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Procedure: Louisiana Civil Procedure

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LOUISIANA CIVIL PROCEDURE

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JURISDICTION OVER SUBJECT MATTER

Church members who wanted to "see for themselves how much money the church took in and how the money was spent"[1] filed suit against their church and their pastor claiming a right to examine the books and records of the church under Louisiana's Nonprofit Corporation Law.[2] The trial court, in *Bourgeois v. Landrum*, granted the order and the plaintiffs examined the books. The plaintiffs who were not satisfied that all of the records had been produced sought sanctions against the defendants for failure to answer interrogatories. The trial court sustained the defendants' exception of lack of jurisdiction over the subject manner. The court of appeal affirmed,[3] reasoning that civil courts should interfere in church matters only in property disputes and that the present issue did not involve property rights but rather a possible dissension over church management. In addition, the court stated that a church did not subject itself to review by civil courts simply because it was organized under the Nonprofit Corporation Act; there had to be a property dispute. The Louisiana Supreme Court reversed and remanded.[4]

The supreme court rejected, as too restrictive, the position taken by the court of appeal that civil courts are to become involved in church matters only to resolve property disputes. The supreme court reasoned that the first amendment circumscribes the authority of civil courts with respect to ecclesiastical disputes in order to protect churches from secular interference in matters of church doctrine, practice, and administration;[5] this protection would not be violated by granting plaintiffs' request in this case because by so doing, civil courts would not be involving themselves in matters of a religious nature—such as doctrine, policy, or management. The court would be merely allowing the plaintiffs to inspect church records. In addition the supreme court also disagreed with the court

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1. Bourgeois v. Landrum, 387 So. 2d 611, 612 (La. App. 4th Cir. 1980).
2. LA. R.S. 12:223(A), (C) (1968).
3. 387 So. 2d 611 (La. App. 4th Cir. 1980).
4. 396 So. 2d 1275 (La. 1981).
5. *See* Jones v. Wolf, 443 U.S. 595 (1979); Serbian Orthodox Diocese v. Melivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).

of appeal's position that the church was not automatically subject to the state's corporation statutes absent a property dispute. The supreme court stated that the church as a nonprofit corporation was subject to the provisions of the statute unless application of the statute would violate the protection guaranteed by the first amendment. Finding no such violation, the court concluded that under the terms of the Nonprofit Corporation Law the plaintiffs had a right to inspect the church records at any reasonable time upon their simple request.

The supreme court was correct in rejecting the position taken by the court of appeal because that position is both too narrow and too broad. The position is too narrow in that it calls for dismissal of any civil action involving a church unless the dispute is over property. It is too broad in that it seems to be saying that in a property dispute a civil court can exercise jurisdiction without considering whether the resolution of that dispute would involve the court in questions of church policy and doctrine. For example, in *Presbyterian Church v. Hull Church*[6] the United States Supreme Court ruled that Georgia courts had violated the first amendment in resolving a church property dispute under Georgia's implied trust doctrine—that doctrine required courts to determine if the national church had so departed from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the national church should be declared terminated. Such a determination would necessarily involve civil courts in questions of ecclesiastical doctrine and interpretation and the relative importance of various tenets of faith and practice—an inquiry the first amendment forbids courts to make.

The decision of the Louisiana Supreme Court in *Bourgeois* focuses on the central question—whether the civil action would involve the court in question of church doctrine, policy, practice, and administration. If such questions are involved the court must dismiss the action; if they are not, the court can resolve the dispute whether it involves property rights[7] or some other question such as the validity of the election of the church's board of directors.[8]

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6. 393 U.S. 440 (1969).

7. Jones v. Wolf, 443 U.S. 595 (1979).

8. Wilkerson v. Battiste, 393 So. 2d 195 (La. App. 1st Cir. 1981). The court decided the question of the validity of the election of the board of directors of a church because the only inquiry was whether the method of election set out in the church charter had been followed; this inquiry did not involve any question of religious law, doctrine, policy, or practice. The court did refuse to hear the question relating to the appointment of a minister because this issue was a purely ecclesiastical matter.

STANDING TO SUE

When the Ramsey River Road Property Owners Association, a nonprofit association, sued to enjoin construction of a bridge across the Bogue Falaya River, the defendants objected that the plaintiff lacked standing to bring the action. The trial court overruled the objection and after trial rendered judgement in favor of the plaintiff. The court of appeal affirmed[9] and the supreme court granted certiorari and affirmed.[10]

In resolving the issue of standing the Louisiana Supreme Court applied the standards set forth by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*,[11] namely: "(1) the members would otherwise be able to bring the suit in their own right, (2) the interests the association seeks to protect are pertinent to its purpose and (3) neither the claim asserted by the association nor the relief sought requires the participation of individual members in the lawsuit."[12] In so doing the Louisiana Supreme Court found that: (1) some of the members owned property on the Bogue Falaya River and could sue in their individual capacities to protect their property, (2) one of the purposes of the Association was to institute actions to protect the environment, and (3) the participation of individual members was not necessary for full adjudication of the controversy. In addition, the court addressed a concern, raised in a concurring opinion in *Save Our Wetlands, Inc. v. Werner Brothers, Inc.*,[13] that an association could be used to conceal the real interests being asserted (that competitors could be masquerading as an environmental association) by noting that the membership list had been made available to the defendants and that the members had testified as to their interest in the litigation.

