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Kellis v. Farber: "Incorporation" Returns to Louisiana Venue

An Orleans Parish domiciliary brought suit in that parish on a cause of action arising from an automobile accident that occurred in Jefferson Parish. Made defendants were the alleged tortfeasor, a Jefferson Parish domiciliary; his employer, a domestic corporation with its registered office in Jefferson Parish; the liability carrier for them both, a foreign insurer; and the plaintiff's uninsured motorist carrier, another foreign insurer. After the trial court sustained a declinatory exception of improper venue and ordered the case transferred to Jefferson Parish, the court of appeal denied the plaintiff's application for a supervisory writ. The Louisiana Supreme Court, in an opinion written by Justice Dennis, reversed the lower courts.¹ The court held that Orleans Parish constituted proper venue for all defendants according to Code of Civil Procedure articles 76² and 73,³ which as exceptions to the general rules of venue contained in article 42,⁴ constitute "an extension, supplement and legal part of the provisions of article 42" by virtue of article 43,⁵ which makes article 42 "subject to" its exceptions.⁶

Kellis v. Farber is important because it implicitly resolves the debate in Louisiana jurisprudence over whether a reference to article 42 suffices to reference the exceptions to article 42. Because *Kellis* limits its holding to the question of whether the exceptions to article 42 are incorporated within it through the operation of article 43, the decision may suggest that venue provisions extraneous to the Code that defer venue determination to article 42, such as that found in the Direct Action Statute,⁷ may not trigger incorporation. On the other hand, the narrow holding may import an intent to apply incorporation to any extraneous venue provision, not just the Direct Action Statute.⁸

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1. *Kellis v. Farber*, 523 So. 2d 843 (La. 1988).

2. Louisiana Code of Civil Procedure article 76 provides alternative venue at the insured's domicile "on . . . any insurance policy," other than those offering life, health, or accident benefits.

3. Louisiana Code of Civil Procedure article 73 provides that venue is proper for all solidary obligors where any one of them may be sued under article 42.

4. Louisiana Code of Civil Procedure article 42 expresses the concept of defendant-domiciliary venue.

5. Louisiana Code of Civil Procedure article 43 makes article 42 "subject to" the enumerated exceptions within the Code as otherwise provided by law.

6. 523 So. 2d at 846.

7. La. R.S. 22:655(B) (Supp. 1989).

8. See, e.g., La. R.S. 13:3203 (1968), the venue rule for the Long Arm Statute.

This note will discuss the holding of *Kellis* and analyze its potential effects. After reviewing the relevant venue provisions contained in the Code of Civil Procedure, a summary of the jurisprudential debate over incorporation will place *Kellis* in historical context. An exposition of the opinion in *Kellis* will follow. The reasoning of *Kellis*, the "codal scheme" on which it relies, and the policies underlying venue and its administration will then be analyzed, and an alternative approach to venue determination will be suggested.

LEGISLATIVE PROVISIONS

Chapter 2 of the Louisiana Code of Civil Procedure contains the majority of the venue provisions present in the Code. Section 1 contains general dispositions. Article 41 defines venue as "the parish where an action or proceeding may properly be brought and tried under the rules regulating the subject."⁹ Article 42¹⁰ contains the general rules of venue for individuals and a variety of legal persons. Of particular importance in this discussion are subsections 1, 2, and 7. Subsection 1 provides in pertinent part that venue for an individual domiciled in the state is "in the parish of his domicile."¹¹ Subsection 2 provides that venue for a domestic corporation is "in the parish where its registered office is located."¹² Finally, subsection 7 provides venue for a foreign insurer in East Baton Rouge Parish.¹³ Article 43 states that "[t]he general rules of venue provided in Article 42 are subject to the exceptions provided in Articles 71 through 83 and otherwise provided by law."¹⁴ These other exceptions are present elsewhere in the Code and the Revised Statutes. Article 45 provides three rules to determine proper venue when certain venue provisions conflict. First, "[a]rticle 78, 79, 80, 81 or 83 governs the venue exclusively, if this article conflicts with any of Article 42 and 71 through 77."¹⁵ Second, "[i]f there is a conflict between two or more Articles 78 through 83, the plaintiff may bring the action in any venue provided by any applicable article."¹⁶ Finally, "[i]f Article 78, 79, 80, 81, 82, or 83 is not applicable, and there is a conflict between two or more Articles 42 and 71 through 77, the plaintiff may bring the action in any venue provided by any applicable article."¹⁷ Article 44 deals with waiver of exceptions to venue.

9. La. Code Civ. P. art. 41.

10. La. Code Civ. P. art. 42(1) expresses the traditional civilian notion that one must be sued before his own judge.

11. La. Code Civ. P. art. 42(1).

12. Id. art. 42(2).

13. Id. art. 42(7).

14. Id. art. 43.

15. Id. art. 45(1).

16. Id. art. 45(2).

17. Id. art. 45(3).

Section 2 of Chapter 2 contains exceptions to article 42. Articles 71 through 77 contain the so-called permissive exceptions, which generally employ the verb "may" and provide alternative venue possibilities. Articles 78 through 85 contain mandatory venue rules, which generally employ the verb "shall" and provide only one venue possibility. Articles 73 and 76 are the two permissive exceptions most relevant for an understanding of *Kellis*. Article 73 provides in pertinent part that venue in an action against joint or solidary obligors is proper "in any parish of proper venue, under Article 42, as to any obligor who is made a defendant."¹⁸ Article 76 provides that venue on any insurance policy, other than those providing life, health, or accident insurance, may be in the parish where the loss occurred or the insured is domiciled.¹⁹

Section 3 contains the rules for transferring a case to another venue. Article 121 provides that "[w]hen an action is brought in a court of improper venue, the court may dismiss the action, or in the interest of justice transfer it to a court of proper venue."²⁰ Article 123 in pertinent part provides that "[f]or the convenience of the parties and the witnesses, in the interest of justice, a district court . . . may transfer a civil case to another district court where it might have been brought."²¹ However, the article also forbids this transfer when "brought in the parish in which the plaintiff is domiciled, and in a court . . . of competent jurisdiction and proper venue."²²

