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Reservation of Rights to Personal Jurisdiction

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RESERVATION OF RIGHTS TO PERSONAL JURISDICTION

Plaintiff sued in city court for specific performance of an alleged sale of jewelry. Service of citation was made on the defendant's mother, with whom he had lived prior to his marriage. The deputy assumed that the Mrs. Sauviac who answered the door was defendant's wife. However, defendant and his wife had established their marital domicile elsewhere. Defendants filed declinatory exceptions of insufficiency of service of process, improper citation, and lack of jurisdiction over the person, along with their answer denying liability. They then filed a reconventional demand reserving their rights under the exceptions. The trial court subsequently overruled the exceptions, holding defendant's reconventional demand an appearance sufficient to waive the declinatory exceptions. Defendants appealed, claiming that they did not, by filing a reconventional demand, place themselves properly before the court so as to waive declinatory exception rights which were specifically reserved. *Held*, the filing of a reconventional demand constitutes an implied waiver of the exception to jurisdiction. An express reservation of rights does not avoid a waiver. Judgment was awarded to defendant on the merits. *Mexic Brother, Inc. v. Sauviac*, 191 So.2d 873 (La. App. 4th Cir. 1966).

Article 5002[1] of the Code of Civil Procedure provides that in city court an answer and all exceptions must be filed simultaneously or the exceptions are waived. The court ruled that this case was not within the provision of article 5002,[2] and that the issue of whether an exception to personal jurisdiction is waived by the filing of a reconventional demand, when rights are specifically reserved, would be decided in light of the general provisions applicable to proceedings in district courts.

Prior to 1936 it was well settled, based on common law prin-

1. Dilatory and declinatory exceptions may be filed simultaneously without a waiver of the objection to personal jurisdiction. LA. CODE OF CIVIL PROCEDURE arts. 925, 928 (1960). No peremptory exception or answer may be filed simultaneously with the declinatory exception urging the objection to personal jurisdiction without a waiver of the declinatory exception. *Id.* art. 7. This same article provides that when a defendant files a declinatory exception urging lack of personal jurisdiction, the filing of a dilatory exception, a peremptory exception, or an answer "when required by law" does not constitute a waiver of the declinatory exception. City courts are one instance in which this is required by law. *Id.* art. 5002: "A defendant shall incorporate in his answer all of the exceptions on which he intends to rely."

2. *Id.* arts. 1003, 1031, 1032. On the basis of these articles, the court decided that a reconventional demand is not an exception, or an answer, or an affirmative defense which is required to be a part of the answer. It is an incidental demand which may be incorporated in the answer.

ciples,[3] that the exception to the citation or to personal jurisdiction was waived if the defendant appeared for any purpose other than to make his exception. This general rule included the filing of dilatory or peremptory exceptions[4] or other pleadings[5] simultaneously with the exception to the jurisdiction.

If an exception to personal jurisdiction is overruled, this objection is not waived by subsequently going to trial on the merits if proper steps are taken to except to the ruling on the jurisdictional issue and to reserve one's rights.[6] This position is in accord with the Federal Rules of Civil Procedure and a majority of states. The theory underlying this rule is that it would be unfair to a defendant who has good defenses both to the jurisdiction and to the merits to require him to waive one for the other, and also, that such a rule avoids multiple trials and appeals.[7]

Even prior to 1936, the contention had been advanced that declinatory exceptions filed simultaneously with other pleadings would be preserved if rights were expressly reserved. But in the 1918 case of *True Tag Paint v. Wellman*,[8] the court held

3. 4 C.J. *Appearance* § 3, at 1316 (1916).

4. State *ex rel.* Brenner v. Noe, 186 La. 102, 171 So. 708 (1936); Martel Syndicate v. Block, 154 La. 869, 98 So. 400 (1923) (exception *ratione personae* was coupled with one *ratione materiae* in same plea); Bank of Selma v. Walker, 130 La. 810, 58 So. 580 (1912); State v. Buck, 46 La. Ann. 656, 15 So. 531 (1894); Standard Indem. Inc. v. Albrought, 81 So.2d 448 (La. App. 1st Cir. 1955); Dauterive v. Sternfels, 164 So. 349 (La. App. 1st Cir. 1935) (peremptory exceptions urging the objection of no cause of action filed with declinatory exception objecting to jurisdiction constitutes a waiver of the objection to jurisdiction); City of New Orleans v. Walker, 23 La. Ann. 803 (1871) (defendant appeared for purpose of objecting to the jurisdiction of the court and at the same time entered a plea of *lis pendens*).

