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NOTES

CIVIL LAW PROPERTY—PRESCRIPTION—PRESCRIPTIVE PERIOD APPLICABLE TO ACTIONS BASED ON ARTICLE 667

Plaintiff, as subrogated insurer of landowner, brought an action pursuant to Louisiana Civil Code article 667¹ against adjoining landowner and his insurer for damages allegedly sustained as a result of pile driving operations. The suit was filed two years after the damage and defendants' plea of one year prescription was sustained by the lower court. On appeal, the Fourth Circuit Court of Appeal affirmed the judgment. *Held*, an action based on article 667 arises *ex delicto* and prescribes in one year.² *Gulf Ins. Co. v. Employers Liab. Assur. Corp.*, 170 So. 2d 125 (La. App. 4th Cir. 1964).

To ascertain the correct prescriptive period applicable to an action it is necessary to classify it. Prior to this case the question of what prescriptive period applied to actions arising under article 667 had never been adjudicated. Many cases dealt with the nature of the action provided by article 667 and from these three different theories have developed. The servitude theory was the earliest and suggested that the action was one imposed by operation of law rather than one arising *ex delicto* and therefore negligence or fault was not a prerequisite to liability.³ Opposed to the servitude theory is the more recent tort theory,⁴

1. LA. CIVIL CODE art. 667 (1870): "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

2. *Id.* art. 3536: "The following actions are also prescribed by one year: "That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses . . ."

3. This theory originated from dictum in *Loesch v. Farnsworth*, 12 So.2d 222 (La. App. Orl. Cir. 1943), and has been applied frequently. See *Gotreaux v. Gary*, 232 La. 373, 94 So.2d 293 (1957); *Selle v. Kleamenakis*, 142 So.2d 50 (La. App. 4th Cir. 1962); *Maryland Cas. Co. v. Rittiner*, 133 So.2d 172 (La. App. 4th Cir. 1961); *Bankston v. Farmer's Co-op. Gin of Winnsboro*, 116 So.2d 91 (La. App. 2d Cir. 1957). The theory has been criticized because it has been applied in cases where the defendants were not adjoining property owners. See *Devoke v. Yazoo & M.V.R.R.*, 211 La. 729, 30 So.2d 816 (1947).

4. *Stone, The Loesch Case and Article 667*, 17 TUL L. REV. 596 (1943).

which says that the basis of liability is article 2315⁵ and therefore fault must be proved before recovery will be allowed.⁶ The third theory is that the cause of action under article 667 is neither *ex delicto* nor *ex contractu* but is a form of strict liability.⁷ This theory appeared after the decision in the instant case.

The French Code has no article which corresponds to article 667. In handling cases of damage to adjoining land where no negligence is involved, the French impose liability by holding that the damage alone is sufficient to create liability under article 1384,⁸ one of the basic French delictual articles.⁹ This approach is basically the same as that of the tort theory. It is apparent, however, that if the tort approach is correct, then article 667 is superfluous, for liability could be obtained through the basic delictual articles of our Code. Such a result would violate the principle of not rendering a statute nugatory.¹⁰

Civil Code article 1760 divides civil obligations into two groups: those created by operation of law and those created by consent of the parties.¹¹ Article 2292 divides obligations created by operation of law into four classes. The first class comprises

5. LA. CIVIL CODE art. 2315 (1870): "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it . . ." This is the first article in the chapter of the Code entitled *Of Offenses and Quasi Offenses*.

6. *Town of Jackson v. Mounger Motors*, 98 So.2d 697 (La. App. 1st Cir. 1957); *Bruno v. Employers' Liability Assur. Corp.*, 67 So.2d 920 (La. App. Orl. Cir. 1953); *Hauck v. Brunet*, 50 So.2d 495 (La. App. Orl. Cir. 1951).

7. *Klein v. Department of Highways*, 175 So.2d 454 (La. App. 4th Cir. 1965) appears to have originated the latest interpretation of article 667 that there can be bases for an obligation other than *ex delicto* or *ex contractu*; however, there is language in the case which makes the holding unclear. In one sentence the court states that the action under article 667 for purposes of LA. R.S. 48:22 (1950) is analogous to an action *ex delicto*. In the same paragraph the court states that the resolution of the legislature which authorized the appellant to file suit against the Department of Highways upon claims resulting from negligence is not permission to sue on a cause of action based on article 667. The court seems to be indicating that an action based on article 667 is not delictual.

8. FRENCH CIVIL CODE art. 1384 (Cachard's transl. 1930): "A person is responsible not only for the damage which he causes owing to his own act, but also for that which is caused by the acts of persons for whom he is answerable or by things which are in his custody."

