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CIVIL SUITS IN FORMA PAUPERIS*

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The "Great Depression" and the increased industrial development of Louisiana have together brought "pauper suits" into new prominence.¹ Louisiana has had legislation allowing such suits since 1912,² but a glance at the reports or digests will convince one that it is only in comparatively recent times that such suits have assumed large proportions.

Essentially, such legislation is sound; but the legal machinery and the attitude of some of the older members of the bench and bar, of the clerks' and sheriffs' offices and court reporters are ill adapted to the needs of the indigent litigant. To them, such suits are a financial burden and an anathema. Moreover, to an extent there is justification for such a viewpoint and means should be found by the Louisiana Legislature to eliminate these individual financial strains.

Some plan whereby the impecunious members of society may prosecute and defend their just rights before our tribunals is a necessary part of our democratic system of jurisprudence. On the whole, it would seem that if our present laws on the subject are fairly applied, they will well serve the purpose.

PERSONS ENTITLED TO BENEFITS OF THE ACT

Perhaps, the most controversial portion of the Act is that which provides:

" . . . any person, who is a citizen of this State, or who if an alien has been domiciled in this State for three years, shall have the right to prosecute and defend in all the courts of this State, including all the Appellate courts, all actions to which he may be a party whether as plaintiff, intervenor, or defend-

* The present discussion is limited to the Louisiana Pauper Act. For a consideration of the general background of the subject, see Smith, *Justice and the Poor* (1919); Maguire, *Poverty and Civil Litigation* (1923) 36 *Harv. L. Rev.* 361. See also the federal law: 28 U.S.C.A. §§ 832 et seq. (1926).

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1. Notice the conclusion reached by Vonau, *Administration of Workmen's Compensation Cases in Louisiana* (1933) 7 *Tulane L. Rev.* 217, 230, that 58.9 per cent of such industrial suits are filed in forma pauperis.

2. La. Act 156 of 1912, amended by Act 260 of 1918 and Act 421 of 1938 [*Dart's Stats.* (Supp. 1938) § 1400, (1932) §§ 1401-1404].

ant, without the previous or current payment of costs or the giving of bonds for costs, if he is unable because of his poverty to pay such costs, or to give bond for the payment of such costs."³

It is unfortunate that the Louisiana courts have never clearly defined the term "citizen" in a forma pauperis case. However, an analysis of *White v. McClanahan*,⁴ shows that a person who is domiciled within the state *at the time suit is filed* and who declares his present intention of maintaining a permanent residence within the state is entitled to proceed under the Act as a "citizen."⁵ The length of time that he has been living in the state makes no difference as long as he has been in the state long enough to acquire a domicile.⁶ In effect, the court holds that a person who is not domiciled within the state at the time the suit is filed is not a citizen, and hence cannot proceed under the Act.⁷

Any misunderstandings which may have arisen on this point have probably resulted from the failure to distinguish "domicile" and "residence."⁸ When this distinction is understood it can easily be seen that: "His change of domicile from such other State, and its location here, is brought about by the act of residing here, combined with the intention of making his home here, of renouncing citizenship elsewhere."⁹

Since the Louisiana courts have held that it is not necessary to be a registered voter in order to have the rights and privileges

3. La. Act 156 of 1912, § 1, as amended by Act 260 of 1918, § 1, and Act 421 of 1938, § 1 [Dart's Stats. (Supp. 1938) § 1400].

4. 135 La. 25, 64 So. 940 (1914).

5. Under a similar Forma Pauperis Act in the State of Tennessee, the courts of that state have held that a pauper "citizen" who is residing in the state at the time the suit is filed can take advantage of it. *Southern Ry. Co. v. Thompson*, 109 Tenn. 343, 71 S.W. 820 (1902); *Landress Co. v. Silva*, 6 Tenn. App. 236 (1927).

6. *Lee v. Memphis Natural Gas Co.*, 187 So. 276 (La. 1939).

7. *White v. Kavanaugh*, 140 La. 750, 73 So. 851 (1917), discloses that either of the following allegations is enough to state a prima facie case for proceeding in forma pauperis: (1) the plaintiff is a citizen of the state, or (2) the plaintiff is an alien who has been resident within the state for three years.

