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could have been liable only by a subsequent agreement, since his liability within the scope of his original suretyship contract never arose. The *Motor Sales* case was also cited as authority for the proposition that the Deficiency Judgment Act is not for the protection of "parties secondarily or otherwise obligated for the indebtedness."[30] Be this as it may the court seems to overlook the fact that the surety in the instant case was being sued as a primary debtor, liable *in solido* with the mortgage debtor. Being directly responsible for the debt, the surety bound *in solido* has the same interest in having the mortgaged property appraised as does the real debtor, and the Deficiency Judgment Act ought to afford him protection. If on the other hand the surety was by contract not bound *in solido*, then it would seem that the very definition of suretyship as an *accessory* obligation would have precluded his liability. It is inconceivable that there can be an accessory obligation to secure the performance of an extinguished principal obligation.

J. Bennett Johnston, Jr.

WORKMEN'S COMPENSATION—PRESCRIPTION—OCCUPATIONAL DISEASES

Plaintiff's employment in defendant's paper mill required him to work "constantly in contact with chemicals and water."[1] He contracted blastomycosis, a form of dermatosis, at some time prior to March 7, 1952, at which time he filed a claim with defendant's health insurer, stating that the cause of his disability was blastomycosis. By April 1, 1952, ulcers and sores had begun to appear on plaintiff's body. When treatment by several doctors failed to alleviate his condition, plaintiff, "due to the inroads of the disease,"[2] was forced to stop working on August 15, 1952. When his bones and lungs became affected, he reported to a veterans hospital where he was hospitalized from January 12, 1953, to April 29, 1953. Plaintiff did not learn of any connection between his disease and his employment, however, until July 13, 1953, when he consulted a doctor who expressed the opinion that such a connection existed. On July 29, 1953, he instituted this suit for workmen's compensation allegedly due by reason of

30. The Farmerville Bank v. Scheen, 76 So.2d 581, 586 (La. App. 1954).
1. 76 So.2d 621, 622 (La. App. 1954).
2. *Ibid.*

his contraction of an occupational disease. Defendant interposed an exception based upon the four-month prescription applicable to claims arising from the contraction of occupational diseases. The trial court overruled this exception but dismissed plaintiff's suit on the merits. On appeal, *held*, affirmed on the merits. The trial court correctly overruled the exception of prescription. The four-month prescription[4] did not begin to run until plaintiff "became aware [that] the disease was related to his employment,"[5] because not until then had the disease "manifested itself" within the meaning of the occupational disease amendment.[6] *Frisby v. International Paper Co.*, 76 So.2d 621 (La. App. 1954).

This is the first case in which an appellate court has interpreted the prescription provisions of the 1952 occupational disease amendment to the Workmen's Compensation Law. There are numerous decisions, however, interpreting a similar provision[7] concerning the prescription of claims arising from latent injuries caused by accidents.[8] The only relevant difference between these two statutory provisions is that in the case of occupational diseases, the four-month prescription dates from the time that the disease "manifests itself," while the one-year latent injury prescription commences to run from the date that the "injury develops." The older decisions suggested a relatively strict construction of the latter provision, holding that an injury "developed" within the meaning of the act as soon as pain resulted or physical symptoms appeared.[9] A new approach to the question of when this prescription begins to run was taken in *Morgan v. Rust Engineering Co.*,[10] decided in 1951 by a court of appeal. In that case the plaintiff, relying on an incorrect diagnosis by the defendant's doctor of an injury as (non-accidental) prostatitis, did not immediately realize that he had suffered an

3. Recovery was denied because plaintiff failed to "prove by an overwhelming preponderance of the evidence" as required by LA. R.S. 23:1031.1(B) (1950) that his disease was contracted in the course of his employment.

4. Although the periods referred to in this note are technically "peremption" rather than "prescription" periods, Brister v. Wray Dickinson Co., 183 La. 562, 164 So. 415 (1935), they will be referred to herein as "prescription" periods.

5. 76 So.2d 621, 623 (La. App. 1954).

6. LA. R.S. 23:1031.1 (1950).

7. LA. R.S. 23:1209 (1950).

8. *Ibid.* This prescription is applicable "where the injury does not result at the time of, or develop immediately after, the accident."

9. See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 384, at 491 (1951); Tate, *Prescription of Latent Injuries*, 12 LOUISIANA LAW REVIEW 73 (1951).

