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However that court accorded standing to the taxpayer to bring suit questioning the legality of police jury action in "closing" a portion of what had been a park area for the purpose of additional public buildings. It found no "closing" but noted that taxpayers have the right to resort to judicial authority to restrain their public servants from transcending their powers where there is evidence (not present in this case) that the result thereof would be to increase the burden of taxation or otherwise injuriously affect the taxpayer.⁴⁴

PROCEDURE

CIVIL PROCEDURE

*Howard W. L'Enfant, Jr.**

General Appearance

If, after filing a declinatory exception alleging lack of jurisdiction, and insufficiency of citation and service of process, the defendant files notice of the taking of a deposition, has he made a general appearance thereby waiving all objections to jurisdiction? This issue was raised in *Stelly v. Quick Manufacturing, Inc.*,¹ and the court ruled that the defendant had made a general appearance because the depositions were concerned with the merits of the case and were not limited to the objections as to *citation* and service of process which had been raised in the declinatory exception. Therefore, in taking the deposition, the defendant was seeking relief other than that permitted in article 7 of the Louisiana Code of Civil Procedure.

Although it may be argued that the defendant had not asked the court for any relief at all because he had not sought an order from the court, the ruling seems to be consistent with the intent of article 7 of the Code of Civil Procedure that if a defendant objects to jurisdiction, he must not voluntarily participate in the action except to challenge the jurisdiction of the court or to seek the limited relief allowed under that article. The filing of a notice of the taking of a deposition in preparation for a trial on the merits, although not a request for relief, is inconsistent with the non-resident defendant's position that he

44. *Id.* at 206-07.

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1. 228 So.2d 548 (La. App. 3d Cir. 1969).

should not be compelled to try the case in Louisiana. Also, it should be noted that the depositions were filed in the record, although the court did not give this as a reason for its decision.

This ruling presents certain problems for the defendant and raises several questions. As a practical matter, the ruling could put the defendant at a disadvantage in preparing his case in the event his objections were overruled. If, as in the instant case, the trial judge delays his decision on the defendant's objections for several months (in the instant case there was a nine month interval between hearing and decision), the defendant would not be able to use discovery to obtain statements from witnesses and the other party while their memories were fresh or to obtain a physical examination of the plaintiff before his alleged injuries had healed. The case also presents certain legal questions. If the plaintiff takes the deposition of the defendant and inquires into the merits of the case, has the defendant made a general appearance? This question was raised in the instant case concerning interrogatories to the defendant, and the court ruled that the answers did not constitute a general appearance because the questions only dealt with the issue of jurisdiction. Further, had the evidence not been obtained through the interrogatories, the defendant would have been entitled to present it either by testimony or by deposition at the hearing on his declinatory exception. This reasoning seems to imply that answers to interrogatories which pertained to the merits of the case would have been a general appearance and objection to jurisdiction would have been waived. Presumably, the same result would obtain if the defendant's deposition had been taken and he had answered questions which pertained to the merits. In the light of this case, it seems that a defendant who objects to jurisdiction or to the sufficiency of citation and service of process may not use any of the discovery devices except to obtain evidence on the issues raised by his declinatory exception, and if the plaintiff uses discovery against him, he must refuse to participate if the plaintiff's inquiry is into the merits of the case. Under Louisiana Code of Civil Procedure article 1421, the parties may stipulate that a deposition be taken in any manner and upon any notice, and it has been held that the use of this informal discovery procedure will not be considered a step in the prosecution or defense of an action for the purpose of determining whether an action has been abandoned.² But it is not certain

2. *De Clouet v. Kansas C. So. Ry.*, 176 So.2d 471 (La. App. 3d Cir. 1965)

whether the use of this procedure would be a general appearance. The defendant would certainly argue that he has not asked the court for any relief and that the taking of depositions in this manner is not a formal proceeding but simply investigation in preparation for trial. Whether this argument would be successful after the *Stelly* case is not clear.

Jurisdiction Over Status

Two recent cases have raised questions as to the sufficiency of the provisions of Code of Civil Procedure article 10, concerning jurisdiction over status.

In the first case, *Self v. Self*,³ the husband filed suit for divorce on the grounds of adultery. The wife had moved to Texas after obtaining a judgment of separation, and the alleged adultery had occurred in Texas. The wife made no appearance and was represented by a court-appointed attorney. The trial court granted the husband a judgment of divorce on the ground of adultery but the court of appeal held that under Louisiana Code of Civil Procedure article 10 (7), Louisiana courts have no jurisdiction in this type of divorce suit. That article provides that a Louisiana court would have jurisdiction in an action for divorce only if one or both of the spouses are domiciled in the state and the grounds occurred in Louisiana or while the matrimonial domicile was in the state. Since the grounds had occurred in Texas, the only possibility for jurisdiction rested on the presence of the matrimonial domicile in the state. But the court reasoned that the judgment of separation had ended the obligation of the parties to live together,⁴ and therefore the matrimonial domicile had been extinguished. The wife, relieved of her obligation to live with her husband, was free to establish a separate domicile.⁵ In drafting the provisions for jurisdiction in divorce actions, the redactors were concerned that residents of other states might "wash their dirty marital linen" in Louisiana; article 10 (7) was designed to prevent this.⁶ But these provisions can also prevent

3. 228 So.2d 518 (La. App. 3d Cir. 1969).

4. LA. CIV. CODE art. 120 provides: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."

5. See *Bush v. Bush*, 232 La. 747, 95 So.2d 298 (1957); *Douglas v. Douglas*, 146 So.2d 227 (La. App. 3d Cir. 1962).

6. McMahon, *Jurisdiction Under the Louisiana Code of Civil Procedure*, 35 TUL. L. REV. 501, 518 (1961). See the cases cited in note 90 of the McMahon article and in LA. CODE CIV. P. art. 10, comment (i).

