The Method and Time of Pleading Dilatory and Declinatory Exceptions

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THE METHOD AND TIME OF PLEADING DILATORY AND DECLINATORY EXCEPTIONS

LOUISIANA Code of Practice of 1870:

Article 331: There are two principal species of exceptions; some are dilatory, others peremptory.

Dilatory exceptions are divided into declinatory and those simply called dilatory.¹

Article 333 (as amended by La. Act. 124 of 1936): It is a rule which governs in all cases of exceptions, except in such as relate to the absolute incompetency of the judge before whom the suit is brought, that they must be pleaded specially in limine litis, before issue joined, otherwise they shall not be admitted.

Hereafter no dilatory exceptions shall be allowed in any case after a judgment by default has been taken; and in every case they must be pleaded in limine litis and at one and the same time, otherwise they shall not be admitted; nor shall such exceptions hereafter be allowed in any answer in any cause.

Article 336: Declinatory exceptions may be pleaded in the defendant's answer previous to his answering to the merits; but, except as relates to the declinatory exceptions, the defendant must plead in his answer all dilatory or peremptory exceptions² on which he intends to rely, or which he is bound to plead expressly and specially, pursuant to the provisions of this Code.³

A problem which confronts all systems of practice is the need to dispose of all procedural objections in advance of trial on the merits and at the same time to prevent the defendant from employing dilatory tactics which unduly delay the trial on its merits. Hence, to prevent the practice of "stringing out" preliminary contests over alleged procedural defects is a result desired by all systems of procedure. It is the purpose of this comment to give a brief history of the pertinent code provisions, and to discuss the

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¹ The English text of Art. 331 (2), La. Code of Practice of 1825 provided that "Dilatory exceptions are divided into declinatory and dilatory exceptions." The French text of this article, however, reads: "Les dilatoires se divisent en déclinatoires et en dilatoires simplement dites." The provision of the Code of Practice of 1870 presents a more correct translation of the French text of the Code of 1825.

² Art. 343, La. Code of Practice of 1870, divides peremptory exceptions into those relating to form and those founded on law, and Art. 344 provides that the former must be pleaded in limine. Those founded on law may be pleaded at any time prior to definitive judgment, and even in the appellate court. Arts. 346, 902, La. Code of Practice of 1870.

³ The articles cited above are those of La. Code of Practice of 1870.
effect of recent decisions—construing these provisions—upon the mode and manner of pleading dilatory and declinatory exceptions under Louisiana practice.

The origin of the pertinent articles of the Code of Practice of 1825 is found in the procedure of Spain and France. Under early Spanish procedure no fixed delays were prescribed by positive law, but the judge was empowered to fix a delay in which the defendant had to file all exceptions. Positive law, under Spanish practice of the latter part of the eighteenth century, fixed the delay for the filing of exceptions, while French procedure under the Code Louis' required all dilatory exceptions to be pleaded at the same time (par un même acte). Thus, it can be seen that the systems of practice from which our own code provisions are descended adequately prevented any stringing out of the dilatory exceptions so as to delay the trial of the cause on its merits.

Similarly, this objectionable practice was suppressed by three provisions of the Code of Practice of 1825. First—Article 336 afforded a line of defense against any stringing out of exceptions by providing that while the defendant might plead his declinatory exceptions either by filing them prior to answer, or by incorporating them in the answer, all dilatory exceptions must be pleaded in the answer. The three exceptions to the latter requirement, covering special circumstances, detracted little from the efficacy of the article. Thus, small opportunity was afforded for the employment of dilatory tactics by the defendant. In passing, there should be observed the striking similarity between these requirements and the corresponding provisions of the Federal Rules of Civil Procedure. Second—Article 333 announced the general rule that all exceptions "must be pleaded specially in limine litis, before is-

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5. Las Siete Partidas, 3. 3. 9. It is interesting to note that exactly the same procedure was followed by a federal judge in Louisiana only recently. Sartar v. United Gas Public Service, 3 Fed. Supp. 943 (D.C. La. 1933).
7. The celebrated Ordonnance Civile ordained by Louis XIV in 1667.
9. Peremptory exceptions founded on law are pleadable at any state of the proceedings prior to definitive judgment. Art. 346, La. Codes of Practice of 1825 and 1870. The exception of improper cumulation of actions and that of want of procedural capacity did not have to be pleaded in the answer. Cf. Arts. 152, 320-321, La. Codes of Practice of 1825 and 1870.
sue joined, otherwise they shall not be admitted.”