The Direct Action Statute also contains a relevant exception to article 42. In actions "against the insurer alone, or against both the insured and the insurer jointly and in solido," venue is proper "in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42."²³

DEBATE

*Surridge v. Bennanti*²⁴ set the stage for the debate whether a reference to article 42 also references the exceptions to that article. In *Surridge*, the plaintiff filed suit against a St. Bernard domiciliary and his foreign insurer on a cause arising from an automobile accident that occurred in Jefferson Parish. Plaintiff argued that venue was proper as to the

18. Id. art. 73.

19. Id. art. 76.

20. Id. art. 121.

21. Id. art. 123.

22. Id.

23. La. R.S. 22:655(B) (Supp. 1989).

24. 261 La. 282, 259 So. 2d 324 (1972).

insurer in Orleans Parish under article 77,²⁵ since the insurer was a "person" within the meaning of the statutory language. The court concluded that article 77 could provide proper venue, because since "article 42 contains the general rules of venue, it is to be understood that the 1962 Amendment [to the Direct Action Statute] . . . incorporated the exceptions to the general rules."²⁶ Nevertheless, the court concluded that article 77 was unavailable to plaintiff in this instance, because the insurer did not qualify as a "person."

In *Davis v. Hanover*,²⁷ the third circuit, ignoring *Surrige*, found that the reference in the Direct Action Statute to article 42 reached none of the exceptions to that article. Oddly enough, however, this limitation on the reach of the Direct Action Statute worked in favor of the plaintiff. After being injured in a collision in Jefferson Davis Parish between automobiles driven by a Calcasieu Parish domiciliary and a Vermillion Parish domiciliary, plaintiff brought suit against the insurers of his host and the other driver in Calcasieu Parish one day before the action would have prescribed.²⁸ Almost four months later, plaintiff added both drivers as defendants. The insurers argued that since the Direct Action Statute reaches the exceptions to article 42, article 73, which allows suit to be brought at the domicile of any solidary obligor *who is made defendant*, controlled venue determination. Since the original complaint did not name the Calcasieu Parish domiciliary, the insurers argued that Calcasieu Parish was an improper venue as to the defendants who were named there.²⁹ The decision is significant

25. La. Code Civ. P. art. 77 provides that "[a]n action against a person having a business office or establishment in a parish other than where he may be sued under Article 42, on a matter over which this office or establishment had supervision, may be brought in the parish where this office or establishment is located."

26. Before amendment in 1962, the Direct Action Statute read in pertinent part: "The insured person . . . shall have a right of direct action against the insurer within the terms and limits of the policy *in the parish where the accident or injury occurred or in the parish where the insured or insurer is domiciled, and said action may be brought against the insurer alone or against both the insured and insurer jointly and in solido, at the domicile of either or their principal place of business in Louisiana.*" (emphasis added). The amended version provided venue for actions against the insurer or the insurer and the insured in solido "*in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure.*" (emphasis added).

27. 289 So. 2d 292 (La. App. 3d Cir. 1974).

28. Prescription is the real stake in many of these cases. See S. McKenzie and H. Johnson, *Louisiana Insurance Law and Practice* § 25, at 45-46, in 15 *Louisiana Civil Law Treatise* (1986).

29. Instead, the insurers argued, venue was proper for the defendants named in the original petition under article 42(7) in East Baton Rouge Parish. Thus prescription had run.

because it provides a rationale for a decision whether the Direct Action Statute should reach exceptions to article 42. In this vein, the court declared:

[W]e are compelled to accept Davis' version of the meaning of the venue provision due to the plain meaning of the use of the disjunctive (parish in which an action COULD be brought against EITHER the insured OR the insurer), rather than the conjunctive (parish in which an action could be brought against BOTH the insured AND the insurer), or of a mutual modifier (parish in which an action could be brought against either the insured or the insurer, WHO IS MADE A DEFENDANT).³⁰

Finding that "the legislature intended to broaden the permissible venues available to claimants, rather than to restrict them,"³¹ the court rejected the plaintiff's incorporation arguments. Nevertheless, as commentators have pointed out, excluding consideration of article 73 from venue determination in this case calls into question the availability of Calcasieu Parish venue as to the insurer of the Vermillion Parish domiciliary, because venue for both insurers is proper in Calcasieu Parish only through the use of the solidary obligor rule of article 73. Otherwise, the insurer of the Vermillion Parish domiciliary must be sued in East Baton Rouge Parish. As to this insurer, the action would have prescribed.³²

Meyers v. Smith,³³ like *SurrIDGE*, presented the supreme court with the question of whether the Direct Action Statute reaches article 77 when it references article 42. Plaintiff sued on behalf of her minor daughter to recover for the wrongful death of the father. The accident occurred in St. John the Baptist Parish. Plaintiff filed suit in Jefferson Parish naming several defendants, none of whom were domiciled there. The parties stipulated, however, that one defendant, an insurer, was handling the claim from its Jefferson Parish office. Plaintiff argued that the Direct Action Statute provided proper venue under article 77, since the exceptions to article 42 are incorporated within it. Referring to its previous determination in *SurrIDGE* as dicta, a plurality of the court rejected the incorporation doctrine.³⁴

30. 289 So. 2d at 294.

31. *Id.*

32. S. McKenzie and H. Johnson, *supra* note 28, at 47-48.

33. 419 So. 2d 449 (La. 1982).

34. The court relied in part on *Davis* for its holding, despite the consequent narrowing of the range of possible venues available to the direct action plaintiff—a result incongruous with the *Davis* rationale. McKenzie and Johnson find a tendency in both the legislature and the courts to broaden the scope of direct action venue. S. McKenzie and H. Johnson, *supra* note 28, § 25, at 48. *Meyers*, an obvious counterexample, is treated as an anomaly.

