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plied. The issues of inscription and reinscription of the claim, as well as the prescription of the right in rem and the right in personam, have been discussed in prior issues of this *Review*.²³

PRESCRIPTION

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ACQUISITIVE PRESCRIPTION

*Lincoln Parish School Board v. Ruston College*¹ presented the question (first impression) of whether a school board could acquire title to property by thirty-year prescription. In 1887, Robert Russ donated a tract of land to Ruston College, which used the property until it ceased functioning in 1895. Then there was a gap not explained in the evidence, following which the property was used as a public school site until the building burned in 1910. The school board then called a successful election to raise money for the construction of a new building, which became Ruston High School. The evidence establishes a continued uninterrupted possession of the property by the school board as owner from 1911.

The trial court held in favor of the school board, and the court of appeal affirmed. Several Louisiana and other civil law authorities are appropriately cited to show that a school board in Louisiana is a body corporate created by the state vested with express power to acquire and alienate property as well as the right to sue and be sued. The right to acquire land by prescription is necessarily included in this power properly vested in a properly created legal person; nor is there any prohibition to exclude such a right. The argument that a school board possesses only limited or restrictive powers is not apposite here because the question at issue is within the granted powers.

One of the policy reasons underlying the civil law institution of acquisitive prescription is to confirm the ownership of a

23. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Security Devices*, 24 LA. L. REV. 205, 208-10 (1964); Note, 24 LA. L. REV. 943 (1964).

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1. 162 So.2d 419 (La. App. 2d Cir. 1964), *writs denied*, 246 La. 355, 164 So.2d 354 (1964).

possessor whose title deed may be lost.² It is therefore of comparative interest to know that in the common law on adverse possession there is a similar idea in the "presumption of a lost grant." However, the extensive quotations from *American Jurisprudence* and *Corpus Juris* may give the impression that these sources are authoritative bases for the decision in the instant case. This is unnecessary and could be misleading.

It is of course correct that in the civil law ownership by acquisitive prescription may be based upon a possession which started by virtue of a written title or grant which cannot be located, but it is not historically correct to say that "the word 'prescription' is from the Latin 'pre' and 'scriptio,' meaning a prior writing."³ Apart from overlooking the use of the same word in liberative prescription, the term is really an abbreviation for the "*praescriptis verbis*" in the formulary procedure of the Roman law, or for the Latin expressions "*praescriptio longi temporis*" and "*praescriptio longissimi temporis*."⁴ By means of certain words written in front of the regular formula addressed to the *iudex*, the passage of time together with certain conditions was given the effect of changing what would otherwise be the result of the case.⁵

Possession and Tacking

The concept of possession which is essential for acquisitive prescription is a difficult one and often tricky. When the situation is further complicated by a question of tacking, the problem is even more difficult. However, the Civil Code and the French commentators, together with the Louisiana jurisprudence, have established a goodly number of rules and guide lines. One of these is the basic code provision which limits the tacking of possession only to that of one's author in title. In the case of

2. 1 PLANIOL, CIVIL LAW TREATISE (An English translation by the Louisiana Law Institute) no. 2645 (1959) [hereinafter cited as PLANIOL], cited in principal case 162 So.2d at 423.

3. 162 So.2d at 423.

4. 1 PLANIOL no. 2644.

5. RADIN, ROMAN LAW 363-64 (1927): "To facilitate procedure, the question of ten years' possession was pleaded as a *praescriptio* (prescription), instead of as an exception . . . ; that is, it appeared in the *formula*, even before the nomination of the *iudex*. The *praescriptio longi temporis* soon became the commonest of the prescriptions, and the term 'prescription' itself became the practical equivalent of usucapion. It is interesting to note that, when the term was taken over in the Middle Ages by English lawyers, it was falsely etymologized, and created the fiction of a 'lost grant,' since the word *prae-scriptio* seems to mean, literally, an antecedent writing."

Noel v. Jumonville Pipe & Machinery Co.,⁶ the Supreme Court reached a decision which might have reflected what some of the parties believed to be the situation but which did great injustice to the established rules of Louisiana law. As to this property, the case is *res judicata*; it is to be hoped, however, that the decision will be limited to its own facts and that no other applications or extensions will be made in the future.

