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Exceptions

Aubrey McCleary

Exceptions

The Louisiana Code of Civil Procedure has made several important changes in the area of exceptions and it is the purpose of this Comment to discuss the law of exceptions, with particular emphasis upon how the prior law has been changed by the new Code.[1]

The definition of the word "exception" in the Code of Practice proved confusing and unsatisfactory.[2] It has been changed by the Code of Civil Procedure which defines an exception as "a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him."[3] Under this definition it is clear that if the means of defense is a denial of the allegations of fact contained in the petition,[4] or an affirmative defense set forth in the answer,[5] then it is not an exception. Also the defendant in an incidental action will be allowed to use any of the exceptions available to the defendant in the principal action. This represents a change in the prior law which permitted exceptions by the defendant in some, but not all, of the incidental actions.[6]

Under the Code of Practice there were two principal kinds of exceptions — the dilatory and peremptory.[7] Dilatory exceptions were further divided into declinatory exceptions and what were referred to as "dilatory exceptions properly speaking."[8]

1. The area of exceptions is covered in the Louisiana Code of Civil Procedure of 1960 in Book II — Ordinary Proceedings, Title I — Pleading, Chapter 3 — Exceptions, Articles 921-934. The area was covered by LA. CODE OF PRACTICE arts. 330-346 (1870).

2. LA. CODE OF PRACTICE art. 330 (1870): "[E]xceptions are means of defense used by the defendant to retard, prevent or defeat the demand brought against him.

"But the word defense, in its more restricted acceptation, is only applied to such exceptions as go to the merits, showing that the action is neither just nor well founded." See LA. CODE OF CIVIL PROCEDURE art. 921, Comment (a) (1960).

3. LA. CODE OF CIVIL PROCEDURE art. 921 (1960).

4. See *id*, art. 1004.

5. See *id.* art. 1005. The affirmative defenses set forth by this article are: arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, division, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, transaction or compromise and any other matter constituting an affirmative defense.

See also LA. CIVIL CODE art. 2130 (1870) as to the modes of extinguishing obligations.

It should be noted that prescription and res judicata are pleaded through the peremptory exception as will be discussed page 206 *infra.*

6. See LA. CODE OF CIVIL PROCEDURE art. 852, Comment (a) (1960).

7. LA. CODE OF PRACTICE art. 331 (1870).

8. *Ibid.*

The Code of Practice also provided two classes of peremptory exceptions — those founded on law and those peremptory as to form.[9] The exception peremptory as to form, however, has never been employed in the procedural law of this state.[10] There were more than thirty specific exceptions that could be raised through these broad classes.[11] This great number of exceptions and the fine lines of demarcation between their functions made the former system cumbersome.

While the Louisiana Code of Civil Procedure has made a major change in the theory of this classification, there will be little difference in practice. The new Code recognizes only three exceptions — the declinatory exception, the dilatory exception, and the peremptory exception.[12] However, the numerous specific exceptions that could be raised under the Code of Practice will now be advanced by *objections* under these three exceptions.[13] Thus there has been a change in the terminology that will be employed under the new Code. Since the exception peremptory as to form has never been employed in the procedural law of this state, it is not retained in the new Code.[14] While the three exceptions will be discussed subsequently, a detailed discussion of the objections that may be raised by each is beyond the scope of this article.

DECLINATORY EXCEPTION

The function of the declinatory exception is to decline the jurisdiction of the court, but not to defeat the action on the merits.[15] The new Code contains an enumeration of the objections which may be raised through the declinatory exception, encompassing all of the former declinatory exceptions.[16] They are: (1) insufficiency of citation, (2) insufficiency of service of process, (3) lis pendens, (4) improper venue, (5) lack of jurisdiction over the person, and (6) lack of jurisdiction over the subject matter.

The problems of the method and time of pleading the declinatory exceptions were troublesome under the Code of Practice.

9. LA. CODE OF PRACTICE art. 343 (1870).
10. See MCMAHON, LOUISIANA PRACTICE 452, n. 82 (1939).
11. McMahon, *The Louisiana Code of Civil Procedure*, 21 LOUISIANA LAW REVIEW 1, 30 (1960).
12. LA. CODE OF CIVIL PROCEDURE art. 922 (1960).
13. *Id.* arts. 925-927.
14. *Id.* art. 922, Comment (b) (1).
15. *Id.* art. 923; LA. CODE OF PRACTICE art. 334 (1870).
16. LA. CODE OF CIVIL PROCEDURE art. 925 (1960).