PLEADINGS

If a plaintiff compromises his claim against one of the alleged joint tortfeasors, reserving his rights against the other, any

9. Ramsey River Rd. Property Owners v. Reeves, 387 So. 2d 1194 (La. App. 1st Cir. 1980).

10. 396 So. 2d 873 (La. 1981).

11. 432 U.S. 333 (1977). These criteria had been used in the earlier case of *Louisiana Hotel-Motel Ass'n, Inc. v. Parish of East Baton Rouge*, 385 So. 2d 1193 (La. 1980), in which the court held that the plaintiffs lacked standing to challenge the constitutionality of a resolution of the City-Parish Council imposing a moratorium on the issuance of licenses to sell alcoholic beverages because there was no showing that (1) individual members would suffer injury from the moratorium, (2) members could sue in their individual capacities, or (3) the suit served any of the interests for which the association had been formed.

12. 396 So. 2d 873, 874 (La. 1981).

13. 372 So. 2d 231 (La. App. 4th Cir. 1979).

recovery he obtains against the remaining defendant must be reduced by the virile share of the released defendant, because the effect of the compromise is to deprive the remaining defendant of his right to enforce contribution from the released defendant through subrogation to the rights of the plaintiff.[14] This result occurs only where the released defendant is found to be a joint tortfeasor and thus liable *in solido* with the other defendant; the burden of establishing the liability of the released defendant usually rests on the remaining defendant.[15] However, in *Danks v. Maher*,[16] where the plaintiff compromised her claim against the doctor (reserving her rights against the hospital) late in the trial, the court stated that it would be unfair to shift the burden of proof to the defendant hospital because the hospital had had no warning that it would be called upon to prove the negligence of the doctor. The court held that, under these circumstances, the plaintiff was bound by the allegations in her petition with respect to the negligence of the doctor. Accordingly, the plaintiffs' recovery was reduced by one-half. The exception created by *Danks* was an issue in two recent cases, *Wall v. American Employers Insurance Co.*[17] and *Raley v. Carter*.[18]

In *Wall* two sets of plaintiffs filed a claim for wrongful death and claims for personal injuries against the drivers of the two vehicles involved in an accident and also against the police jury that maintained the intersection where the accident occurred. Both sets of plaintiffs settled with the drivers and the drivers' insurers and reserved their rights against the police jury. The trial court dismissed the claim against the police jury and the court of appeal reversed but, relying on *Danks*, reduced recovery against the police jury by two-thirds on the grounds that the plaintiffs were bound by their allegations with respect to the negligence of the released drivers. The supreme court granted writs and ruled that the court of appeal was in error in applying *Danks* because the instant case could be distinguished from *Danks* on several points: The settlement had occurred years before the trial; the defendant had raised the issue of the negligence of the released drivers in a supplemental answer praying that any judgment against it be reduced by two-thirds; at trial the plaintiffs had introduced, without objection, evidence showing the lack of negligence of the drivers and showing that the police jury was solely at fault in the accident. The supreme court concluded that the plaintiffs were not bound by their original petitions because

14. *See* LA. CIV. CODE arts. 2103 & 2203; Harvey v. Travelers Ins. Co., 163 So. 2d 915 (La. App. 3d Cir. 1964).

15. 163 So. 2d 915, 922 (La. App. 3d Cir. 1964).

16. 177 So. 2d 412 (La. App. 4th Cir. 1965).

17. 386 So. 2d 79 (La. 1980).

18. 401 So. 2d 1006 (La. App. 1st Cir. 1981).

the pleadings had been amended by the evidence introduced without objection.[19] Having settled this point, the court then considered whether the drivers were at fault on the basis of the evidence presented at trial and determined that they were. The judgment of the court of appeal thus was affirmed but on different grounds.

In considering whether *Danks* should control the result in *Wall*, it seems that *Wall* is distinguishable not only on the grounds stated by the supreme court—the implied amendment of the pleadings—but also because it was not unfair to impose on the police jury the burden of proving fault on the part of the released drivers. The settlement had occurred long before the trial, and the amended answer filed by the police jury showed awareness of its position. The grounds for the exception in *Danks*—the unfairness of shifting the burden of proof to the defendant who would be unprepared—were simply not present in *Wall*.