9. AUBRY ET RAU, *DRIT CIVIL FRANÇAIS* n° 194 (6th ed. 1935); BAUDRY-LACANTINERIE ET CHAUVEAU, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL VI, DES BIENS* n°s 215-217 (3d ed. 1905); 12 DEMOLOMBE, *COURS DE CODE NAPOLEON, TRAITÉ DES SERVITUDES II*, n°s 653, 658 (1882); as cited in Comment, 26 TUL. L. REV. 524, 526 (1952).

10. See *Gee v. Thompson*, 11 La. Ann. 657, 659 (1856): "For it is the duty of the court, where it is possible, to give effect to every article of the code . . ."

11. LA CIVIL CODE art. 1760 (1870): "Civil obligations, in relation to their origin, are of two kinds: 1. Such as are created by the operation of law. 2. Such as arise from the consent of the parties who are bound by them, which are called contracts or conventional obligations . . ."

obligations imposed solely by authority of law, such as engagements resulting from tutorship, curatorship, and neighborhood. The other three classes, which are quasi contracts, offenses, and quasi offenses, arise from a fact personal to him who is bound, or relative to him.¹² It is apparent, therefore, that the Civil Code provides five classes of obligations: (1) contracts, (2) quasi contracts, (3) offenses, (4) quasi offenses, and (5) obligations imposed solely by authority of law.¹³ Article 2292 corresponds to an article in the Civil Code of 1808 which specifically provided that involuntary obligations between neighboring landholders resulted solely from the authority of the law.¹⁴

The court in the instant case recognized the need for classifying the nature of the cause of action in order to ascertain the correct prescriptive period, but concluded that the answer depended upon whether the cause of action arose *ex delicto* or *ex contractu*. This dichotomy rejects the other classes of civil obligations provided by article 2292. It is to be noted that this same circuit court of appeal, in a decision rendered five months after the instant case, said that a cause of action under article 667 was neither *ex delicto* nor *ex contractu*, but was a form of strict liability placed in the Code in the chapter on *Servitudes Imposed By Law*.¹⁵ Article 2292 enumerates as one of its illustrations of obligations imposed by authority of law "engagements as result from . . . neighborhood." Article 667 again emphasizes the idea of neighborhood when it says, "although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his *neighbor*

12. *Id.* art. 2292: "Certain obligations are contracted without any agreement, either on the part of the person bound or of him in whose favor the obligation takes place.

"Some are imposed by the sole authority of the laws, others from an act done by the party obliged, or in his favor.

"The first are such engagements as result from tutorship, curatorship, neighborhood, common property, the acquisition of an inheritance, and other cases of a like nature.

"The obligations, which arise from a fact, personal to him who is bound, or relative to him, result either from quasi contracts, or from offenses and quasi offenses."

13. Planiol also states that this is the traditional classification of sources of obligations. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no 806 (1959).

14. La. Civil Code p. 318, arts. 1, 3 (1808): "In the number of quasi contracts are not included those engagements which are formed involuntarily, such as those tutors and other administrators who cannot refuse the function confided to them, nor those which are formed between neighboring landholders: in all those cases the obligation results only from the authority of the law."

15. Klein v. Department of Highways, 175 So.2d 454 (La. App. 4th Cir. 1965). See note 7 *supra* and accompanying text.

of the liberty of enjoying his own." (Emphasis added.) In addition, article 667 is located within title IV, *Of Predial Servitudes*, having been taken from the works of Domat¹⁶ in which the article was located in section II, *Of The Services of Houses and Other Buildings* of the title *Services*. The position of the article in this work indicates that there was no intended relationship between this article and actions arising *ex delicto*. On the contrary, article 667 was based on the concept of neighborhood. It follows therefore that it should be classified as an obligation stemming solely from the authority of the law.

Article 3544 of the Civil Code provides a ten year prescriptive period for all personal actions not specifically provided for in the Code.¹⁷ There is no prescriptive period provided for obligations stemming from the authority of the law, and so an action based on such an obligation would come under article 3544 unless some other characteristic of the action would bring it within the scope of another prescriptive article.

Article 3536¹⁸ provides a one year prescriptive period for offenses and quasi offenses. Article 3537¹⁹ states that prescription of one year applies where land, timber, or property has been injured, cut, damaged, or destroyed. However, this article has been construed as merely fixing the time from which the one year delictual prescription of article 3536 begins to run and it refers, therefore, only to cases where timber or property are damaged through offenses or quasi offenses.²⁰ Article 3537 does not enumerate a prescriptive period for damage to property caused by the breach of an obligation stemming solely from the authority of the law. Since no other article provides a prescriptive period for such an obligation, the general provision of article 3544 should be applied.