Louisiana domiciliaries from having recourse to the courts of their own state. While it is true that the husband in this case can still obtain a divorce on the grounds of living separate and apart for two years⁷ because this is a recognized exception to the requirements of article 10(7),⁸ the case does raise the question of whether the provisions regulating jurisdiction in divorce actions are too restrictive and ought to be modified to enable Louisiana domiciliaries to have access to their courts while at the same time preventing Louisiana from becoming a divorce center. The *Restatement of Conflicts*, section 113, provides: "A state can exercise through its courts jurisdiction to dissolve the marriages of spouses of whom one is domiciled within the state and the other is domiciled outside the state if . . . (b) the state is the last state in which the spouses were domiciled together as man and wife."⁹ Such a provision would enable a Louisiana domiciliary to obtain a divorce under the facts in *Self*, but would also be sufficiently restrictive to serve Louisiana's policy concerning divorce actions.¹⁰

In the second case, *Stewart v. Stewart*,¹¹ the wife had moved to Tennessee after obtaining a judgment of separation in Louisiana and had given birth to a child 189 days after the judgment. The husband filed suit for divorce on the grounds of adultery and sought disavowal of the child born in Tennessee and a change of custody with respect to the children born before the separation. The wife made no appearance and was represented by court-appointed counsel who filed exceptions objecting to the jurisdiction of the court. The trial court sustained the exceptions with respect to the demands for change of custody and for disavowal, but held that the husband was not precluded from pursuing his action for divorce on the grounds of adultery.¹² The husband appealed and the appellate court affirmed. On the issue of cus-

7. LA. R.S. 9:301 (1950).

8. LA. CODE CIV. P. art. 10(7) and comment (i) which states: "The exceptions referred to in Art. 10(7) are those sanctioned by Civil Code Art. 142 and R.S. 9:301."

9. RESTATEMENT OF CONFLICT OF LAWS § 113 (1934).

10. See note 6 *supra*.

11. 233 So.2d 305 (La. App. 1st Cir. 1970).

12. With respect to the demand for divorce, the court of appeal noted that the record did not disclose any evidence that plaintiff had proceeded with that demand. But Louisiana would have no jurisdiction to grant a divorce on the grounds of adultery because the grounds did not occur in Louisiana or while the matrimonial domicile was in Louisiana. LA. CODE CIV. P. art. 10(7); *Self v. Self*, 228 So.2d 548 (La. App. 3d Cir. 1969). He would have to rely on LA. R.S. 9:301 (1950)—living separate and apart for two years. LA. CODE CIV. P. 10(7), comment (i).

today, the court based its decision on Code of Civil Procedure article 10(5) which provides for jurisdiction in a custody proceeding if the minors are domiciled in the state or are physically present in the state. The minors were not in the state and their domicile was that of their mother which was in Tennessee.¹³ The court also rejected the theory that Louisiana retains jurisdiction to decide custody questions even though the parent with custody has left the state.¹⁴ Since Civil Code article 250 provides that “[u]pon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted,” the matter should have been treated as a request for change of tutor. However, Louisiana would still not have jurisdiction because article 10(4) of the Code of Civil Procedure, dealing with tutorship, requires that the minor be domiciled in Louisiana or have property in the state. The decision is in accord with the express language of Code of Civil Procedure article 10(5) and recent cases.¹⁵

On the issue of disavowal, the court stated that while Code of Civil Procedure articles 6 and 10 applied, the plaintiff could not meet the requirements of article 6¹⁶ and article 10 had no provision for an action to disavow. Since the action to disavow is clearly an action to determine status, article 6 should not apply because it is concerned with the authority of a court to render a personal judgment against a defendant. But article 10, dealing with jurisdiction over status, contains no provision for the action

13. LA. CIV. CODE art. 39: “[T]he domicile of a minor not emancipated is that of his father, mother, or tutor. . . .” See *Pattison v. Pattison*, 208 So.2d 395 (La. App. 4th Cir. 1968); *Nowlin v. McGee*, 180 So.2d 72 (La. App. 2d Cir. 1965).

14. The court relied on *Nowlin v. McGee*, 180 So.2d 72 (La. App. 2d Cir. 1965) and the cases cited in that decision, particularly *Huhn v. Huhn*, 224 La. 591, 70 So.2d 391 (1954).

15. *Huhn v. Huhn*, 224 La. 591, 70 So.2d 391 (1954); *Pattison v. Pattison*, 208 So.2d 395 (La. App. 4th Cir. 1968); *Lucas v. Lucas*, 195 So.2d 771 (La. App. 3d Cir. 1967); *Nowlin v. McGee*, 180 So.2d 72 (La. App. 2d Cir. 1965).

16. LA. CODE CIV. P. art. 6:

“Jurisdiction over the person is the legal power and authority of a court to render a personal judgment against a party to an action or proceeding. This jurisdiction must be based upon:

“(1) The service of process on the defendant, or on his agent for the service of process;

“(2) The service of process on the attorney at law appointed by the court to defend an action or proceeding brought against an absent or incompetent defendant who is domiciled in this state; or

“(3) The submission of the party to the exercise of jurisdiction over him personally by the court, or his express or implied waiver of objections thereto.”

to disavow. As the court noted, the question of jurisdiction in an action to disavow seems to be *res nova*. This is probably because the action is usually brought in a suit for divorce where it is treated as an incidental issue to the principal demand¹⁷ or because in prior actions all the parties were in Louisiana and the issue was not raised.¹⁸ But now that the problem of finding a basis for jurisdiction in an action to disavow has been raised, it should be resolved by appropriate legislation amending article 10 to provide for jurisdiction. As the court stated:

"There are equitable considerations advanced that the rights of plaintiff are hollow indeed if he cannot proceed to have the child disavowed in the courts of this state and he must go to Tennessee to do so. However, equal consideration is due the proposition that the child should not be required to come to Louisiana to defend its paternity in view of the very strong presumption in favor of its legitimacy"¹⁹

