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Comment

Attorney's Fees As an Element of Damage for the Dissolution of Illegally Issued Conservatory Writs

Louisiana Code of Practice of 1870, Article 375, as amended by Louisiana Act 50 of 1886, provides “. . . that in all cases of arrest, attachment, sequestration, provisional seizure and injunction, the defendant may in the same suit, by reconventional demand, recover from the plaintiff the damages he may have sustained by the illegal resort to such writ.”

This article is the broad authority for granting damages to defendant when a conservatory writ has been issued illegally or improvidently. Since conservatory writs are harsh remedies, they should not be lightly resorted to; thus, the attitude of the law is that a person responsible for the improper issuance of a conservatory writ must be prepared to redress all such damages as he may have occasioned the other party.¹ One element of these damages is reasonable attorney's fees expended in obtaining the dissolution of the illegal writ.

If plaintiff is in good faith in causing the writ to issue, he will be held for only “actual” damages. However, there is some authority that he may also be held for punitive damages if he acts maliciously.² At the time of recovery it is not necessary that the attorney's fees actually have been paid, but defendant must have

1. *General Motors Acceptance Corp. v. Sneed*, 167 La. 432, 119 So. 417 (1929).

2. *Barrimore v. McFeely*, 32 La. Ann. 1179 (1880); *Cretin v. Levy*, 37 La. Ann. 182 (1885); *Riggs & Co. v. Bell*, 42 La. Ann. 666, 7 So. 787 (1890); *Bloch v. His Creditors*, 46 La. Ann. 1334, 16 So. 267 (1894); *American Hoist & Derrick Co. v. Frey*, 127 La. 183, 53 So. 486 (1910); *Wall v. Hardwood Mfg. Co.*, 127 La. 959, 54 So. 300 (1911).

See also *General Motors Acceptance Corp. v. Sneed*, 167 La. 432, 444, 119 So. 417, 421 (1929) and *Finance Security Co., Inc. v. Mexic*, 188 So. 657, 661 (La. App. 1939), both of which suggest that punitive damages would be allowed in a proper case. Yet in *Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917), the supreme court clearly held that there is no authority in Louisiana for awarding punitive damages in civil cases. This point seems now to be well settled. *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 143 So. 383 (1932); *Moore v. Blanchard*, 216 La. 253, 43 So. 2d 599 (1949).

actually incurred the obligation to pay.³ Although it would seem that no one is better qualified than the district judge to determine the reasonable value of the legal services rendered, such value must be proved as any other fact.⁴ If an injunction is successfully maintained against the execution of a judgment under a writ of fieri facias, the plaintiff in injunction is usually allowed damages, including attorney's fees, on the theory that this matter is quite similar to the illegal issuance of a conservatory writ.⁵

Obviously no one should be allowed damages for the successful defense of a suit instituted against him; thus, the only damages allowed are those traceable directly to or incidental to the writ and its dissolution.⁶ Ordinarily damages are not allowed when the writ has been dissolved only because it is lacking in some matter of form, such as the affidavit being signed by the attorney instead of the party personally.⁷

Under the present jurisprudence it is very difficult to recover attorney's fees for dissolution of an improperly issued conservatory writ. The cases seem to require that a motion to dissolve the writ must be filed and tried separate and apart from the merits, and that the motion cannot even be referred to the merits without precluding any subsequent claim for attorney's fees.⁸

3. *Wilcox v. Bandy*, 13 La. 38 (1838); *Farrar v. New Orleans Gas Light & Banking Co.*, 2 La. Ann. 873 (1847); *McRae v. Brown*, 12 La. Ann. 181 (1857); *Whitney-Central Nat. Bank v. Sinnott*, 136 La. 95, 66 So. 551 (1914); *Burglass v. Villere*, 170 La. 805, 129 So. 209 (1930); *General Finance Co. of La. v. Veith*, 177 So. 71 (La. App. 1937).

4. Usually other attorneys testify as expert witnesses. *Roos v. P. Goldman & Bro.*, 36 La. Ann. 132 (1884); *Watkins Banking Co. v. Louisiana Lbr. Co.*, 47 La. Ann. 581, 17 So. 143 (1895); *Douglas Public Service Corp. v. Leon*, 196 La. 735, 200 So. 21 (1941).

5. *Soniat v. Whitmer*, 141 La. 244, 74 So. 916 (1916). See also *White v. Givens*, 29 La. Ann. 576 (1877); *Willis v. Scott*, 33 La. Ann. 1026 (1881); *Chapuis v. Waterman*, 34 La. Ann. 58 (1882); *Gilkerson-Sloss Com'n Co. v. Yale & Bowling*, 47 La. Ann. 690, 17 So. 244 (1895); *Ludeling v. Garrett*, 50 La. Ann. 118, 23 So. 94 (1898); *Rivet v. Murrell Planting & Mfg. Co.*, 121 La. 201, 46 So. 210 (1908); *Alfano v. Franek*, 159 La. 498, 105 So. 598 (1925). See *Townsend v. Sheriff*, 42 La. Ann., 890, 8 So. 616 (1890) and *Compton v. Dietlein & Jacobs*, 118 La. 360, 42 So. 964 (1907), where attorney's fees were denied.