5. Stanley v. Jones, 197 La. 627, 2 So.2d 45 (1941) (defendant's appearance in suit to obtain extension of time within which to plead amounted to a general appearance); Adams v. Ross Amusement Co., 182 La. 252, 161 So.601 (1935) (intervenors who appeared and invoked jurisdiction of the court to be declared owners of the attached property and have attachment dissolved submitted to the court's jurisdiction); Stringfellow v. Nowlin Bros., 157 La. 683, 102 So. 869 (1925); Blanks v. Lephiew, 132 La. 545, 61 So. 615 (1913) (nonresident defendants, by filing a demand in reconvention, subjected themselves to court's jurisdiction); True Tag Paint Co. v. Wellman, 142 La. 1038, 78 So. 109 (1918) (answer to merits filed simultaneously with objection to citation); Heard v. Patton, 27 La. Ann. 542 (1875) (defendant objected to service, but exception contained a plea which amounted to an answer).

6. Snyder v. Davison, 172 La. 274, 134 So. 89 (1931); Davis v. Lewis & Lewis, 60 So.2d 230 (La. App. 1st Cir. 1952); Spearman v. Stover, 170 So. 259 (La. App. 2d Cir. 1936).

7. See Annot., 62 A.L.R.2d 939-41 (1958).

8. 142 La. 1038, 1041, 78 So. 109, 110 (1918), the defendant, reserving rights under the exception, filed an answer. The court ruled: "Defendant stated in the exception that he appeared for the sole purpose of the exception, and in the answer he stated that he filed the answer only on condition that

that a reservation of rights would not effect a deviation from the general rule—rights under the exception were still deemed waived.

The 1936 amendment to the Code of Practice provided that all dilatory and declinatory exceptions were to be pleaded at the same time.[9] *State v. Younger*[10] settled the question of whether rights under the exception to jurisdiction over the person could be reserved, as far as dilatory exceptions were concerned. It was firmly established in the jurisprudence that all dilatory exceptions could be pleaded at once without a waiver resulting, if they were pleaded in the alternative.[11] However, as held in *Garig Transfer v. Harris*,[12] and subsequent cases,[13] failure to plead

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the exception be overruled, and with full reserve of the exception; but the statement that defendant appeared for the sole purpose of the exception was contradicted by the fact that he appeared also for the purpose of the answer, since he did as a matter of fact file the answer. It [the exception] was properly overruled."

9. La. Code of Practice art. 333 (1870), *as amended*, La. Acts 1936, No. 124, § 1: "Hereafter no dilatory exception shall be allowed in any case after a judgment by default has been taken; and in every case they must be pleaded in *limine litis* and at one and the same time; otherwise they shall not be admitted; nor shall such exceptions hereafter be allowed in any answer in any cause."

Id. art. 331 provides that "there are two principal species of exceptions; some are dilatory, others peremptory. Dilatory exceptions are divided into declinatory and those simply called dilatory." The court interpreted the 1936 amendment as including all dilatory exceptions—both declinatory and dilatory.

10. 206 La. 1037, 1041-42, 20 So.2d 305, 306 (1944). The defendant in this case wanted to object to the jurisdiction of the court and plead certain dilatory exceptions. Under prior jurisprudence by doing this he would have waived the declinatory exception. The Supreme Court approved of his pleading the declinatory exception first, and then in the alternative, and with reservation of all rights under the first exception, his pleading of the dilatory exception. The court declared: "An exception to the jurisdiction of the court is a declinatory exception and is one of the two principal species of exceptions designated as dilatory exceptions. . . . All of the exceptions filed being dilatory in their nature, relator was required to plead them at the same time under the provisions of Act 124 of 1936 amending and re-enacting article 333 of the Code of Practice. It is inconceivable that relator should be held as waiving his exception to the jurisdiction of the court when he filed the other exceptions with full reservation of rights and without submitting to the jurisdiction of the court, thus doing no more than he was required to do." For discussion of *State v. Younger*, see McMahon, *The Work of the Louisiana Court for the 1954-1955 Term—Civil Procedure*, 16 LA. L. REV. 361, 364 (1956); Comment, 11 LA. L. REV. 366, 374-75 (1951); Note, 19 TUL. L. REV. 460 (1945).

11. Cameron v. Reserve Ins. Co., 237 La. 433, 111 So.2d 336 (1959); Davis v. Lewis & Lewis, 60 So.2d 230 (La. App. 1st Cir. 1952); Morales v. Falcon, 167 So. 109 (La. App. 1st Cir. 1936), discussed in Comment, 1 LA. L. REV. 174 (1938).

12. 226 La. 117, 132, 75 So.2d 28, 34 (1954): "In the Younger case, unlike the case at bar, the exceptions were filed only in the alternative with full reservation of and without waiving his exception to the jurisdiction of the court—here they were submitted together without reservation."