Significantly, the court based its reasoning on the principle that exceptions to the general rule of article 42 are to be narrowly construed. This principle, stated again in Justice Cole's dissent in *Kellis*, derives from Louisiana jurisprudence dating at least to 1878, when the supreme court in *Montgomery v. Louisiana Levee Co.*³⁵ stated:

It is a familiar rule that statutes in derogation of a common right must be construed strictly. The entire article 165 [of the Code of Practice of 1870, containing exceptions to the defendant-domiciliary venue] is an exception to the general rule established by article 162 [defendant-domiciliary venue], and in derogation of the common right of every resident of the State of Louisiana to be sued at the place of his domicile or residence.³⁶

The *Meyers* court found that since the venue provisions of the Direct Action Statute are exceptions to the general rule of article 42, they must be narrowly construed. Thus, the court concluded that the Direct Action Statute does not reach article 77 or any other exception to article 42, because no "mention is made of the exceptions to those rules provided by Article 43, although the legislature could have easily incorporated those exceptions had it desired to do so."³⁷

EXPLICATION OF *KELLIS*

The court first considered proper venue for plaintiff's uninsured motorist carrier. Reasoning from the principle expressed in article 43 that article 42 is "subject to" its exceptions, the court found that since article 42 is subject to article 76, article 42 was inoperative in this context. Instead, venue was proper according to article 76 in Orleans Parish, plaintiff's domicile. Further, since under supreme court jurisprudence³⁸ all defendants were obligated solidarily to the plaintiff, article 73 provided proper venue for all defendants "in any parish of proper venue, under Article 42."³⁹ Having already determined that article 76 controlled as against article 42, the court found venue proper for all defendants according to article 76. "[I]t is clear," the court concluded, "that article 76 and the other articles set out in article 43 are an extension, supplement and legal part of the provisions of article 42."⁴⁰ The court thus decided the case without resort to the venue provision in the Direct Action Statute referencing article 42.

35. 30 La. Ann. 607 (1878).

36. *Id.* at 608.

37. *Meyers*, 419 So. 2d at 451.

38. *Burton v. Foret*, 498 So. 2d 706 (La. 1986); *Hoefly v. Government Employees Ins. Co.*, 418 So. 2d 575 (La. 1982).

39. La. Code Civ. P. art. 73.

40. *Kellis*, 523 So. 2d at 846.

In answering defendants' argument based on *Meyers* that the Direct Action Statute does not reach the exceptions to article 42 by referencing that article, the court disapproved *Meyers*: "In the absence of a contrary expression, when the Legislature adopts the general venue rules in an extraneous act, it should be presumed that it did so with respect for the codal system and with the intention to adopt the codal scheme."⁴¹ However, the court distinguished *Meyers* because that case considered the application of a venue provision contained in a statute extraneous to the Code.⁴² Thus, again, the court shifted the basis for the decision away from the Direct Action Statute.

Answering the argument that a defendant has a "natural or inherent right to be sued at his domicile" that could override this interpretation of the Code, the court stated that the civilian notion of venue, upon which defendants had based their argument, had been rejected when the legislature enacted the Code of Practice of 1825. This rejection was evidenced by the exceptions to the general rule of venue contained in that code as well as their subsequent proliferation. This proliferation "mirrors the newly emerging bases of modern venue statutes,"⁴³ which are based on factors such as

the convenience of both parties; the relationship between the forum and the cause of action; the reduction of litigation through certainty in the laying of venue; the places where the subject of action or part thereof is situated; the place where the cause of action arose; the place where the seat of government is located.⁴⁴

Finally, answering defendants' argument that article 76 is inapplicable in a tort case, the court found that an action on an uninsured motorist policy fit within the broad statutory formula: "[A]s long as the action is on any insurance policy, there is nothing in article 76 or the Code that would bar the article's operation."⁴⁵

Dissenting in *Kellis*, Justice Cole attacked the majority position on several fronts. Emphasizing the status of articles 71 through 77 as exceptions to the general rules contained in article 42, he concluded they should be strictly construed. Thus,

[a]lthough the plaintiff is authorized under article 76 to sue upon her insurance policy in the parish of her domicile, article 73 specifically limits venue to parishes proper under article 42, not

41. Id.

42. Id. at 846-847.

43. Id. at 847.

44. Id. at 848.

45. Id.

article 42 and any venue proper under an exception such as article 76.⁴⁶

Second, Justice Cole attacked the majority's construction of the intent of the legislature. Since the jurisprudence on which the majority relied to find the defendants solidarily liable appeared after the enactment of the Code, Justice Cole argued it was unlikely that the legislature intended the result in *Kellis*.⁴⁷

Criticizing the court's reliance on the proliferating policy bases of venue it had outlined, Justice Cole asserted that "only the plaintiff is likely to be inconvenienced by venue in Orleans Parish."⁴⁸ He claimed that nonparty witnesses would be made to travel out of their parish to testify, that the decision will increase litigation "as it is applied to the other exceptions," and, further, that since the accident occurred in Jefferson, that parish had the closest connection to the cause of action.⁴⁹

Finally, Justice Cole pointed out that should plaintiff lay venue properly in his domicile under the *Kellis* rule, courts would be prohibited from transferring the case under article 123, even if venue is "far from the locale of the witnesses, the defendants or the tort scene."⁵⁰

Justice Lemmon, who concurred with the majority opinion, asserted that "the heart of this case [was] that plaintiff [had] cumulated two actions against plural defendants."⁵¹ Articles 462 and 463, which contain the rules for cumulation of parties and of actions, were applicable, and these articles required that venue be proper for each action. Since defendants had not excepted to the plaintiff's cumulation of actions and since the court had correctly determined venue to be proper for the defendants, the decision itself was correct. Further, Justice Lemmon held out the possibility that "even if venue were proper only as to one defendant under Article 42"⁵² and one of its exceptions, venue would still be proper through the application of the doctrine of ancillary venue.⁵³

ANALYSIS

Reasoning

Despite the majority's attempt to distance itself from the jurisprudence construing the venue provision in the Direct Action Statute and

46. *Id.* Justice Marcus filed a brief dissent paralleling Justice Cole's remarks on the strict construction of exceptions to article 42: "The language of article 73 does not say article 42 'subject to' the exceptions provided in articles 71 through 85." 523 So. 2d at 848 (Marcus, J., dissenting).