Nonetheless, it is submitted that it would be appropriate for Louisiana to base jurisdiction, in an action to disavow, on the fact that the husband is domiciled in the state even though the minor is not.²⁰

Cumulation of Actions

In *Texas Gas Transmission Corp. v. Gagnard*²¹ plaintiff sued to recover for damages sustained in an automobile accident; the defendant reconvened for himself and as administrator of the estate of his minor child to recover the damages they had sustained in the accident. The trial court sustained plaintiff's exception of no cause of action to the reconventional demand. The court of appeal reversed reasoning that since an exception is tried on the face of the petition, with all well pleaded allegations of fact accepted as true, the exception must be overruled if the allegations set forth a cause of action.²² In tort cases based on negligence, this means that the exception will be overruled

17. See, e.g., *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952) where an attorney was appointed to represent the minor.

18. See, e.g., *Feltus v. Feltus*, 210 So.2d 388 (La. App. 4th Cir. 1968) where an attorney was appointed to represent the minor. The husband had filed his disavowal action against both his divorced wife and the minor child.

19. *Stewart v. Stewart*, 233 So.2d 305, 310 (La. App. 1st Cir. 1970).

20. RESTATEMENT OF CONFLICT OF LAWS § 137 (1934): "The status of legitimacy is created by the law of the domicile of the parent whose relationship to the child is in question."

21. 223 So.2d 233 (La. App. 3d Cir. 1969).

22. LA. CODE CIV. P. art. 931; *Elliott v. Dupuy*, 242 La. 173, 135 So.2d 54 (1961).

unless it is clear from the evidence admissible under the petition that the defendant could not be found negligent or that the allegations in the petition establish the contributory negligence of the plaintiff and exclude every reasonable hypothesis other than that plaintiff's contributory negligence was the proximate cause of the accident.²³ Applying these principles to defendant's reconventional demand, the court ruled that the allegations clearly stated a cause of action against the plaintiff. But, in the same exception of no cause of action, the plaintiff had also objected to the defendant's bringing an action on behalf of his child, arguing that the reconventional demand is only available to a defendant and the child was not a defendant.²⁴ The court correctly characterized the objection as one directed toward the defendant's cumulating his and his daughter's actions and should have been raised by the dilatory exception and not by the peremptory exception of no cause of action, particularly since the allegations in the petition, if taken as true, clearly established a cause of action in favor of the child. Since the plaintiff had not waived his objection under the dilatory exception,²⁵ the court proceeded to determine the question of proper cumulation in order to avoid a second appeal on this question. The court held that the cumulation was proper because the defendant could have intervened on behalf of his daughter because he was "demanding similar relief against one of the principal parties arising out of a right related to or arising out of the pending principal and incidental actions."²⁶ The court reasoned that the incorrect designation of an incidental action as a reconventional demand should not prevent the court from considering it as an intervention.²⁷ The court was also mindful of the general policy of the Code to favor

23. *Gilliam v. Lumbermen's Mut. Cas. Co.*, 240 La. 697, 124 So.2d 913 (1960); *Johnson v. Aetna Ins. Co.*, 219 So.2d 563 (La. App. 3d Cir. 1969).

24. LA. CODE CIV. P. art. 1061 provides: "The *defendant* in the principal action may assert in a reconventional demand any action which *he* may have against the plaintiff in the principal action . . ." (Emphasis by plaintiff.)

25. The dilatory exception must be filed before answer and since the plaintiff had not filed an answer to the reconventional demand, he could still file the dilatory exception objecting to improper cumulation of actions. LA. CODE CIV. P. art. 928.

26. 223 So.2d 233,238 (La. App. 3d Cir. 1969). LA. CODE CIV. P. art. 1091 provides: "A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action . . ." See *Bellow v. New York Fire & Marine Underwriters, Inc.*, 215 So.2d 350 (La. App. 3d Cir. 1968).

27. *Bellow v. New York Fire & Marine Underwriters, Inc.*, 215 So.2d 350 (La. App. 3d Cir. 1968); *Treigle v. Patrick*, 138 So.2d 652 (La. App. 4th Cir. 1962).

judicial efficiency and to avoid a multiplicity of suits—a policy reflected in the article permitting cumulation of actions where there is a community of interest between the parties arising out of the same factual issues²⁸ and in the article permitting joinder of parties in a reconventional demand.²⁹

The court in *Gagnard* was correct both in its approach to the problem and in its decision. When the court ruled that the child's suit for damages could be determined in the principal suit and that the incorrect designation of the incidental action as a reconventional demand would not prevent the court from considering it as an intervention, it was following the policy of the Code that "[e]very pleading shall be so construed as to do substantial justice."³⁰ And in proceeding to determine the issue of improper cumulation even though it had not been correctly raised in a dilatory exception, it was carrying out the intent of article 2164 which provides: "The appellate court shall render any judgment which is just, legal, and proper upon the record of appeal."

In ruling that the intervention was proper, the court correctly applied article 1091 which provides: "A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action . . . by (1) Joining with plaintiff in demanding the same or similar relief against the defendant."³¹ Since the child was in fact a third party to the action even though suit was filed on her behalf by the defendant, the intervention and not the reconventional demand was the proper procedure for asserting her demand. Clearly her right to damages arising out of the same accident was related to the object of the principal demand, and she was demanding similar relief from the plaintiff. Had the defendant filed a separate suit against the plaintiff, the

28. LA. CODE CIV. P. art. 463, comment (c).

29. *Id.* art. 1064.

30. *Id.* art. 865. See also *Treigle v. Patrick*, 138 So.2d 652 (La. App. 4th Cir. 1962).

