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Summary Judgment

Ben R. Miller Jr.

jections urged and the grounds thereof."[74] The purpose of this provision is to eliminate the "blanket" exception employed for years in Louisiana practice. When, for example, a defendant filed an exception on the ground that the plaintiff's petition disclosed "no right or no cause of action" without particularizing, it was almost impossible to determine what the specific grounds for the exception were. Since there are numerous points of substantive law, the attorney for the exceptor should specify why there is no right or cause of action. It would seem that this requirement will reduce the number of frivolous exceptions, and will reduce the time required for the trial of the exception, since opposing counsel will be informed of the particular ground for the exception. Thus the opposing attorney will be better able to prepare to argue the exception, and he will be able to take certain steps to overcome some of the objections without having to take the time of the court. This would seem to be conducive to the administration of justice.

CONCLUSION

It would seem that the system of objections will be simpler and more workable under the new Code. Many of the rules that have been developed by the jurisprudence have been codified in simple and concise language. Several changes have been made in the law, but each seems to represent an improvement.

Aubrey McCleary

Summary Judgment

While Articles 966 through 969 of the Louisiana Code of Civil Procedure constitute Louisiana's first venture with summary judgment, it is by no means a procedural novelty. This device was introduced in England in 1855 as part of the English Bills of

74. *Id.* art. 924. It should be noted that amendment of exceptions is provided for in the new Code, Article 1152. It provides: "A defendant may amend his declinatory or dilatory exceptions by leave of court or with the written consent of the adverse party, at any time prior to the trial of the exceptions, so as to amplify or plead more particularly an objection set forth or attempted to be set forth in the original exception. A declinatory or a dilatory exception may not be amended so as to plead an objection not attempted to be set forth in the original exception.

"A defendant may amend his peremptory exception at any time and without leave of court, so as to either amplify an objection set forth or attempted to be set forth in the original exception, or to plead an objection not set forth therein."

Exchange Act to prevent unnecessary delay and expense in collection of notes and bills of exchange.[1] Summary judgment subsequently developed in a few of the American states and later in federal practice. Many states, including Louisiana now, have adopted the substance of Rule 56 of the Federal Rules of Civil Procedure dealing with summary judgment.[2] Since the Louisiana articles track the federal rules almost verbatim, this Comment will include discussion of the jurisprudential development of summary judgment in federal courts in conjunction with discussion of the Louisiana provisions.

Basic Provisions

The object of this procedure is to avoid the delay and consequent expense of a full scale trial of issues having no genuine factual basis.[3] Besides reaching "groundless actions instituted by plaintiffs seeking to harass defendants into nuisance value settlements, . . . [and] baseless defenses interposed by defendants to seize advantage of docket delays before they can be subjected to judgments establishing their unquestionable liability,"[4] the device permits expedient disposition of well presented cases with uncontroverted facts. The procedure employed to achieve this purpose is a relatively simple one[5] whereby the trial judge is able to determine on the basis of pleadings, affidavits, depositions, and other materials, and without the necessity of a live trial, whether there is a genuine issue of material fact. If no

1. 18 & 19 Vict. c. 67 (1855). For a historical discussion see Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929).

2. The constitutionality of summary judgment has been attacked numerous times on the ground that the procedure is a deprivation of the right to trial by jury. All attacks on the constitutionality of the procedure, however, have failed, the court reasoning that summary judgment is simply a method of determining whether there are triable issues to present to a jury. See Boesel, *Summary Judgment Procedure*, 6 WIS. L. REV. 5, 9 (1930).

3. Krieger v. Ownership Corp., 270 F.2d 265 (3d Cir. 1959); Whelan v. New Mexico Western Oil & Gas Co., 226 F.2d 156 (10th Cir. 1955); Chambers & Co. v. Equitable Life Assurance Society of the U.S., 224 F.2d 338 (5th Cir. 1955).

4. McDonald, *Summary Judgments*, 30 TEXAS L. REV. 285, 286 (1952).

5. LA. CODE OF CIVIL PROCEDURE art. 966 (1960):

"The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plantiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

"The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the day of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

such issue exists, and if mover is entitled to judgment as a matter of law, summary judgment should be granted. On the other hand, if a genuine issue of material fact is presented, or mover is not entitled to judgment as a matter of law, the motion will be denied.