In the second case, *Raley v. Carter*, the plaintiff had sued four defendants to recover for injuries sustained in an industrial accident. On the morning of the trial, he dismissed three defendants with reservation of rights against the remaining defendant. At the trial no evidence was introduced by either party as to the negligence of the released defendants. The trial court rendered judgment in favor of the plaintiff, and on appeal the judgment was reduced by three-fourths—the virile shares of the released defendants. The court of appeal followed *Danks* and ruled that placing the burden of proving the negligence of the released defendants on the remaining defendant would be unfair because the release occurred on the morning of the trial, and the defendant would have been prepared to present evidence only on the issue of his own negligence. The court concluded that the plaintiff was bound by the allegations in his petition that the released defendants were joint tortfeasors liable *in solido* with the unreleased defendant. *Wall* was distinguished on the grounds that in that case evidence as to the non-liability of the released defendants had been introduced by the plaintiff without objection from the defendant. The court in *Raley* seems to be saying that if the plaintiff had amended his petition or had introduced evidence as to the non-liability of the released defendants, as was done in *Wall*, the result would have been different. But, as mentioned earlier, *Wall* is distinguishable from *Danks* on a more important point, namely, that the release in *Wall* occurred well before trial; thus there was no basis for finding that it would be unfair to require the defendant to prove the negligence of the released defendants.

19. LA. CODE CIV. P. art. 1154.

EXCEPTIONS

In *International Matex Tank Terminals v. System Fuels, Inc.*[20] the defendant, on the day scheduled for the hearing on the plaintiff's petition to evict the defendant in a summary proceeding, filed declinatory exceptions of lis pendens and improper venue and a peremptory exception of no right of action. The trial court sustained the declinatory objections, but the court of appeal granted a writ and reversed on the grounds that the filing of the peremptory exception was a general appearance which waived the objections asserted in the defendant's declinatory exception. The supreme court granted writs and reversed.

Ordinarily, if a defendant files a declinatory exception and then files a peremptory exception before the court has ruled on the declinatory exception, the defendant has made a general appearance which has the effect of waiving the objections raised in the declinatory exception (except lack of jurisdiction over subject matter),[21] unless the defendant is required by law to plead the exceptions together.[22] Article 2593 of the Code of Civil Procedure provides that "[E]xceptions . . . to a petition in a summary proceeding shall be filed prior to the time assigned for, and shall be disposed of on, the trial."[23] Thus, the question presented in *International Matex*, was whether a summary proceeding under article 2593 is one of the exceptions referred to in article 7 of the Code of Civil Procedure. The supreme court answered that article 2593 is an exception under article 7 because any other result would require the defendant either to waive his declinatory exceptions by making a general appearance by filing the peremptory exception before the court ruled on the declinatory exceptions or to waive his peremptory exceptions by not filing them prior to the trial as required by article 2593. This dilemma would result because article 2593 requires that all exceptions be filed prior to trial and that all exceptions be disposed of at trial. Therefore, the only fair result is to allow the defendant to file all of his exceptions together.

The decision reached by the court in *International Matex* is fair to the defendant and carries out the intent of the Code reflected in article 2593 that summary proceedings should be conducted expeditiously.[24] But an interesting point in the opinion is the court's

20. 398 So. 2d 1029 (La. 1981).

21. LA. CODE CIV. P. arts. 7 & 925.

22. LA. CODE CIV. P. art. 7.

23. LA. CODE CIV. P. art. 2593.

24. LA. CODE CIV. P. art. 2591 provides, "Summary proceedings are those which are conducted with rapidity. . . . "

citation to *Foster v. Breaux*[25] as an example of a case in which the defendant is required by law to file the declinatory and peremptory exceptions together. By citing *Foster* the court seems to be saying that if the defendant has a defense of improper venue and a defense of prescription based on improper venue, he can file the declinatory exception objecting to venue and the peremptory exception objecting to prescription at the same time. But this point is by no means clear in *Foster*, because, in that case, there is also language to the effect that if the trial court rules that venue is not proper, it ceases to be a competent court to rule on the defense of prescription.[26]

DEFAULT JUDGMENT

Article 4916 of the Code of Civil Procedure provides that a plaintiff may obtain a default judgment by producing relevant and competent evidence which establishes a prima facie case; where the claim is based on an open account, prima facie proof may be submitted by affidavit.[27] In *Buddy Patterson Gateway Gulf Sevices v. Howell*,[28] the plaintiff obtained a default judgment by introducing the petition, a citation with the sheriff's return showing service, and an affidavit of the correctness of the account. The petition and the affidavit referred to an itemized account, but no such account was made part of the record. On appeal, the judgment was reversed on the grounds that the evidence was not sufficient to establish a prima facie case. The court stated that in order to obtain a default judgment the plaintiff must prove the essential allegations of his petition to the same extent as if the defendant had filed an answer contesting them; as applied to a suit on an open account, the plaintiff therefore must introduce an itemized account and an affidavit of correctness.

