Louisiana Law Review

Volume 34 | Number 2
The Work of the Louisiana Appellate Courts for the 1972-1973 Term: A Symposium
Winter 1974

Procedure: Civil Procedure

Howard W. L'Enfant Jr.
Louisiana State University Law Center

PROCEDURE

CIVIL PROCEDURE

*Howard W. L'Enfant, Jr.**

JURISDICTION AND VENUE

In *Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.*,[1] the Louisiana supreme court had held that although a nonresident buyer was transacting business in the state within the meaning of the long arm statute,[2] more contacts with the state were required to satisfy the requirements of due process than would be necessary in the case of a nonresident seller even though, under the facts in that case, the buyer was making the purchases in Louisiana as part of his interstate business operations. This distinction between nonresident buyers and sellers was applied by the Third Circuit in *Drilling Engineering, Inc. v. Independent Indonesian American Petroleum Co.*[3] as the basis for its decision that the contacts were insufficient to support jurisdiction over the nonresident corporation which had entered into a contract under which the Louisiana corporation had furnished engineering services for the defendant over a six month period in Indonesia. The defendant had initiated the contact, had sent its vice-president to Louisiana to negotiate the agreement, and in addition, the plaintiff had made drilling studies and had given recommendations on how to correct operational problems encountered by the defendant in Indonesia. The parties had also maintained regular contact through phone calls on the average of twice a week. The Louisiana supreme court reversed finding that under these facts there were sufficient contacts to subject the defendant to jurisdiction without denying him due process of law.[4] The court emphasized that the defendant had solicited the Louisiana plaintiff, had come to Louisiana to work out an agreement which became final when accepted in Louisiana by the plaintiff and that it was a continuous transaction for the six month period. And the supreme court distinguished *Riverland* by finding that the present case did not involve the purchase of goods in this state as had been the case in *Riverland*.

---

* Associate Professor of Law, Louisiana State University.

1. 259 La. 635, 251 So. 2d 45 (1971), *discussed in The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Civil Procedure*, 32 LA. L. REV. 318, 321 (1972).

2. LA. R.S. 13:3201(a) (Supp. 1964).

3. 271 So. 2d 285 (La. App. 3d Cir. 1973).

4. 283 So. 2d 687 (La. 1973).

The significance of the case is not the result which is fair and fully supported by the facts but rather the approach the court used in reaching its decision. The court could have accepted the *Riverland* distinction between buyer and seller as the court of appeal had done and still reversed by finding that there were sufficient additional contacts to assert jurisdiction over the buyer, but the court, instead, tried to distinguish *Riverland* by saying that the instant case did not involve the purchase of goods in Louisiana. However, it is not clear that *Riverland* is so distinguishable because, whereas in that case the defendant purchased goods from a Louisiana plaintiff for use out of state, in the instant case, the defendant purchased engineering services from a Louisiana plaintiff to be performed out of state and in both cases plaintiffs were suing to recover the amount due under the contract for the goods and services supplied. Accordingly, this case could be interpreted to mean that the Louisiana supreme court will not apply the *Riverland* requirement for more contacts for a nonresident buyer than for a nonresident seller in any case and this possibility led Mr. Justice Barham to state, in a concurring opinion, that the purchase was in furtherance of the defendant's business and that "the opinion should not be construed to apply to the ordinary nonbusiness consumer who purchases in Louisiana for the purpose of personal consumption and not for furtherance of a business venture."[5] This distinction between the consumer purchaser and the business purchaser seems required by the sense of fair play embodied in the concept of due process because the business purchaser, like the seller, accepts the possibility of suit in another state as part of the risk of doing interstate business whereas clearly the purchaser for personal use and consumption would not.

In *Moore v. Central Louisiana Electric Co.*,[6] the parents of a fourteen-year-old boy who was killed when the model plane he was flying came in contact with high voltage lines filed suit against the manufacturer of the plane and the manufacturer of the control lines and other defendants. Both of these defendants objected to jurisdiction based on R.S. 13:3201, and the trial court dismissed the suit for lack of jurisdiction and the Court of Appeal for the Third Circuit affirmed. The Supreme Court reversed[7] finding that both defendants regularly did business in Louisiana and regularly engaged in a persistent course of conduct in this state within the meaning of this statute in that they manufactured products which they intended to

5. *Id.* at 690.
6. 257 So. 2d 702 (La. App. 3d Cir. 1972).
7. 273 So. 2d 284 (La. 1973).

