process of law. The term "venue" is no newcomer to the civil procedure of Louisiana, since it has been used in our corporation, and some of our insurance, statutes for years. "Jurisdiction over subject matter" is the exact equivalent of jurisdiction *ratione materiae*. The changes made in this title really are terminological; and were made to eliminate difficulties which our courts have experienced in the past, in confusing jurisdiction *ratione materiae* with jurisdiction *ratione personae*, and the latter with jurisdiction over the person.

The extremely important article on jurisdiction over the person<sup>54</sup> does not, and was not intended to, exercise the full potential of jurisdiction over nonresidents opened up by recent decisions of the United States Supreme Court.<sup>55</sup> It was intended to serve as the theoretical base for the requirements of service of process, or general appearance, for a valid personal judg-

---

53. By Arts. 1-10, 41.

54. Art. 6.

55. Particularly by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); and *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). These two cases swept aside all of the former theories of "consent," "presence," and "doing business" which theretofore had retarded development of the procedural law in this area.



ment; and was purposely phrased very broadly so as not to limit the validity of any particular type of service of process. Future developments in the latter area were to be left to special legislation. An amendment of a section of the Revised Statutes made by one of the implementing statutes<sup>56</sup> appreciably broadens jurisdiction over foreign corporations. Exercise of the full jurisdictional potential over nonresident individuals, and possibly over nonresident partnerships and unincorporated associations as well, in the past has been limited to some extent by constitutional prohibitions;<sup>57</sup> but it is believed that the recent case of *McGee v. International Life Insurance Co.*<sup>58</sup> has now opened up the avenue of service by registered mail in cases where a nonresident individual, partnership, or unincorporated association has either done business in Louisiana, or has entered into a contract to be performed in this state. It is hoped that the Louisiana State Law Institute will draft the necessary legislation to accomplish this within the next two years.

The article on general appearance,<sup>59</sup> which has been needed for years, makes a slight change in the procedural law by providing that a motion for an extension of time to plead does not submit the defendant to the jurisdiction of the court. Another slight change is made in the article on jurisdiction over status,<sup>60</sup> which recognizes the jurisdiction of Louisiana courts to interdict a Louisiana domiciliary who is being treated in an institution in another state.

---

56. La. Acts 1960, No. 32, § 1, amending and re-enacting LA. R.S. 13:3471 (1950). The first subsection of the amended section amends the former LA. R.S. 13:3471(5)(d) by substituting the language "a business activity in this state, service of process in an action or proceeding on a cause of action resulting from such business activity" for the more limited language of the former provision "business activities in this state, through acts done by its employees or agents, service of process in an action or proceeding on a cause of action resulting from or relating to such acts done," etc. The dual purposes of this amendment were: (1) to exercise the full potential of jurisdiction, insofar as foreign corporations are concerned, permitted by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); and (2) to overrule legislatively *Johnson v. El Dorado Creosoting Co.*, 71 So.2d 613 (La. App. 1954) and the cases relied on therein.

57. See *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935). *But cf. Hess v. Pawloski*, 274 U.S. 352 (1927). Both the Nonresident Motorist Act, LA. R.S. 13:3474, 3475 (1950), and the Nonresident Watercraft Owners Act, LA. R.S. 13:3479-3482 (1950) have been held constitutional. *Roper v. Brooks*, 201 La. 135, 9 So.2d 485 (1942); and *Tardiff v. Bank Line*, 127 F. Supp. 945 (D.C. La. 1954), 15 LOUISIANA LAW REVIEW 832 (1954).

58. 355 U.S. 220 (1957).

59. Art. 7.

60. Art. 10(3). This change was made to avoid a judicial vacuum. The courts of some states limit their jurisdiction over incompetency proceedings to domiciliaries of their own state.

The chapter on Venue clarifies the rules on this subject, heretofore fouled up by both the legislature and the courts, without making any great change in actual results. The difficulties caused by the "mandatory language" and the "permissive language" of the various provisions of the Code of Practice is eliminated through an article in the new code which spells out certain priorities and otherwise allows the plaintiff to select any venue provided by any applicable article.<sup>61</sup> The venue of suits on insurance policies, other than life and health and accident policies, is broadened somewhat.<sup>62</sup>

The rules on the recusation of judges are changed in only two slight, and not particularly important, respects.<sup>63</sup>

The chapter on the power and authority of courts is largely declaratory of the prior code and statutory provisions. An appreciable amount of research time for both lawyers and judges will be saved, and some doubt and uncertainty removed, through the articles in the new code which specifically enumerate the judicial acts which may be performed, and the orders and judgments which may be signed, in chambers<sup>64</sup> and in vacation.<sup>65</sup> The heretofore fuzzy area of contempt of court is clarified by articles which define the various contempts, and provide the procedure for trial and punishment thereof.<sup>66</sup>

The duties, powers, and authority of clerks of the various courts are regulated by articles which make no real change from the prior code and statutory provisions. The judicial and quasi-judicial powers of the clerks of the district courts (Orleans Parish excepted) are recognized by applicable articles,<sup>67</sup> but are broadened slightly to permit such a clerk to sign more *ex parte* and *perfunctory* orders than he could before.

---

61. Art. 45.

62. Any action may be brought thereon "in the parish where the loss occurred or the insured is domiciled." Art. 76.

Nothing in the Code modifies or affects the venue provided in the Direct Action Statute, LA. R.S. 22:655 (1950).

63. Under Art. 152, on "the written application of a district judge, the Supreme Court may recuse him for any reason which it considers sufficient." This was done to permit recusation in any justifiable case of embarrassment not listed specifically as a ground therefor. LA. R.S. 13:101 (1950), which allowed a recused Supreme Court Justice to select the judge to replace him, is repealed by La. Acts 1960, No. 32, § 2.

64. Arts. 194, 195.

65. Art. 196.

66. Arts. 221-227. La. Acts 1960, No. 32, § 6, adopts a new LA. R.S. 13:4611 (1950) which provides the maximum punishments for the various types of contempts of court.

67. Arts. 281-288.

The duties, powers, and authority of the sheriff in civil matters, the subject of so many repetitious articles in the Code of Practice, are covered concisely by fourteen articles in the chapter on the subject.<sup>68</sup> For the most part, these articles are declaratory of prior code and statutory rules; but two very important changes are made. Heretofore, the sheriff had the power of administration over seized property only when the seizure was made under a writ of sequestration, fieri facias, or seizure and sale; and his authority to continue the operation of a seized business was extremely doubtful. Under the new code, the sheriff has the power of administration of property seized under any type of writ.<sup>69</sup> He may continue the operation of any business, farm, or plantation under seizure; and must do so when sufficient funds therefor are advanced by any interested person.<sup>70</sup>

### *Actions*

This title is largely declaratory of the prior procedural rules, but one rather important change is made in this area by the procedural revision.

This change relates to abatement of actions. After months of groping for effective solutions of the various problems in this area, the Law Institute concluded that no effective solutions were possible without an amendment of Article 2315 of the Civil Code. After months of study by a special committee, the latter submitted specific recommendations for such an amendment, which were approved with very slight changes. One of the implementing acts<sup>71</sup> effects this amendment. Under it, Article 2315 of the Civil Code is changed in four important respects: (1) the right to recover property damage caused by a wrongful act is recognized as a property right which is inherited by the obligee's heirs if he dies before suit or recovery; (2) the right to recover all other damages caused by a wrongful act, including those for wrongful death, on the death of the injured person is transmitted to designated beneficiaries, who may also recover their individual damages, as under the prior law; (3) the primary class of these beneficiaries is broadened to include major children, as well as the surviving spouse and minor children; and (4) the transmitted and individual rights of a designated

---

68. Arts. 321-334.

69. Art. 328.

70. *Ibid.*

71. La. Acts 1960, No. 30, § 1.

beneficiary are recognized as property rights which, on his death either before judgment or even before the filing of suit, are inherited by the heirs of this beneficiary.<sup>72</sup> With these changes the remaining problems of abatement of actions are solved simply through a basic article<sup>73</sup> providing that no actions abate on the death of a party, except those to enforce a right or obligation strictly personal.

