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Foster v. Breaux: Intricacies in Pleading Interruption of Prescription

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NOTES

FOSTER V. BREAUX: INTRICACIES IN PLEADING INTERRUPTION OF PRESCRIPTION

Plaintiff instituted an action for damages caused by an alleged slander in Plaquemines Parish. He filed suit in Tangipahoa Parish two days before prescription accrued;[1] however, service was not made upon defendants Breaux and Evans until after the prescriptive year.[2] The delay for pleading elapsed without Breaux's having made an appearance, and a preliminary default judgment was entered against him. Subsequently, both defendants filed declinatory exceptions to improper venue.[3] A preliminary default judgment was then entered against Evans. Five days after the declinatory exceptions were filed, both defendants filed peremptory exceptions of prescription.[4] The exceptions to venue were sustained by the First Circuit,[5] and plaintiff's suit was dismissed upon the peremptory exception of prescription. The Louisiana supreme court, in reversing, *held* that, when a plaintiff has filed suit in a court of improper venue and has not served the defendants prior to the expiration of the prescriptive period, a defendant who has waived his objection to venue may not successfully urge, in a peremptory exception, that prescription was *not* interrupted by the filing of suit within the prescriptive period. *Foster v. Breaux*, 263 La. 1112, 270 So. 2d 526 (1972).

The Louisiana Code of Civil Procedure provides for three types of exceptions:[6] the declinatory, which declines the jurisdiction of the

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1. An action for damages from slander prescribes in one year. LA. CIV. CODE art. 3536.

2. The alleged slander occurred on May 18, 1968. Plaintiff filed suit on May 16, 1969. Breaux was served on May 22, 1969 and Evans was served on May 23, 1969. *See* Foster v. Breaux, 263 La. 1112, 270 So. 2d 526 (1972). The supreme court noted that the date of service of process on Breaux was May 22, 1969; however, the court of appeal had indicated that the date was May 21, 1969. Foster v. Breaux, 238 So. 2d 803 (La. App. 1st Cir. 1970), 253 So. 2d 569 (La. App. 1st Cir. 1971). In either case, service was made after the accrual of the prescriptive year.

3. LA. CODE CIV. P. art 925.

4. *See* LA. CODE CIV. P. art 927; LA. R.S. 9:5801 (1950), *as amended by* La. Acts 1960, No. 31 § 1.

5. "At the time of filing, Tangipahoa Parish was an improper venue for this suit, since both of the defendants were domiciled in other parishes, La. C. Civ. P. Art. 42, and since likewise the wrongful conduct occurred elsewhere, La. C. Civ. P. Art. 74." Foster v. Breaux, 263 La. 1112, 1118, 270 So. 2d 526, 528 (1972).

6. LA. CODE CIV. P. art. 922.

court;[7] the dilatory, which retards the progress of the action;[8] and the peremptory, which declares the plaintiff's actions to be legally nonexistent or barred by effect of law.[9] Of the three, only the peremptory exception dismisses or defeats the action; the other two merely retard the progress of the suit.[10] An objection to venue is made through a declinatory exception;[11] a plea of prescription is raised via the peremptory exception.[12]

Because Louisiana has a stage preclusion system of pleading,[13] an untimely filing of an exception may result in a waiver of the objections sought to be raised. Louisiana Code of Civil Procedure article 928 requires that declinatory and dilatory exceptions be pleaded prior to an answer or a judgment by default and that they be filed in the same pleading when both are raised. The peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision;[14] however, the simultaneous filing of declinatory and peremptory exceptions, except when "required by law," constitutes a general appearance, thus waiving the declinatory exceptions.[15]

This orderly pattern does not precisely coincide with the statutory plan by which prescription is interrupted. While judicial inter-

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7. *Id.* arts. 923, 925.
8. *Id.* arts. 923, 926.
9. *Id.* arts. 923, 927.
10. *Id.* art. 923.
11. *Id.* art. 925.
12. *Id.* art. 927.
13. *Cf.* LA. CODE CIV. P. arts. 7, 44, 928.
14. *Id.* art. 928.
15. LA. CODE CIV. P. 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 non-residence of the defendant; or
(5) Dismissal of the action on the ground that the court has no jurisdiction over the defendant.
. . . .
When a 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."