8. Cf. *Oglesby v. Turner*, 127 La. 1093, 54 So. 400 (1911), in which the court said:

"In some jurisdictions 'domicile' and 'residence' are considered as equivalents, but it is not so in this state. A person may reside alternately in several places, but his domicile is in the parish where he has his 'principal establishment'; that is, his 'habitual residence,' or in plain English, 'home.' Civ. Code, art. 38." (127 La. at 1096, 54 So. at 402).

9. *Succession of Simmons*, 109 La. 1095, 1097, 34 So. 101, 102 (1903).

of citizenship,¹⁰ and since in analogous cases¹¹ it has been held that Louisiana domicile is the equivalent of Louisiana citizenship, it is fair to conclude that the expression "a citizen of this State" as used in section 1 of the Act means "a citizen of the United States whose domicile is in Louisiana."

This viewpoint is reinforced by the language of judicial interpretations¹² whereby the practical effect of the phrase "citizen of the state" as used in various statutes and in the Constitution of the United States¹³ has been taken to mean "a citizen of the United States whose domicile is in such state."

In addition to citizens of the United States "domiciled" in Louisiana, only those "aliens" (i.e., foreigners owing allegiance to a sovereign other than the United States) who have maintained a "domicile" within the State of Louisiana for three years, are allowed to sue under the Act.¹⁴ No provision is made in the Act for the indigent citizens of other states, who cannot sue under the terms of the Louisiana Pauper Act unless they have been domiciled here for three years.¹⁵

DETERMINATION OF FINANCIAL CONDITION

It is impossible, considering the present state of the jurisprudence, to do more than establish general limits as to the economic classes which will be allowed to take advantage of the Act. Necessarily, a large amount of discretion is placed in the judge who signs the order allowing the litigant to proceed in forma pauperis.

10. "Therefore, a person may be a citizen of the State, and may not be invested with electoral power." *State v. Fowler*, 41 La. Ann. 380, 381, 6 So. 602 (1889). See *State v. Willie*, 130 La. 454, 58 So. 147 (1912), where the court held that citizenship may be acquired by residence with the intention of remaining. A minor citizen who cannot vote may sue under the terms of the Forma Pauperis Act. *Fils v. Iberia, St. M. & E. R. Co.*, 145 La. 544, 82 So. 697 (1919).

11. *Watson v. Bondurant*, 30 La. Ann. 1 (1878); *State v. James*, 165 La. 822, 830, 116 So. 199, 202 (1928).

12. See *Boyd v. Nebraska*, 143 U.S. 135, 158-160, 12 S.Ct. 375, 381, 36 L.Ed. 103 (1892); *Pacific Mut. Life Ins. Co. v. Tompkins*, 101 Fed. 539, 543 (C.C.A. 4th, 1900); *Harding v. Standard Oil Co.*, 182 Fed. 421, 423 (C.C. N.D. Ill. 1910); *Hammerstein v. Lyne*, 200 Fed. 165, 170 (D.C. Colo. 1912); *Delaware, L. & W. R. Co. v. Petrowsky*, 250 Fed. 554, 557 (C.C.A. 2nd, 1918); *Stockyards Nat. Bank v. Bragg*, 293 Fed. 879, 883 (C.C.A. 8th, 1923); *State v. Fowler*, 41 La. Ann. 380, 6 So. 602 (1889).

13. U.S. Const. Amend. XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

14. La. Act 156 of 1912, § 1, as amended by Act 260 of 1918, § 1, and Act 421 of 1938, § 1 [*Dart's Stats. (Supp. 1938) § 1400*].

15. *White v. Walker*, 136 La. 464, 67 So. 332 (1915).

Ordinarily, his final decision on the matter will not be disturbed.¹⁶ In order to avoid the abuse of the privilege, there have been cases in which the courts refused the application. Thus where a plaintiff owned unencumbered property worth at least \$4,500 he was not allowed to proceed in forma pauperis,¹⁷ and an unmarried, able-bodied seaman without dependents earning \$50 per month and board and lodging was not permitted the benefits of the Act.¹⁸ Nor was a plaintiff with a wife and ten children, who had been working with substantial regularity for several years, earning about \$15 daily, entitled to prosecute in forma pauperis.¹⁹