This provision would appear to govern both declinatory exceptions and dilatory exceptions (properly speaking). Third—Article 344 required that all peremptory exceptions relating to form should be filed in limine.

In view of the articles just mentioned, it becomes important to determine what constituted joinder of issue. Article 357 provided that “The cause is at issue when the defendant has answered, either by confessing or denying the facts set forth in the petition, or by pleading such dilatory or peremptory exceptions as he is bound to plead in limine litis, pursuant to the provisions of this Code.” In addition to this express joinder of issue, issue could also be joined tacitly.

The provisions of the Code of Practice of 1825 prevented the stringing out of exceptions by the following rules. Declinatory exceptions might be pleaded either prior to the filing of an answer, or incorporated therein. Dilatory exceptions and peremptory exceptions relating to form could only be filed by pleading them in the answer. The effect of filing this answer was to join issue, and thus foreclose the filing of any subsequent exception.

These excellent code provisions were to operate efficiently for

11. The exception to the jurisdiction ratione materiae of the court was not required to be pleaded in the answer. This exception cannot be waived. Art. 92, La. Codes of Practice of 1825 and 1870.
12. This article is included in the Code of Practice in the section entitled “Of Dilatory Exceptions.” The corresponding French title in the Code of Practice of 1825, however, read “Des Exceptions Dilatoires En Général.” Cf. Phipps v. Snodgrass, 31 La. Ann. 88 (1879). It might be argued that to have this article apply to declinatory exceptions would permit a plaintiff to sue a defendant without citing him, then foreclose the lack of citation by taking a default. The answer to such a contention, however, lies in the fact that the court cannot join issue tacitly by a default judgment unless process has been served. Robinson v. Enloe, 10 La. App. 435, 121 So. 320 (1929).
13. Despite the code recognition of the peremptory exception relating to form, we have no such exceptions in Louisiana procedure. The classification is that of Pothier, but by reason of the Spanish exceptions having been followed, this classification is meaningless today. Thus the exception to the citation is a peremptory exception relating to form (nulité) in French procedure; but it is a declinatory one in Louisiana. Similarly the exception to procedural capacity is a peremptory exception as to form in French practice; it is a dilatory one in Louisiana. On this point, see McMahon, Parties Litigant in Louisiana-II (1937) 11 Tulane L. Rev. 527, 540.
14. La. Codes of Practice of 1825 and 1870.
15. Tacit joinder of issue occurred in two ways. First, by the taking of a default. Sandeman v. Deake & Willard, 17 La. 352 (1841). Second, by appearing at the trial and failing to object to the introduction of testimony when there has been no default or express joinder of issue. Ducote v. Ducote, 183 La. 886, 165 So. 133 (1938).
16. After issue was joined by the filing of an answer it was impossible thereafter to file additional dilatory exceptions in limine.
only twelve years. In 1837 the Supreme Court decided the case of Magee v. Dunbar,17 in which the pertinent issue was whether a defendant could incorporate dilatory exceptions in his answer filed after default judgment had been rendered against him. Defendant relied on the code provision requiring that a default be set aside when answer was filed prior to its confirmation.18 Instead of seeking the spirit of the code article invoked, and holding that it permitted the defendant to file an answer after default but did not empower him to incorporate dilatory exceptions therein, the court applied the literal language of the article and upheld the defendant's contentions.