13. Mitchell v. Gulf States Fin. Corp., 226 La. 1001, 78 So.2d 3 (1955); Dupre v. Consolidated Underwriters, 99 So.2d 522 (La. App. 1st Cir. 1957).

dilatory exceptions in the alternative, though a reservation of rights under the exception to personal jurisdiction was included, meant a waiver of the declinatory exception.

No affirmative statement has been made in the jurisprudence concerning peremptory exceptions, but it appears that peremptory exceptions can be filed simultaneously without a waiver resulting if rights are properly reserved.[14] On the other hand, the court stated affirmatively in *Cameron v. Reserve Insurance Co.*,[15] "[W]e conclude that the third party defendant's filing of an exception to the jurisdiction *ratione personae*[16] with full reservation of his rights and the filing of his answer at the same time did not constitute a waiver of the jurisdiction."[17]

The Code of Civil Procedure specifies certain exceptions to the general principle that the seeking of any relief constitutes a waiver of the exception to personal jurisdiction.[18] The court

14. See Commercial Credit Corp. v. Carrier, 139 So.2d 256, 259 (La. App. 1st Cir. 1962): "In this case the defendant did not plead the exception of no cause or right of action in the alternative with full reservation of his rights. Therefore the exception to the jurisdiction must be overruled."; Standard Indem. Inc. v. Albrought, 81 So.2d 448 (La. App. 1st Cir. 1955) (the declinatory exception objecting to jurisdiction was deemed waived when a peremptory exception was filed with it; but the court emphasized that the peremptory exception was filed without reserving rights under the declinatory exception). Thus it appears that if rights under the exception had been reserved, they would not have been waived.

15. 237 La. 433, 111 So.2d 336 (1959). But see *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Civil Procedure*, 20 LA. L. REV. 298, 302 (1960), for a discussion of Dean McMahon's disagreement with this decision.

16. This was in reality an objection to venue, since the place where the action was to be brought was objected to. However, common law venue seems substantially equivalent to jurisdiction *ratione personae* and these were used interchangeably by the courts prior to the adoption of the new Code of Civil Procedure. See Comment, 12 LA. L. REV. 210 (1952); Note, 12 LA. L. REV. 503 (1952).

Venue and objection to personal jurisdiction are the same for purposes of the present discussion, since they are both urged under the same type of exception. LA. CODE OF CIVIL PROCEDURE art. 925 (1960): "The objections which may be raised through the declinatory exception include, but are not limited to the following: . . . improper venue; the court's lack of jurisdiction over the person of defendant . . . ."

17. Cameron v. Reserve Ins. Co., 237 La. 433, 455, 111 So.2d 336, 344 (1959), on rehearing.

18. LA. CODE OF CIVIL PROCEDURE art. 7 (1960): "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 any relief other than: (1) entry or removal of the name of an attorney or 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. When a defendant files a declinatory exception which includes a prayer for the dismissal of 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 excep-

reasoned in the instant case that since any refernce to a reconventional demand was omitted from article 7 of the Code of Civil Procedure,[19] the filing of one with an exception to the jurisdiction constituted a waiver.[20] The court further declared that the defendant's reservation of rights under the exception did not prevent the waiver from taking place, basing its decision on *True Tag Paint v. Wellman.*[21]

It is submitted that since *True Tag Paint* was decided in 1918, the court should have applied the reasoning of the subsequent cases on the subject.[22] As this is a request for affirmative relief, it differs materially from cases where the matter is one of defense. In federal court,[23] it appears that even a claim for affirmative relief may be joined with an objection of lack of personal jurisdiction without waiving that exception.[24] The result of allowing a reconventional demand to be pleaded with a declinatory exception of lack of personal jurisdiction with rights properly reserved would enable more rapid disposition of litigation and avoid multiple trials and appeals. It is submitted that the ends of justice would have been better served in the instant case by finding no waiver of the exception to jurisdiction over the person when the defendant has filed a reservation of his rights with a subsequent reconventional demand.

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tion or an answer thereto when required by law does not constitute a general appearance."

19. See note 17 *supra.*

20. See note 5 *supra.*

21. See note 8 *supra.*

22. See notes 14 and 15 *supra.*

23. See Annot., 62 A.L.R.2d 939 (1958).

24. See Investors Royalty Co. v. Market Trend Survey, Inc., 206 F.2d 108 (10th Cir. 1953); Keil Lock Co. v. Earle Hardware Mfg. Co., 16 F.R.D. 388 (D.C.N.Y. 1954); Johnson v. Fire Ass'n of Philadelphia, 240 Mo. App. 1187, 225 S.W.2d 370 (1949).