47. 523 So. 2d at 848 (Cole, J., dissenting).

48. *Id.* at 848-49.

49. *Id.*

50. *Id.*

51. *Id.* at 849-850.

52. *Id.* at 850.

53. *Cf. Kellis*, 523 So. 2d at 849, where Justice Cole discusses ancillary venue.

thus from *Meyers*, it is clear that the Direct Action Statute does apply to the *Kellis* facts. The plaintiff clearly wished to sue "insured[s] and insurer . . . in solido." Thus *Meyers* is not distinguishable on the grounds that it involved a venue provision extraneous to the Code. Further, the court cited *Surridge* as authority for its incorporation theory, and *Surridge* used the Direct Action Statute to arrive at its result.

Beyond the narrowed mechanics of *Kellis*, however, a conceptual difficulty arises from the majority's finding that exceptions to article 42 are "an extension, supplement and legal part of the provisions of article 42." This finding is open to an effective attack by proponents of the strict construction of exceptions,⁵⁴ like Justice Cole, because it fails to specify whether exceptions to article 42 are always already included within the compass of that article or whether each exception remains outside article 42 until invoked to provide venue.

Consider a hypothetical based on the facts of *Kellis*. Since plaintiff wishes to sue her uninsured motorist carrier, she turns to the general rule, which through the operation of 42 then incorporates article 76. At this point, the other exceptions remain outside article 42. Plaintiff next turns to the other defendants. Since they are solidarily liable, article 73 is incorporated with article 42. Since article 73 provides venue under article 42 and since article 76 is now within article 42, article 76 provides proper venue under article 42 for all solidary obligors.

The alternative procedure begins with the assumption that all exceptions to article 42 are already present within it. Here plaintiff has merely to resort to article 73. Since venue is proper as to all solidary obligors under to article 42 and since article 76 is already incorporated within article 42, venue is proper as to all obligors under article 42, in Orleans Parish, the domicile of the plaintiff-insured.

Because the majority structures its reasoning by beginning with article 76 and then turning to article 73, it appears that exceptions are to be sequentially incorporated. On the other hand, language from *Kellis* suggests the latter procedure. The court states that the exceptions are "an extension, supplement and legal part" of article 42.

If the exceptions are sequentially incorporated the theory is subject to attack as being unduly complex. Before article 73 is incorporated, it is not a part of article 42; nevertheless, it can be part of article 42. Further, while strict construction is irrelevant if all exceptions are always already incorporated within article 42, sequential incorporation may be subject to an effective attack through the strict construction of excep-

54. Reliance on this rule has been attacked because the term "common right" as applied to defendant-domiciliary venue is not defined by the courts that use it and because defendant-domiciliary venue is anachronistic. See Comment, Contract Action Venue in Louisiana: Time for a Change?, 25 Loy. L. Rev. 367, 370 (1979). But see Justice Cole's remarks in *Kellis*, 523 So. 2d at 848.

tions. For instance, if the procedure intended by the court is to aggregate exceptions sequentially, plaintiff turns first to her uninsured motorist carrier, and article 76 is incorporated in article 42. Meanwhile, article 73 remains outside article 42. However, article 73 also names article 42. Prior to the incorporation of article 76, article 73 deferred venue to article 42, so this reference can be said to remain empty of any previous incorporations. Because exceptions must be construed narrowly, the reference to article 42 in article 73 is not a reference to article 76 "inside" article 42.

Regardless of which procedure for incorporation the *Kellis* court used to reach these exceptions, however, the conflict between a principle that would read exceptions narrowly to exclude reference through article 43 and one that would incorporate the exceptions into article 42 throws into stark relief the outlines of two competing concepts of Louisiana's venue provisions. The first of these, represented by the defendants' "natural rights" argument in *Kellis*, views article 42 as occupying a privileged, if contingent, position with regard to its exceptions. Thus, article 42 embodies the fundamental value inhering in the very existence of venue rules.⁵⁵ The exceptions to this general rule, however, control in those situations where this fundamental value is either displaced by another⁵⁶ or itself calls for an exceptional venue. In any event, the exceptions are not "incorporated" in the general rule because they are "derogations of the common right" and supplant the general rule only in narrowly circumscribed contexts.

The court in *Kellis* aligns itself with the view that article 42 does not occupy a privileged position with respect to its exceptions. Under this view, there is no venue provision that alone expresses the fundamental policy animating venue; rather, insofar as the venue provisions express such a policy, they express it equally. Exceptions, then, occupy equally-privileged positions with respect to each other and to article 42, which serves as a "catch-all" for those cases that fail to satisfy the requirements of an exception. Further, because this venue system is "evolving," article 42 does not embody the legislature's expression of the fundamental value at the heart of venue. Instead, this general rule and its exceptions implement that value in concert. This structure is said to reveal the "original design of the redactors" to incorporate the

55. One commentator has suggested that defendant-domiciliary venue is based on the fear that "since the plaintiff controls the institution of suit he might behave oppressively toward the defendant unless restricted." Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. Chi. L. Rev. 188, 192 (1933). Cf. La. Code Civ. P. arts. 123 and 5051.

56. An example of such a displacing value is implementation of a substantive law. See La. Code Civ. P. art. 5051.

exceptions to article 42 within it.⁵⁷ When there is no fundamental, privileged rule, the “subject to” formula does not express the idea of derogation, but the idea of incorporation.