sell in interstate markets created by national advertising and the reputation of their products. One of the defendants had sold about six thousand dollars worth of its products to a Louisiana distributor for a period of four years and the other had made a few direct order sales to Louisiana customers and had advertised nationally but neither defendant had any agents or employees in Louisiana. The court of appeal noted that there was no evidence in the record showing where the deceased had obtained the plane and its control lines; the opinion by the supreme court made no mention of this fact evidently considering it unimportant for purposes of applying R.S. 13:3201 (d) which does not require that the injury result directly from the business activity of the defendant, but only that the cause of action arise from the nonresident's causing injury in state from an act or omission out of state and that, in addition, the nonresident must regularly do business, solicit business or engage in any other persistent course of conduct.[8] This case, as did *Drilling Engineering*, indicates that the Louisiana supreme court is more willing to find the requirements of due process to have been satisfied by activities which were considered insufficient in the opinion of the lower courts and has thereby given a longer reach to our long arm statutes without being unfair to nonresident defendants.[9]

In *Martin v. Martin*,[10] the plaintiff filed a summary proceeding to have the amount of past due alimony and child support determined and made executory in accordance with the Louisiana judg-

8. LA. R.S. 13:3201 (Supp. 1964): "A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to cause of action arising from the nonresident's . . . (d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state."

9. *See also* Fisher v. Albany Mach. & Supp. Co., 261 La. 747, 260 So. 2d 691 (1972), (where the supreme court reversed the First Circuit Court of Appeal and upheld jurisdiction in an action brought against the nonresident manufacturer who had sold the $12,958 piece of sawmill equipment which caused the fatal injuries, finding that this sale was deriving substantial revenue from goods used or consumed in Louisiana within the meaning of R.S. 13:3201(d)).

Also the Fourth Circuit in *Boykin v. Lindenkramar*, 252 So. 2d 467 (La. App. 4th Cir. 1971) upheld jurisdiction over a Swedish corporation which manufactured large construction cranes and sold them to an independent U.S. corporation which marketed them throughout the United States. The court reasoned that the defendant knew that its cranes would be marketed nationwide and must have intended this and so when its cranes reach Louisiana in substantial quantities, no matter how they are marketed, then it is successfully soliciting and doing business in Louisiana within the meaning of R.S. 13:3201(d).

10. 250 So. 2d 491 (La. App. 3d Cir. 1971).

ment of divorce which ordered the defendant husband to make monthly payments. Although the defendant was domiciled in Texas, the plaintiff alleged that he was subject to the jurisdiction of a Louisiana court under 13:3201 (d)[11] because the defendant's failure to pay alimony to his wife and children in Louisiana while he was domiciled in Texas caused damage in this state by an offense or quasi offense committed through an act or omission outside of state and that the defendant had the necessary minimum contact with Louisiana because he was divorced here, his former wife and children live here and, until recently, he worked in Louisiana a substantial portion of the time. The court rejected the argument by finding that failure to pay alimony is not an offense or quasi offense within the meaning of the statute. The court reasoned that there is no Louisiana statute or decision classifying the failure to pay alimony as an offense or quasi offense and that liability for alimony arises under special statutory provisions setting forth the circumstances under which the liability exists and the procedure for enforcement and thus liability for alimony cannot be enforced through the Civil Code articles pertaining to offenses and quasi offenses. The court refused to follow an Illinois case[12] which ruled that the failure of a nonresident father to pay for support of an illegitimate child constituted a tortious act within the meaning of the Illinois long arm statute.

As an additional basis of jurisdiction the plaintiff relied on the concept of "continuing jurisdiction"; that is, if a Louisiana court acquired jurisdiction over the subject matter, the person, or the status, it retains jurisdiction even though the defendant leaves the state. Applying this principle the plaintiff argued that since a Louisiana court acquired jurisdiction over the defendant in the divorce proceedings, jurisdiction still existed to enforce the alimony judgment rendered in those proceedings. The court rejected this argument because the plaintiff had filed a separate suit in a different court instead of filing a contradictory motion in the original divorce proceedings and therefore, the court concluded, the concept of continuing jurisdiction has no application.

The *Martin* decision seemed to indicate that the concept of continuing jurisdiction could be used as a basis for personal jurisdiction over a nonresident defendant in a proceeding to recover past due alimony and child support if the motion is filed in the court where the original proceedings were held but this was expressly rejected by a later First Circuit decision, *Smith v. Smith*.[13] In that case the

11. *See* note 8 *supra*.

12. Poundexter v. Willis, 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967).

13. 257 So. 2d 446 (La. App. 1st Cir. 1972).

plaintiff filed an action to obtain an executory judgment for past due alimony and child support payments in the court which had granted the divorce and had determined the alimony and child support payments. Although the defendant had moved to New York following the divorce, the plaintiff argued that the court retained jurisdiction to render a money judgment against him. The court ruled that there was no continuing jurisdiction because the action to obtain an executory judgment for the amount of unpaid alimony and child support is not incidental to the divorce and that the only case where the concept of continuing jurisdiction had been recognized is where the plaintiff debtor sought to modify his obligation to the nonresident creditor, his former wife.[14] Therefore, the court concluded, since the action for past due alimony is not a modification of the original decree, there is no basis for applying the concept of continuing jurisdiction.