ruption occurs when suit is filed in a competent court,[16] if the demand is filed in a court which is not competent, prescription is interrupted only by service of process upon a defendant within the prescriptive period.[17] When service is not made timely, questions arise concerning the proper sequence of filing objections to venue and pleas of prescription, for a determination of venue is also indispensable to resolving the issue of prescription. It is therefore necessary to consider whether the determination of venue is the same for both. Although venue may be improper at the time suit is filed, a defendant may waive his declinatory objections. If a waiver occurs, the court is then of proper venue and may render a judgment on the merits.[18]

For the purpose of deciding whether prescription has been interrupted, however, R.S. 9:5801 seems to require that a determination of venue be made at the time the action is commenced.[19] The commencement of a civil action is defined by Louisiana Code of Civil Procedure article 421 as "the filing of a pleading presenting the demand to a court of competent jurisdiction." Thus, it appears that the inter-

16. LA. CODE CIV. P. art. 5251(4): " '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."

17. LA. R.S. 9:5801 (1950), *as amended by* La. Act 1960, No. 31 § 1: All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or 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 defendants served by the service of process.

Cf. LA. CIV. CODE art. 3518: 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.

See also Miller v. New Orleans Pub. Serv., Inc., 250 So. 2d 108 (La. App. 4th Cir. 1971); Hazel v. Allstate Ins. Co., 240 So. 2d 431 (La. App. 3d Cir. 1970); Doucet v. Home Ind. Co., 188 So. 2d 442 (La. App. 3d Cir. 1966); Venterella v. Pace, 180 So. 2d 240 (La. App. 4th Cir. 1965); Lipps v. Zor, Inc., 170 So. 2d 915 (La. App. 4th Cir. 1965); Conkling v. Louisiana Pow. & Light Co., 166 So. 2d 68 (La. App. 4th Cir. 1964); Gaudin v. Cunningham, 164 So. 2d 624 (La. App. 3d Cir. 1964); Sansone v. Louisiana Pow. & Light Co., 164 So. 2d 151 (La. App. 1st Cir. 1964); Knight v. Louisiana Pow. & Light Co., 160 So. 2d 832 (La. App. 4th Cir. 1964); Hidalgo v. Dupuy, 122 So.2d 639 (La. App. 1st Cir. 1960); Barbers v. Jolly, 107 So. 2d 81 (La. App. 2d Cir. 1958); Flowers v. Pugh, 51 So. 2d 136 (La. App. 1st Cir. 1951).

18. *Cf.* Ponthieux v. Lindsay, 216 So. 2d 407 (La. App. 3d Cir. 1968), *aff'd*, 254 La. 647, 226 So. 2d 482 (1969).

19. *See* note 17 *supra* for the text of the statute.

ruption of prescription is to be determined by deciding whether venue was proper at the time of the filing of suit.[20] Louisiana courts have consistently followed this interpretation and have based their decisions as to whether the filing of suit interrupted the running of prescription by making an evaluation of competency[21] on the basis of the situation that existed at the time suit was filed.[22]

The first case in which a court considered whether venue should be tested at some point other than the filing of suit in deciding whether prescription had been interrupted was *Mayeux v. Martin*.[23] Plaintiffs had filed a tort suit in a court of improper venue (at the time of filing) on the last day of the prescriptive year; service of citation was made several days later. Defendant interposed a peremptory exception of prescription without having filed a declinatory exception to venue. Plaintiffs contended that the filing of an exception of prescription prior to a declinatory exception to venue constituted a general appearance,[24] the right to plead the declinatory excep-

20. LA. R.S. 9:5801 (1950), *as amended by* La. Acts 1960, No. 31 § 1, and LA. CODE CIV. P. art. 421 were intended to be read *in pari materia*. See the explanatory note under the amended LA. R.S. 9:5801 and comment (e) under LA. CODE CIV. P. art. 421.

