

# Civil Procedure - Applicabilty of Delay for New Trial to Interlocutory Judgments

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## NOTES

### CIVIL PROCEDURE — APPLICABILITY OF DELAY FOR NEW TRIAL TO INTERLOCUTORY JUDGMENTS

Seventeen days after signing an interlocutory judgment overruling defendant's exception of prematurity, the trial judge, on his own motion, granted a new trial on the exception.<sup>1</sup> Upon the new trial defendant's exception was maintained and plaintiff's suit dismissed. The Fourth Circuit Court of Appeal reversed and remanded. *Held*, the trial court cannot grant a new trial on an interlocutory order after the expiration of the three-day delay for application for a new trial provided in Louisiana Code of Civil Procedure Article 1974. *Robinson v. T. Smith & Son*, 148 So. 2d 477 (La. App. 4th Cir. 1963).

Historically an interlocutory judgment has differed from a final judgment in that it does not adjudicate the ultimate rights of the parties or finally put the case out of court.<sup>2</sup> Since the days of Romano-Canonical procedure,<sup>3</sup> the English High Court of Chancery,<sup>4</sup> and the traditional common law courts,<sup>5</sup> an interlocutory judgment has not been *res judicata* and has been revocable by the judge rendering it.<sup>6</sup> Today a majority of common law states still regard an interlocutory judgment as within the court's control, subject to modification or rescission at any time prior to rendition of a final judgment.<sup>7</sup> The Federal Rules of Civil Procedure give the trial judge discretion to grant a

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1. Plaintiff sued for workmen's compensation, and defendant filed an exception of prematurity alleging payments had been made.

2. 1 BLACK, JUDGMENTS § 21 (2d ed. 1902); FREEMAN, JUDGMENTS § 38 (5th ed. 1925); see RESTATEMENT, JUDGMENTS § 41, comment a (1942).

3. ENGLEMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 485 (1927).

4. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 386 (1952).

5. *Id.* at 385.

6. *Ibid.* Until a final judgment was rendered, an interlocutory judgment was considered "within the breast of the court" rendering it, subject to its control.

7. *Vauss v. Thomas*, 249 Ala. 449, 31 So. 2d 502 (1947); *People v. Greene*, 74 Cal. 400, 16 Pac. 197 (1887); *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623 (1907); *Alabama Hotel Co. v. J. L. Mott Iron Works*, 86 Fla. 608, 98 So. 825 (1923); *Riley v. Board of Trustees of Policemen's Pension Fund*, 207 Iowa 177, 222 N.W. 403 (1928); *McCormack v. Moore*, 273 Ky. 725, 117 S.W.2d 952 (1938); *Sheppard v. Morgan*, 184 So. 386 (La. App. 1st Cir. 1938); *Madison v. Sheets*, 361 Mo. 712, 236 S.W.2d 286 (1951); *Bent v. Miranda*, 8 N.M. 78, 42 Pac. 91 (1895); *Bannon v. Bannon*, 270 N.Y. 484, 1 N.E.2d 975 (1936); *Markofski v. Yanks*, 297 Pa. 74, 146 Atl. 569 (1929); *Baker v. Swineford*, 97 Va. 112, 33 S.E. 542 (1899); *Balfour-Guthrie Inv. Co. v. Geiger*, 20

new trial on a final judgment within a provided delay,<sup>8</sup> but give him plenary power to alter an interlocutory judgment at any time until rendition of a final judgment.<sup>9</sup>

The Louisiana Code of Practice required the judge to sign all final judgments<sup>10</sup> and provided a new trial could be granted only within three days of the signing.<sup>11</sup> A judgment which determined the merits of an issue but lacked the judge's signature was not considered a final judgment,<sup>12</sup> and a new trial could be granted on it at any time before signature, even if more than three days had elapsed from its decision.<sup>13</sup> No signature was required for interlocutory judgments,<sup>14</sup> and a signing did not convert a judgment otherwise interlocutory into a final one.<sup>15</sup> Since an interlocutory judgment was considered within the court's control until final judgment, until that time it was generally held revocable at the judge's discretion<sup>16</sup> without a formal motion for a new trial.<sup>17</sup> Further, since interlocutory

Wash. 579, 56 Pac. 370 (1899); State *ex rel.* United Fuel Gas Co. v. DeBerry, 130 W. Va. 418, 43 S.E.2d 408 (1947); 49 C.J.S. *Judgments* § 230 (1947).