Mention should be made of the articles in the new code on the subject of cumulation of actions,<sup>74</sup> which are much clearer and more explicit than those of the Code of Practice. These, however, make no change in procedural theory and few changes in results. They are made more explicit to retain the original simplicity of the rules on cumulation of actions; and to prevent the further application of Anglo-American rules on the subjects of joinder of actions and of parties, which are based on substantive concepts completely alien to the civil law of Louisiana, and which in the past have done some damage and threatened even more to our civil procedure.<sup>75</sup> The articles in the new code bring the "misjoinder of parties" clearly within their application, and spell out the requirement of community of interest heretofore recognized by the jurisprudence.<sup>76</sup> Two conflicting lines of cases in the past prescribed different penalties for a misjoinder of parties: in the greater number of cases the suits were dismissed, while in some decisions the plaintiff was required to elect.<sup>77</sup> Under the new code, the trial court may: (1) require the plaintiff to elect; or (2) simply order separate trials of the actions improperly joined.<sup>78</sup> The trial court may also order separate trials of cumulated actions, when it feels that it would be difficult to try them together, when the defendant has failed to object to the improper joinder, or even when the joinder is theoretically proper.<sup>79</sup>

The new code borrows the language of the Federal Rules of Civil Procedure regulating the procedure of the true class ac-

---

72. This amendment overrules legislatively *Chivers v. Roger*, 50 La. Ann. 57, 23 So. 100 (1898); *Kerner v. Trans-Mississippi Terminal R. Co.*, 158 La. 853, 104 So. 740 (1925); and all subsequent cases based thereon.

73. Art. 428.

74. Arts. 461-465. See also Art. 647.

75. On this point see *The Joinder of Parties in Louisiana*, 19 LOUISIANA LAW REVIEW 1, 5-9 (1959).

76. Arts. 461, 463, 647.

77. See cases cited in Comment (c) of Art. 464.

78. Art. 464.

79. Art. 465.

tion;<sup>80</sup> but, as the Louisiana cases cited in the comments show, the new articles merely state with greater precision the rules previously recognized in the jurisprudence.

### *Parties*

The title on Parties constitutes a definite improvement of our procedural law, but not too many changes are made therein. The chapter on Joinder provides needed rules for the heretofore blurred area of indispensable and necessary parties,<sup>81</sup> but actually makes only one rather unimportant change in the law.<sup>82</sup>

The chapters on Parties Plaintiff and Parties Defendant consolidate all of the rules on these subjects which heretofore were to be found scattered about in the Code of Practice, the Civil Code, the Revised Statutes, and in the jurisprudence. The great majority of these articles enunciate rules which are identical with those under the prior law, but a few very important changes are made. To remove the prior conflict in the case law, the new code provides that the succession representative alone is the proper plaintiff to enforce the rights of a succession, and the proper defendant against whom the obligations of a succession should be enforced, as long as it is under administration, regardless of the type of action.<sup>83</sup> The rocks on which many a suit has foundered — whether a right sought to be enforced by, or an obligation sought to be enforced against, a married woman belongs to or is owed by her paraphernal estate or by the com-

---

80. Arts. 591-597. The hybrid and spurious class actions are merely permissive joinder devices which are needed to broaden, under the theory of ancillary jurisdiction, the sharply restricted jurisdiction of federal courts. They are not at all necessary in the procedure of state courts, which are not limited to cases involving a federal question of diversity or citizenship. For this reason, they were not adopted by the new code. See Comment (c) of Art. 591.

81. Arts. 641-647.

82. Under the prior law, one of a number of joint obligees or obligors might sue or be sued alone. Under the new code, all joint obligees or obligors are necessary parties, who must join or be joined when timely objection to the nonjoinder is made by a defendant. Arts. 643-645. This was done to discourage multiplicity of litigation. As under the prior law, "One or more solidary obligees may sue to enforce a solidary right, and one or more solidary debtors may be sued to enforce a solidary obligation, without the necessity of joining all others in the action." Art. 643.

83. Arts. 685, 734. While the general rule is that a personal representative of a decedent, appointed or confirmed by a court of another state, may not sue in Louisiana without being appointed the ancillary succession representative by a Louisiana court, Arts. 685, 3403, an exception was made for wrongful death actions. An administrator or executor appointed or confirmed by a court of another state, and in whom a right to recover damages for wrongful death vests, is permitted to sue in a Louisiana court without qualifying as ancillary administrator or executor. LA. R.S. 13:3331 (1950), added by La. Acts 1960, No. 32, § 6. See Comment (a) of Art. 3403.

munity of acquêts and gains — are removed under the new code. Suit in the alternative by, or against, the wife and her husband is expressly permitted.<sup>84</sup> As under the prior law, a partnership is recognized as a legal entity; but while heretofore it had to appear through and be represented by *all* of its partners, under the new code it may appear through and be represented by *any* authorized partner.<sup>85</sup> Unincorporated associations may sue and be sued under the new code.<sup>86</sup> The technical differences between the procedural rules relating to the enforcement of the rights of a foreign corporation in equity receivership, and those of one in a statutory receivership, are removed under the new code. An ancillary receiver must be appointed for both by a Louisiana court, and he is the proper plaintiff in both cases.<sup>87</sup>

The new code has a complete set of rules on the substitution of parties,<sup>88</sup> modeled upon the applicable provisions of the present Rules of the Supreme Court of Louisiana.

### *Pleading*

Despite some rumors to the contrary, the new code retains the present system of fact pleading,<sup>89</sup> but tempers it to a considerable extent by an article authorizing and encouraging the ready amendment of pleadings.<sup>90</sup> Several slight changes are made in the formal requisites of all pleadings. The salutation, or address to the court, is eliminated as unnecessary, but there is a requirement that all pleadings have a caption.<sup>91</sup> Verifying affidavits are no longer required, except for petitions for provisional remedies (conservatory writs).<sup>92</sup> Neither a certificate of the filing of an exception in good faith, nor a verifying affidavit of the truthfulness of facts alleged therein, are required under the new code. In lieu of both certificate and verifying affidavit, the new code requires each pleading to be signed by at

---

84. Arts. 686, 735.

85. Art. 688. This was done because of the increasing number of partnerships with a very large number of partners, but which have a resident managing partner with plenary authority to institute suit to enforce the rights of the partnership.

86. Arts. 689, 738.

87. Art. 692. See Comment (c) thereof.

88. Arts. 801-807.

89. Arts. 854, 891, 1003.

90. Art. 1154.

91. "Every pleading shall contain a caption setting forth the name of the court, the title and number of the action, and a designation of the pleading. The title of the action shall state the name of the first party on each side with an appropriate indication of other parties." Art. 853.

92. Verifying affidavits are still required in petitions for an attachment, sequestration, or injunction. Arts. 3501, 3603.

least one attorney of record, and this signature "constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."<sup>93</sup>

Aside from those just noted, there are no changes with respect to the rules governing the petition.

The rules regulating the exceptions have been simplified appreciably by a few simple, but quite important, changes. The present thirty-odd nominate exceptions are reduced to three: *the* declinatory exception, *the* dilatory exception, and *the* peremptory exception.<sup>94</sup> The workability of the new system appears to be guaranteed by articles which enumerate specifically the objections which may be urged through each exception.<sup>95</sup> Each exception is required to "state with particularity the objections urged and the grounds thereof."<sup>96</sup> The prior "sacred order" of pleading the various declinatory exceptions (now objections) is completely eliminated through the provisions that "When two or more of [the specific] objections are pleaded in the declinatory exception, they need not be pleaded in the alternative or in any particular order."<sup>97</sup> As under the prior law, the declinatory and dilatory exceptions must be pleaded at the same time; but again the prior hypertechnical rules are eliminated through the provision that "When filed at the same time or in the same pleading, [the declinatory and dilatory] exceptions need not be pleaded in the alternative or in a particular order."<sup>98</sup> If the declinatory exception is sustained because the action is brought in a court of improper jurisdiction or venue, the trial court may now transfer the action to a proper court,<sup>99</sup> instead of being forced to dismiss it.

As under the Code of Practice, written motions are deemed to be pleadings. The chapter in the new code on this subject makes two important changes. The very useful motion to strike, which was used in Louisiana for more than a century before it

---

93. Art. 863.

94. Art. 922.

95. The specific objections which may be pleaded through the declinatory, dilatory, and peremptory exceptions, respectively, are enumerated in Arts. 925, 926, and 927.