Apparently, the decision in Magee v. Dunbar was not received favorably by the profession, because two years later a statutory provision was adopted, showing the obvious legislative intent to overrule the unfortunate decision. However, instead of amending the code article construed in the case, a separate legislative provision stipulated that, "Hereafter no dilatory exception shall be allowed in any case after a judgment by default has been taken; and in every case must be pleaded in limine litis, nor shall such exceptions hereafter be admitted in any answer in any cause."19

The effect of legislative overruling proved much worse than the decision sought to be overruled. In the effort to remedy the narrow evil of Magee v. Dunbar, the doors were thrown open to the much greater evil of stringing out the exceptions. No longer were defendants required, or even permitted, to plead all of their dilatory exceptions in the answer. They responded to the new statute nobly by pleading these exceptions singly, forcing the plaintiff to dispose of the exception by a trial thereof, then pleading another, almost ad infinitum—the process being limited only by the number of exceptions. However, the plaintiff was not left entirely without a remedy. On one occasion the Supreme Court not only denounced but prohibited the practice,20 but for some reason—probably the questionable soundness of the decision21—

17. 10 La. 546 (1837).
18. "If the defendant on the very day when a definitive judgment by default was to have been rendered against him, appear and file his answer, the first judgment taken shall be set aside." Art. 314, La. Code of Practice of 1825.
21. The case would appear to be unsound. The first exception filed by the defendant in question was the declinatory one to the citation, and after this was overruled defendant filed an exception to the jurisdiction. This the court refused to allow, saying: "A party will not be allowed thus to delay a trial upon the merits of the cause by pleading singly, a variety of technical objec-
this case does not appear to have been invoked. There was available to the plaintiff, moreover, the opportunity of moving for a default immediately after the first dilatory exception had been overruled, thus joining issue\textsuperscript{22} and preventing the filing of additional dilatory exceptions. However, these preventives were more theoretical than actual,\textsuperscript{23} and stringing out the exceptions became firmly imbedded in Louisiana practice.

In the 1870 revision of the Code of Practice the statute just referred to was tacked on to Article 333 as a second paragraph thereof. Despite the effect of this upon Articles 336 and 357, both of these were retained as originally written.\textsuperscript{24} A decade later the possible conflict between Articles 333 and 336 was presented squarely in \textit{Chaffee v. Ludeling},\textsuperscript{25} and the Supreme Court held that since the former represented the last expression of legislative will it was controlling. The retention of Article 336 was labelled "a piece of clumsy carelessness."

The possible effect of Article 333 of the Code of Practice of 1870 upon the code rules relative to joinder of issue has not been settled by the jurisprudence. Prior to 1839 issue was joined expressly only by the filing of an answer, either admitting or denying the facts of the petition or incorporating dilatory exceptions and peremptory exceptions relating to form.\textsuperscript{26} But after 1839 such exceptions could not be incorporated into the answer. Did the pertinent code provision still retain its original meaning, or did it now provide that issue was joined also by pleading such dilatory or peremptory exceptions as he is bound to plead in \textit{limine litis}? If it meant the latter, this would be most important, for it would suppress the practice of stringing out exceptions,\textsuperscript{27} although its effect upon the amendment of the petition would be unfortunate.\textsuperscript{28}

\begin{footnotes}
\item[22] See note 15 supra.
\item[23] A trial judge would rarely, if ever, permit the plaintiff to move for a default if the defendant stood ready to file additional exceptions.
\item[27] If issue was joined by the filing of a dilatory exception or a peremptory exception relating to form, it would be impossible to file thereafter any dilatory exceptions in \textit{limine}.
\item[28] Art. 419, La. Code of Practice of 1870, prohibits the plaintiff from alter-
At least one recent case strongly implies the joinder of issue by the filing of dilatory exceptions.

By 1936 the practice of stringing out exceptions had proven so obnoxious to the profession in this state that legislation was adopted to prevent it. Article 333 was amended so as to require that all dilatory exceptions be filed "at one and the same time, otherwise they shall not be admitted." This amendment in turn has presented grave and vexing problems.

