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Citation of Appeal in Louisiana

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rule on the effect of the evidence provisions of this code in civil suits. Points of civil evidence are seldom presented to the appellate courts. From this it would seem that even though the proper source of civil evidence rules is none too clear, the rules which are presently applied by the trial courts do not seem to be a source of great concern.

Roy M. Lilly, Jr.

Citation of Appeal in Louisiana

Appeals are favored in Louisiana procedure and will not ordinarily be dismissed on mere technicalities. Support for this principle may be found in statute[1] and in judicial decision.[2] Yet, in at least one phase of the appellate procedure—that involving citation of appeal—numerous technical and arbitrary rules can be found which are entirely unnecessary to a workable and just system.

The Code of Practice of 1825 originally provided for the taking of appeal only by petition and citation.[3] In 1843, Articles 573 and 574 of that code were amended so as to allow appeals to be taken by motion in open court at the same term at which judgment was rendered and without the necessity of citation of appeal.[4] In *Prudhomme v. Edens*,[5] decided soon after the 1843 amendment, the trial judge granted an appeal upon motion made in the term following that in which judgment had been rendered. Recognizing that this procedure was not in accordance with the provisions of the code articles, the Supreme Court, nevertheless,

1. Art. 898, LA. CODE OF PRACTICE of 1870; LA. R.S. § 13:4433 (1950).

2. Succession of Tullier, 216 La. 821, 44 So.2d 880 (1950); Picard v. Mutual Life Ins. Co. of N.Y., 212 La. 234, 31 So.2d 783 (1947); McCann v. Todd, 201 La. 953, 10 So.2d 769 (1942); Gulf States Finance Corp. v. Colbert, 61 So.2d 626 (La. App. 1952); Johnson v. Wyble, 55 So.2d 711 (La. App. 1951).

3. Art. 573, LA. CODE OF PRACTICE of 1825: "Whoever intends to appeal, must present a petition to that effect to the court. . . ."

Art. 581, LA. CODE OF PRACTICE of 1825: "When an appeal has been taken, . . . the clerk shall deliver a copy of the petition of appeal to the sheriff, to be served on the appellee, together with a citation. . . ."

4. La. Acts 1843, No. 64, p. 40: "*Be it enacted* . . . , That Articles five hundred and seventy three and five hundred and seventy four of the Code of Practice be so amended that the party intending to appeal may do so either by petition or by motion in open Court at the same term at which judgment was rendered . . . and when an appeal has been granted on motion in open Court, no citation of appeal or other notice to appellee shall be necessary."

5. 6 Rob. 64 (La. 1843).

refused to dismiss the appeal, stating "we do not think the form of the application a sufficient ground to dismiss the appeal allowed in this case. . . . [Service of citation having been made] the appellee has had all the advantages he would have been entitled to, had an ordinary petition of appeal been filed."[6] In two cases[7] following soon after the *Prudhomme* case the court made it clear that, while an appeal should not be dismissed simply because it was taken by motion at the term following rendition of judgment, citation must be served on the appellee when appeal has been taken by this procedure.

The Code of Practice of 1870, in Articles 573[8] and 574,[9] contains substantially the same language as the provisions introduced into the earlier code by the amendment of 1843. Under the present code the court has followed the early decisions discussed above when ruling upon the validity *per se* of an appeal granted on motion in open court at a term following rendition of judgment.[10] Numerous decisions have dealt with such appeals as if there were no question as to their validity[11] and, without exception, service of citation has been held to be an essential step in all appeals taken by this procedure.[12] Since Article 581[13] expressly provides that citation shall be served on the appellee[14] when an appeal is

6. *Id.* at 66.

7. De St. Avid v. Pichot, 3 La. Ann. 6 (1848); M'Collam v. Pointe Coupee Parish, 10 Rob. 20 (La. 1845).

8. Art. 573, LA. CODE OF PRACTICE of 1870: "Whoever intends to appeal may do so either by petition or by motion in open court, at the same term at which judgment was rendered. . . ."

9. Art. 574, LA. CODE OF PRACTICE of 1870: ". . . and when the appeal has been granted upon motion in open court, . . . no citation of appeal, or other notice to appellee, shall be necessary."

