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PROCEDURE

CIVIL PROCEDURE

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PROCEDURAL CAPACITY

Lack of procedural capacity is waived unless asserted in a dilatory exception prior to answer. An unemancipated minor lacks procedural capacity, but does he have the capacity to waive it by failing to urge the dilatory exception? Article 2002, which provides that a judgment against an incompetent not represented as required by law is an absolute nullity, seems to imply that he does not. In *Nicosia v. Guillory*,[1] suit was brought against an unemancipated minor who retained counsel and filed an answer. The supreme court upheld the waiver of lack of procedural capacity, but carefully pointed out that the minor defendant had attained majority prior to trial. The result seems proper, because the defendant was capable of assisting counsel and exercising discretion on issues arising during the course of litigation. One may hypothesize situations, however, in which upholding the waiver will produce a result at odds with the policy underlying the requirement that a valid judgment can not be rendered against an incompetent who is not represented in the manner provided by law.

EXCEPTIONS

A defendant may raise through the dilatory exception the objection that the plaintiff's demand is premature;[2] the function of this objection is to avoid trial on the merits where some fact necessary to the validity of plaintiff's claim has not yet occurred, or where plaintiff's right to seek the judicial resolution of the claim has not matured. The exception was reviewed by appellate courts in two significant cases during the past term.

Louisiana Civil Code article 2531 provides that a buyer may not seek rescission unless a good faith seller is first given an opportunity to remedy the defect. The Third Circuit has concluded that the seller may raise the

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1. 322 So. 2d 129 (La. 1976).
2. LA. CODE CIV. P. art. 926.

defense of lack of opportunity to repair through the objection of prematurity.[3]

The supreme court holds that the defense that the plaintiff has not exhausted the administrative remedy[4] may be raised by answer, by the dilatory exception pleading prematurity, or by the peremptory exception of no cause of action.[5] Where the defendant chooses to assert the defense through the dilatory exception, he bears the burden of showing that an administrative remedy is available; upon such showing, the burden shifts to the plaintiff to prove that the administrative remedy is irreparably inadequate.

JOINDER

The provisions of the Code of Civil Procedure regulating joinder of claims and parties subsequent to the initial pleadings suffer from a number of defects. Two of these defects — the lack of a broad cross-claim,[6] and confusion as to when intervention is proper — faced the Fourth Circuit in *Gallin v. Travelers Insurance Co.*[7] A personal injury plaintiff sought judgment against two alleged tortfeasors; one of the co-defendants attempted to enforce a claim for her own damages against the co-defendant and another by a "third party pleading." The co-defendant urged improper joinder because under article 1111 third party practice may be used only to assert that a party is liable to the original defendant "for all or part of the principal demand." The court agreed, but concluded that the pleading could be maintained as an intervention by the co-defendant into the claim by the original plaintiff.[8]

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3. Jordan v. LeBlanc & Broussard Ford, Inc., 332 So. 2d 534 (La. App. 3d Cir. 1976).

4. *See* O'Meara v. Union Oil Co., 212 La. 745, 33 So. 2d 506 (1947) (administrative remedies must be exhausted before relief can be sought from the courts, except in extreme cases or where irreparable injury would otherwise result).

5. Steeg v. Lawyers Title Ins. Corp., 329 So. 2d 719 (La. 1976). The latter method is available only if the failure to exhaust the administrative remedy appears on the face of the petition, without resort to introduction of evidence.

6. Article 1111 permits a defendant to "bring in any person, *including a codefendant*, who . . . is or may be liable to him for all or part of the principal demand." (Emphasis added). There is no express statutory authority, however, for other kinds of cross-claims, including, for example, a co-defendant's claim for the damages he has sustained.

7. 323 So. 2d 908 (La. App. 3d Cir.), *cert. denied*, 329 So. 2d 452 (La. 1976).