DISCOVERY

In *Fowler v. Jordan*[29] the plaintiff obtained a judgment for attorney's fees and expenses when the defendant failed to appear on the day set by the parties for taking the plaintiff's deposition. The defendant had originally given written notice that the deposition was to be taken on April 14, 1980, but the plaintiff's attorney contacted the defendant's attorney and the deposition was rescheduled for May 2, 1980, at which time the defendant failed to appear. No written notice of the May 2, 1980, deposition was given and this

25. 263 La. at 1112, 270 So. 2d 526 (1972).
26. 263 La. at 1124, 270 So. 2d at 530.
27. LA. CODE CIV. P. art. 4916.
28. 392 So. 2d 140 (La. App. 1st Cir. 1980).
29. 397 So. 2d 24 (La. App. 2d Cir. 1981).

omission, the court of appeal concluded, was fatal to the plaintiff's claim for expenses and attorney's fees. The court interpreted article 1447[30] as requiring written notice as a prerequisite to a claim for expenses and attorney's fees; only with such a notice would all parties be made aware of their obligation to appear, and in addition, written notice would eliminate the risk of misunderstandings which can occur in oral communications.

Articles 1471[31] and 1473[32] of the Code of Civil Procedure provide for a variety of sanctions, including dismissal of the suit, which can be imposed where, for example, a party fails to comply with an order to permit discovery or fails to appear for the taking of his deposition or fails to serve answers to interrogatories. In *Allen v. Smith*[33] the plaintiff refused to comply with an order to produce for inspection the motorcycle alleged to be defective, failed to appear on the day set for the taking of his deposition and failed to answer interrogatories. The defendant moved to dismiss the plaintiff's suit, and when the plaintiff failed to comply with the order to submit a brief on the question of whether the dismissal should be with prejudice, the trial court dismissed the plaintiff's claim with prejudice. The court of appeal affirmed, finding no abuse of discretion.[34] The supreme court reversed on the grounds that a dismissal with prejudice was such a drastic remedy that it should be applied only in extreme circumstances. In this case, the record did not show that the noncompliance was due to the wilfulness, bad faith, or fault of the plaintiff. Therefore, imposition of the drastic penalty of dismissal with prejudice was an abuse of discretion. But the supreme court also believed that the imposition of other sanctions was appropriate and ordered that the defendant be awarded costs and attorney's fees and that these payments should be made by the plaintiff's counsel because the record indicated that noncompliance was due to the inattention of counsel. The court also ordered the plaintiff to comply with the discovery requests and stayed his action until he complied.

In *Allen* the court sought to compel compliance with the requests for discovery while protecting an innocent client from the mistakes of counsel. The court believed that the fair result would be to make the attorney pay for his inattention while protecting his

30. LA. CODE CIV. P. art. 1447.
31. LA. CODE CIV. P. art. 1471.
32. LA. CODE CIV. P. art. 1473.
33. 390 So. 2d 1300 (La. 1980).
34. 380 So. 2d 174 (La. App. 1st Cir. 1979).

client from a dismissal with prejudice which would have been a bar to a subsequent suit on the same claim.[35]

SUMMARY JUDGMENT

The case of *Vermillion Corporation v. Vaughn*[36] has led a strenuous procedural life traveling from trial court to the court of appeal to the United States Supreme Court—after denial of writs by the Louisiana Supreme Court—back to the court of appeal, then to the Louisiana Supreme Court which remanded it to the trial court for a trial on the merits. The plaintiff sued to enjoin various defendants from using canals it alleged were private and under its exclusive control. The defendants took the position that the canals were navigable waterways subject to public use. After a deposition and affidavits had been filed, the plaintiff moved for summary judgment; in opposition the defendants argued that they had a right to use the canals as a substitute for the natural waterways which had been destroyed by the man-made canals. Although this contention was rejected as immaterial by the trial court and the court of appeal, the United States Supreme Court ruled that the defendants' allegations, if true, might constitute a defense under federal law to the plaintiff's claim for injunctive relief. The court of appeal refused to remand to the trial court for the introduction of evidence on this question because the defendants' answers did not affirmatively plead this defense, and their affidavits were not based on personal knowledge; therefore, the court concluded that there was no genuine issue of material fact and again affirmed the granting of the summary judgment.[37]

The Louisiana Supreme Court granted a writ of review and reversed. With respect to the objection that the defendants had not raised the defense of the destruction of the natural waterways, the Louisiana Supreme Court ruled that either the answer should be considered amended by the evidence offered in the affidavit or a formal amendment of the answer should be allowed in light of the affidavits. The court also rejected the objection that the affidavits could not be considered because they failed to show that they were made on personal knowledge. The court stated that an affidavit which did not affirmatively show that it was based on personal knowledge could be considered by the court if no objection was raised to it, unless it was clear that the affidavit was not based on personal knowledge. In reaching this conclusion, the supreme court followed