The key sentence of the new Louisiana summary judgment procedure has been borrowed almost verbatim from the federal rules and provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to material fact*, and that mover is entitled to judgment as a matter of law."[6] (Emphasis added.) Determination of exactly when a genuine issue of material fact exists will probably be the biggest task of the Louisiana courts.[7] The phrase "genuine issue as to material fact" contemplates two elements: first whether there is a genuine issue or dispute, and secondly whether the issue is over a fact material to the case. A genuine issue appears to be the antithesis of a formal issue which leads to the conclusion that a formal denial or general allegations cannot defeat summary judgment.[8] A genuine issue may perhaps best be termed a triable issue. In reference to the meaning of "material fact," it was said in *Durasteel Co. v. Great Lakes Steel Corp.*[9] that a factual issue is not to be deemed material until it possess "legal probative force as to a controlling issue" of the case. Neither of these are determinations to be made lightly, for if judgment is improvidently granted, a costly appeal will be necessary. Chief Judge Hutcheson of the Fifth Circuit Court of Appeals in reversing an impromptu grant of a summary judgment cautioned the lower federal courts: "that here, as so often before, it has served only to prove that short cutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through."[10]

Summary judgment is not a "trial by affidavit" since the

6. *Ibid.* FED. R. CIV. P. 56(c) has the identical language except that the "mover" is called "the moving party." Judge Clark in speaking of this sentence said: "These are very carefully chosen words intended to express a very definite thought." Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 571 (1952).

7. See Asbill & Snell, *Summary Judgment Under the Federal Rules — When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143 (1953).

8. See Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1950); Ramsower v. Midland Valley R.R., 135 F.2d 101 (8th Cir. 1943).

9. 205 F.2d 438, 441 (8th Cir. 1953).

10. Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 365 (5th Cir. 1951).

judge is presented at the hearing with the essence of all the evidence that would be available at the trial.[11] Any apparent harshness is avoided by safeguards such as the availability of cross examination by the use of depositions, and the opportunity to present affidavits reciting why the opponent to a motion for summary judgment is unable to obtain the necessary opposing affidavits. Protection is also afforded by the basic theory of the procedure, in that a summary disposition will not be allowed where there is any reasonable doubt as to the existence of factual issues; and this doubt is to be resolved against the moving party.

Something of a parallel to summary judgment is found in the Louisiana motion for judgment on the pleadings.[12] The question presented by this motion is solely one of law. Thus if this motion is made and the pleadings contain conflicting factual allegations, or the defendant enters a general denial, an issue of fact exists, and the motion must be denied without the opportunity for either party to introduce evidence to contradict the formal allegations. Similarly the motion for summary judgment can be supported, opposed, and decided solely on the basis of the pleadings, if the parties desire. In this instance the two procedures are identical. However, by employing summary judgment procedure to its fuller extent, the formal allegations or denials of fact may be pierced by affidavits and other materials outside of the pleadings, illustrating the primary purpose of summary judgment.

Availability in Civil Actions

The Louisiana motion for summary judgment is applicable in principal and well as incidental actions.[13] While the specific mention made in the federal rules of the applicability of summary judgment in an action for a declaratory judgment[14] was omitted in the Louisiana articles, this omission should not have the effect of forestalling the use of the device in Louisiana declaratory actions, since the specific mention in the federal rules was probably due to the newness of the device at that time.[15] In fact, it would seem that the motion would be of great use in a suit for declaratory relief, since in many such actions the facts are set-

11. See Note, 5 VAND. L. REV. 607 (1952).
12. LA. CODE OF CIVIL PROCEDURE art. 965 (1960).
13. See *id.* art. 966, which provides in part: "The plaintiff or defendant in the principal or any incidental action . . . may move for a summary judgment in his favor."
14. FED. R. CIV. P. 56(a).
15. For a discussion of this point, see 6 MOORE, FEDERAL PRACTICE ¶ 56.02(13) (2d ed. 1953).

tled and even stipulated, the only dispute being over the applicable law.[16] Cases involving contract construction and commercial paper are likewise effectively handled by summary judgment procedure in the federal courts.[17] Should Louisiana adopt an administrative agency or board type system for settlement of workmen's compensation disputes, summary judgments would probably be frequently rendered, since ordinarily only a limited judicial review is provided in such cases. The device should also prove useful to assert affirmative defenses or matters which will bar a judgment for the plaintiff, such as prescription, res judicata, and release.[18]

Exceptions to the permissible use of summary judgment procedure in Louisiana appear in Article 969 whereby judgments on the pleadings and summary judgments are prohibited in actions for divorce, separation, annulment of marriage, and "in any case where the community, paraphernal, or dotal rights may be involved in an action between husband and wife."[19] The purpose seems to be to prevent consent decrees in an important area more subject to collusion than others.[20]

An additional restriction to prevent collusion, while it will probably seldom be used, is built into summary judgment procedure. This is the requirement that the moving party ask for judgment *in his favor*.[21] Thus, if a defendant moved for entry

16. The Louisiana Code of Civil Procedure will greatly increase the use of declaratory judgments in Louisiana. Article 1871 works a legislative overruling of Burton v. Lester, 227 La. 347, 79 So.2d 333 (1955), in which it was said that declaratory relief could not be sought where any other remedy was available to the plaintiff.