31. The court also relied on *Bellow v. New York Fire & Marine Underwriters, Inc.*, 215 So.2d 350 (La. App. 3d Cir. 1968). For a restrictive interpretation of article 1091, see *Resor v. Mouton*, 200 So.2d 308 (La. App. 4th Cir. 1967) where the court refused to allow a third party to intervene in a suit to recover for personal injuries because the third party was seeking recovery for property damage and not for personal injuries; therefore, his right was not related to the object of the principal demand even though both actions arose out of the same accident. The court in *Resor* distinguished an earlier case, *Emmco Ins. Co. v. Globe Indem. Co.*, 237 La. 286, 111 So.2d 115 (1959), which had allowed an intervention to collect property damage by reading it as being limited to actions under the direct action statute.

child's action for damages could have been cumulated in that suit because there was a community of interest between the parties joined—the actions cumulated arose out of the same facts and presented the same legal issue.³² The fact that the defendant filed an incidental action instead should not prevent the same cumulation. There is nothing in the Code to preclude such a result, and the public policy of avoiding a multiplicity of suits favors such a procedure. Any problems presented by the cumulation can be handled by separate trials.³³

Exception of No Right of Action

In *American Bank & Trust Co. v. French*,³⁴ plaintiff bank, as holder in due course, had filed suit on a promissory note executed by defendant. In its petition plaintiff alleged that the note matured because the security given in connection with the note had declined in value and the defendant had not furnished additional security. The note had been secured by funds on deposit in defendant's savings account, but these funds had been withdrawn by the defendant's wife shortly before she and the defendant had separated. The defendant filed an answer in the form of a general denial, reconvened for damages alleging that the bank had committed an error and mistake when it had permitted the wife to withdraw the funds, and filed an exception of no right and no cause of action. The trial court sustained the exception of no right of action. On appeal, the plaintiff argued that the exception was in effect a dilatory exception of prematurity because of the language, "plaintiff had no right to institute proceedings against defendant at the time that it did,"³⁵ and that it could not be raised after answer had been filed.³⁶ The court of appeal admitted that the exception had certain overtones of prematurity, but rejected the argument that it was a dilatory exception urging prematurity alone, because to hold that would cause a dismissal of plaintiff's suit unwarranted by the facts. The court reasoned that since plaintiff had urged maturity of the note and defendant had urged the maturity was the result of the error and negligence of the plaintiff, both parties were entitled to be heard on these complaints. The plaintiff's second argument was that the defendant could not use the peremptory

32. LA. CODE CIV. P. art. 463, comment (c).

33. *Id.* art. 1033.

34. 226 So.2d 580 (La. App. 1st Cir. 1969).

35. *Id.* at 583.

36. LA. CODE CIV. P. art. 923.

exception of no right of action to raise the affirmative defenses of error, mistake and estoppel. The court of appeal agreed reasoning that the defendant's answer and petition in reconvention set forth the affirmative defenses of estoppel, error, and mistake; therefore, the trial court was in error in sustaining the exception of no cause or no right of action because such a judgment sanctions the dismissal of plaintiff's suit with prejudice.³⁷ Since the defendant's exception had been styled both an exception of no right and no cause of action and since the judgment did not mention the objection of no cause of action, the court of appeal, in order to remove any doubt as to the basis of the trial court's ruling, found that the trial judge had acted on the exception of no right of action. The court concluded that the evidence clearly raised the issue of whether the alleged error or misconduct of the plaintiff estopped it from bringing the action and that this was sufficient to overcome a peremptory exception of no right of action.

While the decision is correct in its result, it is not as precise as it could be and contains some misleading statements. The court correctly characterized the exception as not being the dilatory exception of prematurity but gave as its reason the fact that it would have to dismiss the plaintiff's suit if it were to rule otherwise. If the court had found that the exception was, in fact, the dilatory exception of prematurity, it would have had to overrule the exception as untimely filed because all objections which may be raised under the dilatory exception, such as prematurity, are waived if not pleaded before answer and this exception had been filed after answer.³⁸ Clearly, if the plaintiff's allegation of fact were taken as true, it had stated a cause of action, and the exception of no cause of action had to be overruled. On the exception of no right of action, the court, after stating that the exception is used to test the plaintiff's interest in the suit, also stated that it is used to test whether the plaintiff is under some disability, such as minority or interdiction. The court concluded, "Simply stated the exception of no right of action tests the capacity of the plaintiff."³⁹ In making this statement the court failed to distinguish the dilatory exception of lack of procedural capacity⁴⁰ which tests the plaintiff's capacity to sue and the peremptory exception of no right of action which is used

37. The court relied on LA. CODE CIV. P. art. 934.

38. LA. CODE CIV. P. art. 928.

39. 226 So.2d 580, 584 (La. App. 1st Cir. 1969).

40. LA. CODE CIV. P. art. 926 (6).

to inquire into the plaintiff's interest in the cause of action.⁴¹ In this case, the plaintiff, as holder in due course, had sufficient interest in the cause of action (enforcing a promissory note) so that he had a right to file suit to enforce that note. The fact that the defendant may have a defense which bars recovery such as mistake, error, or estoppel does not prevent the plaintiff from bringing his action. This should have been the basis for overruling the exception of no right of action, and it should have been clearly stated in order to avoid confusion as to the proper function of that exception. In view of the court's statement that the exception of no right of action simply tests the capacity of the plaintiff, its conclusion that the evidence raises a question of whether the bank is estopped to bring the action and that, "[t]hese well pleaded facts are sufficient to overcome a peremptory exception of no right of action,"⁴² is too imprecise and could be misleading. It is clear from the Code of Civil Procedure that the defenses raised by the defendant in this case, error, mistake, and estoppel, must be pleaded in the answer. Comment (c) under article 927 provides that since estoppel is available to the plaintiff as well as to the defendant, it cannot be treated exclusively as an exception, and therefore, ". . . it is required that estoppel be pleaded . . . by the defendant as an affirmative defense." And article 1005 provides: "The answer shall set forth affirmatively . . . error or mistake, estoppel"

Motion for Summary Judgment

In *Stevens v. State Mineral Board*,⁴³ when the plaintiff filed a suit to remove a cloud from his title in the form of a mineral lease, the defendants filed a motion for summary judgment on two principal grounds: (1) that the plaintiff title was defective because the property in question was the bed of a navigable waterway and thus could not have been validly alienated by the state, and (2) that the property had been adjudicated to the state for taxes in 1932 and so the attempted redemption was invalid because article IV, section 2 of the Louisiana Constitution prohibits the state from alienating the bed of any navigable waterway. The trial judge rendered judgment on the motion, and the court of appeal affirmed.⁴⁴ In the supreme court plaintiff

41. *Id.* art. 927, comment (b)(5) and cases cited therein.