6. *Horn v. Bayard*, 11 Rob. 259 (La. 1845); *Norton & White v. Cammack*, 10 La. Ann. 10 (1855); *Collins v. Edwards*, 13 La. Ann. 342 (1858); *Lemeunier v. McClearley*, 41 La. Ann. 411, 6 So. 338 (1889); *Ivers v. Ryan*, 42 La. Ann. 32, 7 So. 61 (1890); *Levert v. Sharpe*, 52 La. Ann. 599, 27 So. 64 (1900); *Three Rivers Oil Co. v. Laurence*, 153 La. 224, 95 So. 652 (1923).

7. *Phelps & Co. v. Boughton*, 27 La. Ann. 592 (1875); *Barry v. Union Sulphur Co.*, 167 La. 227, 119 So. 30 (1928); *Calavartenos v. S. E. Raw Fur Merchants of La.*, 189 La. 94, 179 So. 46 (1938). *Contra: Hollinsworth v. Atkins*, 46 La. Ann. 515, 15 So. 77 (1894).

8. *Crowell & Spencer Lbr. Co. v. Duplissey*, 130 La. 837, 58 So. 590 (1912); *Three Rivers Oil Co. v. Laurence*, 153 La. 224, 95 So. 652 (1923); *In re Morgan & Co. v. DeRidder Light & Power Co.*, 155 La. 915, 99 So. 696 (1924); *Dehan v. Youree*, 166 La. 635, 117 So. 745 (1928); *Roy O. Martin Lbr. Co. v. Sinclair*, 56 So. 2d 240 (La. 1951).

The theory of the rule is that it is "impossible" to separate the portion of the attorney's services rendered in dissolving the writ from that directed toward defeating the main demand, unless a motion to dissolve has been tried separately. Since attorney's fees cannot be allowed for defeating the main demand, all claim for fees is rejected. The rule was succinctly stated in *Farris v. Swift*:

"... whenever an attachment or other conservatory writ is dissolved after hearing the merits, or so that it is impossible to differentiate between the attorney's services for dissolving the attachment and those for defending the suit, such attorney's fees cannot then form an element of the damages to be allowed for the wrongful issuance of the writ, 'for to do so would be to allow the fees virtually for defending the suit on the merits, which is not permissible.'" ⁹

The purpose of this comment is to evaluate this rule and to show that it is neither supported by necessity nor the early jurisprudence of this state.

SUMMARY OF EARLY JURISPRUDENCE

The early cases consistently allowed attorney's fees for the dissolution of illegally issued writs and show that the judiciary also entertained a proper regard for the high value of an attorney's services.¹⁰

In *Jones v. Doles*,¹¹ an 1848 case, Doles had caused certain logs belonging to Jones to be sequestered under a claim that the logs were the property of his debtor. The only issue tried was ownership of the logs, and there was judgment on the merits for Jones. Despite the fact that the writ was dissolved on the merits, when Jones later brought an action for damages,¹² the supreme

9. *Farris v. Swift*, 156 La. 12, 17, 99 So. 893, 894 (1924).

10. *Farrar v. New Orleans Gas Light & Banking Co.*, 2 La. Ann. 873 (1847) (injunction—\$500); *Herford v. Babin*, 14 La. Ann. 333 (1859) (injunction—\$500); *British & American S.S. Navigation Co. v. Sibley & Co.*, 27 La. Ann. 191 (1875) (attachment—\$500); *Brandon & Co. v. Allen & Co.*, 28 La. Ann. 60 (1876) (attachment—\$1800); *Frank & Co. v. Chaffe & Sons*, 34 La. Ann. 1203 (1882) (attachment—\$500); *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357 (1888) (injunction—\$500); *Chaffe, Powell & West v. MacKenzie*, 43 La. Ann. 1062, 10 So. 369 (1891) (attachment—\$1000); *Martin v. Tellotte*, 115 La. 769, 40 So. 41 (1905) (injunction—\$250); *Wall v. Hardwood Mfg. Co.*, 127 La. 959, 54 So. 300 (1911) (sequestration and attachment—\$500).

11. 3 La. Ann. 588 (1848).

