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Private Law: Prescription

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of the contract of lease. Whether it be for food-vending concessions, as in the present case, or for other purposes, the determination as to whether there is a sublease will also determine the scope of the lessor's privilege on effects which do not belong to the principal lessee.

MORTGAGES

A present mortgage may secure future debts,[7] and the so-called "collateral mortgage" may be reissued without the need for a new recordation. Since the mortgage's effectiveness against third persons is fixed by the date of recordation, it was considered that the original date of recordation continued to be the effective date of the collateral mortgage regardless of the number and actual dates of reissuances. The harshness of this result, with reference to other mortgages which were recorded against the property prior to the reissuance of the collateral mortgage, was alleviated by the decision in *Odom v. Cherokee Homes, Inc.*[8] The court held that in competition with other mortgages, the collateral mortgage ranks from the date of issuance or reissuance of the note secured by it and not from the original date of recordation. A very good discussion of this case and the issues has already appeared in this *Review*.[9]

PRESCRIPTION

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ACQUISITIVE PRESCRIPTION

For acquisitive prescription of either ten years or thirty years, the basic requirement is possession, and this must be a possession *as owner*.[1] In *Journet v. Gerard*,[2] defendant had been using a strip of land between his residence property and the street, but the evidence showed record title in the plaintiff. To the plaintiff's petitory action, the defendant pleaded acquisitive

7. LA. CIVIL CODE art. 3292 (1870).
8. 165 So. 2d 855 (La. App. 4th Cir. 1964); writs denied, 246 La. 868, 167 So. 2d 677 (1965).
9. Note, 25 LA. L. REV. 789 (1965).
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1. LA. CIVIL CODE arts. 3436, 3500 (1870).
2. 173 So. 2d 263 (La. App. 3d Cir. 1965).

prescription. Even though the defendant seemed to have the exclusive use of this strip of land, the evidence showed that a servitude of passage had been duly established by the respective ancestors in title. The defendant's use of this servitude could not constitute possession *as owner*, and the plea of prescription was unfounded.[3] The plaintiff was recognized as owner subject to the servitude of passage.

Southern Natural Gas Co. v. Naquin[4] is another case in which the physical use of a property did not constitute possession *as owner*. Pretermitting the factual complications of a large family, and reducing the problems to the one here essential, the situation was as follows. Several co-heirs had accepted the successions of their parents, and then for fifty years one of these co-heirs continued to have the use and enjoyment of the entire property in question. Although one co-owner has the right to use and occupy the entire property, he is not in possession *as owner* of the whole. Such *precarious* possession[5] can only be transformed into a *legal* possession as owner by means of some unequivocal notice to the other co-owners of an adverse possession against them.[6] The payment of taxes does not serve this purpose; neither does the co-owners' reference to the property as identified with the person occupying it. The court did not need to decide, and refrained from deciding, whether the granting of mineral leases would constitute sufficient notice to change the precarious possession of a co-owner into a legal possession as owner. It should take a completely clear, overt, and unequivocal act to put co-owners on notice that the one who is occupying the property intends to start an adverse possession for the purpose of acquisitive prescription.

LIBERATIVE PRESCRIPTION

Two of the most frequent problems in the application of the laws of liberative prescription are the classification of the nature of the cause of action and the fixing of the starting point for the running of the time. In *Tripod Boats v. George Engine Co.*,[7] one court of appeal held that an action for damages caused by

3. LA. CIVIL CODE art. 797 (1870).
4. 167 So. 2d 434 (La. App. 1st Cir. 1964); writ refused, 246 La. 884, 168 So. 2d 268 (1964).
5. LA. CIVIL CODE arts. 3433, 3446, 3500 (1870).
6. *Id.* art. 3489.
7. 170 So. 2d 238 (La. App. 4th Cir. 1965).

vices and defects in the thing sold is redhibitory in nature[8] and that it prescribes in one year *from the date of the sale* under Civil Code article 2534. In *Motorola Aviation Electronics, Inc. v. Louisiana Aircraft, Inc.*,[9] another court of appeal likewise classified an action for damages due to defective equipment as redhibitory (rather than breach of warranty), and fixed the starting point for the running of time *from the seller's abandonment of efforts to remedy the defects*; the only Civil Code article cited is 3528[10] from the plea of the defendant in reconvention. The comparison of these two opinions leaves something to be desired, and it is hoped that the Supreme Court will clarify the matter.

Underlying the classification of the actions and the respective prescriptive periods, there must have been certain policy objectives which motivated the variety and complexity of the existing rules. It may be time to consider a different set of much simpler rules more closely reflecting present needs in present conditions.

