Prescription - Continuing Tort - Burden of Apportionment

J. Luther Jordan Jr.

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and in the action for indemnity he would be entitled to complete relitigation of all issues.\textsuperscript{17}

The court seemed impressed by the fact that no prior judgment had been rendered against the claimant and indicated that therefore his payment to the widow had been made without compulsion. Whether the compromise settlement was made under legal compulsion or voluntarily is a matter to be decided in the action for indemnity. In most jurisdictions it is incumbent upon the plaintiff to prove that his compromise was fair and reasonable and that he was legally liable to the injured person,\textsuperscript{18} but in at least one state the compromise itself is prima facie evidence of the fairness of the settlement and of the liability of the plaintiff to the payee.\textsuperscript{19} In either case the question of compulsion is an issue to be litigated and determined on the merits, and the absence of prior judgment against the plaintiff should not be a bar to the action.

It is submitted that the decision in Winford v. Bullock finds no support in the jurisprudence of Louisiana and is a departure from the general rule of other states and of the federal system.

A. M. POSNER

\textbf{Prescription—Continuing Tort—Burden of Apportionment—}

Plaintiff sued for damages to his land caused by salt water, waste oil and other refuse which flowed intermittently from the defendant's oil wells for four years. Defendant's plea of one year prescription under Article 3536 was sustained, the court being convinced that a greater portion of the damages occurred long prior to the period fixed for prescription. The opinion is interesting because of a dictum statement, the burden of proof rests on plaintiff to show what part of the damage was sustained after the period fixed for prescription. \textit{Parro v. Fifteen Oil Company}, 26 So. (2d) 30 (La. App. 1946).

\begin{itemize}
\item \textsuperscript{17} City of Wabasha v. Southworth, 54 Minn. 79, 55 N.W. 818 (1893); Popkin Bros., Inc. v. Volk's Tire Co., 20 N.J. Misc. 1, 23 A.(2d) 182 (1941); Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N.E.(2d) 790 (1944); Aberdeen Constr. Co. v. City of Aberdeen, 83 Wash. 429, 147 Pac. 2 (1915).
\item \textsuperscript{18} Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647 (1875); Inhabitants of Swansea v. Chace, 82 Mass. 303 (1859); Frank Martz Coach Co., Inc. v. Hudson Bus Transportation Co., Inc., 133 N.J.L. 342, 44 A.(2d) 488 (1945); Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N.E.(2d) 790 (1944); Aberdeen Constr. Co. v. City of Aberdeen, 83 Wash. 429, 147 Pac. 2 (1915).
\item \textsuperscript{19} See Miles v. Southeastern Motor Truck Lines, Inc., 295 Ky. 156, 173 S.W.(2d) 990 (1943).
\item 1. Art. 3538, La. Civil Code of 1870.
\end{itemize}
Torts prescribe in one year. Prescription, however, has troubled the courts when the tortious acts are of a continuing nature. The problem is susceptible to several different approaches. A few courts adopt the theory that the damage sustained is one single injury and refuse to let it be subdivided into its yearly quotients. Approval might lead to either of two opposed conclusions: First, one may say prescription is suspended until the continuous tort is abated, the result being the plaintiff recovers for all the damages he has sustained. Infrequently, this position seems to have been taken by the Louisiana courts. Should the plaintiff be suing for an injunction, this would seem logical, provided the plaintiff had not been guilty of laches. However, should the suit be for damages, it is difficult to justify such a holding, as the Civil Code specifically enumerates the causes which suspend the course of prescription. Second, the courts may hold the action is prescribed one year from the time the wrongful conduct began. The effect of this is that the plaintiff recovers nothing unless he brings his suit within one year. Though Louisiana seems never to have chosen this position, there is language in a few decisions in other jurisdictions which would support such an attitude. The reasons advanced for such decisions do not seem sound.

Louisiana courts, as well as most other state courts, will generally permit the damage resulting from a continuing tort to be apportioned. In these cases the problem of who has to prove when the damage occurred is of utmost importance. In most Louisiana cases the plaintiff has the burden. The justification often advanced is that when one of the parties to a suit has more means of knowledge concerning a matter to be proved than the other, the onus is on him. This position, however, has not been consistently adhered to, and it appears to be inconsistent with the usual attitude toward prescription. Generally he who pleads prescription must prove all the facts necessary to sustain his plea.

2. A series of acts set on foot by a single impulse and operated by an intermittent force, no matter how long a time it may occupy.
6. The Texas court took the view that tort was a permanent one rather than a continuing one.
NOTES

If the act committed were a single tort, it is clear the defendant would have to support his plea of prescription by proving the act was committed over one year before the suit was brought. Similarly, if the plaintiff were suing for damages inflicted by a series of separate torts, some, but not all, of which were committed more than a year prior to the date of institution of suit, it would be incumbent on defendants to show which of these torts were prescribed. Therefore, it follows that in cases involving continuing wrongful conduct, the defendant should prove what part of the damage was sustained prior to the period fixed for prescription. It has been suggested that the practice of requiring plaintiff, rather than defendant, to apportion the damage in order to avoid the plea of prescription is attributable to an erroneous interpretation of the misleading language of the 1902 amendment to Article 3537.9

J. LUTHER JORDAN, JR.

SALES—LITIGIOUS REDEMPTION9—Duncan R. Crain filed suit for partition by licitation, alleging himself to be owner of 32/33 interest in a tract of land. Defendants, plaintiff's children, admitted his right to a partition, but claimed that he was owner of only 135/264 interest and prayed that partition be in kind. After issue had been joined, three other parties, hereinafter referred to as plaintiffs, were substituted as parties plaintiff. They had acquired all of Duncan Crain's interest in the land by deed after the suit had commenced, pursuant to an option purchased and recorded prior to filing of Duncan Crain's petition.

At the trial, defendants tendered to the plaintiff the amount the latter had paid for Crain's interest, and asked that they be declared owners of plaintiffs' interest under Article 2652.2 The trial court held that defendants had the right to acquire all of the plaintiffs' interest by tendering the amount paid by them to Crain.

1. For a survey of the subject of litigious rights see Comments, The Transfer of Litigious Rights in Louisiana Civil Law (1939) 1 LOUISIANA LAW REVIEW 593 and 518, and The Sale of a Litigious Right (1939) 13 Tulane L. Rev. 448.
2. Art. 2652, La. Civil Code of 1870. He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with interest from its date.