42. *American Bank & Trust Co. v. French*, 226 So.2d 580, 585 (La. App. 1st Cir. 1969).

43. 255 La. 857, 233 So.2d 542 (1970).

44. 221 So.2d 645 (La. App. 4th Cir. 1969).

argued that the judgment was incorrect on the merits and that the case could not be disposed of on a motion for summary judgment. The court reversed on the grounds that the use of summary judgment had been improper. The court was in doubt as to whether there was a genuine issue of material fact because defendants, while insisting that there were no genuine issues of fact, also stated that if the judgment were reversed there would have to be a remand to decide the questions of fact that they would raise in their answer. The defendants also insisted that in a motion for summary judgment a party may present only part of his case, admitting certain facts only for the purpose of the motion and that, if he loses on the motion, he may start over and make a different and even contrary factual presentation. The court rejected defendant's arguments, reasoning that this would lead to piecemeal trials and that it would also eliminate the exception of no cause of action.

The purpose of the motion for summary judgment is to determine whether, in the light of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, there is a genuine issue of fact.⁴⁵ If there is, the issue must be resolved by the trier of fact. Summary judgment does more than the exception of no cause of action which simply tests the sufficiency of the plaintiff's pleadings; it examines the available evidence to determine whether there should be a trial on the factual issues presented in the pleadings. While the court was correct that the motion should not take the place of the exception of no cause of action, it does not necessarily follow that a party may not admit certain facts only for the motion and that, if he loses and there is a trial on the issues of fact, he may not present his view of the facts unhindered by what he was willing to admit on the motion for summary judgment. Where, for example, he bases his defense on a different legal theory from that asserted in his motion, he should be able to present his facts without being bound by what he had admitted for the motion. On the other hand, if his answer raises the same legal issues as his motion, it would not be unfair to require him to stand by the admissions of fact he had made in support of his motion for summary judgment.

In rejecting the use of summary judgment, the court stated that a motion for summary judgment was intended to be used only in cases "where such judgment disposes of the entire case."⁴⁶

45. LA. CODE CIV. P. art. 966.

46. 255 La. 857, 870, 233 So.2d 542, 547 (1970).

This statement is in clear conflict with the Code. Article 966 states that either party may move for summary judgment in his favor "for all or part of the relief for which he has prayed." The fact that the Code intended that the motion for summary judgment be used even though it does not dispose of the entire case is also revealed in article 968 which, in speaking of judgments on the pleadings and summary judgments, provides: "If the judgment does not grant mover all of the relief prayed for, jurisdiction shall be retained in order to adjudicate on mover's right to the relief not granted on motion." Rather than leading to piecemeal trials as the supreme court feared, the use of summary judgment will expedite the actual trial by eliminating uncontested issues. If other courts follow the position taken in *Stevens* and allow summary judgment only where it would dispose of the entire case rather than as intended by the Code to grant all or part of the relief prayed for, much of its value will have been lost unnecessarily.

Incidental Actions

In *Hebert v. Armstead*⁴⁷ plaintiff filed suit to collect for damages sustained in an automobile accident. The suit was filed shortly before the one-year prescriptive period had elapsed. The defendant reconvened for damages sustained in the same accident, and the plaintiff filed a peremptory exception of prescription because the one-year period had run when the defendant filed his petition in reconvention. The trial court sustained the exception and the court of appeal affirmed. The decision was clearly correct because the rules of prescription apply to all actions whether they are filed as principal actions or as incidental actions. As Civil Procedure article 1034 provides: "A defendant in an incidental action may plead any of the exceptions available to a defendant in a principal action, and may raise any of the objections enumerated in Articles 925 through 927." Prescription is one of the objections enumerated in article 927. While the decision was correct under the law as it existed at that time, it does raise the question of whether such a result is desirable. One party could take advantage of another simply by waiting until prescription has almost run before filing his suit thereby leaving the defendant, who may have thought that there would be no lawsuit over the dispute, with only a pre-

47. 227 So.2d 636 (La. App. 3d Cir. 1969).

scribed cause of action to use as a defense.⁴⁸ Possibly with this in mind the legislature recently added article 1067⁴⁹ to the Code of Civil Procedure which provides: "A reconvention is not barred by prescription if it was not barred at the time the main demand was filed; provided such reconvention is filed within ninety days of date of service of main demand." Under this new article if the situation in *Hebert* were to arise again, the defendant would be able to file his reconventional demand and not be barred by prescription.

Amendment of Pleadings

In *Hancock Bank v. Alexander*⁵⁰ plaintiff sued defendants to collect on a note and prayed for sequestration of an automobile owned by the defendants because it was within the power of the defendants to sell, dispose of, waste, or remove the property during the action. The defendants moved to dissolve the writ of sequestration on the grounds that the petition failed to allege that the plaintiff had a privilege or mortgage on the property sequestered.⁵¹ The trial court refused to dissolve the writ and granted a motion for summary judgment in favor of the plaintiff. The defendants appealed and the court of appeal affirmed. The defendants argued that defects in writs granting provisional relief cannot be cured by amendments—an argument supported by cases decided before the new Code of Civil Procedure.⁵² The court rejected this argument, relying upon article 1154, which provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be tried in all respects as if they had been raised by the pleading." When evidence of the mortgage was introduced without objec-

48. LA. CODE CIV. P. art. 424 provides: "A prescribed obligation may be used as a defense if it is incidental to, or connected with, the obligation sought to be enforced by the plaintiff."