Interpretation

With regard to the venue scheme within the Code, three articles yield the majority of the arguments to be made in support of either the incorporation or the fundamental-rule concepts of venue. After a brief introductory remark, article 42 specifies that an “individual” domiciled in Louisiana is to be sued in the parish of his domicile. Beginning with this principle, the statute embarks on a series of analogies to various legal entities, which are, for its purposes, the equivalent of individuals. For each of these defendant entities, the article prescribes an equivalent of domicile.⁵⁸

This pattern of analogies based on defendant-domiciliary venue may be contrasted with the exceptions to article 42. Article 76, for instance, provides alternative venue on any insurance policy at the domicile of the plaintiff. On the other hand, this very pattern of analogies may be said to illustrate the failure of defendant-domiciliary venue to provide for the majority of cases. Thus the idea of a fundamental rule would have no foundation in the fact of the article. Further, none of the venue provisions contained in article 42 explicitly denominates venue for these legal entities as “domicile”: venue here is simply venue. Finally, if an exception’s reference to article 42 means defendant-domiciliary venue, what is to be made of article 80, which provides alternative venue “where the defendant in the action is domiciled”?⁵⁹ If a reference to article 42 sufficed to signal defendant’s domicile, the legislature would not have felt compelled to spell out its intention in article 80 so explicitly.

The language of article 43 is similarly problematic.⁶⁰ Aside from the question whether it creates a pool of exceptions within the compass of article 42 or whether certain exceptions to article 42 are by virtue of its action sequentially aggregated, there is the question of what “subject to” means. The majority in *Kellis* took the position that the language creates an inclusive relationship between the general rule and its exceptions. However, the etymology of the word “subject” reveals quite

57. *Kellis*, 523 So. 2d at 847.

58. L'Enfant, *Developments in the Law, 1981-1982—Louisiana Civil Procedure*, 43 La. L. Rev. 491, 495 (1982).

59. La. Code Civ. P. art. 80.

60. With the adoption of the Code of Civil Procedure, the language now contained in article 43 was excluded from the general rule and established in its own article. This exclusion may then be said to emphasize the separateness of article 42 and its exceptions, in that no reference to the exceptions is now included in the general rule itself. See La. Code Prac. art. 162 (1870).

another meaning: that one object is placed or thrown ("ject") beneath ("sub") another.⁶¹ The two objects thus participate in a spatial relationship, but they remain distinct. Should one be incorporated in the other, the spatial relation inherent in the word would vanish. Thus, in terms of article 43, the "spatial" relationship means, by analogy, that the "higher" object, the exception to article 42, is legally prior to, or controls, the "lower" object, article 42. To denote an inclusive relationship, article 43 could have simply specified that the exceptions are "included in" article 42.⁶²

Finally, article 45 provides arguments militating against both the incorporation of exceptions within article 42 and the strict construction of exceptions as derogations from a "common right." Article 45(3) suspends the operation of article 43 when article 42 conflicts with articles 71 through 77.⁶³ In such a conflict, plaintiff may lay venue according to any of the applicable, conflicting provisions. Since *Kellis* builds its incorporation theory on the "subject to" language in article 43 and since article 43 is suspended when article 42 conflicts with the enumerated exceptions, it is apparent that the legislature could not have intended articles 71 through 77 to constitute a legal part of article 42.

But article 45(3) also argues against the idea that the legislature intended that exceptions to article 42 be narrowly construed as derogations of common right. Here, since under article 45(3), both article 42 and the enumerated exceptions provide proper venue in case of conflict, article 42 appears as a mere alternative rule rather than the fundamental expression of venue policy. Further, since article 42 is not "subject to" these exceptions, they are no longer derogations, but form with article 42 a pool of equivalent alternatives.

Thus the "subject to" language with which *Kellis* builds its incorporation theory can apply only to venue provisions other than those found in articles 71 through 77. The language of article 45(1), however, argues against the incorporation of articles 78 through 83 when it provides for the possibility of conflict between these exceptions and article 42.⁶⁴ If articles 78 through 83 are incorporated within article 42, there

61. W. Skeat, *An Etymological Dictionary of the English Language* 606 (3d ed. 1897).

62. The provenance of the "subject to" formula may support the incorporation concept. This statutory language enters Louisiana law as the French verb "recevoir," to receive, in the original, French version of the Code of Practice of 1825. The French language controlled in cases of conflict with the English. See Tucker, *Source Books of Louisiana Law*, 7 Tul. L. Rev. 82, 87 (1932), on the subject of conflict between the versions. The exceptions to article 42 are then "received" or "included" in it. Idiomatically, however, the French wording merely means that the general rule "has" some exceptions. See La. Code Civ. P. art. 5051.

63. See *supra* text accompanying note 17.

64. This argument applies as well to article 45(3), which also provides for conflict between article 42 and its exceptions.

can be no conflict, because by definition they are part of article 42.

As an exception to article 42 that provides alternative venue under article 42, the Direct Action Statute controls venue determination as against that article, but also allows a plaintiff to sue in venues appropriate under article 42 if he wishes:

[S]uch action *may* be brought against the insurer alone, or against both the insured and insurer jointly or in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer *under the general rules of venue prescribed by Art. 42, Code of Civil Procedure.*⁶⁵

Since article 42 contains specific provisions setting out proper venue for domestic⁶⁶ and foreign⁶⁷ insurers, it may be that the legislature in its 1962 revision of the Direct Action Statute meant merely to incorporate these provisions by reference. However, had the legislature intended such a restrictive interpretation, it might simply have specified the paragraphs it meant to include. Further, since article 42 is not an exception to the general rule of venue, but the general rule itself, a reference to article 42 should not be construed strictly. Arguably, a reference to article 42 in an exception to article 42 deprives the referring statute of its status as an exception.