10. Pool v. Gaudin, 207 La. 403, 21 So.2d 424 (1945); Haggerty v. Annison, 133 La. 338, 62 So. 946 (1913); Mayville Canal Co. v. Lake Arthur Rice Milling Co., 119 La. 449, 44 So. 260 (1907); Comire v. Schiro Amusement Co., 6 La. App. 441 (1927). *But cf. In re* Land Development Co., 148 La. 925, 88 So. 118 (1921); Frederick v. A. Marx Picture Frame Co., 127 La. 149, 53 So. 474 (1910); Piazza v. Louisiana Power & Light Co., 197 So. 298 (La. App. 1940); Jackson v. Weeden, 17 La. App. 306, 135 So. 745 (1931).

11. *E.g.*, Graves v. D'Artois, 210 La. 857, 28 So.2d 457 (1946); Officer v. American Ins. Co., 182 La. 1054, 162 So. 771 (1935); Jacobsen v. McGarry, 178 La. 79, 150 So. 838 (1933); Bass v. Lane, 169 La. 681, 125 So. 853 (1930); Palmisano & Palmisano v. Bonner, 167 La. 1014, 120 So. 630 (1929); Ducre v. Succession of Ducre, 167 La. 133, 118 So. 864 (1928); Smith v. O'Reilly Elevator Co., 134 La. 635, 64 So. 494 (1914); Whitley v. Whitley, 27 So.2d 920 (La. App. 1946); Haydel v. Major, 19 So.2d 628 (La. App. 1944); Loudan v. Metropolitan Life Ins. Co., 161 So. 196 (La. App. 1935); Colbert v. Alphonse Brenner Co., 8 La. App. 605 (1928); Chapman v. Meyer, 5 La. App. 337 (1927).

12. See note 11 *supra.*

13. Art. 581, LA. CODE OF PRACTICE of 1870: "When an appeal has been taken . . . the clerk shall deliver a copy of the petition of appeal to the sheriff, to be served on the appellee, together with a citation. . . ."

14. LA. R.S. § 13:3471 (1950). Citation of appeal may be served on appellee's attorney of record rather than directly on the appellee.

taken by petition, the only appeals which do not require citation are those taken by motion in open court at the same term at which judgment was rendered.[15]

Originally, the word "term" as used in Article 573 referred to the short terms once held by district courts, which normally lasted only a few weeks.[16] The last three Louisiana constitutions have provided for continuous ten-month sessions for the district courts[17] (Parish of Orleans excepted).[18] The court has defined the word "term" as being synonymous with this ten-month session;[19] in other words, the term referred to in Article 573 is construed to be the entire period from the end of one court vacation to the beginning of another.[20] The situation created by the lengthening of the terms of court was not contemplated at the time appeal without the necessity of citation was made a part of Louisiana procedure.[21] While it is extremely unlikely that an appellee will be unaware that an appeal has been taken, it seems unnecessarily burdensome to require a prospective appellee to watch the court record during a whole ten-month term in order to determine if and when an appeal has been taken.[22]

In *Ryland v. Harve M. Wheeler Lbr. Co.*[23] the court, discussing the question of necessity of citation, said that "the word 'rendered,' as used in C.P. . . . 573 . . . is to be construed with article 546 of the Code of Practice, as also with Act No. 40 of 1904 . . . and, as thus construed, means rendered *and signed*. . . ."[24] (Italics supplied.) In this case judgment was rendered at one term but not signed until the next. The appeal taken in the

15. Art. 574, LA. CODE OF PRACTICE of 1870. *Cf.* State v. Graham, 25 La. Ann. 433 (1873) (mandamus—no citation required).

16. La. Acts 1816, p. 24, required the district courts to hold two terms per year. Cuddy v. Belleville Iron Works Co., 4 La. Ann. 582 (1849): "There was no hardship in the fiction of law involved in that statute [the 1843 amendment to the Code of Practice] which considered a party as in court during a term which in the country parishes rarely was prolonged beyond two or three weeks, and in [New Orleans] covered one month." *Id.* at 584.