Cf. Miller v. New Orleans Pub. Serv., Inc., 250 So. 2d 108, 110 (La. App. 4th Cir. 1971): "By Act No. 31 § 1 of 1960 it was amended to its present form, LSA-R.S. 9:5801, quoted above. Among other things it changed the wording from interruption by 'the filing of a suit' to interruption by 'the commencement of a civil action.' The definition of LSA-C.C.P. art. 421 shows this to mean exactly the same thing. Any doubt as to this was removed by the elimination of article 359 of the Code of Practice in effect at the time of the Canada case, *supra*, and which seemed to cause that court some concern."

21. LA. CODE CIV. P. art. 5251(4).

22. *See* Schrader v. Coleman E. Adler & Sons, 225 La. 352, 72 So. 2d 872 (1954); Levy v. Stelly, 277 So. 2d 194 (La. App. 4th Cir. 1973); Tug Alamo, Inc. v. Electronic Serv., Inc., 275 So. 2d 419 (La. App. 4th Cir. 1973); Greene v. Engolio, 257 So. 2d 831 (La. App. 1st Cir. 1972); McGowan v. Gomez, 254 So. 2d 307 (La. App. 4th Cir. 1971); Miller v. New Orleans Pub. Serv., Inc., 250 So. 2d 108 (La. App. 4th Cir. 1971); Mayeux v. Martin, 247 So. 2d 198 (La. App. 3d Cir. 1971); Hazel v. Allstate Ins. Co., 240 So. 2d 431 (La. App. 3d Cir. 1970); Venterella v. Pace, 180 So. 2d 240 (La. App. 4th Cir. 1965); Conkling v. Louisiana Pow. & Light Co., 166 So. 2d 68 (La. App. 4th Cir. 1964); Sansone v. Louisiana Pow. & Light Co., 164 So. 2d 151 (La. App. 1st Cir. 1964); Knight v. Lousiana Pow. & Light Co., 160 So. 2d 832 (La. App. 4th Cir. 1964); Cupples v. Walden, 124 So. 2d 613 (La. App. 3d Cir. 1960); Hidalgo v. Dupuy, 122 So. 2d 639 (La. App. 1st Cir. 1960); Barbers v. Jolly, 107 So. 2d 81 (La. App. 2d Cir. 1958); Banks v. K & H Stock Farm, 97 So. 2d 444 (La. App. 1st Cir. 1957); Collector of Rev. v. Rundell, 72 So. 2d 749 (La. App. 2d Cir. 1953); Flowers v. Pugh, 51 So. 2d 136 (La. App. 1st Cir. 1951). *See also* note 20 *supra*.

23. 247 So. 2d 198 (La. App. 3d Cir. 1971).

24. *Cf.* LA. CODE CIV. P. art. 7.

tion having been waived,[25] the court in which the suit was filed was now one of proper venue. Plaintiffs argued that since venue was now proper, timely filing of suit interrupted prescription.

The court of appeal rejected this argument and upheld the plea of prescription, noting that it was "unnecessary" to determine if the filing of the peremptory exception constituted a waiver of defendant's declinatory exceptions to venue since "the result would be the same in any event."[26] If a general apperance had occurred when the peremptory exception was filed, this would bar the defendant from objecting to venue subsequently. The filing of the peremptory exception, however, had no effect on the outcome of the decision on the accrual of prescription. The court ruled that the filing of the peremptory exception did not make venue proper retroactive to the date of filing of suit. "It did not change the circumstance that the action had prescribed *before* any such waiver took place."[27]

The factual situation in *Foster v. Breaux* is similar to that in *Mayeux*, except that in the former a preliminary default judgment had been entered against the defendant Breaux prior to his filing a peremptory exception of prescription. Foster adopted the plaintiff's position in *Mayeux* and argued that since the default judgment precluded Breaux from raising a declinatory exception to venue, the fact that the court in which the suit was filed was originally one of improper venue was irrelevant. Plaintiff contended that the waiver of venue operated retroactively; therefore, prescription had been interrupted when the suit was filed.