It is difficult to reconcile the use of continuing jurisdiction to allow a resident debtor to reduce the amount of his alimony and child support payments to a nonresident wife and children with the refusal to recognize it as a valid basis for jurisdiction when the resident wife seeks to modify the amount of the alimony and support obligation owed by a nonresident husband or when she tries to obtain an executory judgment for past due payments. The Louisiana court should have sufficient interest in the question of support and alimony to justify retaining jurisdiction to decide questions of modification or enforcement of its original decree. In addition, further consideration should be given to the question of whether failure on the part of the nonresident husband to make support payments in Louisiana to Louisiana residents pursuant to a Louisiana judgment is causing injury by an offense or quasi offense within the meaning of the long arm statute.[15] The court in *Martin* ruled that it was not but in so doing the court did not consider the fact that a husband's failure to support his family under certain circumstances can be a crime[16] and thus should be considered an offense or quasi offense within the meaning of the statute. In addition, strong policy reasons support a finding of jurisdiction either under the long arm statute or by means of the

14. Carpenter v. Carpenter, 240 So. 2d 13 (La. App. 2d Cir. 1970); Dupre v. Guillory, 216 So. 2d 327 (La. App. 3d Cir. 1968).

15. LA. R.S. 13:3201 (Supp. 1964): "A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's . . . (c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state."

16. LA. R.S. 14:74 (1950), *as amended by* La. Acts 1952, No. 368 § 1; 1968, No. 233 § 1; 1968, No. 147 § 1; 1968, Ex. Sess, No. 14 § 1; 14:75 (1950), *as amended by* La. Acts 1968, No. 647 § 1.

concept of continuing jurisdiction because a husband ought not to be able to escape his responsibilities simply by moving out of state.

In *Swann v. Performance Contractors, Ltd.*,[17] plaintiff sued a Jamaican corporation for the value of services performed in Jamaica and when the defendant made no appearance, obtained and confirmed a judgment by default. Service of process had been made on a representative of the defendant in Louisiana pursuant to R.S. 13:3471 (1) which provides that if a foreign corporation not required to appoint an agent for service of process has engaged in a business activity in Louisiana then service may be made on any agent or employee of the corporation in this state. On appeal, the defendant argued that service of process was improper because the plaintiff had neither alleged nor proved that the defendant had engaged in a business activity in Louisiana and also that the plaintiff had neither alleged nor proved personal jurisdiction over the defendant. The court of appeal correctly ruled that objections to service of process or to jurisdiction over the defendant were not before the court for review because the defendant had not raised these issues through the filing of a declinatory exception before judgment by default.[18] On the question of whether the plaintiff must plead and prove the validity of service of process and that the court has jurisdiction over the defendant even if no timely objection had been made by the defendant, the court interpreted R.S. 13:3471 (1) as not requiring a plaintiff to allege and prove that the corporation engaged in a business activity in Louisiana as a prerequisite to valid service of process because the requirement of a business activity is jurisdictional in nature and if this issue is not raised by the defendant the plaintiff is not required to plead or prove it. In the court's view, R.S. 13:3471 (1) is satisfied when an agent or employee of the corporation is served as shown by the sheriff's return, and personal jurisdiction is presumed. This result is in harmony with the design and intent of the Code of Civil Procedure which assigns the responsibility for raising objections to service of process and personal jurisdiction to the defendant by requiring that these objections must be presented through a declinatory exception filed before answer or judgment by default,[19] and if these objections are not raised through the exception they cannot be raised on appeal,[20] the proper remedy for the defendant being to bring an action

17. 271 So. 2d 294 (La. App. 3d Cir. 1973), *writ refused*, 273 So. 2d 847 (La. 1973): "The result is correct."

18. LA. CODE CIV. P. arts. 925, 928.

19. *Id.*

20. *See* Michigan Wis. Pipe Line Co. v. Sugarland Dev. Corp., 221 So. 2d 593 (La. App. 3d Cir. 1969), *writ denied*, 254 La. 469, 223 So. 2d 872 (1969) (no error of law).

to annul the judgment.[21] The defendant cannot avoid the responsibility for raising these objections by insisting that the plaintiff must prove jurisdiction and valid service of process even if no objection is made.