12. It was not until the 1886 amendment to the Code of Practice Article 375 that a reconventional demand for damages was allowed in the same suit when the parties were residents of the same parish.

court allowed the reasonable expense of counsel employed in defending the former suit. Two years later, in *Penny v. Taylor*,¹³ a sequestration was coupled with the main demand. The only response was an answer filed to the merits, and the writ was dissolved after trial. Attorney's fees paid for defense of the original suit were \$250. The court pointed out that plaintiff could recover only the portion fairly due for the services relating to the release of the writ and set this value at \$150. In *Gray, Macmurdo & Company v. Lowe & Pattison* (1856)¹⁴ a rule to set aside an injunction was discharged without prejudice to the parties, and after trial on the merits the injunction was dissolved. In awarding attorney's fees the court discussed the *Jones* and *Penny* cases and announced that plaintiff could recover only that portion of the amount paid counsel which was expended for services relating to the dissolution of the injunction. The court had no difficulty in determining that, out of the total \$500 paid by plaintiff to his attorney, \$100 was a reasonable fee for dissolving the writ. None of these cases required that the writ be dissolved on the trial of a motion or rule to dissolve, rather than on the merits, as a condition precedent to the recovery of attorney's fees for the dissolution of the illegal writ.

The practice of apportioning the attorney's services was followed for a number of years. Attorney's fees were allowed for the dissolution of illegally issued writs whether the writs were dissolved on motion or rule,¹⁵ on motion or rule referred to and tried with the merits,¹⁶ or simply upon the trial of the merits.¹⁷

13. 5 La. Ann. 714 (1850). See also *Dyke v. Walker*, 5 La. Ann. 519 (1850), where attorney's fees were awarded when sequestration dissolved after trial on the merits.

14. 11 La. Ann. 391, 392 (1856).

15. *Ricard's Heirs v. Hiriart*, 5 La. 244 (1833) (injunction); *Conrey v. Elbert*, 2 La. Ann. 18 (1847) (civil arrest); *Brown v. Lambeth*, 2 La. Ann. 822 (1847) (injunction); *Bridge v. Ennis*, 28 La. Ann. 309 (1876) (attachment); *Meaux v. Pittman*, 35 La. Ann. 360 (1883) (injunction); *Roos v. P. Goldman & Bro.*, 36 La. Ann. 132 (1884) (civil arrest); *MacFarland & Dupre v. Lehman, Abraham & Co.*, 38 La. Ann. 351 (1886) (attachment); *Watkins Banking Co. v. Louisiana Lbr. Co.*, 47 La. Ann. 581, 17 So. 143 (1895) (attachment); *Bickham v. Hutchinson*, 50 La. Ann. 765, 23 So. 902 (1898) (attachment); *American Furniture Co. v. Grant-Jung Furniture Co.*, 50 La. Ann. 931, 24 So. 182 (1898) (sequestration); *Levert v. Sharpe*, 52 La. Ann. 599, 27 So. 64 (1900) (injunction); *Yun Loy v. Rosser*, 52 La. Ann. 1723, 28 So. 251 (1900) (sequestration).

16. *Hernsheim & Bro. v. Levy*, 32 La. Ann. 340 (1880) (attachment); *Seeligson & Co. v. Rigmaiden & Co.*, 37 La. Ann. 722 (1885) (attachment); *Chaffe, Powell & West v. MacKenzie*, 43 La. Ann. 1062, 10 So. 369 (1891) (attachment); *Vives v. Robertson*, 52 La. Ann. 11, 26 So. 756 (1899) (sequestration); *Billington v. Poitevent & Favre Lbr. Co.*, 52 La. Ann. 1397, 27 So. 725 (1900) (attachment); *American Hoist & Derrick Co. v. Frey*, 127 La. 183, 53 So. 486 (1910) (sequestration).

17. *Stetson v. LeBlanc*, 6 La. 266 (1834) (sequestration); *Melancon's Heirs*

The only limitation upon the granting of attorney's fees was that they were not allowed for defense of the suit on its merits or for prosecuting the suit for damages. In *Accessory Transit Company v. McCerren*, an 1858 case in which an attachment was dissolved as an incident of trial on the merits, the court expressed the apportionment rule like this:

"In regard to lawyer's fees, as an element of damage in this class of cases, it seems now to be settled . . . that, *although no separate fees have been stipulated for services rendered in relation to the attachment, as contradistinguished from the defense of the suit at large, yet the court may assess as damages . . . such proportion of the whole fee paid counsel . . . as it may deem reasonably applicable in remuneration of services peculiarly relating to the attachment.*" (Italics supplied.)¹⁸