96. Art. 924.

97. Art. 925.

98. Art. 928.

99. Art. 932. La. Acts 1960, No. 32, § 1, amends LA. R.S. 13:3271-3276 (1950) to provide adequate machinery for the transfer of actions from one court to another.

was abruptly abolished by the Supreme Court with the astonishing explanation that it was not recognized under our system of pleading, is restored.<sup>100</sup> The other change is much more important: the motion for summary judgment is borrowed from the Federal Rules of Civil Procedure.<sup>101</sup> This fills a long-felt need in our procedural system.<sup>102</sup>

Two changes, in addition to those mentioned initially, are made with respect to the answer. The first and most important is that the delay for answering under the new code is a flat fifteen days,<sup>103</sup> instead of the prior ten days plus the distance differential. As under the prior law, an extension of time to plead may be granted by the trial court for good cause.<sup>104</sup> The remaining change is not important enough to warrant textual discussion.<sup>105</sup>

A number of important changes are made with respect to the incidental demands. For one thing, the number thereof is reduced from five to three,<sup>106</sup> through the merger of the demand in compensation with the reconventional demand,<sup>107</sup> and the fusion of the third opposition with the intervention.<sup>108</sup> Under the prior law, exceptions might be filed, and answers were required, only to intervention and the third party demand (the former call in warranty). Under the new code, exceptions may be filed, and answers are required, for reconventional demands as well.<sup>109</sup>

---

100. Art. 964.

101. Arts. 966-969.

102. The exception of no cause of action and the motion for judgment on the pleadings are both useful procedural devices to be employed when the petition or the answer fails to state an adequate cause of action, or a defense, as the case may be. Neither may pierce sufficient but frivolous allegations. Frivolous actions or defenses may be disposed of quickly through the motion for summary judgment, without the necessity of awaiting a trial on the merits.

103. Art. 1001.

104. *Ibid.*

105. Under the present law, the pleading of *inconsistent facts* in the alternative (if within the knowledge of the pleader) is prohibited, but the alternative pleading of *inconsistent legal conclusions* or inferences based on the same basic facts is permitted. This subtle and nebulous difference has caused courts and attorneys to spin their wheels, and to waste more time than the results could possibly justify. Hence, the new code provides that an "answer may set forth two or more defenses in the alternative, even though the factual or legal bases thereof may be inconsistent or mutually exclusive. All allegations in such cases are made subject to the obligations set forth in Article 863" (implied certificate of good faith through signature). Art. 1006.

106. Art. 1031.

107. Art. 1062.

108. Art. 1092.

109. Arts. 1034, 1035.



Other than those mentioned above, only one change has been made with respect to the reconventional demand, but it is an important one. Under the prior law, a reconventional demand might have been filed only when it had connexity with the main demand, or there was a diversity of residence between plaintiff and defendant. Under the new code, any cause of action may be asserted through the reconventional demand, regardless of connexity or diversity of residence.<sup>110</sup>

The only change of great importance made with respect to intervention is its broadening to absorb the present third opposition,<sup>111</sup> as mentioned above.

When the Law Institute drafted the articles governing the third party demand (third party practice), these were included in two different sections of the chapter in the *projet* on the Incidental Demands: (1) in the general rules applicable to all incidental demands; and (2) in the section applicable only to the third party demand. In 1954, when the Third Party Practice Act was enacted, the legislature adopted only the second set of provisions, leaving a number of resulting hiatuses.<sup>112</sup> The new code, of course, fills in all of these hiatuses.<sup>113</sup> Another extremely important change made in this area by the procedural revision is the amendment of Article 2103 of the Civil Code by one of the implementing acts,<sup>114</sup> so as to permit the enforcement of contribution among joint tortfeasors through the third party demand.<sup>115</sup>

### *Citation and Service of Process*

The only important change made by this title is a clarifica-

---

110. Art. 1061.

111. Arts. 1092, 1093.

112. These former hiatuses were pointed out and discussed in *Survey of 1954 Legislation — Courts and Judicial Procedure*, 15 LOUISIANA LAW REVIEW 38, 46-49 (1954). See also *Cameron v. Reserve Insurance Co.*, 237 La. 433, 111 So.2d 336 (1959), 20 LOUISIANA LAW REVIEW 432 (1960), which held that since the Third Party Practice Act had no venue provisions, a third party defendant could not be sued in the parish where the main demand was pending, unless he could have been sued therein as an original defendant.

113. Arts. 1031-1040. The third party demand must be filed in the court where the main demand is pending. Art. 1034.

114. La. Acts 1960, No. 30, § 1.

115. Despite the adoption of the Third Party Practice Act, it had been held that contribution among joint tortfeasors could not be enforced through the third party demand, unless the third party defendant had been sued solidarily originally with the third party plaintiff. It was held that substantively there was no right to enforce contribution against a joint tortfeasor not sued by the plaintiff. *Kahn v. Urania Lumber Co.*, 103 So.2d 476 (La. App. 1958). LA. CIVIL CODE art. 2103 (1870), as amended and re-enacted by La. Acts 1960, No. 30, § 1, legislatively overrules this decision.

tion of the prior law. Under the former statutory provision requiring service of all pleadings, and authorizing service by mail or delivery of all pleadings not required to be served by the sheriff, there was considerable confusion and uncertainty as to when a pleading had to be served by the sheriff and when it might be served by mail or delivery. The new code clarifies this by limiting the instances in which pleadings may be served by mail or delivery.<sup>116</sup>

A change made by one of the implementing acts<sup>117</sup> makes it possible to reduce the cost of services to be made at a distance from the parish seat.<sup>118</sup>

### *Production of Evidence*

Two extremely important changes in the law are made in the title on this subject. Under the prior law, witnesses might be subpoenaed to testify personally in civil cases only if they lived in the parish or within one hundred miles of the place where the court was held. Under the new code, any witness living or present in the state may be subpoenaed to testify personally.<sup>119</sup> As under the prior law, a sufficient deposit must be made with the clerk of the court to cover the fee, mileage, and expense allowance of a witness living or present in another parish, before a subpoena to him can be issued.<sup>120</sup>

The new code adopts the Uniform Judicial Notice of Foreign Law Act, which will permit a Louisiana court to take judicial notice of the statutes and common law of another American state.<sup>121</sup>

No change is made with respect to depositions and discovery;

---

116. Service by mail or delivery is limited to a "pleading which requires no appearance or answer, or which under an express provision of law may be served as provided in this article." Art. 1313. *Cf.* Arts. 1063, 1093.

117. La. Acts 1960, No. 32, § 6, adds a new LA. R.S. 13:3484 (1950) which effects the change.

118. The party desiring to have service made at a distance of more than 10 miles from the parish seat may request that the papers be mailed to a deputy sheriff, constable, or marshal living in the vicinity where service is to be made. When such a request is made, whether complied with or not, the sheriff may not charge more than the cost of mailing the papers, and mileage for the actual distance from the home or office of the deputy, constable, or marshal, and return. LA. R.S. 13:3484 (1950), as added by La. Acts 1960, No. 32, § 6.

119. Art. 1352.

120. Art. 1352; LA. R.S. 13:3661 (1950), as amended and re-enacted by La. Acts 1960, No. 32, § 1.

121. Art. 1391.

except to break the lengthy and unwieldy statutory sections into shorter articles.<sup>122</sup>

### *Trial*

Two rather important changes are made in the law by the articles in this title of the new code. The prior rule that the plaintiff might discontinue his action as of non-suit at any time up to the moment it was submitted to the trial court had been productive of hardship and injustice to many defendants. Under the new code, plaintiff may dismiss his suit at any time, but the trial court has discretion to determine whether this dismissal is with or without prejudice.<sup>123</sup> Similarly, the rule that when a plaintiff failed to appear at the trial the court could only non-suit him is discarded by the new code. Here again, the trial court is given discretion to determine whether the judgment of dismissal is with or without prejudice.<sup>124</sup>

Students of civil procedure in other American states, and some defense lawyers in Louisiana as well, will be more critical of the articles on jury trial than of any other portion of the new code. Few of the controls over the irresponsibility of the jury contained in the Federal Rules of Civil Procedure have been borrowed by the new code. This was not the result of inadvertence or oversight, as the Law Institute devoted the greater portion of six days to the consideration of and debate on these points. The Institute's conclusion that the plenary review of factual issues by the appellate courts of Louisiana<sup>125</sup> was the most effective jury control possible, and was all that was needed for the relatively few cases tried by jury in this state, accounts for the small number of changes made in this area. The article limiting the cases which may be tried by jury make one, or possibly two, slight changes in the law.<sup>126</sup> Alternate jurors are provided for.<sup>127</sup> Both special verdicts and answers to interrogatories to accompany a general verdict are made available.<sup>128</sup> The judgment *non obstante veredicto* is recognized, but is limited to cases where a general verdict is accompanied by answers to interrogatories.<sup>129</sup>