In *Thomas Organ Co. v. Universal Music Co.*,[22] a California corporation filed suit in Louisiana on an open account against several defendants one of whom was no longer a resident of Louisiana. Service on that defendant was made by registered mail, in accordance with R.S. 13:3204, and was accepted by a member of defendant's family at his domiciliary address in Missouri. A duplicate set of pleadings was sent by certified mail marked, "deliver to addressee only" and was refused by the defendant personally. The trial court sustained the defendant's declinatory exception on the grounds of insufficient service of process because the plaintiff, as a nonresident, was not entitled to use the long arm statute. The court of appeal reversed and held that the long arm statute was not restricted to Louisiana plaintiffs. In rejecting the defendant's argument that the statute was intended to protect Louisiana residents only, the court found that there was no substantiation for it either in the language of statute, which made no mention of plaintiffs, or in any of the United States Supreme Court cases defining the requirements of due process which made no mention of any intent to limit suits against nonresidents with minimum contacts with the state to those brought by resident plaintiffs.[23] The court further found that even though a state may naturally have a greater interest in protecting its own citizens, the place where the activity in question occurred may be the most convenient forum to try the suit. This was particularly true under the facts of this case because all of the sales had been made to the defendants in Louisiana while they were Louisiana residents and Louisiana would have much more interest in this action than Missouri where one of the defendants presently lives. The court concluded that "[t]o deny plaintiff service upon defendant partners just because they had left the state wherein they conducted all of the business which is the subject of this suit would be offensive to the concept of 'fair play and substantial justice.' "[24]

Having concluded quite properly and fairly that the plaintiff had the right to use R.S. 13:3201, the court next considered whether the

21. Dicta Realty Assoc. v. Conrad, 230 So. 2d 595 (La. App. 4th Cir. 1970); LA. CODE CIV. P. art. 2001.

22. 261 So. 2d 323 (La. App. 1st Cir. 1972).

23. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

24. 261 So. 2d 323, 326 (La. App. 1st Cir. 1972).

statute's requirements for service of process had been met. The defendant argued that the service was invalid because he had refused to accept service and that the acceptance by a member of his family was ineffective. The court, in rejecting this argument, found that the long arm statute[25] contained no provision against domiciliary service, and had no requirement for a signed return receipt. As the court interpreted the statute, the requirements for service of process would be satisfied when plaintiff's counsel sends a certified copy of the citation and petition to the defendant by registered or certified mail. The court was correct in rejecting the defendant's arguments because, under the facts in this case, his position would indeed "make a mockery of R.S. 13:3204"[26] but the court's conclusion that the statute does not require a signed receipt raises questions. If the plaintiff mails citation and petition to the defendant by registered or certified mail and it is returned because the addressee is no longer at that address and his whereabouts are unknown, could the plaintiff validly proceed against the defendant who has clearly had no notice of the suit? The requirement of procedural due process is satisfied if service of process has been attempted by means reasonably calculated to give actual notice, but actual notice is not required[27] and sending notice by registered or certified mail to the defendant's last known address would be, under the circumstances, reasonably certain to give him notice. But the Louisiana statute requires an affidavit of the person who mailed the process "to which shall be attached the return receipt of the defendant"[28] and one court has interpreted this to mean that there is no jurisdiction without proof of service and that without the return receipt there is no proof of service.[29] Under the facts in that case no receipts had been filed but the same result might be reached where the return receipt was marked "unable to deliver." A possible approach would be for the plaintiff to move for the appointment of an attorney to represent the nonresident defendant as one who could not be served by mail or through actual delivery but who is subject to the court's jurisdiction under R.S. 13:3201.[30] Since the proceeding would be a contradictory one against the defendant's court appointed attorney, R.S. 13:3205 might not be a problem because it only prohibits the granting of a default judgment against the nonresident. Support for this approach can be found in the recent case of *Carey v.*

25. LA. R.S. 13:3204 (Supp. 1964).
26. 261 So. 2d at 327.
27. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
28. LA. R.S. 13:3205 (Supp. 1964).
29. Guidry v. Rhodes, 238 So. 2d 248 (La. App. 3d Cir. 1970).
30. LA. CODE CIV. P. art. 5091.

Daunis[31] where, after seven unsuccessful attempts to serve a defendant in an action arising out of an accident in Louisiana, an attorney was appointed to represent the defendant and the court reasoned that, even if the defendant was a nonresident (there was a question whether the defendant was still a Louisiana domiciliary because a week after the accident she married and moved out of state with her husband who was in military service), it had jurisdiction over the defendant under R.S. 13:3201 (c) and therefore the appointment of the attorney was valid. The court did not discuss R.S. 13:3205 but the decision does support the use of the court appointed attorney in conjunction with the long arm statute and such a procedure should satisfy the requirements of due process as discussed earlier.