Although the Supreme Court of Louisiana speaking through Justice Land said, in *Hudnell v. Thames*,²⁰ that the Act "is intended to afford relief to people who are penniless, and who are without means to secure the court costs," it probably did not mean to establish any such harsh test. Certainly, this decision must be read in the light of other cases. In *Fils v. Iberia, St. M. & E. R. Co.*,²¹ three negro children owning household effects valued at \$194 were allowed to prosecute a suit in forma pauperis where the costs were \$425, even though they had the means to secure the costs from friends or others unwilling to see them deprived of legal recourse. In the latter case, the Supreme Court of Louisiana speaking through Justice Provosty said: "For being entitled to sue in forma pauperis, it is not necessary that the would-be litigant should be *destitute* even of a mattress upon which to lie, or a table upon which to eat, or a chair upon which to sit."²² In another case, the plaintiff was permitted the benefits of the Act although he earned from three to five dollars a day.²³

EXTENT OF RIGHT GRANTED

The Act grants to impecunious litigants seeking its benefits the right to take advantage of it at any stage of the proceedings²⁴ and since the passage of Act 421 of 1938, the party allowed to pro-

16. The discretion of the trial court in permitting a plaintiff to proceed in forma pauperis is broad and will not be disturbed merely because plaintiff admitted that he earned from three to five dollars per day. *Yee v. Charley Cabs, Inc.*, 158 So. 261 (La. App. 1935).

17. *Succession of Lewis*, 178 La. 227, 151 So. 189 (1933).

18. *Nemarich v. Star Checker Cab Co.*, 150 So. 862 (La. App. 1933).

19. *Hudnell v. Thames*, 178 La. 131, 150 So. 854 (1933).

20. 178 La. 131, 150 So. 854 (1933) (italics supplied).

21. 145 La. 544, 82 So. 697 (1919).

22. 145 La. at 554, 82 So. at 700 (italics supplied).

23. *Yee v. Charley Cabs, Inc.*, 158 So. 261 (La. App. 1935). Cf. *Singleton v. First Nat. Life Ins. Co.*, 157 So. 620 (La. App. 1934), where plaintiff who had an income of \$2.50 per week was allowed to proceed in forma pauperis.

24. *Succession of Wolfe*, 180 La. 688, 157 So. 391 (1934).

ceed under the Act can do so in or out of court both in the parish where the proceedings originated and in all parishes of the state.²⁵ The right granted extends to the services of notaries and witnesses as well as those rendered by sheriffs, clerks and court stenographers. In actual practice it would seem that this right has been seriously limited by a narrow and incorrect construction of the provision of the Act which states: "Provided that no officer shall be required by reason of this Act to incur any cash outlay."²⁶

Many trial lawyers have experienced the baffling and disheartening delay which faces them when they handle a forma pauperis case in the country parishes. Many court officers seem to regard a forma pauperis suit as a personal affront. The clerks of court in general seem to realize that they are not personally losing anything, but just try to get the constable of a Justice of Peace Court to serve subpoenas without paying him or try to get a Notary Public from another parish to take depositions without payment for his services.

Some sheriffs feel that they should be paid for their services in forma pauperis cases. Yet, if they would only stop to think—the gas, oil, tires, use of an automobile, forms and time are being paid for by the Parish. Why should it make a difference to them? Somehow, it does.

Does a court stenographer have the right under the above provision to demand pencils, paper, ink, pens, typewriter ribbons, carbon paper, second sheets and binders? If so, where is an impoverished litigant going to get the money to pay for these supplies? Should the lawyer advance these costs? Most experienced plaintiff's lawyers find that if they want to get the testimony in a forma pauperis case of any length transcribed within the year, they had better see the court stenographer and make a deal with him.

And what about expert witnesses? Can you force a medical expert to appear without assurance of payment? And suppose you could—of just how much value will his testimony be?

Certainly, in all of these cases an attorney who pays the costs from his own pocket knows that there is a fifty-fifty chance that he will never be reimbursed for them.

25. Hebert and Lazarus, *The Louisiana Legislation of 1938 (1938)* 1 *LOUISIANA LAW REVIEW* 80, 136.

26. *L. a. Act 156 of 1912, § 1, as amended by Act 260 of 1918, § 1, and Act 421 of 1938, § 1 [Dart's Stats. (Supp. 1938) § 1400].*

The Louisiana State Bar Association recently went on record as condemning, as a violation of canon 42 of the Canons of Ethics, the payment of costs of court by a lawyer without an agreement with the client that he will be reimbursed.²⁷ If this interpretation be adhered to by the Bar of Louisiana, it will make it impossible to successfully prosecute most *forma pauperis* cases in country parishes unless present conditions change.