---

122. Arts. 1421-1515.

123. Art. 1671.

124. Art. 1672.

125. Under LA. CONST. art. VII, §§ 10, 29 (1921).

126. A jury trial is not permitted in cases involving less than \$1,000, nor in workmen's compensation cases. Art. 1733.

127. Art. 1769.

128. Arts. 1811, 1812.

129. Art. 1812.

Both *additur* and *remittitur* are made available as alternatives to a new trial.<sup>130</sup>

### *Judgments*

The Uniform Declaratory Judgment Act is transferred to the new code, but with one extremely important change. The Supreme Court had held, in *Burton v. Lester*<sup>131</sup> and subsequent cases, that this statute could not be invoked where there was any other adequate remedy available. These cases are overruled by an article in the new code which provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."<sup>132</sup>

Notice of the signing of all final judgments in the district court will be issued by the clerk. As under the prior law, this notice will be served by the sheriff where the judgment was by default and there was only domiciliary service of the citation.<sup>133</sup> In all other cases, under the new code, the notice of judgment will be mailed by the clerk to each counsel of record, and to each party not represented by counsel.<sup>134</sup>

The trial court is given the same power to assess costs in its discretion, rather than against the party cast, which the appellate courts now enjoy.<sup>135</sup>

The rehearing in the trial court is abolished under the new code, but this is a mere matter of terminology as the broadened new trial may be granted "to all or any of the parties and on all or part of the issues, or for reargument only."<sup>136</sup> The rules regulating the action of nullity are changed in one important, and quite beneficial, respect. To avoid the prior difficulty due to conflicting lines of Supreme Court cases, as to whether a trial court may annul a judgment either affirmed or rendered on appeal, the new code requires such a nullity action to be "brought in the trial court, even though the judgment sought to be annulled may have been affirmed on appeal, or even rendered by the appellate court."<sup>137</sup> The procedural rules regulating the revival of money

---

130. Art. 1813.

131. 227 La. 347, 79 So.2d 333 (1955).

132. Art. 1871. A further change, which affects actions for a declaratory judgment adjudicating the ownership of immovable property, is mentioned in the discussion of Real Actions, *infra*.

133. Art. 1913.

134. *Ibid.*

135. Art. 1920.

136. Art. 1971.

137. Art. 2006.

judgments are transferred from the Civil Code to the new procedural code without change.<sup>138</sup>

### *Appellate Procedure*

The delays allowed generally for appeals are changed under the new code. The prior delay of ten days, exclusive of Sundays, allowed for a suspensive appeal is now increased to a flat fifteen days.<sup>139</sup> The prior delay of one year allowed generally for devolutive appeals is shortened to ninety days.<sup>140</sup> The procedure for obtaining an order of appeal has been simplified. Under the new code, an order of appeal may be obtained either on oral motion in open court, or by petition, regardless of the "term" of court in which the order is sought or the judgment sought to be appealed from was rendered.<sup>141</sup> Regardless of the manner in which an order of appeal is obtained, it is the duty of the clerk of the trial court to mail notices of the order of appeal to counsel for all parties other than the appellant, or to all other parties not represented by counsel.<sup>142</sup> The failure of the clerk to issue or mail this notice does not affect the validity of the appeal.<sup>143</sup> The return day is governed by the same rules which obtained heretofore, except that the trial judge is given authority to make any necessary extension thereof, on application of the clerk, or of the deputy clerk preparing the transcript.<sup>144</sup> As under the prior law, the costs due the clerk of the trial court for preparing the transcript must be paid him; but one important change requires the payment to the clerk of the trial court of the filing fee which will be due the appellate court, and the trial court clerk's payment of the latter to the appellate court clerk.<sup>145</sup> Regardless of

---

138. Art. 2031.

139. Art. 2123. An appeal from a justice of the peace or city court, or from a district court in a case involving \$100 or less, whether suspensive or devolutive, must be taken within 10 days. See the discussion on Trial Courts of Limited Jurisdiction, *infra*.

140. Art. 2087. An appeal from a judgment granting or refusing an annulment of marriage, separation from bed and board, divorce, awarding custody or alimony, may be taken only within 30 days. Arts. 3942, 3943.

141. Art. 2121.

142. *Ibid*.

143. Such a failure of the clerk would entitle the appellee to an extension of time in the appellate court to move to dismiss, answer the appeal, or file his brief, as under the prior law when citation of appeal was necessary, was prayed for by the appellant, but never issued or served.

144. Art. 2125. Though the new code does not go into effect until January 1, 1961, a similar provision is now contained in L.A. R.S. 13:4438 (1950), as amended by La. Acts 1960, No. 38, § 1, which went into effect on July 1, 1960. This latter statute was one proposed by the Judicial Council of Louisiana to implement the recent appellate reorganization.

145. Arts. 2126, 2127. Though these code articles do not go into effect until January 1, 1961, similar provisions are now contained in L.A. R.S. 13:4445 (1950),

the court to which the appeal is taken, it is the duty of the clerk of the trial court to transmit the record to the appellate court.<sup>146</sup> No failure or delay of the clerk of the trial court in preparing or transmitting this transcript is imputable to the appellant.<sup>147</sup> Under the prior law, an answer to the appeal might be filed ordinarily as late as three days before the day assigned for argument in the appellate court.<sup>148</sup> Under the new code, an answer to the appeal must be filed within fifteen days of the return day, or the day on which the transcript is actually filed in the appellate court, whichever is later.<sup>149</sup>

### *Execution of Judgments*

A considerable number of changes in the law are made in this area. The efficacy of the writ of fieri facias is extended from seventy days to one year.<sup>150</sup> One of the implementing acts makes two changes of importance to seizures generally, which are not limited to those made under a writ of fieri facias. The constructive seizure of immovable property, as an additional mode of seizure, is now possible throughout the state.<sup>151</sup> This remedy, modeled upon the former statute applicable only to Orleans and Jefferson Parishes, is badly needed in cases where actual seizure is either virtually impossible, or simply not feasible. For the first time, money and movables on the person, or in the possession or under the control, of a defendant may be ordered delivered to the sheriff, under penalty of punishment for contempt for a noncompliance.<sup>152</sup>

---

as amended by La. Acts 1960, No. 38, § 1, which went into effect on July 1, 1960. See note 144 *supra*.

146. Art. 2127.

147. *Ibid.*

148. LA. CODE OF PRACTICE art. 890 (1870). In the courts of appeal, if the case was assigned for argument within the first three days of any term, the answer to the appeal might have been filed at any time prior to argument.

149. Art. 2133. This is somewhat of a reversion to the rule of LA. CODE OF PRACTICE art. 890 (1870), prior to amendment by La. Acts 1908, No. 103, § 1. The change made in the new code was designed to effect a definite determination of the issues to be presented to the appellate court as early as feasible, so as to permit and encourage adequate briefing of all of these issues.

150. Art. 2294.

151. LA. R.S. 13:3851-3861 (1950), as amended by La. Acts 1960, No. 32, § 6. These new statutory provisions combine and replace both the former LA. R.S. 13:3857-3862 (1950), providing for the constructive seizure in Orleans and Jefferson Parishes, and the former LA. R.S. 13:3851-3856 (1950), applicable to all parishes except Orleans and Jefferson, providing for the recordation of a notice of seizure of immovable property in the mortgage office of the parish, to serve as notice of the privilege of the seizure.