Article 333 of that Code, as amended in 1936, provided that: "[N]o 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."[17] In *State v. Younger*[18] this article was interpreted as applying to both dilatory exceptions properly speaking and to the declinatory exceptions. Since the declinatory exceptions had to be filed *in limine litis* and at the same time as the dilatory exceptions properly speaking, the practice of stringing out the exceptions was no longer allowed.[19] However, the usefulness of this rule was dissipated to a large extent by subsequent decisions imposing highly technical requirements as to the manner of pleading declinatory exceptions and dilatory exceptions properly speaking.[20] These cases held that when dilatory exceptions properly speaking were pleaded in the alternative with declinatory exceptions, then all exceptions had to be pleaded in a "sacred order," and with full reservation of each declinatory exception pleaded before the dilatory exceptions. If this procedure was not followed, the declinatory exceptions would be considered as having been waived.[21]

The Louisiana Code of Civil Procedure legislatively overruled these seemingly hypertechnical requirements imposed by the jurisprudence. It provides that when two or more objections are pleaded in the declinatory exception they do not have to be pleaded in the alternative or in any particular order.[22] If both the declinatory and the dilatory exceptions are pleaded, then they must be pleaded at the same time, but they do not have to be pleaded in the alternative or in any particular order.[23] Further, the new Code does away with the rule that declinatory and dilatory exceptions must be pleaded *in limine litis*, and it

17. LA. CODE OF PRACTICE (1870).
18. 206 La. 1037, 20 So.2d 305 (1944), 19 TUL. L. REV. 460 (1945).
19. Note, 19 TUL. L. REV. 460 (1945).
20. Mitchell v. Gulf States Finance Corp., 226 La. 1008, 78 So.2d 3 (1955); George W. Garig Transfer v. Harris, 226 La. 117, 75 So.2d 28 (1954), 15 LOUISIANA LAW REVIEW 849 (1955).
21. MCMAHON, LOUISIANA PRACTICE 59, n. 44.3 (Supp. 1956). A declinatory exception was also waived if pleaded with a peremptory exception even if the peremptory exception was pleaded in the alternative. Standard Indemnity, Inc. v. Albrought, 81 So.2d 448 (La. App. 1955).
22. LA. CODE OF CIVIL PROCEDURE art. 925 (1960).
23. *Id.* art. 928.

provides that they must be pleaded *prior to answer or judgment by default.*[24]

Unless the objections are pleaded[25] when a defendant makes an appearance, he waives all objections which may be raised through the declinatory exception, except the court's lack of jurisdiction over the subject matter. In general, the defendant will be considered as making an appearance when he, either personally or through counsel, seeks relief from the court.[26] The objection to the court's lack of jurisdiction over the subject matter is not waived even by going to trial on the merits of the case.[27]

Generally, the declinatory exception must be tried and decided prior to a trial of the case on the merits.[28] There may be, however, exceptional circumstances under which the trial judge has no alternative but to refer a declinatory exception to the merits, and decide it after a trial of the case. If, for example, a plaintiff sues two defendants at the domicile of one on the grounds that they are solidary obligors and the nonresident files an objection of improper venue under the declinatory exception, there is no method for the court to determine if venue is proper until it decides whether or not the defendants are solidarily liable. Under the rules developed by the jurisprudence the exception would be referred to the merits and decided after the

24. *Ibid.* In an ordinary proceeding the defendant has fifteen days from the service of process upon him to file an answer. *Id.* art. 1001.

25. *Id.* art. 925. Apparently the provision in Article 925 that when a defendant makes "an appearance" he waives all objections that may be raised by the declinatory exception, unless he pleads them, means when he makes a "general appearance" as provided for in Article 7.

26. *Id.* art. 7: "Except as otherwise provided in this article, a party makes a general appearance which subjects him to the jurisdiction of the court and impliedly waives all objections thereto when, either personally or through counsel, he seeks therein any relief other than:

"(1) Entry or removal of the name of an attorney as counsel of record;

"(2) Extension of time within which to plead;

"(3) Security for costs;

"(4) Dissolution of an attachment issued on the ground of the nonresidence of the defendant; or

"(5) Dismissal of the action on the ground that the court has no jurisdiction over the defendant.