The First Circuit Court of Appeal rejected Foster's argument, stating, "by failing to object timely to an improper venue, the party affected does nothing more than submit to trial in a court of improper venue."[28] By not objecting to venue timely, defendant was "*thereafter* precluded from challenging improper venue,"[29] but there was no retroactive effect to his waiver. Prescription was not interrupted because at the time the suit was filed the court was one of improper venue. The court emphasized that "[w]e are in total accord with both the reasoning and result reached in *Mayeux* . . .";[30] *i.e.*, in drawing a distinction between the time that is decisive for determining whether

25. LA. CODE CIV. P. arts. 7, 44, 928.

26. Mayeux v. Martin, 247 So. 2d 198, 200 (La. App. 3d Cir. 1971).

27. *Id.* (Emphasis added.)

28. Foster v. Breaux, 253 So. 2d 569, 570 (La. App. 1st Cir. 1971), *rev'd*, 263 La. 1112, 270 So. 2d 526 (1972).

29. *Id.* (Emphasis added.)

30. *Id.* at 571.

prescription has been interrupted, and the time that is controlling for examining a court's competency to rule on the merits of the action.

In reversing the *Foster v. Breaux* appellate court and in holding that prescription was interrupted, the Louisiana supreme court has cast serious doubt on the validity of this dichotomized view of venue. The supreme court began with the premise that prescriptive statutes are to be strictly construed, and, if two constructions are possible, the court should adopt the one that favors maintaining rather than barring the action.[31] Since liberative prescription may be renounced, even tacitly,[32] the court reasoned that, if one tacitly renounces a necessary, underlying "circumstance" of prescription, the result should be a waiver of prescription. The court further reasoned that, if one waives the right to plead a circumstance which might validate a plea of prescription (the circumstance here being improper venue), "he may not be permitted to re-urge the circumstance thus renounced in order to validate his prescription plea."[33]

Since the objection to venue may be waived,[34] and since venue is an aspect of competency,[35] the supreme court reasoned that the competency of a court must be determined at the time competency is questioned rather than by reference to the time at which the suit was filed. Having reached this conclusion, the court construed R.S. 9:5801 to mean that "the filing of the suit interrupts prescription if, *at the time the exception pleading prescription is filed*, the court is of competent jurisdiction."[36] The preliminary default judgment against Breaux precluded him from raising a declinatory exception to venue.[37] Thus, when he subsequently sought to urge his peremptory exception of prescription, venue was proper (as he had waived his right to object to it), the court was of competent jurisdiction, and therefore the filing of suit was considered to have interrupted the running of prescription.

Under this rationale, if venue is proper at the time when a defen-

31. The court's desire to maintain the suit is understandable in view of the fact that Evans, the co-defendant, had been dismissed because he had filed his declinatory objection to venue timely. The court noted that if Breaux and Evans were solidary obligors, which it appears that they were, then the interruption of prescription as to Breaux would also be effective as to Evans, and Evans could thus be brought back into the suit. *Cf.* LA. CIV. CODE art. 2097.

32. LA. CIV. CODE arts. 3460, 3461.

33. Foster v. Breaux, 263 La. 1112, 1121, 270 So. 2d 526, 529 (1972).

34. LA. CODE CIV. P. arts. 7, 44, 925, 928.

35. *Id.* art. 5251(4).

36. Foster v. Breaux, 263 La. 1112, 1122, 270 So. 2d 526, 529 (1972) (Emphasis added.)

37. LA. CODE CIV. P. art. 928.

dant files a peremptory exception of prescription under R.S. 9:5801, prescription will be considered as having been interrupted when plaintiff filed his suit, regardless of the propriety of venue at that point. Thus, once venue is proper, a plea that prescription was not interrupted (because suit was filed in a court of improper venue) will be of no avail.

This rationale produces disturbing consequences. A court which is not of proper venue has no power to rule on a peremptory exception; yet, once a court becomes competent, the peremptory exception must be overruled because the court is competent at the time the exception pleading prescription is filed. Under this new interpretation of R.S. 9:5801, it must be concluded that the filing of suit interrupted the running of prescription. As a way out of this dilemma, the court, in dicta, suggests two possible methods by which a defendant may successfully urge a plea of judicial interruption of prescription.