The facts of the *Noel* case are not unduly complicated. A man actually possessed thirty-eight acres in excess of the plantation which he owned. At his death, the plantation was inherited by his wife and children, one son continuing the physical possession of the entire tract. This son then acquired by donation and purchase the other heirs' shares of the plantation. In all these transactions, the property description is of the original plantation with no indication of the extra thirty-eight acres. To hold, as the Supreme Court did, that there can be tacking of possession without the juridical link of an author *in title* is stepping out of bounds, and the decision of the majority has already been subjected to careful and well-directed criticism.⁷ The majority may have been moved by what appeared to be the understandings (or misunderstandings) of the parties, but the decision was not in accordance with the law and should not be repeated.

It does not follow that the record owner has been unduly deprived of his property; there might be other bases on which acquisitive prescription or the action in boundary⁸ could succeed against them. Fortunately, one case does not make law in Louisiana, and the harm to be avoided for the future is not to let this decision create a tear in the fabric of the law.

Good Faith and Just Title

In *Monsanto Chemical Co. v. Jones*,⁹ a married woman made an authentic act of sale of community property with her marital status showing in the deed and with the knowledge of her hus-

See also BUCKLAND, A MANUAL OF ROMAN LAW 131, 392 (1925); GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 1046 (6th ed. 1918).

6. 245 La. 324, 158 So. 2d 179 (1963), reversing 148 So. 2d 891 (La. App. 1st Cir. 1962).

7. Dissenting opinions in 245 La. at 347 and 354, 158 So. 2d at 188 and 190; Notes, 24 LA. L. REV. 888 (1964), 38 TUL. L. REV. 575 (1964).

8. Distinguish privity of possession for boundary action under LA. CIVIL CODE art. 852, and privity of title under art. 3494.

9. 160 So. 2d 428 (La. App. 2d Cir. 1964).

band but without his participation in the deed. Of course, the conveyance was a nullity, but since it was regular on its face the court held that it constituted a "just title" for the ten-year acquisitive prescription. In the concentration of the case on whether this deed was a just title, not enough attention was given to another essential element, namely, good faith. With reference to this element, the court stated:

"There is no evidence in the record that Eudoxie Jones was not in good faith in acquiring the property. She acquired the land from the person she believed to be the owner of the property. She made no examination of the records but accepted the deed from Martha Goldsmith at 'face value.'"¹⁰

However, since the deed showed the vendor to be a married woman, and since ignorance of the law is no excuse, it may be questioned whether the transferee was legally in good faith.

In *Menefee v. Pipes*,¹¹ after concluding that a certain conveyance was a simulation, the court held that a simulated deed cannot constitute a just title for purposes of the ten-year acquisitive prescription.

LIBERATIVE PRESCRIPTION

Many of the practical problems concerning liberative prescription fall into three categories: (a) the classification of the nature of the cause of action; (b) the starting point for the period of prescription; and (c) interference with the running of time — as do the cases herein discussed.

Nature of the Cause of Action

There continues to be dispute concerning the classification (for purposes of liberative prescription) of the cause of action against a physician for malpractice — is it *ex delicto* (one-year prescription) or *ex contractu* (ten years)? In last year's Symposium, this problem was discussed at some length¹² in the course of some critical observations on the decision in *Phelps v. Donaldson*.¹³ It is not meaningful, nor is it readily practical,

10. *Id.* at 431.

11. 159 So. 2d 439 (La. App. 2d Cir. 1964), *writ denied*, 245 La. 798, 161 So. 2d 276 (1964).

12. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Prescription*, 24 LA. L. REV. 213-14 (1964).

13. 243 La. 1118, 150 So. 2d 35 (1963), *affirming* 142 So. 2d 585 (La. App. 3d Cir. 1962).

to distinguish the malpractice in an ordinary situation from that where there is an expressed or implied agreement to warrant the success of the services. Nor can any legal or policy considerations support the distinction between the liberative prescription of three years against the doctor's claim for ordinary fees and that of ten years if there has been a "contract" for the performance of his services.¹⁴ A simple solution to extricate the state of our law from this unnecessary multiplication of confusion is to adhere to the civil law technique of reverting to the original authoritative sources and classify in the same category all actions arising out of the physician-patient relationship for which Civil Code article 3538 provides a three-year liberative prescription.

All these comments and observations are again applicable to the new decision on the same problem in *Brooks v. Robinson*,¹⁵ where the court reached a result opposite to the *Phelps* decision by adopting the distinction made, and giving it a new twist by finding in the facts an instance of "non-performance" of what the doctor should have done (*ex contractu*) as distinguished from "unskillful performance" (*ex delicto*). When a doctor receives X-rays which show the possibility of active pulmonary disease, and he takes no action to treat or even to notify the patient, it is tweedle-dum or tweedle-dee to classify his malpractice as *non-performance* or *unskillful performance* for purposes of liberative prescription.

