

Civil Procedure - Filing Suit In Court of Incompetent Jurisdiction

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therefore recover from the unreleased tortfeasor only one half, or his virile share, of the total amount of damages sustained. Since the released tortfeasor cannot be liable to the unreleased tortfeasor for all or part of the sum that the latter may be required to pay, the unreleased tortfeasor cannot implead the released party on a third-party demand.

It is submitted that the court, in deciding the instant case, was guided by the manifest intention of the legislature to erase any distinction between delictual and contractual solidary liability. To force a debtor released by a compromise with the creditor to contribute to an unreleased debtor who has been compelled to pay more than his virile share would destroy the effectiveness of a compromise and release, unless all parties could be brought into the settlement negotiations. This court, by applying article 2203 in full to delictual obligations, holds that discharge of one solidary debtor discharges his proportionate share of liability. The decision encourages compromise as a method that is preferable to litigation for effective settlement of tort liability without impairing the unreleased debtor's rights or doing inequity to the claimant.

David E. Soileau

CIVIL PROCEDURE—FILING SUIT IN COURT OF INCOMPETENT JURISDICTION

Plaintiffs, in a joint action, seek to recover damages for the alleged wrongful death of their husband and father who was electrocuted on March 1, 1960, while working near power lines of defendant, a Florida corporation with its principal place of business in New Orleans. Plaintiffs, citizens of Louisiana, filed suit in federal district court on February 6, 1961, which was within the one-year prescriptive period;¹ however, due to administrative delay, service of citation was not made on defendant corporation until the prescriptive period had expired.² The federal district court, on its own motion, dismissed the action for lack of diversity of citizenship jurisdiction. The present action

1. LA. CIVIL CODE art. 3536: "The following actions are prescribed by one year: That for . . . damages . . . resulting from offenses or quasi offenses . . ."

2. Service of citation was made on March 3, 1961, or 24 days after the suit was filed in United States District Court.

was then filed in a Louisiana district court on April 6, 1962. This court sustained the defendant's plea of one year's prescription and dismissed the action. The First Circuit Court of Appeal affirmed. *Held*, federal court being a court of incompetent jurisdiction, the filing of suit in that court did not interrupt the prescription period; and, since service was not made on defendant during the prescriptive period, plaintiffs' cause of action prescribed, although the delay in service after filing was not attributable to the plaintiffs. *Sansone v. Louisiana Power & Light Co.*, 164 So.2d 151 (La. App. 1st Cir. 1964).

Article 3518 of the Louisiana Civil Code provides that prescription shall be interrupted by the service of citation upon the defendant within the prescriptive period.³ In suits against corporate defendants, R.S. 12:66 authorizes interruption of prescription by the mere filing of suit in a court having jurisdiction over the corporation.⁴ Prior to its amendment, R.S. 9:5801⁵

3. LA. CIVIL CODE art. 3518 (1870): "A legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not. The provisions of this article likewise apply to actions ex delicto, heretofore or hereafter filed, in a United States District Court of America, when and if said court holds it is not a court of competent jurisdiction."

Article 3518 is found in the section of the Code dealing with acquisitive prescription; however, the jurisprudence is well settled that the method of interruption found in that article pertains to liberative prescription. See *Perkins v. Long-Bell Petroleum Co.*, 227 La. 1044, 81 So.2d 389 (1955); *Knight v. Louisiana Power & Light Co.*, 160 So.2d 832 (La. App. 4th Cir. 1964).

The jurisprudence has consistently maintained that service of citation, within the prescriptive period, will interrupt the accrual of prescription. See *Perkins v. Long-Bell Petroleum Co.*, *supra*; *Conkling v. Louisiana Power & Light Co.*, 166 So. 2d 68 (La. App. 4th Cir. 1964); *Knight v. Louisiana Power & Light Co.*, *supra*; *Nettles v. Great Am. Ins. Co.*, 155 So.2d 87 (La. App. 1st Cir. 1963); *Mayon v. Delta Well Logging Serv., Inc.*, 127 So.2d 16 (La. App. 1st Cir. 1961); *Cupples v. Walden*, 124 So.2d 613 (La. App. 3d Cir. 1960); *Hidalgo v. Dupuy*, 122 So.2d 639 (La. App. 1st Cir. 1960); *Harris v. Lopez*, 109 So.2d 496 (La. App. Or. Cir. 1959); *Babers v. Jolly*, 107 So.2d 81 (La. App. 2d Cir. 1958); *Dumont v. Henserling*, 62 So.2d 864 (La. App. Or. Cir. 1953); *Flowers v. Pugh*, 51 So.2d 136 (La. App. 1st Cir. 1951); *Tagliavore v. Ellerbe*, 149 So. 296 (La. App. 2d Cir. 1933); *Agurs v. Putter*, 137 So. 640 (La. App. 2d Cir. 1931); *Adams v. Citizens' Bank*, 136 So. 107 (La. App. 2d Cir. 1931).