8. This theory of cross-claim by intervention has been urged by other Louisiana courts. *See* Bellow v. New York Fire and Marine Underwriters, Inc., 215 So. 2d 350 (La. App. 3d Cir. 1968). In *Gehr v. Department of Highways*, 337 So. 2d 691 (La. App. 4th Cir. 1968), the co-defendant filed a third party complaint against its co-defendant

This approach brought the court squarely into conflict with its earlier restrictive interpretation of article 1091,[9] which provides that intervention is proper when the intervenor asserts a right relating to the "object of the pending action. . . ."[10] The court previously had ruled that the "object" of the principal demand was the claim asserted by the original plaintiff, thus permitting intervention only by an assignee or co-owner of that claim.[11] In *Gallin*, the Fourth Circuit reversed its earlier ruling, bringing it in line with the Third Circuit, which has given a broader interpretation to the phrase "object of the principal demand."[12] Having found intervention proper, the court then upheld the cross-claim by permitting the co-defendant to "intervene" into the initial demand. The decision in *Gallin* is commendable in result, but the questionable use of intervention points up the need for a procedural device comparable to the cross-claim in federal and common law practice. Rigid rules preventing joinder of related claims serve as a stumbling block to the attainment of judicial efficiency; the better view is to provide procedural devices for all types of joinder of related claims and leave the matter within the broad discretion of the trial judge. If the initial decision to permit joinder subsequently proves inefficient or unfair to any party, the trial court can rectify the matter by ordering severance or separate trial.[13]

DEFAULT JUDGMENTS

The Louisiana Code of Civil Procedure provides that "if no answer is filed timely . . . confirmation of a judgment of default may be made after two days . . . ."[14] Article 928 permits the pleading of a peremptory exception "at any stage prior to submission of the case for decision."[15] What if a defendant files the peremptory exception after the entry of judgment of default (preliminary default) but prior to confirmation? The Third Circuit, in *American Bank & Trust Co. v. Marbane Investments, Inc.*,[16] holds that the filing of the peremptory exception "suspends the

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and a non-party; the court permitted the action against the original co-defendant as an intervention into the initial action, and then approved the joinder of the non-party pursuant to article 463 of the Code of Civil Procedure.

9. *See* Resor v. Mouton, 200 So. 2d 308 (La. App. 4th Cir. 1967).

10. LA. CODE CIV. P. art. 1091.

11. 200 So. 2d 308 (La. App. 4th Cir. 1967).

12. Bellow v. New York Fire and Marine Underwriters, Inc., 215 So. 2d 350 (La. App. 3d Cir. 1968).

13. LA. CODE CIV. P. arts. 465 and 1038.

14. *Id.* art. 1702.

15. *Id.* art 928.

16. 337 So. 2d 1209 (La. App. 3d Cir. 1976).

effect of the default," and the preliminary default may not be validly confirmed until disposition is made of the exception. Thus a judgment obtained by confirmation of default while a peremptory exception is pending is invalid because it is not founded upon a "validly effective" default.[17]

JURY TRIAL

A party may demand trial by jury of any issue triable of right by a jury in a pleading filed within ten days after the service of the last pleading directed to such issue.[18] The Second Circuit, citing a "well established policy of our law favoring a litigant's right to a jury trial,"[19] concludes that the trial judge has discretion to grant a jury trial where the request has not been timely made. The court indicated, however, that the discretion might be abused if prejudice would result to an adverse party.

MODIFICATION OF JUDGMENTS IN THE TRIAL COURT

If the trial judge concludes that a jury verdict is so excessive or inadequate that a new trial should be granted for that reason only, he may indicate to the proper party within what time an additur or remittitur may be entered.[20] The Code permits this procedure, however, only if the amount of the excess or inadequacy of the verdict "can be separately and fairly ascertained."[21] The Second Circuit concluded that general damages such as pain and suffering or loss of love and affection cannot be separately and fairly ascertained, and thus the trial judge is powerless to suggest an additur or remittitur when he determines that an award of such damages is excessive.[22] After the Third Circuit reached a contrary conclusion,[23] the supreme court granted writs and, in an opinion by Justice Dixon in *Miller v. Chicago Ins. Co.*, proceeded to a thorough discussion of the additur and remittitur provisions.[24] Writing for a five-man majority,[25] Justice Dixon noted that the interpretation placed by the Second Circuit would render the