17. LA. CONST. Art. 117 (1898); LA. CONST. Art. 117 (1913); LA. CONST. Art. VII, § 43 (1921). See also LA. R.S. §§ 13:501-503 (1950).

18. LA. CONST. Art. VII, § 43 (1921) (New Orleans district court terms are nine and one-half months). See also LA. R.S. § 13:1301 (1950).

19. *In re* Hamner & Co., 169 La. 963, 126 So. 439 (1930); Marine Oil Co. v. Cutler Bros., Inc., 179 So. 485 (La. App. 1938); Deal v. Sovereign Camp, W.O.W., 161 So. 621 (La. App. 1935).

20. Vacation is not a part of the court term. Hunt v. Hunt, 191 La. 362, 185 So. 284 (1938); Succession of Morris, 136 La. 69, 66 So. 542 (1914); Roy v. Succession of Vercher, 152 So. 385 (La. App. 1934).

21. See note 16 *supra.*

22. For a proposed change in the rules of procedure which will remedy this situation, see notes 43 and 44 *infra.*

23. 146 La. 787, 84 So. 55 (1919).

24. 146 La. 787, 791, 84 So. 55, 57 (1920).

latter term by motion in open court was held not to require citation. The same result was reached in *Herold v. Jefferson*,[25] where judgment was rendered at the end of one term and motion for a new trial was carried over and denied in the following term. Thus, for the purposes of determining the necessity of citation of appeal, a judgment is considered as being rendered in the term in which it becomes effective.

In cases in which citation of appeal is required,[26] the effect of a failure to serve the appellee depends on whether or not the fault of such failure may be attributed to the appellant. Where the appellant is at fault, the appeal will be dismissed on motion of the appellee,[27] unless, of course, there has been a waiver of citation.[28] Although the decisions have not been entirely consistent, it is apparently settled today that an appellant must pray for service of citation, and by failing to do so is deemed to be at fault[29] if the appellee is not served.[30] This rule is equally true when third persons, not parties to the original suit, appeal from a judgment affecting them adversely.[31]

Where there are several parties involved in a litigation, it is often troublesome to determine correctly which parties are necessary appellees and which, if any, are not. In any suit involving a number of litigants the question arises as to whether the appel-

25. 172 La. 315, 134 So. 104 (1931).

26. Knowledge on part of appellee or his counsel that an appeal has been taken does not affect the necessity of citation. Graves v. D'Artois, 210 La. 857, 28 So.2d 457 (1946); McCutchen v. Hudson, 132 La. 177, 61 So. 157 (1913); Jacobs v. Sartorius, 3 La. Ann. 9 (1848).

27. Hunt v. Hunt, 191 La. 362, 185 So. 284 (1938); Jacobsen v. McGarry, 178 La. 79, 150 So. 838 (1933); Marable v. Barhan, 137 La. 254, 68 So. 440 (1915); King v. First Methodist Church, 137 La. 879, 69 So. 593 (1915); Gulf States Finance Corp. v. Colbert, 61 So.2d 626 (La. App. 1952); Comire v. Schiro Amusement Co., 6 La. App. 441 (1927).

28. Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926); Succession of Williams, 156 La. 704, 101 So. 113 (1924); Graff v. Graff, 136 La. 749, 67 So. 817 (1915); *In re* Great Southern Lbr. Co., 132 La. 989, 62 So. 117 (1913); Louisiana Power & Light Co. v. Mosley, 18 So.2d 210 (La. App. 1944) [*Contra*: Colbert v. Alphonse Brenner Co., 8 La. App. 605 (1928)].

29. *E.g.*, Graves v. D'Artois, 210 La. 857, 28 So.2d 457 (1946); Jacobsen v. McGarry, 178 La. 79, 150 So. 838 (1933); Ducre v. Succession of Ducre, 167 La. 133, 118 So. 864 (1928); McCutchen v. Hudson, 132 La. 177, 61 So. 157 (1913); Gulf States Finance Corp. v. Colbert, 61 So.2d 626 (La. App. 1952); Estilette v. United States Fidelity & Guaranty Co., 61 So.2d 242 (La. App. 1952). *But see* Tennent v. Caffery, 163 La. 976, 113 So. 167 (1927); Barton v. Kavanaugh, 12 La. Ann. 332 (1857); Ludeling v. Frellsen, 4 La. Ann. 534 (1849).