35. LA. CODE CIV. P. art. 1673.
36. 397 So. 2d 490 (La. 1981).
37. 387 So. 2d 698 (La. App. 3d Cir. 1980).

its earlier ruling in *Barnes v. Sun Oil Co.*[38] that the failure to show that an affidavit is based on personal knowledge is a formal defect which is waived if not objected to by a motion to strike or in some other way. But an affidavit which fails to make the affirmative showing of personal knowledge must be distinguished from one which clearly shows that it was *not* based on personal knowledge, because the latter is fundamentally defective and cannot be considered in ruling on a motion for summary judgment.[39]

DIRECTED VERDICTS

The Louisiana Code of Civil Procedure article 1810[40] provides for the granting of directed verdicts in both jury and nonjury trials, but it does not set forth what the standard should be or whether the standard should be different in each of these cases. In addition, the article does not state whether the dismissal of the plaintiff's case on a motion for directed verdict can be with or without prejudice. These questions were addressed in recent cases decided by the supreme court and courts of appeal.

In *Breithaupt v. Sellers*,[41] an action to recover for injuries sustained when the plaintiff was shot while hunting, the trial judge granted the defendant's motion for a directed verdict on the grounds that the plaintiff's failure to wear "hunter orange" was contributory negligence as a matter of law and barred recovery. The court of appeal affirmed but the supreme court reversed. The supreme court stated that the question of whether the plaintiff's negligence caused his injury was a question of fact for the jury; in deciding whether the motion for a directed verdict was properly granted, the court adopted the test that had been used by the court of appeal—namely, could reasonable people looking at the evidence in a light most favorable to the plaintiff arrive at different conclusions. Applying the standard, the supreme court concluded that it was error to grant the motion for a directed verdict and remanded for a new trial. The standard applied by the supreme court without comment in *Breithaupt* had been applied earlier by the Third Circuit Court of Appeal in *Campbell v. Mouton*.[42] In *Campbell* the appellate court adopted the standard for directed verdicts in jury cases used

38. 362 So. 2d 761 (La. 1978). *See also* Benoit v. Burger Chef Systems of Lafayette, Inc., 257 So. 2d 439 (La. App. 1st Cir. 1972).

39. *See* Walker v. Firemen's Ins. Co., 264 So. 2d 277 (La. App. 3d Cir. 1972); Hidalgo v. General Fire & Cas. Co., 254 So. 2d 493 (La. App. 3d Cir. 1971).

40. LA. CODE CIV. P. art. 1810.

41. 390 So. 2d 870 (La. 1980).

42. 373 So. 2d 237 (La. App. 3d Cir. 1979).

by the federal courts[43] because article 1810 is based on Rule 50 of the Federal Rules of Civil Procedure. The same standard had also been applied in other circuits.[44]

Where the trial is without a jury, the courts of appeal[45] have applied a different standard. If a motion for directed verdict is made at the close of the plaintiff's case, the court must resolve the issues of fact based on a preponderance of the evidence test instead of determining, as would be done in a jury case, whether the evidence is sufficient to enable reasonable minds to reach different conclusions. In deciding the proper standard to be used in non-jury cases, the courts again looked to federal cases[46] for guidance. In so doing they followed the decision of the Louisiana Supreme Court in *Madison v. Traveler's Insurance Co.*:[47] that when state rules of procedure are obtained from the federal rules, the state courts may look to the federal cases interpreting those provisions for guidance.

On the question of whether the dismissal on a motion for directed verdict could be with or without prejudice, the court of appeal for the first circuit, in *Littles v. Southeastern Fidelity Insurance Co.*,[48] held that the dismissal must be with prejudice. In reaching this decision the court was persuaded by two factors. First, although article 1810(B) was taken almost verbatim from Rule 41(B) of the Federal Rules of Civil Procedure, the following language was omitted from the Louisiana article: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits." The court interpreted this omission to mean that Louisiana judges were not intended to have the same discretion that federal judges had to dismiss with or without prejudice. This intepretation was strengthened by a second factor. Louisiana Code of Civil Procedure article 1810 provides that, "[t]he Court may then determine the facts and render judgment against the plaintiff. . . . " In light of this language the court, in *Littles*, concluded that a determination on the facts is a determination on the merits which is a final adjudication of the matter and makes a dismissal without prejudice inappropriate because such dismissals are usually based on procedural grounds.[49]

43. *See* Boeng Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969).

44. *See* Perkins v. American Mach. & Foundary Co., 385 So. 2d 492 (La. App. 1st Cir. 1980); Regas v. Argonaut S.W. Ins. Co., 379 So. 2d 822 (La. App. 4th Cir. 1980).

