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# Pleading and Practice - Appeal of Dissolution of Nonresident Attachment

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## PLEADING AND PRACTICE — APPEAL OF DISSOLUTION OF NONRESIDENT ATTACHMENT

Plaintiff brought an action for indebtedness coupled with a writ of attachment under which certain property was seized on the ground that defendants were absentees or nonresidents of the state. Intervenor moved for dissolution of the writ on part of the property seized. Upon plaintiff's failure to answer the intervention, a default judgment was rendered against him, dissolving the attachment as to a portion of the property. Eleven months later, plaintiff appealed devolutively from the judgment dissolving the attachment. The Supreme Court *held* motion to dismiss the appeal sustained. The validity of a judgment dissolving a nonresident writ of attachment cannot be affected by a reversal of the judgment on a devolutive appeal, for jurisdiction over the property has been lost. Such legal consequences could have been avoided only by taking and perfecting a suspensive appeal. *South Street Lumber Co. v. Dickerson,* 106 So.2d 513 (La. 1958).

There are two distinct types of attachments under Louisiana law: resident,[1] where the writ is merely incidental to a demand in personam, and nonresident[2] where the proceeding is quasi in rem,[3] operating only upon the property seized. The resident

1. LA. CODE OF PRACTICE art. 240 (1870): "A creditor may obtain such attachment of the property of his debtor, in the following cases: (1) When such debtor is about leaving permanently the State, without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him previous to his departure, or when such debtor has already left the State permanently. . . . (3) When he conceals himself to avoid being cited and forced to answer to the suit intended to be brought against him. (4) When he has mortgaged, assigned or disposed of, or is about to mortgage, assign or dispose of his property, rights or credits, or some part thereof with intent to defraud his creditors or give an unfair preference to some of them. (5) When he has converted, or is about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors."

2. *Id.* art. 240(2): "A creditor may obtain such attachment of the property of his debtor . . . (2) When such debtor resides out of the State." LA. R.S. 13:3952 (1950), originally La. Act 1932, No. 220, § 1: "In all suits in which the demand is for a money judgment and the defendant is a non-resident of this state, or when the defendant is not domiciled in this state, whatever may be the nature, character or origin of the plaintiff's claim, the plaintiff may sue out a writ of attachment against the defendant's property, whether the claim be for a sum certain or for an uncertain amount, and whether the claim be liquidated or unliquidated, upon making affidavit and giving bond as now required by law in suits against non-resident defendants, provided that the provisions of this Section shall not apply in cases in which the defendant has a duly appointed agent in the state upon whom service of process may be made."

3. Freeman v. Alderson, 119 U.S. 185 (1886): "There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims as-

attachment is a conservatory writ provided by law in aid of and to protect the creditor's rights under certain circumstances[4] in a personal action against the debtor. The citation is the basis of jurisdiction for the action, with the attachment as an incident thereof.[5] In the case of the nonresident attachment, however, the action is not a demand on the person, but upon the property seized.[6] The attachment itself constitutes the principal demand, is the very foundation of the suit, and stands as the basis of jurisdiction and in place of the citation required in ordinary proceedings.[7] It becomes apparent, then, that when the proceeding is predicated upon the writ of attachment, dissolution of the writ results in dismissal of the action.[8] However, the attaching creditor is not without remedy, for it is well settled that an appeal may be taken from an interlocutory judgment which releases property from attachment.[9]

The necessity of taking a suspensive rather than a devolutive appeal from the dismissal of nonresident attachments was first recognized in the early case of *Watson v. Simpson*[10] in which the court held that such an appeal was essential to maintain the liability of sureties on a bond releasing property attached, after the attachment had been dissolved. This principle was reaffirmed sixty-five years later in *Stanford v. Bischoff*,[11] where the court announced that a devolutive appeal from a judgment sustaining an exception of no cause of action did not stay the dissolution of the nonresident attachment; therefore, the attachment could not be reinstated on appeal even though judgment

serted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State."

4. See circumstances enumerated in note 1 *supra*.

5. Burgin Bros. & McCane v. Barker Baking Co., 152 La. 1075, 95 So. 227 (1922).

6. *Ibid.*

7. Hope v. Gordon, 186 La. 697, 173 So. 177 (1937); W. H. Hodges & Co. v. Penn R.R., 171 La. 699, 132 So. 115 (1931); Collins v. McCook, 136 So. 204 (1931); Latham v. Glasscock, 160 La. 1089, 108 So. 100 (1926); Pugh v. Flannery, 151 La. 1063, 92 So. 699 (1922); First Nat. Bank & Trust Co. v. Drexler, 171 So. 151 (La. App. 1936); Wright v. Melder, 125 So. 765 (La. App. 1930).