30. Failure to pray for citation is cured if appellee is served. Richards v. Horecky, 173 La. 411, 137 So. 198 (1931); Succession of Mereaux, 28 So.2d 300 (La. App. 1946); Wiltz v. Home Bldg. & Loan Ass'n, 24 So.2d 204 (La. App. 1945).

31. Levert v. Shirley Planting Co., 135 La. 209, 65 So. 111 (1914); Scrantz v. Sonnier, 2 La. App. 182 (1925).

lant must particularize the parties to be served with citation. The courts have held that a very general prayer for citation, such as one asking for service "on the appellee,"[32] or on a named party, "*et al.*,"[33] satisfies the duty of the appellant and relieves him of fault if the clerk of court does not issue citation for all necessary parties. Here again, however, there has been some inconsistency in the decisions.[34]

As provided in Article 898,[35] an appeal will not be dismissed because of a defect in service of citation when the fault is not that of the appellant. This article applies not only to defective citation or service thereof,[36] but to complete absence of citation as well.[37] In these cases, instead of a dismissal of the appeal, additional time is allowed for proper service of citation.[38]

Succession of Nunley[39] is the latest among many cases which point out the ease with which, except as to the failure to pray for citation, mistakes of an attorney in taking an appeal may be corrected.[40] At the same time the *Nunley* case illustrates an instance in which the technical requirements of citation can cause delay to a litigant through neither his own nor his counsel's fault.[41] Because of the failure of the clerk of court to issue citation, the appeal was removed from the docket and the appellant unnecessarily "given" additional time in which to have citation

32. Item Co. v. St. Tammany Hotel, 172 So. 792 (La. App. 1937).

33. Kelly, Weber & Co. v. F. D. Harvey & Co., 178 La. 266, 151 So. 201 (1933); Wood & Roane v. Wood, 32 La. Ann. 801 (1880).

34. Succession of Townsend, 36 La. Ann. 447 (1884); Vredenburg v. Behan, 32 La. Ann. 561 (1880) (held particularization not necessary). *Contra*: Bowie v. Menard, 15 La. App. 18, 131 So. 66 (1930), where prayer for citation on "the defendant" was held to be insufficient. See also Comire v. Schiro Amusement Co., 6 La. App. 441 (1927).

35. Art. 898, LA. CODE OF PRACTICE of 1870: ". . . And no appeal to the Supreme Court shall be dismissed on account of any defect, error or irregularity . . . in the citation of appeal or service thereof . . . whenever it shall not appear that such defect, error or irregularity is imputable to the appellant . . . but in all such cases the court shall grant a reasonable time to correct such errors or irregularities. . . ." See also LA. R.S. § 13:4433 (1950).

36. *E.g., In re* Gem Co., 162 La. 416, 110 So. 635 (1926); Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926); Succession of Henry, 113 La. 787, 37 So. 756 (1905); Thompson v. St. Martinville Investment Co., 172 So. 13 (La. App. 1937).

37. *E.g.*, Nunez v. Serpas, 198 La. 415, 3 So.2d 673 (1941); Perkins v. Wisner, 171 La. 898, 132 So. 493 (1931); Taylor v. Allen, 151 La. 82, 91 So. 635 (1922); Johnson v. Wyble, 55 So.2d 711 (La. App. 1951).

38. See notes 35, 36 and 37 *supra*.

39. 222 La. 730, 63 So.2d 737 (1953).

40. In the *Nunley* case the appellant prayed for citation on the wrong party and also appealed to the wrong court. Both these errors were corrected without prejudice to the appellant (the former by the appellant himself several months after original petiton was filed, and the latter by the court of appeal).

41. See cases in notes 36 and 37 *supra* for similar instances.

served on the appellee, who was then before the court moving to dismiss the appeal.