In *Brandon & Company v. Allen & Company* (1876) and *State*

v. Robichaud's Heirs, 19 La. 357 (1841) (injunction); *Offutt v. Edwards*, 9 Rob. 90 (La. 1844) (attachment); *Horn v. Bayard*, 11 Rob. 259 (La. 1845) (attachment); *Littlejohn v. Wilcox*, 2 La. Ann. 620 (1847) (attachment); *Farrar v. New Orleans Gas Light & Banking Co.*, 2 La. Ann. 873 (1847) (injunction); *Jones v. Doles*, 3 La. Ann. 588 (1848) (sequestration); *Dyke v. Walker*, 5 La. Ann. 519 (1850) (sequestration); *Penny v. Taylor*, 5 La. Ann. 714 (1850) (sequestration); *Fleetwood v. Dwight*, 8 La. Ann. 481 (1852) (provisional seizure); *Norton & White v. Cammack*, 10 La. Ann. 10 (1855) (sequestration); *Gray, Macmurdo & Co. v. Lowe & Pattison*, 11 La. Ann. 391 (1856) (injunction); *McRae v. Brown*, 12 La. Ann. 181 (1857) (injunction); *Herford v. Babin*, 14 La. Ann. 333 (1859) (injunction); *Phelps v. Coggeshall*, 13 La. Ann. 440 (1858) (attachment); *Accessory Transit Co. v. McCerren*, 13 La. Ann. 214 (1858) (attachment); *Williams v. Close*, 14 La. Ann. 737 (1859) (injunction); *Bonner v. Copley*, 15 La. Ann. 504 (1860) (sequestration); *Dickinson v. Maynard*, 20 La. Ann. 66 (1868) (attachment); *British & American Nav. Co. v. Sibley & Co.*, 27 La. Ann. 191 (1875) (attachment); *Brandon & Co. v. Allen & Co.*, 28 La. Ann. 60 (1876) (attachment); *Heffner v. Hesse*, 29 La. Ann. 149 (1877) (injunction); *Bernard v. Vicknaire*, Man. Unrep. Cas. 371 (1880) (sequestration); *Barrimore v. McFeely*, 32 La. Ann. 1179 (1880) (provisional seizure); *Frank & Co. v. Chaffe & Sons*, 34 La. Ann. 1203 (1882) (attachment); *Byrne & Co. v. Gardiner & Co.*, 33 La. Ann. 6 (1881) (attachment); *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357 (1888) (injunction); *Ivars v. Ryan*, 42 La. Ann. 32, 7 So. 61 (1890) (provisional seizure); *Riggs & Co. v. Bell*, 42 La. Ann. 666, 7 So. 787 (1890) (injunction); *Bloch v. His Creditors*, 46 La. Ann. 1334, 16 So. 267 (1894) (attachment); *Fush v. Egan*, 48 La. Ann. 60, 19 So. 108 (1896) (sequestration); *Armistead v. Ardis*, 48 La. Ann. 320, 19 So. 278 (1896) (injunction); *State Bank of New Iberia v. Martin*, 52 La. Ann. 1628, 28 So. 130 (1900) (attachment); *Elms v. Wright-Blodgett Co.*, 106 La. 19, 30 So. 315 (1901) (injunction); *Martin v. Tellotte*, 115 La. 769, 40 So. 41 (1905) (injunction); *Wall v. Hardwood Mfg. Co.*, 127 La. 959, 54 So. 300 (1911) (sequestration and attachment); *American Hoist & Derrick Co. v. Frey*, 127 La. 183, 53 So. 486 (1910) (sequestration); *Buras v. Machella*, 172 La. 580, 134 So. 751 (1931) (injunction); *In re Pargoud v. Morgan*, 2 La. 99 (1830) (injunction); *Walker v. Miltenburg*, 22 La. Ann. 375 (1870) (sequestration; attorney's fees were allowed for dissolution of the writs, but it is not clear by what procedure the writs were dissolved).

18. 13 La. Ann. 214, 215 (1858).

Bank of New Iberia v. Martin (1900),¹⁹ after trial on the merits, the trial court rendered judgment in favor of the attaching creditors and maintained the attachments. In both cases the supreme court reversed on appeal, dissolved the attachments, and apportioned attorney's fees sufficient to cover the services rendered in dissolving the writs. In *Barrimore v. McFeely* (1880)²⁰ final judgment was rendered rejecting the lessor's demands and setting aside a writ of provisional seizure. The lessee was awarded the fees of the attorney employed for her defense under the writ. In *Byrne & Company v. Gardiner & Company* (1881)²¹ there was judgment on the merits for the attaching creditor but the attachment was dissolved as being illegally issued. The court apportioned the attorney's fees to the value of the services rendered in dissolving the attachment.

Aiken v. Leathers (1888)²² involved an injunction applied for in federal court. In the damage action brought in state court, defendant argued that plaintiff was not entitled to attorney's fees, since the dissolution of the restraining order did not result from any separate proceeding for dissolution, but flowed from the refusal of the injunction pendente lite. There was no formal hearing of a motion to dissolve the restraining order prior to the hearing on the injunction pendente lite. Yet the court allowed attorney's fees of \$500 for professional services rendered in effecting the dissolution of the writ.

In both *Hernsheim & Brothers v. Levy* (1880) and *Chaffe, Powell & West v. Mackenzie* (1891),²³ a motion to dissolve an attachment because of the falsity of the allegations of the grounds for the writ was referred to and tried with the merits. Judgment was rendered for defendant on the merits and the attachment was dissolved. The court determined a "just estimate" of the services of counsel in dissolving the writ.²⁴ In an 1896 case where a sequestration was dissolved on devolutive appeal to the supreme court, the court allowed attorney's fees, stating, "It is well settled that if a sequestration issues illegally, the defendant in the writ can recover as damages as the fee of counsel only the amount

19. *Brandon & Co. v. Allen & Co.*, 28 La. Ann. 60 (1876); *State Bank of New Iberia v. Martin*, 52 La. Ann. 1628, 28 So. 130 (1900).

