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Local Rule Enforcement by State District Courts

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should be required to have before it some other information about the prisoner so as not to give *undue* importance to any one factor through failure to consider others. To require this should impose no additional burden on the board since its regulations already require as much.

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Local Rule Enforcement by State District Courts

Plaintiffs in a wrongful death action were duly notified of a pre-trial conference scheduled by the trial judge pursuant to article 1551[1] of the Code of Civil Procedure. When plaintiffs' counsel failed to appear, the district court, on its own motion and in accordance with the local rules, entered a dismissal without prejudice. The Court of Appeal for the First Circuit *held*, the local rule which provided the sanction of dismissal for the failure of a party to appear at the pre-trial conference was invalid as a violation of Code of Civil Procedure article 1672.[2] *Boudreaux v. Yancey*, 256 So.2d 340 (La. App. 1st Cir. 1971).

Article 1551 of the Code of Civil Procedure, empowering the trial judge to order a pre-trial conference, enables the court to fashion in advance the course of a trial. Through this procedure it is intended that the parties, the witnesses, and the court will save time, effort, expense, and inconvenience. Article 1551, however, does not specify what sanctions, if any, may be imposed for the failure of a party to comply with the order.

Article 193 of the Code of Civil Procedure[3] gives state dis-

1. "In any civil action in a district court the court may in its discretion direct the attorneys for the parties to appear before it for a conference . . . .

"The court shall render an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matter considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

2. "A judgment dismissing an action shall be rendered upon application of any party, when the plaintiff fails to appear on the day set for trial. In such case the court shall determine whether the judgment of dismissal shall be with or without prejudice."

3. "A court may adopt rules for the conduct of judicial business before it, including those governing matters of practice and procedure which are not contrary to the rules provided by law . . . ." La. Const. art. IV § 4

trict courts a general power to adopt rules to insure the orderly conduct of judicial business, and it is well settled that local rules bind both the judge and the litigants.[4] Court rules are, however, subordinate to legislative enactments, and will be stricken if a conflict arises.[5] In a recent First Circuit case, *Caston v. Woman's Hospital Foundation, Inc.*,[6] a third party intervenor's attorney failed to comply with pre-trial orders and then failed to appear at the pre-trial conference due to an unexplained emergency. The trial court refused to dismiss the intervenor's claim, holding that dismissal was not the proper sanction under the circumstances. The First Circuit affirmed, stating that there had been no abuse of the court's discretion, thereby implying a power of dismissal in the trial court.[7] In an older case, *Walker v. Ducros*,[8] decided in 1866, the use of the sanction of dismissal was upheld, even though the rule requiring appearance was a court rule, and not a legislative enactment. It should be noted that in *Walker* the sanction was upheld, not for the failure of a party to appear at trial, but for failure to appear at a time prior to trial.[9]

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provides, in part: "The Legislature shall not pass any local or special law on the following specified subject: . . . Regulating the practice or jurisdiction of any court, or changing the rules of evidence in any judicial proceeding or inquiry before courts . . . ."

4. Interdiction of Wenger, 147 La. 422, 85 So. 62 (1920).

5. *See* LA. CODE CIV. P. art. 193.

6. 243 So.2d 872 (La. App. 1st Cir. 1971).

7. The court stated that "[t]he rules are intended to aid the orderly conduct of litigation and should not be so literally construed as to defeat their very purpose. To this end the trial judge must of necessity be vested with the discretion to ascertain whether or not the proposed violation is such as to warrant dismissal." *Id.* at 874.

8. 18 La. Ann. 703 (1866). It was there stated that court rules "ought not to be relaxed or suspended to meet temporary convenience or to be accommodated to the ever varying circumstances of time." *Id.* at 704. In this case, both parties failed to appear on the first day of the court term, on which day all cases were to be set for trial, in accordance with a local rule. *See also* Neal v. Hall, 28 So.2d 131 (La. App. 2d Cir. 1946).

Although not specifically stated in the court's opinion, the district court's authority was based on Code of Practice article 145 (1861). This article stated: "The courts are authorized to enact, respectively, rules establishing the mode of proceeding before them, in all cases not provided by this code, provided the same be not contrary to the rules here prescribed." The substance of this article is very similar to that of the first sentence of article 193 of the Code of Civil Procedure.