152. LA. R.S. 13:3862 (1960), added by La. Acts 1960, No. 32, § 6. This statutory provision overrules legislatively a number of cases holding that contempt of court was not an available remedy when a defendant refused to turn over

The judicial sale under execution is changed in several respects. The number of legal advertisements is reduced from the former requirements of three for movables and five for immovables. Under the new code, only one legal advertisement is required for movables, and two for immovables; but in each instance the trial court may order additional advertisements when requested and deemed advantageous.<sup>153</sup> "When property is offered by items or portions and the total price bid is insufficient to satisfy the judgment, with interest and costs, or if the judgment debtor so requests, the property shall be offered in globo and thus sold if a higher bid is obtained."<sup>154</sup> A prior statute, heretofore applicable only to judicial sales in the Parish of Orleans, is now made applicable to the entire state by new statutory provisions<sup>155</sup> adopted by one of the implementing acts. These new statutory provisions permit: (1) the judicial advertisement to designate a minimum percentage of the purchase price to be paid on adjudication; (2) the adjudicatee to pay the balance of his bid within thirty days; (3) the re-sale of the property if the adjudicatee fails to comply with his bid within thirty days; (4) subjecting the first adjudicatee to liability for the difference between the amount bid originally and any lesser amount bid at the re-sale, but not permitting him to profit from any higher bid; and (5) the initial deposit is to be applied towards the satisfaction of any resulting liability of the adjudicatee. This is another change which was badly needed and long overdue.<sup>156</sup>

An unfortunate hiatus under the prior law tied the hands of the sheriff and all junior creditors when property judicially sold brought an amount sufficient to satisfy the claim of the seizing creditor, but with a balance insufficient to satisfy all junior mortgages and privileges. This is filled in by the new code.<sup>157</sup>

---

money or other property on his person, or in his possession or under his control, to the sheriff.

153. Art. 2331. The new LA. R.S. 43:203 (1950), added by La. Acts 1960, No. 34, § 2, provides the rules for computing the publication dates for all judicial advertisements, including those for judicial sales.

154. Art. 2295.

155. LA. R.S. 13:4359-4362 (1950), added by La. Acts 1960, No. 32, § 6.

156. The prior law, in the other 63 parishes of the state, was unsatisfactory and unworkable from the standpoint of both the seizing creditor and the adjudicatee. The obligation of the latter was to pay the full amount of his bid at the moment of adjudication—an impossibility with respect to valuable property which had to be financed. If he failed to do so, the only remedies of the seizing creditor were either: (1) to have the property resold, and the first adjudicatee thus released from all liability; or (2) to sue the adjudicatee to compel specific performance of his bid.

157. "When the sum remaining after payment of the costs and the amount

The rules relating to garnishment are changed in two important aspects. The time allowed for an answer of the garnishment interrogatories in district courts is increased from the prior ten days (plus the distance differential) to a flat fifteen days.<sup>158</sup> The new code ends the need for the judicial straining which our courts were forced to employ in the past in a commendable effort to avoid imposing heavy liability upon a garnishee who was actually not indebted to the judgment debtor, but who failed to answer the interrogatories timely through inadvertence. Under the new code in such a case, the plaintiff must rule the garnishee into court to show cause why the latter should not be condemned to pay the full amount of the plaintiff's judgment or claim. The garnishee's failure to answer the interrogatories timely then constitutes prima facie proof of his indebtedness to the defendant to the full extent of plaintiff's judgment or claim; but the garnishee may now rebut this presumption by proving that he is not actually so indebted, in whole or in part. Even when the garnishee successfully carries this burden of proof, judgment is rendered against him for costs and a reasonable attorney's fee for the plaintiff.<sup>159</sup> The continuing garnishment of wages, salaries, and commissions has been left unchanged in the Revised Statutes,<sup>160</sup> and has not been incorporated into the new code. The general exemptions from seizure are now shifted to the Revised Statutes,<sup>161</sup> without change.

A single article in the new code provides the procedure for the enforcement in Louisiana of a judgment of a court of another state or foreign country. Its provisions are merely declaratory of the prior jurisprudential rules.<sup>162</sup>

### *Summary Process*

The short title in the new code on this subject provides, for the first time, an adequate set of procedural rules for summary

---

due the seizing creditor is insufficient to pay such inferior claims in full, the sheriff may deposit the remainder with the court and proceed by contradictory motion against the inferior creditors to have their claims referred to the proceeds of the sale." Art. 2377.

158. Art. 2412. However, the delay for answering garnishment interrogatories in city and justice of the peace courts, and in the district courts in cases of \$100 or less, is only five days, exclusive of legal holidays. The matter is discussed in Trial Courts of Limited Jurisdiction, *infra*.

159. Art. 2413.

160. LA. R.S. 13:3921-3927 (1950).

161. These provisions have been transferred from the repealed LA. CODE OF PRACTICE art. 644 (1870) to LA. R.S. 13:3881 (1950), added by La. Acts 1960, No. 32, § 6.

162. Art. 2541.



proceedings, which are based upon and taken from the prior case-law. Only one real change is made in this title: exceptions and an answer may be filed to a rule prior to the time assigned for the hearing thereon.<sup>163</sup>

### *Executory Process*

All of the rules regulating executory proceedings are now consolidated, and are stated clearly and distinctly. Only four relatively minor changes are made in the law. A devolutive appeal from an order of seizure and sale is no longer permitted.<sup>164</sup> The need for the conventional *pact de non alienando* in acts of mortgage is eliminated, as the code itself contains a statutory pact.<sup>165</sup> Bond is no longer required when the injunction to arrest executory process is based on a lack of adequate authentic evidence.<sup>166</sup> A chattel mortgage on a motor vehicle evidenced by an act under private signature duly acknowledged may now be enforced by executory process.<sup>167</sup>

### *Succession Procedure*

Those most closely connected with the Institute's work on the new code have often expressed the opinion that the code's greatest contribution to Louisiana law is made by the six titles on succession procedure. It is believed that this view would be justified if the new code went no further than to consolidate all applicable rules on the subject, taken from the Civil Code, the Code of Practice, the Revised Statutes, hundreds of important cases, and from the customary practices in the state. As every attorney in Louisiana has learned from painful experience, the whole theory of succession procedure has been changed by the adoption of the Inheritance Tax Acts; and no provision of the Civil Code or Code of Practice could have been relied on without an extensive research of the Revised Statutes and a mass of jurisprudence. Now complete rules which can be relied on are readily available, phrased in simple language which treats of

---

163. Art. 2593.

164. Art. 2642. This is actually no change, as the devolutive appeal under our prior law was only a trap for the unwary. If the property was sold pending the devolutive appeal, the latter was dismissed on the ground that it presented only a moot question.

165. Art. 2701.

166. Art. 2753(5).

167. The prior doubt on this question, discussed in Comment (c) (3) of Art. 2631, has now been resolved by the amendment of LA. R.S. 32:710(K) (1950) by La. Acts 1960, No. 33, § 1. This statute became effective 20 days after the adjournment of the 1960 regular session of the legislature.

present conditions and practices in Louisiana, rather than of those in France a century and a half ago. The new code does not content itself with this consolidation of rules of succession procedure. It has made the latter adequate for modern social and economic conditions. Because of limitations of space, only the more important of the changes in our succession procedure can be discussed.

Under the prior law, when a probated testament was sought to be annulled, the proponent bore the burden of proving authenticity and validity, unless the presumptive heirs of the testator residing in the parish had been notified of the time the testament was to have been probated, in which event the opponents of the testament carried the burden of proof.<sup>168</sup> The new code takes a more realistic approach by not requiring any such notice, and allowing the time element to determine which party has the burden of proof. If the testament is sought to be annulled within three months of its probate, the proponent carries this burden; if sought to be annulled later, the opponent must shoulder the onus of proof.<sup>169</sup>

The acceptance of successions purely, simply, and unconditionally is quite advantageous to the heirs in many instances, but it may deprive creditors of the deceased of the protection afforded in all common law jurisdictions, where administration for six months or longer is required in all cases. The new code offers much more effective protection to succession creditors than was available theretofore when the succession was accepted without an administration. After the heirs have accepted the succession unconditionally and have been sent into possession, within three months a succession creditor may force them to furnish security for the payment of his claim, under penalty of having the succession reopened and administered.<sup>170</sup>

---

168. The prior rule had two disadvantages. Firstly, it required notice to presumptive heirs in the parish who might not have had the slightest desire or intention of opposing the probate, but who might have been stirred into precipitate action through the notice. This was one of the main reasons why this notice was seldom given. Secondly, it was designed for an era when people rarely left the locality of their nativity, and was anachronistic, in view of the present migratory habits of the American people. The prior rule offered no protection whatever to those presumptive heirs who moved away from the parish, or out of the state.