A search for similar provisions deferring venue determination to article 42 reveals a bewildering set of statutory formulations. Most interesting in terms of the incorporation doctrine is Louisiana Revised Statutes 13:3203,⁶⁸ the venue rule for the Long Arm Statute, which provides alternative venue under the Code generally, but excludes article 42 from consideration. According to the logic of the *Kellis* rule, this reference would exclude every exception to article 42 contained in the Revised Statutes, possibly even itself.⁶⁹

Perhaps more germane to the interpretation of the Direct Action Statute are Code of Civil Procedure articles 73, 593, 2633, and 4653.⁷⁰

65. La. R.S. 22:655(B), amended by 1988 La. Acts No. 934 (emphasis added).

66. La. Code Civ. P. art. 42(2) allows for proper venue where the insurer's registered office is located.

67. La. Code Civ. P. art. 42(7) allows for proper venue in East Baton Rouge Parish.

68. La. R.S. 13:3203 (1968).

69. La. R.S. 13:3203 provides that "[a] suit on a cause of action described in R.S. 13:3201 may be instituted in the parish where the plaintiff is domiciled, or in any parish of proper venue under any provision of the Louisiana Code of Civil Procedure other than Article 42." (Emphasis added). If all exceptions to article 42 are included in it by virtue of article 43, the reference may exclude from consideration the domicile of plaintiff, since it too is an exception to article 42. Cf. La. Code Civ. P. art. 77.

70. La. Code Civ. P. arts. 73, 593, 2633, and 4653. The articles provide proper venue for solidary obligors, for class actions, for enforcement of mortgages or privileges

These articles track the above-emphasized language of the Direct Action Statute, with the difference that they omit the words "general rules." It may be argued that use of this phrase is meant expansively, that is, to reach all exceptions. By the same token, a reference merely to article 42 would limit the reach of the statute to article 42 without its exceptions.⁷¹

Articles 42 and 43 provide a second approach to this difference in terminology. Article 42 announces that it contains the "general rules of venue," and article 43 refers to article 42 as providing them. Thus, the legislature may have intended the words "general rules" as a signal that only the general, fundamental rules of venue contained in article 42 are to govern direct action venue. This ambiguity, however, may indicate that there is really no intended difference between an exception that uses the word "general" and one that does not. Having reached this impasse, the wording of article 2416⁷² provides some help. Providing venue "under Art. 42 or 77," it deals with the two articles as separate entities. If article 77 were included in article 42, there would be no need to mention article 77. Should it be concluded that the two variant formulations of reference to article 42 are interchangeable, the above implication of the language of article 2416 suggests that the Direct Action Statute should travel no farther than the borders of article 42 proper. If, however, "general rules" plus "article 42" is not interchangeable with "article 42" standing alone, and if the term "general rules" is taken in an expansive sense, the implication set up in article 2416 is meaningless in the direct action context.⁷³

Comparison of the Direct Action Statute with Louisiana Revised Statutes 22:1113(D) and 22:1175(C),⁷⁴ however, shows how a venue provision designed to reference all exceptions to article 42 contained in the Code is constructed. Both provide alternative venue "in any proper venue authorized under the Code of Civil Procedure." Thus, arguably, had the legislature intended the Direct Action Statute to reach all exceptions to article 42, it would have drafted the statute similarly or

and for concursus proceedings respectively. As with the reference contained in the Direct Action Statute, the legislature may have intended only certain provisions within article 42 to govern venue determination because of the nature of the specific proceedings.

71. *Id.* art. 5058.

72. La. Code Civ. P. art. 2416 provides venue for garnishment proceedings.

73. Unless, that is, the sequential mode of extending article 42 is employed and an exception deferring venue to article 42 like article 73, which refers to article 42 without using the words "general rules," acts to trigger the second extension.

74. La. R.S. 22:1113(D) (1977 & Supp. 1988) provides venue for proceedings to impose penalties for acting as an insurance agent without a license and for paying commissions to such persons. La. R.S. 22:1175(C) (Supp. 1988) provides venue for proceedings to collect penalties and to receive injunctive relief in connection with, among other things, the misrepresentation that one is an insurance agent.

simply deferred venue determination to the entirety of the Code of Civil Procedure, rather than taking the cryptic approach of relying on article 43 for this result.

What emerges from a consideration of the language and structure of Louisiana's venue provisions is that there was no "original design of the redactors." What the legislature enacted was a set of venue rules much like that perceived by Justice Dennis in *Kellis*: a group of venue rules implementing the policy of venue in concert and without a privileged, central member. However, since there is no "original design" unifying Louisiana's venue provisions, they do not express the concept of incorporation or for that matter, the common right/derogation concept. Instead the venue provisions are to be applied not as a system, but as a series of unconnected, alternative rules according to the conflict rules inherent in the exceptions, the conflict and waiver rules contained in article 43 through 45, and the transfer rules contained in articles 121 through 124.

The legislative history of both the Direct Action Statute and article 73 supports this position.⁷⁵ Among other things, the 1962 amendment substituted "article 42" for "domicile" of the insured or insurer as one proper venue in a direct action. Article 73 is derived from articles 165(6) of the Code of Practice of 1870. Article 165(6) provided proper venue in an action against solidary obligors "at the domicil of any of them."⁷⁶ It appears, then, that the legislature, in amending and replacing these venue provisions, used "article 42" as a convenient synonym for "domicile."⁷⁷

Policy

If the language and structure of Louisiana's venue provisions argue against a legislative intent to incorporate the exceptions to article 42 within it, the policies that animate venue and those that should guide its judicial administration show that incorporation is not only unintended but unwise.

The broad policy category that serves as the reason for venue is the notion that the place of trial should be convenient.⁷⁸ Two aspects

75. See supra note 26 for comparison of the relevant language of the Direct Action Statute before and after amendment in 1962 to accord with the then newly-enacted Code.

