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Procedure: Civil Procedure

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to a full determination of all issues in the case as between all parties. The fourth sub-paragraph of the article is the only one touching on the instant case, and by implication it squarely precludes separate judgments unless there have been separate trials on the demands. Further, the comment under article 1915 says that:

> "The rule that there should be one final judgment is designed to prevent multiplicity of appeals and piecemeal litigation. In cases where the rules of joinder are liberal, however, injustice could result to parties who had clearly distinct claims and who were put to the trouble of *awaiting the sometimes lengthy determination of the entire suit.* Statutory exceptions have, therefore, been enacted." (Emphasis added.)

When the defective judgment of October 13th was sent to Jones, he could have moved for a new trial for reargument only. Once all parties appealed, however, the simplest solution was for the supreme court to grant Jones the relief to which he was entitled under his appeal, rather than under his ill-conceived partial judgment.

If the majority opinion is received by the practicing bar as a correct interpretation of article 1915, not limited to the hardship case there before the court, the unworkable consequences are not fanciful. A judgment in favor of a principal plaintiff might be appealed suspensively by the principal defendant—third party plaintiff; third party plaintiff then might have a later judgment (under the rule of the instant case) over against third party defendant, who might have a new trial resulting in reversal of findings of fact subtending the principal judgment. Further untenable variations are easy to envision.

CIVIL PROCEDURE

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Jurisdiction over the Subject Matter

In defining the jurisdiction of the city courts of New Orleans, article 4835 of the Code of Civil Procedure provides that "[t]hese courts have jurisdiction of reconventional demands and interventions filed therein and necessarily connected with or grow-

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ing out of the main demand, irrespective of the amount in dispute or the value of the property."[1] The omission of any reference to the third party demand raises the question whether such a demand would be within the jurisdiction of the city courts of New Orleans if the demand exceeded the jurisdictional limit. It seems clear that the courts would have jurisdiction of such a demand if it did not exceed one thousand dollars because the jurisdiction of the courts extends to all cases within that limit except certain types of cases expressly excluded.[2] Moreover, the general rules of procedure apply in courts of limited jurisdiction unless the Code expressly provides otherwise.[3]

But what of the third party demand which exceeds the jurisdictional limitation of one thousand dollars? The Fourth Circuit was faced with this question in *Beneficial Finance Co. of New Orleans v. Bienemy*,[4] in which the defendant, when sued by the plaintiff on a promissory note, filed a third party demand against the vendor of a used car which had been paid for in part with the proceeds of the loan from the plaintiff. In the third party demand, the defendant sought rescission of the sale for redhibitory defects in the automobile and damages exceeding the jurisdictional limit. The court overruled the declinatory exception filed by the third party defendant challenging the jurisdiction of the city court over the third party demand by holding that the jurisdiction of the city court was derived from article VII, section 91, of the constitution, which provides that the City Court of New Orleans has jurisdiction over all incidental demands connected with the principal demand irrespective of amount[5] and that the omission of any mention of the third party demand in article 4835 had no effect on the authority of the court. But the court went on to state that the third party demand is limited to the amount of the principal demand, and since the latter may not exceed the jurisdictional limitation of the city court, it follows that the third party demand may not exceed this amount either. On the merits of the third party demand, the court concluded that the car did have a redhibitory defect, but reduced the price instead of rescinding the sale be-

1. LA. CODE CIV. P. art. 4835.
2. *Id.* arts. 4835, 4836.
3. *Id.* art 4831.
4. 244 So.2d 275 (La. App. 4th Cir. 1971).
5. LA. CONST. art. VII, § 91.

cause the buyer had not tendered the car to the seller, a prerequisite to an action in redhibition. Judgment was entered for the third party plaintiff in the amount of the judgment in the principal demand but not to exceed the amount necessary to repair the car.