The first is suggested by the court's reference to *Mayeux* as authority for the proposition 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."[38] Apparently, if a defendant files a peremptory exception of prescription before filing any other exception, the peremptory exception will be properly before the court; if venue is improper and has not been waived when the exception is filed, the exception will be upheld.[39] Although this result is consistent with both the Code of Civil Procedure and the court's interpretation of R.S. 9:5801, this method has limited use. The filing of the peremptory exception first would constitute a general appearance[40] and thus preclude the defendant from raising not only the declinatory exception to venue, but also all of the declinatory exceptions other than lack of jurisdiction over the subject matter.[41] Furthermore, in offering this method, the court has accepted the result of *Mayeux* while at the same time rejecting the *Mayeux* distinction between venue for determining interruption of prescription and venue for determining competency to render a judgment on the merits.

The second method suggested by the court would allow the de-

38. Foster v. Breaux, 263 La. 1112, 1122, 270 So. 2d 526, 530 (1972).

39. *Cf.* LA. CODE CIV. P. arts. 7, 934. The filing of the peremptory exception would constitute a general appearance, thus making the court competent to rule on the exception.

40. *Id.* art. 7. *Cf.* arts. 925, 926.

41. *See* LA. CODE CIV. P. arts. 925, 926. Some of the declinatory exceptions which would be waived would be insufficiency of citation, insufficiency of service of process, *lis pendens*, and lack of jurisdiction over the person.

fendant to file his peremptory exception without waiving his other exceptions. The court noted that Louisiana Code of Civil Procedure article 7 states that "the pleading of other objections [with the declinatory exception] . . . , the filing of the peremptory exception or an answer there with *when required by law*, does not constitute a general appearance."[42] Since the filing of a peremptory exception at any time prior to a decision on a declinatory exception will constitute a general appearance, waiving the declinatory exceptions, the court reasoned that a defendant is "required by law" to plead his peremptory exception with his declinatory ones if he is to avoid waiving the declinatory exceptions. The court thus concluded that a simultaneous filing of the peremptory exception to prescription and the declinatory exception of venue is the proper way to place the peremptory exception before the court without waiving either venue or the other peremptory exceptions.

The only authority that the court cites for this interpretation of article 7 is *State v. Younger*.[43] *Younger*, however, involved the timing of declinatory and dilatory exceptions under an amendment to article 333 of the old Code of Practice.[44] The Reporter's comments in the Code of Civil Procedure indicate that *Younger* was intended to be legislatively overruled.[45] Moreover, "when required by law" was in-

42. 263 La. at 1122-23, 270 So. 2d at 530.

43. 206 La. 1037, 20 So. 2d 305 (1944).

44. La. Code of Practice art. 333 (1870), *as amended by* Acts 1936, No. 124 § 1, required the filing of all declinatory and dilatory exceptions at the same time. Under the jurisprudence prior to the amendment, a filing of both would result in a waiver of the declinatory exception. In *State v. Younger*, 206 La. 1037, 20 So. 2d 305 (1944), the court held that only by filing the declinatory exception first, and then, in the alternative, with full reservation of all rights under the first exception, pleading the dilatory exceptions, could the defendant avoid waiving the dilatory exceptions. Cases subsequent to *Younger* but prior to the adoption of the Code of Civil Procedure strictly adhered to the *Younger* ruling. *See* Hungerford v. Hungerford, 240 La. 24, 121 So. 2d 226 (1960); Cameron v. Reserve Ins. Co., 237 La. 433, 111 So. 2d 336 (1959); Mitchell v. Gulf States Fin. Corp., 226 La. 1008, 78 So. 2d 3 (1955); Garig Trans., Inc. v. Harris, 226 La. 117, 75 So. 2d 28 (1954); Commercial Credit Corp. v. Carrier, 139 So. 2d 256 (La. App. 1st Cir. 1962); Dupre v. Consolidated Under., 99 So. 2d 522 (La. App. 1st Cir. 1957); Standard Ind. v. Albrought, 81 So. 2d 448 (La. App. 1st Cir. 1955). *Cf. The Work of the Louisiana Supreme Court for the 1958-1959 Term—Civil Procedure*, 20 LA. L. REV. 298 (1960); *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Civil Procedure*, 16 LA. L. REV. 361 (1956).

45. LA. CODE CIV. P. art. 925, comment (d): "The second paragraph of this article constitutes a legislative overruling of the cases of State v. Younger, 206 La. 1037, 20 So. 2d 305 (1944) . . . ."