In two cases, the actions were classified as suits in redhibition, and the liberative prescription of one year was applied.¹⁶ In *Lewis v. Republic Supply Co.*,¹⁷ the principal plaintiff claimed \$23,000.00 damages caused by the breaking of a defective cable and the defendant as third-party plaintiff sued his supplier and the manufacturer. The action of the third party plaintiff was classified as an action in redhibition. In *Bayhi v. S. H. Kress & Co.*,¹⁸ the same classification was given to a claim for damages which resulted from the explosion of a bottle of nail polish. According to Civil Code article 2520, the redhibitory action is primarily for cancellation of a sale on account of a latent defect.

14. See *Gore v. Veith*, 156 So. 823 (La. App. Orl. Cir. 1934).

15. 163 So. 2d 186 (La. App. 4th Cir. 1964), *writ denied*, 246 La. 583, 165 So. 2d 481 (1964).

16. LA. CIVIL CODE arts. 2534, 2545, 2546 (1870).

17. 155 So. 2d 200 (La. App. 1st Cir. 1963).

18. 158 So. 2d 270 (La. App. 4th Cir. 1963).

An action exclusively for damages caused by a latent defect would seem to be a horse of a different color.

The classification of actions "on accounts" is often a troublesome matter because the word "account" is used in different legal contexts. In *Succession of Jones*,¹⁹ the court properly refused to apply the three-year prescription of article 3538, for accounts of merchants and retailers and the like, to an action against an executrix for an accounting of her administration.

Starting Point for Liberative Prescription

The underlying theory of liberative prescription is that a creditor loses the right to enforce a claim when he has remained inactive for a certain period during which he could have taken action. When a debt is represented by a promissory note, payable in monthly installments, there is a separate maturity date for each installment upon default of which the creditor could take immediate action against the debtor. Consequently, the creditor's failure to act runs from the time that he could have acted, and the liberative prescription runs against each installment from the date of its default. This is what happened in *Anthon v. Knox*²⁰ despite the contention that prescription should not begin to run until after the due date of the last installment, with the result that prescription was held to have been completed against some installments but not against others of the same note.

A variation of this problem occurred in the case of *Dassau v. Seary*,²¹ where the promissory note contained an automatic acceleration clause which made all the installments due and exigible upon the default in payment of any one. The due date of this first defaulted payment was the starting point for liberative prescription against the full balance due. This *automatic* acceleration clause is to be distinguished from the *elective* acceleration clause, which gives the creditor an option or right to accelerate the maturity of the balance when there has been a default in one payment. This latter type of situation existed in *Anthon v. Knox*, and since the option to accelerate had not been exercised, liberative prescription had completely run on some installments but not on others. Considering the matter of

19. 155 So.2d 454 (La. App. 2d Cir. 1963).

20. 155 So.2d 53 (La. App. 1st Cir. 1963).

21. 158 So.2d 243 (La. App. 4th Cir. 1963).

liberative prescription as well as the exigibility of the debt, an acceleration clause can be a two-edged instrument, albeit much sharper on one edge than the other.

A problem in fixing the starting point for liberative prescription against an action in damages sometimes lies in the distinction between the case where the operating cause of the damage is continuous and the situation where an original single cause results in damages which are progressive. In *Deaton v. Causey*,²² the excavation and grading work done on one property created a change in the natural drainage of surface water, and this drainage brought on a constant washing to the neighboring property. This operating cause of damage was continuous so that the trial court's sustaining of the exception of no cause of action on a plea of prescription was overruled, and the case was remanded for a hearing on the merits and the prescription issue.

The liberative prescription against the action in redhibition is one year from the date of the sale or from the vendee's discovery of the vice.²³ In *Brown v. Dauzat*,²⁴ where the contractor-vendor corrected several defects in a newly-constructed house, the court held that the prescription against the vendee did not commence until the vendor abandoned attempts to repair any more defects. Two different rationales are given: one, that until the seller abandons his efforts to remedy the defects, the buyer is not definitely put on notice that a redhibitory suit will be necessary; the other, that the continual repair efforts constitute repeated interruptions, and that the prescription only begins to run again upon the discovery of the defects in the repair work. The difference is not significant in the present case, but would be important for the distinction between the two ways in which the exercise of a right can be lost by the lapse of time. Some rights are lost by the passage of the specified time which runs without the possibility of any interference; this is sometimes called a forfeiture (or a preemption, or a fixed delay) rather than a prescription. The decision under discussion is predicated upon the assumption that the redhibitory action

22. 154 So. 2d 267 (La. App. 2d Cir. 1963).