The court was correct in stating that the jurisdiction of the court was controlled by article VII, section 91, and that it therefore did have jurisdiction over the third party demand even though it was not specifically mentioned in article 4835. However, its further statement that the third party demand must be limited to the amount of the principal demand, and can therefore never exceed the jurisdictional limitation, seems contrary to the language of the constitution which would allow the action irrespective of the amount. This holding also creates difficulties, particularly in the kind of action presented to the court in *Bienemy*, where the plaintiff had sued to recover on a note representing part of the purchase price of an automobile and the defendant had filed a third party demand against the seller to rescind the sale for redhibitory defects. The court could easily have decided that an action for redhibition is not a proper third party demand in a suit on a note, but the court in *Bienemy* chose to follow cases holding to the contrary.[6] Having decided to allow the action in redhibition as a third party demand, the court should allow it for the full amount even though it exceeds the amount of the principal demand; to do otherwise would force the third party plaintiff to reduce his claim and, since this is a single cause of action, he could not file a separate action for the balance of the claim.[7] Moreover, allowing the claim in its entirety is in accord with article VII, section 91, which provides that all incidental demands necessarily connected with or growing out of the principal demand are within the jurisdiction of the city courts of New Orleans irrespective of the amount in dispute.[8]

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6. Motors Securities Co. v. Hines, 85 So.2d 321 (La. App. 2d Cir. 1956); Automotive Finance Co. v. Daigle, 80 So.2d 579 (La. App. 1st Cir. 1955).

7. LA. CODE CIV. P. art. 5 provides: "When a plaintiff reduces his claim on a single cause of action to bring it within the jurisdiction of a court and judgment is rendered thereon, he remits the portion of his claim for which he did not pray for judgment, and is precluded thereafter from demanding it judicially."

8. LA. CONST. art. VII, § 91.

Jurisdiction in Personam over Nonresidents

In *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*,[9] the plaintiff filed suit to recover the price of lumber sold to the defendant, an Illinois corporation. The defendant filed an exception objecting to the jurisdiction of the trial court over it and the suit was dismissed. The court of appeal affirmed. Jurisdiction over the defendant was asserted on the basis of R.S. 13:3201,[10] which provides that a Louisiana court may exercise personal jurisdiction over a nonresident on a cause of action arising from the nonresident's transacting any business in the state. The comments under this statute state that the statute was enacted in order to allow Louisiana courts to tap the full potential of *in personam* jurisdiction over nonresidents[11] permitted by the cases of *International Shoe Co. v. Washington*[12] and *McGee v. International Life Insurance Co.*,[13] and further that the language "transacting business" was intended to apply to a single transaction of interstate business.[14] The plaintiff argued that the defendant corporation had sufficient contact with Louisiana to allow the courts of this state to exercise *in personam* jurisdiction under 13:3201 without offending due process, even though the defendant was not qualified to do business in Louisiana and did not have an agent for service of process, because the defendant had placed orders with two other lumber companies in Louisiana in addition to the order placed with the plaintiff, and had advertised its products in publications which were distributed in Louisiana. For the court of appeal, the fact that the defendant in this case was a buyer rather than a seller was significant because, the court reasoned, a nonresident seller purposely enters the state directly or through advertisements and thereby exercises the privilege of conducting its business activities in the state and enjoys the benefits and protection of the laws of the state. This makes it both reasonable and fair for the state to exercise jurisdiction over it in actions arising out of its activities, but this is not so with respect to the buyer because he does not contemplate the use of any of the laws or courts of the state for his protection; therefore, he has not deliberately

9. 239 So.2d 465 (La. App. 4th Cir. 1970), *aff'd*, 259 La. 635, 251 So.2d 45 (1971).
10. LA. R.S. 13:3201 (Supp. 1964).
11. *Id.* comment (a).
12. 326 U.S. 310 (1945).
13. 355 U.S. 220 (1957).
14. LA. R.S. 13:3201, comment (d).

invoked the benefits and protection of the state. The court found support for this position in the fact that, while the statute specifically applies to anyone who contracts to supply services or things in Louisiana, it has no comparable provision with respect to those who contract *to buy* in the state. The court concluded that the purchase of lumber by the defendant was not "doing business" within the meaning of the Louisiana statute, and therefore did not satisfy the "minimum contacts" requirement of due process.