8. FED. R. CIV. P. 59, 28 U.S.C.A. § 59 (1960) (ten-day delay after entry of judgment).

9. See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 393 (rev. ed. Wright 1958); 6 MOORE, FEDERAL PRACTICE 3710 (2d ed. 1953).

10. La. Code of Practice art. 546 (1870); see Viator v. Heintz, 201 La. 884, 10 So. 2d 690 (1942).

11. La. Code of Practice arts. 547, 558 (1870) (new trial could be granted on motion of either party or on court's own motion).

12. Rivers & Rails Terminals v. Louisiana Ry. & Nav. Co., 160 La. 931, 107 So. 700 (1926); Franke v. Shaw, 154 La. 508, 97 So. 793 (1923); Laurent v. Beelman, 30 La. Ann. 363 (1878); Walker v. Succession of Hays, 23 La. Ann. 176 (1871); Morgan v. Calliham, 166 So. 180 (La. App. 2d Cir. 1936).

It was said that such a judgment was an interlocutory judgment, Rivers & Rails Terminals v. Louisiana Ry. & Nav. Co., *supra*, but in theory it could not be interlocutory, since it decided all points in controversy between the parties. See La. Code of Practice art. 539 (1870).

13. Rivers & Rails Terminals v. Louisiana Ry. & Nav. Co., 160 La. 931, 107 So. 700 (1926); Cartwright v. New Orleans Ry. & Light Co., 131 La. 210, 59 So. 124 (1912); Snuggs v. Burrus, 67 So. 2d 599 (La. App. Or. Cir. 1953); Rogers v. Illinois Central R.R., 40 So. 2d 403 (La. App. Or. Cir. 1949); Albin v. Harvey & Jones, 162 So. 658 (La. App. 2d Cir. 1935).

A motion by one of the parties or by the judge could provoke a new trial on this type of judgment. Mitchell v. Louisiana Industrial Life Ins. Co., 204 La. 855, 16 So. 2d 458 (1943); State *ex rel.* Shreveport Cotton Oil Co. v. Blackman, 110 La. 266, 34 So. 438 (1903); Gale v. Kemper's Heirs, 10 La. 205 (1836).

14. Feitel v. Feitel, 169 La. 384, 125 So. 280 (1929); Wickman v. Nalty, 41 La. Ann. 284, 6 So. 123 (1889).

15. See note 14 *supra*.

16. Cusachs v. Dugue, 113 La. 261, 36 So. 960 (1903); Levy v. Wise, 15 La. Ann. 38 (1860); Elder v. Rogers, 11 La. Ann. 606 (1856); Shaw v. Thompson, 3 Mart. (N.S.) 392 (La. 1825); Sheppard v. Morgan, 184 So. 386 (La. App. 1st Cir. 1938).

17. Cusachs v. Dugue, 113 La. 261, 36 So. 960 (1903); Elder v. Rogers, 11 La. Ann. 606 (1856).

judgments could not support pleas of *res judicata*, they could be reversed on final judgment.<sup>18</sup>

Today the Louisiana Code of Civil Procedure requires all final judgments to be read and signed in open court,<sup>19</sup> but requires no signature for interlocutory judgments.<sup>20</sup> Article 1974<sup>21</sup> provides that a new trial may be granted only within three days from the date notice of judgment is served "as required by Article 1913," which refers solely to the method for serving notice of *final* judgments.<sup>22</sup> Since Article 1914 provides the method for serving notice of an *interlocutory* judgment,<sup>23</sup> and Article 1974 makes no mention of Article 1914, it would seem to follow that Article 1974 was not intended to apply to interlocutory judgments.<sup>24</sup>

The court in the instant case noted that the judgment overruling the exception of prematurity was an interlocutory judgment.<sup>25</sup> It also recognized that Article 1974 refers to no provision for service of notice of an interlocutory judgment.<sup>26</sup> In the absence of such a provision, the court relied on former jurisprudence<sup>27</sup> and applied Article 1914 in holding that since no notice of judgment was due the parties, the three-day delay for

18. *Carmody v. Land*, 207 La. 625, 21 So.2d 764 (1945); *Reeves v. Barbe*, 200 La. 1073, 9 So.2d 426 (1942); *Mann v. Edenborn*, 185 La. 154, 168 So. 759 (1936); *Feitel v. Feitel*, 169 La. 384, 125 So. 280 (1929); *Tuck v. Commercial Standard Ins. Co.*, 164 So. 472 (La. App. 2d Cir. 1935).

19. LA. CODE OF CIVIL PROCEDURE art. 1911 (1960).

20. *Id.* art. 1914.