"This article does not apply to an incompetent defendant who attempts to appear personally, or to an absent or incompetent defendant who appears through an attorney at law appointed by the court to represent him.

"When the defendant files a declinatory exception which includes a prayer for the dismissal of the action on the ground that the court has no jurisdiction over him, the pleading of other objections therein, the filing of the dilatory exception therewith, or the filing of the peremptory exception or an answer therewith when required by law, does not constitute a general appearance."

27. *Id.* art. 3.

28. *Id.* art. 929.

trial of the case in this situation.[29] It might be argued that the provision in Article 929 of the new Code, that the declinatory exception "shall" be tried and decided in advance of the case, is mandatory, and that the trial judge cannot refer the exception to the merits even in exceptional and unusual cases. It seems, however, that in view of the Reporters' Comments on this article, there was no intention to require that the declinatory exception be tried and decided in advance of trial in all cases.[30]

The Code of Civil Procedure has codified the rules of Louisiana practice with regard to the introduction of evidence on the trial of the declinatory exception. If the grounds for the objection do not appear on the face of the petition, the citation, or the sheriff's return, evidence may be introduced to support or controvert the objections pleaded.[31] While the defendant must lay a foundation for the introduction of evidence, it seems that there will always be an adequate foundation for the introduction of evidence to support the objection because the new Code requires that the exception state with particularity the objection urged and its grounds.[32] The plaintiff is always permitted to introduce evidence to controvert the objections pleaded because the factual allegations of the exception are considered as having been denied or avoided by law,[33] and this is a sufficient foundation for the introduction of evidence.

There is an important change in the new Code concerning the effect of sustaining the declinatory exception. If the action has been brought in a court of improper jurisdiction or venue and the declinatory exception has been sustained, then the court may transfer the action to a proper court if the transfer is in the interest of justice.[34] This provision should eliminate some of the unnecessary costs and delays incurred when the suit is dismissed and must be filed again in a court of proper jurisdiction or venue.

29. See Gordon v. Bates-Crumley Chevrolet Co., 182 La. 795, 162 So. 624 (1935).

30. LA. CODE OF CIVIL PROCEDURE art. 929. Comment (a) (1960).

31. *Id.* art. 930. If the grounds for the objection do appear on the face of the petition, the citation, or the return, there is no need to introduce evidence either to support or contradict the objections.

32. *Id.* arts. 924, 930, Comment.

33. *Id.* art. 852.

34. *Id.* arts. 121, 932.

DILATORY EXCEPTION

The dilatory exception retards the progress of the suit and does not tend to defeat the action.[35] There was no specific enumeration of the dilatory exceptions in the Code of Practice, but a number were developed by the jurisprudence.[36] The new Code contains the following enumeration of the objections that have been developed:[37] (1) prematurity, (2) want of amicable demand, (3) unauthorized use of summary proceedings, (4) vagueness or ambiguity of the petition, (5) lack of procedural capacity, (6) improper cumulation of actions, including improper joinder of parties, (7) nonjoinder of a necessary party, and (8) discussion. In addition the Code of Civil Procedure also provides an additional objection, that the petition does not conform to the requirements of form that may be raised by the dilatory exception.[38]

The problem of the method and time of pleading the dilatory exception has already been discussed in connection with the declinatory exception. The rules discussed apply to the dilatory exception as well as the declinatory exception.[39]

The dilatory exception must be tried and decided prior to the trial of the case on the merits.[40] Evidence may be introduced on the trial of the exception to support or controvert the objections pleaded when the grounds for the objection do not appear on the face of the petition.[41]

A judgment sustaining the dilatory exception generally orders the plaintiff to remove the grounds for the objection within the delay allowed by the court, and the suit is dismissed only if the plaintiff does not comply with this order.[42] But if the objection urging prematurity is sustained, the suit is dismissed

35. LA. CODE OF PRACTICE art. 332 (1870); LA. CODE OF CIVIL PROCEDURE art. 923 (1960).

36. See MCMAHON, LOUISIANA PRACTICE 323-452 (1939).

37. LA. CODE OF CIVIL PROCEDURE art. 926 (1960). The objections that may be raised by the dilatory exception are not limited to those enumerated. There has been much confusion in the law on the subject of cumulation of actions. See McMahon, *The Joinder of Parties in Louisiana*, 19 LOUISIANA LAW REVIEW 1 (1958). It should be noted that the objection of nonjoinder of a necessary party is raised by the dilatory exception (Article 926); whereas the nonjoinder of an indispensable party is raised by the peremptory exception (Article 927).