The supreme court affirmed the decision of the court of appeal,[15] but for different reasons. The court of appeal had concluded that R.S. 13:3201 would apply to the sale of goods in Louisiana but not to purchase of goods. The supreme court stated that "[i]t is difficult to make a sound argument that, although selling in a foreign state is 'transacting business,' buying is not. Almost by definition, to purchase is to do business."[16] The court also rejected the contention that 13:3201(a)'s "transacting any business" must be read in conjunction with 13:3201(b)'s "contracting to supply services or things in the state." The court concluded that "transacting any business in Louisiana *including a mail order purchase*, will subject the nonresident purchaser to the jurisdiction of the Louisiana courts."[17] (Emphasis added.) Having concluded that there was no basis for distinguishing between nonresident sellers and nonresident buyers as far as the application of 13:3201(a) was concerned, the court then considered whether a distinction should be made with respect to the due process clause. The court noted that no case could be found in which a court had imposed jurisdiction on a nonresident in an action arising from an isolated purchase of goods, but courts had asserted jurisdiction where the purchases were a regular part of the nonresident's business.[18] Moreover, there were differences between nonresident sellers and nonresident buyers because the seller should realize that a sale in another state carries with it the risk of having to defend himself in that state in an action arising out of that sale and this is one of the risks of interstate business. There is nothing in the law of any

15. 259 La. 635, 251 So.2d 45 (1971).
16. *Id.* at ____, 251 So.2d at 46.
17. *Id.*
18. Henry R. Jahn & Son, Inc. v. Superior Court of California 49 Cal.2d 855, 323 P.2d 437 (1958); Sterling Novelty Corp. v. Frank & Hirsch Distrib. Co., 299 N.Y. 208, 86 N.E.2d 564 (1949); Flambeau Plastics Corp. v. King Bee Mfg. Co., 24 Wis.2d 459, 129 N.W.2d 237 (1964).

state to justify the buyer's belief that a mail order purchase would subject him to the jurisdiction of a foreign state. Sellers are in business whereas buyers, simply buying for their own consumption, are not. If this were not the case, buyers would hesitate to make mail order purchases. Having determined that due process requires that a distinction be made between buyers and sellers, the court concluded that it could not assert jurisdiction over the defendant in this case on the basis of the three orders placed in the state, even though the court recognized that the purchase in this case was part of the defendant's business and was not made for personal use. The court left open the question of whether regular and systematic purchases by a nonresident as part of his business would satisfy due process.

The dissent argued that the Louisiana statute in question did not require more than a single transaction in order to vest jurisdiction in Louisiana courts and that the majority failed to apply the spirit of the statute, which was to utilize the full scope of jurisdiction authorized by the supreme court cases defining the limits of due process. The dissent further argued that this case involved a contract executed and performed in Louisiana, controlled by Louisiana law, with a defendant who had previously been involved in similar transactions with other Louisiana firms purchasing materials for use in his business, that the value of the purchases by the defendant was substantial, and that he hoped to profit from the transaction. The dissent concluded that there is no logical or rational basis for the distinction made by the majority and that under the circumstances the result was unjust.

The majority's conclusion that, for purposes of due process, a distinction should be made between a buyer who enters into a transaction in another state for his own use and pleasure and a nonresident seller who enters into a similar transaction for profit as part of his business is sound for the reasons articulated by the court. But it is questionable whether the buyer in this particular case should have had the benefit of that distinction. The purchase by the defendant was as much a part of his business operation as a sale of his products in Louisiana would have been. In both cases, the nonresident, whether seller or buyer, purposefully enters the state through business transactions in pursuit of profit and if it is reasonable to assert jurisdiction over a seller, based on a single sale because this is a reasonable risk

of interstate business, then it is also reasonable to assert jurisdiction over the buyer who is also engaged in interstate business. There are good reasons for making a distinction in favor of the nonresident buyer for personal use and consumption, but there is no logical basis for making a distinction as between buyers and sellers who are both engaged in interstate transactions for profit pursuant to their business objectives.