23. LA. CIVIL CODE arts. 2534, 2546 (1870).

24. 157 So. 2d 570 (La. App. 3d Cir. 1963).

is subject to the ordinary prescription rather than a period of forfeiture, as is the case, for example, for the revocatory action.²⁵

In fixing such a relatively short time for the redhibitory action, the codifiers and their sources were pursuing a policy of stability and early finality for sales contracts; on the other hand, there is also a venerable policy in the *Brown* case to encourage amicable settlement of disputes instead of forcing early litigation. When a relatively short prescription appears along with the substantive rules of a given institution instead of being in the general rules of prescription, it is not unlikely that this is intended as a period of forfeiture.²⁶

The clarification of this point would also answer questions not posed in the principal case, such as when prescription begins to run if the vendor has timely notice and agrees to correct the defect but does not do so. The agreement to make the repair may well be for the sake of maintaining good relations and without admission of liability, so that it might not suffice to constitute an acknowledgment for purposes of interruption.

Interference with the Running of Time

A payment on account constitutes an acknowledgment within the meaning of Civil Code article 3520 and causes an interruption, thereby wiping out the elapsed period and starting afresh on a new one. Where there are several purchases on a single running account, a "payment on account" may well interrupt prescription on the whole open account. However, in *Grand Isle Shipyard, Inc. v. St. Pierre*,²⁷ the payments were made with identification (imputation) of specific invoices, and therefore did not constitute acknowledgments or interruptions of the regular three-year prescription against the remaining items.

In *Humphreys v. McComiskey*,²⁸ the court applied the well-

25. LA. CIVIL CODE art. 1987 (1870); and *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539, 542 (1889).

26. *E.g.*, action in disavowal, LA. CIVIL CODE arts. 191, 192; revocatory action, LA. CIVIL CODE art. 1987, *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539 (1889); action for supplement or diminution of price, LA. CIVIL CODE art. 2498, *Sewell v. Willcox*, 5 Rob. 83 (La. 1843); action to set aside tax sale, LA. CONST. art. X, § 11, *Hollingsworth v. Schanland*, 155 La. 825, 99 So. 613 (1924); actions for lesion, LA. CIVIL CODE arts. 1876, 2595, *Laenger v. Laenger*, 138 La. 542, 70 So. 501 (1916); action to revoke a donation, LA. CIVIL CODE art. 1561; action of redhibition in sale of animals, LA. CIVIL CODE art. 2535. See also *Succession of Pizzillo*, 223 La. 328, 65 So. 2d 783 (1953), and cases cited therein.

27. 163 So. 2d 132 (La. App. 4th Cir. 1964).

28. 159 So. 2d 380 (La. App. 4th Cir. 1964).

fixed rule that a timely suit against one tortfeasor interrupts prescription for other joint tortfeasors.²⁹ Thus, a timely suit against a doctor preserved the effectiveness of the cause of action; and, when it was later alleged that the hospital was a joint tortfeasor, the hospital's insurer could not be released on account of prescription even though the hospital might plead the personal defense of charitable immunity.

MINERAL RIGHTS

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MINERAL LEASES

Obligation To Protect Against Drainage

One of the most significant decisions rendered during the 1963-64 term was *Breaux v. Pan American Petroleum Corp.*,¹ in which plaintiff sought to recover damages for his lessee's failure to prevent drainage of oil and gas from beneath plaintiff's premises. The essential allegations of plaintiff's petition were that: plaintiff owned the land in question; defendant held a mineral lease on the land in question granted by plaintiff; defendant also held a lease on adjoining property; defendant had drilled a well within eighty feet of plaintiff's property line; approximately half of the oil drained from that well was drained from beneath plaintiff's property; defendant had been previously placed in default; and, therefore, plaintiff was entitled to damages equal to one-half of the one-eighth royalty from the draining well. The trial judge sustained an exception of no cause of action, and plaintiff appealed.

Despite the fact that the Third Circuit Court of Appeal sustained the judgment of the lower court, this decision is full of meaning for both lessors and lessees in Louisiana. First, the court rather clearly sustained defendant's exception of no cause of action on the ground that plaintiff had not made proper allegations. The opinion strongly asserts the existence of a

29. LA. CIVIL CODE arts. 2097, 3552 (1870).

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1. 163 So.2d 406 (La. App. 3d Cir. 1964), *writs denied*, 246 La. 581, 165 So. 2d 481.