76. La. Code Prac. art. 165(6) (1870).

77. But cf. La. Code Civ. P. art. 80.

78. See Comment, Contract Action Venue: Time for a Change?, 25 Loy. L. Rev. 367, 371 (1979), for a useful summary of the development and policies of common law venue and, generally, Blume, Place of Trial of Civil Cases, 48 Mich. L. Rev. 1 (1949). The corresponding treatment of civil law venue has proven elusive. In France, whose venue scheme closely resembles Louisiana's, "the general feeling is," according to a

of convenience can be gleaned from article 123.⁷⁹ First, this article authorizes the trial court to transfer a civil case to another district in which plaintiff could have brought it when the transfer is “[f]or the convenience of the parties and the witnesses, in the interest of justice.”⁸⁰ Second, the article implies that a case may be transferred for the convenience of the parties and witnesses because these concerns are central to venue itself.

An additional aspect of convenience appears in considering proper venue for tort cases: “where the wrongful conduct occurred, or in the parish where the damages were sustained.”⁸¹ Article 74, since it allows venue not at a party’s domicile but at the locale of the event underlying plaintiff’s action, demonstrates that convenience to the evidence constitutes another policy behind venue.⁸²

Kellis is subject to criticism on at least two of these fronts. Suppose, for example, an automobile driven by an Orleans Parish domiciliary collides with that of a Caddo Parish domiciliary. The accident occurs in Orleans. Both drivers are insured, and the Caddo domiciliary sues in his home parish. As Justice Cole observed, under facts such as these *Kellis* would authorize venue in Caddo Parish, “far removed from the locale of the witnesses, the defendants or the tort scene.”⁸³ Further, because of the plaintiff-domiciliary proviso in article 123, the otherwise legitimate transfer of this case to Orleans Parish would be prohibited.⁸⁴

Another policy embedded in article 123 is that venue be “just.” On one hand, justice in this context is merely the equivalent of convenience: a convenient forum is a fair forum. On the other hand, this policy, rather than a reason for venue, is a principle of its proper administration. Thus, if plaintiff should deliberately attempt to force defendant to compromise by laying venue in a forum distant from the

treatment of contemporary civilian venue, “that it makes little difference which court in France hears a given case, if, after all, every judge renders justice in the name of the French sovereign nation.” deVries and Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 *Iowa L. Rev.* 306, 316 (1959). *Las Siete Partidas* merely declares that the “ancient sages” thought defendant-domiciliary venue just. *Las Siete Partidas*, Part. 3, Title 2, Law 32, at 52 (L. Moreau Lislet and H. Carleton trans. 1820).

79. La. Code Civ. P. art. 123.

80. The article also provides, however, that should plaintiff bring suit in his domicile and jurisdiction and venue be proper there, the case cannot be transferred.

81. La. Code Civ. P. art. 74.

82. Although some evidence may be easily transported from the tort scene, increasing amounts of such evidence make transportation increasingly burdensome. Further, some evidence may be incapable of transportation at all.

83. *Kellis*, 523 So. 2d at 849 (Cole, J., dissenting). Justice Cole’s criticism is less persuasive as to the inconvenienced defendant, since one of the parties under these facts will be inconvenienced whether venue is laid in plaintiff’s or defendant’s domicile.

84. *Id.*

witnesses, the defendant, or the evidence, it would be "just," even if venue were otherwise proper, for the case to be transferred under article 123. Again the idea that the legislature intended the exceptions to article 42 be "incorporated" in that article is cast in doubt.⁸⁵

An additional administrative policy, related to "justice," is the prevention of forum shopping. According to Justice Cole, the attorney for plaintiff in *Kellis* admitted on oral argument that he chose Orleans Parish because "he obtains 'better' judgments there."⁸⁶ Since plaintiff's uninsured motorist carrier had not contested the lower courts' transfer of the case, Justice Cole surmised that the uninsured motorist carrier knew it was in no danger of being cast in judgment and knew it was merely plaintiff's "venue vehicle."⁸⁷ Justice Cole objected to this "shopping" because it was unintended by the legislature. Further, it may be objected that the practice may also tend to erode confidence in the law, the courts, and the legal profession.

One further administrative policy appears in Justice Cole's dissent in *Kellis*: judicial efficiency. If venue litigation is to be kept at a minimum, venue rules must be certain, and they must be construed as providing as close to a "bright line" standard as possible. Here, the *Kellis* rule presents the distinct possibility that a great many new and unsuspected combinations of exceptions to article 42 will be litigated as plaintiffs attempt to avoid the rigors of prescription and unsympathetic judges.⁸⁸

Finally, article 5051 embodies another administrative policy. The article provides that "[t]he 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."⁸⁹ Since it enlarges the available venues allowed the plaintiff in a direct action, *Kellis* appears to have accomplished the goal set out in this article. However, *Kellis* is an anomaly in the "incorporation" debate, since it did not involve prescription.⁹⁰ Construing venue rules so that they recede from "bright line" status, then, may help implement the

85. Article 73 may provide some protection for defendants in these circumstances. In its second paragraph article 73 provides that "[i]f the action against this defendant [who serves as venue vehicle] is compromised prior to judgment, or dismissed after a trial on the merits, the venue shall remain proper as to the other defendants, unless the joinder was made for the sole purpose of establishing venue as to the other defendants." La. Code Civ. P. art. 73.

86. *Kellis*, 523 So. 2d at 849 (Cole, J., dissenting).