38. LA. CODE OF CIVIL PROCEDURE art. 926 (1960). The requirements of form will be discussed page 208 *infra*.

39. Id. art. 928.

40. *Id.* art. 929.

41. *Id.* art. 930.

42. *Id.* art. 933.

since the defect obviously cannot be cured.[43] If the exception on the grounds of want of amicable demand is sustained, the judgment imposes the costs of court upon the plaintiff.[44] This rule imposing costs upon the plaintiff is apparently designed to encourage plaintiffs to make amicable demands before invoking the judicial process.

PEREMPTORY EXCEPTION

The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent or barred by effect of law.[45] Therefore, this exception tends to prevent or defeat the action, as distinguished from the declinatory and dilatory exceptions which only decline and delay.[46] The Code of Practice does not enumerate the peremptory exceptions that may be raised, whereas the new Code contains the following illustrative enumeration of the objections that may be raised by the peremptory exception:[47] (1) prescription, (2) res judicata, (3) nonjoinder of an indispensable party, (4) no cause of action, and (5) no right of action, or no interest in the plaintiff to institute the suit. All of these objections could be raised by peremptory exceptions under the prior law, and in addition there was the peremptory exception of division.[48] Under the new Code the plea of division is not raised by exception, but rather as an affirmative defense in the answer.[49] The reason for this change is that division merely regulates the effect of the judgment by dividing it among the sureties, and it does not tend to prevent or defeat the demand of the plaintiff, the traditional function of the peremptory exception.

The objections of prescription and res judicata must be pleaded and may not be supplied by the court.[50] However, the court may notice on its own motion the failure to join an indispensable party, or the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit.[51] The

43. This dismissal is without prejudice to the plaintiff's right to bring the action when it has matured. *Id.* art. 933, Comment (c).
44. *Id.* art. 933. This exception on the grounds of want of amicable demand will only be sustained when no amicable demand has been made and the defendant is willing to comply with the plaintiff's demand. *Id.* art. 421, Comment (d).
45. *Id.* art. 923; LA. CODE OF PRACTICE art. 345 (1870).
46. *Ibid.*
47. LA. CODE OF CIVIL PROCEDURE art. 927 (1960).
48. MCMAHON, LOUISIANA PRACTICE 452 (1939).
49. LA. CODE OF CIVIL PROCEDURE art. 927, Comment (a), art. 1005 (1960).
50. *Id.* art. 927 (1960). See also LA. CIVIL CODE art. 2286 (1870).
51. See note 50 *supra*.

Code of Practice provided that peremptory exceptions could be pleaded at any time prior to a definitive judgment,[52] but the jurisprudence qualified this rule by not allowing them to be filed in either the trial or appellate court after the case had been submitted to the court for decision.[53] The Code of Civil Procedure adopts this jurisprudential rule.[54] The appellate court may consider a peremptory exception filed for the first time in that court, if it is filed prior to a submission of the case for decision, and if proof of the ground for the exception appears on the record.[55] If, however, the objection raised by the peremptory exception filed for the first time in the appellate court is prescription, the plaintiff may demand that the case be remanded to the trial court for trial of the exception.[56]

In general, the time of the trial of the peremptory exception is dependent upon when the exception is pleaded. If the exception is pleaded prior to answer, it may be tried prior to a trial of the case on its merits, or the court may, in its discretion, refer the exception to the merits and decide it after a trial of the case.[57] When the exception is pleaded in the answer, or after answer but before the trial of the case, it is tried and disposed of on the trial.[58] If the exception is pleaded after the trial of the case, the court may rule on it at any time. However, if the party against whom the exception is pleaded in this situation is entitled to introduce evidence, and desires to do so, then the exception must be tried specially.[59]

The Code of Civil Procedure retains the rule that no evidence can be admitted to support or controvert a peremptory exception raising the objection that the petition fails to state a cause of action.[60] Evidence may be admitted to support or controvert a peremptory exception raising the other objections, if the exception has been pleaded prior to or at the time of the trial of the case and if the grounds for the exception do not appear on the petition.[61] If the exception is pleaded in the trial