20. 32 La. Ann. 1179 (1880).

21. 33 La. Ann. 6 (1881).

22. 40 La. Ann. 23, 3 So. 357 (1888). Fees also allowed in *Riggs & Co. v. Bell*, 42 La. Ann. 666, 7 So. 787 (1890).

23. *Hernsheim & Bro. v. Levy*, 32 La. Ann. 340 (1880); *Chaffe, Powell & West v. Mackenzie*, 43 La. Ann. 1062, 10 So. 369 (1891).

24. See cases cited note 16, *supra*.

proportioned to the service for dissolving the writ.”²⁵ (Italics supplied.)

SOURCE OF RULE PRESENTLY FOLLOWED

The earliest case found which cast doubt on the applicability of the apportionment rule was *McDaniel & Company v. Gardiner & Company* (1882), where the court stated:

“We cannot include the counsel fees, for defending the attachment suit, in the damages. No motion was made to dissolve the attachment, and the answer filed was purely a defense to the merits, and when the suit was dismissed, the attachment went with it. In such cases, only the fee exclusively for dissolving the writ can be allowed, and here there was no such exclusive or distinct service rendered.”²⁶

This case is the first judicial indication found that the “fee exclusively for dissolving the writ” can only be determined when the writ is dissolved upon a motion filed and tried separate and apart from the merits of the case. The court cited no authority at all, and, as shown above, there was a considerable body of judicial authority to the contrary at this time. Again no motion or rule to dissolve the writ was filed in either *Cretin v. Levy*²⁷ or *Adam Brothers v. Gomila & Company*,²⁸ both decided in 1885. The reasoning of the *McDaniel* case was followed in both cases, and the only damages allowed were the fees of the attorney in bonding the writs. It should be noted that in neither case did the court specifically state that attorney’s fees were disallowed because the writ was dissolved on the merits rather than on a motion to dissolve. Instead, the court emphasized that these were the only damages relating exclusively to the issuance of the writ, and that fees incurred in defending the prior suit could not be allowed. Chief Justice Bermudez dissented strongly in the *Adam Brothers* case. Again in *Lemeunier v. McClearley* (1889)²⁹ the dissolution of an injunction was only incidental to the rejection of plaintiff’s main demand. The court refused attorney’s fees, stating that it could allow only those damages resulting exclusively from the operation of the injunction.

All of the above cases cited the *McDaniel* case, which itself

25. *Fush v. Egan*, 48 La. Ann. 60, 64 (1896).

26. *McDaniel & Co. v. Gardiner & Co.*, 34 La. Ann. 341, 344 (1882).

27. 37 La. Ann. 182 (1885).

28. 41 La. Ann. 411, 412 (1889).

29. *Id.* at 412.

was supported by no authority at all. Other cases relied on were *Byrne & Company v. Gardiner & Company*, *Penny v. Taylor*, *Phelps v. Coggeshall*, and *Accessory Transit Company v. McCerren*, all of which expressly allowed attorney's fees after dissolution on the merits, as shown above.

The *McDaniel* case and the three cases following it are apparently an isolated group. All cases found in the period after these cases, down to about 1910, apparently applied the earlier rule and allowed attorney's fees without regard to the manner in which the writ was dissolved.³⁰ *Seeligson & Company v. Rigmaiden & Company*,³¹ decided in the same year as the *Adams Brothers* and *Cretin* cases, apportioned attorney's fees without discussion when a motion to dissolve an attachment was referred to and tried with the merits. Thus it appears that at this stage the court was not yet committed to the rule that trial on the merits precludes an award of attorney's fees for dissolution of the writ.

In *American Hoist & Derrick Company v. Frey* (1910)³² a motion to dissolve a sequestration was referred to and tried with the merits, and it was decided that the writ was wrongfully issued. Plaintiff argued that no attorney's fees could be allowed since the motion was tried at the same time as the merits. The court expressly rejected this view, saying that it is only where the writ is dissolved as a result of trial *solely* on an answer to the merits that attorney's fees will be disallowed. But, said the court, such fees *may* be allowed when the motion to dismiss or dissolve is tried at the same time as the merits. *Albert Hanson Lumber Company v. Mestayer* (1912)³³ denied attorney's fees where no effort to obtain dissolution of an injunction was made prior to trial on the merits, but indicated that the rule of the *American Hoist* case would be followed in a proper case.

Crowell & Spencer Lumber Company v. Duplissey. (1912) was the earliest case found in which a claim for attorney's fees was rejected expressly upon the following reasoning:

"It is well settled that attorney's fees for dissolving a writ

30. See cases cited *supra* notes 15, 16, 17. See especially *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357 (1888); *Riggs & Co. v. Bell*, 42 La. Ann. 666, 7 So. 787 (1890); *Chaffe, Powell & West v. Mackenzie*, 43 La. Ann. 1062, 10 So. 369 (1891); *Bloch v. His Creditors*, 46 La. Ann. 1334, 16 So. 267 (1894); *Vives v. Robertson*, 52 La. Ann. 11, 26 So. 756 (1899); *Elms v. Wright-Blodgett Co.*, 106 La. 19, 30 So. 315 (1901).