ACTIONS-PRESCRIPTION

In *Nini v. Sanford Brothers*,[32] the Louisiana supreme court faced the interesting question of whether suit filed by a dead man would interrupt prescription. On December 7, 1967, Nini had instructed his attorney to file suit for workman's compensation benefits—he had been injured on July 19, 1966 and had received workman's compensation benefits until January 16, 1967. Suit was prepared on December 8 and filed on December 11, 1967, the same day on which the attorney learned that his client had been killed in an unrelated accident on December 9, 1967. The trial court overruled the exception of prescription finding that the amended petition substituting Nini's widow as party plaintiff related back to the time of filing the original petition and after trial there was judgment on the merits for the plaintiff and the court of appeal affirmed.[33] The supreme court agreed with the lower courts that the amended petition related back to time of filing under Code of Civil Procedure article 1153[34] but preferred to base its decision on the "more basic question: does a suit filed on behalf of a plaintiff who has died prior to the filing of the suit interrupt prescription?"[35] In answering this question in the affirmative, the court found that the one year limitation on workman's compensation actions[36]

31. 274 So. 2d 447 (La. App. 4th Cir. 1973).

32. 276 So. 2d 262 (La. 1973).

33. 258 So. 2d 647 (La. App. 1st Cir. 1972).

34. LA. CODE CIV. P. art. 1153: "When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

35. 276 So. 2d at 264.

36. LA. R.S. 23:1209 bars claims unless proceedings are begun within one year from the accident or from the time the last payment is made.

was (1) to enable the employer to determine when his potential liability would cease; (2) to prevent suits based on stale claims where evidence might be difficult to produce; and (3) to create a conclusive presumption of waiver of a claim on the part of the employee[37] and that these purposes were the same as those which applied to liberative prescription. According to the majority, the essence of the interruption of prescription is notice to the defendant of the claim asserted and, accordingly, prescription would be interrupted even if the plaintiff had no right to bring the action as where a father files suit on behalf of his son who was a major at the time suit was filed.[38] The court concluded that every requirement for a legal interruption existed, "the petition states a real and genuine (not spurious) cause of action, filed in a court of competent jurisdiction and proper venue, informing the defendant that judicial demand is made for workmen's compensation benefits arising from a particular accident."[39] The dissent reasoned that an action can only be brought by a person with a real and actual interest[40] and so the suit filed after Nini's death was nothing more than the filing of a paper and was not the kind of notice contemplated by law for the interruption of prescription. And further, the attorney-client relationship had terminated on the death of Nini.

The reasoning of the majority that prescription is interrupted when the defendant is fully informed of the nature of the claim being asserted against him even though the plaintiff may lack capacity to assert the claim, is more persuasive because it is in full accord with the objectives of prescription mentioned earlier. Moreover, the Civil Code provides that acts done by an attorney under his power of attor-

37. *See* Harris v. Traders & Gen. Ins. Co., 200 La. 445, 8 So. 2d 289 (1942); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 384 (1951).

38. Nettles v. Great American Ins. Co., 155 So. 2d 87 (La. App. 1st Cir. 1963); *See also* National Surety Corp. v. Standard Acc. Ins. Co., 247 La. 905, 175 So. 2d 263 (1965) (a timely suit by the intervenor's compensation carrier against the tortfeasor interrupted prescription on the intervenor's claim against the tortfeasor). 8 OEUVRES DE POTHIER, TRAITE' DE LA PRESCRIPTION, Parte I, Ch. II, No. 54 (1835).

However, a case which seems out of line with the majority's reasoning that the essence of the legal interruption is timely to the defendant is *Miller v. New Orleans Public Service, Inc.*, 250 So. 2d 108 (La. App. 4th Cir. 1971), where prescription was held interrupted by the filing of the action within the one year prescriptive period for tort actions in a competent court even though, at the plaintiff's request, the defendant was not informed, through service of process, of the commencement of the action until three years and ten months after the filing and almost five years after the accident. The defendant had been informed of the suit by letter more than a year after suit had been filed and that there would be no service of process in the hopes of an amicable settlement.

39. 276 So. 2d at 266.

40. LA. CODE CIV. P. art. 681.

ney before he learns of the death of his principal are valid[41] and so the filing of the suit would be valid if done before the attorney learned of the death of his client. But if the suit had been filed afterwards so that it would clearly be an unauthorized suit, would it interrupt prescription? The argument in favor of interruption is that the defendant would be fully informed of the nature and basis of the claim asserted but, on the other hand, the filing of a suit by an attorney without authority to do so is close to the mere filing of a paper discussed by the dissent. Unfortunately, the opinion did not deal with this specific issue and so its resolution remains unclear.

EXCEPTIONS

Prescription is interrupted by filing an action in a court of competent jurisdiction and venue but if the court lacks jurisdiction over the subject matter or is improper venue for the action then prescription is interrupted only by service of citation.[42] Where suit is filed in a court of improper venue and service of process is made after the prescriptive period has run, can the defendant urge prescription if he has waived his objection to venue? This question was first presented in *Mayeux v. Martin*,[43] where the plaintiff argued that the defendant, by filing the peremptory exception of prescription, had made a general appearance and had therefore waived his objection to venue, and, since the court was thereby a court of proper venue, filing not service interrupted prescription. The court concluded that this argument lacked merit because, even if the defendant had waived his objection to venue (the court expressly refrained from deciding this point), the only effect of such a waiver would be to bar a later objection to venue and would not have the effect of making the court one of proper venue and could not change the fact that the action had prescribed before any waiver had been made. In addition, the defendant could not be found to have tacitly renounced prescription because the only pleading he filed was one seeking dismissal of the suit on the grounds that the action had prescribed.