Under Louisiana practice the term "dilatory exception" has two meanings: a specific one which denotes the dilatory exception properly so called; and a general one which embraces both the latter and the declinatory exception. Did the Legislature intend to require that all declinatory exceptions and dilatory exceptions (properly speaking) be filed at the same time, or did it intend that only all the latter should be filed at the same time? There are arguments available in support of either view.

Prior to the 1936 amendment it was well settled that declinatory exceptions were waived if, prior to the trial thereof, any affirmative relief whatsoever was demanded of the court by defendant. Thus, if a defendant pleaded declinatory and dilatory exceptions at the same time, he was deemed to have waived the former. Although one of the cases supporting this position would appear to be out of harmony with the present trend of liberality in Louisiana, the doctrine served a useful purpose. There is nothing in the amendatory legislation which would indicate any legislative intent to depart from this position. In addition, there was little possibility of the defendant unduly delaying the trial of the case through the separate filing and trial of declinatory exceptions. The great evil to be remedied was to prevent the stringing out of dilatory exceptions. Both of these facts would seem to indicate a legislative intent to require only the filing of all dilatory exceptions (properly speaking) at the same time.

32. City National Bank of Selma v. Walker, 130 La. 810, 58 So. 580 (1912);
34. The declinatory exceptions (to jurisdiction ratione personae et materiae, to citation, recusation and lis pendens) are few in number and rare indeed is the case whose facts permit the defendant to employ more than one.
On the other hand, the fact that the 1936 amendment was grafted on to Article 333, which even prior to 1936 was applicable both to declinatory exceptions and dilatory exceptions, would seem to show a legislative intention to insist upon the filing of both types of exceptions at the same time.

Article 333 as amended was first construed in Brown v. Gajan, a case decided by one of the intermediate appellate courts of Louisiana. Plaintiff, invoking previously well settled principles, contended that defendant had waived his exception to the jurisdiction of the court ratione personae by filing it at the same time with the dilatory exception of inconsistency. Defendant countered with the argument that the article as amended not only permitted but required the joinder of the two types of exceptions. The court, assuming the legislative intent to require the filing of both declinatory exceptions and dilatory exceptions (properly speaking), held that the pleading of both types at the same time was in strict compliance with the provisions of the amended article, and that the effect thereof was not a waiver of the declinatory exception. The holding of the case was approved in a subsequent decision by another intermediate appellate court. Unfortunately, the Supreme Court has not yet had an opportunity to pass upon the question.

Under the present status of the matter, a defendant who feels the necessity of pleading both a declinatory exception and a dilatory exception (properly speaking) is placed squarely between the horns of a dilemma. If he relies on Brown v. Gajan and pleads both types of exceptions he will be held to have waived his declinatory exception if the Supreme Court concludes that the legis-

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35. 173 So. 485 (La. App. 1937). A rehearing was granted and the original decree set aside, but since the exception to the jurisdiction of the court was finally maintained, the opinion of the court on rehearing necessarily affirmed its original decision on the question involved. Brown v. Gajan, 175 So. 486 (La. App. 1937).

36. "The defendant could not plead these two exceptions at the same time without placing them both before the court for its action, as the court would have the right to pass on any matters pleaded before it so long as these matters were not withdrawn. In submitting both matters to the court for action at the same time, from the very wording of his exceptions, and from the fact that he was required to plead both exceptions at the same time, the situation is the same as though defendant had pleaded and submitted his motion to require plaintiffs to elect in the disjunctive, or, in other words, that he was submitting and urging this latter plea only in case the exception to the jurisdiction was overruled, thus giving the court the right to pass on the other. We do not think under these circumstances that defendant has submitted himself to the jurisdiction of the court as contemplated by article 93 of the Code of Practice." Brown v. Gajan, 173 So. 485, 487-488 (La. App. 1937).

