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Louisiana Practice - Filing of Dilatory Exceptions - Waiver of Exception to Jurisdiction Ratione Personae

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of the plaintiff at that time may form the basis of a new petitory action.¹⁵

Although the rule as illustrated by the instant case, that *res judicata* includes that which might have been pleaded in a prior suit, constitutes a departure from the strict notions of *res judicata* as codified in Louisiana law, it is based upon sound reasoning. The reduction of unnecessary and harassing litigation, which is the objective of the doctrine of *res judicata* in any litigation,¹⁶ is even more important in cases involving title to real property. The desirability of providing some measure of stability regarding title to real estate¹⁷ is ample justification for the exception as applied in petitory actions.

David M. Ellison, Jr.

LOUISIANA PRACTICE—FILING OF DILATORY EXCEPTIONS—WAIVER
OF EXCEPTION TO JURISDICTION *Ratione Personae*

Plaintiff proceeded by nonresident attachment to be declared owner of a seized certificate to do business and for damages for loss of profits occasioned by the defendant's breach of contract to deliver the certificate. After denial of his motion to dissolve the attachment, defendant filed exceptions to the jurisdiction *ratione personae* and jurisdiction *ratione materiae*, requesting that these exceptions "be considered in accordance with their number and/or the order in which they appear."¹ On rehearing of the appeal, *held*, affirmed.² Defendant's "exceptions to juris-

15. Numerous common law jurisdictions have held that where a plaintiff has no knowledge or means of knowledge of the omitted items, his ignorance will excuse him, and the judgment in the first action will not bar a subsequent action to recover on the omitted items. See cases collected in Annot., 2 A.L.R. 534 (1919).

16. *Opelousas-St. Landry Securities Co. v. United States*, 66 F.2d 41, 44 (5th Cir. 1933) ("Res judicata is a principle of peace. Under its influence an end is put to controversies."); *Speakman v. Bernstein*, 59 F.2d 523 (5th Cir. 1932) (general welfare and interests of state require that there be an end to litigation); *State v. American Sugar Refining Co.*, 108 La. 603, 32 So. 965 (1902) (time should come when all litigation should cease).

17. Our law has traditionally sought to afford the highest protection to innocent third parties who purchase land, relying upon a recorded transfer or a final judicial determination of title. See *Loranger v. Citizens' National Bank*, 162 La. 1054, 111 So. 418 (1927); *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909); *Brown v. Johnson*, 11 So.2d 713 (La. App. 1942).

1. Transcript of Record, p. 47, *Garig Transfer, Inc. v. Harris*, 226 La. 117, 75 So.2d 28 (1954).

2. On the first hearing, the court held that the defendant's submission of the two exceptions at the same time constituted a waiver of the exception to jurisdiction *ratione personae* and cited cases decided prior to the

diction *ratione personae* and *ratione materiae* were submitted together, without reservation,"³ and this act constituted a waiver of the exception to jurisdiction *ratione personae*. *Garig Transfer, Inc. v. Harris*, 226 La. 117, 75 So.2d 28 (1954).

Under article 93 of the Code of Practice the court has held that pleading to the merits of a case, without exception to the jurisdiction of the court *ratione personae*, constitutes a waiver of the right to plead that exception.⁴ Article 333 of the Code of Practice was amended in 1936⁵ to provide that all dilatory exceptions, among which is the declinatory exception to the jurisdiction *ratione personae*, "must be pleaded in limine litis and at one and the same time."⁶ Before the Supreme Court interpreted the amended article, two court of appeal cases dealt with the effect of the 1936 act on the exception to jurisdiction *ratione personae*. The exact wording of the exception which was sustained in *Schultz v. Long Island Machinery and Equipment Co.*⁷ is set forth in the opinion in that case. Defendant's exception embodied a reference to the impropriety of the form of the citation, but the court said that the fact that the plea to jurisdiction was insisted upon, tried, and passed upon without consideration or trial of the alternative plea,⁸ fully preserved the exceptor's rights under the plea to the jurisdiction. In *Browne v. Gajan*⁹ the court of appeal again had occasion to consider the effect of the 1936 act and sustained an exception to jurisdiction *ratione personae*. The court's description of the documents filed shows that this exception and another exception were filed together, but in the alter-

1936 amendment of article 333 of the Code of Practice requiring submission of all declinatory exceptions at the same time. Rehearing was granted because defendant urged the effect of act 124 of 1936 and insisted that he had complied with the requirements of the act and *State v. Younger*, 206 La. 1037, 20 So.2d 305 (1944), by filing his exceptions in the alternative. In view of the facts that the court concurred with the finding of the district judge that the court had jurisdiction of the *res*, the certificate, which was sufficient foundation for the declaration of ownership of the certificate, and, further, that the plea for damages was dismissed as of nonsuit, a determination of the validity of the exception to the jurisdiction *ratione personae* may not have been essential to the decision of this case. Nevertheless, because the court granted a rehearing to consider the alleged error of law in the original opinion this case was felt to be worthy of consideration.