4. LA. R.S. 12:66 (1928): "In all suits against corporations, all prescriptions against corporations shall be interrupted by the filing of the suit in the court having jurisdiction of the action against the corporation."

5. Before its amendment LA. R.S. 9:5801 (1950) provided: "The filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts." The courts have interpreted "competent court," within the meaning of article 3518 and R.S. 9:5801 as a court having jurisdiction *ratione materiae* and *personae*. See *Flowers v. Pugh*, 51 So.2d 136 (La. App. 1st Cir. 1951); *Comment*, 14 *TUL. L. REV.* 601, 603 (1940). When the Louisiana Code of Civil Procedure was adopted the French concepts "jurisdiction *ratione materiae*" and "jurisdiction *personae*" were replaced with the Anglo-American terms "jurisdic-

allowed interruption of prescription against *all* defendants by the filing of suit in a court of competent jurisdiction and proper venue.⁶ The jurisprudence has indicated that R.S. 12:66 and R.S. 9:5801 are not in conflict and can be applied interchangeably against corporate defendants.⁷ In order to consolidate the methods of interruption, the legislature recently amended R.S. 9:5801.⁸ Thus, according to R.S. 9:5801 as amended, prescription may be interrupted in two ways: first, by the filing of suit within the prescriptive period in a court of competent jurisdiction and proper venue; second, by service of citation within the prescriptive period when the suit has been filed in a court of incompetent jurisdiction or improper venue.⁹

In the instant case the suit was filed in the federal court twenty-two days before the lapse of the one-year prescriptive period, but service of citation was not made until two days after the accrual of prescription. Plaintiffs contended that the filing of suit in the federal court interrupted prescription. Alternatively, plaintiffs alleged that the twenty-four-day administrative delay between the filing and service should not be charged

tion over the subject matter" and "venue." A definition of "competent court" is found in LA. CODE OF CIVIL PROCEDURE art. 5251(4) (1960): "Competent court" or "court of competent jurisdiction," means a court which has jurisdiction over the subject matter of, and is the proper venue for, the action or proceeding." See *Knight v. Louisiana Power & Light Co.*, 160 So.2d 832 (La. App. 4th Cir. 1964).

6. The jurisprudence is well settled that the filing of suit in a court of competent jurisdiction interrupts prescription as to all defendants. See *Davis v. Lewis & Lewis*, 226 La. 1059, 78 So.2d 173 (1954); *Schrader v. Coleman E. Adler & Sons Inc.*, 225 La. 352, 72 So. 2d 872 (1954); *Reeves v. Globe Indem. Co.*, 185 La. 42, 168 So. 488 (1936); *Mayon v. Delta Well Logging Serv., Inc.*, 127 So.2d 16 (La. App. 1st Cir. 1961); *Cupples v. Walden*, 124 So.2d 613 (La. App. 3d Cir. 1960); *Banks v. K & H Stock Farms*, 97 So.2d 444 (La. App. 1st Cir. 1957); *Dumont v. Henslerling*, 62 So.2d 864 (La. App. Orl. Cir. 1953); *Flowers v. Pugh*, 51 So.2d 136 (La. App. 1st Cir. 1951); *Blanchard v. Smith*, 45 So.2d 527 (La. App. 2d Cir. 1950).

7. See *Guadin v. Cunningham*, 164 So.2d 624 (La. App. 3d Cir. 1964); *Flowers v. Pugh*, 51 So.2d 136 (La. App. 1st Cir. 1951).

8. LA. R.S. 9:5801 (Supp. 1964): "All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors and interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process." This amendment was not intended to affect the existing methods of interruption or to provide an additional method of interruption. See LA. CODE OF CIVIL PROCEDURE art. 421, comment (e) (1960); *Knight v. Louisiana Power & Light Co.*, 160 So.2d 832 (La. App. 4th Cir. 1964); *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Civil Procedure*, 24 LA. L. REV. 291 (1964).

9. The jurisprudence has supported this interpretation of LA. R.S. 9:5801. See *Conkling v. Louisiana Power & Light Co.*, 166 So.2d 68 (La. App. 4th Cir. 1964); *Knight v. Louisiana Power & Light Co.*, 160 So.2d 832 (La. App. 4th Cir. 1964); *Nettles v. Great Am. Ins. Co.*, 155 So.2d 87 (La. App. 1st Cir. 1963); *Cupples v. Walden*, 124 So.2d 613 (La. App. 3d Cir. 1960).