Service of Process on a Nonresident

In *Guidry v. Rhodes*[19] the plaintiff sued the defendant, a nonresident, to recover for injuries sustained in an automobile accident. Service of process was made on the Secretary of State in accordance with R.S. 13:3474 and 13:3475, and service was also made on the defendant by certified mail pursuant to 13:3204. The defendant filed an exception of lack of jurisdiction over the person, and the trial court sustained this exception and dismissed the suit. The judgment on the exception was affirmed because both statutes require proof of service through the return receipts; since no return receipts were attached to the plaintiff's affidavit declaring that he had mailed the citation and petition to the defendant, the court concluded that there was no proof of proper service of process. The judgment of the court was quite correct in light of the statutes as written, but this case raises the question as to whether the Louisiana statutes in question are more restrictive with respect to proof of service of process than they need be. Due process requires that the defendant be given adequate notice of the proceedings against him in order that he may be able to prepare and plead his defense, but the Supreme Court has held that this requirement of adequate notice is satisfied if means reasonably calculated to give that notice have been employed, and further that it is not necessary that the defendant actually receive notice, only that reasonable means be used to give him that notice.[20] Also, notice by registered or certified mail has been expressly approved as being in accord with the principles of due process.[21] In addition, Louisiana has available additional protection to the nonresident defendant. Code of Civil Procedure article 5091 provides that when the court has jurisdiction over a nonresident defendant who has

19. 238 So.2d 248 (La. App. 3d Cir. 1970).
20. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
21. Id.

not been served with process, either personally or through an agent for service of process, then the court shall appoint an attorney to represent the interests of the nonresident defendant. It seems, therefore, that Louisiana could amend 13:3205 and 13:3475 to provide that, if there is no proof of service through the return receipt of the defendant or the affidavit of the person actually making delivery then the court shall appoint an attorney to represent the nonresident and the action shall proceed contradictorily against the attorney. Such a provision would enable the plaintiff to proceed with his action under either 13:3201 or 13:3474, and the defendant's rights to adequate notice would be protected through both the attempt to communicate with him by registered or certified mail and also by the use of an attorney to represent him. This approach would be in accord with the expansion of jurisdiction over nonresidents and at the same time would not violate any of the rights of the nonresident defendant, especially since the attorney is charged with the responsibility of attempting to communicate with the nonresident.[22]

Nonresident Attachment

In *de Lavergne v. de Lavergne*[23] the plaintiff-wife, after first obtaining a judgment of separation from her husband, filed a contradictory motion under Code of Civil Procedure article 2592 to obtain alimony *pendente lite* from her husband as provided in Civil Code article 148. The defendant-husband was not a domiciliary of Louisiana and could not be served personally, but he did have property in Louisiana in the form of an interest in a trust; therefore, the plaintiff proceeded to establish jurisdiction for her action by attaching the defendant's interest in that trust. Under Code of Civil Procedure article 3542, a writ of attachment can be used in any action for a money judgment against either a resident or a nonresident regardless of the nature, character, or origin of the claim and regardless of whether it is for a certain, uncertain, liquidated or unliquidated amount. The curator appointed to represent the defendant by the court under Code of Civil Procedure article 5091 and the trustees of the trust fund both contended that the plaintiff's action to collect alimony *pendente lite* was not an action for a money judgment within the meaning of article 3542, and that therefore the