8. First Nat. Bank v. Pierson, 176 La. 792, 146 So. 749 (1933); Watson v. Simpson, 15 La. Ann. 709 (1860); Schlatter v. Broaddus, 4 Mart.(N.S.) 430 (1826).

9. Pittman v. Lilly, 197 La. 233, 1 So.2d 88 (1941); Stanford v. Bischoff, 159 La. 892, 106 So. 371 (1925); Bayne v. Cusimano, 50 La. Ann. 361, 23 So. 361 (1897); Wickman & Pendleton v. Nalty, 41 La. Ann. 284, 6 So. 123 (1889); Watson v. Simpson, 15 La. Ann. 709 (1860); Love, Savage & Co. v. McComas & Cloon, 14 La. Ann. 201 (1859); Hyde v. Jenkins, 6 La. 427 (1834); Laverty v. Anderson, 4 Mart.(O.S.) 606 (1817).

10. 15 La. Ann. 709 (1860).

11. 159 La. 892, 106 So. 371 (1925).

on the exception was reversed. However, in both of these cases the defendants, though nonresidents, submitted personally to the jurisdiction of the court, so the requirement of taking a suspensive appeal to maintain the jurisdiction of the court over the subject matter was not at issue.

A comprehensive search on this point in other states revealed only that one other court indirectly approached the issue here presented when determining whether a timely appeal from the dissolution of an attachment resulted in a stay of judgment.[12] The court said: "The present action is, in part, one in rem . . . Dissolution of the attachment . . . in this case was tantamount to release of the res from the jurisdiction of the court and plaintiff's appeal must be held to stay such release for otherwise the anomalous result would be a timely and well-taken appeal without a respondent."

Not until the instant case has a Louisiana court had occasion to announce that the taking of a suspensive appeal is a prerequisite for maintaining jurisdiction over the suit after judgment dismissing the nonresident attachment is rendered. The court reasoned that once a seizure of property by way of nonresident attachment has been dissolved, the judgment of dissolution, upon failure of the seizing creditor to obtain and perfect a suspensive appeal, releases the *res* which is the basis of jurisdiction. Inasmuch as the attachment could not be revived or reinstated by means of a devolutive appeal, the case was moot; and the court refused to pass on the rights of the creditor. This decision appears to be the only one possible. The creditor having failed to take and perfect a suspensive appeal, the inevitable legal results were release of the property and termination of the suit. A reversal on a devolutive appeal of the final and executed judgment dissolving the attachment would find the court powerless to breathe new life into the original attachment since jurisdiction had been lost. Thus, it becomes apparent that such a consequence could have been precluded only by employing the suspensive appeal.

It is submitted that the court's decision is both logical and sound, although it should be noted that it impales a creditor on the horns of a dilemma: If he elects to appeal suspensively from the dissolution of the nonresident attachment, he potentially increases the damages for which he will be liable should it be

12. Melton v. Walker, 209 S.C. 330, 336, 40 S.E.2d 161, 163 (1946).

found, on appeal, that the attachment was validily dissolved. On the other hand, if he chooses not to appeal suspensively, jurisdiction over the action is lost and the creditor's suit terminated.

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### QUASI CONTRACTS —THE FUND DOCTRINE

Plaintiffs in the instant proceeding were attorneys who, in a prior suit, had been employed to represent a relatively small group of depositors opposing a tableaux for distribution of funds held by a bank in liquidation. The basis of the depositors' opposition was that interest from the date of liquidation had not been included in the proposed distribution. The trial court had awarded interest not only to the claiming depositors represented by plaintiffs but also to *all* depositors. On appeal of the depositors' case, the appellant, the banking commissioner, contended that the lower court had erred in awarding interest to the depositors from the inception of the liquidation. He also contended that the lower court had erred in awarding interest to depositors who failed to oppose the distribution. During that appeal, the attorneys had sought affirmance of the judgment of the lower court which had allowed interest from the inception of the liquidation; they *also* had sought to have the judgment affirmed with respect to the unrepresented depositors. The Supreme Court had affirmed the lower court in allowing interest to all depositors from the inception of the liquidation.[1] The attorneys then sought compensation for professional services rendered to all depositors. The bases of their claim are: first, in answering the appeal of the depositors' case, they had sought affirmance of the judgment allowing interest from the inception of the liquidation for their clients, and also had sought affirmance of the judgment allowing interest to the unrepresented depositors; and second, if the proposed distribution had not been opposed, the depositors as a class would have received no interest. The lower court rejected this claim; the Supreme Court, on rehearing, *held*, reversed. These attorneys have brought themselves within the "fund doctrine," and they should recover attorneys' fees, on a quantum meruit, out of the funds so created. *In re Interstate Trust and Banking Company*, 235 La. 825, 106 So.2d 276 (1958).

1. *In re* Interstate Trust and Banking Co., 222 La. 979, 64 So.2d 240 (1953).