9. In *Walker*, both the rule requiring the parties' appearance and the rule imposing dismissal were based on the court's inherent power, as distinguished from *Boudreaux*, in which the order requiring appearance was based on a statutory expression, namely Code of Civil Procedure article 1551. If the penalty of dismissal is upheld as a proper sanction for the violation of a local rule, a fortiori, when a statutory enactment is violated, it should be a proper sanction.

In the instant case, the First Circuit observed that no provision of the Code of Civil Procedure specifically sanctions the penalty of dismissal for failure to appear at the pre-trial conference. The court stated that the sanction of dismissal is not within the inherent power of the court, and held that this sanction exceeds a legislative enactment, article 1672, which is the only legislative expression authorizing dismissal as a sanction for the failure of a party to appear.

In *Rayborn v. Rayborn*,[10] relied on in *Boudreaux*, the local rule had the effect of requiring a response to summary proceeding, in violation of article 2593,[11] which provides that an answer is not required to a petition in a summary proceeding. As a sanction, the party in violation of the rule was precluded from presenting evidence concerning the subject of the answer he was to file. The court held that the local rule was in opposition to a legislative enactment and therefore void.[12] It is not doubted that *Rayborn* and the cases cited therein are correct, but these cases do not answer the question presented by *Boudreaux*, that is, may a sanction which does not contravene any express legislative enactment be struck down?

A strong statutory argument may be made, based on article 191 and article 193, that the power of dismissal is not limited to the situation which article 1672 controls. Article 1672 states that "a judgment dismissing an action shall be rendered . . . when the plaintiff fails to appear on the day set for trial." It is arguable that this is the only situation in which there is no discretion in the court, the dismissal being mandatory. This position is reinforced by article 191 which grants the court "*all*

10. 246 So.2d 400 (La. App. 1st Cir. 1971).

11. "Exceptions to a contradictory motion, rule to show cause, opposition, or petition in a summary proceeding shall be filed prior to the time assigned for, and shall be disposed of on, the trial. An answer is not required, except as otherwise provided by law."

12. In addition to being prevented from introducing evidence, the offending party was also denied the right to cross-examine. The court stated that these penalties constituted a denial of due process. In holding the rule invalid, the court also relied on *Trahan v. Petroleum Cas. Co.*, 250 La. 949, 200 So.2d 6 (1967), where the same basic problem existed; a conflict between a local rule and legislation, LA. R.S. 23:1315 (1950). The court indicated that the statute would prevail, although the issue was not before the court since the rules were not offered in evidence. The Rayborn decision also relies upon *Sciortino v. Sciortino*, 250 La. 727, 198 So.2d 905 (1967), but this case stands only for the propositions that local rules have the effect of law on the judges and litigants and the rules must be placed in evidence for the appellate court to recognize them.

the power necessary for the exercise of its jurisdiction."[13] In view of past reluctance of the appellate courts to interfere with this power,[14] it is possible that article 1672 could be interpreted as an exception to the discretionary right of the court to dismiss rather than an exclusive situation in which the district court is given the power to dismiss.[15]

In *Boudreaux*, the court also reasoned that article 1672 is the only statute which permits dismissal for the failure of a party to appear. However, the case of *Walker v. Ducros*[16] stands as general authority for the use of dismissal for failure to obey court rules. May *Walker* be distinguished by saying that it was decided under the Code of Practice of 1825? It seems not, since the Louisiana Code of Civil Procedure was intended to remove many of the restrictions which had been placed on trial judges by the Code of Practice, by granting them more power, authority, and discretion.[17] It may strongly be contended, therefore, that the inherent power of dismissal should be recognized under the more liberal Louisiana Code of Civil Procedure.

The court, in its reasoning, failed to mention or distinguish *Caston v. Woman's Hospital Foundation, Inc.*[18] The First Circuit in *Caston* stated that "the trial judge must of necessity be

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13. LA. CODE CIV. P. art. 191. (Emphasis added.)

14. In *Green v. Dakin & Dakin*, 15 La. 152, 154 (1840), the court stated: "We have not the power, and still less the inclination, to interfere with the police and regulations of the inferior courts, unless they be manifestly contrary to law and lead to gross injustice . . . ."