21. *Id.* art. 1974: "The delay for applying for a new trial shall be three days, exclusive of holidays. This delay commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913."

22. *Id.* art. 1913. Before the 1961 amendment to this article, the parties were entitled to notice of all final judgments. The 1961 amendment provides that notice of final judgments is required only in the case of a default judgment based on domiciliary service and a final judgment rendered after the case had been taken under advisement.

23. *Id.* art. 1914 provides that the clerk shall make a minute entry of an interlocutory judgment rendered after the case has been taken under advisement. Notice to the parties is required only if a written request for notice has been filed.

24. Support is given this interpretation by the statutory rule of construction, *expressio unius est exclusio alterius* (the inclusion of one thing is the exclusion of another) which serves as an aid in discovering legislative intent not otherwise manifest. See, e.g., *United States v. Barnes*, 222 U.S. 513 (1912); *State ex rel. Fitzpatrick v. Grace*, 187 La. 1028, 175 So. 656 (1937); *City of Shreveport v. Price*, 142 La. 936, 77 So. 883 (1918).

25. 148 So.2d at 479.

26. *Ibid.*

27. *Mitchell v. Louisiana Industrial Life Ins. Co.*, 204 La. 855, 16 So.2d 458 (1943); *Iberville Bank & Trust Co. v. Zito*, 169 La. 421, 125 So. 435 (1929); *State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438 (1903); *Culverhouse v. Marx*, 38 La. Ann. 667 (1886); *Underwood v. Lacapere*, 10 La. Ann. 766 (1855); *Gale v. Kemper's Heirs*, 10 La. 205 (1836).

application for a new trial began the day the interlocutory judgment was rendered.<sup>28</sup> Of the jurisprudence relied on, only one early case supports the court's holding;<sup>29</sup> however, later jurisprudence is squarely contrary.<sup>30</sup> Consequently, the court's construction of Article 1974 as applying to final as well as interlocutory judgments is contrary not only to the latest Louisiana jurisprudence prior to enactment of the Code of Civil Procedure,<sup>31</sup> but also to the legislative intent reflected in Article 1974.<sup>32</sup>

Article 1974 was amended after the decision of the trial judge in the instant case to provide that the delay for applying for a new trial commences to run on the day after the judgment was *signed*.<sup>33</sup> Since only final judgments require the judge's signature,<sup>34</sup> it is submitted that no new trial need be granted for a judge to overrule an interlocutory judgment and that he may do so on his own motion or by a motion of either party at any time before final judgment.<sup>35</sup> Hence, any doubt cast by the instant case upon the application of Article 1974 to interlocutory judgments seems to have been dispelled by legislative enactment.

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28. 148 So. 2d at 480.

29. *Culverhouse v. Marx*, 38 La. Ann. 667 (1886).

30. *Cusachs v. Dugue*, 113 La. 261, 36 So. 960 (1903); *Levy v. Wise*, 15 La. Ann. 38 (1860); *Elder v. Rogers*, 11 La. Ann. 606 (1856); *Shaw v. Thompson*, 3 Mart. (N.S.) 392 (La. 1825); *Sheppard v. Morgan*, 184 So. 386 (La. App. 1st Cir. 1938).

31. See note 30 *supra*, and authorities cited therein.

32. Fairness to the court requires mention that the opinion does not reveal that counsel argued the delay for new trial only applied to *final* judgments.

33. LA. CODE OF CIVIL PROCEDURE art. 1974 (1960), as amended, La. Acts 1961, No. 23, § 1, reads: "The delay for applying for a new trial shall be three days, exclusive of legal holidays. Except as otherwise provided in the second paragraph hereof, this delay commences to run on the day after the judgment was signed.

"When notice of the judgment is required under Article 1913, the delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913."

34. *Id.* art. 1911. It is noteworthy that the trial judge in the instant case signed the interlocutory judgment. The Louisiana Supreme Court has said: "[D]istrict courts should refuse to sign interlocutory judgments rendered by them, save in those instances where they may be directed to do so by law." *Feitel v. Feitel*, 169 La. 384, 389, 125 So. 280, 281 (1929). Had the court not signed the judgment in the instant case, it would have been easier to see that no new trial need have been granted to overturn such judgment.

35. The trial judge in the instant case is perhaps in a dilemma as a result of this decision. He has indicated he thinks plaintiff's suit is premature; yet, under the holding of the instant case he cannot grant a new trial on remand. If the suit goes to trial on the merits, it is likely the trial judge will hold for defendant, saying plaintiff's suit is premature. Nevertheless, the instant case seems to require the judge to allow the trial to proceed on the merits.