17. See 6 MOORE, FEDERAL PRACTICE ¶ 56.17(8) *et seq.* (2d ed. 1953).

18. *Id.* at ¶ 56.17(58) as to statute of limitations, ¶ 56.17(52) as to res judicata, ¶ 56.17(49) as to release.

19. LA. CODE OF CIVIL PROCEDURE art. 969 (1960): "Judgments on the pleadings and summary judgments shall not be granted in any action for divorce, separation from bed and board, or annulment of marriage, nor in any case where the community, paraphernal, or dotal rights may be involved in an action between husband and wife."

20. This rule, developed from an amendment to the Pleading and Practice Act in 1924, provided that a judgment on the pleadings could not be rendered "in any action for divorce, separation from bed and board, annulment of marriage or to any case where the community, paraphernal or dotal rights of a married woman may be involved." La. Acts 1924, No. 228, now LA. R.S. 13:3601(4) (1950).

In speaking of the 1924 amendment the Supreme Court in Mann v. Mann, 170 La. 958, 968, 129 So. 543, 546 (1930), said: "We take it for granted, therefore, that the purpose of the lawmaker was to return to the established jurisprudence and rule of public policy which prohibits divorces or separation on the consent or admission of the parties."

21. LA. CODE OF CIVIL PROCEDURE art. 966 (1960). Because of the provision in Article 966 for serving the motion it can be assumed that the motion must be in written form.

of a consent decree against himself, it seems the court might rightfully decline to grant a summary judgment.

Motion in General

Either the plaintiff or defendant may move for summary judgment and serve the motion on the adverse party at least ten days prior to the hearing. A plaintiff may move for summary judgment anytime *after* answer has been filed. On the other hand the defendant may move at any time. So while the defendant could move after answering, he has a valuable right to seek summary disposition before answering to the claim. It would seem that a motion for summary disposition would be treated like an exception under Article 1001[22] dealing with the delays for answering, and thus if the motion is denied, the defendant would be entitled to ten days to answer to the claim without prejudice.[23] Aside from the exact time limits, whether it be a plaintiff or defendant moving, it would seem that the motion should be made at an early stage in the litigation since the purpose of this procedural device is to avoid a useless trial.

When a defendant prior to answer moves for summary judgment, the federal rules specifically provide that the plaintiff no longer has the power to dismiss his action as of right.[24] This seems to be a logical limitation in that it is a motion going to the merits of the plaintiff's claim and joining issue. Louisiana would appear to follow the same course by virtue of Article 1671 which provides that the plaintiff can voluntarily dismiss his action only upon an application made prior to a general appearance by the defendant. It seems clear that a motion for summary judgment constitutes a general appearance as defined by Article 7,[25]

22. *Id.* art. 1001: "When an exception is filed prior to answer and is overruled or referred to the merits, or is sustained and an amendment of the petition ordered, the answer shall be filed within ten days after the exception is overruled. . . ."

23. One of the source provisions for Article 1001 is Rule 12(a) of the Federal Rules of Civil Procedure, under which if a defendant's motion for summary judgment is denied, the defendant is allowed ten days in which to answer. See 6 MOORE, FEDERAL PRACTICE 2048 (2d ed. 1953).

24. FED. R. CIV. P. 41(a).

25. LA. CODE OF CIVIL PROCEDURE art. 7 (1960): "Except as otherwise provided in this article, a party makes a general appearance which subjects him to the jurisdiction of the court and impliedly waives all objections thereto when, either personally or through counsel, he seeks therein any relief other than:

"(1) Entry or removal of the name of an attorney as counsel of record;

"(2) Extension of time within which to plead;

"(3) Security for costs;

"(4) Dissolution of an attachment issued on the ground of the non-residence

and thus the plaintiff would be precluded from dismissing his action as of right.