45. Littles v. Southeastern Fidelity Ins. Co., 398 So. 2d 575 (La. App. 1st Cir. 1980); Sevin v. Shape Spa For Health & Beauty, Inc., 384 So. 2d 1011 (La. App. 4th Cir. 1980).

46. *See, e.g.*, Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970).

47. 308 So. 2d 784 (La. 1975).

48. 398 So. 2d 575 (La. App. 1st Cir. 1980).

49. *Id.* at 580. *See* LA. CODE CIV. P. art. 1672; "A judgment dismissing an action shall be rendered upon application of any party, when the plaintiff fails to appear on

JUDGMENTS

Under Louisiana Revised Statutes 13:843.1,[50] the clerk is authorized to issue a demand for unpaid court costs to the party primarily responsible not later than one hundred and twenty days after final termination of the civil action. This statute seems to mean that if a judgment has been rendered against the defendant condemning him to pay the costs of the proceedings, the demand for payment of costs would be made to the defendant. But would the result be different if the defendant had taken a suspensive appeal from the judgment? The supreme court in *Meyers v. Basso*[51] ruled that it would. The court held that where the defendant takes a suspensive appeal from a judgment casting him for costs the plaintiff remains the party primarily responsible for the usual costs of the trial[52] until the judgment becomes definitive. Thus the clerk would not be able to demand the costs from the defendant until the judgment of the court of appeal against the defendant becomes final and executory.[53] The supreme court stated that this result protects the clerk because he can collect costs from the plaintiff either in advance or as they accrue and protects the defendant who would otherwise be exposed to the risk of trying to recover the costs he paid from a possibly insolvent plaintiff if the judgment against him is reversed on appeal. The plaintiff who advanced the costs would be protected by the suspensive appeal bond.[54] Since the court concluded that the clerk could not seek costs from the defendant during the suspensive appeal, it reversed the award of attorney's fees in favor of the clerk even though the court of appeal affirmed the judgment against the defendant (thus making his demand for restitution of costs paid under protest moot). Because the clerk failed to meet his burden of proof by furnishing the defendant with an itemized account of the costs as required by the statute,[55] the supreme court assumed that the costs were for the usual expenses of trial rather than for the special expenses of the jury trial for which the defendant would have been responsible.[56]

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the day set for trial. In such case the court shall determine whether the judgment of dismissal shall be with or without prejudice."

50. LA. R.S. 13:843.1 (1978).

51. 398 So. 2d 1026 (La. 1981).

52. Special costs incurred for jury trials would be the responsibility of the party requesting the jury trial. *Id.* at 1028 n.4.

53. LA. CODE CIV. P. arts. 1842 & 2167 (Supp. 1977).

54. LA. CODE CIV. P. art. 2124 (Supp. 1977).

55. Louisiana Revised Statutes 13:843 (1950) provides for the award of attorney's fees when the clerk seeks payment of costs.

56. *Id.*

APPEALS

Article 2121 of the Code of Civil Procedure provides that "[a]n appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment."[57] If the appellant timely files his motion and order for appeal but the order is not signed within the delay allowed for the appeal should the appeal be dismissed as untimely? This question divided the courts of appeal. The first circuit decided en banc in a five to four decision, in *Traigle v. Gulf Coast Aluminum Corp.*,[58] that the appeal should be dismissed. The fourth circuit, in *Scales v. State*,[59] ruled that the appeal was timely taken within the meaning of article 2121. The supreme court granted writs in these cases and also in *Peters v. Livingston Wood Products, Inc.*,[60] and held that where the order is filed timely the appeal has been properly taken even if the order is not signed until the delay has expired.[61] The supreme court stated that originally the signing of the order of devolutive appeal was very important because the order fixed the amount of the devolutive appeal bond[62] and since the bond had to be filed within the delay allowed for taking the appeal,[63] the order also had to be signed within that time. But now that security is no longer required for the taking of a devolutive appeal[64] the signing of the order is a mere formality and so, the signing of this order after the delays had run should not defeat the appeal where the appellant had timely filed the order. The court's conclusion was also influenced by the fact that all pleadings must be filed with the clerk[65] and, with respect to the order of appeal, the clerk has the duty to secure the signature of the judge or he can sign the order of appeal himself (except in Orleans Parish).[66] In the light of these facts, any failure to have the order signed timely is not an error imputable to the appellant and article 2161 provides that no appeal shall be dismissed unless the error or fault is imputable to the appellant.[67] Perhaps in the light of *Traigle*,

57. LA. CODE CIV. P. art. 2121.

58. 391 So. 2d 1290 (La. App. 1st Cir. 1980), *writ granted*, 396 So. 2d 909 (1981).

59. 391 So. 2d 871 (La. App. 4th Cir. 1980), *writ granted*, 396 So. 2d 909 (1981).

60. 393 So. 2d 300 (La. App. 1st Cir. 1980), *writ granted*, 396 So. 2d 910 (1981). This case followed *Traigle*.