The procedure for perfecting an appeal would be greatly simplified if the requirement of citation were eliminated in every case in which the appeal is taken by motion. Perhaps the only justification for the requirement of serving citation on the appellee is the fact that an appellant may wait a full year after judgment before taking the first step to secure an appeal.[42] With this lengthy delay an appellee should be notified when an appeal has been taken. However, if the delay for taking a devolutive appeal were shortened to ninety days, as proposed by the Louisiana State Law Institute,[43] the requirement of citation when appeal is taken by motion would be unnecessary. It would not be unreasonable to require a party in whose favor judgment has been rendered to inform himself of the taking of an appeal within this short period of ninety days. This is particularly true considering that the present procedure places this burden on a prospective appellee during the entire ten-month term at which judgment was rendered.

In the proposed revision of the Code of Practice, on which it is now working, the Louisiana State Law Institute has proposed, in addition to the reduction of the delay for taking devolutive appeal, two other changes in our present procedural rules: (1) all appeals may be taken either on written application or oral motion at any time;[44] (2) in all cases the clerk of the trial court shall cause notice of appeal to be served on the appellees.[45]

The first proposal would result in express authorization in the new Code of Practice of procedure which is now allowed in

42. Art. 593, LA. CODE OF PRACTICE of 1870.

43. Book III, "Proceedings in Appellate Courts," Title I, "Appellate Procedure," Article 6, of the proposed new Code of Practice, as approved by the Council of the Louisiana State Law Institute (unpublished), reads as follows: "Except as otherwise provided by law, an appeal can be taken only within ninety days after the judgment becomes effective as provided in Articles —— [of Book II, Rules of Pleading and Practice in Ordinary Process, Title VI, Judgments]."

44. *Id.* at Art. 8 provides that "An appeal is taken by obtaining the order therefor, within the delay allowed, from the court which rendered the judgment appealed from. This order may be granted on written application or on oral motion in open court, even in vacation or in the session following that in which the judgment appealed from was rendered. The order granting the appeal shall fix the return day thereof in the appellate court and, where necessary, shall fix the amount of bond to be filed. When the order is granted the clerk of court shall cause a notice of appeal to be served on all other parties; but the failure of the clerk to serve this notice shall not affect the validity of the appeal."

45. *Ibid.*

most cases as a result of judicial interpretation of the present code.[46]

The second proposed change would eliminate the dismissal of appeals because of the failure of the appellant to pray for citation. It would also remove from the appellee the duty of determining for himself if an appeal has been taken. However, this proposal would not eliminate the delays caused by the oversight of clerks of court in failing to issue notice of appeal or in failing to have all necessary parties served. The great majority of appeals are taken by motion immediately after rendition of judgment (and very often in the presence of opposing counsel) so that citation or notice is neither necessary under the present procedural rules nor desirable from a practical standpoint. Under the proposal of the Louisiana State Law Institute requiring service of notice of every appeal, the burden on court officers of issuing and serving such notice would be vastly, and, it is submitted, needlessly, multiplied.

A revision of the pertinent Code of Practice article abolishing citation whenever appeal is taken by motion would, in the opinion of the writer, be the more practical method of eliminating the unsatisfactory rules relative to citation of appeal now present in the appellate procedure of this state.

Sidney B. Galloway

Reasonable Additions to a Reserve for Bad Debts for Tax Purposes

The Internal Revenue Code allows two alternative methods to be followed in deducting bad debt losses: (1) a deduction for debts which have actually become worthless during the taxable year and (2) a deduction for a reasonable addition to a reserve for bad debts.[1] The Treasury Regulation pertaining to the calcu-

46. See cases cited in notes 10 and 11 *supra.*

1. In theory these two alternatives conform to the cash and accrual methods of accounting. (See note 6 *infra.*) The Commissioner of Internal Revenue, however, has acquiesced in the Board of Tax Appeals' holding that the method of deducting bad debts will not be disturbed if it is consistent with the taxpayer's method of accounting *so that income is clearly reflected.* Estate of Maurice S. Saltstein, 46 B.T.A. 774 (1942). In this case a taxpayer employing the cash method of accounting was allowed to deduct a reserve against loss of capital. The Commissioner acquiesced in the decision. See also Frederick W. Gray, 8 CCH 1949 TC MEM. DEC. 710 (1949); First National