31. 37 La. Ann. 722 (1885).

32. 127 La. 183, 53 So. 486 (1910).

33. 130 La. 688, 58 So. 511 (1912).

of sequestration can be allowed *only when trial on the writ has been separate from that on the merits.*"³⁴ (Italics supplied.)

No authority was cited to sustain the proposition. It was evidently about this time that the courts began to feel definitely committed to the present-day rule that trial on the merits precludes attorney's fees. Other cases of the same period are in agreement with this view, as appears below.

SUMMARY OF THE MODERN JURISPRUDENCE

In *Mitchell v. Murphy* (1913)³⁵ a sequestration and an attachment were dissolved on motion to dissolve, but a sequestration subsequently taken out was disposed of at the same time as the merits. The court allowed attorney's fees for dissolving the first two writs, but denied them for dissolution of the second sequestration. *Jones v. Monroe* (1914)³⁶ likewise held it to be "impossible" to determine what portion of the attorney's services related to the dissolution of the writ when a motion to dissolve a sequestration was referred to the merits. Attorney's fees were again rejected in 1921³⁷ when an injunction was dissolved on the merits and not on motion to dissolve.

Three Rivers Oil Company v. Laurence (1923)³⁸ is the case most frequently cited as authority for the modern rule. There, defendant filed motions to dissolve writs of injunction and sequestration which were referred to the merits without prejudice to either party. As it turned out, defendant actually was prejudiced, since the supreme court, after affirming the trial court's decision that the writs were illegally issued, refused to allow attorney's fees for the dissolution, stating:

"While it is true that a motion to dissolve the writ of injunction was filed, and was referred to the merits without prejudice to either party, yet it is also true that this motion involved a trial on the merits, and that the injunction was in fact dissolved on the merits and not on the motion. Under the circumstances, attorney's fees will not be allowed as damages, for to do so would be to allow fees virtually for defending the suit on the merits, which is not permissible."³⁹

34. 130 La. 837, 843, 58 So. 590, 592 (1912).

35. 131 La. 1040, 60 So. 677 (1913).

36. 136 La. 148, 66 So. 760 (1914).

37. *Kavanaugh v. Frost-Johnson Lbr. Co.*, 149 La. 972, 90 So. 275 (1921).

38. 153 La. 224, 95 So. 652 (1923).

39. 153 La. 224, 231, 95 So. 652, 654 (1923).

The court did not explain why it could not evaluate the work done by the attorney in preparing the motion, and no authority was cited.

The *Farris* case was decided the next year and since then the rule has been strictly followed in every case found, with one exception.⁴⁰ It appears that the modern jurisprudence does not apply the rule of the *American Hoist & Derrick* case. For example, in *Edwards v. Wiseman* (1941)⁴¹ the claim for attorney's fees was rejected despite the fact that defendant had referred a motion to dissolve a temporary restraining order to the merits with express reservation of his right to claim them. The modern rule has been affirmed in a 1951 case, *Roy O. Martin Lumber Company v. Sinclair*,⁴² which allowed attorney's fees, but the court carefully pointed out that the motion to dissolve the writ was separately tried. Other cases also allow attorney's fees if the motion to dissolve is tried separate from the merits.⁴³ Although doubt was expressed in a few cases,⁴⁴ it now seems established that attorney's fees may be recovered for the dissolution of a temporary restraining order.⁴⁵

CONCLUSION

The modern cases appear definitely committed to the "impossibility" rule, that is, that it is *impossible* to differentiate between the attorney's services for dissolving the writ and those for defending the suit unless a successful motion to dissolve the

40. *Buras v. Machella*, 172 La. 580, 134 So. 751 (1931).

41. 193 La. 382, 3 So. 2d 661 (1941).

42. 56 So. 2d 240 (La. 1951).

43. *Byrd v. Cooper*, 166 La. 402, 117 So. 441 (1923) (sequestration); *General Motors Acceptance Corp. v. Sneed*, 167 La. 432, 119 So. 417 (1929) (attachment); *Cupples Co., Manufacturers v. Baskowitz*, 172 La. 254, 134 So. 83 (1931) (attachment); *Louisiana State Rice Milling Co. v. Potter*, 179 La. 197, 153 So. 690 (1934) (sequestration); *Price v. Foster*, 182 La. 79, 161 So. 161 (1935) (attachment); *Southern Bell Tel. & Tel. Co. v. Louisiana Public Service Comm.*, 183 La. 741, 164 So. 786 (1935) (injunction); *Esmele v. Violet Trapping Co.*, 187 La. 728, 175 So. 471 (1937) (sequestration); *Younger Bros. Inc. v. Spell*, 194 La. 16, 193 So. 354 (1939) (provisional seizure); *Douglas Public Service Corp. v. Leon*, 196 La. 735, 200 So. 21 (1941) (attachment).