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17. *See* LA. CODE CIV. P. art. 2002 (2).
18. *Id.* art. 1732.
19. O'Neal v. Cascio, 324 So. 2d 539, 541 (La. App. 2d Cir. 1975).
20. LA. CODE CIV. P. art. 1813.
21. *Id.*
22. Parks v. Liberty Mut. Ins. Co., 291 So. 2d 505 (La. App. 2d Cir.), *aff'd*, 292 So. 2d 240 (La. 1974).
23. Miller v. Chicago Ins. Co., 306 So. 2d 355 (La. App. 3d Cir.), *aff'd*, 320 So. 2d 124 (La. 1975).
24. 320 So. 2d 134 (La. 1975).
25. Justice Sanders dissented without reasons, and Justice Barham recused.

devices "almost totally useless."[26] He concluded that damages can be separately and fairly ascertained, permitting additur or remittitur, whenever the issue of quantum is clearly and fairly separable from the other issues in the case. The case before the court, in which liability had been stipulated, fell within that test, and the additur suggested by the trial judge in lieu of a new trial was proper.

The rule adopted by the court should apply where liability is stipulated or is ascertained in a separate trial, or where the quantum of damages is fixed by agreement or by law. It is doubtful that it will be applied in a tort action in which the award of damages through the general verdict reflects jury division on the question of liability. In such a case, a jury frequently effects a kind of comparative negligence by the size of the verdict; it is doubtful whether the *Miller* doctrine can be extended to such a case, and the trial judge is left with no alternative to granting a new trial when he disagrees with the jury's allocation of fault.

Another issue resolved in *Miller* is whether the party who accepts the additur or remittitur acquiesces in the judgment and thereby waives his right to appeal on that issue. The theory underlying additur and remittitur is that a party by accepting the trial judge's suggestion agrees to promote judicial efficiency by avoiding a new trial on the issue of quantum; permitting that party to appeal on that issue would defeat the purpose of the procedure. In *Miller*, the supreme court adopts the Wisconsin rule:[27] if the opposing party appeals, the party accepting the additur or remittitur is permitted to raise the issue of the propriety of the judge's action in ordering the additur or remittitur, but where there is no appeal by the opponent, the party accepting the additur or remittitur is precluded from raising that issue on appeal.[28]

The *Miller* decision also prescribes the standard which the appellate court should apply in reviewing the propriety of additur or remittitur. The First Circuit had found that if the award by the jury and the amended award after additur or remittitur are both within the "much discretion" awarded to the trier of fact under article 1934 of the Civil Code, the trial judge abuses his discretion in suggesting the additur or remittitur, and the appellate court should reinstate the jury's verdict.[29] The Third Circuit, however, held that if the amount of damages suggested by the trial judge and reflected in the additur or remittitur is within the discretion granted the trier of fact, the judgment should be affirmed.[30] The supreme court agreed with the reason-

26. 320 So. 2d at 139.
27. *Id.* at 138.
28. *See* Plesko v. City of Milwaukee, 19 Wis. 210, 210 N.W.2d 130 (1963).
29. Sukker v. Newsom, 264 So. 2d 228 (La. App. 1st Cir. 1972).
30. 306 So. 2d at 359 (La. App. 3d Cir. 1975).

ing of the Third Circuit and held that appellate review should be limited to the final judgment of the court reflecting the additur or remittitur.