lative intent was only to require the filing of all dilatory exceptions (properly speaking) at the same time. On the other hand, if he ignores Brown v. Gajan and attempts to plead the declinatory exception alone, he will be precluded from pleading the dilatory exception subsequently if the doctrine of the case is approved. Similarly, he is placed in much the same position in pleading a plurality of declinatory exceptions. Under these circumstances it is submitted that the defendant should be permitted to plead his exceptions in the proper order and in the alternative, and thereby avoid being impaled on either horn of his dilemma. In this way, regardless of how our highest court may eventually decide the case, the defendant will be protected. Despite the decision to the contrary, it is believed that, in view of the present trend in Louisiana procedure away from technicalities and considering the recent expansion of the functions of alternative pleading in this state, the Supreme Court would approve of this procedure.

From the unfortunate results of the legislative efforts to prevent the defendant from employing dilatory tactics, it can be seen that the problem in Louisiana has not yet been solved. In attempting to escape from the consequences of the erroneous decision in Magee v. Dunbar, the statute of 1839 increased the evil effects of dilatory tactics. In the revision of 1870, the effort to integrate our procedure caused this legislation to be added on to Article 333, thus conflicting with Article 336 and probably broadening the provisions of Article 357. The stringing out of exceptions, introduced by the 1839 statute and affirmed by the 1870 revision, was sought to be suppressed by the 1936 amendment to Article 333. This in turn has presented unfortunate complications. The

38. Declinatory exceptions should be pleaded in a certain order, otherwise the defendant will be held to have waived all but the last one. Cf. Brannin v. Clements, 142 So. 621 (La. App. 1932); Godchaux v. Texas & P. Ry. Co., 151 La. 955, 92 So. 398 (1922); Tutorship of the Minor Heirs of Byland, 38 La. Ann. 756 (1886). In these cases it was held that an exception to the jurisdiction waived a prior exception to the citation. Cf. also Ford v. Russel, 13 La. App. 390, 128 So. 310 (1930), which used the following language: "...by voluntarily appearing through his...attorney at law, he has waived his objection to the form of the commencement of the proceeding..." It seems to follow that an appearance and the filing of an exception of lis pendens would amount to a general appearance and waive any right to except subsequently to the jurisdiction.


40. By Haas v. McCain, 161 La. 114, 108 So. 305 (1926); Wells v. Davidson, 149 So. 246 (La. App. 1933); Succession of Markham, 180 La. 211, 156 So. 225 (1934).
run in the seamless weave of the law tends to lengthen. Where will it end?

It is submitted that a return to first principles should be effected. Article 333 should be amended to read as it did in the Code of Practice of 1825. The code provision which caused the initial difficulty in *Magee v. Dunbar* should be amended so as to overrule the doctrine of this case and do nothing more. In this way Louisiana will not only solve the problem without producing unfortunate consequences, but the return to our earlier practice would bring us results quite similar to those effected by the new Federal Rules.

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**DURATION AND REVOCABILITY OF AN OFFER**

The basic principles and practical application of Articles 1800-1804 and 1809 of the Louisiana Revised Civil Code of 1870, dealing with the duration of an offer and the timeliness of an acceptance, have never been explained satisfactorily as a system. It is the purpose of this comment to attempt an explanation of them in terms of their probable origin and in conformity with the theories accepted at the time of their redaction.

The Civil Code of 1808 and the Code Napoleon were almost identical in the title of Obligations; they contained no specific rules on offer and acceptance and only provided that the consent of the party obligating himself was essential to the formation of the contract. The articles here under consideration were first

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41. Art. 317, *La. Code of Practice of 1870*, as amended by *La. Act 85 of 1922*, should be further amended so as to read as follows: "It shall be sufficient in all cases for a defendant to file his answer at any time before the confirmation of a judgment taken by default against him; provided, however, that no exceptions incorporated in any answer filed after a judgment of default has been rendered against defendant shall be admitted."


1. A Digest of the Civil Laws now in force in the Territory of Orleans, with Alterations and Amendments adapted to its Present System of Government (1808).

2. *Le Code Civil des Français (1804)* (commonly referred to as the "Code Napoleon").