The same argument was made in *Foster v. Breaux*[44] where the plaintiff unsuccessfully urged that since the defendant had waived his objection to venue by allowing a judgment by default to be taken against him, prescription would be interrupted by filing rather than

41. *Id.* art. 3032.

42. LA. R.S. 9:5801 (1950), *as amended by* La. Acts 1960, No. 31 § 1.

43. 247 So. 2d 198 (La. App. 3d Cir. 1971) (Suit had been filed within the prescriptive period but service of process had been made afterwards.).

44. 253 So. 2d 569 (La. App. 1st Cir. 1971).

by service of process. The court of appeal expressed its total accord with the result and reasoning in *Mayeux*; however, the supreme court granted writs and reversed,[45] holding that where suit is filed in a court of improper venue within the prescriptive period but service is not made until after the period has run, the defendant cannot successfully urge that the action is prescribed if he has waived his right to object to venue. The majority stated that in determining whether the court was one of proper venue (and therefore whether filing or service interrupted prescription) the critical time is when the plea of prescription is presented not when the action was originally filed, and therefore if the court has become a court of proper venue because the defendant has waived his objection to venue, then prescription is interrupted if the action had been timely filed. The majority recognized that this construction of R.S. 9:5801 was not free from doubt but supported its position by citing the principle that prescriptive statutes are to be strictly construed and the construction which permits the action is favored over that which bars it.[46] In addition, the court reasoned that prescription may be renounced expressly or tacitly[47] and so it would follow that if a party renounced the right to plead a circumstance (improper venue) which would validate a plea of prescription, he cannot re-urge what has been renounced to validate his plea.[48] Since under the rule in *Foster* waiver of the objection to venue could result in the loss of the plea of prescription, the defendant must proceed carefully to preserve his objection of venue and in this regard *Foster* raises serious questions and presents certain difficulties. For example, what does the defendant do if the plaintiff timely files in a court of improper venue and service is made after the prescription period has run? Ordinarily, the defendant would immediately file the peremptory exception of prescription but by so doing he makes a general appearance and waives the declinatory exception of improper venue;[49] does this mean he has, like the defendant in

45. 263 La. 1112, 270 So. 2d 526 (1972). The case is the subject of a student casenote in 34 LA. L. REV. 463 (1974).

46. The court cited Union Carbon Co. v. Mississippi River Fuel Corp., 230 La. 709, 89 So. 2d 209 (1956); Mansur v. Abraham, 183 La. 633, 164 So. 421 (1935). *Cf.* State v. Stewart Bros. Cotton, 193 La. 16, 190 So. 317 (1939).

47. LA. CIV. CODE arts. 3460-61.

48. The court cited a case holding that when a party withdraws a plea of prescription, he has abandoned it and may not re-urge it. Marionneaux v. Brugier, 1 McGloin 257 (La. App. Orl. Cir. 1881); *cf.*, Succession of Harvey v. Harvey, 44 La. Ann. 80, 10 So. 410 (1892); Coon v. Brashear, 7 La. 265 (1834).

49. An objection to venue can only be raised through the declinatory exception which must be filed before answer or judgment by default—Louisiana Code of Civil Procedure article 928—or before the defendant makes a general appear-

Foster, also lost his objection of prescription? The court in *Mayeux* had held that he had not and the majority noted that where a party files a plea of prescription at a time when the venue is improper he does not waive his right to plead that the suit is prescribed because of improper venue, citing *Mayeux*. If the court had stopped there, it would have been reasonable to conclude that *Mayeux* was still valid and that a defendant would not waive his venue objection by filing the plea of prescription first. But the court cast considerable doubt on the continued validity of *Mayeux* by stating that if a defendant files a peremptory exception of prescription subsequently to filing a declinatory objection to venue, he waives the venue objection by making a general appearance. There would be no waiver, the court reasoned, if he files his plea of prescription based on improper venue along with his declinatory attack on venue. This would not be a general appearance within the meaning of Code of Civil Procedure article 7 because the defendant is required by law to plead these objections together "since otherwise he would waive his right to question the venue."[50] Therefore, the careful practitioner should file a declinatory objection to improper venue first which, as the dissent pointed out, means that the action would be dismissed or transferred to a court of proper venue and the plea of prescription would be raised only after the plaintiff refiles in a court of proper venue or would be raised in the transferee forum. Such a result only delays the final disposition of the case on the basis of prescription and makes Louisiana's exceptions even more technical than they were already. If the defendant filed both a declinatory exception objecting to venue and a peremptory exception objecting to prescription, the same result would probably occur because the court would first dispose of the case on the basis of the venue objection and either dismiss or transfer. In the words of the dissent, "[t]he better rule would be one which preserves to a litigant the right to choose the procedural vehicle that will finally dispose of the matter without requiring him to exhaust dilatory tactics."[51]