169. Art. 2932.

170. Two different sets of provisions of law effect this. Under Arts. 3007, 3008, and 3034, within three months of the date of a judgment sending the heirs into possession unconditionally, a creditor may rule these heirs into court to compel them to furnish security for the payment of his claim, and for an administration of the succession in default of the furnishing of this security. Third persons who prior thereto had purchased succession property from these heirs, or

Under the prior law, even though an opposition to an application for appointment as administrator was filed in only one or two cases out of a thousand, notice of such an application had to be advertised for ten days; and the administration could not commence until this delay expired. Under the new code, no such advertisement is necessary. To provide for the occasional case where the application would be opposed, any interested person, after the death of a deceased, may petition the court where the succession will be opened for notice of any application for letters of administration.<sup>171</sup> When such a petition is filed within ten days of the death of the deceased, or prior to the application for appointment, notice of the application must be given to the petitioner,<sup>172</sup> who is allowed ten days to file his opposition thereto.<sup>173</sup> If no such petition for notice is filed prior to the application for appointment, and ten days have elapsed since the death of the deceased, the court may act upon the application *ex parte*.<sup>174</sup>

The prior rules governing the public inventory are retained by the articles on the subject of the new code.<sup>175</sup> Under the Inheritance Tax Act a sworn, descriptive list of the property of the deceased had to be filed when there was no administration of the succession and no formal inventory filed. In Orleans Parish, a formal inventory was required by law in all cases where the deceased's estate grossed ten thousand dollars or more. The new code allows the person at whose instance an inventory would otherwise be taken, in all cases, the option of submitting a sworn, descriptive list of all succession property.<sup>176</sup> This is the article which produced opposition to the new code from some of the judges and attachés of the Civil District Court for the Parish of Orleans, and from some of the New Orleans notaries.<sup>177</sup>

---

obtained mortgages thereon, are not prejudiced thereby. See Art. 3008.

A second set of statutory provisions enables a succession creditor, where there has been no administration, to obtain a privilege on all of the property left by the deceased by filing an affidavit of his claim in the mortgage office within three months of the death of the deceased. This privilege affects movables left by the deceased and then held by the heirs, and all immovables inherited from the deceased, even though alienated by the heirs. LA. R.S. 9:5011-5016 (1950), added by La. Acts 1960, No. 31, § 6. These statutory provisions replace LA. CIVIL CODE arts. 1444-1464 (1870) regulating the action of separation of patrimony, which were repealed by La. Acts 1960, No. 30, § 2. Conceivably in certain instances this may cause the immovables left by a deceased to be in limbo for three months after his death, but the same result obtained before under LA. CIVIL CODE art. 1458 (1870).

171. Arts. 3091-3093.

172. Art. 3093.

173. Art. 3094.

174. Arts. 3094, 3096.

175. Arts. 3131-3135.

176. Art. 3136.

177. Investigation by the Law Institute of the manner in which the prior law

Probably the greatest defect of our prior succession procedure was due to the fact that the court had no power to authorize the succession representative to do a number of things which are absolutely necessary for the efficient management of the estate. The new code supplies this necessary judicial power. After notice to the heirs and creditors, and a contradictory hearing if any oppose the request for authority, the district court may authorize: the compromise or modification of any action or right of action by or against the succession;<sup>178</sup> the investment of the idle funds of a succession;<sup>179</sup> the continuation of any business owned by the deceased;<sup>180</sup> the lease of succession property;<sup>181</sup> the performance of an executory contract;<sup>182</sup> and the borrowing of

---

operated in Orleans Parish indicated that in the great majority of cases the appraisers appointed for succession inventories had no specialized knowledge of the values of the property which they were called on to appraise, but were attachés of the civil district court; that in some instances these appraisers never saw the property which they appraised, and did nothing more than sign the inventory; that in other instances bank accounts were "appraised," at considerable expense to the heirs; and that in all cases the cost of these inventories in Orleans Parish was completely out of line with their cost in the great majority of other parishes. The Institute concluded that in many instances an inventory served no useful purpose whatever; that in such instances the notarial and appraisers' fees constituted legal "feather-bedding" which could neither be justified nor defended; and that the prior practices in New Orleans constituted the very worst form of public relations for the profession.

At its meeting on May 14, 1960, the Council of the Law Institute considered a request that Art. 3136 be amended so as to require inventories for all successions which were to be administered. This request was based on the argument that, in such cases, an inventory by a disinterested notary was needed for the protection of succession creditors, who otherwise might be defrauded through the intentional omission of the applicant for letters to list items of property on the descriptive list which were owned by the deceased. After due consideration, the Council concluded: (1) that the information used by the notary in listing the property of the deceased in an inventory always comes from the attorney who would prepare the sworn, descriptive list; (2) that there is no more opportunity for the concealment of succession assets by dishonest heirs in the sworn, descriptive list than in the inventory; (3) that a fraudulent descriptive list can be corrected in exactly the same manner as a fraudulent inventory; and (4) in some aspects, a sworn, descriptive list provides greater protection to succession creditors, since a dishonest applicant who intentionally omits items of property from his list not only subjects himself to punishment for contempt for deceit and imposition on the court, but also subjects himself to a criminal prosecution for false swearing. The Council of the Institute further noted that the inventory of Louisiana law is completely unknown to the other 49 states of the Union, where the sworn, descriptive list has always been used successfully.

LA. R.S. 47:2413(B) (1950) was amended by La. Acts 1960, No. 35, § 1, so as to avoid any conflict with the provision of Art. 3136.

178. Art. 3198.

179. Art. 3223.

180. Arts. 3224, 3225.

181. Art. 3226. This article does not affect in any way the authority of a succession representative to execute a mineral lease, under LA. R.S. 9:1491-1493 (1950).

182. Art. 3227.

money by the succession representative.<sup>183</sup>

Statutes adopted since 1932 have liberalized the procedure for selling succession property, both at private and at public sale. These advances are retained under the new code, which further makes it possible in all cases to sell succession property for any purpose whatsoever.<sup>184</sup> As in sales under execution, the number of advertisements for the public sale of succession property is reduced to one advertisement for movables and two for immovables, with power granted to the court to require additional advertisements when advantageous.<sup>185</sup>

The prior procedure for the submission of the claims of creditors and their payment by the succession representative in due course of administration is retained in the new code; but three additional safeguards are afforded succession creditors. Firstly, provision is made for the submission of a sworn, formal proof of claim by a creditor.<sup>186</sup> The submission of this formal proof of claim, even if rejected by the succession representative: (1) suspends the running of prescription on the claim as long as the succession is under administration;<sup>187</sup> and (2) avoids the effect of the statutory prohibition of parol proof of a claim against a party deceased.<sup>188</sup> Secondly, the acknowledgment by a succession representative of a claim, no matter how submitted, has greater effects.<sup>189</sup> Thirdly, a creditor may petition the court for mail notice by the succession representative of the filing of his tableau of distribution.<sup>190</sup> If a copy of this petition is served on the succession representative, the latter must mail a notice to the petitioning creditor of the filing of the tableau.<sup>191</sup>

The problem of the "overlooked asset" of a succession is solved by the new code, which authorizes the re-opening of a closed succession when and if such assets are subsequently dis-

---

183. Art. 3228.

184. Art. 3261.

185. Art. 3272.

186. Art. 3245.

187. *Ibid.*

188. L.A. R.S. 13:3721(4) (1950), as amended by La. Acts 1960, No. 32, § 1.

189. It would: (1) entitle the creditor to have his claim included on the tableau of distribution; (2) create a prima facie presumption of the validity of the claim, even though not included on the tableau; and (3) suspend the running of prescription against the claim as long as the succession was under administration. Art. 3243. Further, it would avoid the effect of the statutory prohibition of parol proof of a claim against a party deceased. L.A. R.S. 13:3721(2) (1950), as amended by La. Acts 1960, No. 32, § 1.

190. Art. 3305.

191. Art. 3306.

covered.<sup>192</sup> Ancillary probate procedure is spelled out in the new code,<sup>193</sup> through a codification of the prior jurisprudential rules on the subject.