22. LA. CODE CIV. P. art. 5094.
23. 244 So.2d 698 (La. App. 4th Cir. 1971).

writ of attachment could not be issued. In support of this position, they relied on an earlier Fourth Circuit case in which the court had said that an action for alimony was not an action for a money judgment because, unlike the ordinary money judgment, a judgment for alimony will not become executory until the defendant has failed to pay in accordance with the terms of the judgment.[24] Therefore, since the judgment for alimony is not an executory judgment, it does not fall within the meaning of article 9 of the Code of Civil Procedure providing for jurisdiction to render a money judgment against a nonresident based on attachment of his property.[25] The court in *de Lavergne* rejected this position and the authority relied upon to support it by stating that the language in the prior opinion to the effect that an action for alimony could not be commenced under the authority of article 9 was improvidently made and that it must now be corrected. The court held that a proceeding for alimony is a suit for judgment ordering the payment of money just as any suit which has for its object the recovery of money and damages or the enforcement of any obligation to pay a sum of money whether liquidated or not. The defendant and the trustees had also relied on the fact that a judgment for alimony provides for contempt if payments are not made as provided and that on this basis it should also be distinguished from the money judgment referred to in articles 9 and 3542. The court also rejected this basis for distinguishing the judgment for alimony from an ordinary judgment, and concluded that the additional remedy of a contempt proceeding was available to protect wives and children and that this additional protection should not lead to the result that a nonresident husband whose property and funds in the state would be subject to attachment by ordinary creditors could avoid attachment by his wife, for alimony or for support of his children simply because the law provided additional protection in the form of contempt to aid the wife and children in collecting on this obligation owed by the husband.

The decision of the court in construing articles 9 and 3542 to make available the nonresident attachment in an action for alimony is correct for, as the court stated, it would be clearly inconsistent with the purpose of protecting wives and children through the additional remedy of contempt to deny to them

24. Puissegur v. Puissegur, 220 So.2d 547 (La. App. 4th Cir. 1969).
25. *Id.*

the use of a nonresident attachment where this basis would be available to ordinary creditors proceeding against a nonresident debtor. In addition, the language of article 3542 indicates that the redactors of the Code intended to give it as broad an application as possible. However, there is a problem with the use of the nonresident attachment in an alimony proceeding. In ordinary quasi in rem proceedings, after judgment has been rendered against the nonresident defendant, a writ of fieri facias is issued and the property attached is sold to satisfy the judgment, but in the case of an alimony judgment, this judgment does not become executory and, therefore, the property seized under the attachment cannot be sold until the nonresident defendant defaults in the payment of the alimony provided in the judgment. In the *de Lavergne* case, the plaintiff was also seeking a judgment making executory the past due payments; to that extent the judgment rendered was executory. But is the effect of the proceeding allowed in *de Lavergne* that property attached at the beginning will remain under seizure, and that if the defendant defaults the plaintiffs will proceed to make the judgment executory and execute on this executory judgment against the property attached? As applied to the facts in this case, it would mean that the nonresident defendant's interest in the trust would remain under seizure and that this interest would be subject to execution from time to time as the defendant defaulted in his continuing obligation to pay the alimony. A contrary position would be that once the judgment has been rendered declaring the defendant liable, then the property which had been seized in order to establish jurisdiction would be released because the purpose of the seizure had been accomplished, namely, providing jurisdiction; since the judgment could not be executed immediately against that property, the interest of the defendant should not remain under permanent seizure. The consequences of this position might be to deprive the plaintiff of the benefit of the judgment she had received because, if the property is released, the nonresident could remove the property from the state and when he subsequently defaulted in his payments, the plaintiff would have no assets to proceed against. The plaintiff could not transfer the judgment for alimony to another state where the defendant had assets and seek enforcement under full faith and credit because the judgment, having been rendered by a court based on quasi in rem jurisdiction, is necessarily limited in its effect to whatever property the non-

resident has in the state. Such a result would be clearly unacceptable and the court therefore made the correct choice.

Another approach to the problem would be to say that a court could acquire jurisdiction over a nonresident to declare his liability in any action for alimony or child support without the necessity for attachment of any interests he may have based on the fact that, since an action for alimony or child support is incidental to the action for separation or divorce, the court which had jurisdiction to render the judgment of divorce or separation would also have jurisdiction to decide all incidental questions arising in the course of that action including questions of child support and alimony. Thus, a Louisiana court could render a judgment against a nonresident declaring his liability to the plaintiff for alimony and child support and this judgment, based on jurisdiction over the defendant, could be enforced under full faith and credit wherever the defendant had assets. This approach finds support in the expansion of in personam jurisdiction, which makes it possible to render a judgment against a nonresident defendant provided he has sufficient contact and relationship with the forum rendering the judgment so that requiring him to appear and defend would not offend traditional notions of fair play and justice.[26]