15. The argument may also be made that failure to attend the pre-trial conference is evidence of failure to prosecute and dismissal would be an appropriate sanction. In *Lewis v. New York Fire & Marine Underwriters, Inc.*, 233 So.2d 743 (La. App. 4th Cir. 1970), the court held that article 1672 required the party to prosecute his case on the day set for trial, rather than merely appearing. After recognizing the power of the court to dismiss for failure to prosecute, one need only define "failure to prosecute" to include failure to attend the pre-trial conference to say that the court possesses the power to dismiss for failure to attend the pre-trial conference. *But cf.* Levy v. Stelly, 230 So.2d 774 (La. App. 4th Cir. 1970).

This interpretation necessarily means that the court does not inherently possess the power of a dismissal, but rather that it is vested with the power under a legislative enactment. This could be troublesome when other violations of local rules occur which could not be interpreted as failure to prosecute. Code of Civil Procedure article 1672 also contains the language "on the day set for trial," and such an interpretation would read this phrase out of the statute when non-appearance at a pre-trial conference is involved.

16. 18 La. Ann. 703 (1866).

17. McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960).

18. 243 So.2d 872 (La. App. 1st Cir. 1971).

vested with the discretion to ascertain whether or not the proposed violation is such as to warrant the maximum penalty of dismissal."[19] The appellate court's opinion was premised on the trial court's possession of the power of dismissal, the only issue being the proper exercise of discretion. It will be noted that in *Caston* the failure to attend the pre-trial conference was aggravated by the failure of the attorney to attend the personal conference of the attorneys, as prescribed by the pre-trial procedure. This does not seem to be such a difference as would change the sanction if the party failed only to attend the pre-trial conference.

The decision in *Boudreaux* leaves serious problems since the authorities used do not aid the district courts in formulating sanctions for disobedience of local rules. Neither does the statement by the court, that the sanction must not violate a principle of substantive law, give the courts any distinct or practical guidelines.[20]

19. *Id.* at 874.

20. Since article 1551 is similar to rule 16 of the Federal Rules of Civil Procedure, it is helpful to look to the federal law and practice in similar situations. *See* McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960). The general rule making power of the federal district courts is granted by rule 83. The power of dismissal is given by rule 43, which allows dismissal for the failure of plaintiff to comply with any order of court. This rule is the only significant difference between the federal and state authority for the imposition of the sanction of dismissal for the failure of a party to obey court orders or rules, there being nothing comparable to 41(b) in Louisiana procedure. The dismissal under rule 41, unless otherwise stated, is a dismissal with prejudice, as contrasted with article 1672 of the Louisiana Code of Civil Procedure, which provides that the judge must make a determination of whether the dismissal is with or without prejudice. The leading federal case is *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962), in which there was a delay of approximately five years from the filing of the suit until the calling of the pre-trial conference by the trial court. When plaintiff's counsel failed to attend, the trial court dismissed for "failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action." *Id.* at 629. The Supreme Court affirmed, but did not decide if the failure to attend the pre-trial conference, by itself, would have justified dismissal. Due to the Court's statement concerning the scope of the decision, federal courts have consistently rested their decisions upholding a dismissal on grounds other than solely a failure to attend the pre-trial conference. *See* Hyler v. Reynolds Metal Co., 434 F.2d 1064 (5th Cir. 1970); Provenza v. H. & W. Wrecking Co., 424 F.2d 629 (5th Cir. 1970); Wisdom v. Texas Co., 27 F. Supp. 992 (N.D. Ala. 1939). The federal courts have not evidenced a similar attitude toward violation of other court rules or orders, and FED. R. CIV. P. 41(b) does not require it as to pre-trial conferences. *See* Marshall v. Southern Farm Bureau Cas. Co., 353 F.2d 737 (5th Cir. 1965); Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th Cir. 1964); *In re* Societa Italiana De Armamento, 210 F. Supp. 444 (E.D. La. 1962). An indication of change has recently been shown by the Fifth Circuit in *McGrady v. D'Andrea Elec., Inc.*, 434 F.2d 1000 (5th Cir. 1970), in which

What sanctions are available to the trial court? The only sanction given by the legislature is contempt of court. Continuance of conference with a penalty against the offending party, as to the evidence presented at the pre-trial conference, or a direct fine, might also be suggested, their bases being the inherent power of the court. With respect to contempt, article 224(2) provides that the willful disobedience of any lawful judgment, order, mandate, writ, or process of the court will constitute a constructive contempt.[21] But when a party is held in contempt he may apply for supervisory writs, and while these writs are pending no further action is taken in the case. This procedure, in the overall picture, defeats the purpose of pre-trial, which is to reduce the docket overload, and save the court and the parties time and inconvenience.[22] The same result is likely to be reached if the attorney is held in contempt.