In federal practice after a motion for summary judgment, the opposing party may file a cross motion for the same relief.[26] The existence of multiple motions should not, however, be interpreted as *requiring* the court to render a summary judgment for one of the parties. Like the inability to confer jurisdiction over the subject matter by consent of the parties,[27] two motions for summary judgment should not necessarily result in a judgment unless the requisites are met by one of the parties: bearing the burden of proof that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.[28]

Another difficulty concerning cross motions which has been faced by federal courts is presented where the moving party is not entitled to a summary judgment, but the court finds that the non-moving party is entitled to judgment.[29] The majority of the federal opinions hold that a cross motion is not a prerequisite to a grant of summary judgment to a non-moving party thereto entitled.[30]

Materials Considered with Motion

Pleadings. It is permissible to support, oppose, and render a summary judgment on the basis of the pleadings alone, in which case the motion would be functionally similar to the motion for judgment on the pleadings.[31] However, to accomplish the basic purpose of the procedure under consideration — to pierce formal allegations in the pleadings — other materials should be submitted with the motion.

Affidavits. Evidentiary affidavits in support of and in oppo-

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of the defendant; or

"(5) Dismissal of the action on the ground that the court has no jurisdiction over the defendant. . . ."

26. See 6 MOORE, FEDERAL PRACTICE ¶ 56.13 (2d ed. 1953).

27. LA. CODE OF CIVIL PROCEDURE art. 3 (1960).

28. Accord, Mitchell v. McCarty, 239 F.2d 721 (7th Cir. 1957); Volunteer State Life Insurance Co. v. Henson, 234 F.2d 535 (5th Cir. 1956); F.A.R. Liquidating Corp. v. Brownell, 209 F.2d 375, motion denied, 223 F.2d 128 (3d Cir. 1954).

29. See 6 MOORE, FEDERAL PRACTICE ¶ 56.12 (2d ed. 1953).

30. *Id.* at ¶ 56.12, n. 5. The State of New York has adopted the simplest solution by specifically providing that judgment can be granted to the non-moving party. New York Code of Practice, Rule 113 (1951): "If upon such motion it shall appear that the opposing party is entitled to judgment, the judge hearing the motion may award judgment, even in the absence of a cross-motion therefor."

31. See note 12 *supra* and accompanying text.

sition to a motion for summary judgment are allowed but are not required.[32] Their use has the advantage of presenting sworn evidentiary material but the disadvantage of not affording cross examination or the opportunity to observe demeanor. Article 967 provides the three requirements which qualify affidavits for consideration by the courts: (1) to be made on personal knowledge of affiant, (2) to disclose facts admissible in evidence, and (3) to show affiant's competency. These requirements seem to subject affidavits to the normal rules of evidence. Federal courts have interpreted strictly the first requirement of personal knowledge and thus excluded affidavits made upon only the affiant's information and belief.[33] As to the form of an affidavit, it has been aptly stated by a Justice of the New York court system:

> "The affidavit should proceed in logical sequence. State whether the affiant is twenty-one or over — if not, give his exact age, his address, his present occupation and connection with the case. Then state clearly and concisely the facts, the evidentiary facts, not ultimate facts or conclusions, of which the affiant has personal knowledge. The fact that it is stated as a conclusion that the affiant has personal knowledge of the facts will not suffice. The facts as set forth in the affidavit must show that he has such knowledge . . . . Let the affidavit follow substantially the same form as though the affiant were giving testimony in court. That is always the safe way to proceed."[34]

32. LA. CODE OF CIVIL PROCEDURE art. 967 (1960): "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

"If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this article are presented in bad faith or solely for the purposes of delay, the court immediately shall order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be adjudged guilty of contempt."

33. Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950); Maddox v. Aetna Casualty & Surety Co., 259 F.2d 51 (5th Cir. 1958); Roucher v. Traders & General Insurance Co., 235 F.2d 423 (5th Cir. 1956); Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1950).