Cumulation of Actions

In *Montgomery v. American Motorists Insurance Co.*,[27] the plaintiff sued the defendant-insurer on a fire insurance policy to recover the cost of repairs necessitated by acts of vandalism which had occurred on March 30, 1969. The defendant filed an exception of no right or cause of action, alleging that on the date of the vandalism the named insured was someone other than the plaintiff and that the endorsement changing the name of the plaintiff was only issued on April 3, 1970. The exception was sustained by the trial court with leave for the plaintiff to amend within ten days. The plaintiff filed a supplemental and amended petition joining the named insured as plaintiff. The defendant then filed an additional exception of no right or cause of action alleging that since the named insured had sold the premises on January 27, 1969, he had no insurable interest on March 30, 1969, the alleged date of the loss. The trial court dismissed the action

26. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
27. 242 So.2d 45 (La. App. 2d Cir. 1970).

as to the named insured. On February 10, 1970, the original plaintiff filed a second supplemental and amended petition naming an additional defendant, alleging that there was an agency relationship between the defendants, and that since the second defendant had knowledge of the transfer, this knowledge should be imputed to the insurer. The plaintiff further alleged that the second defendant was negligent in not having the insurance policy changed to the name of the plaintiff after having been notified of the change of ownership. The petition prayed for damages against both *in solido*. The defendant insurer filed an objection to the petition, and the trial court ruled that the joining of the second plaintiff was in fact a substitution rather than a joinder, that the original plaintiff was removed from the suit, and that the dismissal of the action as to the second plaintiff had the effect of terminating the entire lawsuit. Therefore, there was no action pending at the date the plaintiff filed his amended petition. Judgment was rendered vacating the order allowing the filing of the supplemental petition, and dismissing the demands against the insurer.

On appeal, the court ruled that the trial court was incorrect in disallowing the amended petition filed on February 10, 1970, because the judgment sustaining the exception of no cause and no right of action as to the original petition was not rendered until February 11, 1970; therefore, on the date of the filing of the supplemental petition, the plaintiff's action was still pending. The court further ruled that the plaintiff's appeal from the February 11, 1970, judgment was timely because it was perfected on April 22, 1970. As to the defendant's further contention that the joinder of the second plaintiff was in effect a substitution since the interests of the two plaintiffs were mutually exclusive and that this substitution constituted an abandonment by the original plaintiff of his pending suit, the court of appeal ruled that there was no authority for considering such a joinder to be a substitution, and, consequently, an abandonment of the original action. Rather, the court reasoned, the joinder of the two causes of action without pleading them in the alternative constituted an improper cumulation of parties under Code of Civil Procedure article 463(3); the cumulation was improper because the two causes of action were contradictory, and the proper remedy in such a case was for the court to order either separate trials of the action or to have the plaintiff choose which course of

action to pursue. Moreover, an objection to improper cumulation of actions must be raised by the dilatory exception and cannot be raised under the exception of no right or cause of action. Since the defendant failed to raise the dilatory exception of misjoinder and permitted the cause of action with respect to the second plaintiff to be resolved, there is no longer any necessity for having the trial judge exercise his option to make the plaintiff choose which action to pursue. The court concluded that since there was no substitution and no abandonment on the part of the plaintiff when he filed a supplemental and amended petition adding the second party plaintiff the district court was in error in refusing to consider the supplemental petition filed on February 10, 1970. The appellate court therefore reversed and remanded for further proceedings.

The decision of the court of appeal is correct and is in accord with the underlying spirit of the Code of Civil Procedure to avoid dismissing or deciding cases based on procedural technicalities. The court was convinced that the plaintiff had sufficient allegations to constitute a cause of action, that he should be allowed his day in court on the merits of his complaint, and that the issue should not be disposed of on the technical basis that, by filing a supplemental and amended petition joining another plaintiff where the allegations in this petition were inconsistent with the allegations in the original petition, plaintiff's actions amounted to a substitution and abandonment where this was clearly not the intent of the plaintiff and where the Code clearly provides for the pleading of inconsistent positions provided it is done so in the alternative.