44. *Albert Pick & Co. v. Stringer*, 171 La. 131, 129 So. 731 (1930); *Vidal v. Sterlington Gas Corp.*, 182 La. 19, 161 So. 6 (1935).

45. *Southern Bell Tel. & Tel. Co. v. Louisiana Public Service Comm.*, 183 La. 741, 164 So. 786 (1935); *Bogalusa Ice Co. v. Moffett*, 188 La. 598, 177 So. 679 (1937). See also *Whitney-Central Nat. Bank v. Sinnott*, 136 La. 95, 66 So. 551 (1914); *Whitbeck v. Rea*, 158 La. 1003, 105 So. 43 (1925), same result before 1924 injunction statute. This is at best illusory since plaintiff in injunction can set trial on the rule for the preliminary injunction at such an early date that defendant will not have time to file a motion or rule to dissolve the restraining order.

writ has been separately filed, tried, and decided.⁴⁶ It seems just as clear that the early jurisprudence allowed attorney's fees as an element of damages in every case in which a conservatory writ was illegally issued, it making no difference whether the writ was dissolved on a separate motion to dissolve, on a motion to dissolve referred to the merits, or upon the merits after answer only was filed.⁴⁷ It is not easy to understand why modern courts find it "impossible" to apportion the fees when the older courts did not even express it to be difficult. The procedural law has not changed in any great particular (except for injunctions, and attorney's fees are allowed when a temporary restraining order is dissolved on motion or rule tried separate from the rule nisi).⁴⁸ Perhaps the "impossibility" rule is followed because of a feeling that, as a matter of public policy, damages for the improper, but good faith, issuance of conservatory writs should be limited. However, no indication of such policy was found in any of the cases, and Code of Practice Article 375 would seem to set out a contrary policy. More likely the rule is followed because of the throttling effect of "stare decisis."⁴⁹

In two cases,⁵⁰ one decided in 1928 and one in 1942, motions to dissolve the writs issued were overruled prior to trial on the merits, but the trial judges dissolved the writs after hearing the merits. The claim for attorney's fees was refused in each case. In three earlier cases⁵¹ (1876, 1896, and 1900) no motions to dissolve at all were filed. In each case the trial judge gave judgment on the merits for plaintiff and sustained the writ; yet, on appeal, the supreme court, after deciding that the trial court's judgment

46. See cases cited in notes 35, 36, 43 and 44, above; *Farris v. Swift*, 156 La. 12, 99 So. 893 (1924) (attachment); *In re Morgan & Co. v. DeRidder Light & Power Co.*, 155 La. 915, 99 So. 696 (1924) (injunction); *Fabacher v. Rouprich*, 160 La. 433, 107 So. 295 (1926) (sequestration); *Smith v. Keith Motors Co.*, 163 La. 395, 111 So. 798 (1927) (sequestration); *Socola Rice Mill v. Gitz*, 165 La. 984, 116 So. 407 (1928) (sequestration); *Dehan v. Youree*, 166 La. 635, 117 So. 745 (1928) (provisional seizure); *Montgomery v. Bouanchaud*, 179 La. 312, 154 So. 8 (1934) (injunction); *Kupperman v. Moore*, 185 La. 1000, 171 So. 104 (1936) (provisional seizure); *Department of Conservation v. Reardon*, 200 La. 491, 8 So. 2d 353 (1942) (temporary restraining order).

47. See *Jones v. Doles*, 3 La. Ann. 588 (1848); *Penny v. Taylor*, 5 La. Ann. 714 (1850); *Accessory Transit Co. v. McCerren*, 13 La. Ann. 214 (1858), and cases cited supra notes 15, 16, 17.

48. See cases cited supra notes 43 and 44.

49. For example, the *Three Rivers Oil* case (153 La. 224, 95 So. 652 [1923]) has been cited as authority for the rule in some 14 later cases, while the case itself cited no authority and made no attempt to explain the rule.

50. *Socola Rice Mill Co. v. Gitz*, 165 La. 984, 116 So. 407 (1928); *Department of Conservation v. Reardon*, 200 La. 491, 8 So. 2d 353 (1942).