APPEALS

An appeal is perfected, and the jurisdiction of the district court is divested, when a litigant obtains an order of appeal and posts the proper bond within the delay allowed by law.[31] The district court retains jurisdiction for limited purposes, including a proceeding to "test the solvency of the surety . . . [and] . . . consider objections to the form, substance, and sufficiency of the appeal bond, and permit the curing thereof."[32] The Code further provides that "within four days, exclusive of legal holidays, of the rendition of judgment holding the original bond insufficient or invalid, or at any time if no rule to test the original bond has been filed, the party furnishing it may correct any defects therein by furnishing a new or supplemental bond"[33] and "[t]he new or supplemental bond is retroactive to the date the original bond was furnished, and maintains in effect the order . . . conditioned on the furnishing of . . . [it]. . . ."[34]

In *Guilliot v. City of Kenner*,[35] appellant filed an appeal bond which was not signed by the principal or the surety; in addition, the affidavit forms on the reverse were entirely blank and unsigned. However, a power of attorney authorizing an agent to execute the bond for the surety was attached. The court of appeal on its own motion questioned its jurisdiction because of the failure of appellant to file an appeal bond. Appellant thereafter filed a supplemental bond. The court of appeal then dismissed, being of the opinion that it was without jurisdiction to entertain the appeal. On appeal, the supreme court affirmed, with three justices dissenting.[36]

The majority reasoned that while the appellate court does not have jurisdiction to consider the form, substance and sufficiency of an appeal bond, it does have the authority to determine whether what purports to be a bond is in fact a bond and whether it is timely filed. Since the bond in question did not bind the surety, it was no bond at all, and the action of the appellate court in dismissing the appeal was proper.

Justice Tate's dissent was based upon the rationale that an action to reform the bond could have been brought, at least against the agent who

31. LA. CODE CIV. P. art. 2088.
32. *Id.*
33. *Id.* art. 5124.
34. *Id.*
35. 326 So. 2d 359 (La. 1976).
36. Justices Tate, Calogero and Dennis dissented.

executed the bond in improper form. Accordingly, the appellant was entitled to furnish a supplemental bond and maintain the appeal.

The decision is not dictated by the language of the Code. Article 5124 gives a party the right to furnish a supplemental bond even where the original bond is "invalid" as well as "insufficient," and it is at least arguable that invalidity includes every situation in which the appellant makes any effort, no matter how incomplete, to furnish bond. But the decision may reflect the court's growing impatience with the inability or refusal of some attorneys to attend to the uncomplicated detail in the simple procedure of perfecting an appeal. The decision, however, has interjected into the law the need for another distinction which may be difficult to make, *i.e.*, between a bond which is merely insufficient but invalid and one which is so insufficient or so invalid that it is no bond at all.

An appeal may be taken from a final judgment, which must be signed by the judge. Frequently a judge will indicate the manner in which the judgment will be rendered, or will render written reasons for judgment, and the unsuccessful litigant will appeal before judgment has been signed. If the appeal reaches the appellate court without a signed judgment, that court is without jurisdiction and must dismiss.[37] If final judgment is signed subsequent to the perfection of the appeal and is a part of the record when the appeal is lodged, the appellate court has jurisdiction, but there remains the question of whether the appeal should be dismissed because of an irregularity, error or defect imputable to the appellant. Three cases during this term indicate that the appellate courts are split nicely upon this question, and that the supreme court has yet to render a definitive decision. The First Circuit dismissed such an appeal, although the delays for appealing from the signed judgment had elapsed, and the effect of the decision was to deny any review.[38] The Second Circuit declined to dismiss where the judgment as signed was not substantially different from the oral judgment, and the adverse party was not prejudiced and received fair notice of the appeal.[39] The Fourth Circuit, reversing its earlier holding, also declined to dismiss the appeal.[40] An older decision indicates the Third Circuit would dismiss.[41]

37. *See, e.g.*, Brock v. Police Jury, 198 La. 787, 4 So. 2d 829 (1941); Hogleman v. Crowley Bldg. & Loan Ass'n. 200 So. 2d 790 (La. App. 3d Cir. 1967).

38. Malbrough v. Kiff, 312 So. 2d 915 (La. App. 1st Cir. 1975).

39. Womey v. Department of Highways, 325 So. 2d 732 (La. App. 2d Cir. 1976).

40. Richards v. Gettys, 329 So. 2d 475 (La. App. 4th Cir. 1976).

41. Forman v. May, 201 So. 2d 683 (La. App. 3d Cir. 1967).