Motion for a New Trial

In *Sonnier v. Liberty Mutual Insurance Co.*,[28] the jury rendered a verdict rejecting the plaintiff's claims after a five-day trial, and a final judgment dismissing the plaintiff's claim was rendered based on the jury verdict. The plaintiff then filed a motion for a new trial alleging as errors the jury's failure to carry out instructions as to the law given by the court and also the failure of some jurors to make a fair and full disclosure upon voir dire examination. The motion for a new trial was denied without a hearing because, in the words of the trial judge, " '[t]he foregoing application presents nothing new for consideration and therefore

28. 258 La. 813, 248 So.2d 299 (1971).

a contradictory hearing is not warranted and the above application is accordingly summarily denied.' "[29] The plaintiff then applied to the appellate court for supervisory writs and the issue presented was whether a trial court may deny a motion for a new trial without a contradictory hearing. In upholding the action of the trial court, the court of appeal reasoned that prior to the 1960 Code of Civil Procedure it was recognized that the trial court could deny a motion for a new trial without a hearing,[30] and that this procedure was not changed by the new Code because articles 1971 and 1972 provide for the granting of new trials upon the contradictory motion of any party. But no mention is made that a contradictory hearing is required where the motion for a new trial is denied.[31] In the opinion of the court of appeal the omission was intentional because a hearing would serve a useful purpose when the trial court is disposed to grant a new trial. It would give the opposing party an opportunity to cite facts and present arguments to support the original judgment. But in the case where the allegation in the motion is insufficient to persuade the trial court to grant a new trial, nothing would be gained by holding a hearing. The plaintiff relied on article 963 which provides that if the mover is not clearly entitled to the order he seeks without supporting proof, then there must be a contradictory hearing, and that the motion for a new trial is not a motion seeking relief to which the mover is clearly entitled. The court of appeal rejected this, reasoning that the Code did not overrule the prior practice and that if the redactors of the Code had intended to require that such applications be heard contradictorily before the court could deny the motion, it would have been a simple matter to have so provided. Instead, the articles simply provide for a contradictory hearing before the motion for a new trial can be granted.

The supreme court granted a writ of certiorari and affirmed the decision of the court of appeal. In the supreme court the plaintiff argued that due process required a contradictory hearing on an application for a new trial. This position was rejected by the supreme court, which held that the due process clause certainly did not contemplate that every step in a civil trial must be accompanied by a contradictory hearing between the parties

29. *Id.* at 816, 248 So.2d at 300.
30. Courtin v. Browne, 151 La. 741, 92 So. 320 (1922).
31. Sonnier v. Liberty Mutual Ins. Co., 237 So.2d 699 (La. App. 3d Cir. 1970, *aff'd*, 258 La. 813, 248 So.2d 299 (1971).

affected by the court's ruling. In considering the plaintiff's second argument that the trial court and court of appeal had erred in their decisions with respect to the denying of the motion for a new trial without a hearing, the supreme court began its analysis by noting that a new trial may be granted by the court on its own motion; in addition, the court noted, there is no clear indication that the Code of Civil Procedure intended to change the prior law under which a trial judge had the power to decide a motion for summary judgment without a contradictory hearing. The court recognized that certain allegations in a motion for a new trial would clearly require a contradictory hearing, but concluded that the allegations made by the plaintiff in this particular case did not call for such a hearing. The allegation that the judgment was clearly contrary to the law and the evidence presented nothing new, the court reasoned, to the judge who tried the case, heard the evidence, and listened to the arguments presented to the jury. Similarly, the allegation that the court committed prejudicial error in failing to give the instructions requested by the movant as to which reservation of objection was made did not require a new trial because the judge to whom the motion was addressed was the same judge who had received the jury instructions requested by the plaintiff and had made the decision as to whether those instructions would be given. With respect to the allegation that the court committed prejudicial error in curtailing argument proffered by movant's counsel during his summation to the jury after all the evidence had been received, this did not present the situation in which a contradictory motion might develop grounds for the trial judge to change his mind about his ruling concerning the argument of the plaintiff's attorney and his summation to the jury.