LA. CODE CIV. P. art. 928, comment (b): "This article changes the procedural law in one respect: it suppresses the rule of State v. Younger . . . . This jurisprudential rule is unnecessarily technical, and is out of harmony with the procedural philosophy

tended by the drafters of the Code of Civil Procedure to be a reference to specific statutory requirements.[46] Thus the *Foster v. Breaux* dictum that the phrase is synonymous with undesirable legal consequences appears to be inconsistent with the legislative intent.[47]

Furthermore, there are inherent difficulties in this method. As Justice Barham points out in his dissent, even if the peremptory and declinatory exceptions were filed simultaneously, "the ruling on the

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on which this Code is based."

46. *See Expose' des Motifs, No. 2, Book I, Courts, Actions, and Parties, Title I, Courts.* (Unpublished). In the original draft of the Code of Civil Procedure, the last paragraph of article 7 did not exist. The first draft was not accepted by the Council and "[t]his article was recommitted for two reasons: (1) to broaden the exceptions to the article so that a defendant compelled by law to file his answer at the same time as his declinatory exception in a city court would not make a general appearance thereby . . . ." The draft of article 7 presented to the Council on July 11-12, 1958 was substantially the same as the current article 7; however, in that draft, no mention was made of peremptory exceptions. It was at this meeting that the phrase "the peremptory exception or" was added in pencil to the Reporter's draft.

The intent of the drafters was correctly interpreted in *Mexic Bros., Inc. v. Sauviac*, 191 So. 2d 873, 876 (La. App. 4th Cir. 1966), in which the court noted: "The provision allowing filing of peremptory exception and an answer along with the exception to jurisdiction 'when required by law' clearly refers to the city courts under [LA. CODE CIV. P.] Articles 5001-5002."

In *Polmer v. Spencer*, 256 So. 2d 766 (La. App. 1st Cir. 1971), the First Circuit quoted at length from a memorandum by the late Dean McMahon, reporter for the Code of Civil Procedure, and agreed with his contention that "there is no waiver of the declinatory exception incorporated in the answer or coupled therein with a peremptory exception in cases in city courts, justice of peace courts, and 'clerk's book' cases in district courts, because Articles 4892, 4922(2), 4941, 4971, and 5002 require all exceptions to be incorporated in the answer in these cases. The defendants here were not *required by law* to file their peremptory exceptions with their declinatory exceptions. They should have had the latter assigned for trial, or at least should have waited until they had been disposed of, before filing their peremptory exceptions. Not having done so, they waived their declinatory exceptions." Also see Judicial Forms Annotated, Form No. 401, Note 1, 10 West's LSA-CODE CIV. P. p. 262 (1963).

There is no indication that the drafters intended that a general appearance should not result by the simultaneous filing of peremptory and declinatory exceptions except when required by statutes relating to City Courts.

47. Contrary to the dicta in *Foster v. Breaux*, the pattern of the Code of Civil Procedure indicates that a simultaneous filing of a peremptory exception to prescription (under R.S. 9:5801) and a declinatory exception to venue should result in a general appearance. *See* LA. CODE CIV. P. arts. 7, 44, 928. This would constitute a waiver of the right to object to the court's competency with reference to venue insofar as it goes to the court's ability to render a judgment in the case, but should not waive a peremptory exception of prescription on the grounds that venue was improper at the time of either the filing of suit or the service of citation. Nevertheless, it now appears that the supreme court will rule that it is correct to file a peremptory exception of prescription with declinatory exceptions, and that neither will a general appearance be the result of such simultaneous filing nor will the declinatory exceptions be waived.

lesser declinatory exception, which would have to be considered first, would have barred any consideration of the peremptory exception by that court."[48] The trial court, having reached the conclusion that venue was improper, would have to either dismiss the action or transfer it to a court of proper venue.[49] The second court, noting that the first was incompetent, would then uphold the plea of prescription. The defendant would ultimately win, but the life of the suit would be unnecessarily extended and the defendant's victory, though assured, would occur only after the incurring of additional costs.[50]

It can be argued that, under this second method, the only peremptory exception presently "required by law" to be filed with a declinatory exception to venue is a plea of prescription under R.S. 9:5801; however, an issue which remains unresolved is how broadly the phrase "when required by law" will be interpreted in the future. Even if a narrow approach is taken, it is not clear whether the peremptory exception may be filed simultaneously with all declinatory objections or only a declinatory exception to venue.[51]

Because the instant case offers some new interpretations of Louisiana rules of procedure, attorneys will have to take into account the intricacies involved in pleading accural of prescription under R.S. 9:5801. *Foster v. Breaux* yields the following possibilities:

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48. Foster v. Breaux, 263 La. 1112, 1126, 270 So. 2d 526, 531 (1972).