49. La. Acts 1970, No. 472, § 1.

50. 227 So.2d 183 (La. App. 3d Cir. 1969).

51. LA. CODE CIV. P. art. 3571 provides: "When one claims the ownership or right to possession of property, or a mortgage, lien or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenue therefrom, or remove the property from the parish, during the pendency of the action."

52. *Terzia v. The Grand Leader*, 176 La. 151, 145 So. 363 (1932); *Louisiana State Bd. of Medical Examiners v. Sloat*, 91 So.2d 412 (La. App. 2d Cir. 1956); *Salter v. Walsworth*, 167 So. 494 (La. App. 2d Cir. 1936). See also *McMahon, The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 51 (1934).

tion,⁵³ this had the effect of amending the petition and curing any defect as to the issuance of the writ of sequestration. The court concluded that article 1154 legislatively overruled the cases relied upon by the defendants which had held to the contrary. The decision reached a just result in its liberal approach to the question of amendments to the pleadings.⁵⁴ To have held otherwise would have meant that, in similar cases, the writ would be dissolved because of a defect in the petition and the plaintiff would simply file a new petition alleging the mortgage, probably on the same day as the dismissal of the first petition, and the property would be sequestered again. Such a result is unjustified where there is evidence that the plaintiff does in fact have a privilege or mortgage. There is no prejudice to the defendant because he can use the motion to dissolve to determine whether, in fact, the plaintiff has a right to sequester his property. Decisions concerning the validity of writs granting provisional relief, such as sequestration, ought to be based on evidence and not on the preciseness of pleadings. As article 865 provides: "Every pleading shall be so construed as to do substantial justice." Furthermore, the liberal reading given to article 1154 is in accord with article 5051 which provides: "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."

Despite the persuasiveness of the position taken by the court of appeal, the supreme court reversed,⁵⁵ holding that the articles dealing with the requirements for the issuance of the conservatory writs will not permit an amendment once the defendant has moved to dissolve the writ.⁵⁶ The court reasoned that since the seizure takes place on the petition of the plaintiff, all the defendant can do is to file a motion to dissolve. His damage has already occurred because his property has already been seized; hence, it is too late to cure defects after the seizure. This reasoning overlooks the fact that the seizure is only unlawful and

53. The evidence of the mortgage was introduced at the hearing on plaintiff's motion for summary judgment.

54. See *Tate, Amendment of Pleadings in Louisiana*, 43 *TUL L. REV.* 211 (1969).

55. *Hancock Bank v. Alexander*, 256 La. 643, 237 So.2d 669 (1970).

56. LA. CODE CIV. P. arts. 3501, 3571. The court also relied on the comment under article 1154 that the article merely codified the prior jurisprudence. The court interpreted this to mean that the earlier case prohibiting amendment to cure defects on conservatory writs had not been overruled as the court of appeal had concluded. These cases are cited in note 52 *supra*.

the defendant is only entitled to damages if the plaintiff had no right to seize the property. Where the plaintiff has a right to sequester the property, because he has a privilege or mortgage on the property and the defendant has the power to dispose of the property, then the seizure is not unlawful even though the plaintiff may not have pleaded correctly. In such cases the court should look beyond the defects in the pleadings to determine whether the party has been prejudiced because of the defects in the pleadings, and the procedure should be overturned only when there has been prejudice which cannot be cured in any other way. The court remanded the case to try the motion to dissolve in accordance with the views expressed and to allow the defendant to introduce evidence of the damages he had sustained because of the unlawful sequestration. This decision is based on the technicalities of pleading which is contrary to the intent of the Code⁵⁷ and ignores the substantive right of the plaintiff to obtain that sequestration because he did in fact have a mortgage on the property.

Supplemental Pleadings

In *Collins v. Richland Aviation Service, Inc.*,⁵⁸ after the plaintiff had obtained a judgment against the defendant corporation, the defendant filed a pleading giving notice that the corporation, which had been cast in judgment, had been dissolved. The plaintiff then filed a supplemental petition against two individuals alleging that the corporate entity had been ignored by these individuals and that they had run the business as an individual operation and, in the alternative, if the corporate entity had been maintained, then these two individuals, who were the sole stockholders, officers and directors, were liable to the extent of any sums received in the liquidation of the corporation because they had dissolved the corporation when there was an outstanding claim against it. The trial court overruled the defendants' exceptions of no right and no cause of action and their motion to strike the supplemental petition. The court of appeal, on writ of certiorari, affirmed. The court held that the plaintiff had a cause of action against stockholders and officers who had received the assets of a corporation which

57. LA. CODE CIV. P. arts. 865 and 5051 quoted in the text at p. 357 *supra*.
58. 225 So.2d 241 (La. App. 2d Cir. 1969).

had been dissolved while there was a claim pending against it⁵⁹ and approved of the use of the supplemental petition to allow the plaintiff to assert his cause of action because the cause of action was related to the cause of action asserted in the original petition and had arisen subsequent to the filing of the original petition.⁶⁰ The court's approach seems in accord with the objectives of the Code in providing for supplemental pleadings. It allows the plaintiff to assert his cause of action as quickly and inexpensively as possible without causing any prejudice to the defendants who would still have all of the delays and defenses which would have been available to them if the plaintiff had filed a separate suit against them. Since the cause of action is related to that asserted in the original petition, it is appropriate that it be tried in the same action. The alternative to the approach allowed in this case would be a multiplicity of actions which should be avoided wherever possible.