34. Shientag, *Summary Judgment*, 4 FORD L. REV. 186, 198 (1935).

An adverse party unable to produce an opposing evidentiary affidavit is able, however, to appeal to the discretion of the court. He may present affidavits stating reasons for his inability to present evidentiary affidavits, and request the court to refuse the application for judgment, or order a continuance to permit affidavits or depositions to be obtained, or discovery had, or grant such other order as is just.[35]

A small controversy reigns in some federal courts as to whether affidavits can overcome allegations in the opposing party's pleadings. A minority of cases answer in the negative,[36] and thus would, in effect, relegate the summary judgment procedure to a judgment on the pleadings. On the other hand, the majority position holds that "summary judgment should be rendered, even though an issue may be raised formally by pleadings, where the supporting affidavits and the opposing affidavits, if any, show that there is no genuine issue of material fact."[37]

Affidavits used with summary judgment are subject to a rule designed to prevent their misuse. If a court is satisfied that the affidavits are presented either in bad faith *or* for the purposes of delay, it may order the party presenting them to pay the adverse party the reasonable expenses of obtaining the counter affidavits plus attorney's fees.[38] A potential contempt penalty is also provided.[39]

Depositions. In presenting evidence for a determination of whether a factual issue exists, depositions are extremely useful, since the deponent is subject to cross examination and his testimony is subject to the normal rules of evidence.[40] Because the summary procedure article uses the word "depositions" generally, it may be assumed that the depositions can be either upon oral examination or written interrogatories.[41]

Other Materials. One other form of presentation of evidence

35. LA. CODE OF CIVIL PROCEDURE art. 967 (1960).
36. See Note, 51 NW. U. L. REV. 370, 375 (1956).
37. 6 MOORE, FEDERAL PRACTICE 2069 (2d ed. 1953).
38. LA. CODE OF CIVIL PROCEDURE art. 967 (1960).
39. *Ibid.* It would appear that both the payment and contempt penalties apply to the evidentiary affidavits to support and oppose a motion and to the affidavits appealing to the discretion of the court, since they precede the penalty provision in the same article.
40. *Id.* arts. 1421 *et seq.*
41. *Id.* arts. 1451 *et seq.* An interesting and successful use of depositions was made in the case of Hufner v. Erie Railroad, 26 F. Supp. 855 (S.D. N.Y. 1939), where the plaintiff's deposition showed that defendant's conduct amounted to only ordinary negligence. Since as a matter of law the defendant would only be liable for wilful and wanton conduct, his motion for summary judgment was granted.

is given specific mention in the articles — admissions on file. Admissions on file may apparently be the result of a request for admissions under the discovery procedure, an answer to an interrogatory or deposition, contained in an affidavit made by counsel during trial, or in other ways.[42]

While not included in the article, other forms of evidence presentation appear to be available in Louisiana, as in federal practice without the benefit of specific mention in either place. Interrogatories to the parties under Article 1491 of the Code may apparently be used, but the slight conflict as to their use in federal practice should be noted.[43] Also a limited use in federal courts of oral testimony may be seen,[44] based on Rule 43(e) which allows oral testimony to be taken at the discretion of the court upon the hearing of any motion based on facts not appearing of record. Further, it would seem that, as in a regular trial, a judge hearing a motion for summary judgment may take judicial notice of those facts susceptible of judicial notice.[45]

Rendition of the Summary Judgment

In Louisiana, if a summary judgment is granted, it must adjudicate all of the merits of the claim or defense.[46] In federal practice an interlocutory judgment on the issue of liability alone is allowed, even though a genuine issue of fact exists as to damages.[47] While it appears that some of the Reporters on the Louisiana Code of Civil Procedure favored this federal provision,[48] the adopted version does not allow a partial summary judgment. This exclusion was apparently due to a desire to simplify sum-

42. See 6 MOORE, FEDERAL PRACTICE ¶ 56.11(6) (2d ed. 1953).

43. See Kohler v. Jacobs, 138 F.2d 440 (5th Cir. 1943); Town of River Junction v. Maryland Casualty Co., 110 F.2d 278 (5th Cir. 1940).

44. See 6 MOORE, FEDERAL PRACTICE ¶ 56.11(8) (2d ed. 1953).

45. Accord, Ellis v. Cates, 178 F.2d 791 (4th Cir. 1949); United States v. Philadelphia, 140 F.2d 406 (3d Cir. 1944); Sieb's Hatcheries, Inc. v. Lindley, 108 F. Supp. 415 (D.C. Ark. 1952).

46. LA. CODE OF CIVIL PROCEDURE art. 968 (1960):

"Judgments on the pleadings, and summary judgments, are final judgments and shall be rendered and signed in the same manner and with the same effect as if a trial had been had upon evidence regularly adduced. If the judgment does not grant mover all of the relief prayed for, jurisdiction shall be retained in order to adjudicate on mover's right to the relief not granted on motion.

"An appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment."