The two questions of classification and commencement of the proper prescription were both involved in *Successions of Webre*.[11] The Supreme Court held that a demand for collation is subject to the general ten-year prescription under Civil Code article 3544; and dismissing contentions that it commences upon knowledge of the conveyance or upon the filing of the formal succession proceedings, the court held that this prescription runs from the death of the person to whose succession collation is to be made.[12]

In *Gulf Ins. Co. v. Employers Liab. Assur. Corp.*,[13] the action was for damages resulting from pile-driving operations on adjacent property, and the basis for the action was the *sic utere* servitude of Civil Code article 667.[14] The defense pleaded the one-year prescription for tort actions under Civil Code article 3536. The court discussed the misleading question of whether

8. LA. CIVIL CODE arts. 2520, 2541 (1870).

9. 172 So. 2d 118 (La. App. 1st Cir. 1965).

10. LA. CIVIL CODE art. 3536 (1870): "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. . . ."

11. 247 La. 461, 172 So. 2d 285 (1965), noted in 25 LA. L. REV. 983 (1965).

12. For fuller discussion of the issues, see Note, 25 LA. L. REV. 983 (1965).

13. 170 So. 2d 125 (La. App. 4th Cir. 1964); noted in 26 LA. L. REV. 409 (1966).

14. See also this symposium, under "Property."

the action was ex delicto or ex contractu, concluding that it was the former and therefore prescribed. Actually, it is neither, but rather an action for violation of a property limitation imposed by law;[15] and in the absence of any express prescription for actions in damages resulting from violation of legal servitudes, the general ten-year prescription for personal actions should apply.[16]

In recent years, there have been several cases involving liberative prescription against actions for medical negligence and malpractice. Doctors and dentists carry, or should carry, liability insurance, so that some of these suits are direct actions against the insurer. The reported cases do not disclose the reasons for the delays in instituting suit; it can be surmised that sometimes a patient hopes for complete recovery despite the mistake, or that a compensatory treatment was being tried, or that the patient was too sick or too worried about other incidents of his illness to obtain timely legal advice. Procrastinations by the doctor (without such acknowledgment as would interrupt prescription) could also account for the excessive delay in bringing action. In any event, the one-year prescription, as for a tort, is unreasonably short. The accuracy and propriety of classifying such actions as ex delicto have been questioned and discussed before.[17]

In the case of *Springer v. Aetna Cas. & Sur. Co.*,[18] a suit for damages resulting from alleged negligence of a physician was instituted against the doctor's insurer. The court classified this as a tort action and dismissed it on the ground of the one-year liberative prescription of Civil Code article 3536. The starting point for the commencement of this prescription was placed at the date on which the patient acquired knowledge of the doctor's alleged negligence. The court's opinion finishes with this state-

15. In a later decision by different judges of the same court (4th Circuit), it was stated that "a cause of action under [Civil Code article] 667 is neither ex delicto nor ex contractu, but is a form of strict liability placed in the Civil Code under the chapter of servitudes imposed by law." Klein v. Department of Highways, 175 So. 2d 454, 457 (La. App. 4th Cir. 1965). At the same time, the court held that the Highway Department could not be held liable because the action under Article 667 "*for the purposes* of R.S. 48:22 is more analogous to an action ex delicto" (*id.* at 458).

16. For fuller discussion, see Note, 26 LA. L. REV. 409 (1966).

17. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Prescription*, 24 LA. L. REV. 210, 213 (1964); *The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Prescription*, 25 LA. L. REV. 352, 356 (1965).

18. 169 So. 2d 171 (La. App. 4th Cir. 1964).

ment: "Therefore, we are compelled to reach the inevitable conclusion . . ."[19] This language reflects a reluctance to enforce this hardship or to create the social injustice of imposing on the patient a financial responsibility that was intended for the insurer — the *lex dura lex sed lex* impotence of the court to render a different decision that would be more in keeping with current concepts of social justice.

It is submitted that this *inevitability* is not necessarily so. In the first place, it is neither necessary nor correct to classify as ex delicto all actions which claim damages or which allege negligence. The noble but weak effort to alleviate the hardship by distinguishing the physician's "non-performance" (ex contractu) from his "unskillful performance" (ex delicto) is neither sound nor convincing nor very helpful.[20]

Secondly, it is not necessary to fix the starting point for the running of this prescription at the date of acquiring knowledge of the alleged negligence. This again carries out the analogy to actions ex delicto, but the two situations are not the same. In the case of a tort, the wrongful and harmful action occurs either at once or is a continuing activity of the same sort. In a malpractice case, it is not necessarily known at the time of the wrongful act, nor at the time of the patient's acquiring knowledge thereof, whether permanent damage will result or not. In the present case, as would generally be true, the doctor and his consultant specialists undertook to remedy the harm, and it was some time before it was definite that a disability would remain. According to the court's decision, prescription was running anyway. A different and a more realistic approach for fixing the starting point for liberative prescription was taken by a different court during this same term, where it was held that prescription commenced at the abandonment of efforts to remedy the defect.[21]

Finally, it is resubmitted that "it would be more in accord with what appears to be the intent of the codifiers to subject them both [doctor and patient] to the three-year prescription

19. *Id.* at 173.