10. 52 So.2d 86 (La. App. 1951).

accidental injury, even though he suffered pain at the time of and subsequent to the accident. Like the plaintiff in the instant case, the plaintiff in the *Morgan* case was not aware of any connection between his employment and his condition until so informed by a physician. Suit was instituted more than one year after the accident but less than one year after plaintiff learned that his injury was related to his employment. The court allowed compensation but based its decision on the narrow ground that the misdiagnosis had been made by the *defendant's* doctor. In 1952, the Supreme Court decided the leading case of *Mottet v. Libbey-Owens-Ford Glass Co.*[11] In that case a workman experienced "very acute pain"[12] at the time that his back was injured in January of 1946. On the strength of his doctor's incorrect opinion that his condition was caused by neuritis, plaintiff continued his regular work. In September of 1946 the plaintiff's injury was correctly diagnosed as a ruptured disc, but he continued light work until March 11, 1947, at which time the pain in his back forced him to discontinue working altogether. He filed suit in March of 1947. The Supreme Court construed the Workmen's Compensation Law liberally and allowed recovery, holding that prescription had not begun to run until the plaintiff was forced to cease work, even though he was aware prior to that time of the cause and nature of his injury. In a recent case decided by a court of appeal, *Johnson v. Cabot Carbon Co.*,[13] the plaintiff experienced a low back pain on December 12, 1951. Plaintiff continued to work despite the pain until May 5, 1952. He brought suit on December 17, 1952. The court rejected plaintiff's contention that his injury had been misdiagnosed as (nonaccidental) prostatitis and neuritis and sustained a defense based upon the one-year accidental injury prescription. In a lengthy opinion that is not entirely clear, the court distinguished the *Mottet* case by stating that in the case before it, "the plaintiff was examined and treated for a lumbosacral sprain immediately or shortly after the happening of the accident."[14]

In the instant case, which involved the prescription of claims arising from the contraction of occupational diseases, defendant contended that plaintiff's disease "manifested itself" more than four months prior to bringing suit and that plaintiff's claim was therefore barred by the four-month occupational disease pre-

11. 220 La. 653, 57 So.2d 218 (1952).
12. 57 So.2d 218, 219 (La. App. 1952).
13. 75 So.2d 389 (La. App. 1954), *cert. granted, ibid.*, Jan. 10, 1955.
14. 75 So.2d 389, 402 (La. App. 1954).

scription. It was shown that plaintiff's disease was correctly diagnosed more than four months prior to the institution of suit. The court, however, alluded to the *Mottet* case as an example of liberal statutory construction and, holding that the four-month prescription had not run, said: "Manifestly, knowledge of the diagnosis but without knowledge or reasonable information that his disease was related to his employment . . . could not enable the plaintiff to avail himself of the rights granted under the act."[15] The defendant also pleaded the one-year prescription applicable in the case of accidental injuries, apparently regarding this as an additional prescriptive period for occupational diseases. Citing the *Mottet* case as authority, the court rejected this defense, stating that that prescription had not begun to run until August 15, 1952, when plaintiff was forced by the disease to cease work.

It seems that the legislature, by providing a prescriptive period of four months for occupational disease claims, intended this to be the only prescription applicable to occupational diseases. It is therefore difficult to understand why the court did not dispose of the exception based upon the one-year accidental injury prescription by holding it inapplicable to the case. It is interesting to note that in applying this prescription, the court held that it had not started running until plaintiff discontinued working. This was at least one year prior to the date of plaintiff's realization that his disease was related to his employment, on which date the court held that the four-month occupational disease prescription began to run.

It is submitted that the result of the decision with regard to the commencement of the four-month prescription is sound. As a practical matter, the diseased workman cannot claim workmen's compensation until such time as his illness is so diagnosed as to suggest to him that it may be related to his employment. However, the policy implicit in the instant case of allowing prescription to run only from that time creates the problem of determining when a worker should be placed on notice of the possibility of a claim so as to start prescription running. Although an employee should not be allowed to enlarge the prescription period by his failure to seek medical diagnosis, he should not be required to proceed on a "mere suspicion"[16] that

15. 76 So.2d 621, 623 (La. App. 1954).
16. *Cf.* St. Mary's Hospital v. Industrial Commission, 257 Wis. 411, 43 N.W.2d 465 (Wis. 1950).

he has a compensable claim. Nor should he be held to have greater skill in diagnosing or recognizing the early symptoms of a progressive condition than any other layman.[17] Certainly, if his injury or disease has been diagnosed as non-industrial by either his employer's physician[18] or his own,[19] he should not be expected to ignore his medical advisers and file a claim anyway.[20] It is hoped that the present trend in the decisions will culminate in Louisiana's adoption of the majority view that prescription does not begin to run until the claimant should, as a reasonable man, recognize both the nature and employment connection of his disease or injury.[21]

J. Bennett Johnston, Jr.

17. *Cf.* Consolidated Coal Co. v. Porter, 64 A.2d 715 (Md. 1949) (silicosis); Middle River Sanatorium v. Industrial Commission, 224 Wis. 536, 272 N.W. 483 (1937) (tuberculosis); 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.42, at 262 (1952).

18. Travelers' Ins. Co. v. Mabry, 179 F.2d 216 (5th Cir. 1950); Morgan v, Rust Engineering Co., 52 So.2d 86 (La. App. 1951).

19. Great American Indemnity Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949).

20. 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.41, at 262 (1952). See Great American Indemnity Co. v. Britton, 179 F.2d 60, 62 (D.C. Cir. 1949), where it was observed: "We cannot place a premium on the filing of claims which fly in the face of professional advice and ethical standards."

21. See 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.41, at 260, n. 25 (1952) for extensive citation of cases.