51. *Brandon & Co. v. Allen & Co.*, 28 La. Ann. 60 (1876); *Fush v. Egan*, 48 La. Ann. 60, 19 So. 108 (1896); *State Bank of New Iberia v. Martin*, 52 La. Ann. 1628, 28 So. 130 (1900).

on the merits was incorrect, dissolved the writ and apportioned the attorney's fees. And for almost every other modern case denying attorney's fees an identical or very similar earlier case can be found which allowed attorney's fees.⁵²

Thus it appears that, contrary to the statement in *Farris v. Swift* quoted above, it is not actually "impossible to differentiate between the attorney's services for dissolving the attachment and those for defending the suit."⁵³ The one valid exception to the allowance of attorney's fees, however, might be the rule announced in *American Hoist & Derrick Company v. Frey*⁵⁴ (but seldom followed) to the effect that, when the only response to a suit coupled with a conservatory writ is an answer, and the writ is dissolved solely because the merits of the case are with defendant, no counsel fees will be allowed. But even this exception should be placed upon grounds of public policy rather than "impossibility," in view of the many cases which have allowed attorney's fees under such circumstances.⁵⁵

It is submitted that a return to the prior rule regarding attorney's fees would be desirable. Even when the motion to dissolve is referred to the merits, attorney's fees are certainly an element of the "damages he [the defendant] may have sustained by the illegal resort to such writ."⁵⁶ Furthermore, the line of cases stretching over an eighty year period, from 1830 to about 1910, provides ample jurisprudential authority for such a move, and as said by Chief Justice Bermudez in his dissent to *Adam Brothers v. Gomila & Company*, it should be "indifferent to the defendants that two counsel were not employed, one to dissolve the writ, another to resist the claim."⁵⁷ Neither should it be material that the technical procedure of *Williams v. Ralph*

52. For example, compare two cases where injunctions were dissolved when the only trial had was upon the merits—*Crowell and Spencer Lbr. Co. v. Duplissey*, 130 La. 688, 58 So. 511 (1912) (attorney's fees denied) and *Melancon's Heirs v. Robichaud's Heirs*, 19 La. 357 (1841) (attorney's fees apportioned). Compare *Jones v. Monroe*, 136 La. 148, 66 So. 760 (1914); *Kavanaugh v. Frost-Johnson Lbr. Co.*, 149 La. 972, 90 So. 275 (1921); *Three Rivers Oil Co. v. Laurence*, 153 La. 224, 95 So. 652 (1923); *Smith v. Keith Motors Co.*, 163 La. 395, 111 So. 798 (1927), where attorney's fees were rejected when motions to dissolve were referred to and tried with merits, and cases cited in note 16, supra, where fees were apportioned under the same circumstances. Compare cases cited in note 17, supra, with those cited in note 45.

53. 156 La. 12, 17, 99 So. 893, 894 (1924).

54. 127 La. 183, 53 So. 486 (1910).

55. See especially *Jones v. Doles*, 3 La. Ann. 588 (1848); *Penny v. Taylor*, 5 La. Ann. 714 (1850); *Phelps v. Coggeshall*, 13 La. Ann. 440 (1858); *Accessory Transit Co. v. McCerren*, 13 La. Ann. 214 (1858).

56. Art. 375, La. Code of Practice of 1870.

57. 37 La. Ann. 479, 481 (1885).

*R. Miller Shows*⁵⁸ was not followed, that is, of insisting that the motion to dissolve be tried immediately before the merits proper and that separate records be maintained.

*John V. Parker**

Mineral Rights—Forced Pooling Under Louisiana Act 157 of 1940

In the field of mineral law, private ownership and contractual rights and obligations have been increasingly subjected to the needs of an advancing economy, a development typical of modern law. The passage of Act 157 of 1940¹ began a new chapter in Louisiana mineral law and some significant problems concerning the rights of landowners and owners of mineral rights have arisen in the slightly more than a decade since the enactment of this statute.

This comment will not discuss the basic constitutional issues of the act, which have already been well settled.² One of the most interesting problems in mineral conservation arises from the authority conferred by the act on the commissioner of conservation to establish compulsory drilling and production units.³ This specific area is the main concern of this comment.

The overall purposes of this legislation and the resulting orders of the commissioner are to obtain the maximum possible production of oil and gas from underground pools and to prevent the drilling of unnecessary wells. The basis of the unitization orders is that there is a coequal right in landowners whose tracts cover a common pool to take from this source. Forced pooling is used to protect these common owners.⁴

58. 17 So. 2d 67 (La. App. 1944). See also *Kavanaugh v. Frost-Johnson Lbr. Co.*, 149 La. 972, 90 So. 275 (1921); *Byrd v. Cooper*, 166 La. 402, 117 So. 441 (1928); *Albert Pick & Co. v. Stringer*, 171 La. 131, 129 So. 731 (1930); *Vidal v. Sterlington Gas Corp.*, 182 La. 19, 161 So. 6 (1935); *Southern Bell Tel. & Tel. Co. v. Louisiana Service Comm.*, 183 La. 741, 164 So. 786 (1935).

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1. La. R.S. (1950) 30:2-20.

2. The act was upheld as a valid exercise of the police power of the state and a proper delegation of authority to the commissioner of conservation in the case of *Hunter v. McHugh*, 202 La. 97, 11 So. 2d 495 (1942), appeal dismissed 320 U.S. 222 (1943).

3. La. R.S. (1950) 30:4(13), 9, 10.

4. *Louisiana Gas Lands, Inc. v. Burrow*, 197 La. 275, 1 So. 2d 518 (1941). For a complete explanation of the conservation program and its administra-