The intention of the Louisiana Legislature in adopting the Pauper Act was undoubtedly to make the courts freely accessible to that portion of the population which otherwise would be unable to use them. Therefore, it follows that the costs of such free usage was to be borne by the state. Unfortunately, specific provisions for handling such expenses have not been made. Until they are, this phase of the law will continue to be troublesome. The Act should be amended to do one of three things:

1. Establish a state fund to bear the expenses of all pauper litigations,
2. Provide that the respective Police Juries or Clerks of Court bear the expense,²⁸ or
3. Institute in each judicial district of the state a judicial equalization fund to be built up by a charge upon every paying litigant.²⁹

It was probably in partial recognition of this weakness of language in the Act that the courts have held that the right to pro-

27. Report of Standing Committee on Professional Ethics, Louisiana State Bar Association, Alexandria, La., April 21, 1939. The underlying theory is that a lawyer should not have a financial interest in litigation that he is conducting for a client.

In reality, it would seem that as applied to *forma pauperis* cases such an interpretation of canon 42 is beneficial to the members of the Bar since it relieves them of a heavy burden of advancing costs, which it was not intended they should bear.

28. The East Baton Rouge Bar Association is attempting to establish such a solution. At a meeting on April 14, 1939, it adopted a Resolution which stated that, in view of the increasingly large amount of personal injury and workmen's compensation litigation involving "paupers," the Police Jury and Clerk of Court should increase the compensation of the court stenographers so as to take care of their services in cases lost by paupers.

29. The Judicial Expense Fund in Orleans Parish is an admirable example of how this would work.

Who the intended beneficiaries of the Act are is doubtful. Was it meant to cover only the unemployed person, or were its benefits likewise to be given to that large portion of the citizenry who are working but do not earn enough to pay expensive court costs or hire a lawyer except on a contingent fee. Certainly, it would seem that in all close cases the issue should be resolved in favor of the applicant in *forma pauperis*. No man should be forced to mortgage his home or deprive his family of food, clothing or education in order to secure his rights or defend his interests. It is much sounder for society to amortize the burden by some system of pooling.

ceed in forma pauperis will not be denied to a litigant merely because he has contracted with counsel for payment of a fixed fee and had paid a portion thereof with borrowed funds,³⁰ even though the Act specifically forbids counsel to charge fees other than those contingent upon the amount recovered.

By the specific terms of the Act a devolutive appeal without bond may be prosecuted in forma pauperis³¹ at any stage of the proceedings.³² The Act is silent concerning suspensive appeals and in general the Louisiana courts have not permitted suspensive appeals in forma pauperis.³³ However, the courts have allowed suspensive appeals by litigants proceeding in forma pauperis, without furnishing of appeal bond in any amount, where there are funds within the custody of the court that depend upon the outcome of the suit.³⁴

Although the courts have gone beyond a literal interpretation of the Act in allowing suspensive appeals, they have refused to relieve indigent plaintiffs of the duty of giving bond prior to the issuance of conservatory writs.³⁵ It has been argued that the Legislature should change this;³⁶ but, as yet, nothing in that direction has been done.

The Act clearly provides that a litigant in forma pauperis may ask for a jury trial; but to date there have been no reported cases on the matter. In practice, judges will be quite reluctant to allow a civil jury trial to a pauper since the parish will have to bear the expense. However, since the intent of the Legislature is quite clear, the Supreme Court of Louisiana will undoubtedly

30. *Jeffcoat v. Hammons*, 160 So. 182 (La. App. 1935). Cf. *Loftin v. Frost-Johnson Lumber Co.*, 133 La. 644, 63 So. 252 (1913); *Smith v. Lyon Cypress Co.*, 140 La. 507, 73 So. 312 (1916). Contra: *United States v. Ross*, 298 Fed. 64, 33 A.L.R. 728 (C.C.A. 6th, 1924).

31. La. Act 156 of 1912, § 1, as amended by Act 260 of 1918, § 1, and Act 421 of 1938 § 1 [*Dart's Stats.* (Supp. 1938) § 1400]. See *Beuhler v. Beuhler Realty Co.*, 155 La. 319, 326, 99 So. 276, 278 (1923).