As under the prior law, half-costs are provided for in small successions, but the new code makes two important changes in this area. Firstly, the "small succession" has had its maximum increased from five hundred dollars to two thousand dollars.<sup>194</sup> Secondly, it is not "necessary to open judicially the small succession of a person who died intestate leaving no immovable property, and whose heirs are his descendants, ascendants, or surviving spouse."<sup>195</sup> In such instances, the heirs must submit to the inheritance tax collector an affidavit stating the facts and describing the property of the deceased.<sup>196</sup> An endorsement by the inheritance tax collector that no inheritance tax is due on a multiple original of such affidavit is full authority for the payment of money or delivery of property owned by the deceased prior to his death.<sup>197</sup>

### *Provisional Remedies*

The number of conservatory writs has been reduced from five to three, through the abolition of the harsh writ of arrest,<sup>198</sup> and the merger (without further change) of provisional seizure with sequestration.<sup>199</sup> Garnishment, heretofore an incident only of the writs of fieri facias and attachment, is also made available

---

192. Art. 3393.

193. Arts. 3401-3405. See note 83 *supra*.

194. Art. 3421.

195. Art. 3431.

196. Art. 3432.

197. Arts. 3433, 3434. None of the articles in the new code repeal, modify, or affect the provisions of LA. R.S. 9:1513 (1950), allowing a surviving spouse to withdraw \$1,000 from the funds of a deceased on deposit, without a judgment of possession or court order.

198. *Preliminary Statement*, PROJET OF THE LOUISIANA CODE OF CIVIL PROCEDURE 547, 548 (1960).

199. Arts. 3572, 3575. Where the lessor employs sequestration to enforce his claim for unpaid rent, the writ issues without bond. Art. 3575. A number of the special statutes incorporated in Title 9 of the Revised Statutes, and one in Title 13 thereof, made provisional seizure available for the enforcement of the privileges recognized therein. La. Acts 1960, No. 31, § 1, amends LA. R.S. 9:4501, 9:4502, 9:4601, 9:4622, 9:4721, and 9:4866 (1950) so as to make these privileges enforceable by sequestration without bond. La. Acts 1960, No. 32, § 6, adds a new LA. R.S. 13:4002 (1950) to make sequestration without bond the remedy for the enforcement of the privileges of farm and plantation workers, and adds a new LA. R.S. 13:3957 (1950) which provides that sequestration without bond may be used wherever a statute authorizes the use of provisional seizure.

See also LA. CIVIL CODE art. 2709 (1870), as amended by La. Acts 1960, No. 30, § 1.

under the writ of sequestration.<sup>200</sup> The necessity of posting the citation and notice of seizure on the bulletin board of the court, when the attachment is issued against a nonresident, is now eliminated. Citation and all other papers must be served upon the attorney at law appointed by the court to represent the nonresident defendant.<sup>201</sup> Under the prior law, attorney's fees were allowed defendants only when the writs of attachment and sequestration were dissolved on motion, and prior to trial of the cases on their merits. Under the new code, attorney's fees may be allowed the defendants "whether the writ is dissolved on motion or after trial on the merits."<sup>202</sup> The prior law required a release bond of a defendant to effect the release of attached property from seizure, but permitted the defendant to effect the release of sequestered property under a forthcoming bond.<sup>203</sup> This is changed under the new code, which requires a release bond in both cases.<sup>204</sup>

Only one important change is made in injunction procedure.<sup>205</sup>

### *Real Actions*

The Council of the Law Institute spent a very considerable amount of time on this title, considering and rejecting several possibilities for the simplification of the procedure in this area, before accepting the one finally adopted. This attains the desired simplicity, ties in much more closely with the concepts of the Civil Code than did the Code of Practice, and retains the usefulness of all prior jurisprudence in this field. The former petitory action and the former action to establish title are merged into a broadened petitory action,<sup>206</sup> with the possession (or lack of pos-

---

200. Art. 3503.

201. Art. 5091.

202. Art. 3506. This article restores the jurisprudential rule in effect in Louisiana for more than a century, which allowed the court to apportion the services of the attorney in dissolving the writ and defending the case on its merits. The rule discarded by this article unfairly prejudiced a defendant whose valid motion to dissolve was erroneously overruled, only to be sustained after a trial on the merits, or on appeal.

203. The obligation of the release bond is to pay any judgment recovered by the plaintiff, with the surety's obligation limited to the penal sum of the bond. The obligation of the forthcoming bond is only to return the property when demanded by the sheriff, with no liability under the bond for ordinary wear and tear. In the case of automobiles and other mechanical equipment, the forthcoming bond greatly reduces the plaintiff's chances of enforcing his judgment against the property seized.

204. Arts. 3507, 3508.

205. A suspensive appeal from a final injunction may no longer be taken by the defendant as a matter of right, but now rests within the sound judicial discretion of the trial court. Art. 3612.

206. Arts. 3651-3653.

session) of the defendant determining the type of burden of proof imposed on the plaintiff.<sup>207</sup> Through a broadening of the definition of "disturbance in law" of the Code of Practice to include all of the grounds for the former jactitory action,<sup>208</sup> the latter is merged with the former possessory action into a broadened possessory action.<sup>209</sup> The judgment which may be rendered in favor of a successful plaintiff in the broadened possessory action not only would quiet him or restore him to possession, but if he had prayed for this relief, it would also order the defendant to assert his pretensions of ownership within a delay to be fixed by the court (not less than sixty days), or be precluded thereafter from ever asserting such pretensions.<sup>210</sup> The broadened possessory action thus retains, for a person in possession, all of the advantages of the former jactitory action. To fill in serious hiatuses in the former procedure, an article in the new code provides that possession determines the burden of proof in actions where the ownership of immovables is at issue directly or indirectly, such as those for a declaratory judgment, concursus proceedings, and expropriation cases.<sup>211</sup>

The cumbersome and tedious procedure of the former hypothecary action (properly speaking) is simplified greatly. The new code contains a statutory *pact de non alienando* which applies to all judicial and legal mortgages.<sup>212</sup> The creditor has to reduce his claim secured by a legal mortgage to judgment; and, of course, he would already have a judgment in the case of a judicial mortgage. Property in the hands of a third person subject to a judicial or legal mortgage may be seized in the execution of this judgment,<sup>213</sup> with notice of the seizure of the property served on both the judgment debtor and the then owner or possessor.<sup>214</sup> As a practical matter, there is no change in the pro-

---

207. The new code retains the rule of the former petitory action, and all of the jurisprudence thereof by requiring a plaintiff, when the defendant is in possession, to "make out his title" to the property. When the defendant is not in possession, the plaintiff is only required to "prove a better title thereto than the defendant." Art. 3653. The latter rule is based on the sounder line of conflicting jurisprudence with respect to the former action to establish title. See Comment (b) of Art. 3653.

208. Art. 3659. The defective and ridiculous definition of "disturbance in law" of Article 52 of the Code of Practice appears to have been the reason for our borrowing the jactitory action from Spanish procedure. France has gotten along well for centuries without it, due to the broad definition in its jurisprudence of the "trouble de droit" as a ground for employing the possessory action.

209. Arts. 3655-3662.

210. Art. 3662.

211. Art. 3654. The burden of proof is the same as under Art. 3653. See note 207 *supra*.

212. Art. 3741.

213. *Ibid.*

214. Art. 3742.



cedure for the enforcement of a conventional mortgage by an ordinary proceeding.<sup>215</sup> The remedies formerly available to a defendant in the former hypothecary action (properly speaking) are all available to the then owner or possessor of the property seized, but he has to become the actor, and assert his rights through injunction or intervention.<sup>216</sup>

### *Separation from Bed and Board, and Divorce*

The new code consolidates the procedure in these areas, which is transferred from the Civil Code and the Revised Statutes. Only two changes are made in the law, both of which are quite important. Firstly, the venue in separation and divorce cases is broadened appreciably: these actions "shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile."<sup>217</sup> Secondly, the appeal taken from a judgment in these cases "shall not suspend the execution of the judgment in so far as the judgment relates to custody or alimony."<sup>218</sup>

### *Tutorship*

A full complement of articles is provided in the new code on this subject, but, except as noted below, the title on the subject merely consolidates the procedural rules thereon heretofore contained in the Civil Code, the Revised Statutes, and the jurisprudence. There are only two important changes made. Firstly, the court is given the same power to authorize necessary acts of management by the tutor as is given it by the new code with respect to the succession representative.<sup>219</sup> Secondly, the new code adopts the "prudent man rule" for the investment and management of the minor's funds and property.<sup>220</sup> This permits a tutor, with the prior approval of the court,<sup>221</sup> to invest the minor's funds in "blue-chip" stocks which will rise in value if inflation continues to progress, instead of compelling him to invest in bonds which, if the present creeping inflation continues,

---

215. Since practically all conventional mortgages contain the *pact de non alienando*. In the enforcement of a conventional mortgage by an ordinary proceeding, notice of seizure need be served only on the judgment debtor, and there is no necessity for service of such a notice on the then owner of the property. Cf. Arts. 3722 and 3742.