52. LA. CODE OF PRACTICE art. 346 (1870).
53. O'Hara v. New Orleans, 30 La. Ann. 152 (1878); Gayarre v. Millaudon, 23 La. Ann. 305 (1871).
54. LA. CODE OF CIVIL PROCEDURE art. 928 (1960).
55. *Id.* art. 2163.
56. *Ibid.*
57. *Id.* art. 929.
58. *Ibid.*
59. *Ibid.* It should be noted that the peremptory exception cannot be pleaded in the trial court after a submission of the case for decision. *Id.* art. 928.
60. *Id.* art. 931.
61. *Ibid.*

court *after* the trial of the case, then the plaintiff is entitled to introduce evidence to controvert the exception, but the defendant is only entitled to introduce evidence to rebut that offered by the plaintiff.[62]

The judgment sustaining a peremptory exception will ordinarily dismiss the suit.[63] However, when the grounds for the objection can be removed by amendment of the petition, the plaintiff will be permitted to do so within the delay allowed by the court.[64]

FORM OF EXCEPTIONS

Although there were few statutory or code requirements as to the form of the exception under the prior law,[65] a customary form developed in practice and under the rules of many Louisiana trial courts.[66] The Code of Civil Procedure does have a required form for the exception, but it is very similar to that customarily used under the prior law.[67] The exception must be prefaced with a caption,[68] set forth the name and surname of the exceptor,[69] and contain a simple, concise, and direct statement of allegations of fact in numbered paragraphs.[70] There must be a prayer for relief,[71] and if the defendant is represented by an attorney, the exception must be signed by an attorney of record in his individual name and with his address.[72]

One slight difference under the new Code is that neither a verification nor certification of the exception will be required.[73] The signature of the attorney constitutes a certification by him that he has read the exception and that to the best of his knowledge, information, and belief there is good ground to support it.

The most significant change in the form of the exceptions is the requirement that they "state with particularity the ob-

62. *Ibid.* The exception cannot be pleaded in the trial court after the case has been submitted to the court for decision. *Id.* art. 928.
63. *Id.* art. 934.
64. *Ibid.*
65. LA. CODE OF PRACTICE arts. 333, 336, 346 (1870) required that the exceptions be pleaded "specially." LA. R.S. 13:3601 (1950) required a certification and verification of factual allegations made therein.
66. See MCMAHON, LOUISIANA PRACTICE 260 *et seq.* (1939).
67. LA. CODE OF CIVIL PROCEDURE art. 924, Comment (a) (1960).
68. *Id.* art. 853.
69. *Id.* art. 924.
70. *Id.* art. 854.
71. *Id.* art. 924.
72. *Id.* art. 863.
73. *Ibid.*

jections urged and the grounds thereof."[74] The purpose of this provision is to eliminate the "blanket" exception employed for years in Louisiana practice. When, for example, a defendant filed an exception on the ground that the plaintiff's petition disclosed "no right or no cause of action" without particularizing, it was almost impossible to determine what the specific grounds for the exception were. Since there are numerous points of substantive law, the attorney for the exceptor should specify why there is no right or cause of action. It would seem that this requirement will reduce the number of frivolous exceptions, and will reduce the time required for the trial of the exception, since opposing counsel will be informed of the particular ground for the exception. Thus the opposing attorney will be better able to prepare to argue the exception, and he will be able to take certain steps to overcome some of the objections without having to take the time of the court. This would seem to be conducive to the administration of justice.

CONCLUSION

It would seem that the system of objections will be simpler and more workable under the new Code. Many of the rules that have been developed by the jurisprudence have been codified in simple and concise language. Several changes have been made in the law, but each seems to represent an improvement.

Aubrey McCleary

Summary Judgment

While Articles 966 through 969 of the Louisiana Code of Civil Procedure constitute Louisiana's first venture with summary judgment, it is by no means a procedural novelty. This device was introduced in England in 1855 as part of the English Bills of

74. *Id.* art. 924. It should be noted that amendment of exceptions is provided for in the new Code, Article 1152. It provides: "A defendant may amend his declinatory or dilatory exceptions by leave of court or with the written consent of the adverse party, at any time prior to the trial of the exceptions, so as to amplify or plead more particularly an objection set forth or attempted to be set forth in the original exception. A declinatory or a dilatory exception may not be amended so as to plead an objection not attempted to be set forth in the original exception.

"A defendant may amend his peremptory exception at any time and without leave of court, so as to either amplify an objection set forth or attempted to be set forth in the original exception, or to plead an objection not set forth therein."