3. *Garig Transfer, Inc. v. Harris*, 75 So.2d 28, 34 (La. 1954).

4. See, e.g., *State ex rel. Brenner v. Noe*, 186 La. 102, 171 So. 708 (1936) and other cases cited at 1 MCMAHON, LOUISIANA PRACTICE 303, nn. 48, 49 (1939).

5. La. Acts 1936, No. 124, p. 386.

6. Art. 333, LA. CODE OF PRACTICE OF 1870.

7. 173 So. 569, 570 (La. App. 1937).

8. The trial court had held that the reference to defective citation was not an exception. The Supreme Court neither affirmed nor reversed that holding specifically, but referred to the reference as an "alternative plea."

9. 173 So. 485, 487 (La. App. 1937).

native. The court emphasized that, although the two separate documents were filed simultaneously, the exception to jurisdiction *ratione personae* was filed solely for that purpose and without submitting to the jurisdiction, and that in the accompanying exception, exceptor expressly denied the waiver or abandonment of the other exception filed. Both of these cases were noted without comment by the Supreme Court in the instant case.¹⁰ In *State v. Younger*¹¹ the Supreme Court displayed the same liberality which was shown in the decisions of the courts of appeal. The court record in the *Younger* case shows that the defendant's first sentence declined jurisdiction *ratione personae*, giving the grounds therefor.¹² Immediately following the single exception, the "exceptor pray[ed] that this exception be maintained," and introduced his additional exceptions with this paragraph: "And, now, with full reservation of the foregoing exception and without in any way waiving the same, but solely to comply with the requirements of Act 124 of 1936, exceptor presents, in the alternative, the following additional exceptions: . . ."¹³ The court approved the use of this language and it has become the accepted method of pleading the declinatory exception to jurisdiction *ratione personae* and all other declinatory and dilatory exceptions "at the same time,"¹⁴ without waiving the former.

If the three cases discussed above may be said to embody the pleading requirements for filing dilatory exceptions in the alternative, it is interesting to compare the language of the exceptions used in the instant case:

"Now into Court . . . comes [exceptor] appearing herein solely for the purpose of *these exceptions and reserving all rights, particularly to answer*, and requesting that the exceptions be considered in accordance with their number and/or the order in which they appear excepts:

"(1) To the jurisdiction *ratione personae*.

"(2) To the jurisdiction *ratione materiae*.

10. 75 So.2d 28, 34 (La. 1954).

11. 206 La. 1037, 20 So.2d 305 (1944).

12. "Now . . . comes [exceptor's name and address] sought to be made defendant herein, who declines the jurisdiction of this Honorable Court on the ground that his domicile is in the Parish of . . ." Transcript of Record, p. 1, exceptions, *State v. Younger*, 206 La. 1037, 20 So.2d 305 (1944).

13. *Ibid.*

14. See LA. STATE BAR ASS'N, LOUISIANA FORMULARY ANNOTATED 83 (1951).

"Wherefore, exceptor prays that *these exceptions* be maintained

"And for all general and equitable relief.

"And now without in any manner waiving the benefit of the *foregoing exceptions* [defendant here urged several additional exceptions]." ¹⁵ (Emphasis added.)

The court stated that the first two exceptions "were submitted together, without reservation, and with the prayer that these exceptions be maintained" ¹⁶ However, in its statement of facts the court noted that defendant, in filing the additional exceptions, had reserved his rights under the exceptions to jurisdiction. Apparently, the court felt that the reservation mentioned in its statement of facts applied to the first two exceptions taken together, and that it did not identify the exception to the jurisdiction *ratione personae* with the requisite particularity. This view is supported by the fact that the exceptor filed his additional exceptions without "waiving the benefit of the *foregoing exceptions*." The conclusion reached by the court may find additional support in the fact that by referring to "these exceptions," the exceptor was treating them conjunctively and alternatively only with reference to the subsequent exceptions. The joinder of the two exceptions was apparently viewed as the fatal "filing together," although the exceptor's intention to present the exceptions alternatively and disjunctively could have been inferred from his request that they "be considered in accordance with their number and/or the order in which they appear." ¹⁷

Whether these strict and highly technical requirements of pleading are justifiable in order to preserve the legal fiction which permits a defendant to come into court to resist suit without submitting to jurisdiction *ratione personae* may be debatable. Nevertheless, that the court will carefully scrutinize pleadings to detect a waiver is a fact with which the practitioner must deal. In the light of the instant decision, the exceptor may find a thorough review of the *Younger, Browne* and *Schultz* cases a prerequisite to the drafting of a waiver-proof exception to jurisdiction *ratione personae*.

Mary Ellen Caldwell

15. Transcript of Record, p. 47, *Garig Transfer, Inc. v. Harris*, 226 La. 117, 75 So.2d 28 (1954).

16. 75 So.2d 28, 34 (La. 1954).

17. See note 15 *supra*.