Code of Civil Procedure article 1814 provides that a new trial must be granted if it is proved that the jury was bribed or behaved improperly so that impartial justice had not been done. The motion contained two allegations concerning the jury: one that the jury failed to carry out the instructions as to the law given by the court, and secondly, that on voir dire examination some of the jurors had failed to make an adequate, fair, and full disclosure, thereby denying to the movant the intelligent exercise of his peremptory challenges and his challenges for cause. The court concluded that neither of these allegations amounted to a complaint of jury misconduct within the meaning of article 1814.

Article 1975 requires that the motion be verified by the affidavit of the applicant when the motion is based on jury misconduct. The absence of this affidavit was further evidence that the plaintiff did not intend to allege jury misconduct in his motion, but simply made the allegations as an afterthought. The supreme court concluded that the procedure followed by the trial judge was far more efficient than the procedure urged by the plaintiff, and that to require the court and attorneys to go through a contradictory proceeding in the absence of a clear showing in the motion that there were issues of fact or law reasonably calculated to change the outcome or reasonably believed to have denied the applicant a fair trial would be to add unnecessary delay in the administration of justice.

The dissent argued that the Code of Civil Procedure intended to change the prior practice with respect to allowing the court to deny a motion for summary judgment without a hearing. According to the dissent, under the Code of Practice a contradictory hearing was not required on a motion for a new trial either to grant or to deny such a motion. If the motion required the production of evidence it could be decided on affidavits which were made part of the motion. The fact that the Code of Civil Procedure makes repeated reference to contradictory hearings was taken as a clear indication that a change was intended. Moreover, the strong import of articles 1971, 1972, and 1976 are that a contradictory hearing is required. More particularly, article 1976 requires notice of the motion of new trial and of the time and place assigned for the hearing on that motion. This was taken as unmistakably indicating that it applied to all motions for new trials and that a hearing was contemplated whether the motion was granted or denied. Article 1976 was cited as further evidence, though the court was careful in pointing out that the articles with respect to the motion for new trial must be applied before resort to the general provisions concerning motions under article 1963. The dissent was also persuaded that the allegations in the motion fell within the ambit of article 1972 provided that a new trial must be granted where the party has discovered evidence important to the cause which could not have been obtained despite due diligence before or during the trial, and also that the allegations fell well within the meaning of article 1814 which requires a new trial if the jury was bribed or behaved improperly. The court characterized the other allegations as being so vague

and indefinite as not to properly present a valid basis for a new trial.

The position taken by the majority seems preferable to that taken by the dissent for the trial judge should have the discretion to decide whether, on the basis of the allegations in the motion for a new trial, there is a valid reason for holding a hearing. If he is convinced that the allegations do not present a sufficient basis for a new trial, judicial economy would indicate that the motion should be denied without the necessity for a hearing. In most cases in which the mover alleges that he has discovered new evidence or that he has evidence of jury misconduct, the court will order a hearing to determine whether, in the light of this evidence, a new trial should be granted. In conclusion, the decision with respect to whether the motion for a new trial should be denied without a hearing can properly rest within the discretion of the trial judge because the mover's rights would be fully protected by an appeal.

CRIMINAL PROCEDURE

*Dale E. Bennett**

Questioning—Detention on Suspicion

The arrest of defendant in *State v. Amphy*[1] was held to be valid on a finding of probable cause; defendant's constitutional rights had been respected and *Miranda* warnings given. However, the court's opinion is of special interest due to Justice Tate's discussion of the proper scope of interrogation upon "an investigatory detention—on the basis of grounds constituting less than the probable cause required for an arrest." Justice Tate cites United States Supreme Court authority for the sound proposition that "[s]uch sort of temporary (an hour or so) detention does not, however, necessarily offend federal constitutional guarantees against unlawful searches and seizures."[2] Further guidance as to proper police procedures for pre-arrest custodial interrogation is found in Justice Tate's reference, with apparent approval, to the American Law Institute's Model Code of Pre-Arraignment Procedure Rule which "proposes to permit such pre-arrest cus-

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1. 249 So.2d 560 (La. 1971).
2. *Id.* at 565.