32. *Buckley v. Thibodaux*, 181 La. 416, 159 So. 603 (1935) (application made after rendition of judgment by trial court).

33. *Bailey v. Spiro*, 169 So. 898 (La. App. 1936); *Succession of Wolfe*, 180 La. 688, 157 So. 391 (1934). See *Crawford v. Tampa Interocean S.S. Co.*, 159 So. 353, 355 (La. App. 1935).

34. *Succession of Jones*, 189 La. 693, 180 So. 489 (1938); *State ex. rel. Messina v. Cage*, 152 So. 399 (La. App. 1934); *Wickes v. Metropolitan Life Ins. Co.*, 169 So. 101 (La. App. 1936). Note (1937) 11 *Tulane L. Rev.* 647.

35. *Orgeron v. Lytle*, 180 La. 646, 157 So. 377 (1934).

36. Note (1935) 9 *Tulane L. Rev.* 306. It is to be hoped that the Legislature will not follow this suggestion unless they also provide funds from which defendants, against whom conservatory writs are improperly issued, may be reimbursed for the damage done them. As a practical matter, no change should be made, since such a law would certainly be abused by litigants.

uphold the right of a litigant under the Act to have a jury trial if he asks for one.

FORMALITIES REQUIRED

The procedure to be followed by a person desiring to litigate in forma pauperis is set forth in detail in section 2 of the Act.³⁷ It is of some importance that the affidavit be properly drawn, since its shortcomings will often be seized upon by opposing counsel as an excuse for filing a rule to traverse, with its attendant delay. But if the affidavits substantially comply with the requirements of the Act the judge will usually allow time in which to file a proper affidavit.³⁸

It has been held that the affidavit by a "third person" in support of an application for authority to prosecute a suit in forma pauperis may be executed by the attorney for the litigant.³⁹ It is believed, however, that the better practice requires that the supporting affidavit be executed by someone other than counsel.⁴⁰

Upon the presentation of the affidavit, it is the duty of the judge to make an examination of the facts concerning the financial condition of the applicant.⁴¹ He does not have an absolute duty of signing an order allowing the applicant to litigate in forma pauperis. His only duty is to make a comprehensive examination of the facts of the case. He cannot summarily reject the application;⁴² in his discretion, he signs or rejects it.

Once the judge has signed the order allowing the litigant to proceed in forma pauperis, he cannot thereafter of his own volition rescind the order. He can only pass upon the matter again if a rule to traverse the affidavits of poverty is filed,⁴³ and full op-

37. La. Act 156 of 1912, § 2, as amended by Act 165 of 1934, § 1 [Dart's Stats. (Supp. 1938) § 1401].

38. See *Boudreaux v. Rossen*, 139 So. 706, 707 (La. App. 1932). The following is suggested as being a form of paragraph, which if included in the affidavit, will not be open to objection:

"That he is a citizen of the United States and of this state and is presently domiciled within and a resident of this state and has the intention of remaining here permanently; and that he is unable because of his poverty and want of means either to pay the costs of this action in advance, or as they accrue, or to give bond for the payment of such costs; and that he desires and is entitled to file and prosecute under the provisions of Louisiana Act 156 of 1912, as amended, without the payment of costs in advance, or as they accrue, or without furnishing bond therefor."

39. *Harrison v. Jones*, 187 La. 489, 175 So. 37 (1937).

40. *McMahon*, Louisiana Practice (1939) 199, n. 275.

41. *State ex rel. Gentry v. Stephens*, 2 La. App. 460 (1925).

42. *Harrison v. Jones*, 187 La. 489, 175 So. 37 (1937).

43. *Singleton v. First Nat. Life Ins. Co.*, 157 So. 620 (La. App. 1934). *Contra: Palmer v. Wyatt Lbr. Co.*, 146 So. 494 (La. App. 1933).

portunity must be afforded the opposing litigant to do this.⁴⁴ Certainly, the general spirit and purpose of the Act would tend to the conclusion that the opposing litigant can at any stage of the proceeding call to the attention of the court a radical change in the financial condition of the party proceeding in forma pauperis.