87. *Id.*

88. Another benefit of certainty here would be the minimizing of judicial discretion.

89. La. Code Civ. P. art. 5051.

90. Prescription rules represent the desire that legal rights have an end. Again, the policy is certainty. See Comment, Legal Rights and the Passage of Time, 41 La. L. Rev. 220, 228 (1980).

substantive law by allowing tort plaintiffs to add defendants after the actions would have prescribed, but the resulting uncertainty has its cost.⁹¹

Suggested Approach

Kellis suggests that the earliest assertion that the exceptions to article 42 might be incorporated within it comes from Judge Tate, when writing for this review in 1969, he expressed dissatisfaction over certain language in *Laverne v. Tennessee Farmers Mutual Insurance Co.*⁹²

for implying that direct action suits may never be brought at other than these venues authorized by the direct action statute. If the direct action suit against the insurer is properly cumulated with an action against a joint or solidary obligor, it may also be brought in any parish or proper venue under Article 42 as to any other solidary obligor⁹³

It is clear, however, that, far from endorsing the principle of extension *Kellis* applies, Judge Tate's remarks concern only the ranking of, or choice between, inconsistent exceptions to article 42. He continues, "[F]or example, had a joint tortfeasor domiciled in Vermillion been joined [with the foreign insurer of another, non-resident tortfeasor] as codefendant, the venue would be proper in that parish . . . even though it is not one of the venues authorized by the direct-action statute for suits against the insurer alone."⁹⁴ Thus, in its direct action aspect, *Kellis* would call for venue as specified in the Direct Action Statute, but in its solidary liability aspect, the case would call for venue according to article 73. For the purposes of venue determination, then, Judge Tate is merely stating that when a direct-action defendant and a tortfeasor are also solidary obligors, neither the direct action venue rule nor the quasi-offense venue rule of article 74 control. Instead, article 73, the venue rule for solidary obligors, provides proper venue under article 42 for all defendants and actions.

In contrast to the procedure established in *Kellis*, application of Louisiana's venue provisions as a series of alternative rules provides a certain procedure that arrives at a convenient forum. Consider this rule application when used to determine venue for the *Kellis* action. Plaintiff wishes to sue four solidary obligors in one forum: the two tortfeasors,

91. *Id.*

92. 208 So. 2d 561 (La. App. 3d Cir. 1968). The majority in *Kellis* cites Judge Tate's remarks as direct authority for the proposition that each exception to article 42 is an "extension, supplement and legal part" of article 42. *Kellis*, 523 So. 2d at 846.

93. Tate, *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Civil Procedure*, 29 La. L. Rev. 269, 275 (1969).

94. *Id.*

Jefferson Parish domiciliaries; the foreign insurer of both tortfeasors; and plaintiff's uninsured motorist carrier, also a foreign insurer. Article 73 provides proper venue "under Article 42, as to any obligor who is made a defendant."⁹⁵ Article 45(3) does not apply because article 73 does not conflict with article 42. Article 42 provides venue for all insurers under subsection 7 in East Baton Rouge Parish.⁹⁶ Both tortfeasors may be sued under subsection 1 "in the parish of [their] domicile,"⁹⁷ Jefferson Parish.

But since plaintiff wishes to sue her uninsured motorist carrier, article 76(3) also applies to plaintiff's action.⁹⁸ Under article 76(3) venue is proper "in the parish where the loss occurred."⁹⁹ Jefferson Parish, or where "the insured is domiciled,"¹⁰⁰ Orleans Parish.

Since plaintiff also wishes to sue the two tortfeasors and their insurer, the venue provisions contained in article 74 and the Direct Action Statute are potentially applicable as well. Thus, it is necessary to consider the conflict rules implied in the applicable provisions. To begin with the simplest scenario, had plaintiff wished merely to sue one tortfeasor without an insurer, article 45 would allow plaintiff to lay venue according to either article 74, "where the wrongful conduct occurred, or . . . where the damages were sustained,"¹⁰¹ or article 42(1), in defendant's parish of domicile or residence.¹⁰² If, however, this defendant had an insurer, the Direct Action Statute would provide venue "in the parish in which the accident or injury occurred or [where] an action could be brought against either insured or insurer under . . . Art. 42."¹⁰³ The striking identity of authorized venues in a tort suit both with and without an insurer-defendant, implies 1) that the legislature intended to duplicate permissible venues for each type of suit and 2) that the legislature intended that when an insurer is sued along with the tortfeasor, the Direct Action Statute should control as against article 74.

Consider now the *Kellis* facts: plaintiff wishes to sue two tortfeasors and their insurer; thus, the Direct Action Statute controls. Venue is proper, then, where the accident or injury occurred, Jefferson Parish, or, under article 42, in the parish of domicile of insured or insurer,

95. La. Code Civ. P. art. 73.

96. Id. art. 42(7).

97. Id. art. 42(1).

98. Although the article does not explicitly provide venue for uninsured motorist policy actions, the words "any other insurance policy" are extremely broad. See Id. arts. 5051-52.

99. Id. art. 76(3).

100. Id.

101. Id. art. 74.

102. Id. art. 42(1).

103. La. R.S. 22:655(B) (Supp. 1989).

Jefferson Parish or East Baton Rouge Parish. But plaintiff also wishes to sue her uninsured motorist carrier. Article 45 authorizes venue either under article 76, in Jefferson or Orleans Parishes, or under article 42(7), in East Baton Rouge Parish.

It appears then that plaintiff must file two suits: one against the tortfeasors and their insurer and one against her uninsured motorist carrier. If she wishes to sue all defendants in one forum, plaintiff must avail herself of article 73, the venue rule for solidary obligors, which authorizes plaintiff to sue where venue would be proper as to any defendant under article 42, that is, where any defendant is domiciled. In the final analysis, then, article 42 provides proper venue on the *Kellis* facts in Jefferson Parish or in East Baton Rouge Parish. Otherwise plaintiff must file two suits.

Conclusion

Even though plaintiff has been injured in an automobile accident in a parish other than that where she is domiciled by residents of the other parish, she can nevertheless bring suit against the tortfeasors and their insurers in the parish of her domicile by suing her uninsured motorist carrier as well. In order to reach this result, *Kellis* found that the exceptions to article 42 are somehow incorporated within it. By embracing this theory of Louisiana's venue provisions, the court rejected the traditional notion that defendant-domiciliary venue is a "common" or fundamental right and the principle that exceptions to article 42 are to be construed narrowly. The statutory language and structure of Louisiana's venue provisions and the interests of convenience, judicial efficiency and certainty in the law support the better view: that the legislature did not intend to adopt either system, providing instead a series of independent, alternative rules to be applied according to the conflict rules inherent in the exceptions, the conflict and choice rules found in article 43 through 45 and the transfer rules found in articles 121 through 124.

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