216. Art. 3743.

217. Art. 3941.

218. Art. 3943.

219. Arts. 4265-4268.

220. Art. 4269.

221. Art. 4270.

may represent less purchasing power at the end of a long period of investment than at the beginning.

#### *Interdiction and Curatorship of Interdicts*

The title on these subjects in the new code likewise affects a consolidation of the procedural rules transferred from the Civil Code, the Revised Statutes, and the jurisprudence. Only two changes in the procedural law are made thereby, both in the same article. Firstly, the clerk of court is required to record in the conveyance records a notice of the filing of the suit for interdiction. Secondly, the curator is required to cause the registry of the judgment of interdiction in the conveyance records of the parish where the judgment was rendered, and of every other parish where the interdict owns immovable property, within ten days of the curator's appointment.<sup>222</sup>

#### *Partition Between Co-Owners*

The title in the new code, consolidating the Civil Code, the Revised Statutes, and the jurisprudential rules on the subject makes a single important change in the procedural law, in the chapter dealing with partition when an absentee is a co-owner. An article therein provides that when plaintiff has prayed for a partition by licitation and an absent defendant appears personally and so prays, the court may order a partition in kind if the property is susceptible of division.<sup>223</sup>

#### *Concursus Proceedings*

The new code articles on this subject blend the jurisprudential rules of concursus and the provisions of the former Interpleader Act. Two important changes are made thereby. Firstly, the remedy is broadened to include the equitable bill in the nature of interpleader, as well as interpleader itself; and thus protection is afforded not only against double or multiple liability but also against double or multiple vexation from litigation as well. The remedy is made available not only to a stakeholder who admits liability, but to a person who denies liability in whole or in part, but who contends that, if subject to any liability, he is liable to only one of the defendants.<sup>224</sup> Secondly, a change is made with

---

222. Art. 4552.

223. Art. 4630.

224. Art. 4652.

respect to the penalty for failure of a defendant to answer timely.<sup>225</sup>

### *Eviction of Tenants and Occupants*

The articles in the new code on eviction combine the provisions of the Eviction of Tenants Act and the Sharecroppers Eviction Act. One quite important change in the law is made therein. Under the new code, the notice to vacate must allow the tenant or occupant not less than five days to vacate in all cases.<sup>226</sup> Under the prior law, the vacate notice had to allow at least five, ten, or thirty days, depending on the circumstances.

### *Trial Courts of Limited Jurisdiction*

This title in the new code provides the long-needed set of uniform procedural rules for cases in the justice of the peace, city, and municipal courts of civil jurisdiction, and in the district courts in cases involving one hundred dollars or less — those cases over which the district courts have concurrent jurisdiction with justices of the peace. A number of important procedural changes are made in this title.

The jurisdiction of all city courts is automatically raised to their full constitutional maximum.<sup>227</sup>

In all cases in *all* city courts, *regardless of the amount involved*, in justice of the peace courts, and in cases involving one hundred dollars or less in the district courts:

- (1) The delay for answering is five days, exclusive of legal holidays;<sup>228</sup>

---

225. The prior act provided that, in such a case, the tardy claimant was estopped from asserting his claim; but the courts, to avoid the imposition of such a harsh penalty, held that it might not be imposed unless a default had been taken and confirmed against the tardy claimant. This rule might have worked well when only two claimants were impleaded, but when there were a large number of defendants, some of whom had answered timely and some of whom had not, the rule was impossible to apply. To solve this problem, Art. 4657 provides that if a claimant impleaded fails to answer timely, any interested party may obtain an order requiring him to answer within an additional delay, under penalty of being precluded thereafter from answering. It is believed that such a reasonable sanction will be enforced by the courts.

226. Arts. 4701, 4702. The requirement in Art. 4701 that the vacate notice must be given not more than thirty days before the expiration of a lease which has a definite term is to prevent the incorporation of such a notice in the lease at the time of its execution.

227. Arts. 4832-4835. The jurisdiction of city courts in New Orleans is prescribed by LA. CONST. art. VII, §§ 91, 92 (1921).

228. Arts. 4895, 4921, 4922(1), 4941, 4971, 5002.

(2) An appeal, suspensive or devolutive, must be taken within ten days;<sup>229</sup>

(3) Answers to garnishment interrogatories must be filed within five days, exclusive of legal holidays;<sup>230</sup>

(4) Notice of rendition of judgment is unnecessary, except when rendered by default in a case where only domiciliary service of citation has been made;<sup>231</sup> and

(5) All exceptions must be filed with the answer.<sup>232</sup>

Applications for new trial are not allowed in justice of the peace courts, and generally in city courts when the amount involved is one hundred dollars or less;<sup>233</sup> but such applications are allowed in city courts when the amount involved is more than one hundred dollars,<sup>234</sup> and in district courts, both in cases involving one hundred dollars or less and in *de novo* appeals.<sup>235</sup>

Except as mentioned above, the procedure in city courts in cases involving more than one hundred dollars is the same as in the district court of the parish where the city is situated.<sup>236</sup>

The numerous, lengthy, and repetitious sections formerly in Title 13 of the Revised Statutes on city and justice of the peace courts have been re-drafted and simplified by one of the implementing acts.<sup>237</sup>

### *Other Provisions of Act Adopting Code*

The new procedural code is adopted by Section 1 of Act 15 of 1960. Other sections of this statute warrant notice. Section 2 authorizes the Louisiana State Law Institute to direct the continuous revision of the new code, so as to incorporate therein all future procedural legislation. This employs the same pattern

---

229. Arts. 4899, 4921, 4922(6), 4942, 5002. The Civil District Court for the Parish of Orleans has no jurisdiction over a case involving \$100 or less. LA CONST. art. VII, §§ 81, 91, 92 (1921). No appeal lies from a judgment rendered by any other district court in a case involving \$100 or less. *Id.* art. VII, § 29.

230. Arts. 4895, 4921, 4922(5), 4941, 4971, 5002.

231. Arts. 4898, 4921, 4922(4), 4941, 4971, 5002.

232. Arts. 4892, 4921, 4922(2), 4941, 4971, 5002.

233. Arts. 4897, 4921, 4941. A new trial may be applied for in a New Orleans city court in cases involving \$25 or more. Arts. 4922, 5002.

234. Art. 5002.

235. Art. 4972.

236. Art. 5002.

237. La. Acts 1960, No. 32, §§ 3 and 4, adopting a new Chapter 7, "City Courts," composed of 76 new sections added as LA. R.S. 13:1871-2162 (1950), and adopting a new Chapter 9, "Justice of the Peace Courts," composed of 7 new sections added as LA. R.S. 13:2581-2587 (1950).

which has been adopted heretofore by the legislature to provide for the continuous revision of the Revised Statutes. Section 3 contains the necessary severability clause.

Section 4 of the adopting statute provides that the provisions of the new code, when effective, will apply to all civil actions or proceedings instituted thereafter or then pending. However, with respect to the latter, the act makes two important exceptions to cover the transition. The first provides that the adoption of the new code will not

“decrease or shorten any procedural delay granted or allowed by any law in existence immediately prior to, and which had commenced to run but had not yet completely elapsed on, the effective date.”

The second exception provides that the adoption of the new code will not “affect the validity or change the legal effect of any judicial, official, or procedural act done or attempted, or of any failure to act, prior to the effective date.”

Section 5 repeals the Code of Practice and all laws in conflict or inconsistent with the new code. The repealing section, however, specially excepts the 1960 legislation recommended by the Judicial Council to implement the recent constitutional appellate reorganization.<sup>238</sup> To avoid the inevitable conflict of legislation adopted later in the legislative session, Section 6 of the adopting act specially provides that the provisions of the new code shall control and prevail over any other 1960 statute in conflict therewith, “regardless of which act is adopted later or signed later by the Governor.”

Section 7 provides that the Louisiana Code of Civil Procedure shall become effective on January 1, 1961.

---

238. La. Acts 1960, No. 38, § 1, amending LA. R.S. 13:4438, 13:4441, 13:4442, 13:4445, and 13:4446 (1950).