61. Traigle v. Gulf Coast Aluminum Corp., 399 So. 2d 183 (La. 1981), *rev'g* 391 So. 2d 1290, *and* 393 So. 2d 300; *aff'g* 391 So. 2d 871.

62. LA. CODE CIV. P. art. 2124.

63. LA. CODE CIV. P. art. 2087.

64. LA. CODE CIV. P. art. 2124 (Supp. 1977): "No security is required for a devolutive appeal."

65. LA. CODE CIV. P. art. 253.

66. LA. CODE CIV. P. arts. 281 & 282.

67. LA. CODE CIV. P. art. 2161.

the procedure for taking a devolutive appeal should be simplified by requiring only the filing of a notice of appeal within the delays allowed. This would eliminate the signing of the order which is now merely a formality.[68]

In *Bond v. Commercial Union Assurance Co.*,[69] the parents of a deceased motorcyclist filed separate suits to recover for his wrongful death and for the pain and suffering he endured before he died. The first suit was brought against the driver of the vehicle that had turned in front of the deceased and her insurer and the second was brought against the uninsured motorist insurer of the deceased (Commercial Union) and against the parents' uninsured motorist insurer (Lumbermens). The insurers filed several exceptions which were overruled and also filed a third-party demand against the driver. The cases were consolidated for trial and after the jury returned a verdict in favor of the defendant driver, the trial court rendered judgment dismissing all claims. The plaintiffs appealed, but the insurers did not appeal or answer the plaintiffs' appeal. The third circuit reversed and rendered judgment against the defendant driver and her insurer and also against Lumbermens and Commercial Union. The court also considered the insurers' third-party demand against the driver even though the insurers had not sought modification of the judgment with respect to their third-party demands by filing an answer to the appeal.[70] The court ruled on the third-party demand because the record was complete and to remand for consideration of these demands would be contrary to the principles of judicial economy and efficiency. The court decided that, as a matter of law, the uninsured motorist insurers had no right of subrogation against the defendant tortfeasor.[71] The supreme court granted Lumbermens' petition for a writ of certiorari and reversed. Lumbermens asserted, among other allegations of error, that the court of appeal erred in finding that the deceased was covered by his parents' policy. This point had been raised by exception in the trial court and was overruled, but it was not raised in the appellate court, and the plaintiffs' argued that therefore it had been abandoned. The supreme court disagreed on the grounds that the defendants could not have asserted the error on appeal before judgment because the overruling of the exception was not a final judgment

68. *See* FED. R. APP. P. 3, 4. This suggestion was also made by the first circuit in *Traigle v. Gulf Coast Aluminum*, 391 So. 2d 1290, 1292 (La. App. 1st Cir. 1980).

69. 387 So. 2d 617 (La. App. 3d Cir. 1980).

70. LA. CODE CIV. P. art. 2133 (Supp. 1968 & 1970).

71. LA. R.S. 22:1406(D)(4) (1950); Nieman v. Travelers Ins. Co., 368 So. 2d 1003 (La. 1979).

and did not cause irreparable injury; and furthermore, since the defendants had received a favorable judgment on the merits, they were under no obligation to raise the point by appeal or even by answer since they sought no modification of the judgment. Having determined that the issue had not been abandoned and was properly before it, the supreme court went on to state that the better practice would have been for Lumbermens to have answered the appeal because the issue then would have been considered by the court of appeal, and the supreme court would have had the benefit of the court's judgment. For failing to answer, Lumbermens was assigned the costs of the writ even though it was successful on the merits. The supreme court reversed the judgment against Lumbermens because it found that the deceased was not covered by his parents' policy.[71a]

Bond raises some interesting points. The first is the willingness of the court of appeal to consider the insurers' third-party demands against the driver even though the insurers had not appealed or filed an answer to the plaintiffs' appeal. Although no harm was done because the court affirmed the dismissal of the third-party demands on other grounds, this procedure seems to be contrary to the intent of articles 2082 and 2133 of the Code of Civil Procedure that questions concerning an incidental demand be presented by either appeal or answer. This procedure also raises questions of fairness to the third-party defendant who would be entitled to believe that no question involving his liability to the third-party plaintiff would be before the court of appeal because no appeal or answer had raised that point and who would therefore make no defense in the court of appeal. Another interesting point in *Bond* is the statement by the supreme court that the better practice for the successful litigant is to raise objections to the overruling of his exceptions by answer to the appeal. Although this procedure does not seem to be required by article 2133 because the appellee does not want to have the judgment modified, revised or reversed—it does have the advantage of raising these issues before the court of appeal for consideration in the event that the judgment in favor of the defendant is reversed. This procedure would also give the supreme court the benefit of the court of appeal's consideration of these issues and would save a litigant in Lumbermens' position the cost of a writ of certiorari. Thus it seems that a defendant who is successful in the trial court but who believes that the trial court was wrong in overruling his exceptions should answer the appeal and should assert as error the overruling of his objections as an alternative basis for upholding the judgment in his favor.