47. FED. R. CIV. P. 56(c): "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

48. See Comments of the Reporters in materials for Redactors prepared November 16, 1951, and used in Advisory Committee January 1, 12, and 26, 1952, at p. 31.

mary judgment and to the fact that Louisiana has few civil jury trials.[49] Thus if liability has been established without a genuine issue of material fact arising, and yet a genuine issue of damages is presented, a motion for summary judgment must be denied.

If a motion for summary judgment is denied, it is an interlocutory decree, since it does not affirmatively adjudicate all issues of the case.[50] Normally in Louisiana the ability to appeal an interlocutory decree would be tested by the irreparable injury formula retained in the new Code.[51] The drafters of the summary judgment procedure, however, left no doubt to be resolved by the courts by providing that no appeal lies from the denial of a motion for summary judgment.[52]

The effect of denial on the ground that mover was not entitled to judgment as a matter of law has been stated by the federal courts as precluding another motion for summary judgment on the same grounds, as the denial becomes the law of the case.[53] However, denial on the grounds of controverted facts does not establish the existence *vel non* of facts presented to the court.[54]

Since the Code specifically requires that a summary judgment can only be rendered where there is no genuine issue as to material fact and mover is entitled to judgment as a matter of law,[55] it follows that before granting the motion the court should be reasonably certain that a summary judgment can be justly rendered. Thus discretion can apparently be exercised in deny-

49. *Ibid.*
50. LA. CODE OF CIVIL PROCEDURE art. 968 (1960).
51. *Id.* art. 2083.
52. *Id.* art. 968.
53. Fraser v. Doing, 130 F.2d 617 (D.C. Cir. 1942). *But see* 6 MOORE, FEDERAL PRACTICE 2099 (2d ed. 1953), where it is said: "The doctrine of the law of the case is flexible enough to permit a departure from the prior enunciated legal rule when warranted. And if good reason is shown why the prior ruling is no longer applicable or for some other reason should be departed from, the court can and should entertain a renewed motion for summary judgment in the interest of effective judicial administration."
54. This would follow logically from the fact that if the motion for summary judgment is denied, the case must go to regular trial. It should be noted that Louisiana did not adopt Federal Rule 56(d), which allows the trial judge, if practicable, to ascertain what facts were and were not in good faith controverted if he denied the motion. Such a finding in federal court would foreclose the introduction of evidence on points found to be uncontroverted. Apparently this provision was not adopted in Louisiana in an effort to simplify the procedure. However, approximately the same results may be had in Louisiana through the pre-trial procedure.
55. See Alaniz v. United States, 257 F.2d 108 (10th Cir. 1958); Brodrick v. Gore, 224 F.2d 892 (10th Cir. 1955); Broderick Wood Products Co. v. United States, 195 F.2d 433 (10th Cir. 1952).

ing a motion for summary judgment.[56] However, there is a possibility of injustice in denial as noted by Judge Clark:

> "Refusal of summary disposal of a case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal, as it does from the grant, the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all."[57]

Ben R. Miller, Jr.

Reconventional Demand

The Louisiana Code of Civil Procedure makes several important changes in the procedure concerning incidental demands. One of the main incidental demands is reconvention,[1] which has been uniformly defined in the Louisiana Codes of Practice as "The demand which the defendant institutes in consequence of that which the plaintiff has brought against him."[2] It would appear that Louisiana adopted the reconventional demand from the Spanish,[3] although there are references to French legislation on the subject.[4]

PLEADING

Under the Code of Practice of 1870 the reconventional demand could be pleaded either in the answer to the principal action or as a separate demand.[5] If the reconventional demand was incorporated in the answer, it was not considered a part thereof, but as a petition setting forth a distinct cause of action.[6] Thus the rules of pleading relative to the petition applied except that it appears neither an answer nor exceptions to the reconventional demand were permitted.[7] Following the usual proce-

56. See 6 MOORE, FEDERAL PRACTICE ¶ 56.15(6) (2d ed. 1953).
57. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578 (1952).
1. LA. CODE OF PRACTICE art. 374 (1870).
2. *Ibid*; LA. CODE OF PRACTICE art. 374 (1825).
3. 2 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CODE OF PRACTICE OF 1825, p. 64 (1937).
4. E.g., Agaisse v. Guedron, 2 Mart.(N.S.) 73 (La. 1824).
5. LA. CODE OF PRACTICE art. 377 (1870).
6. *Cf.* Woodward-Wight Co. v. Haas, 149 So. 161 (La. App. 1933).
7. This has been a frequently litigated subject with cases holding that excep-