Next, under the court's inherent power, an exclusionary sanction with respect to certain evidence is a possible penalty. Since dismissal is totally ineffective against a defendant, the exclusionary penalty would be an appropriate sanction against him. The harshness of this sanction is readily seen in *Rayborn*, and it appears to the writer that an exclusionary sanction against a defendant is a much more severe penalty than is a dismissal without prejudice against a plaintiff. This type penalty is very questionable, however, in the light of Rayborn's statement that the sanction in that case was a denial of due process.[23] Closely related to this would be a sanction which acted to transfer the burden of proof to the offending party, with respect to certain issues. However, the problem of court administration could render the enforcement of this penalty difficult, and considering the extensive use of discovery and the information that

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the court stated that the failure of a party to attend the pre-trial conference, by itself, was sufficient to warrant a dismissal under the inherent power of the court to enforce its rules. The court cited *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885 (5th Cir. 1968), although in *Flaska* the statements were dicta, since the court held the sanction of dismissal too harsh under the circumstances.

21. *See also* LA. CODE CIV. P. art. 224(4) which provides that: "Deceit or abuse of the process or procedure of the court by a party to an action or proceeding, or by his attorney," will also constitute contempt.

22. LA. CODE CIV. P. art. 1551, *Foreword on Proposed Pre-trial Statute*: "The other immediate benefits of pre-trial may be said to include the following: . . . (4) The saving of much time, effort, expense and inconvenience, not only for the parties and the court, but also for the witnesses."

23. The court stated therein, in dicta, that the denial of the right to cross-examine and to present evidence deprived defendant of due process. Rayborn v. Rayborn, 246 So.2d 400, 404-05 (La. App. 1st Cir. 1971).

may be gained thereby, it is possible that the penalty would not act as an effective deterrent. A direct fine against the party or the attorney might be suggested. However, in *Gamble v. Pope & Talbert, Inc.*,[24] a federal case, it was held that a fine, independent of the contempt statute, was not within the inherent power of the court. The same line of reasoning could be applicable to a state law situation, especially in view of the restrictive attitude taken with respect to the inherent power of the trial court, as evidenced by *Boudreaux*.

It is unsatisfactory to say, as did the First Circuit, that the absence of the sanction of dismissal in article 193 and article 1551 precludes its use. If it is necessary that the sanctions be listed, then the trial court is powerless to enforce its order for a pre-trial conference (because as the court stated, *no* penalties are set out in the Louisiana Code of Civil Procedure). Certainly it is an undesirable situation, and it is unlikely that the legislators intended to leave the court without the power to enforce article 1551.

It is quite possible that the situation in *Boudreaux* was not appropriate for dismissal, but the court did not limit itself to such a narrow position.[25] However, it is possible to envision such a gross abuse as would deserve dismissal. The ideal solution would be the enactment of a statute, which conclusively states that the district courts possess the power of dismissal as a sanction for the violation of local court rules. In the absence of a statute, it is submitted that there be judicial reconsideration of the problem, and a determination that the power of dismissal is present in the district court. This result could be secured if the implications of *Caston* were followed. The writer suggests that dismissal may be the only sanction which is both effective in commanding respect for local rules, and in carrying out the overall purpose of pre-trial procedure.

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24. 307 F.2d 729 (3d Cir. 1962). Defendant's attorney failed to file pre-trial memorandum on time, in violation of a court rule. The court could have invoked the contempt statute, FED. R. CIV. P. 42, and fined defendant's attorney under it. *But see* Flaska v. Little Marine Constr. Co., 389 F.2d 885 (5th Cir. 1968).

25. "We are forced to conclude that the penalty of dismissal of the plaintiff's suit for failure to appear at a pre-trial conference is not sanctioned by either C.C.P. Article 193 which permits the adoption of court rules or C.C.P. Article 1551 which statutorily outlines pre-trial procedure." 256 So.2d at 342. The court also stated that the penalty of dismissal went beyond a principle of substantive law.