EXECUTORY PROCESS AND SEQUESTRATION

In two very important cases the Louisiana supreme court sustained the validity of executory process and the writ of sequestration against challenges that these procedures were not in accord with the requirements of procedural due process. The challenge to the writ of

ance—Louisiana Code of Civil Procedure article 925.

50. 263 La. at 1123, 270 So. 2d at 530.

51. *Id.* at 1127, 270 So. 2d at 531.

sequestration arose in *W. T. Grant Co. v. Mitchell*[52] when the creditor sued to collect an installment sales contract and had the defendant's stereo, stove, refrigerator, and washer seized under the writ of sequestration based on his belief that the defendant might encumber or dispose of the property during the proceedings.[53] The defendant moved to dissolve the writ of sequestration on the grounds that the stove, refrigerator, and washer were exempt from seizure under state law[54] and also on the grounds that the seizure was a denial of due process because he was not given notice or an opportunity to defend his property before it was seized. The motion to dissolve the writ was denied by the trial court and an application for review was denied by the court of appeal but granted by the Louisiana supreme court which affirmed the trial court's ruling.

In rejecting defendant's objections based on the statute exempting such property from seizure under "any writ, mandate or process whatsoever,"[55] the court interpreted this statute as applying to seizures in execution of judgments and not to seizures under provisional remedies such as sequestration. In reaching this conclusion the court relied on the fact that it is found in the Revised Statutes in the section dealing with seizures in general which also contains provisions dealing with the execution of judgments and not in the separate chapter dealing with the provisional remedies. Moreover this statute replaced Code of Practice article 644 which had been held to apply only to seizures in the execution of judgments and not to provisional seizures.

In arguing a denial of due process the defendant relied primarily on the United States Supreme Court decision of *Fuentes v. Shevin*[56] in which prejudgment replevin statutes were held unconstitutional because the debtor was not given an opportunity to defend his property before it was seized. In that decision the court noted that if the creditor could show immediate danger that the debtor might conceal or destroy the goods then seizure before the debtor has had an opportunity to be heard might be justified and the Louisiana supreme court

52. 263 La. 267, 269 So. 2d 186 (1972).

53. LA. CODE CIV. P. art. 3571.

54. LA. R.S. 13:3881 exempts from seizure "under any writ, mandate, or process whatsoever" a stove, refrigerator and washer.

55. LA. R.S. 13:3881 (Supp. 1960), *as amended by* La. Acts 1961, No. 25 § 1; 1970, No. 242 § 1.

56. 407 U.S. 67 (1972). This case and its effect on Louisiana creditors is discussed in Anderson and L'Enfant, *Fuentes v. Shevin: Procedural Due Process and Louisiana Creditor's Remedies*, 33 LA. L. REV. 62 (1972) and Comment, 47 TUL. L. REV. 806 (1973).

concluded that that exception applied to the instant case. But the court also based the validity of sequestration on the defendant's consent to its use. The court reasoned that since the purchaser is conclusively presumed to know the law, he knows that the sale gives the buyer a vendor's privilege and with it the right to use the writ of sequestration whereby the property may be seized without prior notice if the buyer defaults in his payments and, therefore, the buyer, through the act of purchase, consented to the use of this remedy.

The conclusion of the majority that the property is not exempt on state law grounds seems questionable in the light of the very broad and unambiguous language of the statute itself exempting the property from seizure by "any writ, mandate, or process whatsoever,"[57] particularly when the statute is viewed in the light of its policy objective of providing the debtor and his family with the minimum household furnishings necessary for health and activity.[58] Accordingly, such statutes should receive a liberal construction.[59] There is also an unacceptable practical result. According to the majority this property, although not exempt from seizure under a writ of sequestration, would be exempt from sale under the writ of fieri facias in execution of a judgment. Thus the creditor is able to seize property which cannot be sold to satisfy any judgment obtained against the defendant; all the creditor can do is deprive the debtor of his property under the writ of sequestration pending a final judgment at which point it must be returned since it is exempt from sale. To treat the property as exempt from seizure even under the writ of sequestration would be in accord with the language and spirit of the statute and would produce consistent results. The court's ruling on the constitutional issue is not settled because the United States Supreme Court granted the defendant's petition for a writ of certiorari.[60]

In *Buckner v. Carmack*,[61] the defendant successfully challenged the constitutionality of Louisiana's executory process, specifically articles 2638 and 2639 of the Code of Civil Procedure, in the trial court, but on appeal the Louisiana supreme court upheld the constitutionality of the procedure. The defendants' position was based on the recent United States Supreme Court decision, *Fuentes v. Shevin*[62] which held that due process requires that a debtor must be given

57. LA. R.S. 13:3881 (Supp. 1960), *as amended by* La. Acts 1961, No. 25 § 1; 1970, No. 242 § 1.

58. Young v. Geter, 185 La. 709, 170 So. 240 (1936).

59. *Id.*

60. Mitchell v. W.T. Grant Co., 93 S. Ct. 2276 (1973).

61. 272 So. 2d 326 (La. 1973).