The defendants also objected because the court had allowed the filing of the supplemental petition without giving them notice. The court agreed that as a general rule the requirement of reasonable notice in article 1155 would mean a contradictory motion and a hearing before allowing the supplemental pleading⁶¹ but that, in this case, the defendants had suffered no prejudice because their objections were considered in the hearing on their exceptions and the motion to strike. In deciding this question the court applied the correct standard. The decision should not be based on simply whether the procedures outlined by the Code had been followed but rather on whether the deviation from the general rule had caused prejudice to the party opposing the procedure. If there was no prejudice, then the procedure should stand even though the Code had not been followed precisely. To overturn a procedure where there was no showing of prejudice would be to interpret the Code in a very technical manner—an approach expressly rejected by the Code itself which declares: "The articles of this Code are to be

59. The court of appeal relied on *Fudickar v. Inabnet*, 176 La. 777, 146 So. 745 (1933) and *Ortego v. Nehi Bottling Works*, 182 So. 365 (La. App. 2d Cir. 1938).

60. LA. CODE CIV. P. art. 1155: "The court, on motion of a party, upon reasonable notice and upon such terms as are just, may permit mover to file a supplemental petition or answer setting forth items of damage, causes of action or defenses which have become exigible since the date of filing the original petition or answer, and which are related to or connected with the causes of action or defenses asserted therein."

61. *Id.* *Wallace v. Hanover Ins. Co.*, 164 So.2d 111 (La. App. 1st Cir. 1964).

construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves."⁶² Moreover, article 1155 gives the court the discretion to allow the supplemental pleadings "under such terms as are just."

Involuntary Dismissal

In two cases, the Fourth Circuit Court of Appeal dealt with the meaning of article 1672 of the Code of Civil Procedure which provides: "A judgment dismissing an action shall be rendered upon application of any party, when the plaintiff fails to appear on the day set for trial." In the first case, *Levy v. Stelly*,⁶³ the plaintiff had filed two suits on the same cause of action in state and federal courts. When the case in state court was called for trial the plaintiff requested an indefinite continuance, stating that he did not want to try the case in state court but intended to proceed with the action in federal court and that the only reason he wanted a continuance was to preserve his rights against prescription because the action in federal court had been filed after the prescriptive period had run. The trial court dismissed his suit without prejudice. The court of appeal reversed on different grounds⁶⁴ but discussed the effect of a valid dismissal on plaintiff's suit in federal court, because the defendant had filed a motion to dismiss in federal court alleging that prescription had run because the dismissal was for failure to prosecute and therefore, under Civil Code article 3519,⁶⁵ the interruption is considered as never having happened. The court rejected this argument, reasoning that the dismissal had been for failure to appear under Code of Civil Procedure article 1672 and that such a dismissal is not within the purview of Civil Code article 3519. The court concluded that even if the judgment had been validly rendered, the judgment would be incorrect because the plaintiff did appear when he asked for a continuance and this would be sufficient, under article 1672, to defeat a motion to dismiss. The court interpreted article 1672 to simply require an appearance in court.

62. LA. CODE CIV. P. art. 5051.

63. 230 So.2d 774 (La. App. 4th Cir. 1970).

64. The judgment dismissing plaintiff's suit was held to be invalid because the plaintiff was not properly named in the judgment.

65. LA. CIV. CODE art. 3519 provides: "If the plaintiff . . . fails to prosecute [his demand] at the trial, the interruption is considered as never having happened."

In a later case, *Lewis v. New York Fire & Marine Underwriters, Inc.*,⁶⁶ the court of appeal rejected this dicta.⁶⁷ The trial court had rejected plaintiff's request for a continuance and, on the same day, had dismissed his case with prejudice when he was unable to proceed to trial. The court of appeal affirmed and interpreted article 1672 to require that a plaintiff not only appear but that he proceed with his case if ordered to do so. The court reasoned that if a trial judge had no authority to dismiss for failure to prosecute at trial, then his authority to deny continuances would be meaningless. The court's interpretation was supported by the fact that article 1672 was not intended to change the prior law and article 536 of the Code of Practice had provided: "If, after the cause has been set down on the docket for trial, the plaintiff does not appear, either in person or by attorney, to plead his cause, on the day fixed for trial, the defendant may require that judgment of nonsuit be rendered against such plaintiff, with costs." The interpretation given to article 1672 by the court in *Lewis* is clearly the correct one and is in harmony with Civil Code article 3519 which provides that the interruption is considered as never having happened if the plaintiff fails to prosecute his demand at the trial. The very literal interpretation given to article 1672 by the court in *Levy* would make it possible for a plaintiff to prevent dismissal simply by appearing in court without any intention of proceeding with the trial. Such a result would be manifestly unfair to the defendant and would destroy the court's discretion in granting continuances. To avoid this question in the future, article 1672 should be amended to provide that the plaintiff's suit will be dismissed if he fails to plead his cause on the day fixed for trial.

Jury Trials

In *Talley v. Friedman*⁶⁸ plaintiff filed suit against defendants to recover for injuries sustained in an automobile accident and prayed for a jury trial. The defendants filed a third party demand against the Department of Highways for contribution, and the department filed an exception objecting to trial by jury.⁶⁹ The

66. 233 So.2d 743 (La. App. 4th Cir. 1970).

67. The court was also aware that its holding conflicted with dicta in *Maxie v. Hartford Ins. Co.*, 212 So.2d 165 (La. App. 3d Cir. 1968) and *Berger v. Johnson*, 141 So.2d 164 (La. App. 4th Cir. 1962).

68. 255 La. 735, 232 So.2d 495 (1970).