PAYMENT OF COSTS

By the terms of the Act,⁴⁵ if a litigant who avails himself of the privileges therein granted is successful, the opposing litigant is liable for the costs.⁴⁶

In the recent case of *Jackson v. Hart*⁴⁷ the Orleans Court of Appeals held that Act 156 of 1912, as amended by Act 260 of 1918 and Act 421 of 1938 was unconstitutional insofar as it placed on parties who compromise with pauper litigants liability for accrued costs. The reason given was that the title did not indicate this as one of the objects of the statute.

Section 4 of the Act provides:

"That in case the litigant exercising the privilege granted by this act is cast, he shall be condemned to pay the costs incurred by him and the costs recoverable by the other parties to the action."

In several cases the courts have inferred that the unsuccessful litigant in forma pauperis is liable for the costs.⁴⁸ A literal reading of section 4 would seem to indicate that these decisions are correct. Just what procedure is used to enforce this obligation on the part of the pauper and how long it would endure have never been discussed in a reported case.

However, there are other decisions which give the impression that litigants in forma pauperis are only liable for the costs when

44. *Buckley v. Thibodaux*, 181 La. 416, 159 So. 603 (1935); *Brewer v. Thoele*, 186 La. 168, 171 So. 839 (1937).

45. La. Act 156 of 1912, § 3 [Dart's Stats. (1932) § 1402].

46. However, in *Fulton Bag & Cotton Mills v. Fernandez*, 165 So. 476 (La. App. 1936), the court required the successful interpleader in a concursus proceedings to pay his portion of the costs before he could take the fund from the registry of the court. This peculiar result was due to the nature of the action and seems to be correct.

47. 186 So. 747 (La. App. 1939). It may be of interest to note that a writ was granted on April 4, 1939 (La. Sup. Ct. Docket No. 35297).

48. See *White v. Walker*, 136 La. 464, 465, 67 So. 332, 333 (1915); *Singleton v. First Nat. Life Ins. Co.*, 157 So. 620, 622 (La. App. 1934).

successful.⁴⁹ But, it may be that these courts were merely recognizing that in practice the unsuccessful litigant in forma pauperis cannot pay the costs even if legally liable. Certainly, if these courts mean to say that a plaintiff litigating in forma pauperis cannot be cast for costs if he loses, they are wrong in their interpretation of the Act.

Our legal system was not created for the use alone of the person or corporation who could afford to use it. In a democratic state the courts must be freely and quickly accessible to all who may feel the need of a tribunal before which to settle their dispute, regardless of their ability to pay. Otherwise, the personality of the individual, his desires, and his opinions mean little. As has often been said, a right is no better than the availability of the remedy necessary to enforce it. If the courts are to be truly a sanctuary for the oppressed, financial obstacles should be removed in fact as well as in theory.

Many attorneys who habitually defend employers, insurance companies and other corporate interests feel that a rule to traverse suit in forma pauperis is a fine way to harass a pauper plaintiff. All too often it results in inadequate compromise, particularly of workmen's compensation cases. This attitude should be changed.

It should never be forgotten that court stenographers are human beings, and that as such, they hate to do something for nothing. Experience has taught them that many cases filed in forma pauperis are lost. They feel that attorneys are gambling with their services, supplies and equipment. Naturally, they are reluctant to be helpful. Nor can they be blamed if they transcribe the testimony of paying cases before they do that of the pauper cases. The present delays of many months in the country parishes, attributable to this cause, are unfortunate and something should be done promptly to remove this obstacle to prompt adjudication of pauper cases.

49. *State ex rel. Dear & Johnson, Inc. v. Bullock*, 169 So. 415 (La. App. 1936) (official court reporter not entitled to fees and costs in case of final judgment against plaintiff); *Fulton Bag & Cotton Mills v. Fernandez*, 165 So. 476, 477 (La. App. 1936). Cf. *Taylor v. Southern Carbon Co.*, 153 So. 597, 599 (La. App. 1934) and *Reiner v. Maryland Casualty Co.*, 185 So. 93, 96 (La. App. 1938) (writs refused by Supreme Court of Louisiana on March 6, 1939).

In *Seaux v. G. B. Zigler Co.*, 183 So. 564, 567 (La. App. 1938), the court said: "We note that the judgment imposes the costs on the plaintiff although it appears that under an order previously granted he had been permitted to prosecute his suit under the benefit of the pauper act. To that extent, the judgment may be said to be in error, and it is therefore amended by eliminating the costs with which the plaintiff was cast."