62. 407 U.S. 67 (1972). *See* note 56 *supra*.

notice and an opportunity to be heard before he is deprived of a significant property interest. The majority distinguished Louisiana's executory procedure from the replevin procedures struck down in *Fuentes* because, unlike the writ of replevin which could be issued by the clerk of court on the *ex parte* allegations of the creditor, the writ of seizure in an executory proceeding could only be issued by the judge[63] who must be satisfied that the petition is supported by authentic evidence of the obligation secured by a mortgage or privilege containing a confession of judgment and any other instruments necessary to complete plaintiff's right to use this procedure and notice is given in the form of the demand for payment (unless it has been waived) which is served on the debtor and a copy of the petition, although not required to be, is usually served along with the demand. Moreover, the seizure of immovable property is usually by constructive seizure and so there is no actual dispossession of the debtor until the sale which is at least thirty days later[64] and the debtor must be served with notice of the seizure.[65] In addition to these differences from the replevin procedure, the majority stated that the Louisiana procedure is founded on a confession of judgment which is a contractual waiver of the right to a prior adversary hearing and, since the challenge is to the constitutionality of the articles on their face, there is no contention of unequal bargaining power or overreaching by the creditor and the instrument itself did not give any evidence of abuse. The majority noted that the confession of judgment is expressly authorized by the Louisiana Constitution in Article VII, section 44 and had been upheld by the Louisiana courts[66] and further, that the constitutionality of a confession of judgment whereby the debtor had authorized the entry of a personal judgment against him had been upheld by the United States Supreme Court in a recent case.[67] The majority concluded that the debtor has ample opportunity, both before and after seizure, to assert any defenses and objections he may have either through an injunction[68] or a suspensive appeal.[69]

63. The majority made no reference to article 283 of the Louisiana Code of Civil Procedure which authorizes the clerk of a district court to sign an order for the issuance of executory process.

64. LA. CODE CIV. P. arts. 326, 2331, 2722, 2724; LA. R.S. 13:3853-55, 4346 (Supp. 1960); 43:203 (Supp. 1960), *as amended by* La. Acts 1961, No. 26 § 1; 1972, No. 627 § 1.

65. LA. CODE CIV. P. arts. 2293, 2721.

66. Marbury v. Pace, 29 La. Ann. 557 (1877); CIT Leasing Corp. v. Bar-Tender of Louisiana, Inc., 258 So. 2d 228 (La. App. 4th Cir. 1972); Kirkeby-Natus Corp. v. Campbell, 210 So. 2d 103 (La. App. 4th Cir. 1968).

67. D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972).

68. LA. CODE CIV. P. arts. 2642, 2751-54.

69. *Id.* art. 2642.

The dissent recognized the differences between the replevin procedure and Louisiana's executory procedure but concluded that the Louisiana procedure was not in accord with the requirements of procedural due process because article 2639 does not inform the debtor of his right to a hearing before his property is seized. It simply tells him that if he does not pay within three days his property will be seized. Serving a copy of the petition is inadequate to meet the due process challenge because it does not tell him of his right to a hearing and if it is done, it is only by local practice; it is not required by law. The remedies of injunction and supensive appeal were not, as the dissent saw it, sufficient substitutes for a hearing before seizure. The fact of constructive seizure was also not persuasive because in all cases of movable property and in many cases of immovable property there is actual seizure. The dissent concluded that, "It is not that Louisiana cannot validly provide for executory process; it is that Louisiana has not under the present codal scheme provided due process in executory process as required by *Fuentes*."[70]

The issue of the constitutionality of executory process is still not definitively answered. An appeal was taken from the *Buckner* decision and is still pending in the United States Supreme Court. It is noteworthy that while the Supreme Court has not acted on *Buckner*, it did affirm a decision by a three judge court (with one judge dissenting), rendered after and relying on *Buckner*, that executory process was in accord with the requirements of due process.[71]

---

70. Buckner v. Carmack, 272 So. 2d 326, 333 (La. 1973).

71. Ross v. Brown Title Corp., 356 F. Supp. 595 (E.D. La. 1973), *aff'd*, 93 S. Ct. 2788 (1973).