49. LA. CODE CIV. P. art. 932. *See also* Foster v. Breaux, 263 La. 1112, 1123, 270 So. 2d 526, 530 (1972).

50. Although the majority in *Foster v. Breaux* apparently envisioned that this second court could and would uphold defendant's plea of prescription, the second court would be competent at the time the peremptory exception of prescription was filed. This being the case, the second court might be forced to rule that the filing of suit interrupted prescription, since, "at the time the exception pleading prescription is filed, the court is of competent jurisdiction." 270 So. 2d at 529 (1972). Thus, even if the defendant filed the peremptory and declinatory exceptions simultaneously, he might still have his peremptory exception overruled despite having been successful in the declinatory exception to venue. This paradox was apparently unforeseen, yet it is the logical conclusion of the *Foster v. Breaux* line of reasoning.

51. *Foster v. Breaux* contains no indication that the dictum concerning LA. CODE CIV. P. art. 7 is to be strictly confined. Article 7 does not differentiate between pleas of prescription and other peremptory exceptions. The filing of any peremptory exception prior to the filing of other exceptions, or after the filing of declinatory exceptions but prior to a decision thereupon, results in a general appearance and thus waives the declinatory exceptions. Using the *Foster v. Breaux* approach it can be argued that the filing of all peremptory exceptions are "required by law" to be filed simultaneously with all declinatory exceptions. If this is to be the ultimate result of *Foster v. Breaux*, then the stage preclusion system of pleading exceptions may be drastically changed. On the other hand, it can be argued that *Foster v. Breaux* should be limited to the simultaneous filing of only a peremptory exception to prescription under R.S. 9:5801 and a declinatory exception to venue, since venue is an integral part of both exceptions.

(1) If at the time defendant files his peremptory exception, venue is proper, or if, because of a default judgment or some other waiver of the right to plead declinatory exceptions, the objection to venue has been waived, then the subsequent filing of the peremptory exception will always be of no avail, for the exception must be overruled.[52]

(2) If at the time defendant files his peremptory exception, venue is improper, the filing of the peremptory exception is permissible, and a decision will be reached on the merits of the exception. However, such a filing will constitute a general appearance and will thus waive the right to plead any of the declinatory exceptions except lack of jurisdiction over the subject matter.[53]

(3) If a declinatory exception has been filed, but no decision on it has been rendered, the subsequent filing of the peremptory exception will constitute a general appearance and thus waive the declinatory exception.[54]

(4) If the peremptory exception is filed simultaneously with the declinatory objection to venue, both will be properly before the court and there will be no waiver of the declinatory exception.[55] If the declinatory exception to venue is upheld, the suit must either be dismissed or transferred to a court of proper venue.[56]

While the instant case encourages the maintaining of suits, it would be preferable to limit *Foster v. Breaux* to its facts to avoid further inroads into the Louisiana stage preclusion system of pleading.

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52. This is the narrow holding of *Foster v. Breaux*.

53. *See* LA. CODE CIV. P. art. 925.

54. *See* LA. CODE CIV. P. art. 7. It is not clear whether a court would rule that this is similar to situation (2) and therefore consider that the peremptory exception had been filed at a time when venue was improper and thus reach the merits of the exception or whether a court might hold the waiver of the declinatory exception retroactive to the time of its filing. If the latter occurs, the peremptory exception would also be lost since, at the time the peremptory exception is filed, venue would be proper; *Foster v. Breaux* would then necessitate a decision that prescription had been interrupted by the filing of suit.

55. This is the "as required by law" situation.

56. *See* LA. CODE CIV. P. art. 932.