71a. The supreme court, on rehearing, reversed and further held that the uninsured motorists' insurer had a right of subrogation. 407 So. 2d 401 (La. 1981).

SUPERVISORY WRITS

In *Herlitz Construction Co. v. Hotel Investors of New Iberia, Inc.*[72] the trial court overruled the defendants' exception of no cause of action and the court of appeal denied the application for supervisory writs on the grounds that supervisory jurisdiction should be exercised only where there is palpable error and the risk of irreparable injury.[73] The supreme court granted a writ of review and reversed. The supreme court stated that the court of appeal was in error in requiring a showing of irreparable injury before it would exercise its supervisory jurisdiction because such a showing would entitle a litigant to appeal an interlocutory ruling, and supervisory jurisdiction is intended to apply to situations not covered by the right of appeal.[74] The supreme court concluded that in a case such as this, where the overruling of the exception is arguably incorrect and a reversal will terminate the litigation and there is no dispute of fact to be resolved, the interests of judicial efficiency and fairness would be served if the court of appeal considered the merits of an objection which could, if sustained, avoid the expense of an unnecessary trial on the merits. The supreme court remanded the case to the court of appeal for a consideration of the merits of the defendant's objection.[75]

RES JUDICATA

In 1975 Juban Properties was successful in a suit against Claitor for a declaratory judgment recognizing his right to build a fence. The court of appeal declared that the fence would not violate a prior reciprocal agreement between the parties.[76] The fence was built, and in 1978 Claitor, R.G. Claitor's Realty (the partnership which had acquired the property adjoining the fence) and another plaintiff sued Juban Properties and other defendants seeking removal of the fence on the grounds that it interfered with a servitude existing in favor of the plaintiffs' property. The trial court granted the defendant's motion for summary judgment on the grounds that the plaintiffs' action was barred by the res judicata effect of the prior declaratory judgment. The court of appeal affirmed and the supreme court granted writs and affirmed.[77]

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72. 396 So. 2d 878 (La. 1981).

73. *Id.* at 878.

74. LA. CODE CIV. P. art. 2083.

75. The defendant's objection was that the only item of damages recoverable for breach of an obligation to pay money is interest. 396 So. 2d at 878.

76. Juban Properties, Inc. v. Claitor, 354 So. 2d 672 (La. App. 1st Cir. 1977).

77. R.G. Claitor's Realty v. Juban, 391 So. 2d 394 (La. 1980).

The supreme court interpreted Civil Code article 2286 as requiring identity of demand, cause, and parties between the two actions in order for the principle of res judicata to apply. The court found that the same thing was demanded in both suits; the thing demanded in the first suit was recognition of the right to build the fence and the second suit demanded removal of the fence. On the second point, identity of cause, the plaintiffs argued that the first judgment was based on the reciprocal agreement whereas the basis for the second suit was the creation of a servitude in favor of the plaintiffs' property apart from the reciprocal agreement. The supreme court found from the record in the first suit that the issue of such a servitude had been raised in the pleadings, and evidence had been introduced on this question. The silence of the first judgment on this issue meant that it had been rejected—a final judgment is held to dispose of all issues raised by the pleadings and on which evidence has been introduced unless the issue has been specially reserved.[78] The supreme court found identity of parties even though one of the plaintiffs, R. G. Claitor's Realty, had not been a party to the first suit—it had acquired the property during the litigation and thus became a successor of the party of record. A concurring opinion found identity of parties because Claitor, who was a general partner of the partnership that acquired the property, stipulated that the transfer would not be used as a defense.

In dissent, Justice Dennis argued that the second suit was based on a new theory relying on article 2275—the creation of a servitude through the in-court confession under oath by Juban that he had given Claitor permission to use the area on which the fence was built. The majority, on rehearing, acknowledged that the reference to article 2275 was a new argument but reaffirmed the position taken in the original opinion that the issue of whether that verbal agreement created a servitude was fully litigated in the first suit and could not be relitigated.[79]

Only future cases will make it clear whether Justice Dennis is correct in asserting that *Juban* marks a departure from the court's position with respect to res judicata. If *Juban* is read as saying that res judicata barred the second suit even though a new theory of recovery was asserted, then Louisiana would be moving closer to the common law principle of res judicata which bars relitigation of the same claim even if the second suit is based on a different theory of recovery. But it must be remembered that the majority expressly based its decision on the finding that the issue asserted in the second suit—creation of a servitude by verbal agreement—had been litigated in the first suit.

78. *See* Sewell v. Argonaut S.W. Ins. Co., 362 So. 2d 758 (La. 1978).
79. 391 So. 2d at 403.