The Louisiana courts have recognized that actions which appear to be delictual in nature may not be.²¹ The jurisprudence

16. DOMAT, CIVIL LAW no 1046 (Strahan's transl. 2d ed. 1853).

17. LA. CIVIL CODE art. 3544 (1870): "In general, all personal actions, except those before enumerated, are prescribed by ten years."

18. *Id.* art. 3536.

19. *Id.* art. 3537: "The prescription mentioned in the preceding articles runs:
". . . .

"And where land, timber or property has been injured, cut, damaged or destroyed from the date knowledge of such damage is received by the owner thereof."

20. See *Liles v. Barnhart*, 152 La. 419, 93 So. 490 (1922); *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So.2d 767 (La. App. 1st Cir. 1957).

21. In *Fisher v. Levy*, 180 La. 195, 156 So. 220 (1934), a deputy clerk of court made a mistake and cancelled a mortgage which had not been paid. He was

indicates that the entire petition of the plaintiff must be considered in determining the character of a particular cause of action.²² Except for the instant case, all the actions for damages to land or property in which the one year prescriptive period had applied were found to be actions in tort.²³ These decisions do not in any way conflict with the position that actions which are based on article 667 should prescribe after a ten year period, since in the past the courts have been quick to realize that some actions which looked as if they arose *ex delicto* did not.

It is clear from the wording and origin of article 667 that it is based on the legal concept of neighborhood and, in the classification of obligations by articles 1760 and 2292 of the Code, it is therefore an obligation stemming from the authority of the law. It is not an offense or quasi offense. Since there is no enumerated prescriptive period in the Code for obligations stemming solely from the authority of the law, actions based on article 667 should prescribe in ten years under the general provisions of article 3544.

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sued and he pleaded prescription of one year. Judge O'Niell in his concurring opinion stated that the clerk was a public official charged by article 3394 to account for any loss resulting from his improper actions. He said that right of action was not founded upon an offense or quasi offense in the broad sense of the terms used in article 3536 of the Civil Code but arose *ex contractu*.

In *Distefano v. Michiels*, 158 La. 885, 104 So. 914 (1925), in an action against a surety on a bond required to operate a public service car, Justice O'Niell held that even though bond was given for payment of damages arising *ex delicto* the action against the surety was *ex contractu* and prescribed in ten years.

In *Foster v. City of New Orleans*, 155 La. 889, 99 So. 686 (1924), the defendant build a swimming pool twelve feet in front of the plaintiff's house. Plaintiff sued for damages caused by the close proximity of the pool. The court stated: "It can not be said that damages in this case arose *ex delicto* or from a tort. The municipality was not at fault in any way. The suit is for compensation due under article 167 of the Constitution of 1913, for a lawful act." *Id.* at 891, 99 So. at 687. See also *Lacour v. National Sur. Co.*, 147 La. 586, 85 So. 600 (1920); *Rogay v. Julliard*, 25 La. Ann. 305 (1873).

22. See *Iberville Land Co. v. Amerada Pet. Corp.*, 141 F.2d 384 (5th Cir. 1944); *Laclede Steel v. Silas Mason Co.*, 67 F. Supp. 751 (W.D. La. 1946); *State ex rel. Levet v. Lapeyrollerie*, 38 La. Ann. 912 (1886).

23. *Young v. International Paper Co.*, 179 La. 803, 155 So. 231 (1934); *DiCarlo v. Laundry & Dry Cleaning Serv.*, 178 La. 676, 152 So. 327 (1933); *Spyker v. International Paper Co.*, 173 La. 580, 138 So. 109 (1931); *Dejean v. Louisiana Western R.R.*, 167 La. 111, 118 So. 822 (1928); *National Park Bank v. Concordia Land & Timber Co.*, 159 La. 86, 105 So. 234 (1925); *Griffin v. Drainage Comm'n of New Orleans*, 110 La. 840, 34 So. 799 (1903); *Beauvais v. Hall Transport Co.*, 49 So.2d 44 (La. App. 2d Cir. 1950); *Roppolo v. Pick*, 4 So.2d 839 (La. App. Orl. Cir. 1941); *Callender v. Marks*, 166 So. 892 (La. App. 2d Cir. 1936); *Heath v. Suburban Bldg. & Loan*, 16 So. 546 (La. App. Orl. Cir. 1935).