69. LA. R.S. 13:5104 (1960) provides: "No suit against the state or other public body shall be tried by jury."

plaintiff moved for separate trials of the principal and incidental demands, and the defendants filed a motion to strike plaintiff's request for a jury trial. The trial court sustained the exception of the Department of Highways and maintained the motion of the defendants to strike the request for a jury trial. When the court of appeal denied writs under its supervisory jurisdiction, the plaintiff applied for writs of certiorari, mandamus, and prohibition to the supreme court which were granted.⁷⁰ The supreme court recognized the right of the state not to have any claim against it tried by jury and tried to reconcile that right with that of the plaintiff to have a trial by jury.⁷¹ The court concluded that it could give effect to both rights by ordering separate trials of the principal and incidental demands. In reaching this result, the court relied on article 1038 of the Code of Civil Procedure which provides: "The court may order the separate trial of the principal and incidental actions. . . ." The court also found support in articles 1734 and 1735 which allow the parties to request a jury trial for certain issues. Although the defendant relied on an earlier supreme court case which had held that there could be no jury trial if the state were a co-defendant,⁷² the majority distinguished that case on the fact that there the state was a co-defendant in the principal demand whereas in the instant case it was a defendant in an incidental action. The dissent argued that the prior case was controlling because in both cases there was the possibility that the separate trials could produce conflicting results. The dissent also argued that there was but one law suit involving various demands and that if the state were a party to that suit, then the statute prohibiting jury trials when the state is a party must control as to the entire suit. Separate trials would be circumventing the legislative mandate.

The majority reached the correct result because even though there is the possibility that the separate trials might produce inconsistent results, a party should not be deprived of his right to a jury trial. With respect to the statute forbidding jury trials in suits against the state or other public bodies, it is clear that the legislature intended to provide that the liability of the state could only be determined in a trial without jury. This mandate would be carried out by ordering a separate trial on the defen-

70. 254 La. 827, 227 So.2d 372 (1969).

71. LA. R.S. 13:5104 (1960) and LA. CODE CIV. P. art. 1731 which provides: "Except as limited by Article 1733, the right of trial by jury is recognized."

72. *Jobe v. Hodge*, 253 La. 483, 218 So.2d 566 (1969).

dant's third party demand against the Department of Highways. It would be the same result as if the defendant had filed a separate suit against the Department for contribution.

Appeal

In *Cunningham v. Hardware Mutual Casualty Co.*⁷³ plaintiff had filed suit against three defendants and their liability insurers. Plaintiff compromised with one of the defendants and one of his insurers, reserving his rights against all other defendants including the other insurer of the defendant with whom he compromised. Judgment was rendered against the plaintiff as to all the defendants. Plaintiff appealed as did one of the defendants who demanded contribution from the other defendants if the court of appeal reversed the trial court and cast them in judgment. The issue was thus raised of whether a third party demand may be asserted on appeal when no such action had been initiated in the trial court. The court of appeal based its decision on a prior supreme court case⁷⁴ which had held that an appeal by one co-defendant brought the other defendant before the appellate court even though the plaintiff had not appealed from the judgment dismissing that defendant and that such an appeal was tantamount to filing a third party demand.

Ordinarily, a demand for contribution must be initiated by a petition filed in the trial court.⁷⁵ If the third party demand could be asserted for the first time on appeal, then the appellate court could be faced with issues which had never been presented or passed upon by the trial court. Since there would be no judgment to review on those issues, the appellate court would ordinarily remand the case to allow the trial court to render judgment on those issues. To do otherwise the appellate court would be functioning as a trial court with respect to the third party demand. But in this particular case, the action of the appellate court was justified because all of the issues involved in the third party demand—the liability of the defendants and the amount of the damages—were before the appellate court. But

73. 228 So.2d 700 (La. App. 1st Cir. 1969).

74. *Emmons v. Agricultural Ins. Co.*, 245 La. 411, 158 So.2d 594 (1963). But see *Williams v. City of Baton Rouge*, 252 La. 770, 214 So.2d 138 (1968), discussed in *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Civil Procedure* 30 LA. L. REV. 286, 306 (1969).

75. LA. CODE CIV. P. arts. 1032, 1111.

the practice of allowing third party demands to be filed for the first time on appeal should be strictly limited to those cases where the third party demand presents no new issues. In many cases, one defendant could have a valid defense to his co-defendant's claim for contribution, and in those situations the demand for contribution should be asserted in a separate action or by the third party demand filed in the trial court, and not asserted for the first time on appeal.

*Martin v. Martin*⁷⁶ raised the question of when the appeal bond must be filed in a devolutive appeal from a city court in cases over \$100.00. At the time of the decision, article 5002 provided that the suspensive appeal bond must be filed within ten days of the denial of a new trial or within ten days after the expiration of the delay for applying for a new trial, but the article was silent as to the delays for filing the bond in a devolutive appeal. The court ruled that the delays for filing a suspensive appeal bond did not apply to the filing of a devolutive appeal bond and relied on the principle of statutory construction that the inclusion of one is the exclusion of the other⁷⁷ to support its conclusion. Since article 5002 did not apply, the court used article 5001 which provides: "Except as otherwise provided in Article 5002, the procedure in a civil case in a city court of which a justice of the peace does not have concurrent jurisdiction is the same as that provided by law for a civil case in the district court of the parish in which the municipality is situated." The court applied article 2087 which governs the delays for filing a devolutive appeal bond in district court cases and ruled that the appeal bond had been timely filed. The decision correctly applied articles 5001, 5002, and 2087, but subsequent to this decision article 5002 was amended to cover this situation and now provides: "The devolutive appeal bond, as required by the applicable provisions of Article 2124, must be filed within the delays allowed above for a devolutive appeal." Thus, the delays for filing the devolutive appeal bond are the same as those provided for filing the suspensive appeal bond—within ten days after the expiration of the delays for applying for a new trial or within ten days of the denial of a new trial. The amendment has the effect of overruling the result reached in *Martin*.

76. 228 So.2d 355 (La. App. 4th Cir. 1969).

77. *Id.* at 358. "[I]nclusio unius est exclusio alterius."