20. See *The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Prescription*, 25 LA. L. REV. 352, 356 (1965).

21. Motorola Aviation Electronics, Inc. v. Louisiana Aircraft, Inc., 172 So. 2d 118 (La. App. 1st Cir. 1965).

of Article 3538"[22] for all actions arising out of the doctor-patient relationship. This might need a decision of the Louisiana Supreme Court, but it does not need legislation. For the additional reasons of social justice and uniformity, this is strongly recommended.

Another illustration of the unsatisfactory status of our law on the problem of classification is seen in the case of *Devillier v. First Nat. Funeral Homes, Inc.*[23] During a funeral, the casket was dropped and the body was mutilated; suit by the family survivors was dismissed on the basis of the one-year prescription applied to actions ex delicto. The only Louisiana authority cited is the recent case of *Phelps v. Donaldson*,[24] from which the court quoted an excerpt of a prior case to the effect that the failure to perform the duties imposed by law in certain relationships may be a tort, while the basic relationship was created by contract.

It should be noted, however, that the Supreme Court's affirmance in the *Phelps* case pretermitted this argument and is based on the ground that the orthodontist's contract in that case did not "warrant" any particular result; in the latter event, the applicable prescription would have been ten years. In the present *Devillier* case, the contract with the funeral home is described as *warranting* a decent burial, and the propriety of the *Phelps* case as reference is therefore questionable.

Furthermore, and apart from the warranty distinction, there is still an uneasy feeling about the initial problem of classification as between actions ex contractu and ex delicto. The underlying social policies of liberative prescription should be faced and determined more deliberately and clearly, as has already been suggested.[25]

In *Soirez v. Great American Ins. Co.*,[26] a direct action was brought by the wife against her husband's liability insurer for injuries received as an automobile guest. Although the wife could not sue her husband, the cause of action against the in-

22. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Prescription*, 24 LA. L. REV. 210, 213-14 (1965).

23. 164 So. 2d 597 (La. App. 3d Cir. 1964).

24. 142 So. 2d 585, 587 (La. App. 3d Cir. 1962), affirmed, 243 La. 1118, 150 So. 2d 35 (1963).

25. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Prescription*, 24 LA. L. REV. 210, 214 (1964).

26. 168 So. 2d 418 (La. App. 3d Cir. 1964).

surer was classified as a tort and the one-year prescription was applied. It was pointed out that while the wife had a *cause* of action against her husband, she did not have a *right* of action against him; however, since this inability to sue her husband did not obstruct her right to sue the insurer, there was nothing to interfere with the running of prescription against this claim.

A keenly debated issue was presented in *National Sur. Corp. v. Standard Acc. Ins. Co.*[27] as to whether a suit by the employer's compensation insurer against the alleged third party tortfeasor also interrupted the prescription with respect to the claim of the injured employee. The court of appeal held that there was no interruption because the nature and extent of the employee's demand was quite different from the insurer's claim, so that the defendant in a suit on the latter claim could not be deemed thereby to have been notified of the former. In reversing, the Supreme Court maintained that both demands affected the same cause of action,[28] and held that prescription against the employee's claim had been interrupted by the insurer's suit, in which the employee had intervened. Both positions have substantial merit; from the point of view of social policy, and considering that the one-year prescription is rather short in such cases, the Supreme Court's ruling comes closer to fulfilling the social need.

MINERAL RIGHTS

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MINERAL SERVITUDES

Joint Lease Extension

The decision in *Armour v. Smith*[1] sheds further light on the rules regarding joint lease extension of mineral servitude interests. Plaintiff's vendor had created a mineral servitude in favor of himself by reservation in 1939. In 1946, plaintiff and her vendor entered into a lease on a standard printed form for a

27. 247 La. 905, 175 So. 2d 263 (1965), reversing 168 So. 2d 858 (La. App. 2d Cir. 1964).

28. LA. R.S. 9:5801 (1950).

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1. 247 La. 122, 170 So. 2d 347 (1964).