against them in determining whether prescription had accrued. In rejecting plaintiffs' first contention the court applied 28 U.S.C. § 1332(c), which provides that a corporation shall be deemed a citizen of both the state of incorporation and the state in which it has its principal place of business.¹⁰ Since defendant corporation had its principal place of business in New Orleans and plaintiffs were citizens of Louisiana, the federal court manifestly lacked diversity of citizenship jurisdiction. Thus the federal court was a court of incompetent jurisdiction within R.S. 9:5801, and prescription was not interrupted by the mere filing of suit within the prescriptive period. More significantly, the court rejected the plaintiffs' contention that the administrative delay between the filing of suit and service was not chargeable against them. Applying R.S. 9:5801, the court reasoned that although filing suit in a court of incompetent jurisdiction within the prescriptive period did not operate to interrupt prescription, service of citation within the prescriptive period would have been sufficient to do so. In so holding, the court recognized that the purpose of allowing the filing of suit in a court of competent jurisdiction to interrupt prescription was to relieve a plaintiff of the burdens of administrative delays in the service of citation when he has complied with the required procedure in R.S. 9:5801.¹¹ Clearly, since the plaintiff has little control over the time when service of citation is made,¹² a plaintiff who files a suit in a court of competent jurisdiction and proper venue within the prescriptive period should not be charged with subsequent administrative delays in service. On

10. 28 U.S.C. § 1332(c) (1958): "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business." The legislative history of this statute indicates that its intended purpose was to narrow the scope of jurisdiction, not to broaden it. The practice sought to be curtailed consisted of filing claims in federal courts between essentially local parties based on the fiction that one of the parties, a corporation, was chartered in another state. See *Nayer v. Sears Roebuck & Co.*, 200 F. Supp. 319 (D. N.H. 1961); 2 U.S. CODE CONG. & AD. NEWS 3101 (1953).

11. 164 So.2d at 154. See *Tagliavore v. Ellerbe*, 149 So. 296, 297 (La. App. 2d Cir. 1933); cf. *Conkling v. Louisiana Power & Light Co.*, 166 So.2d 78 (La. App. 4th Cir. 1964). Therefore, if the suit is filed in a court of competent jurisdiction, prescription is interrupted and it is immaterial, in regard to the accrual of prescription, when service is made. See *Cupples v. Walden*, 124 So.2d 613 (La. App. 3d Cir. 1960); *Hidalgo v. Dupuy*, 122 So.2d 639 (La. App. 1st Cir. 1960); *Dumont v. Henserling*, 62 So.2d 864 (La. App. Or. Cir. 1953).

12. Some courts have taken the position that the officer of the court was in some respects under the plaintiff's direction, and if the officer fails in his duty he becomes responsible to the plaintiff. See *Ficklin v. New River Drainage Dist.*, 133 La. 203, 62 So. 632 (1913); cf. *Blanchard v. Smith*, 45 So.2d 527 (La. App. 2d Cir. 1950); *Tagliavore v. Ellerbe*, 149 So. 296 (La. App. 2d Cir. 1933).

the other hand, the court reasoned that plaintiff should be charged with the effects of administrative delays in service when the suit is filed in a court of incompetent jurisdiction, since he has the choice of the forum. Consequently, when a plaintiff chooses a forum of incompetent jurisdiction or improper venue, he should be required to bear the consequences of any administrative delays in service of citation.¹³

It is submitted that this decision was necessary and proper in the interest of efficient judicial administration. There is no doubt that the effects of the accrual of prescription can be harsh, as demonstrated by the instant case. On the other hand, prescription serves to prevent defendants from being harassed by long-delayed suits and suits with no foundation which are purposely delayed, so that evidence will be lost and the defendant encouraged to settle his case without going to trial. When viewed in this light, it appears that the court was wise in not relaxing the strict rules governing the interruption of prescription. In the future, in order to avoid a plea of prescription from being sustained when federal jurisdiction is uncertain, it would be prudent for plaintiff's attorney to verify the service of citation before the end of the prescriptive period. As an alternative, filing the suit in both the federal court and the state court within the prescriptive period would insure preservation of the plaintiff's cause of action; however, this latter procedure is more expensive for the plaintiff, and duplicate filing is scarcely conducive to efficiency and economy in judicial administration.

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CORPORATE LAW — RESTRICTIONS ON ALIENABILITY OF STOCK

Four non-stockholders desired to purchase a controlling interest in a corporation from defendant, a majority shareholder. The articles of incorporation contained the following restriction on the alienability of stock: before sale of stock to

13. This reasoning is in accord with the jurisprudence. See *Conkling v. Louisiana Power & Light Co.*, 166 So.2d 68 (La. App. 4th Cir. 1964); *Knight v. Louisiana Power & Light Co.*, 160 So.2d 832 (La. App. 4th Cir. 1964); *Hidalgo v. Dupuy*, 122 So.2d 639 (La. App. 1st Cir. 1960); *Flowers v. Pugh*, 51 So.2d 136 (La. App. 1st Cir. 1951).